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Chapter on

**Relationships between Competition Agencies and Public
Procurement Bodies**

ICN CWG Subgroup 2: Enforcement Techniques

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1. Introduction

The aim of this Chapter is ***to provide competition agencies with practical tools for building constructive relationships with public procurement bodies*** in order to ensure free and fair competition in public bidding processes. These tools are intended to facilitate the efficiency of public procurement as well as to improve the competitive environment in relevant markets. Pursuant to this goal, the Chapter touches upon issues related to the organization of procurement processes in a competitive way, including signs of bid-rigging, behavioral screens, legitimate and non-legitimate forms of cooperation between bidders, leniency programs, and several other topics. However, given the existence of academic literature in this area, the Chapter will focus on these issues in the context of cooperation between competition agencies and public procurement bodies. Practical examples are based on the replies to a Questionnaire that was circulated to the ICN Cartel Working Group SG2 Members in 2014.

The regulation of bidding processes for public contracts aims to create greater efficiency in public procurement procedures and is based on the following principles:

- Free and fair competition, including equality and fairness for participants in government procurement markets;
- Cost-quality efficiency of procurement in terms of obtaining higher quality goods and services supplied for a more favorable price;
- Savings of government budgets;
- Openness and transparency;
- Responsibility and accountability; and
- Boosting production and increasing employment.

Successful design of bidding process usually leads to greater involvement of small and medium-sized enterprises (“SMEs”) in procurement of goods and services for public needs.

Conversely, bid-rigging leads to the violation of these principles, distortion of competition in public procurement markets, dampening of innovation, inefficiencies and the illegal appropriation of additional profits by participants of bid-rigging schemes.

Powers of national competition agencies to influence procurement decisions by other government bodies and, therefore, the ability of competition agencies to intervene in public purchasing procedures vary across jurisdictions depending on national legal framework. They range from granting competition agencies powers to cancel the public procurement bids they believe to be anticompetitive and impose the necessary remedies, to the possibility of influencing public bidding regulations and public procurement bodies’ practices solely by competition advocacy and educational means.¹

The regulatory regimes governing public procurement also differ across jurisdictions. For example, some jurisdictions have mandatory criteria requiring procurement authorities to use open public electronic bidding systems via the Internet with some limited exceptions. Other

¹ The examples are provided in the survey responses provided by the responding Cartel Working Group Sub-Group 2 Members. See Annex A.

jurisdictions mandate closed bids with bidding rules and bid evaluation decided only by the agency managing the bidding process.

Given the diversity of national regulations governing bidding processes, this Chapter seeks to incorporate the experiences of multiple jurisdictions with diverse regulatory regimes. Doing so will permit readers to select tools and arrangements for relationships between competition agencies and public procurement bodies that will best serve the needs of their jurisdiction in their particular regulatory environment. For this purpose, the Chapter summarizes the experiences of multiple jurisdictions that took part in a survey on building relationships between competition agencies and public procurement bodies. Thus, the factual base of this Chapter represents the experiences of a variety of jurisdictions and is diverse in terms of geographical location, economic development and maturity of competition agencies.

2. Overview of national regulatory regimes governing public procurement

The organization and regulatory regimes governing national systems of public procurement vary across jurisdictions thus creating different modes of relationship between competition agencies and public procurement bodies. However, there are some observable patterns of building national procurement systems providing grounds for their grouping based on the following characteristics:

2.1. Centralized vs decentralized public procurement

Under a **centralized system** of public procurement there is generally one procurement agency performing the public procurement function in the interests of, and on behalf of, all or most government bodies in their jurisdiction. In this type of system, all governmental agencies must request that the centralized procurement body purchase goods and services for them if the monetary value of the purchase exceeds a certain limit. Often, this public procurement agency will place all government orders on the same web-site, thus seeking to ensure transparency of the procurement process. One possible exemption from this rule may involve government agencies purchasing sophisticated goods and services from private sector suppliers, e.g. ministries of defense, energy, health, etc.²

Conversely, under a **decentralized system** all or most government bodies have their own procurement departments responsible for their supply of requested goods and services.³ It should be noted that some jurisdictions have a hybrid structure, involving a combination of both centralized and decentralized public procurement systems.

2.2. Presence of national public procurement legislation

An important feature influencing the relationships between competition agencies and public procurement bodies is whether the country has national public procurement legislation and bylaws mandatory for all government bodies⁴; or if each government agency has independent powers to establish their own procurement rules. National systems can vary between these two extremes by having, for example, some general rules mandatory for all agencies, while allowing each agency the ability to develop their own rules. Another possibility could be for jurisdictions to impose procurement legislation on a group of agencies, while leaving other agencies outside this group thus providing them with the opportunity to develop their own procurement rules. In practice, many jurisdictions use a combination of these structures. There are also important differences between jurisdictions in which national competition laws apply to public procurement decision making by government bodies only at the national/federal level, and those in which national competition laws also apply at the state/local government level. In both cases, there can be governmental bodies that are exempted from national competition legislation in full or in part.

² Among the jurisdictions that provided answers to the survey Colombia, Finland, Hungary, Ireland, Kenya and Malta reported that they had a centralized system of public procurement.

³ Among the jurisdictions that provided answers to the survey Australia, Germany, Italy, Mexico, the Netherlands, Poland, Russia, Sweden, the United Kingdom and the United States reported that they had a decentralized system of public procurement.

⁴ Among the jurisdictions that provided answers to the survey Chile, Colombia, Finland, France, Germany, Hungary, the Netherlands, Kenya, Italy, Poland, Russia, Sweden and the United States reported that they had national public procurement legislation or/and regulation. The United Kingdom reported that it has guidelines in place, both at regional and local level, for public procurement bodies.

A number of jurisdictions have signed the World Trade Organization (“WTO”) Agreement on Public Procurement⁵ that provides *inter alia* for public tendering procedures generally used by most national governments and international regional trade and economic associations.

2.3. Bid-rigging and corruption

Many competition agencies have found that there is a causal link between competition and corruption – that is to say more competition results in less corruption while, conversely, increased corruption results in decreased competition. Like cartels, corruption can have significant adverse effects on consumers, businesses and the economy. Tackling collusion and corruption are not mutually exclusive goals, so there is a need to accommodate both in order to better protect the public procurement process. By working to limit collusion, competition agencies contribute significantly to reducing corruption in public tenders. As such, a number of competition agencies have focused on public procurement as a way of helping to fight corruption. For example, some competition agencies have incorporated elements into their outreach programs to warn public procurement officials who may be tempted to participate in such conduct that they will be prosecuted and encourage honest public procurement officials. In addition, many competition agencies work with other law enforcement officials in their jurisdictions, such as police forces or anti-corruption units to support each others’ efforts to combat corruption and promote competition.

Effective advocacy and outreach can promote a change of culture in the procurement practices in jurisdictions and generate public support for enforcement efforts. More generally, competition agencies can identify and advocate for the removal of any public procurement rules or procedures that facilitate or foster collusion or corruption.

The OECD has done a great deal of work on the intersection between corruption and collusion. For example, at the 2014 OECD Global Forum on Competition, members discussed how anti-competitive behaviour and corruption interact through the corruption of business licensing processes or other types of regulation to restrict entry. More general links between corruption and anti-competitive behaviour were addressed such as public and judicial attitudes to these two abuses, as well as the links between institutions engaged in fighting them. Participants shared relevant cases from their own jurisdictions and also any formal or informal agreements with anti-corruption institutions.⁶

⁵ Available at http://wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁶ More information on this session can be found at the OECD’s website:

<<http://www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm>>.

3. Relationships between competition agencies and public procurement bodies

It is important for competition agencies to have a variety of investigative tools and approaches at their disposal to initiate bid-rigging investigations and it is not advisable to rely on one single tool or approach alone.

In general, there is a distinction between so-called reactive methods where an external event, such as the receipt of a complaint or leniency application, would trigger the investigation, and proactive methods that are agency-generated⁷, such as screening of public tenders, intelligence and monitoring activities of bid participants.

In the public procurement sector, these tools and approaches could be further strengthened through cooperation and interaction with public procurement officials (and regulators if present). A procurement agency may interface with a competition agency at various levels, including the following:

- as a complainant in the context of a case initiation when it suspects flaws in the procurement procedure;
- as a provider of tender information and data which can be useful for the screening, monitoring and intelligence activities of a competition agency in areas or sectors of interest;
- as a third party in the context of a case initiation and/or in the course of a formal antitrust investigation;
- as a subject of advocacy activities of the competition agency aimed at raising the level of awareness of the risks of bid-rigging in procurement tenders.

In developing these relationships, competition agencies and public procurement bodies should become familiar with each other's legal and institutional framework, powers and procedures. In particular, there should be a common understanding of the potential conflicts between competition law and procurement rules.

On one hand, the objectives of procurement officials may not be aligned with the objective of competition officials: the former are interested in ensuring smooth tender procedures and their timely realization, with legitimate fears that a launch of an antitrust investigation may interrupt the tender procedures or invalidate the tender outcomes. This may cause adverse consequences on the provision of the requested goods or services. As a result, procurement officials might be less prone to file complaints with competition agencies

On the other hand, it is important that procurement officials understand that a behavior that is legitimate under the procurement rules might still be in violation of competition law: in other words, procurement procedures or tools may be used in an anticompetitive way.

For instance, in some jurisdictions, joint ventures and consortia among companies are typically legitimate forms of cooperation among bidders. Such consortia can be a useful way to help new and/or smaller suppliers overcome the potential barriers to entry that can be erected through, for example, aggregated contracts and joint procurement exercises. In tenders where bidders face high transaction costs in bidding, they may be able to overcome high transaction costs involved in preparing bids by sharing resources (for example by sharing an expert report about a project) which will enhance the procurement process. Therefore, a consortium is generally considered pro-competitive if the member companies are not able to independently perform the contract for which they bid, because it adds new competitors to the tender. However, if cooperating companies could independently perform the contract, then in some jurisdictions, there must be

⁷ For a more general treatment of case initiation, reactive and proactive methods, see ICN work-product: [Chapter4 - Cartel Case Initiation of Anti-cartel Enforcement Manual](http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf>.

an efficiency defense for the combination to qualify as a legitimate form of cooperation from an antitrust point of view. In addition, consortia and joint ventures should be temporary and conform to the purpose of rendering services for a concrete bidding process. If parties aim to create joint ventures and consortia with the same participant in different tender processes, this can be understood as a merger by the competition agency and consequently they may request authorization under merger control rules. In some jurisdictions, independent companies may submit a joint bid as long as they present and obtain authorization from the competition agency.

Another example of potential conflict arises in the area of subcontracting rules. In some jurisdictions, it is acceptable for one of more of the losing bidders to become a subcontractor of the winning bidder. However, if this is the result of a previous agreement, with one entity agreeing to lose the bid in exchange for the winner's promise to subcontract to the loser, it might violate competition law.

Other areas of cooperation or interaction between competition agencies and procurement bodies (and public procurement regulators if present) could include advocacy activities directed towards market players and local authorities and the exchange of information. The latter would be the case, for example, of markets where competition agencies have already found instances of bid-rigging. In such markets cooperation between competition agencies and public procurement bodies can be aimed at revealing a risk of recidivism and its prevention.

Interactions between competition agencies and procurement bodies will be highlighted in the remaining Sections of the Chapter. In particular, Annex A will provide examples from different jurisdictions.

4. Outreach to procurement bodies

4.1. Purposes of outreach

It is good practice for competition agencies to engage in educational and outreach programs to public procurement bodies and procurement officials to raise awareness of possible signs of bid-rigging and to establish a working relationship between the competition agencies and procurement officials.

