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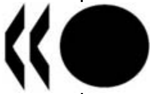

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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PUBLIC PROCUREMENT

THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING COMPETITION

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English/French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable discussion on Public Procurement – The Role of Competition Authorities in Promoting Competition, held by the Competition Committee in June 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les marchés publics – le rôle des autorités de concurrence en matière de commande publique dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the member country submissions, and the background paper of the Secretariat, a number of key points emerge:

(1) Public procurement is a key economic activity of governments, accounting for a large proportion of Gross Domestic Product worldwide. Effective public procurement avoids mismanagement and waste of public funds.

"Public procurement" is the purchase of goods or services by the public sector and it generally accounts for a large share of public expenditure in a domestic economy. Existing statistics suggest that public procurement accounts, on average, for 15% of Gross Domestic Product (GDP) worldwide, and is even higher in OECD countries where that figure is estimated at approximately 20% of GDP. Through its public procurement policy, the public sector can affect the structure of the market and the incentives of firms to compete more or less fiercely in the long run. Procurement policy therefore may be used to shape the longer term effects on competition in an industry sector.

The primary objective of an effective procurement policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best "value for money". It is therefore important that the procurement process is not affected by practices such as collusion, bid rigging, fraud and corruption. Anticompetitive conduct affecting the outcome of the procurement process is a particularly pernicious infringement of competition rules. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay supra-competitive prices. These practices have a direct and immediate impact on public expenditures and therefore on taxpayers' resources.

(2) The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and "ordinary" markets, procurement regulations may facilitate collusive arrangements.

The competition concerns arising from public procurement are the largely the same concerns that can arise in an "ordinary" market context: the reaching of collusive agreements between bidders during the auction process or across actions. The peculiarity of a public purchaser as compared to a private purchaser is that the government has limited strategic options. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector is subject to transparency requirements and generally is constrained by legislation and detailed administrative regulations and procedures on public procurement. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion. Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better coordinate future tenders.

The lack of flexibility which may result from strict regulation of the procurement process limits the opportunities for the public purchaser to react strategically when confronted with unlawful cooperation among potential bidders seeking to increase profits. It is therefore important that the legislative and regulatory framework on public procurement be designed to allow sufficient flexibility on the purchasing side. Introducing new and different procurement procedures (e.g. reverse auctions or direct negotiations) or allowing the procurement entity to adapt the standard procurement procedures according to the market situation with which it is confronted, may achieve positive results.

(3) *The risks for competition in public procurement can be reduced by careful consideration of the various auction features and their impact on the likelihood of collusion. Designing auction and procurement tenders with collusion in mind may significantly contribute to the fight against anticompetitive behaviour, as it allows the creation of an environment where the bidders' ability and incentives to reach collusive arrangements are significantly reduced, if not eliminated.*

There are numerous different forms of tenders that might be adopted in the procurement context but not all bidding models are equal from the point of view of competition. Where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple auction or tender process (either sealed or open bid). When there are not enough firms to sustain competition, more sophisticated arrangements may be necessary to achieve an efficient outcome. The choice of the most suitable bidding model given the circumstances of the procurement is therefore the starting point of any attempt to prevent collusion in public procurement.

Open tenders, for example, are more susceptible to collusion than sealed-bid tenders. Open tenders allow ring members to communicate during the course of the tender and therefore make it easier for them to reach a collusive understanding at the auction (so called in-auction collusion). In a sealed-bid tender, in which each bidder simultaneously makes a single "best and final" offer, collusion is much harder and it requires ex-ante communication that is not needed at an open tender. From the perspective of encouraging entry, sealed-bid tenders have the merit of making the selection much more uncertain than in an open tender. Sealed-bid tenders encourage participation of "weaker" or smaller participants since they have a chance of winning if the highest-value bidder is seeking a bargain and does not bid the maximum amount it would have in an open tender.

(4) *The efficiency of the procurement process not only depends upon the bidding model adopted but also on how the tender is designed and carried out. The design of the precise features of the competitive bidding process can also have a strong influence on the efficiency of the outcome.*

While auction design is not "one size fits all", the risk of collusion can be reduced when the procurement agency ensures that the procurement activity is designed and carried out to achieve three main objectives: (1) reducing barriers to entry and increasing bidders' participation; (2) reducing transparency and the flows of competitively sensitive information; and (3) reducing the frequency of procurement opportunities.

- Increasing the opportunity for potential bidders to participate in a tender can improve the efficiency of the bidding process and reduce the likelihood of collusion. If participation in a tender is limited to a small number of bidders, the costs of organizing a sustainable cartel will be lower. In procurement markets, barriers to entry can be lowered by designing tender participation criteria which are not unnecessarily restrictive and by reducing the bid preparation costs (e.g. through electronic bidding systems).

- Collusion can be established and sustained if firms have complete information on the main variables of competition. A high degree of transparency over the procurement process may facilitate collusion by facilitating the detection and punishment of deviations from a cartel agreement. Because of the potentially destabilizing effect of non-identifiable bidders on bid rigging, procurement officials should consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers or allowing bids to be telephoned in or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe.

- A collusive equilibrium is only possible if the same firms regularly meet and interact in the market place. Only in this case are firms capable of adapting their respective strategy by acting and reacting to competitors' strategies. Collusion is therefore facilitated if bidders meet each other repeatedly in a number of procurement opportunities. Reducing the number of such opportunities therefore may facilitate competition. This might be achieved, for example, by holding fewer and larger tenders. If the distance in time between one tender and the next is sufficiently long, the individual firms have less reason to fear retaliation in the future for undercutting the cartel price today. On the contrary, holding tenders at short and regular time intervals may favour collusion.

(5) *When designing public tenders, procurement officials should consider limiting joint bids and sub-contracting and imposing a reserve price. Depending on the facts of each procurement activity, these considerations may promote efficient procurement outcomes.*

Some jurisdictions allow joint bidding by firms in the same market only if bidding is costly or if the performance of the contract would require a certain size. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. A bidding consortium should not be permitted if each firm in the consortium has the economic, financial and technical capabilities to supply on its own the procured products.

If possible, bids should be free of sub-contracting. Allowing the winning bidder to enter into sub-contracting arrangements has a potentially important effect on the likelihood of bid rigging. In particular, the mechanisms of the cartel may be such that bidders who agree not to lower their bid or not to participate at all might be compensated by being awarded a subcontract by the winning bidder.

Imposing an aggressive but credible reserve price, i.e. a maximum price above which the procurement tender is not awarded may reduce collusion as it reduces the illegal gains. In addition, reserve prices can reduce the number of rounds in an open auction, thereby reducing the opportunity for signalling.

(6) *Reducing collusion in public procurement requires strict enforcement of competition laws and the education of public procurement agencies at all levels of government to help them design efficient procurement processes and detect collusion.*

Collusion in public procurement may be reduced through strict, effective competition law enforcement. Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging or considering bid rigging as a per se violation of the competition rules. Other countries simply base their enforcement practice against bid rigging on the general antitrust laws against anti-competitive agreements.

Many competition authorities are also involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders. There are many examples of educational programs to this end. Some authorities have regular bid rigging educational programs for procurement agencies; others organise ad hoc seminars and training courses. This education effort includes documentation describing collusion and bid rigging, the forms it can take and how to detect it.

These outreach programs have proved extremely useful for a number of reasons: (i) they help competition and public procurement officials to develop closer working relationships; (ii) they help educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conduct which may indicate that bid-rigging is occurring; (iii) they train procurement officials to collect evidence that can be used to prosecute better and more effectively bid rigging conduct; (iv) they help educate public procurement officials and government investigators about the cost of bid rigging on the government and ultimately on the taxpayers; and, finally, (v) they warn procurement officials not to participate in bid rigging and other illegal conduct which undermines competition in procurement tenders.

(7) Public procurement officials should be aware of a number of signs of bid rigging. Competition authorities can help procurement agencies to identify these signs at an early stage of the procurement process, increasing the effectiveness of competition law enforcement.

A number of factors can alert procurement agencies and antitrust agencies to the risk of a collusive outcome in a procurement market: concentrated market structure, a high level of market transparency, high entry barriers, limited residual competition, limited buyer power, stable demand and supply conditions, opportunities for repeated interaction between market participants and symmetrical firm characteristics. These factors may facilitate the formation of a collusive outcome, although not all of these factors must be present for collusion to be likely.

However, bid rigging, price fixing, and other collusion can be very difficult to detect; collusive agreements are usually reached in secret. Suspicions may be aroused though by unusual bidding or pricing patterns or something a vendor says or does. A number of countries (such as Canada, Switzerland, Sweden and the U.S.) have developed check lists to help procurement agencies to spot instances of possible collusion. These check lists contain indications of potentially collusive conduct, but they are not conclusive. For example, the fact that the level of bids is too high compared to the estimate should not be viewed as evidence of collusion as it may simply reflect an incorrect estimate. Thus, these indicators should simply alert agencies that further investigation is required to determine whether collusion exists or whether there are other plausible explanations for the events in question.

Another way to detect and prevent bid rigging in public procurement is to monitor constantly bidding activities and perform quantitative analyses on the bid data. This can help procurement agencies (with the support of competition authorities) to identify up-front those sectors where infringements of antitrust rules are more likely. In order to do so, however, it is crucial to examine the bids that have been submitted in the past to determine if the patterns are consistent with a fully competitive process. These analyses would allow procurement and competition agencies to maximise their efforts, optimising tender design in those industry sectors which are at risk and allocating law enforcement resources to the detection of collusion in those sensitive sectors.

SYNTHÈSE

par le Secrétariat

Il ressort de la table ronde, des exposés des pays Membres et du document de référence du Secrétariat les points essentiels suivants :

(1) *Activité économique capitale des administrations, la passation des marchés publics représente une fraction importante du produit intérieur brut à l'échelle mondiale. Des procédures de passation efficaces permettent d'éviter une mauvaise gestion et un gaspillage des deniers publics.*

Le terme « marché public » désigne l'achat de biens ou de services par le secteur public ; cette activité représente généralement une part importante des dépenses publiques dans une économie. D'après les statistiques disponibles, ces marchés représentent en moyenne 15 % du produit intérieur brut (PIB) mondial. Dans les pays Membres de l'OCDE, la proportion serait même supérieure, aux environs de 20 %. Au travers de sa politique de marchés publics, le secteur public peut modifier la structure du marché et les incitations des entreprises à se livrer une concurrence plus ou moins féroce à long terme. Du même coup, cette politique peut être utilisée pour produire certains effets à plus long terme sur la concurrence dans un secteur d'activité donné.

L'objectif premier de toute politique de passation de marchés est de promouvoir l'efficience, c'est-à-dire la sélection du fournisseur proposant le prix le plus bas ou, plus généralement, le meilleur rapport qualité-prix. Il est donc important que la procédure d'adjudication ne soit pas entachée de pratiques comme la collusion, le trucage des offres, la fraude ou la corruption. Les comportements anticoncurrentiels influençant l'issue d'une procédure d'attribution de marché constituent une forme particulièrement pernicieuse de violation des règles de la concurrence. Les pratiques de trucage des offres majorent artificiellement le prix payé par l'administration publique pour acheter des biens et des services ; au final les prix facturés au secteur public sont supraconcurrentiels. Ces pratiques ont donc un effet direct et immédiat sur les dépenses publiques et, partant, sur les ressources des contribuables.

(2) *Les règles formelles qui régissent les procédures de passation des marchés publics peuvent faciliter la communication entre les concurrents et donc favoriser la collusion. Même si le risque de collusion concerne aussi bien les marchés publics que les marchés « ordinaires », les règles de passation des marchés peuvent faciliter les accords collusifs.*

Pour l'essentiel, les problèmes de concurrence qui se posent dans le cadre des marchés publics sont les mêmes que ceux qui peuvent survenir dans le contexte des marchés « ordinaires » : il s'agit des accords collusifs qui peuvent être passés entre les candidats au cours d'une séance d'enchères ou entre deux enchères. Contrairement à l'acheteur privé, l'acheteur public a un choix limité d'options stratégiques. Alors qu'un acheteur privé peut choisir entre différentes stratégies d'achat, le secteur public a des obligations de transparence et doit généralement respecter différentes dispositions légales, des règlements administratifs détaillés et des procédures précises de passation de marchés. Ces règles sont conçues pour éviter tout abus de pouvoir discrétionnaire de la part du secteur public. Néanmoins, une transparence totale de la procédure d'adjudication et de ses résultats peut favoriser la collusion. Divulguer des informations telles que l'identité des

enchérisseurs et les détails propres à chaque offre permet aux concurrents en présence de repérer les membres ayant fait défection à un accord collusif, de les sanctionner et de mieux se concerter les fois suivantes.

Le manque de flexibilité qui peut découler des règles strictes encadrant la procédure de passation limite les possibilités de l'acheteur public de réagir de manière stratégique face à des soumissionnaires susceptibles de se concerter en vue d'accroître leurs profits. Par conséquent, il est important que les textes législatifs et réglementaires sur la passation des marchés publics laissent une certaine latitude aux entités acheteuses. Introduire des procédures nouvelles et différentes (enchères inversées, négociations directes, etc.) ou autoriser l'entité adjudicatrice à adapter les procédures existantes à la situation effective du marché, peut donner des résultats positifs.

(3) *Il est possible d'atténuer les risques anticoncurrentiels inhérents à la passation de marchés publics en examinant avec soin les caractéristiques des différents types d'enchères et leur incidence sur les probabilités de collusion. Concevoir les règles d'enchères et les procédures d'attribution en ayant constamment à l'esprit le risque de collusion peut contribuer de manière significative à la lutte contre les comportements anticoncurrentiels ; cela permet en effet de créer un environnement où la capacité et l'intérêt des soumissionnaires à passer des accords de collusion sont considérablement diminués, voir nuls.*

De multiples modèles d'appels d'offres sont envisageables pour attribuer des marchés mais tous n'ont pas les mêmes effets sur la concurrence. Quand les entreprises présentes sur le marché visé sont assez nombreuses pour assurer un niveau raisonnable de concurrence, il suffit généralement d'une procédure d'enchères ou d'appel d'offres simple pour obtenir des résultats efficients. Dans le cas contraire, il peut être nécessaire de recourir à des procédures plus sophistiquées. Le choix du modèle le plus approprié compte tenu des circonstances au moment de la passation constitue donc le point de départ de toute tentative d'empêcher des accords collusifs visant des marchés publics.

Les enchères ouvertes, par exemple, sont plus susceptibles de favoriser la collusion que les enchères sous pli scellé. Elles permettent aux membres d'une entente de communiquer entre eux durant les enchères et il leur est donc plus facile de conclure un accord collusif pendant l'adjudication (« accord collusif en cours d'enchères »). Dans le cadre d'une enchère sous pli scellé, comme tous les enchérisseurs indiquent simultanément leur « meilleure offre définitive », la collusion est beaucoup plus compliquée et implique des échanges d'informations préalables, ce qui n'est pas le cas pour les enchères ouvertes. S'agissant de l'incitation à entrer sur le marché, les enchères sous pli scellé ont l'avantage de rendre la sélection nettement plus aléatoire que dans le cadre d'enchères ouvertes. La participation des candidats « plus faibles » ou des entreprises de taille plus modeste est encouragée puisqu'ils ont une chance de remporter l'appel d'offres si le plus offrant cherche à faire une affaire et offre moins que si l'appel avait été ouvert.

(4) *L'efficience de la procédure d'adjudication ne dépend pas uniquement du modèle de soumission mais aussi de la manière dont l'appel d'offres est conçu et mis en œuvre. Les spécificités de la procédure peuvent également être déterminantes en termes d'efficience.*

Bien qu'il n'existe aucun modèle « prêt à l'emploi », on peut réduire le risque de collusion en s'assurant que l'appel à la concurrence est conçu et se déroule de manière à ce que les trois grands objectifs suivants soient atteints : (1) abaisser les barrières à l'entrée et élargir la participation ; (2) réduire la transparence et les flux d'information sensibles en termes de concurrence ; et (3) espacer les appels d'offres.

- Augmenter les chances des enchérisseurs potentiels de participer à un appel d'offres peut rendre la procédure plus efficiente et réduire les risques de collusion. Si les candidats à un appel d'offres sont peu nombreux, les coûts d'organisation d'une entente viable sont moins élevés. Sur les marchés d'approvisionnement, les obstacles à l'entrée peuvent être abaissés en définissant des critères de participation aux appels d'offres qui ne soient pas inutilement restrictifs et en diminuant les coûts de préparation des dossiers (soumission par voie électronique, par exemple).

- Une collusion peut voir le jour et durer si les entreprises disposent d'informations complètes sur les principales variables de la concurrence. La divulgation de nombreuses informations sur les transactions peut favoriser les ententes collusives en permettant de repérer et de sanctionner plus aisément les membres faisant défection. En raison de l'effet potentiellement déstabilisateur des enchérisseurs non identifiables sur les ententes, les agents adjudicateurs devraient envisager de ne pas divulguer l'identité des enchérisseurs et, par exemple, de leur attribuer des numéros. Ils peuvent aussi autoriser le placement d'enchères par téléphone ou par courriel au lieu d'obliger tous les enchérisseurs à se réunir en un lieu et à une date donnés pour enchérir en direct.

- Un équilibre collusif n'est possible que si des entreprises se rencontrent à intervalles réguliers et ont des contacts entre elles. C'est à cette seule condition qu'elles peuvent adapter leurs stratégies respectives en agissant et en réagissant aux stratégies des concurrents. La collusion est donc facilitée quand les enchérisseurs se rencontrent souvent, à l'occasion d'un certain nombre d'appels d'offres. Espacer ces occasions de rencontre entre soumissionnaires peut donc être favorable à l'exercice de la concurrence. Une des solutions consiste à organiser des appels d'offres moins fréquents mais portant sur des montants plus importants. Si l'intervalle de temps entre deux appels d'offres est suffisant, les entreprises isolées ont moins de raisons de redouter des représailles dans le futur pour avoir, à un moment donné, proposé un prix inférieur à celui arrêté par les membres de l'entente. *A contrario*, organiser des appels d'offres à intervalles réguliers et rapprochés peut favoriser les collusions.

(5) *Les entités adjudicatrices chargées de concevoir les appels d'offres publics devraient envisager de limiter les soumissions conjointes et la sous-traitance et de fixer des prix de réserve. En fonction des circonstances propres à chaque procédure, ces précautions peuvent améliorer l'efficience.*

Certains pays autorisent la soumission d'offres conjointes par des entreprises présentes sur le même marché uniquement si les frais de préparation des dossiers sont élevés ou si le marché à attribuer nécessite que l'adjudicataire ait une certaine taille. Dans ces cas de figure, les offres conjointes permettent à des entreprises de petite taille de soumissionner pour des marchés importants dont elles seraient sinon exclues. La candidature d'un consortium ne devrait pas être admissible dès lors que chaque entreprise qui en fait partie a les capacités économiques, financières et techniques voulues pour fournir seule les produits recherchés.

Dans la mesure du possible, les dossiers ne devraient pas prévoir de contrats de ce type. Autoriser l'adjudicataire à conclure des contrats de sous-traitance peut sensiblement modifier les probabilités de trucage des offres. Une entente peut être conçue de manière à ce que les soumissionnaires acceptant de ne pas baisser leur prix ou de ne pas participer du tout puissent être dédommagés par l'adjudicataire (via l'attribution d'un contrat de sous-traitance).

Imposer un prix de réserve agressif mais crédible, c'est-à-dire un prix plafond au-dessus duquel les enchères seront annulées, peut réduire le risque de collusion en minorant les bénéfices

illégaux escomptés d'un accord collusif. En outre, les prix de réserve peuvent réduire le nombre de tours dans une enchère ouverte, réduisant du même coup les possibilités d'envoi de signaux.

(6) Réduire le risque de collusion dans le cadre des marchés publics impose d'appliquer strictement le droit de la concurrence et de former les entités adjudicatrices, à tous les niveaux de l'administration, pour les aider à définir des procédures d'appels d'offres efficientes et à détecter les faits de collusion.

La collusion en relation avec des marchés publics peut être contrée par une application stricte et efficace du droit de la concurrence. Dans de nombreux pays, le droit de la concurrence interdit expressément le trucage des offres ou considère cette pratique comme une violation en soi des règles de protection de la concurrence. Pour sanctionner les soumissions concertées, d'autres pays s'appuient tout simplement sur le droit antitrust qui prohibe les accords anticoncurrentiels.

De nombreuses autorités de la concurrence participent aussi à des initiatives de sensibilisation aux risques de trucage des appels d'offres. Il existe de multiples exemples de programmes conçus à cet effet. Dans certains pays, les autorités prévoient des programmes de formation réguliers consacrés aux soumissions concertées et destinés aux entités adjudicatrices ; d'autres organisent des séminaires ou des formations *ad hoc*. L'effort de sensibilisation inclut également la diffusion de brochures sur la collusion et les soumissions concertées, les différentes formes qu'elles peuvent prendre et les moyens de les détecter.

Ces programmes de vulgarisation se sont révélés extrêmement utiles pour un certain nombre de raisons : (i) ils aident les autorités de la concurrence et les responsables des marchés publics à tisser des relations de travail plus étroites ; (ii) en présentant des exemples réels de modèles d'offre et de comportement pouvant trahir des pratiques de soumission concertée, ils contribuent à apprendre aux responsables des marchés publics comment exercer leur vigilance afin de les détecter ; (iii) ils forment ces mêmes responsables à recueillir des preuves qui peuvent être utiles pour poursuivre avec plus d'efficacité les auteurs de telles pratiques ; (iv) ils contribuent à informer les responsables des marchés publics et les enquêteurs de l'administration de ce que coûtent les soumissions concertées à l'État et donc au contribuable ; enfin, (v) ils mettent en garde les responsables des marchés publics pour qu'ils ne participent pas à des soumissions concertées ou à toute autre pratique illégale préjudiciable à la concurrence dans les marchés publics.

(7) Les agents chargés de la passation des marchés publics devraient connaître un certain nombre d'indices de trucage des offres. Les autorités de la concurrence peuvent les aider à identifier ces signes à un stade précoce, ce qui garantit une application plus efficace du droit de la concurrence.

Un certain nombre de facteurs peuvent alerter les organismes chargés des marchés publics et les autorités de la concurrence d'un risque de collusion dans le cadre de l'attribution d'un marché : concentration du marché, degré de transparence important, barrières élevées à l'entrée, concurrence résiduelle et pouvoir d'acheteur limités, stabilité des fonctions d'offre et de demande, possibilités d'interactions répétées entre les entreprises du marché et symétrie de leurs caractéristiques. Ces facteurs facilitent la conclusion d'accords collusifs, mais il n'est pas nécessaire qu'ils soient réunis pour que le risque existe.

Quoi qu'il en soit, il peut être très difficile de repérer un trucage des offres, une fixation des prix ou d'autres types d'ententes car ces accords sont généralement tenus secrets. Néanmoins, les soupçons peuvent être éveillés par des méthodes inhabituelles de soumission ou de détermination

des prix ou encore par les déclarations ou les actions d'un fournisseur. Un certain nombre de pays, parmi lesquels le Canada, les États-Unis, la Suède et la Suisse, ont établi des listes de critères pour aider les entités adjudicatrices à détecter d'éventuelles collusions. Contenant simplement des indicateurs de comportement collusif, ces listes ne sont pas concluantes. Ainsi, le fait que le niveau des offres soit trop élevé par rapport à l'estimation n'est pas nécessairement un indice de collusion et peut simplement refléter une estimation initiale erronée. Les indicateurs listés ont donc pour simple fonction d'alerter les adjudicateurs que des recherches approfondies seraient nécessaires pour déterminer s'il y a collusion ou si les faits constatés peuvent s'expliquer autrement de façon plausible.

Un autre moyen de détecter et de prévenir les soumissions concertées dans le cadre d'appels d'offres publics consiste à surveiller en permanence le déroulement des soumissions et à analyser les données sur un plan quantitatif. Cela peut permettre aux adjudicateurs (avec l'aide des autorités de la concurrence) d'identifier en amont les secteurs où des violations du droit de la concurrence sont plus susceptibles de se produire. Pour ce faire, il est néanmoins essentiel d'examiner les offres présentées dans le passé afin de déterminer si les méthodes utilisées ne sont pas dans une certaine mesure anticoncurrentielles. Ces analyses peuvent aider les adjudicateurs à tirer le meilleur parti des efforts qu'ils déploient pour améliorer au maximum la conception des appels d'offres dans les secteurs économiques « à risque » et peuvent permettre aux autorités de la concurrence d'affecter des moyens légaux à la détection des collusions dans les secteurs sensibles.

BACKGROUND NOTE

Introduction

The Third Report on the Implementation of the 1998 Recommendation on Hard Core Cartels lists the fight against anticompetitive behaviour in auction and in procurement (so-called *bid rigging*) amongst the enforcement priorities that Member countries should pursue in their fight against hard core cartels. Public procurement generally accounts for a large share of public expenditure in a domestic economy. In OECD countries public procurement accounts for approximately 15% of GDP and in many non-OECD countries that figure is even higher[1].

The Report also notes that a significant portion of domestic cartels concerns bid rigging in auction or procurement procedures. Frequently, the best placed authority to detect signs of unlawful bidding arrangements is the procurement authority, as it has good knowledge of the relevant industry sector and it can observe patterns in bidding processes that could indicate unlawful collusive activity.

The Report concludes that more countries should expand their awareness programmes, and work more extensively with procurement officials in an effort to fight bid rigging more effectively. Procurement authorities can to some extent influence how bidding procedures are organised to make the formation of cartels more difficult.

However, programmes to systematically educate procurement officials exist only in a few member countries. This suggests that in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among firms participating in bidding procedures and of the important role they can play in preventing and detecting cartels.

This Background Note offers a pragmatic approach to structuring public procurement to achieve the best result in terms of competition policy. The main objective of this Note is to offer some guidance to competition and procurement authorities on how to reduce the formation of cartels by designing tenders which maximise effective competition.

This Background Note is structured as follows:

- The first part of this Note summarizes the types of bidding models which are more commonly used and the risks related to competition that these models may entail.
- The second part discusses efforts to reduce the risk of bid rigging. In particular, this part discusses how public procurement agencies can structure tenders to minimize or eliminate up-front the risks for competition and what competition authorities can do to help procurement agencies.

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1 OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

- Finally, it discusses the signs of bid rigging that public procurement officials should be aware of, in order to increase the effectiveness and timeliness of authorities' intervention against anticompetitive conduct.

1. Bidding models, public procurement and competition issues

"Procurement" is the purchase of goods and services by public or private enterprises. The bidder with the lowest price enters into an obligation to provide the goods or services which have been tendered. The primary objective of an effective procurement policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best "value for money". It is therefore important that the procurement process is not affected by practices such as collusion, bid rigging, fraud and corruption.

Procurement is often, but not always, carried out through competitive "bidding" or "tendering" processes. There are, of course, many desirable economic efficiency features of competitive processes. In particular, a bidding process may both identify the most efficient supplier of a certain good or service and simultaneously determine the efficient price. Open, competitive processes may also ensure access to business opportunities for new suppliers and can be more easily defended against claims of discrimination or favouritism.

"Public procurement" is the purchase of goods or services by the public sector. Public procurement raises specific interests because of the peculiar situation that occurs when the public sector acts as a buyer on the market. If the public purchasing entity faces a supply side that is made of a small number of suppliers, the resulting interaction can be described as one between a group of oligopolists and a very special buyer. In some cases, this very special buyer may also represent the largest (or even the only) buyer on the market, hence enjoying market power on the demand side (i.e. a monopsonist).[2]

The peculiarity of a public purchaser as compared to a private purchaser is that the government has more limited strategic options. Whereas a private purchaser can choose his strategic actions within a wider set of options, the public sector is subject to transparency requirements and generally is constrained by legislation and detailed administrative regulations and procedures on public procurement. While these rules are set as an attempt to avoid any abuse of discretion by the public sector[3], the resulting lack of flexibility limits the opportunities for the public purchaser to react strategically when confronted with cooperation among potential contractors seeking to increase profits.

1.1 Bidding models, bidding strategies and outcomes

It is complex (and beyond the scope of this Note) to synthesise all the types of auction or procurement settings that are used by public authorities to sell or purchase goods and services on the market place.

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2 Buyer power of procuring entities may exist, for example, where the demand of the state and/or state-controlled enterprises represents a large part of the market and private demand is scarce or where procuring institutions cooperate for buying goods and services. However, reaching such a conclusion requires an in-depth analysis of the market structure. There could be private buyers competing with the public sector in attracting the supply of the same or substitutable goods, and other private or public buyers outside the territory of the public purchasing entity.

3 Transparency and non-discrimination obligations together with formal requirements with which procurement processes have to comply may limit the exercise of the public sector's bargaining power. This is for instance the case in the European Union, where the Directives on public procurement define rules that have to be followed by all contracting authorities.

Standard bidding models can be subject to a number of variations and details, which may include for example reserve prices and restrictions on bid increments and on bid timing. Further complications are introduced when multiple objects are being purchased, either simultaneously or sequentially.

Standard Bidding Models

There is a vast literature on bidding at auctions and procurement which identifies four main standard bidding models[4]. These four models can be classified into *open and dynamic* bid models (where participants can submit a series of bids up to reaching their own maximum value and the content of their bids is publicly known) and *sealed and static* bid models (where each participant simultaneously makes a single "best and final" bid, which is secret[5]):

- *Ascending auction*. In an ascending auction, the price is raised until only one bidder remains and the highest bid is the final price.
- *Descending auction.* In a descending auction, the price is lowered until a bidder cries out and that is the final price.
- *First-price sealed-bid auction*. In this model, each bidder submits a single bid without knowing the other bids; the highest bidder wins and pays his bid.
- S*econd-price sealed-bid auction*. In this model, each bidder submits a single bid without knowing the other bids; the highest bidder wins but pays the amount of the second-highest bid.