Competition agencies can minimize the risk of bid-rigging by educating and raising awareness among public procurement officials of the harms of bid-rigging and the importance of competition. Public procurement officials have knowledge of the relevant markets and the behavior of companies active in these markets. They are therefore in a good position to both detect signs of possible bid-rigging and to actively inform companies of what types of cooperation are allowed in public procurement. Therefore, it is important that procurement officials are provided with information about what bid-rigging is and what signs they should look for to detect bid-rigging at an early stage. It is also important to provide procurement officials with tools to decrease the likelihood of bid-rigging occurring in public procurement process.

In addition, outreach programs are useful tools for helping competition agencies and public procurement officials develop closer working relationships; to train procurement officials to collect evidence that can be used to more effectively prosecute bid-rigging conduct; and to increase awareness of public procurement officials and government investigators about the cost of bid-rigging to the government and ultimately to the taxpayers. A good relationship with public procurement bodies may also generate leads about cartel activity which may be a source for the initiation of formal investigations and thus increase detection of illegal anticompetitive conduct in the market.

Building closer relationships between competition agencies and public procurement bodies facilitates earlier detection of signs of bid-rigging by public procurement bodies and prompt passing of this information to competition agencies. Based on this information the latter can make a decision on initiating a bid-rigging investigation. The agencies complement each other in their efforts to counter bid-rigging: competition agencies can provide the public procurement bodies with knowledge on detecting bid-rigging and revealing its possible signs, while the public procurement bodies may furnish information necessary for the competition agency to initiate an investigation.

When conducting outreach activities, it is important that competition agencies do not appear critical of the work done by procurement officials. Instead, they should act as a support mechanism for procurement officials that helps them to improve the terms of supply of goods and services for public needs. Further, it should be made clear that competition agencies are not proposing that procurement officials do more work; instead, competition agencies are simply promoting awareness of the risk of bid-rigging among procurement officials because awareness is the first step in reducing risk and may lead to better tender design as well as detection of possible cases of bid-rigging.

Annex A presents examples of how competition agencies within the ICN work to establish a good relationship with public procurement bodies and increase awareness on signs of bid-rigging and the harm on competition. Numerous examples of materials, including checklists, presentations and brochures, developed by ICN members can be found on a dedicated page of the ICN website⁸.

⁸ See: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/procurement.aspx>

4.2. Forms of outreach

4.2.1. Outreach presentations

Many competition agencies conduct outreach presentations to public procurement bodies and professional associations in their jurisdictions. These presentations generally include information on anti-competitive conduct; tools for recognizing bid-rigging behavior; instruments for preventing or decreasing the risk of bid-rigging; and steps to be taken when bid-rigging is suspected. Some competition agencies find it helpful to include real-life or hypothetical case examples during these outreach presentations. Case examples can be useful because they provide procurement agents with actual or plausible scenarios to which they can apply the knowledge learned during the presentation.

Outreach presentations can be conducted with small or large groups. Small groups have the advantage of a more intimate setting where participants are often more willing to ask questions. They also allow competition agencies more flexibility to focus the presentation on the issues most relevant to the small group. On the other hand, large group settings permit competition agencies to reach a higher number of procurement agents using fewer resources.

The 2012 OECD Recommendation on Fighting Bid-Rigging in Public Procurement, including the 2009 OECD Guidelines for Fighting Bid-Rigging in Public Procurement⁹ (“Guidelines”) contain a great deal of information that can be used by competition agencies in developing their own outreach presentation. For example, the Guidelines list common forms of bid-rigging; industry, product and service characteristics that help support collusion; a checklist for designing the procurement process to reduce risks of bid-rigging; and a checklist for detecting bid-rigging in public procurement. Much of this information is universal and can be incorporated directly into any competition agency’s outreach presentation.

Following outreach presentations, many competition agencies use post-outreach presentation surveys to evaluate the effectiveness of the presentation and the procurement officials’ increased awareness. These surveys can be useful to determine what aspects of a presentation were most and least beneficial, and to assist competition agencies in crafting future presentations.

4.2.2. Educational material for procurement agencies

There are several competition agencies that publish educational materials such as brochures, newsletters or guidelines that are specifically geared towards public procurement bodies. These educational materials typically explain the competition laws of the relevant jurisdiction, indicators of bid-rigging, tools for bid-rigging prevention, and steps to be taken when bid-rigging is suspected. Certain educational information, such as regular newsletters, may also contain recent case examples or information on current issues in public procurement and bid-rigging investigations. Educational material may be distributed to procurement agencies at all levels of government and is generally made available on a competition agency’s website. The Anti-Cartel Enforcement Manual Chapter on ‘Cartel Case Initiation’ contains a number of additional examples of education material that can be distributed to procurement authorities.¹⁰

4.2.3. Checklists for procurement agents

A number of competition agencies have created checklists for detecting bid-rigging in public procurement. These checklists are intended to aid public procurement bodies in identifying

⁹ The 2009 OECD Guidelines for Fighting Bid-Rigging in Public Procurement can be found online: <<http://www.oecd.org/daf/competition/cartels/42851044.pdf>>.

¹⁰ For more information see pages 12 and 13 of the Anti-Cartel Enforcement Manual Chapter on ‘Cartel Case Initiation’: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf>>.

indicators of collusion in bid submissions. They are typically distributed by competition agencies to public procurement bodies and may also be made available on a competition agency's website.

4.2.4. Formal meetings with procurement agencies

Many competition agencies participate in high-level formal meetings, either regularly or periodically, with officials of procurement agencies in their jurisdiction. These meetings are typically intended to educate members of different public procurement bodies about the meaning of bid-rigging, how to identify bid-rigging, how to prevent bid-rigging, and what steps should be taken when bid-rigging is suspected. These meetings may also be useful to discuss more in depth how a tender or procurement design can be improved to prevent bid-rigging and promote greater competition. High-level meetings between competition agencies and public procurement bodies are often a precursor to establishing a formal and regular relationship between the two types of agencies.

4.2.5. Informal meetings with procurement agencies

Meetings at the working level can be very effective as case handlers, staff attorneys and investigators are well placed to provide practical answers to any questions and to give anecdotes from their own enforcement experiences. Also, some competition agencies consider that if they intend to provide training on the detection of bid-rigging to public procurement officials from a certain group, it is more effective to have informal meetings and phone conversations with the group before discussing any official proposals.

4.2.6. Memoranda of understanding

Some competition agencies have signed memoranda of understanding ("MOUs") or other formal agreements with public procurement bodies in their jurisdiction. These MOUs or agreements are intended to strengthen the prevention, detection, reporting and investigation of possible cartel activity, including bid-rigging, and provide public procurement bodies with tools for detecting and reporting bid-rigging. Typically, these MOUs or agreements provide that competition agencies and public procurement bodies will agree to share information relating to procurement processes by way of collaboration in the areas of enforcement, education and awareness. By working together to share resources and exchange knowledge, both competition and procurement agencies can benefit from each other's expertise and enhance their ability to achieve their goals of preserving and promoting fair, efficient and competitive processes. The information exchanges between competition and procurement agencies should take into account the relevant rules on confidentiality and particularly the rules applicable to competition proceedings.

5. Leniency and bid-rigging: cooperating with public procurement agencies to promote leniency

Undoubtedly, one of the most successful investigative tools available to competition agencies around the globe to detect and prosecute cartels is the leniency program. In several jurisdictions, cartel activity detection rates have soared since the implementation of leniency programs; however detecting big rigging through leniency applications presents additional challenges.

In general, some competition agencies have determined that a successful leniency program relies on three pillars:¹¹ (i) conspirators must fear detection; (ii) such detection may lead to high fines and, (iii) the competition agency must design a transparent procedure explaining to leniency applicants how to access the program and the requirements to be granted full immunity or a reduction of fines.

To sum up, the first factor relates to an active competition agency that has been successful in detecting and sanctioning cartels in the past. This will depend on the governmental support and the rate of success during previous years.

The second factor deals with the fines that the authority has imposed. This factor is of critical importance because theoretically, the economic profit of collusion must never exceed the sum of a potential fine imposed by the competition agency. In this point, an additional effective deterrence factor is the fear of serving time in jail.

Finally, it is important to remind competition agencies that a transparent procedure is the key to a successful leniency program. Cartel members must know the procedures for applying to the program, the immunity or maximum reduction of fine available, and what is required to receive the benefits of the program.

Finally, it is important to remind competition agencies that a transparent procedure is key to a program's success. Cartel members must know the procedures for applying to the program, the immunity or maximum reduction of fine available, and what is required to receive the benefits of the program.

However, detecting big rigging through leniency programs can be more challenging than using the programs for detecting other anticompetitive practices. That makes cooperation between competition agencies and procurement bodies in detection and prevention of bid-rigging practices even more important.

Bid-rigging cartel members see fewer incentives to "blow the whistle" because they can also face (i) criminal charges (due to the fact that bid-rigging is a criminal offense in many jurisdictions), (ii) possible debarment from bidding on future contracts, sometimes for several years and, (iii) reputational damage that can be politically adverse in the aftermath.

Criminal charges

Big rigging is considered to be anticompetitive conduct in most jurisdictions with competition regimes. However, not all jurisdictions consider bid-rigging to be criminal offense, meaning that a leniency applicant will only have to deal with the competition agency in order to obtain full leniency immunity. This situation may signify that for an applicant located in a jurisdiction where bid-rigging is not a criminal offense, it will be easier to access the leniency program, if available.

¹¹See among others, speech by former Deputy Assistant Attorney General Scott Hammond, U.S. Department of Justice, Antitrust Division on "Cornerstones of an Effective Leniency Program" to the ICN Workshop on Leniency Programs (November 2004), available at: <http://www.justice.gov/atr/public/speeches/206611.htm>.

Conversely, in jurisdictions where bid-rigging conduct is punished with criminal penalties, the situation for a cartel member wishing to apply to a leniency program may be somewhat different due to the possible involvement of authorities other than the national competition agency.

In that regard, there are two groups of criminal bid-rigging regimes. The first group includes jurisdictions where the competition agency also enforces the criminal bid-rigging statutes or there is a high level of interaction between competition agency and criminal authorities. Therefore, leniency programs cover both the administrative and criminal penalties in such jurisdictions (e.g., Australia, Canada, United States, United Kingdom etc.). The second group includes jurisdictions in which competition agencies and criminal law enforcement authorities are different and apply separately their respective statutes (e.g. Colombia, Chile, Israel, etc.).

In the second group of jurisdictions, interaction between competition and procurement agencies is not as close as the first group. In these jurisdictions, the success of detection bid-rigging practices through a leniency program is greatly impaired because cartel members (especially directors and high ranking executives of companies) may face a criminal investigation even if they obtain full immunity in an antitrust investigation.

Debarment

Notwithstanding the coordination between competition and criminal law enforcement agencies, applicants to a leniency program may be debarred from bidding on future contracts for several years. This could mean a practical wind up of the company and/or their executives' main activities. Needless to say, many bidding companies participate in different procurement tenders at the same time, and this reduces the likelihood that they will come forward and blow the whistle.

Accordingly, if a company that submits bids in several procurement processes is involved in a bid-rigging conspiracy in one of the processes, applying to a leniency program may mean that they could be debarred in all of processes (even these without bid-rigging).

Although competition agencies are aware of the benefits of leniency programs, persuading administrative agencies to refrain from applying debarment rules to leniency applicants may be challenging.

Reputational damage

Bid-rigging cases often make the headlines of newspapers, thus damaging the reputation of the companies and individuals involved. After companies have been identified for bid-rigging, they may face duress not only from the public but also from politicians and agents involved in the public procurement process.

Suspicion of all activities carried out by a company during previous years will be common and clients, politicians and the media may try to avoid any contact with the company. For that reason, coming forward and reporting bid-rigging conduct may simply be so burdensome that companies would prefer to defend themselves and maintain innocence even after an investigation.

6. Bid-rigging: detecting and case initiation

According to the OECD, “*bid-rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process*”¹². More specifically, bid-rigging is an agreement on the terms of participation in a public bid between the competing companies.

Countering bid-rigging is an important area of cooperation between competition agencies and public procurement bodies. Competition agencies can use outreach to educate procurement bodies about the possible signs of collusion between bidders for public contracts. On the other hand, public procurement bodies can provide useful market specific information that the competition agencies can use to identify collusion and its typical signs. Both can further work on raising their awareness of such signs with reference to national and international experiences.

Although bid-rigging normally takes place in a specific country environment, some signs of bid-rigging are, to a substantial extent, universal and, therefore, can be identified with reference to international experiences.

As a result of their interaction, competition and public procurement bodies can develop a common approach to identifying signs of bid-rigging in order to address this issue by joint effort to the extent possible in their country specific legal environment. In particular, efforts can be made to ensure that procurement bodies and regulators are familiar with bidding patterns commonly associated with bid-rigging and are able to evaluate whether a particular tender presents a bid pattern that might be of concern. In fact, procurement agencies may lack the resources and skills necessary to run more advanced screening tests, which are based on economic theories of collusion and competitive tendering and whose aim is to provide more reliable evidence of bid-rigging. These screens are likely to be carried out by competition agencies, while public procurement agencies can greatly assist in collecting the data necessary to run screens and providing background information about the tender under scrutiny.

If a screening test reveal *prima facie* evidence of bid-rigging, competition agencies may want to initiate a formal antitrust investigation which is jurisdiction specific and depends on the legal powers of a competition agency. In some jurisdictions, competition agencies have powers to control the competitiveness of public procurement and can initiate a bid-rigging case on their own initiative if they suspect a violation of competition legislation in the course of a public tender. In other cases, competition agencies can react to requests/tip-offs from a procurement agency or government body, or a complaint from participants in a public bid. In some jurisdictions both ways are possible. However, there are also jurisdictions where public procurement at the federal and/or regional level is exempted from national competition legislation and the national competition agency can only advise procurement agencies on techniques for discovering bid-rigging and initiating a bid-rigging case.

6.1. Bidding patterns indicative of bid-rigging

Several bidding patterns and screens are commonly found in bid-rigging cases. A comprehensive list can be found in the *OECD Guidelines for Fighting Bid-Rigging in Public Procurement*¹³, and in particular the Section on *Checklist For Detecting Bid-Rigging In Public Procurement*. Other examples have been provided in the context of the ICN¹⁴.

¹² OECD Guidelines on Fighting Bid-Rigging in Public Procurement, p. 1, OECD 2009.

¹³ These Guidelines are part of the 2012 OECD Recommendation on Fighting Bid-Rigging in Public Procurement that calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of bid-rigging in public tenders. The Guidelines

Competition agencies should ensure that procurement bodies and regulators are aware of certain bidding patterns and other signs of bid-rigging conspiracies, for example:

- The same company wins most of the bids;
- A number of companies take turns winning successive public bids (bid rotation);
- There are few bid participants or no new participants;
- The bid participants are well aware of their competitors and their proposals;
- The bid process does not erode the target price;
- Participants withdraw during the bid;
- Limited access to information on the bid; or
- The public contract price deviates substantially from the fair market price.

Additional patterns include market allocation, where participants decide not to compete in certain markets or for certain customers, and non-conforming bids, where participants deliberately submit bids that fail to meet bidding requirements in order to be disqualified.

Other signs of bid-rigging are evident in the application materials that bidders submit to public procurement officials at the public agency soliciting the bids. The same misspelled words, typographic or arithmetic errors, and cut-and-paste information may appear in bid packages that competing companies submit. This suggests that the companies prepared the bids in consultation with one another, or even that the same person prepared and submitted each company's bid using the same office equipment.

6.2. Proactive methods of bid-rigging detection

Proactive methods of detecting bid-rigging available to competition agencies include the following:

- empirical methods, such as screening of public tenders, economic analysis and intelligence activity¹⁵ that investigate specific areas of interest that have been identified;
- outreach, education and other compliance initiatives targeted to procurement agencies (see Section 4); and;
- monitoring of media or trade press and monitoring of firm participation in industry events or initiatives organized by business associations.

are available in numerous languages at the following link of the OECD website: <http://www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>.

¹⁴ See the webpage of the ICN Cartel Working Group, available at:

<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/procurement.aspx>

¹⁵ Intelligence-led investigations can also be used to detect bid-rigging. For example, by building up an in-house intelligence function, a competition agency can use tools such as a 'Cartels Hotline' (an email address, a phone line and/or an anonymized system for suspicions and complaints) or by setting up an informant rewards program. Competition agencies may also develop intelligence on suspect bids through covert activity - including covert surveillance and the use of covert human intelligence sources (where an agency might task an individual to establish or maintain a relationship with those involved in suspected bid-rigging to obtain information and to provide it to the agency) subject to the necessary authorizations and conditions.

Some competition authorities have developed a solid experience in using sophisticated methods of bid-rigging detection, called screens. Conducting screens may require a substantial volume of data. Some of this data may not be directly accessible for competition authorities. Competition authorities' need to access this data for the purposes of thorough and comprehensive analysis is an additional argument for their close cooperation with public procurement bodies.

It is possible to distinguish between two general approaches to screening¹⁶. Under the "structural" approach, a series of industries or markets are screened to identify those which exhibit characteristics that make them more prone to collusion. The "behavioral" approach is designed to evaluate firms' behavior, market conditions, and outcomes for indication of collusion.

6.2.1. Structural screens

Structural screens are based on market conditions that can facilitate collusion, and, in particular, bid-rigging conspiracies. Where there are few sellers in a market, or a small group of major vendors controls a large percentage of the market, collusion amongst competitors is easier and more likely. Similarly, if the competing vendors for a particular contract are the same each time an agency solicits bids, collusion is more likely. Risk of collusion also increases where the product procured is standardized, and differentiating features such as special design characteristics, quality, or accompanying services are not present or significant. In some markets, competitors interact frequently at trade association meetings, site visits or other industry gatherings, and these events may provide opportunities for collusion. Some industries have a high rate of employee turnover, with individuals taking successive jobs at competing companies. Each of these factors potentially increases the likelihood of collusion, and may warrant increased scrutiny of the bidders and the bidding process.

In most cases, structural screens are straightforward and simple to implement, as they require data which is readily available or easy to collect, and do not involve sophisticated economic analysis. In addition, staff training on the screening process is not demanding. Structural screens are limited, however, because they do not provide competition agencies with evidence of collusion; they only point to a market's propensity for collusion. While their contribution to bid-rigging detection is limited, structural screens still provide competition agencies with indicators that would trigger close scrutiny.

6.2.2. Behavioral screens

The development of "behavioral" screens has been considerable in the area of bid-rigging due to the availability of a variety of information and data on public tenders. Given the economic relevance of public procurement in many jurisdictions, guidelines on the design of the procurement process in order to reduce risks of bid-rigging have also been developed.

Behavioral screens are generally based on data obtained from the comparison of publicly available databases or the auditing of public procurement procedures, whether conducted internally by a separate wing of the relevant public agency, or externally by an independent State body with specific powers of audit. Therefore, cooperation with public procurement bodies and regulators is essential in this area.

Behavioral screens are based on two underlying assumptions: the independence of bids and the bid-cost relationship. In a competitive tender process, bids are submitted independently. Thus, if a bid-rigging agreement exists, bids may show high correlation which could be

¹⁶ For a more in-depth review of the literature on cartel screens, see the OECD Roundtable on [Ex-officio cartel investigations and the use of screens to detect cartels \(2013\)](#), in particular the Background Note by the OECD Secretariat and the papers by experts.

explained by co-ordination between bidders. In addition, bids submitted by independent competitors should reflect appropriately the costs of each bidder in a competitive market.

A number of screens to detect possible bid-rigging conspiracies have been used to test the assumption of the independence of bids. The simplest screen is identical bids: many bid-rigging cases have been flagged to competition agencies by procurement officials who have detected identical bids submitted by allegedly competing bidders.

Other screens are based on a high correlation between bids, after controlling for costs and market power variables. For instance, in the case of several identical local bidding markets, if differences in correlations cannot be explained by observable differences in market conditions, then it is possible that a coordinated behavior among bidders has occurred in the local market with higher bid correlation.

Another set of screens considers unexpected or significant differences between winning and losing bids. In a competitive environment, differences between bids are not expected to be significant. Sometimes a new company will unexpectedly enter a bid round and offer a price significantly lower than the price that a public agency historically paid pursuant to a contract. This may indicate that the new entrant is bidding competitively, and that the historically higher price is due to the companies in the bid pool rigging their bids in previous years. Public procurement officials should consider whether this sort of sudden change in bidding behavior may indicate prior collusion amongst bidders.

Another set of screens is based on the assumption of the alignment of the bid and the underlying costs of the bidder. In a collusive context, the relationship between bids and cost is broken, as conspiring firms will aim to achieve supra-competitive profits. If, for example, a firm submits a higher bid for a contract and a lower bid for a similar contract in terms of costs, this could indicate a pattern of bids that is consistent with collusive activity, all other things being equal. These screens are based on a comparative analysis of bids submitted by the same bidder in similar market situations or tenders, or alternatively, bids of different bidders in markets with similar competitive conditions.

Unlike structural screens, the behavioral screens aim at finding direct indicators of a bid-rigging conspiracy with a view toward launching an investigation. Further assessment of the bids is still needed, however, as behavioral screens do not provide sufficient evidence of bid-rigging. In other words, these screens can generate false positives (flagging cases which do not merit further scrutiny) or false negatives (failing to identify collusion in a particular market). Another important drawback is that, unlike structural screens, behavioral screens are a data- and resource-intensive activity, where access to relevant information, specific skills and know-how are essential requirements.

To partly overcome these issues, structural screens can be combined with behavioral ones to simplify them and obtain empirical results that can be more easily interpreted. For instance, behavioral tests can be applied on public tenders which are selected according to factors typically facilitating collusion: tender contracts of significant size and related to homogenous products (where price is the key competitive variable for the award of the contract); tenders with a limited number of participants (below ten) and tenders occurring on a regular or frequent basis.

7. Practical means of facilitating a competitive environment and preventing bid-rigging in public procurement

7.1. Introduction

Uncovering and prosecuting collusion in public bidding should be concurrent with the development and implementation of preventive measures. Such measures make bid-rigging riskier and less attractive for potential participants of illegal bid-rigging arrangements to engage in collusive conduct.¹⁷ This is another important area of cooperation between competition agencies and public procurement bodies. It includes several aspects, described below.

7.2. Designing the bidding process to minimize the risk of collusion

An effective design of a bidding process is important for minimizing the risk of collusion. Experience suggests that several precautionary measures may increase the competitive pressure between bidders while reducing opportunities to collude successfully.

Before engaging in the design of a bidding process, a sound knowledge of the needs of the public procuring body is a basic prerequisite to ensure that the services and/or products required are clearly identified in the tender offer. Moreover, procurement officials should be aware of the main characteristics of the markets involved, including the number and size of the potential bidders. Thereafter, a number of precautions may be considered across the various stages of the tender design, including the definition of the object and technical requirements, the allotment criteria, the requirements for participation and the awarding criteria.

Examples of measures suitable to enhance effective competition in a procurement process and reduce the risk of bid-rigging are listed below. Further aspects of tender design can be found in the Checklist for Designing the Procurement Process to Reduce Risks of Bid-Rigging included in the 2009 OECD Guidelines referred to above. In addition to other factors, the OECD cites: (i) the importance of performing pre-tender market studies, (ii) the importance of reducing the costs of participation to tenders, (iii) the importance of reducing opportunities for bidders to communicate during the tender process, and (iv) the need to balance transparency requirements during the tender process.

7.2.1. Increasing the bidding pool

The more qualified bidders that are able to respond to an invitation to tender, the stronger the competition will be and the better the expected outcome. However, many factors may affect the outcome of a tender procedure by unduly restricting the potential numbers of bidders.