Over the years a number of variations on these four basic bidding models have developed, including hybrid models, such as the *Anglo-Dutch auction*, which captures features of both the ascending model (often called "English") and of the sealed-bid model (or "Dutch")[6]. In an Anglo-Dutch auction the auctioneer begins by running an ascending auction in which price is raised continuously until all but two bidders have dropped out. The two remaining bidders are then each required to make a final sealed-bid offer that is not lower than the current asking price, and the winner pays his bid.

In each of the four models described above, if the value of winning the contract depends *only* on the bidder's own characteristics, like its own costs, the auction is called a *private value auction*. Alternatively, if the value of winning the contract depends on factors affecting all bidders, such as the consumers' willingness to pay and regulators' future behaviour, the auction is a *common value auction*[7].

Despite the apparent differences between the four standard bidding models, it is possible to group them in two very similar categories in terms of bidding strategies and outcomes.

4 For a detailed discussion on auction and bidding models, see OECD, Roundtable on Competition in Bidding Markets, Background Note by the Secretariat, DAF/COMP(2006)27.

5 As it will be discussed further, transparency and availability of true information in the bidding process are, in various ways, key elements in auction and procurement design.

6 This model was proposed the first time in Klemperer (1998).

7 *Affiliated values* refer to the intermediate situation between pure private values and pure common values (which could be considered special cases of the general concept of affiliated values).

Both in an *English auction* and in a *second-price sealed-bid auction,* each bidder stays in the bidding process until the price reaches the bidder's own value. After the bidder with the second-highest valuation drops out, the only remaining active bidder is the one with the highest valuation. It wins at the price equal to (or perhaps just slightly higher than) the second-highest valuation. The difference between the two models is that in a *second-price sealed-bid auction* the winning bidder pays the second-highest valuation.

In a *Dutch auction* and in a *first-price sealed-bid auction*, bidders must trade off bidding higher, thus increasing the probability of winning, against bidding lower and increasing the value of winning. The bidder with the highest bid wins and pays his bid, but he is not necessarily the bidder with the highest valuation. His bid is less than his valuation.

The various standard bidding models are very similar in terms of outcomes. They yield the same expected revenue under certain conditions and result in each bidder making the same expected payment as a function of his information about the value of the object. This is the so-called *revenue equivalence theorem*.

But the "revenue equivalence theorem" does not mean that all auction models are equal from the point of view of competition policy. As will be discussed later, *open tenders* are more susceptible to collusion than *sealed-bid tenders*. Similarly, *private negotiations* with potential suppliers are less likely to lead to collusion than public tender processes.

1.2 Competition concerns arising in public procurement

Generally, the competition concerns that may arise from public procurement are the same that can arise in an "ordinary" market context.

The overarching concern with public procurement is that, because formal rules governing public procurement make communication among rivals easier, they can promote collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process[8]. In particular in those instances where entry is difficult and when bidding is not based on a "winner-takes-all" competition[9], collusion can emerge as easily in auctions and bidding processes as in "ordinary" economic markets[10].

In order to achieve and maintain over time a collusive equilibrium, a number of cumulative conditions must apply.

- The colluding parties must be able to agree on a "common policy" (i.e. a common bidding strategy).
- The colluding parties must be able to monitor whether the other firms are adopting such a common policy.
- The consequences of deviations from the common policy (i.e. punishment and retaliation) must be sufficiently severe and credible.

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8 For a general overview of collusion in procurement see Albano et al. (2006) and literature cited therein.

9 Competition is "winner-takes-all" when each participant wins all or none of the order.

10 OECD, Roundtable on Competition in Bidding Markets, Note by Prof. Klemperer, DAF/COMP/WD(2006)72.

- The foreseeable reactions of both customers and current and future competitors must not be such as to undermine the common policy.

The standard checklists of factors used to detect the risk of emergence of a collusive outcome (i.e. the fulfilment of the cumulative conditions mentioned above) are also appropriate for predicting the likely emergence of a collusive outcome in public procurement markets. Various factors may facilitate the formation of a collusive outcome, although not all of these factors must necessarily be present for collusion to be likely.

The main factors are briefly discussed below.

1.2.1 Market structure and market concentration

Intuitively, the fewer the suppliers, the easier it is for them to collude. A rule of thumb in any market is that more suppliers make for more intense competition, resulting in lower prices and better quality.

Similarly, if participation in a tender is limited to a small number of bidders, the costs of organizing a sustainable cartel will be lower; it will be easier for them to find terms of coordination and to monitor whether those terms are actually respected by each bidder; punishment mechanisms will be more effective since cheating firms will be exposed to much higher losses. Generally, a tender with few bidders risks being unprofitable for the procurement entity and potentially inefficient[11].

Conversely, if participation in the procurement process is broad, bidders will have greater incentives to deviate from any collusive understanding in order to try and win the tender. Monitoring such deviations will be much more difficult. Incentives to *cheating* will be higher and stability of bidders collusion weaker.

1.2.2 Market transparency

Collusion can be reached and sustained if firms have complete and perfect information on the main variables of competition. Market transparency allows firms to align their strategies more easily and to promptly detect and punish any deviation from the agreed collusive terms.

This means that increased transparency in tenders, such as information about the terms and conditions offered by winning and losing bidders may increase the risk of collusion. As will be discussed further below, there is a clear trade-off between reducing transparency to keep collusion under control and increasing transparency to control corruption and favouritism.

1.2.3 Entry barriers and participation

Generally, if barriers to entry are low or if substitute products exist, collusion will not be successful. If, on the contrary, high entry barriers protect market incumbents from competitive pressure from potential new entrants, it is more likely that the collusive outcome will be reached and maintained sufficiently stable over time[12].

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11 Bulow and Klemperer (1996).

12 In procurement markets, for example, if entry barriers are low or absent, then it would not matter if unsuccessful bidders for a public tender were forced to leave the market – the threat of potential competition from new entrants would persist and would constrain the market power of firms in the market. If the threat posed by new entry is not credible due to high entry costs, incumbents will be more likely to reach and maintain a collusive agreement.

The public sector can raise barriers to enter a procurement market if it adopts procurement practices that have the effect of restricting participation in public tenders[13]. It is important that conditions for accessing the tendering process are not such as to unnecessarily restrict participation. If unjustifiably selective, those conditions may be viewed as a barrier to entry into the procurement market.

On the other hand, designing public tenders to merely increase the number of bidders may not necessarily increase competition where the additional bidders are known to be weaker. To increase competition, procurement processes should be designed to ensure participation by the "right" bidders for the goods or services tendered, rather than by "any" bidder[14].

1.2.4 Residual competition

For collusion to be sustainable over time it is necessary that participants are in a position to jointly raise prices on the market to the monopoly level. The number and the strength of the *outsiders* to the collusive understanding is an important factor in assessing if collusion is a likely market outcome.

In this respect, the public sector may structure public tenders to affect market structure by awarding contracts to a larger number of firms and therefore maintaining diversity on the supply side. Or, even without rotating the suppliers in the market, public procurement should not increase the gap between market leaders and other suppliers, or create incumbency advantages for contractors in future tenders.

1.2.5 Buyer power

If the purchaser enjoys some degree of market power, it can use it to destabilise any possible collusive understanding amongst the sellers. Therefore, buyer power can be used to make suppliers compete more vigorously, jeopardizing attempts to collude.

In the case of public procurement, because the purchasing entity is the public sector, it may enjoy purchasing power by virtue of the size of its demand or because of its importance as a customer. Where the public sector, through its procurement, exercises countervailing buyer power, it keeps a check on suppliers' market power, making suppliers compete more vigorously for public contracts than they otherwise would. The exercise of countervailing buyer power may sustain a competitive market in the long-term, or even help new suppliers overcome entry barriers.

However, because public procurement decisions may not be necessarily driven by a desire to maximise profits[15], the public sector may be considered less likely to engage in the exercise of buyer power with the objective of gaining advantages over other buyers of similar goods and services. In this respect, it

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13 This is because the public sector may be more risk averse than a private purchaser. Any failure of procurement that jeopardises the ability of the public sector to provide services to the public is highly visible, and may have significant detrimental effects. As a result, avoiding failures is a high priority for the public sector. This may lead to an overly strong incentive to limit participation in public tenders to large and reputable firms, or to stick with incumbent suppliers.

14 This may be particularly important with regard to setting prequalification criteria for restricted tenders, which determine not just the likely number of bidders, but also their characteristics.

15 The public sector may pursue a variety of policy objectives through its procurement, such as environmental, affirmative action or industrial policy objectives. Such objectives could potentially lead to an adverse impact on competition or perhaps even require a restriction or distortion of competition amongst suppliers. This could be for example the case if the procurement process were to increase the gap between large and small firms within a market or force some firms to leave the market altogether.

is also important that the regulatory framework applicable to public procurement leave sufficient flexibility to the procurement entity to exercise its countervailing buyer power.

1.2.6 Stability of market conditions

It is easier to coordinate the respective strategies in a market whose conditions (i.e. the demand and supply functions) are relatively stable.

If such variables tend to change frequently, i.e. the demand is unpredictable, volatile or lumpy and the supply conditions are constantly changing, it will be difficult to know if deviations from the agreed collusive terms are due to a maverick attempt to gain market shares (and therefore should be punished) or if they are mere reactions to a demand shock in order to find a new equilibrium.

In a public procurement context, the incentives to under-bid competitors are larger if demand is large at present, but expected to fall in the future. This means that a constant, predictable flow of demand from the public sector may increase the risk of collusion.

1.2.7 Repeated interaction and multi-market contacts

A collusive equilibrium is only possible if the same firms regularly meet and interact in the market place. Only in this case, are firms capable of adapting their respective strategy by acting and reacting to competitors' strategies.

Therefore, collusion in public procurement is more easily sustained when bidders interact repeatedly, either in the same market over time, or in different markets (so-called *multi-market contacts*), because repeated interaction allows bidders to observe their respective patterns in bidding and it allows for more effective punishment of firms trying bidding below the collusive level. Splitting up a requirement across multiple tenders, for instance, can increase the risk of collusion.

1.2.8 Symmetry among firms

Intuitively, it is easier to collude if firms are similar.

If there are significant differences in the size, market share and cost structure of the colluding firms, the collusive strategy is unlikely to be sustained over time. Asymmetries, which are likely to result in differences in market shares, can in fact prevent firms from correctly allocating the reduction in output required to obtain the expected price increase.

1.3 Other considerations related to procurement policy and competition

Public procurement policy can affect competition in a number of ways[16]. Short-term effects on competition amongst potential suppliers, i.e. effects on the intensity of competition amongst existing suppliers in a particular tender is just one possible effect, but it is not the only one. Public procurement can have other, longer-term effects on competition as public procurement can affect important features of an industry sector (such as the degree of innovation, the level of investment, vertical integration, etc.). This in turn would be reflected in the level of competition in future tenders.

Fighting and preventing fraud and corruption in public procurement is another important consideration. While ideally there would be no trade-off between enhancing competition and reducing

[16] Econ Report (2004).

corruption, some of the possible approaches that will be discussed below for reducing collusion in public procurement may enhance corruption. The intersection between these two policy objectives is therefore delicate and countries should explore ways to enhance competition without jeopardising efforts to control corruption and favouritism.

1.3.1 Long-term effects of procurement on the level of competition

Through its public procurement policy, the public sector can affect the structure of the market and the incentives of firms to compete more or less fiercely in the long run. Procurement policy therefore may be used to shape the longer term effects on competition in an industry sector.

Public procurement policy, for instance, can have significant long-term effects on the level of private or public investment, on the speed and quality of innovation and generally it can affect the overall competitiveness of a market, i.e. effects that capture changes in market structure and technology caused by public procurement, which would be reflected, for example, in the level of competition in future tenders.

- *The level of investment in the market*. An overly strong focus in public tenders on price as awarding criteria may discourage new investments to improve the quality or the range of the products and services offered, because bidders might not be able to recoup their costs. At the same time, significant public sector demand can be used to provide incentives for investment, not least in order to ensure that capacity in the long-term is sufficient to meet the public sector's needs.

- *The pace and quality of innovation*. Where procurement is used to promote innovation, it may also reduce the risk of collusion as it increases the incentives to deviate from a collusive understanding. In markets where innovation is important, coordination may be more difficult since innovations, particularly significant ones, may allow one firm to gain a major advantage over its rivals.

- *Vertical integration*. *Through* tenders of bundles of vertically related products or services, the public sector favours long-term decisions of firms to integrate vertically[17]. Conversely, by insisting on purchasing services unbundled, the public sector might remove or weaken incentives for vertical integration. This is a policy decision which may have a significant impact on the structure of supply, i.e. it can limit the number of competitors that can be sustained long-term and it might eventually force smaller (non-vertically integrated) firms out of the market, despite the fact that they may offer specific goods or services within the chain more efficiently.

The long-term consequences on rivalry and competitiveness of these choices in a certain industry sector are obvious.

1.3.2 Procurement policy, competition policy and corruption

In many countries there is a perception that corruption and favouritism are a more important problem in public procurement. This is because public procurement tends to involve large orders and this increases

[17] In the short term, non-vertically integrated firms can deal with tenders of bundled product by forming bidding consortia. This possibility and its effects on competition are discussed further in section 3.4.

the temptation of public officials (particularly in countries where the level of compensation for public servants is low) to engage in corrupt practices[18].

Corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or other rewards[19]. Public procurement policy therefore has to be particularly careful to avoid instances where corruption may occur.

Corruption of public officials is not just a regrettable thing as such, but it has an impact on the efficient allocation of procurement. By definition, corruption in procurement involves an allocation of contracts which is not the same as that that would have been obtained through the competitive process. Corruption either leads to the allocation of the contract to a firm which was not the bidder with the lowest price but rather to the firm who has offered the bribe. In this sense, corruption in public procurement implies a distortion of competition. Thus the fights against corruption and anti-competitive practices are highly complementary policies.

However, it is true that some of the possible approaches for reducing collusion, which will be discussed in more detail below, may not facilitate the fight against corruption and favouritism. For example:

- We will conclude that full transparency of the outcomes of tenders may facilitate collusion and we will suggest that procurement agencies should not disclose information such as the identity of the bidders and the terms and conditions of each bid. However, reducing the degree of transparency of the tender process may affect the likelihood of corruption, as less transparency provides opportunities for discriminatory treatment.

- Similarly we will discuss the possibility of holding fewer, larger tenders as a way of increasing competition and rivalry. However, this means that the amounts at stake will be higher and therefore the incentives for corruption may increase.

In practice, therefore, there are trade-offs between enhancing competition and the desire to minimise collusion. However, it may be possible to control corruption and favouritism without full transparency by limiting disclosure to designated procurement-oversight agencies. This may involve the creation of a separate monitoring body to monitor the procurement official's conduct while limiting the publicly available bidding information.

The German Bundeskartellamt as public procurement tribunal

In Germany, for example, the competition authority has three public procurement chambers which act as a public procurement review body (i.e. as an appeal court against decisions of public procurement agencies). The guiding principles of the Bundeskartellamt's public procurement tribunals are competition, transparency, non-discrimination and fair tendering procedures.

In Germany, public contracts principally have to be awarded under competitive conditions through a public tender in a transparent and non-discriminatory way. In principle the contract is awarded to the bidder submitting the economically most advantageous offer.

[18] See Jenny, F. "Competition and Anti-Corruption Considerations in Public procurement", in OECD (2005), "Fighting Corruption and Promoting Integrity in Public Procurement".

[19] Examples might include drawing up the specifications in a way that excludes other firms from competing for the contract or cutting short the period for responses to limit the number of likely bidders.

The three public procurement tribunals set up at the Bundeskartellamt, review, upon request, whether public contracting entities have met their obligations in the award procedure. The tribunals are entitled to take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected.

Some countries have enacted specific legislation aimed at fighting collusion when public procurement officials are directly involved in orchestrating the bid rigging. While the anticompetitive conduct of the firms involved is caught by the provision in the competition laws, the competition authorities are generally harmless against the illegal conduct of the public officials involved[20]. Japan is an example of a country where the competition authority has some enforcement powers against the public officials involved in the bid rigging.

The Japanese Involvement Prevention Act

In order to solve the recurring problem of the involvement of procurement officials in bid rigging, in 2002 Japan enacted a new law (the Act Concerning Elimination and Prevention of Involvement in Bid Rigging) which allows the Japanese Federal Trade Commission (JFTC) to take actions against the public officials involved in bid rigging.

The new law allows the JFTC to request the head of procurement institutions involved to investigate the alleged misconduct by their employees and to take all necessary measures to eliminate their involvement in bid rigging. The adopted measure must be made public.

In addition, after the investigation has confirmed the involvement of public officials in bid rigging, under the new law the administration is entitled to demand from the involved employees, compensation for the damages caused.

Other countries, finally, have enacted specific legislation aimed at increasing transparency in public tenders expressly to prevent discriminatory behaviour by the public entity. Such legislation may have other policy objectives in mind and may not necessarily be designed to prevent or deal with anti-competitive behaviour. This is for instance the case of the European regulatory framework on public procurement, which is principally designed to ensure open participation to tenders by any interested EU bidder and complies with the general principles of transparency, non-discrimination, equal treatment, mutual recognition and proportionality, as follows from the EC Treaty and the jurisprudence of the European Court of Justice.

2. How to reduce risks of bid rigging and to maximise competition in public procurement

We have noted that domestic legislations governing public procurement may limit the strategic options of the public sector when confronted with anticompetitive conduct in a procurement setting. It is often the case that the public sector is subject to transparency requirements and its decisions generally are constrained by legislation and detailed administrative regulations and procedures. As just discussed, while these rules are set to avoid discriminatory treatment and favouritism, they may limit the opportunities for the public sector to react strategically when confronted with unlawful cooperation among potential contractors seeking to increase profits.

It is therefore important that the legislative and regulatory framework on public procurement be designed to allow sufficient flexibility on the purchasing side. In this respect, an excess of standardization

[20] This is often the case as corruption is considered in many countries a criminal offence, which is prosecuted under the general criminal law enforcement system.

may be a negative thing. Conversely, an enhancement of flexibility for procuring entities, for example introducing new and different procurement procedures (e.g. reverse auctions or direct negotiations) or allowing the procurement entity to adapt the standard procurement procedures according to the market situation with which it is confronted, may be a positive thing.

In practice, the risks for competition in public procurement can be reduced by careful consideration of the various auction features and their impact on the likelihood of collusion. Designing auction and procurement tenders with collusion in mind may significantly contribute to the fight against anticompetitive behaviour, as it allows the creation of an environment where the bidders' ability and incentives to reach collusive arrangements are significantly reduced, if not eliminated.

Within the limits set by the domestic laws and regulations on public procurement, procurement agencies can to some extent influence how bidding procedures are organised and carried out. Therefore they are in a privileged position to make the formation of cartels more difficult. Frequently, procurement agencies are also the best placed authorities to detect signs of illegal activities as they can observe patterns in bidding processes that could indicate unlawful collusive activity.

In many instances, however, procurement officials are not sufficiently alerted to the factors that favour collusion, so that they cannot effectively prevent these conditions from arising. Similarly, most procurement officials are not sufficiently alerted to suspicious behaviour which occurs during the tender, so that they cannot intervene to block it. This is an area where competition authorities can (and should) play an extremely beneficial role if they closely cooperate with procurement agencies at all stages of the procurement process and expand their awareness programmes in an effort to fight against bid rigging more effectively.

2.1 Raising awareness of public procurement officials and of bidders to the risks and consequences of bid rigging

Many public procurement tenders are carried out by municipalities or small agencies which may not have the knowledge of how to design an efficient procurement process, how to minimise collusion and how to detect it. A process of education for public procurement bodies can therefore be important.

In the overall context of fighting cartels, many competition authorities are directly or indirectly involved in advocacy efforts to raise the level of awareness of the risks of bid rigging in procurement tenders. Some authorities have bid rigging educational programs for procurement agencies. This education, at a minimum, could be a document written by the antitrust authority describing collusion and bid rigging, the forms it can take and how to detect it. Competition authorities could also develop a sort of operational guide for procurement agencies and officials, i.e. a common set of procurement rules which could then be applied across auctions and procurement tenders.

Countries should also consider reinforcing national networks to combat collusion in public procurement by exchanging information between agencies involved in public procurement and competition authorities. Both the competition and procurement authorities would benefit from enhanced interactions between them. This would be the case, for example, of markets where competition authorities have already found instances of bid rigging, particularly if there is evidence that the ring members obtain a significant part of their business from public authorities and therefore that there is a risk of recidivism.

Competition advocacy by competition authorities (and indeed by procurement agencies) can also address private companies, particularly those who are frequently active in bidding markets. While this effort could be costly in terms of resources and time, it may have beneficial effects long-term. One could envisage different ways in which this could be achieved, including the following:

- Firms could be required by the tender notice to adopt internal procurement compliance programs as a condition to bid in public procurement tender. Such compliance guidelines could be written in cooperation with or approved by the competition authority.

- Another condition that could be included in the tender notice could be to require individuals within firms who are responsible for bidding to have attended regular briefings and programs ensuring knowledge of the penalties for collusion and bid rigging. Those programs could be held by officials of the competition authority or of the procurement agencies or of both agencies together.

- The tender notice could introduce supplementary penalties disallowing firms found guilty of collusion in past procurement from re-bidding for a certain period of time[21]. In case there are limited possible suppliers on the market, the tender notice could provide for an automatic adjustment of the bids from firms found guilty of collusion in order to penalise them by increasing their bid cost.

2.2 Choosing the most suitable bidding model

There are numerous different forms of tenders that might be adopted in the procurement context but, as anticipated above, not all bidding models are equal from the point of view of competition. The choice of the right bidding model (or, better, the most suitable bidding model given the circumstances of the procurement) is therefore the starting point of any attempt to prevent collusion in public procurement.

Intuitively, *open tenders* are more susceptible to collusion than *sealed-bid tenders*. Similarly, *private negotiations* with potential suppliers are less likely to lead to collusion than public tender processes.

Open tenders allow ring members to communicate during the course of the tender[22] and therefore make it easier for them to reach a collusive understanding at the auction (so called *in-auction collusion*)[23]. A bidding system where bids are publicly opened with full identification of each bidder's price and specifications is the ideal instrument for the detection of price-cutting[24]. Open (ascending or descending) tenders, however, are more likely to allocate the contract to the bidder who values it the most, since the bidder with a higher value always has the opportunity to re-bid to top a lower-value bidder. While there are

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21 In some countries (e.g. Mexico), it is the domestic legislation regulating public procurement which includes provisions disqualifying bidders from auctions if they are found to have agreed on prices or obtained any illegal advantage over the other bidders.

22 The clarity of bidding rules makes communication easier than in ordinary markets. Bidding rules tightly constrain rivals' conduct as compared with ordinary markets. In ordinary markets, firms can vary quantities, prices, varieties and the like. In public tenders, by contrast, the only communications are prices. With less "noise," public tenders can allow clearer communications via bids (so called *signalling*). Signalling allows bidders to announce what they wish to win, to threaten retaliation if thwarted, and thereby to reach an understanding of who will win what.

23 At an open tender, the cartel can use a very simple rule: if a cartel member is actively bidding, this signals its intention to win the tender and the cartel member can tacitly agree not to push their bids down. If a cartel member withdraws from the tender, then another can bid, but no other cartel member bids against it. Intra-cartel competition is therefore eliminated during the tender and there is no need for express ex-ante communication or coordination between the cartel members. See Kovacic et al. (2006); Klemperer (2004).

24 Stigler (1964).

measures that can be taken to reduce the exposure to collusion in an open tender[25], if the risk of anticompetitive conduct is significant, procurement officials should consider alternative bidding models.

In a sealed-bid tender, in which each bidder simultaneously makes a single "best and final" offer, collusion is much harder and it requires ex-ante communication that is not needed at an open tender. The ability to punish deviations is reduced if not eliminated and incentives to cheat on a collusive understanding are therefore significantly higher[26]. From the perspective of encouraging entry, sealed-bid tenders have the merit of making the selection much more uncertain than in an open tender. "Weaker" or smaller participants therefore have a chance of winning the tender if the highest-value bidder is seeking for a bargain and does not bid the maximum amount it would have in an open tender.

In general, prosecution of collusion may be easier in a sealed-bid tender than in an open tender. A sealed-bid tender leaves a paper trail that identifies all of the bidders and their bids. By contrast, an open tender may not formally record all of the bids and, since participants may not have an opportunity to submit their bids before the price becomes too high, there may be no record of who participated. If a cartel depends on non-participation, it would be difficult for prosecutors to identify those who did not participate in an open tender[27].

In addition, there are numerous different forms of bidding systems that might be adopted in the procurement context. From a competition perspective, for example, a first-price bidding model may be more immune to collusion. Hence, if the risk for collusion is high, procurement agencies should consider structuring the tender using a sealed-bid first-price model, which is more likely to minimise the bidders' ability and incentives to collude.

Another approach to reduce collusion in procurement is the introduction of a certain degree of uncertainty (or randomness) in the outcome of the procurement process. We mention two possibilities:

- The procurement official might decide not to disclose in advance the precise mechanism by which competing bids are compared. In practice, however, tender offers often include a precise weighting scheme for each of the components deemed important to the buyer. While this is generally done to reduce discriminatory behaviour in the selection, one should be aware of the fact that this practice may increase the risk of collusion.

- The procurement official might decide to select randomly or through individual negotiations from among those firms whose price was within a certain percentage of the winning bid. This degree of uncertainty, combined with a degree of secrecy over the terms and conditions of the winning bid, may make collusion harder as cartel members cannot tell, when the winning firm is not the firm selected by the cartel, whether the firm was undercutting the cartel, or was simply selected randomly.

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25 See discussion further in section 3.3.

26 In order to secure a supra-competitive gain, the cartel must drop the bid of its highest valuing member to a level below the level of a non-cooperative bid, and the other bidders must refrain from bidding. This reduction in his bid opens the door for deviant behaviour. By slightly overbidding this reduced bid, a ring member could achieve a gain that it would have never realized if all bidders had acted non-cooperatively. Sealed-bid tenders are nevertheless not immune to coordination. Repeated interaction over time and over a number of tenders can allow the development of signalling, particularly if the procurement official provides information about past behaviour.

27 In support of possible later prosecution, "all" aspects of an auction should be retained for a long period of time and, to enhance deterrence, this practice should be publicly announced. Kovacic et al. (2006).

Another possibility is to structure the procurement process in such a way as to increase the bidders' exposure to the consequences of bid rigging. For instance, procurement agencies could require participants to attest to the fact that they did not engage in collusive (or other illegal) practices or agree with other firms as to the price or other conditions of the bid. This attestation has a double purpose. First, it would ensure that firms and their managers are aware of the penalties for collusion. Second, once having signed such a certificate, a firm and its managers, if they do engage in bid rigging, face stiff competition penalties and could be exposed to further liabilities such as sanctions for perjury, which in many jurisdictions is a criminal offence.

Finally, one has also to consider that it may not always be efficient to adopt some form of bidding process, but that an *individual negotiation* with a limited number of suppliers may yield the most efficient outcome. This may be the case in the following circumstances:

- If the costs of organising and holding an auction are high. Each potential bidder must incur costs analysing the requirements, assessing its own ability to fulfil the requirements and determining an appropriate bid. These costs of preparing bids may be significant. The bids must, in turn, be considered by the procurer. The total cost involved for a complex project may be substantial;

- If the likely bidders and, indeed the likely least-cost bidder, may already be known to the procurer. In this context, it may be more efficient for the procurer to approach the least-cost bidder directly to negotiate a price (perhaps with the threat of competitive tendering if it is felt necessary);

- If it is not possible to contractually specify in advance all the elements of the services to be supplied;

- If other policy reasons or other explicit reasons exist, which do not require the procurer to select the least-cost supplier, i.e. if diversity of supply is essential to ensure continuity of service;

- If secrecy considerations prohibit the public solicitation of bids;

- If the number of potential bidders is very small, a single bidder may have very significant market power; in this case, a simple tender will not yield an efficient outcome and it may be appropriate to adopt more sophisticated contracting approaches to procurement.

2.3 Designing procurement tenders to reduce risks of collusion

The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out[28]. The design of the precise features of the competitive bidding process can also have a strong influence on the efficiency of the outcome. For example, the number of bidders may be reduced where the initial specifications are drawn up unnecessarily tightly[29], the tender is not widely advertised or the time for responses is inappropriately short.

28 It is possible to suggest that auction/procurement design may not matter very much when there is a large number of potential bidders for whom entry to the procurement process is easy. See Klemperer (2004).

29 The procurer, in defining the goods or services that it wishes to purchase, defines the scope of the market in which competition will occur. In order to enhance competition, therefore, it is important that the procurement requirements are carefully specified so as not to exclude any goods or services that might be effective substitutes. Therefore, the procurement specifications should, in preference, specify the outcomes desired and leave it to the bidders to suggest possible mechanisms for meeting those outcomes.

Unfortunately, there is no check list for how one should design an auction or procurement tender. Auction design is not "one size fits all", but one has to design tailored auctions to fit the situation. So really one must look at the specifics of the situation. In general, however, the risk of collusion can be reduced by ensuring that the procurement activity is designed and carried out to ensure that three main objectives are achieved:

2.3.1. Reducing barriers to entry and increasing bidders' participation

Competition may be enhanced not merely by attention to the demand side of the market (the number of potential substitutes) but also to the supply side of the market. In particular, it may be possible to enhance the number of competitors by reducing barriers to entry.

We have seen above how the choice of the bidding model can also impact the participation rate in the tendering process. If attendance to the tender is an issue, participation can be promoted by adopting a sealed-bid tender rather than an open tender[30]. In an open tender, the weaker bidders know that only the strongest bidders will remain near the end of the bidding process and are likely to conclude that, if they are going to drop out of the bidding late, they are better off not bidding at all and saving the bid preparation cost[31]. Surprisingly, this effect holds even when the difference between the "weak" and the "strong" is small. By contrast, with a sealed-bid auction, weaker bidders may win at a price that the stronger bidder could have beaten, but did not. In a sealed-bid auction, the stronger bidder cannot change his bid once he sees the weaker bidders' bids, as he can in an open auction.

When it comes to designing the public procurement process, the selection process itself should not deprive firms of the right to submit a bid on the basis of criteria which are not directly relevant to the procurement (for example, an experience or financial strength requirement may unnecessarily reduce the number of competitors), neither should the process exclude firms from other geographic areas.

There are several ways in which barriers to entry can be lowered in procurement markets:

- Regulatory barriers to entry could be removed, such as controls on the number, size, composition or nature of firms which may submit a bid or policies which favour firms on the basis of economically irrelevant criteria in the industry.

- Barriers to foreign trade could be removed, by removing constraints on foreign participation in procurement.

- Sunk costs as a barrier to entry may be tackled directly. For example, where entry into a competing market requires a specialised piece of equipment, the procurer could purchase the equipment and lease it to the successful bidder, thus reducing the sunk costs of entry.

Participation can also be favoured by a reduction of the bid preparation costs. In some cases these costs can represent a substantial entry barrier, particularly for smaller suppliers. This can be accomplished in a number of ways:

- By standardising tendering procedures, including across time and jurisdictions. For some but not all aspects of a tender, this may involve a certain trade-off with designing tenders specific to their circumstances.

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30 There are tradeoffs, however, since a sealed-bid model may favour entry but it makes collusion between the bid taker and the bidders more problematic.

31 Klemperer (2004).

- By packaging tenders to spread fixed bid preparation costs across more tenders or splitting objects into several smaller parts; this may attract more bidders.
- By allowing adequate time for firms (who may not have had advance notice of a tender) to prepare and submit a bid.
- By using an electronic bidding system, which also reduces the cost of tendering[32].

Another way to increase participation is to "strengthen" weaker bidders. Promoting participation, particularly by smaller firms, also reduces the *incumbency effect*[33]. This also can be done in a number of ways. One possibility is the so-called *set-aside*, i.e. allowing only small enterprises to bid on certain licenses[34]. Another possibility is to *split objects or lots*[35].

2.3.2 Reducing transparency and the flows of information

It was noted earlier that a high degree of transparency over market transactions may facilitate collusion as it may facilitate the detection and punishment of deviations from a cartel agreement. This is particularly true for open tenders which allow bidders to communicate during the bidding process. A number of methods could be used to make collusion harder at an open tender:

- Bidders could be forced to bid 'round' numbers and the exact amount can be pre-defined in the tender offer; this would prevent signalling[36].
- Bids could be made anonymous and the number of bidders remaining in the bidding process could be kept secret[37].

Because of the potentially destabilizing effect of non-identifiable bidders[38] on bidding rings, the procurement official might consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers. The procurement official might, for instance, allow bids to be telephoned in or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe. And, the procurement official can allow a bidder to submit more than one bid under different bidder numbers, or under different identities.

Future competition may be enhanced if, after a tender is awarded, the procurement agency simply does not reveal the identity of the winning bidder and the terms and conditions of the winning contract. If bidders know other bidders' identities and the terms of their respective bids, then they can monitor compliance with the collusive arrangement, retaliate against deviations and cooperate better across tenders.

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32 On electronic tendering see examples mentioned below in section 4.3.

33 That is when winning one tender provides advantages in another. For example, the winner of a first tender, now the incumbent, may be advantaged in subsequent tenders for the same product due to the information that it was obtained by winning in the first tender.

34 An example of a set-aside, though perhaps aimed more at restricting market power later, would be to prohibit the incumbent from bidding.

35 Grimm at al. (2006); Dimitri et al. (2006).

36 Klemperer (2004).

37 Crampton and Swartz (2000).

38 These are also known as 'shill bidders', i.e. when an agent of a given bidder is not recognizable as such by the procurement official and by the other bidders.

This highlights a sharp contrast between public and private procurement activities.

In public procurement, there is a need for transparency in announcing the winner and the price even if this facilitates collusion. It is clear that increased transparency helps to diminish corruption, as transparency helps to monitor the fairness of the selection process. In public procurement, a sufficient degree of transparency in the selection process is crucial especially when foreign firms are involved or potentially involved[39].

In the case of private procurement, large industrial buyers typically rely on secret negotiations in their procurement operations. Private negotiations encourage price-cutting by individual bidders without fear of being detected by the other members of the cartel. A similar effect could be achieved in public procurement if the procurement process allows for a final round of individual negotiations after the procurement process has short listed the most efficient suppliers.

2.3.3 Reducing the frequency of procurement opportunities

It was noted earlier that collusion is facilitated when competing firms meet each other frequently in different markets. The reason is that repeated, frequent interaction facilitates punishment strategies among competing bidders which is necessary for sustained effective collusion. By changing the size and timing of tenders, procurement officials may encourage bidding ring break-up through cheating.

Reducing the number of opportunities in which these firms meet may reduce the opportunities for punishment and therefore may facilitate competition. This might be achieved, for example, by holding fewer, larger tenders, such as tenders for the right to provide certain services over the next five or ten years, rather than organizing a tender every year. If the period of time is long enough, the individual firms need not fear retaliation in future for undercutting the cartel price today. On the contrary, holding tenders at short and regular time intervals may favour collusion.

More predictable auction or procurement schedules and unchanging quantities sold or bought can facilitate bid rotation schemes by helping the bid-riggers find a focal point, a "natural" way to share winning. Lower value and more frequent auctions or procurement reduce the incentives to cheat on a cartel. In this respect, if collusion is a significant threat, procurement officials should consider bundling smaller tenders[40] and refraining from announcing the schedule of future tenders.

2.4 Other considerations on effective procurement design

There are other considerations that procurement officials should keep in mind when designing public tenders. Depending on the facts of each procurement activity, these considerations may affect the efficient outcome of the procurement. They include the possibility for several firms of bidding jointly, the right for the winner to sub-contract all or part of the awarded supply and the imposition of a reserve price by the procurement official.

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[39] For instance, the European Union and the World Trade Organisation have rules requiring public notification of winning bids so as to minimise the potential for foreign claims of an unfair process. The WTO multilateral Agreement on Government Procurement ("GPA") binds those countries which have signed up to the agreement to use open, transparent and non-discriminatory procurement procedures for all government procurement above a certain size.

[40] Grimm at al. (2006); Dimitri et al. (2006). We must note, however, that bundling of smaller tenders may reduce the number of potential bidders (and therefore increase the risk of collusion) because smaller firms may be prevented from bidding for large procurement contracts, unless they join bidding consortia.

Allowing firms to participate jointly to the tender, so-called *joint bidding* or *bidding consortia*, may have a number of effects on the outcome of the procurement activity, some of which go in opposite directions.

- Joint bidding is competition-enhancing if it allows firms that are not able to supply complementary products to join with other firms to jointly supply those complementary products. There is also a so-called *information effect* of joint bidding which is pro-competitive as it promotes more aggressive bidding due to the information pooling.

- However, when competing firms bid jointly, this usually reduces competition as joint bidding reduces the number of participants. This so-called *reduced competition effect* promotes less aggressive bidding and therefore has negative effects on competition.

Some jurisdictions allow joint bidding by firms in the same market only if it is costly to make a bid or the contract would require a certain size. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. It is not always obvious, however, that small firms working together would really have the organisational structure to perform the work a large firm can. If they do not, then it is not clear why joint bidding should be allowed as it increases the risk of collusion. A bidding consortium should not be considered admissible if each single firm in the consortium has the economic, financial and technical capabilities to supply the procured products[41].

Allowing the winning bidder to enter into *sub-contracting arrangements* has potentially an important effect on the likelihood of bid rigging. In particular, the mechanisms of the cartel may be such that bidders who agree not to lower their bid or not to participate at all might be compensated by being awarded a subcontract by the winning bidder. Hence, if possible, bids should be free of sub-contracting.

Imposing an *aggressive but credible reserve price*, i.e. a maximum price above which the procurement tender is not awarded may reduce collusion[42]. An aggressive reserve price reduces the gains from collusion[43]. In addition, reserve prices can reduce the number of rounds in an open auction, thereby reducing the opportunity for signalling.

2.5 Enforcing competition law rules in public procurement

In addition to the above possibilities, collusion in public procurement may of course be reduced through strict, effective competition law enforcement. Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging or considering bid rigging as a *per se* violation of the competition rules. Other countries simply base their enforcement practice against bid rigging on the general antitrust laws against anti-competitive agreements.

While actively enforcing competition rules against bid rigging and mostly ensuring strong publicity to such enforcement activity is an important deterrent, many countries have introduced a number of systems to deter the formation of rings in auctions or procurement.

[41] Albano et al. (2006)

[42] Kovacic et al. (2006).

[43] Reserve prices need to be credible to be effective. A reserve price which is too low may increase the risk that an insufficient number of bidders participate. A reserve price at the opportunity cost (such as the cost of self-provision or extending an existing contract or adapting a substitute) would be credible.

While a detailed analysis of these systems goes beyond the scope of this Note, we think it useful to mention them because if implemented they help to reduce the likelihood of collusion in public tenders.

- Withdrawal of all or part of the benefit of the amnesty and leniency programs to ring leaders and/or other active members of the ring.
- Increased incentives for whistle-blowers who help uncover a bid rigging practice (e.g. bounty systems).
- Increased fines (or limited reductions of fines) for ring leaders and/or other active members of the ring.
- Enhanced effectiveness of the so-called coat-tail actions by private entities, i.e. provide incentives for private actions and damages actions to recover losses incurred as a consequence of a bid rigging (e.g. treble damages, class actions, plaintiff's extended discovery powers, lower standard of proof, etc.).
- Criminal prosecution of ring members, also in countries where antitrust infringements are not a criminal offence.

3. How to detect anticompetitive conduct in public procurement

3.1 Forms in which bid rigging manifests itself

As with horizontal agreements more generally, bid rigging or collusion in procurement may take several forms:

- Simple price-*fixing*, whereby a winning bidder and a winning bid is chosen and the other bidders are instructed to bid a certain amount higher. In order for this arrangement to be sustainable, the rents earned by the winning bidder need to be shared with the other cartel members. This could be achieved, for example, through changing the identity of the winning bidder according to some preset formula (such as a formula which preserved existing market shares).
- *Market-sharing* agreements, whereby customers are divided according to type or geographic location and competitors agree to submit higher bids in markets assigned to other firms. This may also be linked with a scheme for sharing the rents if demand in the different markets is variable.
- "*Bidding fees*", whereby the ring charges the ring members a fee for submitting a bid and the bidders simply add this fee to their bid price. The accumulated funds are later returned to the members through some mechanism.
- "Sharing the spoils", whereby the winning bidder agrees to compensate the losing bidders "for the costs of submitting their bids". This extra charge is then added to each firm's bid price. In a variant of this approach, the winning bidder may agree to subcontract work to the losing bidders, again, in order to share some of the rents.

These infringements can be achieved in various ways, but usually one or more of the following techniques are used.

- **Bid suppression**. In "bid-suppression" or "bid-limiting" schemes, one or more firms who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or

withdraw a previously submitted bid so that the designated winner's bid will be accepted. Sometimes, one or more conspirators may file fabricated bid protests in order to try to deny an award to non-conspirators. After the bid is let, the winning bidder may pay off the co-conspirators through cash payments or subcontracts.

- **Complementary bidding**. "Complementary bidding" (also commonly called "protective" or "shadow" bidding) occurs when some firms submit bids that are too high to be the winning bid or, if the bids are seemingly competitive in price, then they are unacceptable because of other non-price terms. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. This enables the designated winning competitor's bid to be accepted when the agency requires a minimum number of bidders.

- **Bid rotation**. In a "bid rotation" scheme, all members of the ring submit their bids, but take turns being the winning low bidder.

- **Subcontracting**. In subcontracting arrangements competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

3.2 Checklist for possible collusion – What factors and suspicious behaviour should be monitored during the auction process

Bid rigging, price fixing, and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. However, suspicions may be aroused by unusual bidding or pricing patterns or something a vendor says or does.

A number of countries (such as Canada, Switzerland, Sweden and the U.S.) have developed check lists to help procurement agencies to spot instances of possible collusion. These check lists contain mere indications of potentially collusive conduct. For example, the fact that the level of bids is too high compared to the estimate should not be viewed as evidence of collusion as it may simply reflect an incorrect estimate. Thus, these indicators should simply alert the agencies that further investigation is required to determine whether collusion exists or whether there are other plausible explanations for the events in question.

U.S. Guidelines to Procurement Officials

As an example, the indicators of bid rigging which are contained in a recent pamphlet from the Antitrust Division of the Department of Justice aimed at auctioneers are reported below[44]. The pamphlet distinguishes between indicators which relate to bid and bid patterns, prices and other suspicious statements or behaviour.

Bids

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.

[44] See Antitrust Division, US Department of Justice (2005), Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For.

- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:
- Prices stay identical for long periods of time.
- Prices previously were different.
- Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts historically were given.
- Vendors are charging higher prices to local customers than to distant customers. This may indicate local prices are fixed.

Suspicious Behaviour

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendor's bid.
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes.
- A company requests a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract (likely a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding.

3.3 Permanent monitoring of bidding markets as a way to detect possible collusive conduct

Another possible way of detecting and preventing bid rigging in public procurement is to monitor constantly the bidding activities and perform quantitative analyses on the bid data. This could allow procurement agencies (with the support of competition authorities) to identify up-front those sectors where infringements of antitrust rules are potentially more likely.

In order to do so, however, it is crucial to examine the bids that have been submitted in the past to determine if the patterns are consistent with a fully competitive process. These analyses would allow procurement agencies to maximise their efforts in optimising tender design in those industry sectors which are at risk and they would allow competition agencies to efficiently allocate enforcement resources to detecting collusion in these sensitive sectors.

This exercise is easier in countries where public procurement activities are centralised and the procurement process is electronic.

The Korean electronic procurement system and centralised monitoring of procurement outcomes

Korea has recently introduced a mandatory electronic procurement system, called KONEPS. The Korean electronic procurement system is a web based system which processes electronically the entire procurement process (including registration, bidding, contract, inspection and payment) and it provides related information on a real time basis. The Public Procurement System (PPS) introduced KONEPS in 2002 and all the public organizations are mandated to notice procurement tenders through KONEPS.

Today, over 90% of public tenders in Korea are conduced electronically. According to the latest annual report of KONEPS[45], the introduction of the electronic procurement system has increased participation to public tenders and has significantly improved transparency in procurement administration, eliminating all instances of corruption[46]. In addition, the system has boosted efficiency in procurement, increasing the number of transactions and significantly reducing transaction costs.

Thanks to the data generated by the electronic tendering process, the Korean Fair Trade Commission (KFTC) is able to screen for bid rigging. The screening program (called BRIAS, Bid Rigging Indicator Analysis System) was introduced by the KFTC in 2006 and automatically carries out statistical and empirical analyses for the possibility of collusive biddings based on the information on bidding for public projects of the state, local governments, and government financed institutions.

The Brazilian electronic procurement system

The Brazilian Federal Government has also set up a government e-procurement system, called COMPRASNET[47]. The system is a web-based on-line procurement system used by all Federal Government procurement units.

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45 Available on line at www.pps.go.kr/english/

46 Before the launch of KONEPS, reports on the number of corruption cases in procurement recorded more than 100 cases per year. Since 2004, when the system had settled in, there has been no case of disciplinary measures for corruption in procurement. In general, on the effect on corruption of electronic procurement systems, see Lengwiler and Wolfstetter (2006).

47 More information are available on line (in Portuguese) at the following link: http://www.comprasnet.gov.br/

COMPRASNET is a system where the public purchasing organisation registers its procurement needs. The system then automatically informs registered suppliers by e-mail and the supplier may download the bidding documents. For goods classified as commodities, the whole process may be done on line, using a price quoting system[48]. For larger procurement, a reverse auction procedure is used. In the reverse auction the bids are submitted on line and each supplier can reduce its bid price during the auction and the one offering the lowest price at a pre-agreed end time for the auction will be awarded the contract.

Auctions and prices are open for inspection by the public, and auction results are posted immediately. The system therefore enables better and more transparent procurement, as well as reducing the length of the process. For example, a normal procurement process takes more than two months. The on-line reverse auction may be completed in less than 15 working days. The use of on line procurement has also increased the participation of small businesses in government tenders. In terms of effect on rivalry, it is estimated that the system brought an estimated average 20% reduction of final price for goods and services acquired through reverse auction and price quoting.

It is evident that this tool may not lead to useful result in countries where there are many and small procurement agencies and they may not have the necessary resources to undertake such analyses. The size of public procurement as a share of OECD GDP is large and monitoring the results of procurement processes would be a major undertaking. However, an official policy to review a certain percentage of public procurement tenders would certainly act as a deterrent for a number of potential conspiracies.

4. Summary and conclusions

Public procurement is the purchase of goods and services by public the public sector and in most countries constitutes a substantial part of the domestic economy. Practices such as collusion, bid-rigging, fraud and corruption prevent the efficient outcome of the procurement process. The most common forms of procurement involve some form of tender or auction, although other practices (e.g. individual negotiations) are used, especially where the number of potential tendering firms is small.

Public procurement processes are often constrained by various regulatory requirements. For example, public procurement processes are often subject to transparency requirements. Public procurement may also be used as a tool to address other public policy objectives, such as environmental, affirmative action or industrial policy objectives. Using public procurement policy to pursue multiple objectives is important. However, when it comes to enhancing competition, domestic legislation on public procurement should leave sufficient flexibility for the purchasing entity to react strategically when confronted with anticompetitive cooperation among potential contractors.

Some public procurement markets exhibit features which favour collusion among the bidders. This Note concludes that collusion may be favoured in procurement processes as a result of a number of factors, including the following:

- Certain procurement markets may be small and relatively highly concentrated with moderately high barriers to entry.
- Firms in these concentrated markets typically compete against each other frequently, both in the same market over time and in different markets.
- The identity of the winning bidder and the terms and conditions of the winning contract are often made public.

48 This is a two- to three-day purchase posting site.

- The precise mechanism by which competing bids are compared is specified in advance in detail and there is often a precise weighting scheme for each of the components deemed important to the buyer.

- There are weak incentives for efficiency on the part of the procurement official - leading to a degree of "slackness" in purchasing arrangements, lack of vigilance against collusion, lack of incentive to open the bidding process more widely and, indeed, a tolerance for a certain amount of co-operative behaviour amongst bidders.

Many OECD countries have explicitly focused their antitrust enforcement efforts on fighting and preventing bid rigging. Bid rigging is almost universally condemned as a violation of antitrust rules and in some countries it is prosecuted as a criminal offence. Moreover, a number of countries have taken specific actions against bid rigging, including compliance programs for private firms and/or educational programs for procurement agencies to alert them to the signs and risks of bid rigging. Several countries have programs protecting whistle-blowers and excluding ring leaders or active ring members from the benefits of their amnesty/leniency programs. Other countries provide for an increase in fines to bid-riggers. Many countries, finally, permit "follow on" private actions through which victims of bid-rigging can recover losses, or multiples thereof, resulting from collusion.

Collusion in procurement markets can also be effectively prevented by careful choice of the bidding model and by careful design of the bidding process. Unfortunately, there is no ideal bidding model which fits all situations, but one has to design tailored auctions to fit the specifics of each procurement opportunity.

In general, however, the risk of collusion can be reduced by ensuring that the procurement activity is designed and carried out to ensure that three main objectives are achieved: (i) lowering barriers to entry and increasing participation; (ii) limiting the amount of information available about the outcomes of the tenders; and (iii) reducing the frequency of procurement opportunities.

Some of the possible approaches for reducing collusion suggested in this Note, however, may not facilitate the fight against corruption and favouritism. There may be a trade-off between controlling collusion and controlling corruption and countries should explore ways to enhance competition in procurement without jeopardising efforts to control corruption.

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NOTE DE RÉFÉRENCE

Introduction

D'après le document de l'OCDE intitulé *Les ententes injustifiables : Troisième rapport sur la mise en œuvre de la recommandation de 1998*, la lutte contre les comportements anticoncurrentiels dans les ventes aux enchères et les marchés publics (trucage des appels d'offres prenant la forme de *soumissions concertées*) figure parmi les priorités d'action que les pays Membres devraient se fixer dans le cadre de leur lutte contre les ententes injustifiables. Les marchés publics représentent généralement une part substantielle des dépenses publiques de l'économie nationale. Elle équivaut à environ 15 % du PIB dans les pays de l'OCDE et elle est même encore plus élevée dans de nombreux pays non membres[1].

Ce rapport note également que la majorité des ententes nationales concernent des soumissions concertées dans des procédures de ventes aux enchères ou de passation des marchés publics. Souvent, c'est l'autorité adjudicatrice qui est la mieux placée pour déceler les indices de truquage des offres, car elle connaît bien le secteur d'activité et peut repérer, lors de la procédure de soumission des offres, les éléments laissant supposer l'existence d'ententes illicites.

Le rapport conclut qu'un plus grand nombre de pays devraient élargir leurs propres programmes de sensibilisation et coopérer plus systématiquement avec les agents chargés des marchés publics afin de lutter avec plus d'efficacité contre les soumissions concertées. L'autorité adjudicatrice peut exercer une certaine influence sur la manière dont se déroulent les soumissions, de façon à rendre les ententes plus difficiles.

Pourtant, les programmes de formation systématique des agents chargés des marchés publics n'existent que dans quelques pays membres. On peut donc penser que les autorités adjudicatrices ne sont pas encore suffisamment conscientes du risque d'entente entre les soumissionnaires, ni du rôle de premier plan qu'elles peuvent jouer dans la prévention et la détection des ententes.

La présente note de référence propose une méthode pragmatique pour structurer les procédures de passation des marchés publics afin d'obtenir les meilleurs résultats possibles en termes de protection de la concurrence. Le principal objectif de cette note est de fournir aux autorités de la concurrence et aux autorités adjudicatrices quelques pistes pour éviter la création d'ententes en élaborant des appels d'offres qui assurent une concurrence optimale.

La note s'articule comme suit :

- la première partie récapitule les modèles d'appels d'offres les plus répandus et les risques qu'ils peuvent comporter pour la concurrence ;

[1] OCDE, *Corruption dans les marchés publics : Méthodes, acteurs et contre-mesures*, 2007.

- la seconde partie étudie les initiatives susceptibles de limiter le risque de trucage des offres. Elle s'intéresse en particulier à la manière dont les organismes chargés des marchés publics peuvent structurer les appels d'offres pour minimiser ou supprimer en amont les risques d'effets anticoncurrentiels, ainsi qu'à ce que les autorités de la concurrence peuvent faire pour les aider dans cette tâche ;

- en dernier lieu, la note présente les indices de trucage des offres que les agents chargés des marchés publics devraient connaître pour que les autorités compétentes puissent contrer avec plus d'efficacité et de rapidité les comportements anticoncurrentiels.

1. Modèles d'appels d'offres, marchés publics et problèmes de concurrence

La « passation de marchés » désigne l'achat de biens ou de services par des entreprises publiques ou privées. Le soumissionnaire offrant le prix le plus bas (« moins disant ») est dans l'obligation de fournir les biens ou services ayant fait l'objet de l'appel d'offres. L'objectif premier de toute politique de passation de marchés est de promouvoir l'efficience, c'est-à-dire la sélection du fournisseur proposant le prix le plus bas ou, plus généralement, le meilleur rapport qualité-prix. Il est donc important que la procédure d'adjudication ne soit pas entachée de pratiques comme la collusion, le trucage des offres, la fraude ou la corruption.

Bien que ce ne soit pas systématique, la passation d'un marché s'appuie fréquemment sur une procédure d'« appel d'offres concurrentiel » ou de « mise en adjudication ». Ces procédures de mise en concurrence présentent naturellement de nombreux avantages du point de vue de l'efficience économique. Un appel d'offres, par exemple, permet d'identifier à la fois le fournisseur et le prix le plus efficient pour le bien ou le service recherché. Les procédures de passation concurrentielles et ouvertes peuvent également ouvrir des débouchés aux nouveaux fournisseurs et prêtent moins le flanc aux accusations de discrimination ou de favoritisme.

La « passation de marchés publics » désigne l'achat de biens ou de services par le secteur public. La passation de tels marchés soulève des problèmes très particuliers car c'est le secteur public qui agit comme acheteur sur le marché. Si l'acheteur public est en présence d'une offre constituée par un petit nombre de fournisseurs, la relation qui s'établit entre les deux peut être décrite comme celle qui existe entre un oligopole et un acheteur très spécial. Dans certains cas, cet acheteur très spécial peut aussi être le principal acheteur sur le marché (voire le seul), ce qui crée une puissance de marché du côté de la demande (situation de monopsone)[2].

Ce qui fait la particularité d'un acheteur public, c'est-à-dire de l'État, par rapport à un acheteur privé est que ses options stratégiques sont plus limitées. Alors qu'un acheteur privé dispose d'un éventail d'actions stratégiques plus large, le secteur public a des obligations de transparence et doit généralement respecter différentes dispositions légales, des règlements administratifs détaillés et des procédures précises de passation de marchés. Même si toutes ces règles ont été pensées pour éviter tout abus de pouvoir

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2 Ce pouvoir d'achat des entités adjudicatrices existe quand, par exemple, la demande de l'État ou des entreprises publiques représente un pan important du marché et que la demande privée est limitée, ou lorsque les institutions chargées des achats gouvernementaux coopèrent entre elles pour se procurer les biens et services recherchés. Néanmoins, on ne peut conclure à l'existence d'une puissance de marché avant d'avoir effectué une analyse approfondie de la structure du marché. Le secteur public peut être en concurrence avec des acheteurs privés s'efforçant d'obtenir des biens identiques ou substituables à ceux qu'il recherche, mais aussi avec d'autres acheteurs privés ou publics se trouvant hors du territoire de compétence de l'entité responsable des achats gouvernementaux.

discrétionnaire de la part du secteur public[3], le manque de flexibilité qui en résulte limite les possibilités de l'acheteur public de réagir de manière stratégique face à des soumissionnaires susceptibles de se concerter en vue d'accroître leurs profits.

1.1 Enchères : modèles, stratégies et résultats

Il n'est pas aisé (et cela n'entre pas dans le cadre de la présente note) de synthétiser tous les modèles d'enchères ou de passation de marchés que les administrations publiques peuvent utiliser pour vendre ou acheter des biens et des services sur le marché.

Les principaux modèles d'enchères existants peuvent se distinguer les uns des autres par différentes particularités et divers détails (prix de réserve, restrictions concernant les surenchères et la période de présentation des soumissions, etc.) et la situation est encore plus complexe lorsque plusieurs biens sont vendus, simultanément ou successivement.

Principaux modèles d'enchères

Les très nombreux travaux de recherche consacrés aux enchères et à la passation de marchés identifient quatre grands modèles d'enchères[4]. Ces quatre modèles peuvent être classés en *modèles ouverts et dynamiques* (où les participants peuvent soumettre une série d'offres à concurrence de leur propre valeur plafond et la teneur de leurs offres est connue de tous) et les modèles d'*enchères scellées et statiques* (où chaque participant fait une seule enchère, sa « meilleure offre définitive », qui reste secrète[5]).

- *Enchères ascendantes* : le prix augmente jusqu'à ce qu'il ne demeure plus qu'un seul enchérisseur, qui remporte l'enchère au dernier prix.

- *Enchères descendantes* : le prix diminue jusqu'à ce qu'un candidat se déclare preneur et remporte les enchères au dernier prix.

- *Enchères sous pli scellé au premier prix* : chaque enchérisseur remet une offre sans connaître les autres soumissions. Le bien est attribué au plus offrant, qui paie le montant offert.

- *Enchères sous pli scellé au deuxième prix* : chaque enchérisseur remet une offre sans connaître les autres soumissions. Le bien est attribué au plus offrant, qui paie le prix offert par le deuxième plus offrant.

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[3] Les obligations relatives à la transparence et à la non-discrimination, de même que les exigences formelles auxquelles doivent satisfaire les procédures de passation des marchés, peuvent empêcher le secteur public d'exercer pleinement son pouvoir de négociation. C'est notamment le cas dans l'Union européenne, où les règles que doivent respecter toutes les autorités contractantes sont définies par les directives sur les marchés publics.

[4] Au sujet des modèles d'enchères, voir OCDE, *Table ronde sur la concurrence sur les marchés d'enchères. Note du Secrétariat*, DAF/COMP(2006)27.

[5] Comme il en sera question plus loin, la transparence et la possibilité d'accéder à des informations exactes lors de la phase de soumission des offres sont, à bien des égards, des éléments clés pour l'élaboration des procédures d'enchères et de passation de marchés.

Au fil des années, un certain nombre de variations ont vu le jour à partir de ces quatre modèles de base, y compris des modèles hybrides comme le modèle des *enchères mixtes (« English-Dutch auction »),* qui reprend les caractéristiques du modèle ascendant (« English auction ») et du modèle d'enchère au prix marginal sous pli scellé (ou « Dutch auction »)[6]. Dans ce cas, on conduit une enchère ascendante jusqu'à ce qu'il ne reste plus que deux enchérisseurs. Chacun d'entre eux doit ensuite remettre une offre définitive sous pli cacheté qui ne soit pas inférieure au prix offert et le plus offrant remporte la mise et paie le montant offert.

Dans chacun des quatre modèles présentés ci-dessus, si la valeur attribuée au marché dépend *uniquement* de paramètres propres à l'enchérisseur, par exemple les coûts qu'il supporte, on parle d'*enchères à valeur privée*. En revanche, si cette valeur dépend de facteurs concernant tous les enchérisseurs (disposition des consommateurs à payer un certain prix ou comportement futur de l'autorité de tutelle, par exemple), on parle d'enchères à *valeur commune*[7].

Malgré les différences apparentes entre les quatre principaux modèles, il est possible de les regrouper en deux catégories très similaires du point de vue des stratégies adoptées et des résultats obtenus.