Identifying the optimal size of a contract is not an easy task. Consolidating the work into larger contracts may increase competition where the existing contract covers a narrow geographic area and a corresponding few number of contractors submit bids. A larger contract is often potentially profitable for competitors outside a local geographic area, and thus increases the pool of likely bidders. On the other hand, an artificial or unjustified extension of the scope of the service required may restrict participation of more specialized or smaller firms. Therefore, in certain jurisdictions one of the rules for public procurement procedures provides that separate procedures should not be clustered into one large procedure.

¹⁷ More exhaustive and in-depth analysis of such measures can be found in 2012 OECD Recommendation on Fighting Bid-Rigging in Public Procurement, including the 2009 “OECD Guidelines for Fighting Bid-Rigging in Public Procurement” in Annex 1 (referred to above).

Participation requirements may exclude firms that in the past have not provided products or services to the procurement agency similar to those of the tender in question, with the result being that the contract is repeatedly awarded to the same local firms. Importance of previous relevant experience may be considered, but it should not necessarily be restricted to past relationships with the procurement agency.

Technical and economic/financial requirements should be proportionate to the value of the contract. A disproportionate turnover threshold may prevent the participation of small and medium enterprises whose turnover may fall below the thresholds simply because their business does not cover the entire national market. In addition, turnover thresholds should be consistent with the number of years for which the contract is tendered. In any event, turnover should not be viewed as the only indicator for evaluating the financial/economic stability of potential bidders. A variety of means/indicators, such as bank statements and bank guarantees of a similar amount to the maximum value of the contract, may be contemplated.

7.2.2. Allowing for substitute products when possible

Whenever possible, contract specifications should allow for substitute products or services, as long as they provide similar functional performance. Procurement officials should avoid the use of established brands or standards to identify product/service characteristics in the contract. Specifications should instead illustrate the performance requested as to allow potential bidders to check whether their products/services can meet these requirements.

7.2.3. Avoiding a request for specific technologies or indication of brands of products, and focusing on qualitative criteria of goods and/or services purchased

Bidding conditions are of critical importance and can be a tool to avoid collusion practices. However, when effects on competition are not properly assessed, requirements can limit the access of participants to the process. In that sense, it is desirable that public procurement bodies design bidding procedures and conditions where selection criteria principally deal with the specific needs of the public agency, rather than focusing on products of a determined brand. (e.g., rather than procuring computers with Windows Operating system, public procurement bodies could focus on procuring computers that can access the Internet, have word processing capabilities, etc.).

The recipe for a successful bidding process starts with a careful drafting of the bidding conditions. The more general the conditions (without compromising quality), the more participants will be able to join the process. Conversely, requesting specific technologies or indicating specific brands of products creates higher barriers to entry.

7.2.4. Allowing for more than one winner

The products and/or services subject to tender may be bundled in a single lot or split into several lots, on the basis of the actual characteristics of the products and/or services involved.

The design of the lots should be consistent with the activity's minimum efficient scale. Effective economies of scale and scope should be assessed on the basis of a market analysis, taking into account both supply and demand side characteristics. However, too broad bundles may unduly favor operators organized in a way to perform multi-sector activities. Participants in tenders should be able to compete on single, distinct services.

The benefits of aggregating demand in a single lot (e.g., increase in bargaining power, avoid duplication of transaction costs, increase in scale economies) are less clear when the product/service is differentiated. In addition, having only one winner might entail the risk of the

buyers being locked in by a dominant supplier, which may translate into a reduction of the degree of competition over time. Therefore contracting agencies should strike a balance between demand aggregation and allowing participation of both large and smaller firms, namely by splitting procurement contracts into several lots and/or softening the constraints for joint bidding demand aggregation, having regard to the structure of the affected markets from both demand and supply side.

In general, the number of lots should be lower than the number of bidders: therefore, in defining the number of allotments it is important to consider the number and the dimensions of the potential bidders. A high number of lots may increase the risk of potential collusion among participants through allocation of lots among themselves.

7.2.5. Avoiding predictability

Predictability of the outcome of the tender may facilitate collusion between bidders. Often contracts mainly mirror former concessions to municipality-owned providers, both in terms of the services obligations and in terms of the geographical areas concerned.

As a general rule, procurement officials should analyze the competitive structure of the market and avoid creating circumstances where specific firms find themselves particularly well suited to the characteristics of certain lots. To this end, officials might consider aggregating or disaggregating lots and revise the qualitative requirements for the products/services requested.

7.2.6. Requesting the bidders to sign an anti-collusion declaration when submitting proposals for the bid

In several jurisdictions, companies submitting a bid must sign an anti-collusion declaration, often in the form of a statement under oath, that they have neither agreed with competitors about the bids nor disclosed bid prices to any competitors or attempted to convince competitors to rig the bid. This measure may be extremely effective, particularly where a false declaration can render the company liable to a civil remedy or criminal penalty even if there is insufficient evidence to prove that the competitors agreed to rig the bid or in fact rigged the bid.

7.2.7. Evaluation of tenders as a mean to counter bid-rigging

In the tender evaluation process, and primarily in the process of evaluating financial offers, the public procurement bodies have a rather wide scope as regards how the tenders should be evaluated and what type of model/template the public procurement body wants to apply for this purpose.

In this regard, the public procurement body should consider the possibility to apply a model/template which ensures, or at least aims to ensure, that bid-rigging is avoided or, in any case, that the model does not encourage bid-rigging. Consequently, the public procurement body should thoroughly consider all aspects and all possible consequences when designing and applying a model/template for tender evaluation. As for the competition agency, it may play an important role both in advising the public procurement body on tender evaluation from the positions of revealing the possibility of bid-rigging and development of the evaluation template.

7.2.8. Other means

Contract duration should be proportionate to the required investments and to the level of expected turnover, and also should take into account potential unforeseeable activities. The competition agency may advise the public procurement body to limit the contract duration to invoke competition for rendering the relevant products or service to the government periodically.

The presence of clauses to pursue other public policy objectives may restrict participation and therefore be in conflict with the competition goal. It might be disproportionate to impose obligations upon the winner to offer specific additional products or services.

Some measures may help to mitigate the lock-in effects of long-term relationships between contracting agency and the incumbent provider. In particular, contracting agencies may ease the access to infrastructure and equipment for new entrants, e.g., by obliging the incumbent to divest ancillary goods and equipment that are necessary for newcomers to offer the product or perform the service. Moreover, information asymmetry between the contracting agency and incumbent providers may be reduced by obliging the incumbent provider to release information and data to the contracting agency. Knowing the cost environment of the relevant goods or services and benchmarking bids wherever possible will help the contracting agency to prevent or detect bid-rigging.

Other helpful suggestions are: seeking objective justification for any failure to bid, sharing intelligence with other public sector procurers, and keeping good notes of all discussions with potential bidders.

7.3. Electronic bidding and electronic public procurement trade spots

Electronic bidding is an efficient means of preventing collusion and corruption among bidders in the course of public procurement. It helps to achieve the following objectives:

- Transparency in bidding procedure and prevention of information leaks.
- All information related to a public bid is available on the relevant web site in real time, thus minimizing personal contacts among bidders.
- Increase in the number of potential suppliers.
- Reduction in the dissemination of information about other competitors' bids among participants.
- Conservation of time and resources required for public purchasing and savings resulting from increased competition.
- Prevention of corruption. Access to tender information is open; therefore, the risk of arbitrary decision making by a person responsible for purchasing is reduced. A winner of a bid is determined electronically. The information is exchanged not by physical persons, but via a system of information exchange. Therefore, it is not possible for a procurement agency official to counterfeit information or provide incorrect information because the information is being directly taken from the official source.
- Transparency of the evaluation procedure of bids received. The results of the evaluation are disclosed, including bidding prices.
- Increase of SMEs participating in public bids.
- Increased competition, reducing the possibility of collusion among bidders.

Competition agencies may advocate for the introduction of electronic bidding systems because of the ability of these systems to facilitate competition in public procurement markets. When established, such systems or trade platforms may facilitate disclosure of bid-rigging by competition or public procurement authorities, depending on which of them is responsible for

countering bid-rigging in a particular jurisdiction. With the increasingly digital sophistication of bidders, measures will still need to be put in place to prevent bid-rigging in electronic procurement rounds.

Electronic bidding and maintenance of the relevant databases provides competition agencies with the possibility to run behavioural screens to detect suspicious bidding patterns more efficiently. This is an area where competition agencies and procurement bodies could work closely together to ensure that the correct data is extracted from the electronic platform, collected, and organised in a way that allows competition agencies to run the appropriate screening techniques.

Moreover, the analysis of electronic data may sometimes provide important evidence of collusion in the course of public bidding. For example, this type of data might demonstrate that bids by different tender participants were prepared on the same computer.

8. Conclusion

Bid-rigging in public procurement is a serious issue costing governments and taxpayers billions of dollars every year. This practice increases prices and lowers the quality of goods or services offered in public tenders. Given the correlation between bid-rigging and public procurement, it is important for competition agencies to build and enhance relationships with public procurement authorities in their respective jurisdictions at all levels of government. Having a strong relationship between competition and procurement agencies will help to achieve a variety of positive outcomes in public tenders, including free and fair competition, cost-quality efficiency of procurement, savings of government, openness and transparency, responsibility and accountability, among other results.

By working with procurement authorities, competition agencies can minimize the risk of bid-rigging by educating and raising awareness about procurement practices that facilitate collusive conduct. Additionally, having strong relationships assists in the detection and deterrence of bid-rigging by providing competition agencies with an avenue to educate and support procurement authorities in these endeavors.

Although this chapter has laid out many of the methods currently being used to promote and enhance relationships between competition agencies and procurement authorities, the list is not exhaustive, and the anti-cartel community continues to develop and encourage new, innovative tools and mechanisms to promote these relationships.

ANNEX A. Use of powers and competition advocacy means by competition agencies to achieve a competitive outcome in public procurement bids: Examples of successful relationship between competition authorities and public procurement bodies from the experience of the ICN Cartel Working Group Members

In Australia, the Australian Competition and Consumer Commission (“ACCC”) is permitted to engage with and cooperate with both State and Federal criminal / disciplinary authorities on any investigation related to breaches of the Competition and Consumer Act (“CCA”), including bid-rigging.

The form that the cooperation takes depends on the particular terms of any relevant legislation, Memoranda of Understanding etc. that may govern the cooperation. Section 155AAA of the CCA prevents the ACCC from sharing information with any third party except as provided by the Section.

In general terms, provided certain preconditions are met, Section 155AAA permits the ACCC to share information, including confidential third party information, with other relevant Australian government authorities to assist the ACCC and the third party agency in the performance of their duties.

In Botswana, the competition agency is a fairly new agency and it is not possible to overemphasize the critical role of thoroughly educating public procurement bodies on the agency’s mandate. Competition law is not a subject that is commonly discussed, let alone understood in this jurisdiction.

For the past 24 months, the agency has been engaged in a robust exercise of interacting with officials from procurement bodies including those from central governments, local governments and parastatals (a company or agency owned in whole or in part by the government). The aim of these interactions has been to educate procurement bodies on competition policy and regulation.

In Brazil, the Brazilian Administrative Council for Economic Defense (“CADE”) has promoted several meetings with public procurement bodies, especially with local public servants. Thus, by transferring techniques for detecting bid-rigging, CADE tries to build an actual network of agencies – including local ones – responsible for fighting bid-rigging.

Furthermore, CADE is strengthening its partnership with local Account Tribunals - responsible for supervising public procurement procedures – in order to promote pro-competitive design in public procurement.

In Canada, the Competition Bureau (“Bureau”) regularly provides outreach presentations to public procurement bodies at all levels of government. These presentations provide procurement officials with the knowledge necessary to detect, deter and report bid-rigging to the Bureau. In particular, they included information on, among other things, the bid-rigging provisions in the *Competition Act*, the common forms of bid-rigging, the characteristics that make an industry more susceptible to bid-rigging, the warning signs for possible bid-rigging, and the techniques that can be used to prevent bid-rigging.