Dans une *enchère ascendante* et dans une *enchère sous pli scellé au deuxième prix*, chaque enchérisseur reste dans la course jusqu'à ce que le prix offert atteigne la valeur qu'il attribue lui-même au bien. Après que l'enchérisseur attribuant au marché la deuxième plus forte valeur renonce, seul l'enchérisseur dont l'estimation de la valeur du marché est la plus forte demeure en lice. Il remporte les enchères à un prix égal (ou peut-être très légèrement supérieur) à l'évaluation du deuxième meilleur enchérisseur. La différence entre les deux modèles est que, dans *une enchère sous pli scellé au deuxième prix*, le gagnant paie un prix correspondant à la deuxième plus forte estimation. .

Dans une *enchère au prix marginal sous pli scellé* et dans une *enchère sous pli scellé au premier prix*, l'enchérisseur doit arbitrer entre, d'une part, soumettre une offre plus élevée, ce qui augmente la probabilité de remporter les enchères, et, de l'autre, soumettre une offre plus basse, ce qui lui rapportera plus s'il gagne. Le plus offrant remporte les enchères et paie le montant correspondant. Cependant, il n'a pas nécessairement attribué la valeur la plus élevée au marché. Son offre est inférieure à son estimation.

Sur le plan des résultats, les différents modèles sont très proches. Ils aboutissent aux mêmes gains dans certaines conditions et chaque enchérisseur paie le montant espéré en fonction des informations dont il dispose quant à la valeur du bien. C'est ce que l'on appelle le *théorème de l'équivalence du revenu*.

Toutefois, ce terme de « théorème de l'équivalence du revenu » ne signifie nullement que tous les types d'enchères soient similaires au regard de la politique de la concurrence. Comme on le verra, les *enchères ouvertes* sont plus susceptibles de favoriser la collusion que les *enchères sous pli scellé*. De la même façon, les *négociations privées* avec des fournisseurs potentiels risquent moins de favoriser la collusion que les appels d'offres publics.

[6] Ce modèle a initialement été proposé par Klemperer (1998).

[7] Les « *valeurs affiliées* » sont à mi-chemin entre les valeurs strictement privées et les valeurs strictement communes (qui pourraient être considérées comme des cas particuliers du concept général de valeurs affiliées).

1.2 Problèmes de concurrence et passation de marchés publics

En général, les problèmes de concurrence dans le contexte des marchés publics sont les mêmes que ceux qui se posent sur les marchés « ordinaires ».

En matière de marchés publics, la principale préoccupation touche au fait que les règles formelles qui régissent l'adjudication facilitent la communication entre les concurrents, ce qui peut favoriser la collusion et atténuer la concurrence et nuit donc à l'efficience de la procédure[8]. Quand, en particulier, l'entrée sur un marché est difficile et que la soumission des offres ne repose pas sur une logique de concurrence où le gagnant « rafle la mise »[9], le risque de collusion entre enchérisseurs ou entre soumissionnaires est aussi réel que le risque de collusion entre concurrents exerçant sur des marchés commerciaux « ordinaires »[10].

Pour qu'un équilibre collusif soit trouvé et puisse durer, un certain nombre de conditions doivent être réunies.

- Les participants à l'entente doivent être capables de décider d'une « politique commune » (c'est-à-dire d'une stratégie de soumission commune) ;

- chaque participant à l'entente doit pouvoir s'assurer que les autres entreprises adoptent bien la politique commune ;

- les conséquences de l'éventuelle défection d'un participant (sanctions, rétorsion, etc.) doivent être suffisamment graves et crédibles ;

- les réactions prévisibles des clients ainsi que des concurrents existants et futurs ne doivent pas être susceptibles de compromettre la politique commune.

Les listes de critères habituellement utilisées pour détecter le risque de collusion (c'est-à-dire la réunion des conditions évoquées ci-dessus) permettent aussi de prévoir d'éventuelles collusions dans le contexte des marchés publics. Plusieurs facteurs peuvent favoriser la formation d'une entente, même si tous ne doivent pas nécessairement être réunis pour qu'il y ait possibilité de collusion.

Les principaux facteurs sont brièvement examinés ci-après.

1.2.1 Structure et concentration du marché

A priori, moins les fournisseurs sont nombreux, plus il leur est facile de s'entendre. Et plus ils sont nombreux, plus la concurrence est intense, ce qui se traduit par une baisse des prix et une amélioration de la qualité.

De même, si les candidats à un appel d'offres sont peu nombreux, les coûts d'organisation d'une entente viable sont moins élevés, car il est plus facile de définir les modalités de la coordination et de vérifier que chaque participant à l'entente les respecte ; les mécanismes de sanction sont aussi plus efficaces car les tricheurs s'exposent à des pertes plus importantes. En règle générale, un appel d'offres

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[8] Pour une vue d'ensemble sur la question des collusions liées aux marchés publics, voir l'article d'Albano et autres (2006), ainsi que les travaux qui y sont cités.

[9] On parle de logique du « gagnant qui rafle la mise » lorsque chaque participant peut remporter l'intégralité de la commande ou repartir sans rien.

[10] Voir la note de Klemperer dans OCDE, *Roundtable on Competition in Bidding,* DAF/COMP/WD(2006)72.

auquel participent peu de soumissionnaires risque de se révéler peu rentable pour l'entité adjudicatrice et inefficient[11].

À l'inverse, si les participants sont nombreux, les soumissionnaires ont plus intérêt à ne pas honorer un accord de collusion afin de tenter de remporter le marché et il est beaucoup plus difficile aux participants à une entente de se surveiller mutuellement. Les incitations à *tricher* sont plus importantes et la viabilité de la collusion est moindre.

1.2.2 Transparence du marché

Une collusion peut voir le jour et durer si les entreprises disposent d'informations complètes et parfaites sur les principales variables de la concurrence. La transparence du marché leur permet d'harmoniser plus facilement leurs stratégies et de détecter rapidement et de sanctionner tout manquement aux termes de l'accord collusif.

Par conséquent, à vouloir renforcer la transparence des appels d'offres, notamment par la communication d'informations sur les conditions proposées tant par les soumissionnaires non retenus que par les adjudicataires, on peut augmenter le risque de collusion. Comme on le verra, il faut manifestement procéder à un arbitrage entre la nécessité de diminuer la transparence pour maîtriser les risques de collusion et accroître la transparence pour lutter contre la corruption et le favoritisme.

1.2.3 Barrières à l'entrée et participation

Généralement, quand les barrières à l'entrée sont peu contraignantes ou qu'il existe des produits de substitution, la collusion échoue. Si, au contraire, des barrières élevées protègent les entreprises déjà installées des éventuels nouveaux venus, les probabilités de formation et de viabilité d'une entente sont plus importantes[12].

En choisissant des procédures de passation des marchés publics qui ont pour effet de restreindre la participation, le secteur public peut dresser des obstacles à l'entrée sur un marché[13]. Il est important que les conditions d'accès à l'appel d'offres ne soient pas de nature à restreindre inutilement la participation. Dans le cas contraire, elles risquent d'apparaître comme des obstacles à l'entrée.

D'un autre côté, concevoir les appels d'offres publics uniquement en vue d'augmenter le nombre de soumissionnaires ne favorise pas obligatoirement la concurrence si les soumissionnaires supplémentaires ont une puissance de marché notoirement plus faible. Pour intensifier la concurrence, les procédures de

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11 Bulow et Klemperer (1996).

12 Dans les marchés publics, par exemple, quand les obstacles à l'entrée sont peu contraignants voire inexistants, il n'est pas gênant que les soumissionnaires non retenus soient forcés de quitter le marché, car la menace d'une concurrence éventuelle de la part de nouveaux arrivants subsiste et restreint le pouvoir de marché des entreprises en place. Quand cette menace n'est pas crédible parce que les coûts d'entrée sont élevés, les entreprises installées risquent davantage de passer un accord collusif et de s'y tenir

13 Ceci est lié au fait que le secteur public peut être beaucoup plus hostile au risque qu'un acheteur privé. Tout dysfonctionnement de la procédure susceptible de diminuer sa capacité à fournir des services au public est extrêmement visible et peut avoir des effets très néfastes. En conséquence, éviter de tels dysfonctionnements est une des priorités du secteur public. Ce dernier peut donc être excessivement incité à limiter la participation aux entreprises de grande taille ou renommées ou à traiter avec les fournisseurs existants.

passation doivent être conçues de manière à garantir la participation des « bons » candidats compte tenu des biens et services recherchés, plutôt que la participation du plus grand nombre[14].

1.2.4 Concurrence résiduelle

Pour qu'une collusion soit viable, il faut que les participants soient en mesure de relever conjointement leurs prix jusqu'au niveau du prix de monopole. Le nombre et la force des acteurs *extérieurs* à l'accord collusif sont des facteurs déterminants pour évaluer la réalité du risque de collusion.

Le secteur public peut donc organiser les appels d'offres publics de manière à modifier la structure du marché en attribuant des contrats à un plus grand nombre d'entreprises et en préservant ainsi une certaine diversité de l'offre. Sans parler de veiller à la rotation des fournisseurs, il a intérêt à ce que les procédures de passation ne creusent pas le fossé entre les entreprises dominantes et les autres et n'avantagent pas les entreprises déjà implantées sur le marché lors d'appels d'offres ultérieurs.

1.2.5 Pouvoir d'acheteur

Si l'acheteur détient un certain pouvoir de marché, il peut s'en servir pour déstabiliser d'éventuelles ententes collusives entre les vendeurs. Par conséquent, le pouvoir de l'acheteur peut servir à stimuler la concurrence entre les fournisseurs, compromettant ainsi le succès des tentatives de collusion.

Dans le cas des marchés publics, comme le rôle de l'acheteur est tenu par le secteur public, celui-ci peut détenir un pouvoir de marché du simple fait qu'il représente une demande ou un client de première importance. En s'appuyant sur la procédure d'adjudication pour exercer son pouvoir d'achat et contrer la puissance sur le marché des fournisseurs, le secteur public oblige ces derniers à se livrer une concurrence plus intense. L'exercice de ce contre-pouvoir peut garantir la vitalité de la concurrence à long terme, voire aider de nouveaux fournisseurs à surmonter les obstacles à l'entrée.

Néanmoins, comme les décisions d'attribution de marchés ne procèdent pas obligatoirement du désir de maximiser la rentabilité[15], on peut considérer que le secteur public est moins susceptible d'exercer son pouvoir d'acheteur en vue d'en retirer des avantages par rapport à d'autres acheteurs de biens et services similaires. Il faut donc aussi que la réglementation de la passation des marchés publics laisse une marge de manœuvre suffisante à l'entité adjudicatrice pour exercer son contre-pouvoir d'acheteur.

1.2.6 Stabilité des conditions du marché

Il est plus facile de coordonner des stratégies sur un marché où la situation (fonctions d'offre et de demande) est relativement stable.

Quand ces variables ont tendance à changer fréquemment, c'est-à-dire quand la demande est imprévisible, volatile ou fluctuante et que l'offre évolue constamment, il est difficile de savoir si le non-

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14 Cela peut s'appliquer tout particulièrement aux critères de présélection qui sont utilisés pour les appels d'offres restreints et qui déterminent non seulement le nombre probable de soumissionnaires mais aussi leurs caractéristiques.

15 En matière de passation de marchés, le secteur public peut avoir divers types d'objectifs, liés à l'environnement, la discrimination positive, la politique industrielle, etc. Or, la poursuite de ces objectifs peut avoir une incidence sur la concurrence, voire exiger une restriction de concurrence ou une distorsion de concurrence entre les fournisseurs. Cela peut être le cas, par exemple, quand la procédure d'attribution creuse le fossé entre petites et grandes entreprises ou contraint certaines entreprises à sortir tout simplement du marché.

respect des modalités de l'accord collusif résulte d'un acte de dissidence visant à gagner des parts de marché (donc à sanctionner) ou s'il ne s'agit que d'une réaction de rééquilibrage après un choc provoqué par des variations de la demande.

Dans le domaine des marchés publics, les incitations à proposer des conditions plus avantageuses que celles des concurrents s'accroissent quand la demande est immédiatement importante, mais va sans doute baisser. Par conséquent, un flux de demande prévisible et constant émanant du secteur public peut augmenter les risques de collusion.

1.2.7 Interactions répétées et comportements coordonnés

Un équilibre collusif n'est possible que si des entreprises se rencontrent à intervalles réguliers et ont des contacts entre elles. C'est à cette seule condition qu'elles peuvent adapter leurs stratégies respectives en agissant et en réagissant aux stratégies des concurrents.

Par conséquent, une collusion visant des marchés publics a plus de chances de durer si les soumissionnaires entrent fréquemment en contact, en étant sur le même marché ou sur des marchés différents (on parle alors de *comportements coordonnés)*, parce que ces interactions répétées leur permettent d'observer leurs modèles d'offre respectifs et de sanctionner plus efficacement les francs-tireurs prêts à soumissionner à un prix inférieur au prix collusif. Lancer plusieurs appels d'offres pour satisfaire une seule exigence, par exemple, peut accroître le risque de collusion.

1.2.8 Symétrie entre les entreprises

A priori, il semble plus facile de former une entente entre entreprises similaires.

Si les participants à l'entente diffèrent sensiblement les uns des autres par leur taille, leur part de marché et leur structure de coût, la stratégie collusive risque de ne pas être viable. Les asymétries, susceptibles de se solder par des écarts de parts de marché, peuvent empêcher les entreprises de répartir convenablement la réduction de production requise pour obtenir la hausse de prix souhaitée.

1.3 Autres considérations relatives aux politiques de marchés publics et à la concurrence

La politique d'achat de l'État peut agir sur la concurrence de nombreuses façons[16]. L'effet à court terme sur la concurrence entre les fournisseurs potentiels, c'est-à-dire sur l'intensité de la concurrence entre fournisseurs existants candidats à un appel d'offres donné, n'est qu'un des effets possibles de cette politique et non le seul. Les marchés publics peuvent avoir d'autres effets – à plus long terme – sur la concurrence, car ils peuvent modifier les caractéristiques essentielles d'un secteur d'activité (innovation, niveau d'investissement, intégration verticale, etc.), ce qui détermine en partie l'intensité de la concurrence lors des appels d'offres ultérieurs.

Combattre et prévenir la fraude et la corruption constitue une autre priorité de la politique de marchés publics. Même si, dans l'idéal, il n'y a pas à choisir entre un renforcement de la concurrence et un recul de la corruption, parce qu'elles sont susceptibles de réduire le risque de collusion, certaines des méthodes examinées ci-après peuvent, simultanément, aggraver la corruption. L'arbitrage entre ces deux objectifs est donc délicat et chaque pays doit réfléchir aux moyens d'accroître la concurrence sans nuire à la lutte contre la corruption et le favoritisme.

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16 Rapport de la Commission économique et monétaire (2004).

1.3.1 Effets à long terme des achats publics sur la concurrence

Par sa politique de marchés publics, le secteur public peut modifier la structure du marché et les incitations des entreprises à se livrer une concurrence plus ou moins féroce à long terme. Du même coup, cette politique peut servir à obtenir certains effets à plus long terme sur la concurrence dans un secteur d'activité donné.

Ainsi, la politique de marchés publics peut avoir des effets à long terme significatifs sur le niveau de l'investissement privé ou public et sur le rythme et la qualité de l'innovation ; plus généralement, elle peut modifier la compétitivité globale d'un marché, c'est-à-dire qu'elle peut avoir des effets reflétant l'évolution de la structure du marché et des technologies qu'entraînent les attributions de marchés publics (intensité de la concurrence lors d'appels d'offres ultérieurs, par exemple).

- *Niveau de l'investissement*. Une focalisation exagérée des appels d'offres publics sur le critère du prix peut décourager les soumissionnaires d'investir pour améliorer la qualité ou élargir leur gamme de produits et de services de peur de ne pas récupérer leurs coûts. En même temps, une demande significative de la part du secteur public peut aussi inciter les entreprises à investir plus, ne serait-ce que pour s'assurer qu'elles sauront durablement satisfaire les besoins du secteur public.

- *Rythme et qualité de l'innovation*. Quand ils servent à promouvoir l'innovation, les marchés publics peuvent aussi réduire le risque de collusion, en incitant davantage les entreprises à se désolidariser d'un éventuel accord collusif. Sur les marchés très innovants, il peut être plus difficile de se coordonner car les innovations, surtout quand elles sont significatives, peuvent procurer à une entreprise un avantage décisif sur ses concurrentes.

- *Intégration verticale*. En lançant des appels d'offres pour des groupes de produits ou de services caractérisés par une relation verticale, le secteur public favorise les stratégies à long terme d'intégration verticale[17]. *A contrario,* en insistant pour se procurer des services dissociés, le secteur public peut probablement dissuader les intégrations verticales ou réduire les incitations à ce type d'intégration. Il s'agit d'une décision stratégique qui peut avoir des incidences non négligeables sur la configuration de l'offre, c'est-à-dire qui peut limiter le nombre de concurrents capables de se maintenir sur le marché à long terme et elle peut conduire à évincer du marché des entreprises plus petites n'ayant certes pas opté pour l'intégration verticale mais éventuellement susceptibles de fournir avec plus d'efficience les biens ou services recherchés.

À l'échelle d'un secteur d'activité donné, ces choix ont manifestement des répercussions durables sur la concurrence et la compétitivité.

1.3.2 Stratégie en matière de marchés publics, politique de la concurrence et corruption

De nombreux pays considèrent que la corruption et le favoritisme sont deux problèmes plus spécifiquement liés aux marchés publics. En effet, ces marchés représentent généralement des commandes

[17] À court terme, les sociétés n'ayant pas procédé à une intégration verticale peuvent se réunir pour proposer des produits groupés. Cette possibilité et ses effets sur la concurrence sont abordés plus en détail à la section 3.4.

d'une valeur considérable qui, pour les agents publics, constituent une tentation supplémentaire de se laisser corrompre (en particulier dans les pays où les fonctionnaires reçoivent un traitement modeste)[18].

On parle de corruption dans le cadre d'une passation de marchés, lorsque le fonctionnaire chargé par l'entité adjudicatrice d'organiser la procédure est convaincu, en contrepartie de pots-de-vin ou d'autres gratifications, de l'organiser ou d'en modifier l'issue de manière à avantager une entreprise en particulier[19]. La politique de marchés publics doit donc être élaborée avec le plus grand soin pour éviter les situations propices à la corruption.

La corruption d'agents publics n'est pas seulement regrettable en soi, elle a également un impact sur l'efficience de l'adjudication. Quand les fonctionnaires chargés de la passation des marchés sont corrompus, les marchés ne sont évidemment pas attribués de la même manière que si le principe de mise en concurrence était respecté. La corruption aboutit à confier un marché non pas au moins disant mais à l'entreprise ayant proposé un dessous de table. C'est en ce sens qu'elle fausse la concurrence. Par conséquent, la lutte contre la corruption et la lutte contre les pratiques anticoncurrentielles sont deux options extrêmement complémentaires.

Toutefois, il est exact que certaines des démarches envisageables pour combattre la collusion, démarches qui seront examinées plus en détail ci-après, peuvent compliquer la lutte contre la corruption et le favoritisme. Par exemple,

- On conclura que la transparence totale des résultats des appels d'offres peut faciliter la collusion et nous suggérerons aux entités adjudicatrices de cesser de communiquer des informations telles que l'identité des soumissionnaires et les détails propres à chaque offre. Néanmoins, rendre la procédure de passation moins transparente peut aussi accroître le risque de corruption en ouvrant la possibilité d'avantager tel ou tel candidat ;

- de même, on examinera la possibilité de lancer des appels d'offres moins nombreux mais représentant des marchés plus importants, afin de stimuler la concurrence. Toutefois, comme les montants en jeu seront plus élevés, le risque de corruption le sera aussi.

Dans la pratique, il faut donc procéder à des arbitrages entre l'objectif de renforcement de la concurrence et le désir de réduire au maximum les accords de collusion. Quoi qu'il en soit, il est sûrement possible de lutter contre la corruption et le favoritisme sans en passer par une transparence totale, en restreignant simplement la communication des informations aux instances de surveillance des marchés publics, ce qui impliquerait peut-être de créer un organe distinct afin de surveiller la conduite des fonctionnaires concernés tout en limitant la divulgation d'informations au public.

Allemagne : le *Bundeskartellamt* et sa fonction de tribunal des marchés publics

En Allemagne, par exemple, l'autorité de la concurrence s'appuie sur trois chambres spéciales chargées de réexaminer l'attribution de marchés publics et auprès desquelles il peut être fait appel de décisions prises par les entités adjudicatrices. Les principes qui guident l'action du *Bundeskartellamt* sont la concurrence, la transparence, la non-discrimination et l'équité des procédures d'appels d'offres.

[18] Voir Jenny, F. « Competition and Anti-Corruption Considerations in Public procurement », in OCDE, (2005), *Fighting Corruption and Promoting Integrity in Public Procurement*.

[19] Cela peut consister, par exemple, à fixer un cahier des charges tel que les autres entreprises soient exclues de la mise en concurrence ou à raccourcir le délai de soumission des offres pour limiter le nombre de candidatures.

En principe, les marchés publics allemands doivent être attribués dans le cadre d'une procédure de mise en concurrence, à l'issue d'un appel d'offres public transparent et parfaitement équitable. La règle prévoit que c'est le mieux disant économique qui remporte le marché.

En cas de saisine, les trois chambres créées dans le cadre du *Bundeskartellamt* vérifient que les entités contractantes ont respecté leurs obligations au regard de la procédure d'adjudication. Ces chambres sont habilitées à prendre des mesures pour remédier à toute violation de droits et éviter tout préjudice aux parties intéressées.

Certains pays se sont dotés d'une législation spécifique pour traiter les cas de collusion dans lesquels les agents responsables des marchés publics participent directement à l'organisation de soumissions concertées. Si la conduite anticoncurrentielle des entreprises en cause relève du droit de la concurrence, les autorités de la concurrence sont généralement impuissantes en ce qui concerne l'éventuelle complicité d'agents publics[20]. Le Japon est un des pays où les autorités de la concurrence disposent d'un certain nombre de prérogatives pour sanctionner les fonctionnaires ayant contribué à des soumissions concertées.

La loi japonaise de prévention des soumissions concertées impliquant des agents publics

Pour régler le problème récurrent de l'implication de responsables des marchés publics dans des affaires de soumissions concertées, le Japon a adopté en 2002 une loi de prévention et de répression des soumissions concertées, qui permet à la Commission japonaise de la concurrence (*Japan Fair Trade Commission*, JFTC) de poursuivre les agents publics cités dans des dossiers de soumissions concertées.

En vertu de cette nouvelle loi, la JFTC peut demander aux responsables des institutions adjudicatrices incriminées d'enquêter sur les écarts présumés de leurs agents et de prendre toutes les mesures nécessaires pour y mettre un terme. Ces mesures doivent être rendues publiques.

Qui plus est, une fois que l'enquête a confirmé la participation d'un agent public au trucage d'un appel d'offres, l'administration peut s'appuyer sur la nouvelle loi pour exiger des réparations de l'intéressé.

D'autres pays, enfin, ont voté des lois visant spécifiquement à rendre les procédures de passation plus transparentes, avec l'objectif déclaré d'empêcher toute pratique discriminatoire de la part de l'entité adjudicatrice. Cet arsenal législatif peut également viser d'autres objectifs et n'est pas nécessairement destiné à prévenir les comportements anticoncurrentiels ou à y remédier. C'est le cas, par exemple, de la réglementation européenne relative à la passation des marchés publics. Elle a essentiellement été conçue pour garantir l'ouverture des appels d'offres à tout candidat originaire de l'UE et respecte les grands principes de transparence, de non-discrimination, d'égalité de traitement, de reconnaissance mutuelle et de proportionnalité qui découlent du Traité instituant la Communauté européenne et de la jurisprudence de la Cour de justice des Communautés européennes.

2. Comment réduire les risques de trucage des offres et maximiser la concurrence dans les marchés publics

On a vu que les lois nationales encadrant la passation des marchés publics pouvaient limiter l'éventail des options stratégiques dont dispose le secteur public pour contrer les comportements anticoncurrentiels liés à l'attribution de marchés. Il est fréquent que le secteur public soit soumis à des obligations de transparence et qu'il doive tenir compte de la législation ainsi que de règles et procédures administratives précises. Comme on vient de le voir, malgré leur objectif de lutte contre les discriminations et le

[20] C'est souvent le cas, car de nombreux pays considèrent la corruption comme une infraction réprimée par le droit pénal général.

favoritisme, ces règles peuvent limiter les possibilités du secteur public d'opter pour la stratégie de son choix lorsqu'il s'aperçoit que certains candidats tentent d'augmenter leurs profits en s'entendant de manière illégale.

Par conséquent, il faut que les textes législatifs et réglementaires sur la passation des marchés publics laissent une certaine latitude aux entités acheteuses. À cet égard, une normalisation excessive peut se révéler néfaste. Inversement, autoriser une certaine souplesse, par exemple en permettant aux entités adjudicatrices d'introduire des procédures nouvelles et différentes (enchères inversées, négociations directes, etc.) ou d'adapter les procédures existantes à la situation effective du marché, peut avoir des effets positifs.

Concrètement, on peut atténuer les risques anticoncurrentiels inhérents à la passation de marchés publics en examinant avec soin les caractéristiques des différents types d'enchères et leur influence sur les probabilités de collusion. Concevoir les règles d'enchères et les procédures d'attribution en songeant constamment au risque de collusion peut sensiblement contribuer à la lutte contre les comportements anticoncurrentiels ; cela permet en effet de créer un environnement où la capacité et l'intérêt des soumissionnaires à passer des accords de collusion sont considérablement diminués, voir nuls.

Dans la limite des dispositions législatives et réglementaires sur les marchés publics, les organismes adjudicateurs peuvent plus ou moins influer sur l'organisation et le déroulement des procédures de soumission. Ils sont dans une position idéale pour entraver les ententes. Souvent, ils sont aussi les mieux placés pour déceler les indices d'activités illégales, car ils peuvent repérer, lors de la soumission des offres, des éléments laissant supposer l'existence d'ententes illicites.

Dans de nombreux cas, cependant, les responsables de marchés publics ne sont pas assez sensibilisés aux facteurs favorisant la collusion pour y parer efficacement. La plupart d'entre eux ne sont pas non plus suffisamment informés de ce qui constitue un comportement suspect dans le cadre d'un appel d'offres. Ils ne sont donc pas en mesure de s'y opposer. Sur ce plan-là, les autorités de la concurrence peuvent (et doivent) jouer un rôle extrêmement positif en coopérant étroitement avec les organismes responsables des marchés publics, à tous les stades de la procédure de passation, et en développant leurs programmes de sensibilisation afin de lutter encore plus efficacement contre les soumissions concertées.

2.1 Sensibiliser les responsables des marchés publics et les soumissionnaires aux risques et aux conséquences des soumissions concertées

De nombreux avis de marchés publics sont lancés par des municipalités ou de petits organismes n'ayant pas nécessairement les connaissances requises pour définir une procédure de passation efficiente, réduire au maximum la collusion et la repérer. Il peut donc être important de former les responsables des marchés publics.

Dans le contexte général de la lutte contre les ententes, de nombreuses autorités de la concurrence contribuent directement ou indirectement aux efforts de sensibilisation aux risques de trucage des appels d'offres. Dans certains pays, des programmes de formation consacrés aux soumissions concertées ont été élaborés à l'intention des entités adjudicatrices. Ailleurs, la formation pourrait, *a minima*, consister dans la diffusion d'une brochure rédigée par les autorités de la concurrence, qui présenterait la collusion et les soumissions concertées, les différentes formes qu'elles peuvent prendre et les moyens de les détecter. Ces mêmes autorités pourraient également éditer une sorte de guide pratique pour les entités et les agents chargés des marchés publics et les règles communes définies dans le guide pourraient ensuite s'appliquer aux enchères et aux appels d'offres.

Une autre piste à envisager est le renforcement des réseaux nationaux : la lutte contre la collusion pourrait passer par un échange d'informations entre les organismes responsables des marchés publics et les autorités de la concurrence. Les uns comme les autres auraient intérêt à communiquer davantage entre eux, en particulier sur les marchés où les autorités de la concurrence ont déjà constaté des cas de soumissions concertées et s'il est avéré que les marchés publics représentent une part significative de l'activité des entreprises parties aux ententes et qu'il existe donc un risque de récidive.

La promotion des principes de concurrence par les autorités compétentes (mais aussi par les responsables des marchés publics) peut également être assurée auprès des entreprises privées, surtout celles qui sont très actives sur les marchés d'enchères. Bien qu'un tel effort puisse réclamer des moyens et un temps considérables, il peut être bénéfique à long terme. Différentes méthodes permettraient d'atteindre l'objectif. Par exemple :

- l'avis d'appel d'offres pourrait indiquer aux entreprises que le droit de soumissionner est subordonné à l'adoption de programmes internes de conformité avec certaines règles de passation, règles qui pourraient être corédigées ou approuvées par l'autorité de la concurrence ;

- en outre, l'avis d'appel d'offres pourrait imposer aux responsables des soumissions au sein des entreprises intéressées d'assister régulièrement à des sessions et des programmes d'information sur les peines encourues en cas de collusion ou de trucage des offres. Ces formations pourraient être organisées par des représentants de l'autorité de la concurrence ou des entités adjudicatrices, voire les deux ;

- l'avis d'appel d'offres pourrait prévoir des sanctions supplémentaires, de telle sorte que les entreprises convaincues de collusion ne puissent plus soumissionner pendant un certain temps[21]. Sur les marchés caractérisés par un nombre limité de fournisseurs potentiels, l'avis d'appel d'offres pourrait prévoir un alignement automatique des offres soumises par les entreprises déjà convaincues de collusion, de façon à les pénaliser en augmentant leurs coûts de soumission.

2.2. Choisir le modèle d'enchères le plus approprié

De multiples formes d'adjudication sont envisageables pour attribuer des marchés mais, comme on l'avait anticipé, tous les modèles ne sont pas égaux en termes d'incidences sur la concurrence. Le choix du « bon » modèle approprié (ou, plutôt, du meilleur modèle compte tenu des circonstances au moment de la passation) constitue donc le point de départ de toute tentative d'empêcher des accords collusifs dans le cadre de marchés publics.

Les *enchères ouvertes* semblent plus susceptibles de favoriser la collusion que les *enchères sous pli scellé*. De même, les *négociations privées* paraissent moins susceptibles de conduire à des accords collusifs que les procédures d'appels d'offres publics.

Dans des enchères ouvertes, les participants à une entente peuvent communiquer entre eux pendant la procédure[22] et il leur est donc plus facile de passer un *accord collusif en cours d'enchères*[23]. Un système

[21] Dans certains pays (le Mexique, par exemple), c'est la législation relative aux marchés publics qui prévoit d'exclure de la procédure tout enchérisseur potentiel convaincu de s'être entendu sur les prix ou d'avoir obtenu tout autre avantage illicite au détriment des autres participants.

[22] Du fait de la clarté des règles régissant les enchères, la communication entre les participants est plus simple que sur les marchés ordinaires. Ces règles restreignent la marge de manœuvre des concurrents. Quand il s'agit de marchés traditionnels, les offres des entreprises peuvent différer en termes de quantités, de prix, de variétés, etc. Dans le cas des marchés publics, en revanche, seuls les prix sont communiqués. Le « bruit » étant moindre, des informations peuvent être clairement communiquées par le biais des offres

dans lequel les offres sont ouvertes en public et où le prix et les caractéristiques de chaque offre sont connus constitue l'instrument idéal pour détecter les ventes à bas prix[24]. Néanmoins, les enchères ouvertes (ascendantes ou descendantes) risquent plus de permettre l'attribution du marché à l'enchérisseur qui lui attribue la plus forte valeur, car ce dernier a toujours la possibilité de renchérir sur une offre moins élevée. Même s'il existe des mesures permettant de réduire le risque de collusion dans une enchère ouverte[25], les responsables des marchés publics devraient envisager d'autres formules lorsque le risque de comportement anticoncurrentiel est significatif.

Dans le cadre d'une enchère sous pli scellé, comme tous les enchérisseurs indiquent simultanément leur « meilleure offre définitive », la collusion est beaucoup plus compliquée et implique des échanges d'informations préalables, ce qui n'est pas le cas pour les enchères ouvertes. La possibilité de sanctionner les tricheurs est limitée, voir nulle, et les incitations à faire défection sont donc considérablement plus fortes[26]. Concernant l'effet d'encouragement à entrer sur le marché, les enchères sous pli scellé ont l'avantage de rendre la sélection nettement plus aléatoire que dans un appel d'appel d'offres public. En conséquence, les candidats « plus faibles » ou les entreprises de taille plus modeste ont une chance de remporter l'appel d'offres si le plus offrant cherche à faire une affaire et offre moins que si l'appel avait été ouvert.

En général, il est plus facile d'engager des poursuites pénales pour des enchères sous pli scellé que pour des enchères ouvertes. Les enchères scellées laissent une trace écrite qui permet d'identifier tous les enchérisseurs ainsi que leurs offres. Dans le cas d'enchères ouvertes, au contraire, toutes les offres soumises peuvent ne pas être consignées de manière formelle et, comme les participants ne peuvent parfois pas soumettre leurs offres avant que le prix ne devienne excessif, il est possible qu'aucune trace de leur participation ne subsiste. Si l'entente se fonde sur la non-participation, il sera alors difficile d'identifier les membres de l'entente qui n'ont pas pris part directement aux enchères ouvertes[27].

De surcroît, de nombreux modèles de soumission sont envisageables pour attribuer des marchés. Sur le plan de la concurrence, par exemple, le modèle d'enchères au premier prix est peut-être plus à l'abri des

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(envoi de *signaux*). Ces signaux permettent aux enchérisseurs d'annoncer ce qu'ils souhaitent obtenir, de menacer de représailles ceux qui voudraient contrecarrer leurs plans, et donc de s'entendre sur « qui gagnera quoi ».

23 Dans le cadre d'un appel d'offres ouvert, les participants à l'entente peuvent suivre une règle très simple : en soumissionnant activement, un participant peut signaler aux autres son intention de remporter la mise et ceux-ci peuvent accepter tacitement de ne pas baisser leurs prix. Quand l'un des participants se retire, un autre peut enchérir, mais les autres ne surenchérissent pas. Durant l'enchère, la concurrence entre les participants à l'entente est donc supprimée et il ne leur est pas nécessaire de se parler ni de se concerter à l'avance. Voir Kovacic et autres, (2006) ; Klemperer (2004).

24 Stigler (1964).

25 Pour plus de précisions, voir 3.3.

26 Pour réaliser un gain d'ordre supraconcurrentiel, les participants à l'entente doivent ramener l'offre de leur participant le plus offrant à un niveau inférieur à celui d'une offre extérieure et les autres enchérisseurs doivent s'abstenir d'enchérir. Cette baisse ouvre la porte aux défections. En surenchérissant légèrement par rapport à l'offre réduite, un participant à l'entente peut réaliser un gain qu'il n'aurait pu espérer si tous les enchérisseurs n'avaient pas coopéré. Quoi qu'il en soit, les enchères scellées ne sont pas à l'abri d'actions coordonnées. Des interactions répétées peuvent favoriser l'utilisation de signaux, en particulier si l'adjudicateur fournit des informations rétrospectives.

27 En vue d'éventuelles poursuites, « toutes » les informations relatives à une enchère devraient être conservées sur une longue période et cela devrait être indiqué par avance à tous afin d'accentuer l'effet dissuasif. Kovacic et autres, (2006).

manœuvres collusives. Par conséquent, si le risque de collusion est important, les organismes chargés de l'adjudication devraient envisager des enchères scellées au premier prix, plus susceptibles de dissuader les candidats à la collusion et de leur compliquer la tâche.

Pour réduire le risque de collusion, on peut également rendre plus incertaine (c'est-à-dire aléatoire) l'issue de la procédure. Deux options peuvent être retenues :

- le responsable de la procédure peut décider de ne pas indiquer à l'avance le mécanisme précis qui permettra de comparer les offres concurrentes. Dans la pratique, cependant, les dossiers mentionnent souvent une formule de pondération précise pour chaque composante jugée importante pour l'acheteur. Si cette pratique vise généralement à empêcher la discrimination au moment de la sélection, il ne faut pas négliger le fait qu'elle peut accroître le risque de collusion ;

- le responsable de la procédure peut décider de pratiquer une sélection aléatoire ou de lancer des négociations individuelles avec les entreprises dont l'offre s'écarte de l'offre retenue dans la limite d'un pourcentage donné. Cette incertitude, conjuguée à la relative confidentialité des caractéristiques de la meilleure offre, peut rendre une entente plus difficile car, si l'entreprise victorieuse n'est pas celle choisie par les participants à l'entente, ces derniers ne peuvent pas déterminer si son offre était simplement plus intéressante ou si elle a été choisie au hasard.

On peut aussi organiser la procédure d'adjudication de manière à aggraver les conséquences d'un éventuel trucage des offres. Par exemple, l'entité acheteuse peut demander aux participants de déclarer qu'ils n'ont pas opté pour des pratiques collusives (ou autres pratiques illégales) et qu'ils ne se sont pas entendus avec d'autres sur le prix ou d'autres aspects. Cette attestation présente un double intérêt. Premièrement, elle garantit que les entreprises et leurs responsables sont conscients des peines dont est passible la collusion. Deuxièmement, une entreprise et ses dirigeants qui truquent les offres alors qu'ils ont certifié le contraire risquent de se voir infliger des sanctions sévères par l'autorité de la concurrence et peuvent être poursuivis pour déclaration mensongère, infraction qui relève du pénal dans de nombreux pays.

Enfin, il ne faut pas perdre de vue qu'il est parfois plus rentable de préférer une *« négociation individuelle »* avec un nombre limité de fournisseurs à des enchères, quelle qu'en soit la forme. Ce peut être le cas notamment :

- si les coûts liés à l'organisation et au déroulement d'enchères sont élevés. Pour chaque enchérisseur potentiel, analyser le cahier des charges, évaluer sa propre capacité à y répondre et déterminer l'offre appropriée sont autant d'opérations qui ont un coût. La préparation d'une soumission peut donc être relativement onéreuse. Les offres doivent ensuite être examinées par l'entité adjudicatrice. Au total, les coûts inhérents à un projet complexe peuvent être substantiels ;

- si les soumissionnaires probables et même le moins disant probable est déjà connu de l'entité adjudicatrice. Dans un tel contexte, il peut être plus rentable d'approcher directement l'intéressé pour négocier un prix (en brandissant la menace d'un appel d'offres si cela semble nécessaire) ;

- s'il n'est pas possible de déterminer contractuellement à l'avance toutes les composantes des prestations à fournir ;

- si, pour d'autres raisons stratégiques ou explicites, l'entité adjudicatrice n'est pas tenue de choisir l'entreprise la moins coûteuse (par exemple, si la diversité de l'approvisionnement est essentielle pour garantir la continuité du service) ;

- si la publicité de la mise en concurrence est impossible pour des raisons de confidentialité ;
- si le nombre de soumissionnaires probables est très restreint ; un soumissionnaire unique peut alors disposer d'un pouvoir de marché tout à fait considérable ; en l'occurrence, organiser un simple appel d'offres n'est pas efficient et il peut être préférable d'opter pour des méthodes de passation de marchés plus sophistiquées.

2.3 Élaborer des procédures d'appels d'offres minimisant les risques de collusion

L'efficience de la procédure dépend du modèle de soumission choisi mais aussi de la manière dont l'appel d'offres est conçu et mis en œuvre[28]. Les spécificités de la procédure peuvent aussi être déterminantes pour l'efficience. Par exemple, le nombre de soumissionnaires peut être plus limité si le cahier des charges initial est exagérément restrictif[29], si l'appel d'offres ne fait pas l'objet d'une publicité assez large ou encore si le délai de réponse est excessivement court.

Il n'existe malheureusement pas de liste de critères standards permettant de s'assurer que la conception d'une enchère ou d'un appel d'offres est appropriée. En l'occurrence, aucun modèle « prêt à l'emploi » n'est disponible et il faut adapter la méthode d'enchères aux circonstances. Il est donc essentiel d'étudier les spécificités du contexte. Néanmoins, on peut généralement réduire le risque de collusion en s'assurant que l'appel à la concurrence est conçu et se déroule de manière à ce que les trois grands objectifs suivants soient atteints :

2.3.1 Abaisser les barrières à l'entrée et élargir la participation

La concurrence peut être renforcée en agissant non seulement sur la demande (nombre de substituts potentiels) mais aussi sur l'offre. On peut en particulier augmenter le nombre de soumissionnaires probables en diminuant les barrières à l'entrée.

On a vu de quelle façon le choix du modèle d'enchères peut aussi influer sur le taux de participation. Si le nombre de soumissionnaires est essentiel, la participation peut être favorisée en optant pour des enchères sous pli scellé plutôt que des enchères ouvertes[30]. Dans les enchères ouvertes, en effet, les enchérisseurs les moins avantagés savent que seuls les enchérisseurs les mieux placés demeureront longtemps en lice ; ils peuvent considérer que, s'ils doivent se retirer vers la fin, mieux vaut ne pas participer du tout et économiser ainsi les frais d'élaboration d'une offre[31]. Curieusement, c'est vrai même lorsque la différence est ténue entre les enchérisseurs « en position de force » et ceux qui sont les « moins avantagés ». Au contraire, dans le cas d'enchères sous pli scellé, les plus petits enchérisseurs peuvent remporter les enchères à un prix qui aurait pu faire l'objet d'une surenchère du candidat bénéficiant du plus

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[28] On peut raisonnablement penser que la conception d'une enchère ou d'un appel d'offre n'est pas forcément déterminante, lorsqu'il existe un grand nombre de candidats potentiels pour lesquels la participation à l'adjudication ne pose aucun problème. Voir Klemperer (2004).

[29] L'entité adjudicatrice, en définissant les biens ou les services qu'elle souhaite acheter, définit du même coup les limites du marché où s'exercera la concurrence. Pour renforcer la concurrence, il faut donc que le cahier des charges soit établi de manière à ne pas exclure les biens et services qui pourraient constituer des substituts efficaces. En conséquence, il est préférable que le cahier des charges précise les résultats souhaités par l'acheteur et laisse aux soumissionnaires le soin d'indiquer ce qu'il mettra en œuvre pour les atteindre.

[30] Des arbitrages sont toutefois nécessaires car si le modèle des enchères sous pli scellé peut favoriser l'entrée, il peut aussi rendre plus critique le problème de collusion entre le preneur d'offres et les soumissionnaires.

[31] Klemperer (2004).

grand avantage. Dans les enchères sous pli scellé, contrairement aux enchères ouvertes, le participant en position de force n'est pas en mesure de modifier son offre après avoir pris connaissance des offres des plus petits enchérisseurs.

Lorsqu'il s'agit de concevoir une procédure d'adjudication publique, la méthode de sélection proprement dite ne doit pas priver les entreprises du droit de soumissionner en imposant des critères qui ne sont pas directement en rapport avec le marché (exiger une certaine expérience ou assise financière peut conduire à exclure inutilement des candidats) ni écarter des entreprises sur de simples critères géographiques.

Il existe plusieurs façons de réduire les obstacles empêchant la participation à un appel d'offres :

- les obstacles réglementaires à l'entrée peuvent être levés (critères limitant le nombre, la taille, la composition ou la nature des entreprises autorisées à soumissionner, ou encore critères politiques favorisant certaines entreprises mais économiquement non pertinents au regard du secteur d'activité concerné) ;

- les obstacles aux échanges peuvent être levés en supprimant les restrictions relatives à la participation des entités étrangères ;

- les coûts irrécupérables constituent un obstacle qui peut être supprimé directement. Par exemple, lorsque l'entrée sur un nouveau marché exige un matériel spécialisé, l'adjudicateur peut l'acheter lui-même et signer un contrat de location-financement avec l'adjudicataire, réduisant d'autant les coûts d'entrée irrécupérables.

La participation peut aussi être encouragée par une baisse des frais de préparation des soumissions. Ils représentent parfois une part substantielle des obstacles à l'entrée, surtout pour les petites entreprises. Un certain nombre de solutions sont envisageables :

- la normalisation des procédures d'adjudication, notamment sur le plan chronologique entre les différentes circonscriptions administratives. Pour certains aspects spécifiques des enchères, il peut falloir trancher entre cette formule et la mise au point de mécanismes spécifiquement adaptés à la situation ;

- le regroupement d'enchères, pour répartir les frais d'élaboration des offres sur plusieurs opérations, ou le fractionnement d'objets en plusieurs unités moins importantes peuvent attirer des participants plus nombreux ;

- l'octroi d'un délai convenable pour la préparation et la remise des offres, car les entreprises ne reçoivent pas nécessairement de notification préalable d'avis de marché ;

- le recours à un système d'enchères électroniques, qui permet également de réduire les coûts de soumission[32].

Un autre moyen d'augmenter la participation est de « renforcer » la position des enchérisseurs les moins avantagés. Favoriser une participation plus large, en particulier des entreprises de petite taille, peut également atténuer l'*effet de droit acquis* [33] et cet objectif peut être atteint de plusieurs manières. On peut

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[32] Au sujet des enchères électroniques, voir les exemples cités *supra*, section 4.3.

[33] Ce terme décrit le cas où remporter des enchères procure un avantage pour des enchères ultérieures. Par exemple, l'attributaire des premières séries d'enchères, qui devient l'exploitant en place, bénéficie

par exemple *réserver* certains marchés, c'est-à-dire autoriser exclusivement les petites entreprises à enchérir sur certaines licences[34]. Une autre méthode consiste à *fractionner les objets ou les lots*[35].

2.3.2 Réduire la transparence et les flux d'information

On a vu que la publication de nombreuses informations sur les transactions pouvait favoriser les collusions en permettant de repérer et de sanctionner plus aisément les participants faisant défection. C'est particulièrement vrai pour les enchères ouvertes, qui permettent aux enchérisseurs de communiquer entre eux en séance. Un certain nombre de méthodes peuvent être mises en œuvre pour compliquer les collusions dans ce cas de figure :

- les enchérisseurs peuvent être contraints d'annoncer des prix « arrondis », le montant exact étant prédéfini dans l'offre, afin d'empêcher les envois de signaux[36] ;

- les offres peuvent être anonymes et le nombre d'enchérisseurs restant en lice peut être tenu secret[37].

En raison de l'effet potentiellement déstabilisateur des enchérisseurs non identifiables[38] sur les ententes, l'agent adjudicateur peut envisager de ne pas divulguer l'identité des enchérisseurs et, par exemple, leur attribuer des numéros. Il peut aussi autoriser le placement d'enchères par téléphone ou par courriel au lieu d'obliger tous les enchérisseurs à se réunir en un lieu et à une date donnés pour enchérir en direct. Il peut également autoriser un enchérisseur à placer plusieurs offres sous des numéros différents ou sous différentes identités.

Après l'attribution d'un marché, la concurrence peut être renforcée tout simplement si l'entité adjudicatrice ne révèle pas l'identité de l'adjudicataire et les caractéristiques de l'offre retenue. Si tous les soumissionnaires connaissent l'identité des autres et les modalités de leurs offres respectives, ils peuvent surveiller le respect de l'accord collusif, prendre des mesures de rétorsion contre ceux qui font défection et se concerter plus efficacement les fois suivantes.

Cela souligne bien une différence essentielle entre passation de marchés publics et passation de marchés privés.

En matière de marchés publics, l'obligation de transparence impose d'annoncer l'identité de l'adjudicataire et le prix retenu, même si cela doit faciliter la collusion. À l'évidence, plus de transparence peut faire reculer la corruption car la transparence aide à contrôler l'équité de la méthode de sélection. Une

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éventuellement d'une position de force pour d'autres enchères visant le même produit, et ce, grâce aux informations qu'il a obtenues lors des premières enchères.

[34] Pour réserver un marché, ou plutôt peut-être pour restreindre ultérieurement son pouvoir de marché, on peut, par exemple, empêcher l'exploitant en place de soumissionner.

[35] Grimm et autres (2006) ; Dimitri et autres (2006).

[36] Klemperer (2004).

[37] Crampton et Swartz (2000).

[38] Ils sont également dénommés « pousseurs ». Le pousseur est quelqu'un qui enchérit pour le compte d'un autre mais qui n'est pas identifiable comme tel par l'agent adjudicateur ni par les autres enchérisseurs.

certaine transparence est essentielle pour la sélection, surtout si des entreprises étrangères participent ou sont susceptibles de participer à l'appel d'offres[39].

Dans le cas des marchés privés, les gros acheteurs industriels préfèrent habituellement la formule des négociations secrètes. Les négociations privées encouragent les baisses de prix, sans que les candidats aient à craindre d'être repérés par les autres participants à l'entente. On peut parvenir à un résultat comparable dans le cadre de marchés publics si, une fois établie la liste restreinte des fournisseurs les plus efficients, la procédure peut s'achever par des négociations de gré à gré.

2.3.3 Espacer les appels d'offres

Comme indiqué plus haut, la collusion est plus facile lorsque des entreprises concurrentes se rencontrent souvent sur différents marchés. En effet, les contacts fréquents facilitent les stratégies de sanctions réciproques, stratégies nécessaires au maintien d'une entente efficace. Les adjudicateurs peuvent jouer sur le montant des marchés et sur la date d'adjudication pour favoriser l'éclatement d'une entente horizontale par tricherie.

Espacer les occasions qu'ont ces entreprises de se rencontrer peut donc diminuer les possibilités de rétorsion et favoriser la concurrence. On peut y parvenir en espaçant les adjudications et en accordant donc la concession de certains services pour des périodes de cinq ou dix ans plutôt qu'un an. Si la période fixée est suffisamment longue, les entreprises n'ont pas à craindre de représailles futures pour avoir proposé, à un moment donné, des prix plus bas que ceux arrêtés par l'entente. Organiser des adjudications à intervalles réguliers et rapprochés peut au contraire favoriser la collusion.

Des calendriers d'enchères plus prévisibles, ainsi que la vente ou l'achat de quantités identiques, peuvent faciliter les systèmes de rotation des offres en aidant les participants à l'entente à trouver un point de convergence, un moyen « naturel » de partager les enchères remportées. Des montants plus faibles et l'organisation d'enchères plus fréquentes auront pour effet de réduire les incitations à violer l'entente. À cet égard, lorsqu'il existe un risque sérieux de collusion, les responsables de la passation des marchés devraient regrouper les plus petites enchères[40] et ne pas annoncer les enchères à venir.

2.4 Autres considérations sur la conception de procédures d'adjudication efficaces

D'autres aspects devraient être pris en compte par les entités adjudicatrices chargées de concevoir les appels d'offres publics. Selon les particularités de chaque méthode d'adjudication, ces aspects peuvent influer sur le résultat final de la procédure. Il s'agit notamment de la possibilité pour plusieurs entreprises de soumettre une offre conjointe, le droit pour l'adjudicataire de sous-traiter tout ou partie du marché remporté et la fixation d'un prix de réserve par l'entité adjudicatrice.

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39 L'Union européenne et l'Organisation mondiale du commerce, par exemple, exigent que les modalités des offres retenues soient rendues publiques afin d'éviter au maximum que des entreprises étrangères ne portent plainte pour procédure inéquitable. L'Accord (multilatéral) relatif aux marchés publics de l'OMC contraint ses signataires à utiliser des procédures d'adjudication ouvertes, transparentes et non discriminatoires pour tous les marchés publics représentant plus d'un certain montant.

40 Grimm *et al*. (2006) ; Dimitri *et al.* (2006). Nous devons néanmoins préciser que le regroupement des enchères peut réduire le nombre de soumissionnaires probables (et donc augmenter le risque de collusion). En effet, à moins de se regrouper, les petites entreprises peuvent être exclues *de facto* des appels d'offres concernant des marchés importants.

Autoriser des entreprises à se regrouper pour soumissionner, c'est-à-dire à soumettre des *offres conjointes* ou à constituer des *groupements de soumissionnaires (consortiums*) peut avoir un certain nombre d'effets – parfois contradictoires – sur l'issue de la procédure.

- Les offres conjointes renforcent la concurrence si elles permettent à des entreprises qui ne sont pas en mesure de fournir des produits complémentaires de se regrouper avec d'autres entreprises pour fournir ensemble ces produits. On observe également un *effet d'information* propice à la concurrence, la mise en commun d'informations favorisant une stratégie d'offre plus offensive.

- Néanmoins, quand des entreprises concurrentes soumettent une offre conjointe, il y a généralement affaiblissement de la concurrence par réduction du nombre de participants. Cet *effet de réduction de la concurrence* encourage la soumission d'offres moins agressives et a donc des effets néfastes sur la concurrence.

Certains pays autorisent la soumission d'offres conjointes par des entreprises présentes sur le même marché uniquement si les frais de préparation d'un dossier sont élevés ou si le marché à attribuer nécessite que l'adjudicataire ait une certaine taille. Dans ces cas de figure, les offres conjointes permettent à des entreprises de petite taille de soumissionner pour des marchés importants dont elles seraient sinon exclues. Cependant, il n'est pas toujours évident que de petites entreprises travaillant ensemble disposent réellement de la structure d'organisation requise pour assurer les mêmes prestations qu'une grande entreprise. En pareil cas, on ne voit pas vraiment pourquoi les offres conjointes devraient être autorisées, d'autant qu'elles augmentent le risque de collusion. La candidature d'un consortium ne devrait pas être admissible dès lors que chaque entreprise qui en fait partie a les capacités économiques, financières et techniques voulues pour fournir les produits recherchés[41].

Autoriser l'adjudicataire à conclure des *contrats de sous-traitance* peut sensiblement modifier les probabilités de trucage des offres. Une entente peut être conçue de manière à ce que les soumissionnaires acceptant de ne pas baisser leur prix ou de ne pas participer du tout puissent être dédommagés par l'adjudicataire (via l'attribution d'un contrat de sous-traitance). Dans la mesure du possible, les dossiers ne devraient donc pas prévoir de contrats de sous-traitance.

Imposer un *prix de réserve élevé mais crédible*, c'est-à-dire un prix au-dessous duquel les enchères seront annulées, peut réduire le risque de collusion[42]. Un prix de réserve agressif peut réduire les bénéfices escomptés d'un accord collusif[43]. En outre, les prix de réserve peuvent réduire le nombre de tours dans une enchère ouverte, réduisant du même coup les possibilités d'envoi de signaux.

2.5 Appliquer les règles du droit de la concurrence aux marchés publics

En plus des possibilités mentionnées précédemment, la collusion en relation avec des marchés publics peut naturellement être contrée par une application stricte et efficace du droit de la concurrence. Dans de nombreux pays, le droit de la concurrence interdit expressément le trucage des offres ou considère cette pratique comme une violation en soi des règles de protection de la concurrence. Pour sanctionner les

41 Albano *et al.* (2006).

42 Kovacic *et al.* (2006).

43 Les prix de réserve doivent être crédibles pour être efficaces. Un prix de réserve trop bas peut accroître le risque d'avoir un nombre insuffisant d'enchérisseurs. Un prix de réserve égal au coût d'opportunité (tel que celui d'un autoapprovisionnement, de la prorogation d'un contrat existant ou de l'adaptation d'un substitut) serait sans doute crédible.

soumissions concertées, d'autres pays s'appuient tout simplement sur le droit de la concurrence qui prohibe les accords anticoncurrentiels.

Si appliquer avec détermination les règles du droit de la concurrence interdisant le trucage des offres et, surtout, donner une large publicité aux sanctions infligées constituent des dissuasions non négligeables, de nombreux pays se sont tout de même dotés de mécanismes de prévention des ententes lors d'enchères ou d'appels d'offres.

Bien qu'une analyse détaillée de ces mécanismes sorte du cadre de la présente note, il ne semble pas inutile de les citer, car ils peuvent contribuer à diminuer les risques de collusions en relation avec des marchés publics.

- Supprimer tout ou partie des avantages associés aux programmes d'amnistie et de clémence pour les instigateurs et autres membres actifs d'une entente.

- Prévoir des mesures plus incitatives pour obtenir des dénonciations contribuant à révéler des soumissions concertées (primes, par exemple).

- Alourdir les peines d'amende (ou les réduire de façon plus limitée) pour les instigateurs et autres participants actifs à une entente.

- Améliorer l'efficacité des actions privées engagées dans le sillage de l'action publique, par exemple en encourageant l'ouverture de poursuites privées ou d'actions en dommages-intérêts pour couvrir les pertes résultant d'un trucage des offres (dommages-intérêts triples, recours collectifs, pouvoirs d'investigation étendus du plaignant, critères de preuve moins exigeants, etc.).

- Poursuivre au pénal les participants à des ententes, y compris dans les pays où les violations du droit de la concurrence ne constituent pas des infractions pénales.

3. Détecter les comportements anticoncurrentiels durant la passation de marchés publics

3.1 Formes de soumissions concertées

Comme c'est plus généralement le cas avec les ententes horizontales, les soumissions concertées ou la collusion peuvent prendre différentes formes :

- une simple *fixation* du prix. L'adjudicataire et l'offre gagnante sont choisis d'avance, tandis que les autres soumissionnaires reçoivent instruction de présenter des offres à des prix supérieurs. Pour que cette entente fonctionne, il faut que les rentes acquises par l'adjudicataire soient partagées avec les autres parties à l'entente, ce qui peut se faire, par exemple, en changeant l'identité de l'adjudicataire selon une formule prédéterminée (telle que celle qui préserve les parts de marché existantes) ;

- les accords de *partage du marché.* Les clients sont répartis par catégorie ou par région et les concurrents acceptent de présenter des offres plus élevées dans les marchés régionaux attribués à d'autres entreprises. Ce système peut être complété par un mécanisme de partage des rentes si la demande sur les différents marchés est variable ;

- les *« redevances de soumissions »*. L'association des entreprises constituant une entente perçoit, en contrepartie du droit de déposer une soumission, une redevance qui est simplement ajoutée par

les soumissionnaires au prix de leur offre. Les fonds accumulés par l'association professionnelle sont ensuite restitués aux participants par un mécanisme quelconque ;

- le *« partage des dépouilles »*. L'adjudicataire accepte d'indemniser les perdants « des coûts engagés pour présenter leurs soumissions ». Ce supplément est ajouté au prix de soumision de chaque entreprise. Une variante de cette approche consiste pour l'adjudicataire à sous-traiter une partie des travaux aux soumissionnaires non retenus, là encore pour partager une partie des rentes.

Ces systèmes d'ententes peuvent être mis sur pied de diverses manières, mais ce sont habituellement une ou plusieurs des techniques suivantes qui sont utilisées.

- **La répression des soumissions**. Dans le cas de mécanismes de « répression » ou de « limitation des soumissions », une ou plusieurs entreprises qui, en d'autres circonstances, soumissionneraient probablement, s'en abstiennent ou retirent l'offre qu'elles viennent de présenter pour que l'offre du gagnant désigné soit retenue. Parfois, un ou plusieurs des conspirateurs peut monter un dossier de réclamation infondé pour que le marché ne soit pas attribué à une entreprise extérieure à l'entente. Une fois le marché adjugé, le gagnant peut dédommager ses complices par des paiements en numéraire ou des contrats de sous-traitance.

- **Offres complémentaires**. On parle d'« offres complémentaires » (dites également « de complaisance » ou « de camouflage ») lorsque certaines entreprises soumettent des offres trop élevées pour être retenues ou des offres qui semblent compétitives en termes de prix mais sont en réalité inacceptables en raison de certaines clauses hors prix qu'elles comportent. Ces offres-là ne visent pas à être retenues et servent uniquement à donner l'impression que l'entreprise veut réellement participer. De cette manière, le gagnant désigné par les participants à l'entente peut remporter la mise dans les cas où l'entité adjudicatrice impose un nombre minimal de soumissionnaires.