The Bureau has developed a strong relationship with Public Works and Government Services Canada (“PWGSC”), the principal procurement agency of the Canadian federal government. In May 2013, the Bureau entered into a Memorandum of Understanding (“MOU”) with PWGSC.

The MOU outlines that the two agencies will work together to combat cartel activity in procurement processes and real property transaction processes under the responsibility of PWGSC. It also includes an outreach and education component; specifically, it states that PWGSC will have a program to educate procurement officers and the Bureau will provide training on the detection and prevention of bid-rigging.

The Bureau is of the view that an effective outreach strategy should support both bid-rigging detection and prevention, and focuses its outreach efforts on those sectors and situations where the impact of bid-rigging is greatest in terms of both the likelihood of its occurring and the volume of commerce potentially affected.

In Colombia, there are more than one thousand public entities that distribute contracts daily. Public entities in Colombia are created by law, and these laws may give entities the ability to bring forward public procurement processes, even though the country has created a centralized procurement agency.

Public entities may resort to the Superintendence of Industry and Commerce of Colombia (“SIC”), to ask for the competition agency’s advice on how to promote competition within bidding processes. Since 2010, the SIC has visited many of these entities to give them guidelines to prevent and identify bid-rigging in public procurement, and to educate the entities’ officials on how to minimize the risks of collusion.

A couple of entities tried to sign permanent cooperation agreements with the SIC, to review their procurement processes to minimize the risk of collusion. These attempts, however, have not been successful, since the SIC’s human and financial resources are not sufficient to review every procurement process run by these entities and also because there is no legal mandate for the SIC to embark in this permanent role.

In Cyprus, the Commission for the Protection of Competition of the Republic of Cyprus has recently co-operated with the Public Procurement Office of the Government to produce a Best Practices Guide which was then distributed to all public agents that procure products and services. It is also planned in the near future to conduct a relevant training seminar for all procurement agents.

In the European Union, the European Commission cooperates with the national competition agencies of the EU Member States through the European Competition Network (“ECN”). The main mission of the ECN is the consistent and uniform application of EU competition legislation and case-law across the totality of Member-States. Through the ECN, the Commission’s competition decisions and its interpretation of EU competition legislation can reach national procurement bodies through their own contacts with their national competition agency. Some national competition agencies also engage in outreach with public procurement bodies.

Bid-rigging is not a criminal offence under EU law, but as long as it impacts the EU’s financial interest, it falls within the competence of the European Commission’s Anti-Fraud Office (OLAF). There is a pending proposal for an EU Regulation establishing the European Public Prosecutor’s Office, a decentralized EU prosecution office with exclusive competence for investigating, prosecuting and bringing to justice crimes against the EU budget. In the context of the discussions for a European Public Prosecutor, bid-rigging was categorized as one of the offences appropriate for being elevated to the status of a Union-level criminal offence.

In Finland, public procurement is subject to national procurement legislation which derives from the European Community directives on public procurement. Under these rules public sector procurement must follow transparent open procedures ensuring fair and non-discriminatory conditions of competition for suppliers.

The Ministry of Employment and the Economy is the enforcing authority concerning public procurement. One of its departments, the Public Procurement Advisory Unit, provides public

procurement bodies and businesses with information on public contracts. The purpose of the advisory service is to strengthen public procurement bodies' and businesses' competence in public procurement processes, provide help with accessing information about public contracts, and promote strategic thinking and market performance in public procurement.

The Finnish Competition and Consumer Authority is not involved in the surveillance of public procurement procedures. The FCC strives to give advice on how to identify risks of bid-rigging or forbidden co-operation between bidders.

In Germany, public procurement is governed by a complex system of rules with specific review procedures for important public contracts.

In 2012 and 2014 the Bundeskartellamt invited representatives from competition agencies and public prosecutors from across the country to Bonn to exchange their experiences on the prosecution of illegal agreements relating to public and private tenders. The dialogue within the "network on bid-rigging agreements", which was initiated in 2012, serves to increase the quota of uncovered violations.

The Network will continue to meet on a regular annual basis.

In Greece, the Hellenic Competition Commission ("HCC") has close cooperation with the Greek Ministry of Development and Competitiveness on issues related to promoting competition in public procurement. In addition, the HCC contributes to an OECD project currently being implemented in cooperation with the Ministry regarding capacity building of the Greek central purchasing authority.

The HCC is also in contact with the newly appointed Independent Public Procurement Authority and plans to enhance collaboration towards detection and prevention of bid-rigging cartels in the near future.

In 2014 the HCC published a 'Guide for Public Procurement Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders' ("the Guide") in order to enhance the awareness of public officials of bidders' anticompetitive practices. With this advocacy initiative, the HCC intends to help public officials dealing with public procurement to easily detect collusive behavior of participants in tendering procedures which distort the efficiency of these procedures. The Guide is written in simple and non-technical language and includes numerous examples and references to case law, to assist procurement professionals, especially those without any prior knowledge of competition issues, to understand cartel behavior in public tenders.

In Israel, in the area of public procurement the Israel Antitrust Authority ("IAA") works with the Israel General Accountant ("GA"), who oversees government procurement processes, to promote competition in public procurement. Cooperation with the GA includes non-formal consultations concerning specific tenders, as well as issues of general policy and integration of IAA's lectures on avoiding and identifying bid-rigging in the training courses and workshops of the GA, directed to public procurement personnel. Recently, as a result of the IAA's application, the GA has instructed procurement personnel to report suspicious signs or evidence concerning rigged bids.

In Italy, the Italian Competition Authority ("ICA") acknowledges a great importance of the objective of fighting bid-rigging in public procurement. ICA takes into consideration that in Italy public procurement agencies are relatively numerous and the value of public procurement contracts accounts for about 10 per cent of the gross national product in the country.

In 2013 the ICA issued a Handbook, based on the OECD Guidelines referred to above. The Handbook facilitates fighting bid-rigging in public procurement and is intended for all procurement agencies in the country. The Handbook included guidance on identifying and interpreting signals of potential bid-rigging. The use of the Handbook by public procurement

officials helped them to formulate numerous complaints on bid-rigging. As a result, 9 formal proceedings concerning bid-rigging were ongoing at the end of 2014.

The relationship between the competition agency and public procurement bodies also includes competition advocacy by means of exchange of opinions on public procurement issues. 28 out of the 55 opinions issued in 2014 by the Authority concerned public procurement. In 2014 the ICA signed a Memorandum of Understanding with the Anti-Corruption Authority with a view to foster information exchange and cooperation.

In Japan, in order to promote competition and minimize the risk of collusion in public procurement, the Japan Fair Trade Commission (“JFTC”) establishes strong relationships with public procurement bodies in the following ways:

- Appointing liaison persons (e.g. director in charge of procurement) in each central governmental agency and its local branches; and
- Setting up annual meetings with these liaison persons for deeper channels and information exchange.

The JFTC actively brings accusations seeking criminal punishment in serious cases that are considered to have a widespread influence on people’s lives, such as bid-rigging. In order to ensure smooth and appropriate sanctions, the JFTC with the Public Prosecutor’s Office hold a “Conference of Criminal Accusation”, and exchange opinions and information on specific issues related to each case that the JFTC considers worthy of criminal accusation. Another effective mechanism between the JFTC and the Prosecutor’s Office is the procedure for criminal accusation, which was introduced in 2006 and has contributed to the exchange of information and parallel investigations between the JFTC and the Public Prosecutor’s Office at an early stage. In addition, in order to construct a better relationship between the JFTC and the Prosecutor’s Office, the agencies also exchange personnel. Currently the Ministry of Justice has three prosecutors working as investigators at the JFTC. These efforts have resulted in a continued cooperative relationship between the JFTC and the Public Prosecutor’s Office.

Additionally to that, in Japan, the contractors of public procurement are requested to sign a written oath that the contractor will pay a certain percentage of the amount of the contract as a compensation for damages if the competition agency takes actions against it.

In Mexico, the Federal Economic Competition Commission (“COFECE”) continually collaborates with federal and local authorities that engage in procurement procedures in order to prevent and detect bid-rigging. COFECE’s engagement is mostly through training, counseling, MOUs and publishing studies in collaboration with the OECD regarding different public purchasing entities’ legislation, regulation and procurement practices. These actions have been implemented amongst a wide-range of public purchasing entities, including those that provide health care services, electricity, etc.

One of the most relevant cases in this matter relates to cooperation with the Mexican Institute for Social Security (“IMSS,” by its acronym in Spanish). COFECE began counseling IMSS regarding how to design a pro-competitive procurement process and how to prevent bid-rigging in 2006. Furthermore, as a result of an MOU signed between COFECE and IMSS, COFECE acted as an observer during the procurement of medication and healing materials which were acquired in a consolidated manner by public sector health providers.

Moreover, in 2011, in collaboration with the OECD, and in 2014, COFECE provided training to procurement officers from IMSS. The training consisted mainly of the following: a) mechanism for preventing collusive agreements; b) detection of collusion; and c) the actions to undertake once collusion has been detected. The collaboration scheme between COFECE and IMSS has allowed the entity to save significant amounts of taxpayers’ money and helped detect one of the most important cartels sanctioned by COFECE.

In the Netherlands, the Netherlands Authority for Consumers and Markets (ACM) has, in the past, invested in the education of public procurement bodies because public procurement bodies are crucial players in detecting cartels in public procurement procedures. For 2014 and 2015, public procurements is one of ACMs prioritized themes. The ACM does not have regular contacts with all public procurement bodies. There are simply too many public procurement bodies to do so.

In Panama, the Consolidated Text of Act 22 of June 27, 2006 (“Law 22”) regulates public procurement and establishes different procedures for selecting contractors who contract with the State, such as those that are minor contracts, public tenders, bids best value, etc.

However, Law 22 does not include within its purview aspects on free competition and anticompetitive practices in bid-rigging cases, that were covered in Panamanian Competition Law by Law 45 of October 31, 2007 (“Law 45”). Law 45 sets out rules on consumer protection and competition, and is the legal tool used by Panama’s Competition agency to fight public procurement cartels.

The fact that there is a specific rule governing public procurement (Law 22) does not obstruct the application of the principles of free competition in rigged public bids that were contemplated in Law 45 and are considered absolute monopolistic practices. The competition agency may act before or after the procedures for selecting contractors, if there are indications that denote the possibility of a cartel.

In Russia, the procedure for making purchases for state and municipal needs is determined by Federal Law No. 44 FL “*On the contract system in the area of purchasing of goods, works and services for state and municipal needs*” (“Federal Contract System” or “FCS”). The FCS has broad powers to control the observation of competition and reduction of collusion risks in public procurement for state and municipal needs. The control of observation of the competition principles is made in two ways:

- Control of the procedure of placement of state or municipal order: the Federal Antimonopoly Service of the Russian Federation (“FAS”) and its territorial offices have powers to make injunctions to customers and order changes in bid documentation, to request an extension of the terms of a contract or bid to eliminate violations, to annul the results of bids and to apply to a court for a recognition of the results of a bid and the relevant contracts as annulled.
- Control over observation of competition legislation and ceasing various types of conspiracies in the course of a bid: FAS can initiate an antitrust investigation if signs of limitation of competition in the course of a bid are present.

The FAS possibilities in the matter of reduction of collusion risks is not limited to control activities. The FAS cooperates with the state purchasers and conducts educational work by using available means of communication, including roundtables, seminars, training programs and consultations on disputable issues. At the premises of higher education institutions, FAS conducts training for personnel of the state or municipal purchasers. For this purpose, the agency also uses its own training center that has been operational since 2012. This training is mainly intended for the personnel of state or municipal purchasers making purchases of socially important goods and services, as well as purchases in the markets where collusion risks are highest. In recent years, the agency has also conducted training seminars for staff members of controlling agencies such as the Ministry of Internal Affairs and the Court of Auditors. In the course of these seminars, FAS staff members explain the legal liability for collusion, indicate the signs of collusion, explain the procedure of application to the antitrust Law and the features of the leniency program.