- **Rotation des offres**. Tous les participants à l'entente soumettent des offres à chaque fois mais un gagnant est désigné à tour de rôle.

- **Sous-traitance**. L'objet des accords de sous-traitance est que les soumissionnaires ayant accepté de s'abstenir ou de soumettre une offre vouée à être rejetée se voient souvent attribuer des contrats de sous-traitance ou de fourniture par l'adjudicataire. Dans le cadre de certains accords, un soumissionnaire ayant présenté l'offre la plus basse accepte de la retirer au profit du soumissionnaire ayant présenté l'offre arrivée en deuxième position, en contrepartie d'un contrat de sous-traitance lucratif permettant de partager le gain illégal résultant de l'écart entre les offres.

3.2 Liste de critères de détection des collusions – facteurs et comportements suspects à surveiller pendant la procédure d'adjudication

Le trucage des offres, la fixation des prix et autres types d'ententes peuvent être très difficiles à détecter. Les accords collusifs sont habituellement tenus secrets et seules les parties à ces accords en ont connaissance. Néanmoins, les soupçons peuvent être éveillés par des méthodes inhabituelles de soumission ou de détermination des prix ou encore par les déclarations ou les actions d'un fournisseur.

Un certain nombre de pays, parmi lesquels le Canada, les États-Unis, la Suède et la Suisse, ont établi des listes de critères pour aider les organismes chargés de la passation des marchés à détecter les cas de collusion éventuels. Elles contiennent simplement des indicateurs de comportement collusif. Par exemple, un niveau d'offre trop élevé par rapport à l'estimation ne doit pas être considéré comme un indice de

collusion, car il peut simplement refléter une mauvaise estimation initiale. En conséquence, les indicateurs listés doivent simplement alerter les adjudicateurs que des recherches approfondies seraient nécessaires pour déterminer s'il y a collusion ou si les faits constatés peuvent s'expliquer autrement de façon plausible.

États-Unis : directives à l'intention des responsables des marchés publics

Les indicateurs de trucage des offres que recense la Division antitrust du ministère américain de la Justice dans une brochure destinée aux adjudicateurs sont énumérés ci-dessous à titre d'exemple[44]. La brochure distingue trois catégories d'indicateurs, qui se rapportent respectivement aux offres et modèles d'offres, aux prix et aux déclarations ou comportements suspects.

Offres

- La même société remporte toujours un certain marché. C'est d'autant plus suspect qu'une ou plusieurs entreprises soumettent à chaque fois des offres non retenues.
- Les mêmes fournisseurs soumissionnent à chaque fois et semblent remporter le marché à tour de rôle.
- Certaines offres sont bien plus élevées que les listes de prix publiées, les offres précédentes de ces mêmes entreprises ou les devis estimatifs.
- Le nombre de candidats est inférieur à la normale.
- Une société soumet des offres largement plus élevées pour certaines opérations, alors qu'aucune différence de coûts apparente ne semble le justifier.
- Le niveau des offres chute dès qu'un nouveau soumissionnaire, ou un soumissionnaire inhabituel, soumet une offre.
- Un soumissionnaire ayant remporté le marché en sous-traite une partie à des candidats qui ont soumissionné sans succès pour le même projet.
- Une société se retire bien que son offre ait été acceptée et travaille ensuite comme sous-traitant pour le fournisseur ayant finalement remporté le marché.

Prix

- Des prix identiques peuvent indiquer qu'il existe une entente sur les prix, en particulier lorsque :
- les prix demeurent identiques durant de longues périodes ;
- les prix étaient auparavant différents ;
- aucune augmentation des coûts ne semble justifier les augmentations de prix ;
- les remises sont supprimées, en particulier alors qu'elles étaient traditionnellement accordées sur ce marché ;

[44] Voir Division antitrust du ministère de la Justice des États-Unis (2005), *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*.

- les fournisseurs facturent aux clients locaux des prix supérieurs à ceux appliqués aux clients éloignés géographiquement ; c'est peut être le signe que des prix spécifiques sont fixés au niveau local.

Comportements suspects

- Les propositions ou formulaires présentés par des fournisseurs différents comportent des irrégularités (on y retrouve les mêmes erreurs de calcul ou fautes d'orthographe), ou ont été complétés par la même personne (écriture identique) ou utilisent une police ou du papier identiques. Ceci peut indiquer que le moins disant désigné a préparé lui-même tout ou partie du dossier non retenu.

- Les feuillets concernant les offres ou les prix comportent des parties effacées ou d'autres modifications notables indiquant que les prix ont été modifiés à la dernière minute.

- Une société demande à soumettre une offre groupée avec un concurrent ou soumet conjointement son offre et celle d'un autre candidat.

- Une entreprise soumissionne alors qu'elle n'est pas à même de respecter le contrat (il s'agit alors vraisemblablement d'une soumission complémentaire).

- Une société se présente avec plusieurs offres à l'ouverture d'un appel d'offres et elle ne soumissionne qu'après avoir déterminé (ou cherché à déterminer) quels sont les autres candidats.

3.3 Surveillance permanente des marchés d'enchères visant à détecter les comportements collusifs

Un autre moyen de détecter et de prévenir les soumissions concertées dans le cadre d'appels d'offres publics consiste à surveiller en permanence le déroulement des soumissions et à analyser les données sur un plan quantitatif. Cela peut permettre aux adjudicateurs (avec l'aide des autorités de la concurrence) d'identifier en amont les secteurs où des violations du droit de la concurrence sont plus susceptibles de se produire.

Pour ce faire, il est néanmoins essentiel d'examiner les offres présentées dans le passé afin de déterminer si les méthodes utilisées ne sont pas dans une certaine mesure anticoncurrentielles. Ces analyses peuvent aider les adjudicateurs à tirer le meilleur parti des efforts qu'ils déploient pour améliorer au maximum la conception des enchères dans les secteurs économiques « à risque » et peuvent permettre aux autorités de la concurrence d'affecter avec efficience les moyens légaux de détection et de sanction les collusions dans les secteurs sensibles.

La tâche est plus facile dans les pays où la passation des marchés publics est centralisée et où la procédure d'adjudication proprement dite est électronique.

Corée : système d'adjudication électronique et résultats du programme de surveillance centralisée des passations de marchés

Dernièrement, la Corée s'est dotée d'un système obligatoire de passation des marchés appelé « Système intégré de passation dématérialisée de marchés publics » (KONEPS). Ce système d'adjudication en ligne, qui gère par voie électronique l'intégralité de la procédure (inscriptions, soumissions, contrats, contrôles et paiements), fournit en outre des informations en temps réel. Le KONEPS a été lancé en 2002 dans le cadre du Système de gestion des marchés publics et tous les organismes publics sont tenus d'annoncer leurs appels d'offres par ce canal.

À l'heure actuelle, plus de 90 % des avis de marchés publics coréens sont gérés électroniquement. D'après le dernier rapport annuel du KONEPS[45], l'introduction du système a élargi la participation aux appels d'offres publics et a considérablement amélioré la transparence en matière de gestion des marchés publics, au point d'avoir éradiqué la corruption[46]. Qui plus est, le système a augmenté l'efficience des procédures (hausse du nombre de transactions et réduction significative de leurs coûts).

Les données générées par le processus d'adjudication électronique permettent à la Commission coréenne de la concurrence (*Korean Fair Trade Commission,* KFTC) de repérer les cas de soumissions concertées. Appelé « Système d'analyse des indicateurs de soumissions concertées » (*Bid Rigging Indicator Analysis System*, BRIAS), l'outil de détection introduit par la KFTC en 2006 effectue des analyses statistiques et empiriques pour déterminer les risques de soumissions concertées à partir des informations relatives aux appels d'offres qui sont lancés pour les projets publics de l'État, des collectivités locales et des institutions publiques.

Le système brésilien de passation en ligne des marchés

L'administration fédérale brésilienne a également mis en place un système électronique de passation des marchés publics. Appelé COMPRASNET[47], ce portail Internet est utilisé par tous les services de l'administration.

Les acheteurs publics se rendent sur ce portail pour indiquer ce dont ils ont besoin. Le système informe alors automatiquement par courrier électronique tous les fournisseurs préalablement inscrits et ceux qui sont intéressés peuvent télécharger le dossier d'appel d'offres. Pour les biens classés dans la catégorie des produits de base, l'intégralité de la procédure peut se dérouler en ligne grâce à un système d'offres informatisé[48]. Pour les marchés plus importants, une procédure d'enchères inversées est utilisée. Dans ce type d'enchères, les offres sont présentées en ligne et chaque fournisseur peut baisser son prix en cours de séance, le gagnant étant celui qui propose le prix le plus bas à l'heure de clôture préalablement fixée.

Les enchères et les prix peuvent être contrôlés par tout un chacun et les résultats des adjudications sont diffusés immédiatement. Le système garantit donc une attribution plus efficace et plus transparente et réduit les délais. Ainsi, alors qu'une procédure classique prend plus de deux mois, les enchères inversées en ligne peuvent ne nécessiter que 15 jours ouvrables. Le recours au modèle électronique a également permis à un plus grand nombre de petites entreprises de participer aux appels d'offres pour des marchés publics. S'agissant des effets sur la concurrence, on estime que l'application de ce système aux biens et services achetés par l'administration dans le cadre d'enchères et d'offres de prix s'est traduite par une baisse d'en moyenne 20 % des prix finals.

Certes, un tel outil n'est pas nécessairement intéressant dans les pays où la passation des marchés publics est fractionnée entre une multitude de petits organismes, qui ne disposent pas toujours des moyens requis pour effectuer ces analyses. Le poids des marchés publics dans le PIB total des pays de l'OCDE est important et surveiller les résultats de toutes les procédures serait une entreprise de grande envergure.

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45 Consultable en ligne à l'adresse www.pps.go.kr/english/

46 Avant le lancement du KONEPS, les rapports sur la corruption en liaison avec des marchés publics recensaient plus de 100 cas par an. Depuis 2004, date de mise en place du dispositif, il n'y a eu aucune sanction disciplinaire en relation avec de telles affaires. Plus généralement, au sujet de l'effet des systèmes d'adjudication en ligne sur la corruption, voir Lengwiler et Wolfstetter (2006).

47 Pour plus d'informations, consulter le lien suivant (en portugais) : http://www.comprasnet.gov.br/

48 Il s'agit d'un site permettant d'afficher des marchés de fournitures durant deux ou trois jours.

Néanmoins, une politique officielle visant à contrôler la régularité d'un pourcentage donné d'adjudications aurait très probablement un effet dissuasif sur un certain nombre de projets d'ententes.

4. Résumé et conclusions

La passation de marchés publics est l'achat de biens et de services par le secteur public ; dans la plupart des pays, ces marchés représentent une part substantielle de l'économie nationale. L'efficacité d'une procédure d'attribution peut être diminuée par des pratiques comme la collusion, les soumissions concertées, la fraude ou la corruption. Les formes d'adjudication les plus fréquentes sont les appels d'offres et les enchères, bien que d'autres méthodes (négociations de gré à gré, par exemple) soient utilisées, en particulier quand le nombre de candidats potentiels est peu important.

Les procédures de passation des marchés publics sont souvent très encadrées par la réglementation. Par exemple, elles doivent fréquemment satisfaire à des normes de transparence. La passation des marchés publics peut aussi servir à atteindre divers objectifs liés aux politiques publiques (environnement, discrimination positive, politique industrielle, etc.). Il importe de pouvoir s'appuyer sur une politique de marchés publics pour atteindre des objectifs multiples mais, quand il s'agit de renforcer la concurrence, le droit national régissant ces marchés doit être suffisamment souple pour que l'entité adjudicatrice puisse opposer une réaction stratégique aux candidats tentés par des accords anticoncurrentiels.

Certains marchés publics présentent des caractéristiques favorisant la collusion entre soumissionnaires. La présente note conclut que la collusion peut être encouragée par un certain nombre de facteurs, dont les suivants :

- certains marchés d'approvisionnement peuvent être de taille modeste et assez fortement concentrés, avec des barrières à l'entrée relativement élevées ;

- en règle générale, les entreprises opérant sur ces marchés concentrés se trouvent très souvent en concurrence les unes avec les autres, aussi bien sur un même marché que sur des marchés géographiquement différents ;

- l'identité de l'entreprise adjudicataire et les détails de l'offre retenue sont souvent rendus publics ;

- le mécanisme de comparaison des offres est précisé à l'avance, et il existe souvent une pondération précise de chacune des composantes jugées importantes pour l'acheteur ;

- l'acheteur n'est guère incité à faire preuve d'efficience, ce qui entraîne un certain « laxisme » dans les procédures d'achat, un manque de vigilance vis-à-vis du risque de collusion, un manque d'incitation à élargir l'appel d'offres et, à l'évidence, une certaine tolérance à l'égard des comportements collusifs entre soumissionnaires.

De nombreux pays de l'OCDE ont explicitement axé leurs efforts de mise en œuvre du droit de la concurrence sur la lutte contre les soumissions concertées et la prévention de ce type de trucage des offres. Dans la quasi-totalité des pays, cette pratique est d'ailleurs considérée comme une violation du droit de la concurrence, et parfois comme une infraction relevant du droit pénal. Un certain nombre de pays ont pris des mesures plus spécifiques, en instaurant notamment des programmes de mise en conformité avec la législation pour les entreprises privées ou des programmes de formation à l'intention des organismes responsables des marchés publics, afin qu'ils apprennent à déceler les indices de trucage et connaissent les risques associés à cette pratique. Plusieurs pays ont mis sur pied des programmes spécifiques pour que les dénonciateurs soient protégés et que les instigateurs ou les participants actifs aux ententes ne bénéficient

pas de programmes d'amnistie et de clémence. D'autres pays prévoient de majorer les amendes dont sont passibles les participants aux ententes. Enfin, de nombreux pays autorisent l'ouverture de poursuites privées afin que les victimes de soumissions concertées soient dédommagées, au minimum à hauteur des pertes subies.

Un moyen efficace de prévenir la collusion dans le contexte des marchés publics est d'apporter le plus grand soin au choix du modèle d'enchères et à la conception de la procédure de soumission. Il n'existe malheureusement pas de modèle idéal, universel. Il faut adapter le modèle aux circonstances qui entourent la passation du marché.

Toutefois, le risque de collusion peut généralement être atténué, pour peu que la procédure d'adjudication soit conçue et mise en œuvre de façon à ce que trois objectifs principaux soient atteints : (i) abaissement des barrières à l'entrée et élargissement de la participation ; (ii) limitation de la quantité d'informations publiées au sujet des résultats des appels d'offres ; et (iii) espacement des adjudications.

Il reste que certaines des pistes évoquées dans la présente note et susceptibles de réduire la collusion peuvent ne pas faciliter la lutte contre la corruption et le favoritisme. Il peut être nécessaire de procéder à un arbitrage entre le combat contre la collusion et celui contre la corruption ; les autorités devraient donc réfléchir aux possibilités de rendre les adjudications plus concurrentielles sans nuire à la lutte contre la corruption.

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DENMARK

1. Preface

Fair and open competition in government procurement is essential in order to ensure competitive pricing, product innovation and performance improvements. Such competitive public procurement practices help government authorities get the best value for the public they serve.

This requires transparent and unbiased procurement practices, and therefore, an effective and rapid complaint system allowing for legal proceedings must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.

However, by having an informal problem solving procedure available aimed at legalizing the public procurement procedure before the procedure is closed and the contract is awarded, Antitrust Agencies can play an important role in facilitating the establishment of these transparent and unbiased procurement practices.

2. The Danish complaint system in the field of public procurement

The Danish complaint system in the field of public procurement allows for legal proceedings in the ordinary courts or the Complaints Board for Public Procurement (in the following referred to as the "Complaints Board" or "Board"). These legal proceedings are supplemented by an informal problem solving procedure using the Danish Competition Authority as an informal complaint authority.

The following is a description of the Complaints Board and the way it is organised, and the role of the courts in connection with public procurement. This is followed by a description of the activities of the Danish Competition Authority as a complaints authority in the procurement area and the benefits of the informal complaint system. Lastly the co-operation between the authorities responsible for public procurement matters in Europe for the handling of cross-border cases is described.

2.1 The Complaints Board for Public Procurement

The Complaints Board for Public Procurement is a specialised administrative board, which has been set up by law in 1991 to act as review body as required by the two Remedies Directives (Council Directive 89/665/EEC of 21 December 1989 and Council Directive 92/13/EEC of 25 February 1992). Detailed rules regarding the functioning of the Board are laid down in a ministerial order issued by the Danish Minister for Economic and Business Affairs.

2.1.1 Organisation and Competence

The Complaints Board is an independent administrative board for the hearing of complaints and settling of disputes concerning alleged violation of the EU rules for the award of public contracts. The competence of the Board relates both to the public procurement directives and the relevant rules of the Treaty on non-discrimination and the free movement of goods and services.

The Complaints Board is composed by a chairman and three vice-chairmen, all of them professional judges, and a number of listed expert members appointed by the Danish Minister for Economic and Business Affairs among persons with knowledge of building and engineering, public procurement, transport and related commercial activities. In review proceedings the Complaints Board is typically consists of one judge and two experts selected from the list.

2.1.2 Claimants

The Complaints Board only acts upon the submission of a complaint, i.e. a concrete case. The Board is thus not empowered to give legal opinions on an abstract basis. A complaint may be submitted by any party with a legal interest in complaining, which means by anyone who has an individual and significant interest. Thus, all potential suppliers, by definition, are entitled to file complaints.

Furthermore, a number of business organisations and public authorities have been granted a right to complain by the Minister for Economic and Business Affairs. The authorities and organisations currently entitled to submit complaints are listed in a schedule to the above ministerial order.

Furthermore, the Board is entitled to allow a third party to intervene in its proceedings when the case is considered to be of great importance to that third party. This applies even in cases where that party does not itself fulfil the conditions for bringing action.

2.1.3 Procedures (including costs)

A complaint is submitted to the Complaints Board for hearing of the case at a charge of DKK 4,000 (corresponding to around € 500).

In practice, the Complaints Board deals with a case in much the same way as a court of law does. Invariably, the first step is the exchange of pleadings. Notwithstanding, as a starting point, the statutory rule of the exchange of pleadings taking place in writing, cases are often heard by oral procedure. The procedures are based on the right of confrontation and cross-examination. The decisions of the Complaints Board take the form of so-called orders formulated in the same way as judgements in civil cases dealt with by the ordinary courts.

It takes on average a period of 7.5 months for the Complaints Board to decide on a complaint brought before it. The Board handles on average 30-35 complaints yearly.

2.1.4 Possible Reactions

According to the Danish legislation implementing the two Remedies Directives, the power of the Complaints Board are the following: the Board can either reject a case, e.g. if it falls outside its competence, or go into the merits of it, in part or in whole. In the latter case, the Board can 1) annul unlawful decisions, 2) impose interim measures, in which case the contract award procedures will be suspended, or 3) impose upon the contracting authority/entity to comply with the rules (legalise its actions). However, the Complaints Board does not have the power to repudiate a contract that has been concluded. It can only annul the administrative decision to conclude the contract.

2.1.5 Sanctions

If anybody should refuse to give the Complaints Board the necessary information for consideration of the case, the Complaints Board may impose a fine on the persons or contracting authorities/entities in question to force them to supply the information.

In cases where a claimant succeeds in his claim before the Complaints Board, the Board may order the contracting entity to pay the costs to the claimant in connection with the claim. The defendant contracting authority/entity, however, will not have its costs covered, even if the claim is dismissed.

Contracting authorities/entities are liable to punishment if the procurement rules are violated. Moreover, failure on their part to comply with a prohibition or enforcement notice, wilfully or by gross negligence, issued by the Complaints Board is punishable by a fine.

After deciding on the substance of the case the Complaints Board can also deal with a subsequent claim for damages against a contracting entity by the company incurring a loss as a consequence of a violation of the procurement rules. Thus it is not necessary to bring such a claim before the ordinary courts. Damages can both be calculated as the tender costs or go beyond these costs depending on the circumstances of the case. In several cases the Board has imposed contracting authorities to pay substantial damages to companies which have suffered a loss.

2.2 The Courts

A decision made by the Complaints Board can be appealed to the ordinary courts no later than 8 weeks following the decision of the Complaints Board. A few decisions by the Board have subsequently been brought before the courts.

There are no conditions which have to be fulfilled in order to bring a complaint regarding a violation of public procurement rules before the ordinary courts instead of the Complaints Board for first trial. However, as far as the Danish Competition Authority is informed, this possibility has not yet been utilised.

For criminal sanctions to be initiated the contracting entity must be notified to the prosecution service. To this date criminal proceedings have never been instituted by the prosecution against a public contracting authority or entity for violation of the procurement rules.

2.3 The Danish Competition Authority

The Danish Competition Authority is an agency under the Danish Ministry of Economic and Business Affairs. The Danish Competition Authority has been the responsible authority in the procurement area since 1993.

The reason for placing the matters concerning the public procurement under the auspices of the Danish Competition Authority is that public procurement rules are regarded as an important part of the competition rules.

2.3.1 Competence

The Danish Competition Authority strives to ensure the development of effective and free competition in the field of public contracts. Among the essential tasks of the Danish Competition Authority is to ensure the proper understanding and application of the procurement rules. An important part of the Authority’s work is therefore to provide advice concerning the interpretation and the application of the rules on public procurement.

In 1996 the Minister for Economic and Business Affairs increased the control of compliance with the procurement rules, as the Danish Competition Authority was requested to take on a more active and initiating role in this respect. The Minister asked the Authority to try to identify on its own initiative assumed violations and examine complaints received regarding violations of the rules.

Thus, the Danish Competition Authority in the field of public procurement has the legal authority to, issue written recommendations in specific complaint cases, provide written informative statements where questions of general interest are raised and provide for ad-hoc oral guidance on the interpretation and application of public procurement law.

Furthermore, in order to increase the possibilities of swift identification of violations of the procurement rules and a correspondingly swift treatment of complaints, the Danish Competition Authority was in 1996 also given formal legal authority to bring cases before the Complaints Board.

Where the Complaints Board in practice in the majority of cases expresses its opinion on the legality of contract award procedures at a stage where the contract has been awarded, the Danish Competition Authority may step in to deal with a complaint during the procurement procedures.

Through discussions with the contracting authority/entity the Danish Competition Authority tries to change the course in order to legalise its procedures before the procurement procedure is closed and the contract is awarded. This way of hearing complaints at the earliest stage possible during an award procedure corresponds exactly to the intentions behind the Remedies Directives in the public procurement area.

The Danish Competition Authority is not legally entitled to make formal decisions or suspend a procedure. It can only issue a recommendation to this effect. Accordingly the objectives for the informal problem solving system are:

- To ensure equal competition conditions in an informal and pragmatic way.
- To intervene at the earliest possible stage – and before contract is signed.
- To reach solutions in a speedy way, at the lowest conflict level possible and with a minimum of costs.

As a consequence the Competition Authority deals primarily with cases, where the contract has not yet been signed and excludes cases already in legal proceeding. Furthermore, the Authority never deals with claims for damages.

In addition to the informal problem solving system, the Danish Competition Authority is, as mentioned above, authorized to provide ad-hoc oral guidance on the interpretation and application of public procurement law. The Authority has therefore established a telephone hotline service with the specific purpose of answering procurement questions, thereby allowing contracting authorities, tenderers and advisors easy and swift access to guidance in the interpretation and the application of the rules on public procurement.

2.3.2 Claimants

In contrast to the situation for the Complaints Board, there is no limit, in principle, as to whom is entitled to bring a case before the Danish Competition Authority. Where a complaint becomes known to the Authority through an individual, a company or an organisation that does not have the requisite legal interest or has not been granted a right to file a complaint with the Complaints Board, the Authority is nevertheless obliged to examine the case if it is well founded.

2.3.3 Procedures (including costs)

No charge is payable on the submission of a complaint to the Danish Competition Authority, and the Authority is not legally entitled to order a party to pay the costs.

The Competition Authority is not legally entitled to make formal decisions and has today no formal authority to demand information for assessment of a case. Instead, the Authority requests that the contracting authority/entity in question make a statement about the facts giving cause for the complaint. In nearly all cases, such a request is complied with.

When the Authority steps in, it is the Authority and not the claimant who is a party to the case. The Authority's assessment of a case is drafted as a recommendation to the contracting entity of which the claimant receives a copy.

If the recommendation of the Competition Authority is not followed, the Authority can bring the case before the Complaints Board for a decision. With the Complaints Board as well as with the Danish Competition Authority, the documents are open for public inspection according to the ordinary rules of administrative law, except for documents whose contents include the business secrets of a tenderer.

2.3.4 Possible Reactions

In parallel with its non-competence to make decisions, the Danish Competition Authority cannot issue an enforcement notice for the suspension of a procurement procedure or for compliance with requirements for a procurement procedure to be made legal.

If a contracting authority/entity has ignored the recommendation from the Danish Competition Authority as to how the procedures are to be changed to be in conformity with the rules, the Authority will have to bring the case before the Complaints Board. Such a situation has not yet occurred.

In many instances, brief reports on the outcome of complaint cases brought before the Authority are published. In addition to the preventive effect vis-à-vis the contracting authority or entity in question, publication has a substantial informative value to contracting authorities/entities in general.

To summarise, the Competition Authority can: recommend a procedure to be stopped while the investigation is ongoing, issue final recommendations for the procedure in question i.e. make changes to be in conformity with rules or cancel and restart, bring cases before the Complaints Board and publish final recommendations.

2.3.5 Sanctions

The Danish Competition Authority has – as described above - not been granted particular default powers except for the option of bringing a case before the Complaints Board.

2.3.6 Advantages to informal problem solving

Among the advantages to informal problem solving as compared to the legal proceedings in the Complaint Board or the ordinary courts is that it is speedier, less expensive, and solves problems before it is too late.

Furthermore, many companies prefer the informal system, since it viewed as a constructive as opposed to a belligerent way of solving public procurement problems i.e. the cases remain at a low conflict

level. Regardless of the conclusion in the written recommendation the claimant retains the right to bring their complaint before the Complaints Board or the ordinary courts.

2.3.7 Future development

The Danish Competition Authority has forwarded a proposal for new public procurement legislation, which was adopted on 10 May 2007. By the entry into force on 1 July 2007 the Danish Competition Authority will be granted powers in relation to being supplied with the necessary information for consideration of a complaint case or where a violation of public procurement rules is presumed.

If anybody upon request from the Danish Competition Authority should refuse to give the necessary information for consideration of the case, the Competition Authority may impose a fine on the persons or contracting authorities/entities in question to force them to supply the information. Furthermore, the persons or contracting authorities/entities which withholds important information in relation to the case, or supplies the Authority with incorrect or misleading information will be punished with a fine.

2.4 Cross-border Cases

Furthermore, the Danish Competition Authority has taken the initiative to establish the Public Procurement Network (PPN). PPN is an international co-operation network in the field of public procurement, where the members are the authorities responsible for public procurement matters in all EU Member States, the EEA Member States, Switzerland, the accessing countries, the candidate countries and other European countries. The objective of the network is to strengthen the application and the enforcement of the procurement rules through mutual exchange of experience and benchmarking.

The network furthermore provides for an informal problem solving procedure. The alternative problem-solving procedure consists of an intense co-operation between contact points in the countries, participating in the Public Procurement Network. The main idea is to achieve pre-contract problem solving in cross border cases. Therefore, the Danish Competition Authority considers cases submitted by domestic companies encountering problems in other countries as well as cases filed by foreign companies encountering problems when participating in the competition for a public contract in Denmark. The network has, in a number of cross-border cases, demonstrated that the informal problem solving procedure leads to positive results.

The European Commission supports the activities within the Public Procurement Network.

FINLAND

During 2005-2006, the Finnish Competition Authority (FCA) carried out a project ”Public Sector Partnership”, with the objective to promote the FCA’s proactive cartel enforcement. Through this project the FCA has seeked to obtain more systematically information on cartel behaviour and cartel suspicions, especially within public sector purchasers. The need for more systematic information transpired after the legislative reforms of 2004, as a result of which the granting of exemptions, which occupied a great number of the FCA’s resources, was waived. As the exemption system was finished and resources were released from it, the FCA was expected e.g. to strengthen its own initiative cartel enforcement and overall to direct its “new” resources to hard core restrictions. These objectives are partly the background of the “Public Sector Partnership” project.

In Finland, the value of public-sector procurements amounts to roughly an annual EUR 22.5 billion. As the public sector is a major buyer in several markets, the FCA approached the management of the procurement organisations of the biggest Finnish cities in 2005 and suggested to deepen anti-cartel cooperation between the cities and the FCA. The underlying assumption was that the cartels secretly operating in the markets are often interested in public-sector procurements because of the significant value of these procurements. In addition, the FCA’s cartel enforcement history shows that the public sector has often been victim of cartel activity. Therefore, in order to chart the potential cartel suspicions in various markets (and yet unknown by the FCA), it was natural to approach the public-sector purchasing organisations to chart their cartel suspicions and try to create a more profound cooperation with these organisations.