In Spain the Spanish Competition agency has carried out different actions in the area of public procurement since the creation of the former competition agency, the CNC, in 2007. The new authority, the CNMC, which was created in October 2013 as a result of the merger of the CNC with the telecommunication, energy and other sector regulators, has followed that path.

Besides the CNMC's competences in applying the Competition Act to anticompetitive conduct in all sectors of the economy, including public procurement, and public actors as long as they act as market participants. The CNMC is also responsible for the promotion of competition in all sectors. The CNMC must be asked for advice when any new piece of regulation may affect competition in the markets. In addition, it can also issue reports and studies on its own initiative. The CNMC may even challenge before the courts any administrative acts (including public contracts) or regulations (not acts) that give rise to obstacles to free competition.

The competition agency has used these powers in many different ways in recent years. For example, in 2011, it published a Guide to Public Procurement and Competition and in 2013, it published a report on the application of that Guide to public procurement in the public health sector. The Guide is intended for public procurement bodies to help them choose the options most favorable to competition when designing procurement processes, on the one hand, and recognize signs of bid-rigging among firms, on the other hand. In addition, in 2013, a report on in-house providing was issued which included recommendations to use this mechanism in the least-restrictive-to-competition way possible. Furthermore, the CNMC has issued 16 reports in the last year where public tender specifications for the procurement of different goods and services such as fuels, telecommunications or cleaning services, were analyzed and pro-competitive recommendations for change were made.

The Spanish government has recently centralized the procurement of certain goods and services. The CNMC has welcomed the initiative as it may facilitate the achievement of efficiencies and better prices for the public administration. However, these efficiencies should not preclude the principles of effective competition, equal treatment and transparency and thus the CNMC has insisted on the importance of design of procurement specifications and of consideration of the dynamic aspects concerned.

Public procurement is a priority sector for the CNMC, as it has been established in the Action Plan of the institution for 2015. The recently issued document titled "Analysis of public procurement in Spain: Opportunities for improvement from the competition perspective" presents a set of actions to be developed by the CNMC, including training programs for public procurement bodies on the detection of anticompetitive practices in public procurement and vigilance on the transposition of the new EU Directives on Public Procurement.

In Sweden the Swedish Competition agency ("SCA") is also the supervisory body for public procurement. Public procurement is governed by the Swedish Public Procurement Act, which is largely based on the EU Directive 2004/18/EC concerning public procurement. In regards of procurements, the supervisory activities are prioritized with an orientation towards illegal direct award of contracts. New rules were included in the Swedish Public Procurement Act in 2010 and these rules provide the SCA with the possibility to take cases of illegal direct award of contracts to court and issue fines for breaches of the law.

The combination of public procurement and competition in the same authority has many synergies. One of the most important benefits is that the SCA has some inflow of cartel and bid-rigging matters through its procurement work. When SCA employees meet with procurers to discuss procurement legislation and supervision, they also use these opportunities to stress to the procurers the importance of contacting the SCA if they see signs of possible bid-rigging in the tenders they receive.

In terms of outreach activities the SCA has published information about how procurers can make their tenders less prone to bid-rigging and has distributed a checklist which aims to assist procurers to detect bid-rigging cartels. In 2013, the SCA launched an interactive web-based

guide on cooperation in procurements that focuses on the questions that the SCA most frequently receives from both procurers and companies. The web-based guide also includes information on the consequences of illegal cooperation.

In Singapore, open and fair competition is one of the key principles governing government procurement and this is applicable to all government agencies across the board. As a party to the World Trade Organization's Agreement on Government Procurement and several other free trade agreements (FTAs) that they have entered with partners, Singapore's government procurement framework is required to be aligned with international standards and obligations. The policy framework is based on the principles of fairness, transparency and value for money.

To promote a competitive bidding process, the Competition Commission of Singapore ("CCS") has worked with the Ministry of Finance (who is responsible for the procurement policy framework in Singapore) to educate government procuring entities on understanding types of anti-competitive conduct, and what to do when such conduct is suspected. Additionally, CCS works with government agencies to improve their tender/procurement design to minimize the risk of bid-rigging and to promote greater competition. In instances where suppliers are found to be involved in bid-rigging concerning a government contract, they may be debarred or disqualified from being awarded contracts by the government.

CCS conducts talks at local government agencies such as the Singapore Civil Service College (local training college for government agencies) the Ministry of Trade and Industry, the Auditor General's Office, and the Ministry of Defense on anti-competitive behavior and how to spot bid-rigging behavior and some advice on how the tender/procurement design can be improved to prevent bid-rigging and to promote greater competition. Additionally, CCS has produced educational resources on anti-competitive practices relevant to the procuring process.

In Taiwan, the Taiwan Fair Trade Commission ("TFTC") consults with the Public Construction Commission (PCC), which is responsible for the public procurement policies and system design under the Government Procurement Act.

Prior to the putting into force of the Government Procurement Act on 27 May 1999, public procurement activities were subject to the Fair Trade Act which was enacted in 1992. After taking into consideration the likelihood that the Government Procurement Act would be enacted in May 1999 by the PCC, the TFTC consulted with the PCC regarding the application of the Fair Trade Act and the Government Procurement Act on competition issues related to government procurement in December 1998. Following the enactment of the Government Procurement Act, any competition issues related to government procurement that are regulated under the Government Procurement Act, are to be handled by the competent authority in accordance with the Government Procurement Act or by other regulatory authorities in accordance with the Government Procurement Act.

Following the enforcement of the Government Procurement Act, government agencies conduct public procurement related to infrastructure plans, such as transportation, energy, environment protection and travel facilities. They also implement the procedures for selecting bid winners under the Government Procurement Act if the private enterprises are given permission by the regulatory authorities to invest and build such infrastructure. The government agencies' authorities in the application of the procedures for such procurement may, however, be deferred to other regulatory authorities when the other relevant laws take precedence; if any anti-competitive conducts of the bid winner and other subcontractors are not regulated under the Government Procurement Act, such conducts should still comply with the Fair Trade Act.

Article 46 of the Fair Trade Act states, *"where there is any other law governing the conduct of enterprises in respect of competition, such other law shall govern provided that it does not conflict with the legislative purposes of this Law."*

In Turkey, public procurement is regulated by the Public Procurement Authority (henceforth, PPA) under the Act No 4734 “Public Procurement Law” (“Act No 4734”). According to the aforementioned law, the procurements (goods and services) of public institutions are to be conducted through competitive tenders in principle, with exceptions (direct procurements) defined exhaustively.

The substance of Act No 4734 emphasizes the establishment and protection of competition in the procurement process, such as avoiding technical and physical criteria to be too narrow restricting entry and also keeping transaction costs as low as possible, again to encourage potential bidders.

The existence of a specific law regulating public procurements does not interfere with the implementation of Competition Law (i.e. Act No 4054) and these two laws, as well as the authorities practicing them, are complementary. While PPA’s core function is establishing *ex ante* competition, the Turkish Competition Authority’s role is protecting competition *ex post*.

In the UK, the Competition and Markets Authority (“CMA”) was established in April 2014 and is the UK’s single integrated competition and consumer authority, taking over functions previously performed by the Office of Fair Trading (“OFT”) and the Competition Commission. The CMA has no direct oversight of local or central government procurement activities. The Cabinet Office is the UK’s government department tasked with oversight of public sector procurement activities and recently has been involved in transposing the new European Union public procurement directive. Central government procurement in the UK is becoming increasingly centralized within the Crown Commercial Service (part of the Cabinet Office). However, this takes place within a system of decentralized procurement across the wider public sector

In the UK there is a separate criminal cartel offence for individuals who agree with others to make or implement specified hard-core cartel arrangements amongst undertakings, including bid-rigging. This is in addition to potential civil administrative penalties which can be imposed on undertakings for breach of UK and European Union competition law prohibitions.

The CMA has recently delivered a series of talks for public and private sector procurers in Scotland, Wales and Northern Ireland aimed at explaining the CMA’s approach to enforcing the laws against bid-rigging. As part of this series of talks a 60 second guide to bid-rigging has been published on the CMA website which includes the ten most important things procurers should watch out for to spot signs of bid-rigging. This draws on the OECD’s guidelines for fighting bid-rigging in public procurement.

In the United States, the Department of Justice’s Antitrust Division works closely with government agencies to detect, investigate, and prosecute bid-rigging and other fraudulent conduct related to public procurement. Antitrust Division attorneys have expertise in investigating and prosecuting procurement fraud, but public procurement officials and government investigators are best positioned to detect and prevent such conduct. The Antitrust Division cultivates its relationships with public procurement officials and government investigators at various government agencies, who notify the Antitrust Division when they see signs of collusion in a procurement process. This team effort among public procurement officials, government investigators, and Antitrust Division attorneys promotes competition and minimizes the risk of collusion.

In the United States, collusion in public procurement is prosecuted as a federal crime. Bribery of public officials, kickback schemes, and other fraud crimes often accompany bid-rigging of government contracts. Bid-rigging and bribery carry statutory maximum prison sentences of ten years, bribery of a public official carries a maximum prison sentence of fifteen years, and fraud carries a maximum prison sentence of twenty years. The deterrent effect of prison sentences for procurement fraud, like with other crimes the Antitrust Division prosecutes, promotes competition and minimizes the risk of collusion.

The Antitrust Division's outreach to government agencies engaged in procurement serves several important purposes. Outreach programs educate public procurement officials and government investigators about the costs of bid-rigging. Bid-rigging conspiracies often last for many years, and government purchasers, and therefore taxpayers, pay more for goods and services than they should without the full benefits of competition. Additionally, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers. Outreach programs educate public procurement officials and government investigators to detect bid-rigging and fraud. If public procurement officials and government investigators detect illegal conduct early and often, then more successful prosecutions will promote greater deterrence.

The United States is an example of a decentralized public procurement system, but it also has Federal Acquisition Regulations, which provide uniform policies and procedures for public procurement in the federal government. They apply to almost all federal agencies; some agencies are exempt and may promulgate their own procurement rules.

In Zambia, the Zambian national regime governing public procurement falls under the auspices of the Public Procurement Act No. 12 Of 2008 (the Act). The setting up of this Act was necessitated by the need for transparency and accountability in public procurement. The Act establishes the Zambia Public Procurement Authority ("ZPPA") as the body responsible for implementing the Act.

On the other hand, the Competition and Consumer Protection Commission ("the Commission") has been empowered under the Competition and Consumer Protection Act No. 24 of 2014 ("CCPA"), to investigate and pursue perpetrators of prohibited agreements and conduct, under which category bid-rigging falls.

From time to time, the Commission engages the ZPPA, and vice versa, in ensuring there is information exchange and full implementation of the two laws and heightened competition in public procurement processes.

ANNEX B. Real-life cases/samples of bid-rigging practices

Bid-riggers tend to be 'innovative' in their attempts to avoid competition and earn extra profits when supplying products or service to governments. To do so they use not only 'traditional' methods of concerted behavior in public procurement markets (such as price fixing or market allocation, for example), but also 'invent' more sophisticated means of behavior and exchange of information. For this reason this Annex includes some widely spread 'patterns' of illegal concerted behavior by bidders in the course of public procurement tenders exemplified by real life cases.

Price fixing

Case example from Colombia

In this case involving two contracts, the investigated parties offered symmetrically equal prices in different regions, that resulted in both winning the bid in different regions because each company presented a proposal that was 95% of the proposal of the other in one region. This situation prompted the Superintendence of Industry and Commerce of Colombia ("SIC") to launch a formal investigation following accusations from a disqualified bidder.