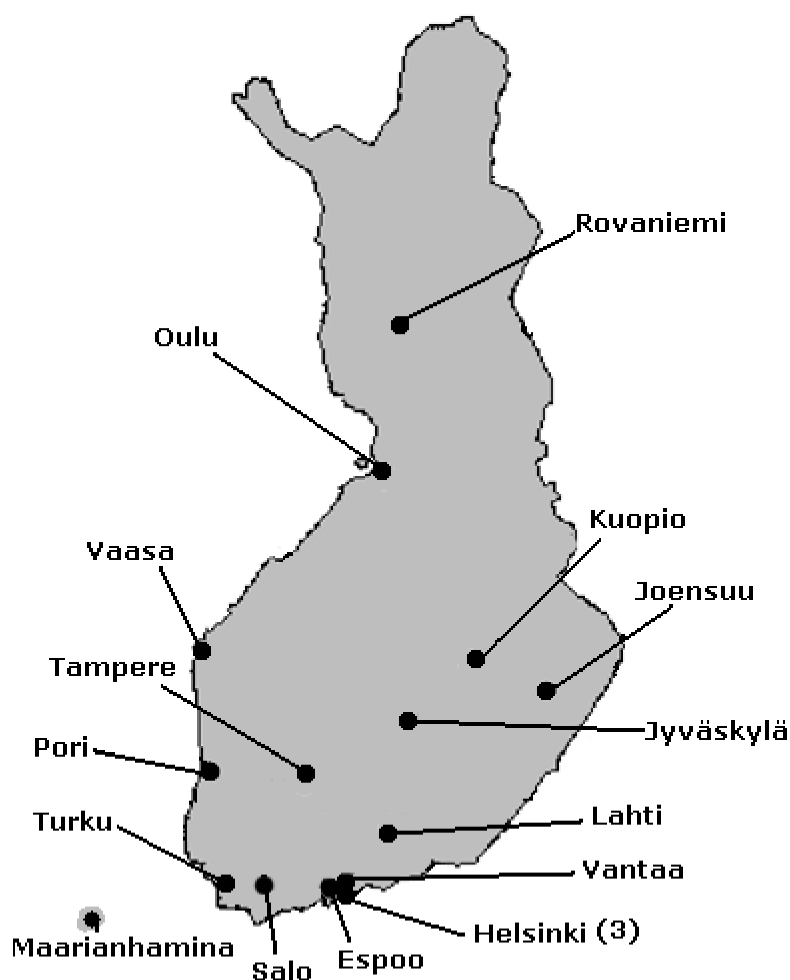
In the initial stage, the FCA presented an invitation to cooperation to the top management of 17 purchasing organisations, active in the 14 biggest Finnish cities. Almost without exception, all the public-sector purchasing organisations who received the FCA’s invitation were ready to cooperate with the FCA.

After approval had been secured for the cooperation in the cities, the FCA prepared and carried out half-day events with each of the purchasing organisation responsible for procurements in their respective cities. The events were composed of three parts where the FCA first presented

- its own activities and the content of the cartel prohibitions
- the process of investigating a cartel at the FCA and the cartel process at the courts
- its experience/knowledge of the ways bidding cartels operate and how to recognize them
- the means with which the purchasing organisations could impede the creation of bidding cartels.

Due to the nature of the public-sector procurements, the main emphasis of the events was on the investigation and prevention of bidding cartels.

Figure 1. Public Sector Partnership – FCA roadshow 2005-2006



A major objective of the events was to obtain information on possible cartel suspicions within the procurement organisations. Another objective was to heighten the municipalities' own knowledge of illegal (bidding) cartels, their knowledge of the negative impacts of cartels and the purchasing organisations' own pre-emptive measures in order to prevent constructing optimal circumstances for bidding cartels. Finally, the project was part the FCA's aim to increase the risk of getting caught from cartels (risk of exposure), to add pressure to the inner disintegration of cartels and therewith to contribute to the functioning of the leniency programme.

In Finland, several cities have claimed they will be claiming damages if violations of the Competition Act are proven in cartels cases currently pending at the courts. Partly due to this fact, a representative from the Association of Finnish Local and Regional Authorities (Kuntaliitto) was often present in the events. In the second part of the events, he discussed the cities' possibility to claim damages if the cities are the object of bidding cartels, as Kuntaliitto has been consulting cities about the practices which are required when filing the actions for damages. Furthermore, representatives from the local state provincial offices, responsible for investigating local competition restraints, also participated in the events.

The third part of the events was comprised of a discussion on the experiences of the procurement organisation on the functioning of the markets and possible cartel suspicions. In several events, the representatives of the purchasing organisations presented cartels suspicions on certain markets already on the spot. However, it should be emphasised that the objective of the events was to encourage purchasing organisations to inform FCA - also after the events - of their cartel suspicions and in order to create a long-term form of cooperation with these organisations and the FCA. In most cases, the trust is based on putting a "face to name".

The FCA's experience on the cartel events is positive. In the course of the events, the FCA obtained information on new cartel suspicions whose investigation at the FCA has begun. Although there are no plans to arrange corresponding events in 2007, the cooperation with the purchasing organisations shall continue. The intention is to create a channel which would provide the FCA, on a lasting and systematic basis, with information on the serious cartel suspicions met by the public sector in their procurement activities, and which would also provide the municipalities' procurement function with means to combat bidding cartels in advance and to complicate, pro-actively, the functioning of bidding cartels.

The FCA gave out a press release on the matter in June 2006 together with Kuntaliitto following the events with the cities.[1] The FCA plans to arrange corresponding events with big private buyers as well.

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1 See www.kilpailuvirasto.fi/english - news archive - News, 15 June 2006 "FCA and municipalities to tackle cartels together"

FRANCE

(DGCCRF)

1. Introduction

Le bon emploi des deniers publics nécessite que l'achat public soit réalisé sur un marché concurrentiel seul à même de garantir une allocation efficiente des ressources aux besoins. Mais la spécificité des marchés publics complique le jeu traditionnel entre la demande et l'offre.

L'acheteur public est souvent contraint de réaliser son programme d'investissement dans un délai imposé. Contrairement au consommateur, il envisage rarement de différer l'investissement projeté en cas de conjoncture économique défavorable. Cette rigidité de la demande est bien analysée dans la théorie économique dite des « choix publics1 ».

Afin de garantir une utilisation optimale des deniers publics, la réglementation de la commande publique a conféré au principe de transparence une place prépondérante. Ce faisant, la publication des délibérations allouant les crédits publics aux différentes procédures d'achat ainsi que la publication des avis d'attribution des marchés peuvent faciliter les comportements collusifs entre offreurs.

Par ailleurs, le souci de recherche d'économie a conduit les acheteurs publics à regrouper leurs achats afin de tirer profit d'un effet de masse. Mais cette massification des achats a pour conséquence d'instaurer des barrières à l'entrée supplémentaires sur le marché ; les appels à la concurrence dès lors centralisés deviennent moins nombreux ce qui limite d'autant le nombre d'affaires potentielles pour les candidats.

La présente contribution expose le rôle de la DGCCRF dans la commande publique afin de promouvoir l'existence d'une concurrence suffisante entre offreurs. Elle expose l'intérêt de la présence le plus en amont possible de la DGCCRF lors de l'acte d'achat, dès le stade de la remise de l'offre par les entreprises. Cette assistance des pouvoirs adjudicateurs lors des procédures de mise en concurrence minimise les effets des ententes entre offreurs (1). Elle analyse les conséquences du nouveau regard porté par la DGCCRF sur l'acheteur public et le rôle reconnu au pouvoir adjudicateur qui devient un acteur à part entière du marché L'attention portée à l'acheteur public a favorisé le développement d'une coopération avec les pouvoirs adjudicateurs (2). Enfin, l'expérience de la DGCCRF acquise lors de l'analyse des comportements collusifs des offreurs a permis de développer des techniques de détection des pratiques anticoncurrentielles (3).

2. Le rôle de la DGCCRF à l'occasion des procédures de mise en concurrence.

Les procédures de mise en concurrence dans la commande publique sont soumises à des règles d'origine communautaire ou internationale. Conformément à ces règles, les marchés doivent être conclus selon des procédures qui garantissent un traitement équitable pour tous les candidats. Le Parlement

[1] *Le texte fondateur de la théorie des choix publics est The Calculus of Consent publié en 1962 par James M. Buchanan (prix Nobel 1986) et Gordon Tullock.*

européen et le Conseil ont adopté en 2004 de nouvelles directives pour les marchés publics permettant de tirer le meilleur profit possible des avantages d'un marché intérieur élargi. L'ouverture des marchés publics a permis de stimuler la concurrence favorisant la baisse des prix payés par les pouvoirs publics pour leurs achats.

Les évolutions successives du code des marchés publics lors des réformes de 2001, 2004 et 2006 ont consacré la primauté des principes de liberté d'accès, d'égalité de traitement et d'objectivité des procédures. L'acheteur public s'attache à rechercher l'efficacité de l'acte d'achat ce qui nécessite l'existence d'une situation concurrentielle entre offreurs. Seule une ouverture du marché en rapport à ses enjeux garantira une concurrence suffisante entre offreurs potentiels.

Les contraintes relatives aux financements publics et l'intérêt accordé par la société en son ensemble sur ce thème ont permis à la DGCCRF d'être présente lors des procédures de mise en concurrence initiées par les acheteurs publics. La DGCCRF participe ainsi aux commissions d'appels d'offres des pouvoirs adjudicateurs. La présence d'un agent de l'autorité nationale de concurrence aux côtés de l'acheteur public et des services du pouvoir adjudicateur minimise les conséquences des éventuels comportements collusifs.

2.1 Les procédures d'appels d'offres ciblées en fonction des enjeux concurrentiels

Le nombre de contrats publics conclus par les pouvoirs adjudicateurs impose une sélection des dossiers qui seront suivis par les agents de la DGCCRF. Un ciblage selon l'enjeu concurrentiel est ainsi réalisé chaque année par les directions territoriales. Cette sélection s'opère généralement par le choix d'un secteur d'activité où les investissements publics s'annoncent comme relativement importants ou lorsque des risques de dysfonctionnement de la concurrence ont été identifiés. Les participations aux commissions d'appels d'offres sont arrêtées à partir de ce ciblage. C'est ainsi qu'en 2006, les agents de la DGCCRF ont participé à 11 000 commissions d'appel d'offres.

2.2 La mise en échec des comportements anticoncurrentiels

La recherche de pratiques anticoncurrentielles dès le stade de la remise de l'offre permet de développer une stratégie destinée à faire échec aux intentions des entreprises soupçonnées d'être en entente. Cette action est particulièrement appropriée lorsqu'il est constaté qu'à l'issue de l'appel à la concurrence, le nombre de candidats est particulièrement faible et que le niveau des offres proposées est supérieur aux estimations des services acheteurs. La concurrence espérée n'étant pas au rendez-vous, l'agent de la DGCCRF intervient si nécessaire afin d'inciter l'acheteur public à relancer la consultation selon des modalités appropriées à l'état de l'offre constatée sur le marché. Un allotissement du marché, la modification du cahier des charges permettront bien souvent au pouvoir adjudicateur d'élargir la concurrence à de nouveaux offreurs afin d'obtenir un prix de marché plus compétitif.

La détection d'indices de pratiques anticoncurrentielles et leur traitement amène normalement une analyse du jeu de la concurrence par l'autorité nationale de la concurrence qui pourra sanctionner les manquements à la règle. Il existe également une procédure alternative, accélérée, qui débouchera le cas échéant par l'envoi d'un rappel de réglementation aux entreprises en cause. Dans la mesure où lors de la prise de connaissance des offres, des signes apparents de concertation sont relevés, que le marché en cause est de portée limitée et que l'appel d'offres n'est pas attribué, la DGCCRF peut en accord avec l'acheteur public intervenir immédiatement auprès des entreprises ayant participé à la consultation. Si des éléments étayant l'hypothèse de concertation sont recueillis lors des interventions, alors les entreprises en cause feront l'objet d'un rappel à la règle. La rapidité de cette procédure permet de sensibiliser les entreprises en les mettant en garde contre les conséquences de leurs actes et incite le pouvoir adjudicateur à donner toute son importance à l'existence d'une concurrence effective entre offreurs lors de l'acte d'achat.

3. La coopération avec les pouvoirs adjudicateurs

La DGCCRF dispose d'un réseau de 150 agents spécialisés répartis dans les directions territoriales qui sont plus particulièrement en charge de la mission concurrence dans la commande publique. A ce titre, ces agents qui sont au contact quotidien des acheteurs publics ont en charge la détection d'indices de pratiques anticoncurrentielles.

3.1 Le développement d'une relation d'intérêt partagé avec les acheteurs publics

Au fil des réformes du code des marchés publics, l'acheteur public s'est vu consentir une souplesse plus grande dans ses procédures d'achat. La fonction achat s'est professionnalisée au bénéfice d'une plus grande efficacité. Accompagnant ce mouvement, le code des marchés publics de 2004 a supprimé la convocation obligatoire des agents de la DGCCRF aux commissions d'ouverture de plis et d'attribution des marchés pour les collectivités locales et l'a remplacé par une simple invitation.

Malgré ce changement, les collectivités locales ont continué à informer régulièrement les services des directions territoriales de la DGCCRF et ont adressé en 2006 près de 100 000 invitations. Une nouvelle relation entre acheteurs publics et la DGCCRF s'est développée: l'acheteur public soucieux du bon emploi des deniers publics qui lui sont confiés recherche l'aide d'un expert dans le domaine de la concurrence. De son côté, la DGCCRF accède directement aux renseignements que peut détenir tout acheteur sur le jeu de la concurrence mis en œuvre par les entreprises qu'il a sollicitées.

Un nouveau regard est porté sur l'acheteur public et cela concerne aussi bien les collectivités locales que les services acheteurs de l'Etat. Si la convocation obligatoire de la DGCCRF aux commissions d'appel d'offres pour les marchés de l'Etat a été maintenue dans le nouveau code des marchés publics, ses services acheteurs sont également considérés comme acteurs à part entière de la commande publique.

La DGCCRF est membre de la Commission des Marchés Publics de l'Etat. Cette commission est en mesure de conseiller les services de l'Etat acheteurs, dès le stade de la préparation des documents de consultation en vue de la recherche des candidatures, tant sur le choix des procédures d'achat appropriées que sur la définition du besoin. Elle peut, le cas échéant, les accompagner ensuite jusqu'à la conclusion du marché. Le seuil de saisine obligatoire de la commission est de 6 M d'euros. Des projets de marchés de montants inférieurs peuvent également être soumis pour examen à la CMPE sur démarche volontaire du service acheteur. Le rôle de la DGCCRF au sein de la CMPE est d'apprécier si les offreurs potentiels pourront effectivement participer s'ils le désirent à la mise en concurrence.

La responsabilisation de l'acheteur public, l'affirmation du rôle du pouvoir adjudicateur en tant qu'acteur du marché et la présence à ses côtés de la DGCCRF favorisent la diffusion de la culture de la concurrence dans l'achat public. Des actions de communication à destination des acheteurs publics sont réalisées par la DGCCRF sur ce thème à l'occasion de colloques ou lors de publications dans des revues spécialisées. Le bon fonctionnement de la concurrence dans la commande publique devient ainsi une priorité de l'acheteur public.

3.2 Le pouvoir adjudicateur directement impliqué par l'enjeu concurrentiel dans les marchés publics.

Une décision de justice a rappelé aux pouvoirs adjudicateurs que leur responsabilité pouvait être engagée à l'égard d'entreprises s'estimant victimes de comportements anticoncurrentiels. L'acheteur public doit en effet choisir le cocontractant du pouvoir adjudicateur à l'issue d'une procédure permettant une mise en concurrence efficace. Dans tous les cas où l'acheteur public est en mesure d'appréhender la manifestation flagrante de pratiques anticoncurrentielles, il doit s'abstenir de conclure le marché avec la ou les entreprises à l'origine de ces pratiques.

Le tribunal administratif de Bastia[2], le 6 février 2003, a annulé un marché au motif que la collectivité locale l'avait attribué à une société alors que son offre permettait d'établir qu'elle portait atteinte au libre jeu de la concurrence et que la société requérante avait informé préalablement l'acheteur public de l'existence de cette entente illicite. La société requérante qui avait une chance sérieuse d'emporter le marché s'est vue attribuer une indemnisation en réparation du manque à gagner résultant de la décision illégale.

Cette décision renforce l'importance du rôle de conseil du représentant de la DGCCRF qui participe aux travaux des commissions d'appels d'offres. Ce dernier a pour mission d'agir en vue de prévenir, de rechercher et de poursuivre les pratiques anticoncurrentielles mises en œuvre par les entreprises à l'occasion des appels d'offres de la commande publique.

L'implication des pouvoirs adjudicateurs dans l'effectivité de la concurrence dans les marchés publics pourrait également être développée à l'avenir si le recours au juge civil était systématiquement opéré à l'issue des condamnations de pratiques anticoncurrentielles relevées dans la commande publique. Les pratiques concertées dans la commande publique ont comme conséquence de majorer artificiellement le prix du marché. Les condamnations prononcées à l'issue des procédures d'infraction n'ont pas pour objet de dédommager les pouvoirs adjudicateurs victimes de ces pratiques. La majoration du prix illicite communément constatée dans les différentes affaires d'entente dans les marchés publics peut être comprise entre 10 % et 30 %[3]. L'allocation par le juge civil de dommages et intérêts en rapport avec les sommes en jeu permettrait assurément aux pouvoirs adjudicateurs de porter un regard intéressé sur le jeu de la concurrence dans la commande publique et ses conséquences. La DGCCRF souhaite inciter et accompagner les pouvoirs adjudicateurs victimes de ces pratiques qui pourront entreprendre les démarches utiles devant le juge du tribunal administratif

4 Les techniques de détection des pratiques anticoncurrentielles

La présence au quotidien des agents de la DGCCRF auprès des acheteurs publics afin de détecter les comportements anticoncurrentiels a permis l'élaboration d'une technique d'analyse des offres des entreprises facilitant l'analyse concurrentielle. A partir des informations collectées lors de la présence aux commissions d'appel d'offres, de l'étude des indices de pratiques anticoncurrentielles relevés et du rapprochement avec les rapports d'enquêtes établissant les infractions, une méthode de détection d'indices a été établie.

Une difficulté est apparue concernant l'appréciation de l'incidence sur la concurrence de la présence de groupements d'entreprises lors des appels à la concurrence. La liberté d'association pour les entreprises rend le groupement par nature licite au regard des règles de concurrence: la complémentarité technique des entreprises permet à l'acheteur de bénéficier lors d'offres réalisées en groupement de solutions techniques

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2 Le tribunal administratif de Bastia a sanctionné la dévolution du marché alors que l'attributaire avait remis des offres distinctes avec deux autres sociétés du même groupe, que les trois offres avaient été rédigées par la même main et que les offres des deux autres sociétés étaient manifestement surévaluées afin de favoriser la proposition de l'attributaire en rendant son offre attractive à l'égard de celles de ses prétendus concurrents.

3 Dans une affaire récente, l'enquête a révélé qu'une pratique mise en œuvre par un syndicat professionnel visant à dissuader ses membres d'octroyer des remises lors des réponses aux appels d'offres des hôpitaux pour la fourniture d'orthoprothèses pouvait avoir pour conséquence un renchérissement du prix marché compris entre 10 et 30 % par rapport à des situations où la concurrence avait joué.

mieux adaptées à ses besoins. Cependant les groupements peuvent également constituer le support de pratiques anticoncurrentielles en asséchant artificiellement le nombre d'offreurs potentiels sur le marché.

Le caractère anticoncurrentiel présumé de la constitution d'un groupement peut résulter d'un cumul d'observations relatif à une réunion d'entreprises en nombre trop important par rapport au marché, à la capacité de chacun des membres du groupement à réaliser des marchés d'un montant nettement supérieur, à la réunion exclusive d'entreprises "leader" du secteur au détriment des entreprises nouvelles et enfin à l'absence de complémentarité entre les membres du groupement. Ces conditions réunies, l'enquête pourra alors être entreprise afin de vérifier l'hypothèse du groupement anticoncurrentiel.

Le développement à terme d'une base informatisée de données nationales permettant d'enregistrer le jeu concurrentiel de chaque candidat participant à une mise en concurrence facilitera la tâche de l'agent de la DGCCRF. Disposant d'indications concernant le positionnement concurrentiel habituel de l'entreprise en rapport également avec les estimations des services acheteurs, l'enquêteur qui prendra connaissance de l'offre de l'entreprise lors de l'ouverture des plis pourra plus facilement estimer s'il est en présence d'un comportement artificiel.

En 2006, les agents de la DGCCRF ont recueillis 219 indices de pratiques anticoncurrentielles dans le domaine de la commande publique. Ces renseignements ont été collectés pour la plupart à la suite de l'observation et de l'analyse des offres des entreprises ayant participé à des appels à la concurrence. A ce stade, les éléments ont été recueillis uniquement de manière périphérique, c'est à dire sans intervention directe dans les entreprises soupçonnées d'avoir participé à la pratique anticoncurrentielle. Bien souvent l'échange avec l'acheteur public permet d'étayer le soupçon initial de l'enquêteur; une recherche historique sur les résultats de marchés antérieurs ou la communication de renseignements parfois considérés comme anodins par l'acheteur public permettront de corroborer les premières hypothèses.

Le positionnement de la DGCCRF aux côtés des pouvoirs adjudicateurs et la possibilité d'intervenir rapidement dès que des signes de concertation sont relevés sur un marché contribuent à la diffusion d'une culture de la concurrence auprès de l'ensemble des acteurs de l'achat public.

FRANCE

(CONSEIL DE LA CONCURRENCE)

1. Introduction

En France, la consommation des administrations et leurs investissements en biens et services représente plus du quart du produit intérieur brut. S'il est difficile de connaître quelle part exacte de ces dépenses donne lieu à une commande publique après mise en œuvre d'une procédure de passation incluant une mise en concurrence des candidats, il est patent que cette part est importante et croissante du fait de l'externalisation de certains services publics, dans des domaines comme l'eau, les transports, la propreté, et du fait de l'ouverture à la concurrence des anciens monopoles publics. En outre, les obligations de mise en concurrence s'étendent, notamment sous l'effet de la mise en œuvre des directives européennes. Il en résulte que les préoccupations de concurrence prennent une place croissante dans l'organisation de la commande publique.

Ces préoccupations de concurrence visent deux objectifs. D'abord et de façon directe, la mise en concurrence des offreurs permet de renforcer l'efficacité de l'action publique en optimisant le rapport qualité-prix de ses achats: quand elle est effective, la concurrence fait, toutes choses égales, baisser les prix en faveur de la demande. Mais en second lieu, en raison de la dimension macroéconomique atteinte par l'ensemble des achats publics et de la grande diversité des secteurs concernés, la plus grande mise en concurrence des offreurs modifie significativement l'intensité de la régulation concurrentielle de l'économie dans son ensemble. Du côté de l'offre, plus de concurrence sélectionne les plus efficaces et améliore la performance économique générale. Or, en France rappelons-le, plus du quart du produit intérieur brut est potentiellement concerné.

Cet état de fait explique l'attention soutenue que les autorités de concurrence portent au jeu des acteurs qui concourent à la réalisation des commandes publiques. Cette attention se porte à trois niveaux: l'adoption des règles du jeu ; le contrôle du fonctionnement de ces règles, lors du jeu ; la sanction du jeu lorsque des pratiques déviantes sont établies. Le texte présenté par la DGCCRF traitant très complètement des deux premiers de ces points, seul le troisième est abordé ici.

Le simple bilan de l'activité répressive du Conseil de la concurrence montre que ces pratiques déviantes perdurent (1) ; leur répression se heurte en effet à la difficulté d'en établir la preuve (2) ; mais une conjonction plus étroite des efforts développés par les autorités de concurrence et par les acheteurs publics responsables est susceptible d'améliorer la situation concurrentielle de ces marchés en augmentant leur capacité à détecter les ententes et à en rapporter la preuve. En conclusion, on avance que cette conjonction nécessite une meilleure prise en compte, dans la règle du jeu concurrentiel, des objectifs légitimes des autorités publiques non réductibles à la seule recherche de la plus grande concurrence possible.

2. Bilan

La DGCCRF indique recueillir, annuellement, environ deux cents indices de pratiques anticoncurrentielles dans le domaine de la commande publique : essentiellement des ententes visant à répartir les marchés. Les investigations menées conduisent à rassembler suffisamment de preuves pour que

le ministre en saisisse le conseil de la concurrence environ 15 fois par an. Toujours annuellement et après l'examen contradictoire des preuves rassemblées par l'instruction, le conseil décide d'infliger des sanctions pécuniaires dans environ la moitié des cas, ce qui représente environ 40 % du total des sanctions infligées par le conseil, toutes pratiques anticoncurrentielles confondues. Ces simples chiffres dénotent l'importance du problème: près de la moitié de l'activité répressive du conseil est consacrée à la sanction des comportements anticoncurrentiels sur les marchés publics. Cette situation perdure, ce qui montre que les sanctions restent trop faibles pour être dissuasives, ou que la probabilité d'y échapper reste trop élevée, ce qui revient au même mais n'appelle pas les mêmes remèdes. Toutes les administrations publiques sont concernées: administration centrale de l'Etat et grandes entreprises publiques soumises à sa tutelle; collectivités territoriales de toutes tailles; administrations de sécurité sociale, hôpitaux notamment. Par secteurs, comme partout dans le monde, ce sont les marchés relatifs à la construction et aux travaux publics qui sont les plus affectés. Que cette situation ne soit pas propre à la France constitue une raison supplémentaire pour s'en préoccuper et s'efforcer de l'améliorer.

Mais les moyens à la disposition du juge de la concurrence sont ceux du droit commun : injonctions et sanctions pécuniaires motivées, dès lors que l'infraction est établie. Or, en matière de commande publique, il est souvent difficile de réunir les preuves des infractions commises.

3. La difficulté de la preuve

Qu'il s'agisse de l'achat ponctuel de biens ou de services, de la réalisation de travaux ou de l'acquisition continue d'une gamme de services complexes dans le cadre d'une délégation de service public, l'achat public, dès qu'il est d'importance, implique la mise en œuvre d'une procédure de passation avec mise en concurrence d'entreprises. L'analyse des cas soumis au conseil révèle trois types de comportements à objet ou effet anticoncurrentiel.

En premier lieu, lorsque les marchés sont répétitifs, la règle de comportement tacite « chacun reste chez soi » permet à un groupe d'entreprises de perpétuer une répartition initiale des marchés sans qu'il leur soit besoin de mettre en œuvre une concertation explicite à chaque nouvelle mise en concurrence : seule l'entreprise sortante titulaire du marché précédent fait une offre acceptable pour le maître d'ouvrage, toutes les autres n'offrant que des prix délibérément gonflés. Ni la jurisprudence nationale ni la jurisprudence communautaire ne condamne le refus tacite de se faire concurrence. Ainsi voit-on, de procédures en procédures, les mêmes entreprises remporter chacune « son » marché, parfois sur de très longues périodes, sans que le juge de la concurrence, et l'acheteur public, n'y puissent mais.

En deuxième lieu, force est de constater qu'un léger échange d'informations entre les entreprises candidates suffit à gravement perturber la loyauté d'une mise en concurrence lorsque le marché ne présente pas de complexité particulière, car il suffit souvent de peu pour réduire significativement l'incertitude où chaque entreprise devrait être maintenue relativement aux offres des autres pour que le risque de perdre la compétition contraigne effectivement ses prix. Or les échanges verbaux ou téléphoniques ne laissent pas de traces, de sorte que l'on peut craindre que la plupart des ententes utilisant ces moyens restent non détectées et, en tous cas, improuvables.

Restent, en troisième lieu, les marchés complexes où l'entente n'est pas réalisable sans une concertation organisée nécessitant réunions et arbitrages, ce qui laisse des traces. Ces traces n'étant pas toujours, et assez vite, bien effacées dans toutes les entreprises participantes, ce sont les ententes de ce type que le conseil condamne lorsque les traces subsistantes lui permettent de rassembler le faisceau d'indices *graves précis et concordants* que la jurisprudence accepte pour preuve dès lors que la preuve formelle fait, comme le plus souvent, défaut. Ces ententes concernent souvent, malheureusement pour leur valeur d'exemple, de grands groupes et présentent parfois un caractère systématique permettant de les assimiler à un cartel.

Dans ces trois cas, la question de la preuve contraint l'efficacité de l'action des autorités de concurrence dans leurs efforts pour améliorer la régulation concurrentielle des marchés publics.

Dans le premier cas, il faudrait remonter à la concertation initiale de répartition des marchés, seule pratique éventuellement condamnable, ce que les simples règles de prescription interdisent.

Dans le deuxième cas, preuves, ou même indices, manquent en fait de sorte que seuls les effets de l'entente sont observables. Peut-on cependant décider qu'une concertation pour répartir des marchés publics est établie dès lors que les propositions faites sont telles que seule une concertation préalable est raisonnablement susceptible d'avoir permis d'aboutir au résultat observé, alors qu'on ne dispose ni de preuves ni même d'indices de cette concertation ? La jurisprudence ne retient pas la pertinence de cette « preuve intellectuelle » si elle demeure seule, sans l'appui supplémentaire d'indices matériels de la concertation.

Un exemple de cette situation – observée – se rencontre lorsque un certain nombre de lots sont répartis par appel d'offres entre un nombre égal d'entreprises et que le résultat des offres montre que chaque entreprise ne s'est réellement intéressée qu'à un seul lot, en offrant pour tous les lots mais en ne faisant une offre compétitive que pour un seul lot, et que chaque lot n'a été ainsi choisi que par une seule entreprise. Une formule mathématique simple permet de montrer que la probabilité pour que chaque lot ne soit choisi que par une seule entreprise ne résulte que du hasard, et non d'une concertation, devient infime quand le nombre des lots s'accroît. Pourtant, même dans ce cas, la « preuve intellectuelle » est rejetée en cas de recours.

Faut-il alors, surtout dans le troisième cas, ne plus compter que sur la chance pour pouvoir se saisir de preuves oubliées, ayant échappé à la destruction opérée par l'une de ces officines spécialisées dans le ''nettoyage'', en particulier des disques durs ? Il existe heureusement d'autres pistes susceptibles de renforcer les capacités à détecter et prouver les ententes dans le domaine des marchés publics.

Beaucoup de ces marchés sont conclus par de petites collectivités territoriales avec des entreprises appartenant à de grands groupes de taille nationale voire internationale. Par exemple, chacun des 95 départements métropolitains passe un marché particulier, pour un bien ou un service donné, mais les mêmes trois ou quatre grandes entreprises répondent à tous ces marchés par l'intermédiaire de leurs filiales locales. Détecter une entente et en rechercher les preuves serait plus aisé si l'on pouvait examiner simultanément le plus grand nombre de ces marchés, et non séparément quelques uns d'entre eux, afin d'opérer des comparaisons pour détecter les anomalies et rechercher les éventuelles compensations que les entreprises participant à l'entente s'accordent les unes aux autres et qui ont peu de chance d'être mises en œuvre, séparément, marché par marché. C'est pourquoi sont spécialement prometteurs les projets de rassemblement de ce type d'information, élaborés par la DGCCRF.