The parties argued that the reason for presenting bids with symmetrically equal prices in different zones was based on the application of game theory; both parties assumed that they were presenting an offer that was 95% of the biggest offer and both won the bid.

The SIC accepted the arguments of the companies, based on game theory and the fact that there was no evidence of meetings or information exchange. The companies were acquitted.

Case example from Spain

In 2013, the Council of Spain Antitrust Authority (further – "CNC Council") fined ten construction companies €16 million for price fixing and bid-rigging on public and private tenders for asphalt. The companies allegedly fixed prices and allocated projects and customers for road conservation, restoration and construction from 1998 to 2011. According to the CNC Council, the "very elaborate cartel" affected more than 900 projects in Cantabria, in northern Spain. The accused, so-called 'G5', divided government-organized tenders, rigged bids for private work and allocated the market for the direct sale of asphalt. In parallel with this conduct, from 1998 to 2011, the 'G5' made agreements with five other companies to divide contracts for minor construction work on Cantabria's highways. According to the CNC Council, the bid-rigging scheme gave the cartelists an advantage over existing or potential competitors and significantly harmed the customers tendering for the works in the national community and at the local level. This resulted in serious repercussions for consumers and the public interest.

Case example from Sweden

In 2010, two companies submitted tenders in a public procurement by a power plant for combustion waste transportation services. The tenders were so similar that it was obvious that the companies had colluded when setting their prices. In the investigation conducted by the Swedish Competition Agency ("SCA"), the parties claimed that they were active at different levels in the service chain. They claimed to have planned for the winner of the contract to subcontract part of the contract to the other company. The SCA found, however, that the companies both had the capacity to submit independent bids and were potential competitors for the contract. The case was eventually settled with a fine-order.

Bid Suppression

Case example from Colombia

In this case, the SIC sanctioned several companies after finding that they carried out methods to manipulate a public procurement process and determine, consequently, who would win bids related to the reconstructing and paving of roads.

The SIC found several warning signs that suggested bid-rigging. For instance, the consortia used the same font size and style and the same titles in their bid documents; they organized documents in the same way and subscribed for services from the same insurance company, their pre-approved credit limits were issued on the same date, at the same bank branch office and for the same quantity. These circumstances, as well as mathematical studies, led the SIC to conclude that the consortiums colluded to decide who would win each contract.

Case example Mexico

In 2006 the Mexico's Federal Economic Competition Commission ("COFECE") conducted an investigation regarding bid-rigging in procurement procedures to purchase generic drugs. The COFECE constructed a data base which helped identify outcomes in 125 procurement procedures for 250 products. The data helped identify almost identical offers and convergence in market participations amongst bidders of two highly demanded drugs: saline solution and insulin. In addition, the data showed how offers and patterns switched drastically after procurement conditions were modified and a new competitor began participating in the processes.

During the investigation, COFECE found that six bidders agreed not to bid against each other and took turns to win bids. In all procedures, the winning bids were practically identical, and the losing bids were identical and highly above the winning bid. Significant sanctions were imposed by COFECE as a result of this investigation.

Case example from Panama

Two market operators, participated in a public tender held by the Social Security Fund for the supply, transportation, delivery and unloading of medical oxygen at hospitals and polyclinics in the Republic of Panama for a period of one year. The bid was for eight geographical regions (provinces). The two companies developed a strategy where they would bid only one cent in the geographic regions that did not interest them, thus favoring the other company. Subsequently, the two companies were sued by the Panamanian Consumer Protection and Free Competition Authority ("ACODECO") for absolute monopolistic practices.

Case example from Russia

The Federal Antimonopoly Service of the Russian Federation ("FAS-Russia") successfully disclosed a bid-rigging scheme that it further called 'ram.' 'Ram' is a concerted bidding practice that does not directly fit into a definition of 'hard' cartel, i.e. an agreement on price fixing and/or market allocation by territory, product or customer. However, this practice leads to the exclusion of conscientious bidders and allows the participants of such arrangements to receive excessive wealth. The FAS-Russia experience provides the following example of a 'ram' type arrangement:

During an electronic auction, several cartel members used the 'ram' model of behavior. Throughout the auction, two members of the anti-competitive agreement, pretending to be actively trading among themselves, sharply lowered the price (up to 51% of the initial contract price). At the same time the non-cartelist bidders lost interest in bidding. Then, in the last seconds of the auction, one of the cartelists bid slightly below the rate of the non-cartelist participants or the initial (maximum) contract price. Next, cartel participants that were awarded

the first and the second places refused to sign the contract. Thus, a contract was signed with a third bidder of the cartel, which only slightly deviated from the initial price.

FAS managed to disclose this type of bid-rigging arrangement primarily by use of resources of the electronic trade spot. Together with other type of evidence, FAS used the IP addresses and electronic addresses of the bid participants. The agency established that the price suggestions of different bidders were made from the same IP address. It helped to proceed to further investigation that eventually led to successful disclosure and deterrence of the cartel.

FAS found the participating companies guilty in violation of Clause 2, Part 1, Article 11 of the Law on Protection of Competition providing that “....*Agreements between competing economic entities – that is economic entities that sell goods on the same market, shall be recognized as cartels and shall be prohibit if such agreements lead or can lead to ... increasing, reducing or maintaining prices in course of competitive bidding...*”

Case Example from Singapore

Twelve motor vehicles traders were found by the Competition Commission of Singapore (“CCS”) to have agreed to refrain from bidding against each other at public auctions of motor vehicles by government agencies. These public auctions, held separately by the Land Transport Authority, the National Environment Agency, the Singapore Civil Defense Force, Singapore Customs and the Singapore Police Force, were regularly held to dispose of decommissioned government motor vehicles like police vehicles, ambulances or items that the government agencies had in their possession, usually taken into custody by the government agencies for a variety of infringements such as road tax arrears.

CCS found that the twelve motor vehicles traders had agreed not to bid against each other at the public auctions and to appoint one trader to bid on behalf of the cartel. When the cartel had won vehicles at suppressed prices at the public auctions, they would then adjourn to a nearby location to conduct their own “private” auctions, where the real bidding would take place. In this way, the cartel kept the prices artificially suppressed at the public auctions and the difference in bid prices between the public and “private” auctions would then be redistributed to all participants of the cartel.

Cover bidding

Case Example from Australia

According to the Australian Competition and Consumer Commission (“ACCC”), for a period of about 10 years, most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings, at which they agreed to allow certain tenders to be won by particular competitors. Calling themselves the ‘Sprinkler Coffee Club’ and the ‘Alarms Coffee Club’, the groups would meet up over a cup of coffee at hotels, cafes, and various sporting and social clubs. At these meetings they would share tenders and decide who was to submit ‘cover prices’ to make the tender process look legitimate, while ensuring the agreed company won the tender. The Federal Court of Australia imposed more than \$AUD14 million in penalties on the companies and some of their executives.

Case Example from the European Commission

In the *International Removal Services case*, the European Commission imposed fines on providers of international removal services for manipulations of submitted bids through minimum price agreements, as well as cover quotes. The participating undertakings agreed on financial compensation (commission from the winner of international removal contracts for those losing out). Commissions were integrated in the price for international removal services. In the course

of this bid-rigging scheme, representatives of the competing market operators met after receiving requests for quotations from customers, shared information and compared quotations.

Case Example from the European Commission

In the *Elevators and Escalators case* the cartelists allocated tenders and other contracts for the sale, installation, maintenance and modernisation of lifts and escalators with the aim of freezing market shares and fixing prices. The projects rigged included lifts and escalators for hospitals, railway stations, shopping centres and commercial buildings. Cartelists informed each other of calls for tender and co-ordinated their bids according to their pre-agreed cartel quotas. Fake bids, too high to be accepted, were lodged by the companies who were not supposed to win the tender, in order to give the impression of genuine competition. Business secrets and confidential information on bidding patterns and prices between the cartel participants were also exchanged.

Case Example from Finland

In 2006 and 2009 a group of companies participated in a two separate public bidding process. In both situations a municipal was selling real estates. In 2006, each company left their own tender. After the companies were told that their tenders were among the top three, the companies withdrew their tenders one by one vowing to financial problems and leaving the third best tender winning. The market court fined the number one and three. The company that had withdrew the second best tender was not held liable for the infringement as the Finish Competition Authority ("FCA") failed to prove that the company had known about the other tenders despite of the similarities in tenders and that the representatives of the companies were seen together at the property before the closing of the bidding process. Shortly after the withdrawal, the company with the second best tender purchased part of the company, which had eventually won the bid.

In 2009, the same three companies participated in a similar bidding process. The tenders came in 1st, 2nd and 5th place. Shortly after having learned that it had won, the company with the best tender withdrew it's tender. It was established due to the personal links between the companies that the companies were aware of each other tenders. The market court fined the companies with the best and fifth best tenders. As the company with the second best tender owned at this time already half of the company with the fifth best tender, they were considered forming a single economic entity and it was not addressed by the FCA.

Case example from Spain

This case involves a bid-rigging infringement conducted by several companies that were invited to restricted tenders for the maintenance and repair of roads and highways in Spain. These companies participated in a meeting before the deadline to present their bids, where they agreed not to compete amongst themselves and to share the mark-up generated in the bid-rigging process. In this meeting, the companies invited to each tender announced at the same time their competitive bids for the tender. The most competitive bidder was assigned to win the tender with a higher price than its competitive bid, and the other participants agreed to present cover bids. The companies also decided to share the mark-up of the bid-rigging, assigning a bigger share to the more competitive bidders. These shares were paid by the winner of each tender, usually by apparently subcontracting services with the other bidders in the affected tenders or in other works of the winner.

The CNC Council found that normal competition in the restricted tenders for road rehabilitation work was replaced by an agreement between bidders which maintained the status quo of the winner and distorted the markdowns to be applied and, ultimately, the prices for services of this kind. The infringement affected tenders for the rehabilitation of road surfaces and platforms which were awarded in 2008 and 2009. The CNC Council found that 47 companies participated

in the collusive agreements described above in order to manipulate markdowns in tenders for public works and imposed fines in excess of €47 million.

Case Example from the UK

In 2004, the Office of Fair Trading (“OFT,” the predecessor to the UK’s Competition and Markets Authority) received a complaint from an internal Audit Manager about collusive tendering for Queens’ Medical Centre University Hospital NHS Trust. This triggered a widespread investigation into the construction industry between 2005 and 2009.

The OFT’s infringement decision in 2009 found that over 100 construction companies had engaged in illegal bid-rigging (principally cover pricing) in England totaling over £200 million in contracts. It found that the practice of cover-bidding was widespread and endemic in the construction industry in England. Contracts were both in the public sector (schools, universities hospitals) and in the private sector (apartment blocks to housing refurbishments). The OFT imposed fines totaling £63.992 million (after allowing for leniency discounts and appeals).

Bid Sharing

Case Example from Canada

In 2005, following an outreach session provided by the Competition Bureau (“Bureau”), Public Works and Government Services Canada (“PWGSC”), the principal procurement agency of the Canadian federal government, contacted the Bureau to raise concerns about certain bidding processes, and the Bureau began an investigation. As a result of this investigation, bid-rigging charges were laid against 14 individuals and seven companies in February 2009. The parties were accused of rigging 10 bids to obtain Government of Canada contracts for information technology services worth approximately \$67 million. Two individuals have each pleaded guilty to one count of bid-rigging. The case against the other individuals and companies is currently before the courts.

Case example from Italy

Over the last few years, the Italian Competition Authority (“ICA”) conducted sector inquiries in the banking and in the insurance sector. The study in the banking sector pointed out a large number of structural and behavioral factors that helped to explain the feebleness of competition, notably the limited quantity and poor quality of the information supplied to customers and to the existence of switching costs. By the same token, the inquiry in the insurance sector showed an information deficit for customers and obstacles to customer mobility.

Following these inquiries, the Authority received many complaints, in particular from public administrations, which proved to be a crucial tool for bid-rigging detection.

For example, the Authority received a complaint from a public administration on suspicious tenders for provision of banking and treasury services. There was only one bid by the four biggest banks in a temporary grouping. Following formal proceedings, the Authority ascertained a single and continued agreement among the four banks aimed at sharing the market and avoiding competition. Both evidence of contacts and information exchange among the four banks and economic models were used to prove the collusive coordination.

In the insurance sector, following the market inquiry a local health unit complained about anomalous tenders. The Italian Competition Authority sent requests for information to other 8 local health units about tenders over the previous 10 years. After starting a formal investigation, the Authority concluded for the existence of a single and continued agreement among the four biggest insurance companies aimed at sharing several tenders. The evidence showed that the undertakings created a turnover system along ten years and for more than 20 tenders.

The Italian Competition Authority fined the parties to the relevant formal proceedings.

Customer and market allocation

Case example from Germany

In 2011 the German national competition authority, the Bundeskartellamt (further – “Bundeskartellamt”) imposed fines totaling 50.5 million Euros on four leading manufacturers of fire-fighting vehicles (IVECO Maidus Brandschutztechnik GmbH, Albert Ziegler GmbH & Co. KG, Schlingmann GmbH & Co. KG, Rosenbauer Group). Overall, the four manufacturers covered more than 90 % of the relevant market. In addition, the Bundeskartellamt imposed a fine on an accountant because of his collaboration with the cartel.

For years the four cartel members granted one another a certain share of sales, so-called “target quotas”. The companies would notify their order intake to an accountant based in Switzerland. The latter would then compile lists which were used to monitor adherence to the agreed quotas at regular meetings of the cartel at Zurich Airport. The companies also agreed on price increases.

In addition to the “Zurich meetings” regular meetings were held at sales manager level. At these meetings invitations to tender received from municipalities for orders of fire-fighting vehicles were divided among the cartel members.

The Bundeskartellamt became aware of the agreements by way of an anonymous notification and carried out four searches between May 2009 and July 2010. In two of the searches which were conducted in Austria, the Bundeskartellamt was successfully assisted by the Austrian competition agency.

The extensive cooperation of the companies and persons involved during the proceedings was taken into consideration in the calculation of the fines. The fines against Albert Ziegler GmbH & Co. KG, Schlingmann GmbH & Co. KG and Rosenbauer Group have become final after a settlement agreement. IVECO Maidus Brandschutztechnik filed an appeal against the fine at the Regional Higher Court in Düsseldorf. The proceeding is still ongoing. The proceedings against the sales managers, CEOs and directors involved were referred to the competent public prosecutors offices for examination under criminal law.

Case example from Germany

In 2011, the Bundeskartellamt closed a case on bid-rigging in public tenders for fire engines with turntable ladders, involving Iveco Magirus Brandschutztechnik GmbH and Metz Aerials GmbH & Co. KG., which belongs to the Austrian Rosenbauer Group. The cartel agreement concerned the manufacture of fire engines with turntable ladders between 1998 and November 2007. Iveco and Rosenbauer have a combined market share of close to 100% for this product. During the cartel period the companies' sales managers met at regular intervals and divided tenders among each other on the basis of project lists. The objective was to divide the market up in half. In order to conceal the cartel agreements, the sales managers initially communicated via prepaid mobile telephones. Since the football world championship in 2006, cartel meetings were referred to in a “football code” as “trainings” and rebates were referred to as “match results.”

The Bundeskartellamt has imposed a fine of 17.5 million Euros against Iveco Magirus Brandschutztechnik GmbH. The company’s willingness to end the proceedings by settlement has been considered in the calculation of the fine. No fine was imposed against Metz Aerials GmbH & Co. KG because the company had informed the Bundeskartellamt of the cartel

agreement in 2010 by way of a leniency application. In May 2010 the Bundeskartellamt conducted a search. The proceedings against the sales managers and CEOs involved were referred to the competent public prosecutor's office for examination under criminal law.

Case example from Spain

A dozen cartel members engaged in market sharing and price fixing through a bid-rigging cartel which was active from 2007 to 2009. The CNC Council found that the participants adopted different agreements for market-sharing and the fixing of prices in the markets for asphalt and related products within Spanish territory.

The agreements to divide the market for hot bituminous mixes and related products were put into effect in the affected areas through the establishment of quotas, in tones of hot bituminous mixes produced, between the participants in the cartel; the exchange of sensitive information on projects and customers, for subsequent sharing; the establishment of basic rates for the products and services needed to carry out the asphaltting; and the division of the projects to be undertaken by reference to the quotas for each participant.

The CNC Council ruled that there was proof that a serious breach of article 1 of the Spanish Competition Act had been committed, consisting of the creation of a cartel aimed at dividing the supply of asphalt for projects undertaken by public authorities through public procurements, and fined 12 companies more than €16 million for operating this cartel in the asphalt market.

Case example from Spain

In this case, the CNC Council found that there was proof that several companies took part in a cartel to divide the Spanish paper envelopes market amongst themselves between 1977 to 2010, adopting several agreements: a bid-rigging agreement for the fixing of prices and the division of the market through the tenders for the envelopes used for elections called by the central government and various regional administrations between 1977 to 2010, including the division of the production of electoral envelopes for the mailshots delivered by political parties.

The cartel originated in 1977, coinciding with the calling of the first democratic elections in Spain, with an agreement to divide the manufacture and supply of electoral envelopes between several envelope manufactures. That agreement to share the market was repeated in almost all of the tenders for envelopes for elections held in Spain from 1977 to 2010.

In addition to with dividing the public tenders for electoral envelopes from 1990 until 2010, some of the cartel members also divided up to 223 large customers through the tenders called by these public and private procurement bodies, to manufacture their pre-printed corporate envelopes.

In summary, the CNC Council found that 15 companies participated in forming and maintaining this cartel in the paper envelopes sector for more than 30 years and imposed fines totaling more than 44 million euros.

Case example from Spain

In December 2014, the Council of the National Commission of Markets and Competition ("CNMC") fined companies in the Spanish industrial-bearing supply sector for forming a cartel in supplying state-owned company RENFE, the Spanish national rail company, which is virtually the only client in this market. The three companies involved divided the market and set prices for Spanish rail bearings, affecting the public procurement contracts opened by RENFE in the years 2004, 2007 and 2011.

According to the Council's decision, the main managers participated in meetings and phone calls after every invitation to tender was published by RENFE. During these contacts, the

companies agreed on a common methods to respond to each public tender by fixing prices and sharing contracts.

Deeming the biddings in 2004, 2007 and 2011 to be a single and continuous infringement of EU law, the CNMC Council emphasized that the three companies had over 80% of the relevant bearings market in Spain, and had increased the cost borne by the government and ultimately taxpayers and rail consumers. Therefore the CNMC Council considered that the undertakings engaged in an infringement of Article 1 of the Spanish Competition Act 15/2007 and Article 101 TFEU, and imposed fines totaling more than 4 million euros, taking into account the fact that these companies account for 80% of all of the suppliers of industrial-bearings in Spain and the consequences that the cartel has had for the Spanish public administration and citizens who support Renfe, either by buying tickets or through taxes.

Case Example from the UK

In 2008, the OFT obtained its first convictions for a criminal cartel offence in the marine hose supply case. ¹⁸ The cartel was global in its scope and involved all of the major manufacturers of marine hose worldwide.¹⁹

The key elements of the cartel included market sharing, allocation of customers and bid-rigging, common price lists and the operation of a home territory principle. One of the UK customers affected was the UK's Ministry of Defense. The cartel secretly employed a full-time coordinator based in the UK to allocate contracts and fix prices.

Actions were coordinated amongst international agencies in a number of jurisdictions. OFT officers executed search warrants at offices and homes in the UK in May 2007 and seized extensive and compelling evidence of the cartel arrangements. At the same time, in an operation coordinated between the OFT and the United States Department of Justice, Antitrust Division, the defendants were arrested in Houston, Texas, where a cartel meeting had taken place the previous day and was covertly recorded by the United States Department of Justice, Antitrust Division. A number of other suspects were also arrested by the Antitrust Division.

Three UK businessmen were sentenced to imprisonment in the UK for between two and a half and three years for their role in the cartel. All three were also disqualified from acting as company directors for periods of between five and seven years. In addition confiscation orders were imposed totaling over £1 million on two of those convicted.

Case Example from the United States Department of Justice, Antitrust Division

Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies coordinated their bidding so each company won fifty percent of each contract each year. Two procurement auditors noticed this pattern when they happened to discuss the contracts over lunch. They reported their concerns to the Antitrust Division of the U.S. Department of Justice and after an investigation the companies and their executives were successfully prosecuted for bid-rigging.

Case Example from the United States Department of Justice, Antitrust Division

When the State of Wisconsin needed road construction, it would seek competitive bids. These road construction projects were funded in part with federal money. In order to avoid having to compete against each other, three companies would agree amongst themselves which of them would be the winning bidder for each project and what amount each of them would bid. They would then submit their bids to the state, making sure that the designated winning bidder

¹⁸ See press release dated 11 June 2008 -Three imprisoned in first OFT criminal prosecution for bid-rigging
<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2008/72-08>

¹⁹ Marine hose is used by the oil and defense industries for transporting oil between tankers and storage facilities.

submitted the lowest bid. After an investigation which involved consensually monitored conspiratorial conversations and the execution of search warrants, the three companies and five individuals pled guilty.

Unlawful joint bidding

Case example from Japan

In relation to a case involving general engineering works ordered by the Ministry of Land, Infrastructure, Transport and Tourism (further – “MLIT”), the construction companies jointly designated successful bidders and managed to have the designated bidders win the bid successfully. Given that the above findings are in violation of the Antimonopoly Act, the Japan Fair Trade Commission (further – “JFTC”) issued cease and desist orders and surcharge payment orders on October 17, 2012.

This case is so-called “government-assisted bid-rigging”. In this case, General Competitive Bidding with Comprehensive Evaluation Method where contractors are selected not only by the price but also by comprehensive evaluation of various elements was used in the procurement process. The employees of the MLIT were involved in the bid-rigging and disclosed the confidential information, in response to the request by bidders, such as the name of bidders, the evaluation scores of the bidders and the cost estimates to one of them.

Hence, the JFTC demanded that the MLIT implement improvement measures to ensure that the involvement in bid-rigging, etc. should be eliminated in accordance with the Involvement Prevention Act.

Case example from Sweden

In 2010, the SCA filed proceedings before the Stockholm City Court against two tire service chains, claiming that they should pay a fine for engaging in unlawful joint tendering in two public procurements in 2005. Despite the fact that the companies were close competitors they submitted joint tenders through the Swedish tire association. The SCA found that the companies had the capacity to submit individual tenders, and therefore the joint tenders constituted infringements of the Swedish Competition Act. On 21 January 2014, the Court ordered the Swedish tire service chains to pay administrative fines for joint tendering in the two public procurements. The Court found that it was not objectively necessary for the two companies to submit joint tenders. As regards the nature of the infringements, the Court found that the joint tenders amounted to pure sales agreements between competitors. Despite the fact that the cooperation took place in the open, the agreements were considered to be restrictive by object.

Bid-Rigging Involving Corruption

Case example from Canada

In 2011, in Canada, the Quebec provincial police force, the Sureté du Québec (the "SQ"), created a Permanent Anti-Corruption Unit ("UPAC"). UPAC's mandate involves, among other things, coordinating investigations of corruption and collusion in the Quebec public system. In June 2012, following a joint investigation by UPAC and the Bureau, a total of 77 charges were laid against nine companies and 11 individuals in the construction industry in connection with a collusion scheme in the Saint-Jean-sur-Richelieu region in Montreal. These charges included 20 counts of bid-rigging against nine companies and 24 counts of bid-rigging against six individuals.