4. Joindre les efforts de toutes les autorités publiques

Les pratiques d'ententes dans le domaine des marchés publics détériorent l'efficacité de la dépense publique et amoindrissent la compétitivité globale de l'économie en raison du poids macro-économique important de l'ensemble de la commande publique. Ces pratiques ont la force des vieilles (et mauvaises) habitudes, et comme elles sont faciles à mettre en œuvre, malaisées à détecter et plus difficiles encore à prouver, leur éradication commande que ces deux autorités publiques que sont acheteurs publics et autorités de concurrence réfléchissent ensemble aux meilleures façons de les combattre.

Abaisser les standards de preuves serait contraire à l'équité. Renforcer le poids des sanctions est, sans nul doute, envisageable, mais elles ont été alourdies déjà sans que leur pouvoir dissuasif apparaisse renforcé. Reste donc à envisager la troisième voie: celle consistant à augmenter la probabilité que les

tricheurs soient pris. Déjà, la procédure de clémence a permis aux autorités de concurrence d'avancer dans cette voie. Mais d'autres dispositions sont à étudier qui dépendent, cette fois des acheteurs publics et de la façon dont ils composent les détails des procédures de passation des marchés.

Lorsque l'absence de concurrence résulte d'un parallélisme de comportement consistant à ce que chaque entreprise conserve son marché sans chercher à conquérir celui des autres, premier type de cas évoqué plus haut, une parade simple et à la portée des acheteurs publics consiste à rompre la routine en modifiant la taille, le nombre, la structure etc. des lots. La règle tacite « chacun chez soi » ne permet plus, alors, de perpétuer la répartition initiale des marchés et les entreprises sont placées au pied du mur : soit accepter d'entrer en concurrence, ce qui est le but poursuivi, soit prendre le risque de s'engager dans une entente explicite.

Dans les cas du deuxième type évoqué, la rupture dans la composition des lots rend nécessaire l'échange d'un plus grand nombre d'informations pour parvenir à une répartition : l'entente devient plus coûteuse et surtout plus risquée.

Enfin dans les cas du troisième type évoqué, l'expérience du conseil conduit à conclure que les ruptures, délibérément provoquées par l'acheteur public concerné, dans la continuité de la définition des lots qu'il propose constituent, pour les entreprises qui s'entendent, une source de conflits dès lors que la répartition des marchés dont elles avaient l'habitude est perturbée. Or les conflits au sein d'une entente forment des circonstances très favorables à l'action des autorités de concurrence.

Pour toutes ces raisons, il apparaît hautement utile de persuader aux acheteurs publics que l'effort est payant qui consiste à rompre la routine de la passation de marchés relatifs à des lots immuables, pour augmenter la concurrence et bénéficier des baisses de prix que cette augmentation apporte.

L'expérience du conseil conduit aussi à faire une autre recommandation aux acheteurs publics. Il est fréquent que des entreprises se groupent pour répondre, par exemple, à un appel d'offres, ou fassent appel à la sous-traitance pour exécuter le marché qu'elles ont remporté. Ces pratiques sont proconcurrentielles dans la mesure où, diminuant le risque entrepreneurial, elles augmentent le nombre des entreprises *a priori* en état de concourir. Mais elles deviennent anticoncurrentielles lorsque ces groupements concernent les entreprises qui étaient les mieux à même de se faire concurrence, ou qu'ils sont organisés de telle sorte qu'ils facilitent les échanges d'informations entre entreprises concurrentes, ou encore quand la sous-traitance est l'outil final de répartition des marchés selon les parts convenues. Les autorités de concurrence ont le plus grand mal, *ex post*, à prouver le caractère anti-concurrentiel d'un groupement ou d'une sous-traitance. En conséquence, il serait opportun que l'acheteur public ait latitude de refuser, *ex ante*, groupements ou sous-traitances dès lors qu'existe une présomption qu'ils dissimulent des pratiques répréhensibles.

De façon générale, il serait utile de donner aux acheteurs publics, par exemple par des réunions de sensibilisation ou des stages de formation spécifique, une information sur les comportements anticoncurrentiels les plus fréquents et sur les indices qui permettent de les détecter. Cela pourrait faciliter la prévention des ententes.

Au total, les autorités passant commandes publiques ont pouvoir de fortement compliquer la tâche des entreprises désireuses de former des ententes pour contourner les règles des marchés publics : une nouvelle chance d'améliorer la loyauté des marchés résulterait d'une meilleure coordination de leur action avec celle des autorités de concurrence.

5. Conclusion

En conclusion, mieux associer les responsables de marchés à l'action des autorités de concurrence dans le domaine de la commande publique demande aussi que ces autorités n'ignorent pas qu'un acheteur public, le plus souvent autorité dirigeante élue d'une collectivité publique ou soumise au contrôle de cette autorité, doit arbitrer entre les avantages que représentent, pour sa collectivité, une forte concurrence porteuse de baisse de prix, et les autres avantages que représente, pour cette même collectivité, le maintien d'activité sur son territoire, grâce à la commande publique. La commande publique entraîne des externalités relevant, par exemple, de l'aménagement du territoire, au sens large. Organiser la commande publique, justement parce qu'elle est publique, ne peut ignorer les externalités qui s'attachent à elle. Ignorer la réalité de ce problème est le plus sur moyen de lui donner une mauvaise solution.

Or il existe des solutions économiquement pertinentes permettant de concilier le maintien de la pression sur les prix que l'aiguillon de la concurrence exerce et certains choix de répartition de l'activité. Ce fait, patent, est reconnu et pris en compte lorsque l'acheteur public organise le dimensionnement des lots qu'il propose à l'offre de telle sorte que même les entreprises de petites tailles (PME) puissent concourir. De même, certaines grandes entreprises qui souhaitent conserver une pluralité de fournisseurs passent leurs marchés au terme d'enchères complexes permettant de sélectionner non un seul gagnant, mais un *gagnant privilégié* en termes de volumes par exemple et des *gagnants annexes*, moins bien traités mais cependant non totalement éliminés. Cette façon de faire maintient une pression concurrentielle sur les entreprises concernées, tout en évitant le risque de faillite que subiraient des perdants trop fragiles.

Un large champ s'ouvre à la réflexion des autorités de concurrence qui voudraient avancer dans cette voie en pleine coopération avec les responsables en charge de la commande publique.

GERMANY

1. Principles of German Public Procurement Law

The German public procurement law traditionally focuses primarily on the public sector as the contracting entity by setting clear-cut requirements for the award of public contracts. In this context the prime objective of the rules regulating public procurement is to oblige the contracting entity to conduct purchases based on the principle of economic efficiency. A set of principles serve to implement this objective and characterise German public procurement practice: the civil law principle, the competition and transparency principle, the principle of long-term efficiency and the principle of decentralised procurement.

Above all the competition and transparency principle and the principle of decentralised procurement also contribute to maintaining competitive structures in the procurement markets. Under the principles of public procurement law anti-competitive and unfair practices are thus to be combated. Furthermore public procurement law provisions include rules under which tenders that involve inadmissible anti-competitive agreements will be excluded from the award procedure.

It is the responsibility of the public procurement tribunals to monitor compliance with these principles. The three public procurement tribunals of the Federation[1] are set up at the Bundeskartellamt. They are responsible for reviewing, upon request, whether public contracting entities have met their obligations in the award procedure.[2] The tribunals are entitled to take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected.

The organisational structure of the public procurement tribunals is comparable to that of a court. The tribunals do not receive any political instructions and their decisions are made by a collegiate body consisting of a chairman and two associate members. In comparison with other jurisdictions, this is a very specific feature of the German system, i.e. the fact that first-instance reviews of a decision under public procurement law are carried out by independent tribunals, and not by the contracting entity itself. This guarantees a high degree of transparency in the review of public procurement decisions.

In exercising their tasks the public procurement tribunals have the same investigatory powers as the Bundeskartellamt itself. They thus have very extensive powers to obtain information and are even entitled to search the business premises of companies concerned. In practice, however, in cases of suspected collusive tendering, the Bundeskartellamt and not the public procurement tribunals takes action and follows up the suspicion, conducting the respective searches, etc., as collusive tendering is punished as a violation of general competition law.

1 Apart from these there are also public procurement tribunals at German *Länder* level. However, their number varies greatly across the different *Länder*.

2 Review by the public procurement tribunals presupposes that certain thresholds are met. These thresholds, which are based on directives of the European Union, are, at present, as follows: 130.000 € as regards public service and supply contracts awarded by the highest administrative authorities of the Federal Republic of Germany, 200.000 € as regards such contracts awarded by other public entities and 5 Mio. € as regards public works contracts.

Thus, in practice the public procurement tribunals focus on the enforcement of provisions under public procurement law, and the Bundeskartellamt on the enforcement of general competition law, particularly cartel law.

2. The prosecution of collusive tendering under competition and criminal law

Collusive tendering is prohibited by the ban on cartels according to Art 81 EC Treaty and Section 1 of the Act against Restraints of Competition (ARC). In the past years the Bundeskartellamt has fined several cartels which operated in bidding markets (e.g. removal services, ready-mixed conrete, firework devices, etc.).

A particular characteristic of bid rigging is that it is the only cartel agreement in Germany which is also prosecuted as a criminal offence (Section 298 of the Criminal Code).[3] In this case the public prosecutor's office is responsible for prosecuting the individuals involved, and the Bundeskartellamt prosecutes the companies.

The Bundeskartellamt's investigation powers and techniques in the process of uncovering collusive tendering are identical with those in other cartel proceedings. As mentioned before, these include extensive investigation powers such as e.g. the right to conduct searches. In uncovering cartel agreements, and thus also collusive tendering, the Bundeskartellamt also benefits from its in-depth market knowledge in all industry sectors which results from the sector-specific structure of its Decision Divisions. The various markets are thus continually and carefully monitored. And finally the leniency programme is also applicable in bid rigging cases. In Germany this has already contributed to uncovering cartels in a large number of proceedings.

3. Design of public procurement proceedings to generate optimal competition

Although, as a rule, it is the public procurement tribunals' task to enforce the provisions relating to the award of public contracts, there are sometimes cases in which the Bundeskartellamt sets very specific conditions for award proceedings in order to create or maintain competition.

3.1 Bidding consortia

To mention is the case law which specifies the conditions under which bidders are allowed to submit a joint bid in an auction. Such bidding consortia can be found in virtually all auction markets but are most frequent in the construction industry. A bidding consortium between two or more significant competitors typically violates the ban on cartels if both companies would have submitted a bid absent the agreement to bid jointly. Setting up a bidding consortium is therefore a cartel agreement if bidding separately would

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3 Section 298 of the German Criminal Code (StGB): "Section 298 Agreements in Restriction of Competition upon Invitations to Tender

(1) Whoever, upon an invitation to tender in relation to goods or commercial services, makes an offer based on an unlawful agreement which has as its aim to cause the organizer to accept a particular offer, shall be punished with imprisonment for not more than five years or a fine.

(2) The private awarding of a contract after previous participation in a competition shall be the equivalent of an invitation to tender within the meaning of subsection (1).

(3) Whoever voluntarily prevents the organizer from accepting the offer or from providing his service, shall not be punished under subsection (1), also in conjunction with subsection (2). If the offer is not accepted or the service of the organizer not provided due in no part to the contribution of the perpetrator, then he will be exempt from punishment if he voluntarily and earnestly makes efforts to prevent the acceptance of the offer or the providing of the service."

have been a viable and rational business decision and if the agreement appreciably restricts competition. Bidding consortia can also fall under the scope of German merger control.

Case example: Prohibition of joint participation by Rethmann and Tönsmeier in GfA Köthen[4]

Rethmann, Tönsmeier and the public-owned GfA Köthen were active in various local disposal markets, especially in the market for the collection and transport of residual waste, waste paper and other types of waste. In a tender to privatise GfA Köthen, Rethmann and Tönsmeier submitted a joint bid. In November 2004, the Bundeskartellamt prohibited the joint participation of Rethmann and Tönsmeier in GfA Köthen. Both the formation of a bidding syndicate by Rethmann and Tönsmeier and the formation of a joint venture constituted illegal anti-competitive agreements within the meaning of the ban on cartels. As a result of the formation of the bidding syndicate only one joint bid was submitted in the tender to privatise GfA Köthen instead of two independent bids. Rethmann, the second-largest German waste disposal company, and Tönsmeier, a well-established medium-sized enterprise, would both have been able to submit an independent bid. According to the Bundeskartellamt's evaluation Rethmann and Tönsmeier would also have coordinated their competitive behaviour in the relevant geographic market after the merger as a consequence of the formation of the cooperative joint venture. Furthermore, the merger would have strengthened a dominant oligopoly in the markets for the collection and transport of residual waste and waster paper in a geographic area of approx. 100 km surrounding the District of Köthen.

3.2 Auctioning obligations as a remedy in antitrust enforcement and merger control

In some cases the obligation to conduct an auctioning process can be an effective remedy in antitrust enforcement. In the Bundeskartellamt's practice there are some relevant cases of this, both in abuse control and merger control. Generally speaking, this kind of remedy can be effective if it serves to open up markets and thus promotes competition on a long-term basis. Within the context of German merger control, remedies imposed in a clearance decision must not be aimed at subjecting the merging companies to a permanent control of conduct. The Bundeskartellamt can thus only clear a merger subject to structure-related remedies. These may be structural remedies in the narrower sense (e.g. selling parts of the company) or remedies aimed at opening up markets by reducing barriers to entry. The latter may include auctioning obligations. Two relevant cases are reported below.

Case example: DSD cost savings through auctions[5]

Under the German Packaging Ordinance companies are obliged to take back and dispose of the packaging which they have brought into circulation. The end consumers do not pay directly for the waste disposal but rather the disposal costs are borne by the company circulating the packaging. The company circulating the packaging discharges its obligation to take back and dispose of the packaging by contracting DSD (or other companies) to do this. At the time when the take-back obligations were introduced, the German industry - backed and supported by politics - set up the company DSD ("Dual System Germany") to fulfil the obligations. The result was a monopolist with a cartel-like ownership structure. Its shareholders consisted of companies from the waste management sector and large companies from trade and industry. The waste management companies were at the same time procurers of DSD as they collected and sorted the packaging waste on DSD's behalf. From the early nineties when the company was set up, DSD enjoyed a "quasi-monopoly" in the market for taking back sales packaging. The Bundeskartellamt initially tolerated

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4 The full text of the Bundeskartellamt decision of 16 November 2004 is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B10-74-04.pdf

5 For more details see press release of 12 October 2004 which is available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_10_12.shtml

DSD's competition law infringements, but made it clear that tolerance would only be temporary. Due to its market power and interlocking interests, DSD's incentives to reduce its costs were weak.

In order to partially allay the competition concerns of the Bundeskartellamt, DSD decided in early 2003 to implement for the first time a transparent and non-discriminatory system of awarding service contracts to the waste disposal companies.[6] The first call for tenders did not bring about any real competition in bidding for many contract areas, with the result that in 2004 DSD had to put out a second invitation for tender for almost half of all its contract areas. In this second invitation for tender DSD, at the Bundeskartellamt's recommendation, had considerably improved the basic conditions for competition, above all for small and medium-size disposal companies, which thus had an increased chance of success. As a result, from 2005 the costs of collecting and sorting, in comparison to the charges paid up to 2003, were reduced by approx. 200 mio. Euro, which corresponded to a reduction of more than 20 per cent.

Case example: Joint venture clearance subject to auctioning conditions[7]

In December 2003, the Bundeskartellamt cleared the planned project of DB Regio AG (DB Regio) and üstra Hannoversche Verkehrsbetriebe AG (üstra), to combine their local public transport activities in the greater Hanover area in a joint venture. Clearance was made, however, under the dissolving condition that contracts for local public transport services in the Hanover region be awarded through competitive procedures.

DB Regio provides all local passenger rail services in the relevant Hanover market area on the basis of a transport contract with the Hanover regional authorities, the duration of which is limited to the end of 2006. In addition it is also active in local public road transport in the greater Hanover area via its regional bus subsidiaries. üstra is by far the leading municipal transport company in the greater Hanover area. On account of a considerable overlap in their areas of operation their combined market shares reach a level of well above 80 per cent in the Hanover market area.

The auctioning conditions ensure that the market is opened up gradually. Accordingly, as soon as the current contracts expire, at least 30 per cent of DB Regio's local passenger rail services and at least 50 per cent of üstra's bus transport services have to be awarded in a Europe-wide award procedure with effect from 1 January 2007 and 1 January 2010, respectively. By 1 January 2013 at the latest the Hanover regional authorities, as the contracting entity for local public transport, have to award all bus transport services provided by üstra and all local passenger rail services provided by DB Regio in the region in a Europe-wide competitive procedure.

4. Education and cooperation with procurement officials

The Public Procurement Tribunals do not provide any specific training for the contracting entities. However, within the framework of outside scientific activities, their staff members give numerous presentations at selected meetings, at national and supranational level, where they specifically introduce the German system of review procedures applicable to the award of public contracts. At these events the tenderers' reliability and the issue of inadmissible anti-competitive agreements are also often discussed. Relevant information on procurement law are available on the Bundeskartellamt's website (www.bundeskartellamt.de), e.g. the Information Leaflet on the legal protection available in the field of

[6] It should be noted that this was only one among several actions that DSD had to take. The most significant change DSD had to make was to dissolve its cartel-like ownership structure by the end of 2004.

[7] The full text of the Bundeskartellamt decision of 2 December 2003 is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B9_91_03.pdf

public contracts[8] and the Discussion Paper on the assessment of bidding syndicates in the tendering of local transport services[9].

In the case of malfeasance of procurement officials sanctions under criminal law are possible: under Section 332 (taking a bribe), Section 334 (offering a bribe) and Section 353b (violation of official secrecy and of a special duty of secrecy) of the Criminal Code.

Particularly in the case of malfeasance in the procurement process it has proved to be of advantage that the German public procurement tribunals act as an independent review authority, and that reviews are not carried out by the contracting entities. Irregularities within contracting entities can thus be uncovered and prosecuted more effectively. In 2004, for instance, the Bundeskartellamt initiated criminal proceedings against a procurement official on charges of violation of official secrecy. During the award procedure and an ensuing review procedure a tenderer referred to very detailed internal administrative information (technical details from bids submitted by other tenderers and the contracting entity's calculation of costs). This gave rise to the suspicion that a procurement official had illegally passed on information from the award proceedings to this tenderer. Ultimately, however, the proceedings were discontinued due to lack of sufficient evidence.

8 Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06Informationsblatt__E.pdf.

9 Available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Bietergemeinschaften_PosPapier.pdf.

HUNGARY

Public procurement procedures are regulated by Act CXXIX of 2003. This Act is fully harmonised with the relevant EC directives. It sets general rules on the issue and frames the specific rules on the different types of procedures. As it does not contain specific provisions on bid rigging, undertakings colluding to restrict competition among themselves regarding a particular tender are therefore subject to the general prohibition of restrictive agreements under the Competition Act and the enforcement activity of the competition authority of Hungary, the GVH.

In the previous years the GVH conducted a number of investigations of alleged bid riggings. Based on its own and international experiences the GVH issued a leaflet for procurement officials containing indicators of rigged bids. It plans the adoption of a new, more in depth paper in the near future. The GVH also became active in terms of advocacy along two main lines. One is the defence of the effective applicability of the Competition Act, the other is the advocating of procedural rules that would make the creation of a cartel more difficult. While successful in the first type of its attempts, the recommendations relating to the design of public procurement procedures mainly remained ineffective. The first, unusually high fines imposed on construction cartels raised public awareness on the issue and caused lively political debate and increased legislative activity peaking in the criminalisation of such cartels in 2005. Having regard to the effective deterrence that might derive from private enforcement, the President of the GVH sent letters to the representatives of entities damaged by cartels prosecuted by the GVH raising their attention to their possibility to claim such damages before court.

1. Individual procedures

The GVH closed 20 investigations relating to cartels in public procurement procedures 15 of which ended with prohibition decision and fines. At this moment eight procedures are in process. The procedures mainly related to construction cartels (highways, roads, buildings) and IT services. Often the procedures were not initiated on the basis of information received from procurement officials but were based on direct information on the existence of the cartel deriving from other sources e.g. former employees, information from the police. Therefore the procedures were mostly initiated with dawn raids almost always presenting direct evidence, so the assessment of the design of the procurement procedure or the analysis of possible indicators of illegal collusion was not necessary in the early stages of the investigations. However certain general observations can be made on the basis of experiences.

In many cases the contracting authority reduced the number of bidders with the application of either restricted procedures, or through the exclusion of participants due to formal errors in their offers. It seems that this circumstance highly facilitated the establishment of cartels, or otherwise contributed to an increase of the offered price. Sometimes such a restriction even seemed to be rather questionable. In one case after the first (rigged) tender was dismissed, the work was won in the second round by an undertaking that was considered incapable for the works and was excluded from the first procedure.[1] It also happened, that though the contest organizer preliminarily established that all five participants were able to complete the works, it started negotiations only with three of them, who later actually rigged their bids.[2] In another case

[1] Case Vj-20/2005

[2] Case Vj-28/2003

after the exclusion of four of the five participants, the fifth party was informed before the negotiations that it is the only participant still in competition. Having received that information the final price offer of the fifth undertaking submitted during the negotiation was even higher than the one given in the second, rigged bid after the dismissal of the first procedure.[3]

It seems to be true that the more bidders are present in a tender, the greater the uncertainty about winning. The importance of uncertainty is clearly identifiable in a case where several e-mail messages were sent to a competitor a week before the deadline for the submission of the bids, urging it to express agreement on the cooperation and complaining that there might be problems with its mobile phone as he was unreachable for several attempts.[4] Therefore though with regard to administrative costs it seems acceptable to rank and then restrict the number of suppliers in negotiated or restricted procedures, contracting authorities should also take into account the increased likeliness of cartels in such situations. Setting unnecessarily strict technical requirements for bidders can also be a source of significant competitive harm. However, some restrictions may be necessary, if low-balling bidders (who bid unrealistically low, gambling on a later contract renegotiation, and if this does not happen, letting the deal fail) are to be excluded.

Though it does not belong to the powers of the GVH to discover collusion between the contract organiser and the competing undertakings, it is obliged to report possible violations of the Criminal Code identified during its procedure to the criminal authorities. In a case concerning the procedure for the joint purchase of IT services for a number of universities the GVH established the existence of the cartel and as it considered that an official of the contracting party cooperated with the competitors it submitted a denounce to the public prosecutor. Though first refused, upon a complaint of the GVH against that refusal the investigation of the police was finally initiated.

A recent case also seems to support that in certain cases officials of the contract organiser collude with the undertakings participating in the tender. An investigation of the GVH was closed due to the lack of sufficient evidence on a cartel concerning the purchase of IT services by the Ministry of Defence. This was so because the GVH was not able to collect enough evidence during its dawn raids and the Ministry has – in breach of the Act on Public Procurements – destroyed documents related to the given tender.

2. General guidance for procurement officials

In 2006 the GVH published a leaflet providing guidance for procurement officials. The leaflet presented the legal and economic background as well as major characteristics of cartels in general. It also enumerated a number of formal and substantial circumstances that might indicate that the bids are actually rigged in a given procedure. In its final part the paper presents the main lines of a competition supervision procedure, including the application of leniency policy. The leaflet was mainly based on a Canadian brochure supplemented by the experiences of the GVH.

As formal indicators of a possible collusion the leaflet enumerates:

- a bidder submits a competitor’s bid as well,
- the bids contain the same mistakes, typo,
- the look and appearance of the bids are similar,

[3] Case VJ-74/2005

[4] Case Vj-21/2005

- the same annexes, attestations etc. are missing,
- information is available that the bidders actually met, or negotiated during the period for making the bids,
- a bidder seems to be aware of the content of its competitors' offers.

As substantial indicators the leaflet stipulates:

- bidders indicate the same prices, identical in their details too,
- there is a considerable difference between the lowest and the other bids,
- a new supplier offers a price previously not typical on the market, and the other bidders follow it,
- almost always a given undertaking provides the winning bid, and it invites the competitors as subcontractors,
- bidders name each other as subcontractors in their offers (formally illegal according to the Act on Public Procurements),
- it is revealed that only one of the bidders has actually turned to the upstream suppliers for offers,
- the winner withdraws thereby forcing the contracting entity to choose the second best (likely behaviour in case of "beauty contests" where the colluding parties cannot predict the exact outcome of the procedure),
- the offer of the local competitor contains the same transport costs as that of distant competitors,
- bidders invoke the "industrial price lists" in their offers.

3. Advocacy

The GVH attempted to influence the design of public procedural rules in order to reduce the possibility of collusion. Concerning the Competitive Dialogue Procedure[5] the GVH noted that if conducted in a way that all participants may be present on a single dialogue with the contracting authority, then the procedure can function as a room for exchange of information facilitating collusion in a later stage of the tender. The GVH therefore suggested that competitive dialogue should not be organised in a way that competitors are present together. This opinion of the GVH was not introduced into the Act and now it depends on the will of the competitors whether the discussions are organised separately or together with the other undertakings.

[5] Competitive dialogue procedure is a public procurement procedure where the contracting authority conducts a dialogue with the candidates admitted to that procedure in accordance with the provisions of the Act, with the aim of laying down the specifics concerning the subject matter of the procedure or the type and conditions of the contract within the framework of the requirements set out by the contracting entity, and on the basis of which the candidates chosen are invited to tender.

The GVH also signalled that the possibility to enter into framework agreements[6] up to four years makes the sharing of the market easier. It was suggested, that the maximum time frame should be reduced to two years. This suggestion was not heard either.

It was also recommended that the Act should provide the possibility to contracting authorities to suspend or declare void the procedure and to turn to the GVH, should they suspect that it is affected by a possible collusion among the bidders. In the stage of appeal the Public Procurement Arbitration Committee would be authorised to the application of such measures. Though the Committee does have the power to bring interim measures in certain cases, like the suspicion of the existence of a cartel, no explicit provision on this matter was introduced into the Act.

The GVH submitted a recommendation that a tenderer should not be allowed to submit a joint tender in the same public procurement procedure with another tenderer, and it should not be allowed to participate in that same procedure as a subcontractor proposed to be contracted for a value in excess of ten per cent of the value of the contract. This proposition was endorsed by the Parliament.

A successful advocacy initiative related to an additional sanction of collusion in past procurement procedures. According to the original text the contracting authority was entitled to exclude participants if they were found by the GVH to be members of a cartel in a previous procedure within the last five years. The GVH considered that such a possibility can have a negative effect on willingness to cooperate with the GVH in the framework of leniency policy. Upon its recommendation the Act was amended and only those undertakings can now be excluded from the procedure, which were found to be in breach of competition law and were the subject of a fine. This way undertakings profiting from full leniency are not threatened by the possible exclusion of future proceedings while the additional sanction on the other perpetrators remained effective.

4. Criminalisation

A record fine imposed in a highway construction cartel raised considerable political attention to the problem of cartels in public procurements. Draft legislation was soon submitted qualifying restrictive agreements in public procurements as crimes punishable up to 5 years imprisonment. Though a number of inconsistencies were highlighted by the GVH during the adoption of the new penal provision (e.g. inconsistencies in the notion of undertaking, or agreement used by the Penal Code and the Competition Act), the main advocacy effort was to keep the functionality of the leniency policy unharmed. The original draft did not contain any rules on exemption from criminal liability but due to the intervention of the GVH the law maker introduced a section according to which criminal liability is ceased if a perpetrator informs the authorities about the cartel before it have already got known about it. However a general problem remained that no procedural background was created between criminal and administrative procedures (see to that effect the presentation of Hungary on the February 2007 meeting of WP3 on cooperation with public prosecutors).

In sum the introduction of the new provision rather constituted the criminalisation of public procurement law than that of the competition law.

[6] A framework agreement is an agreement between one or more contracting entities and one or more suppliers, contractors or service providers, the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period.

5. Raising awareness

In line with the efforts of the European Commission the GVH would also like to increase the role of private enforcement in the field of antitrust. Besides making possible the direct initiation of litigation without prior decision of the GVH establishing the cartel, the GVH also insists on the raising of public awareness on the availability of damages claims. Together with other steps related to cartels in general, the President of the GVH sent letters to the entities[7], which as contracting authorities were damaged by public procurement cartels previously discovered and sentenced by the GVH.

The letters relied on and contained as annex the final decisions of the GVH. They called to the attention that damage claims are limited to five years calculated from the date of the actual occurrence of the damage. The letters also emphasised that as the existence of the cartel was established by the GVH and as its decision is binding on civil courts only the amount of the damage would form subject of the litigation. The GVH also offered professional assistance in case of need.

Though sent in March, up till now only one of the former contracting authorities signalled to the GVH that it intends to start litigation for damages. It also asked for legal assistance from the GVH.

Another initiative of the President of the GVH for raising awareness was sending a letter the Prime Minister. The document contained a number of suggestions partly of advocacy nature. One suggestion related to bribery. As in some cases it was only suspected, while in other cases it was rather clear for the GVH that an official of the contracting authority colluded with the competitors, the GVH recommended to strengthen the supervision of officials organising the tenders not only in respect of legality but also from the point of view of rationality and efficiency, thereby ensuring that an open and efficient competition serving public interest is actually taking place. Connected to this suggestion it was also recommended that civil and administrative consequences should be strictly applied against officials who willingly or negligently negatively influence the outcome of the procurement procedures.

It was also supported to create an electronic database of all public procedures enabling the analysis of the cases based on reliable data.

The GVH stressed that the effectiveness of sanctions highly depends on the length of the procedure before the decisions actually become final before court. It was recommended that the Minister of Justice and Law Enforcement should submit a proposal to the National Council of Judicature to the privileged treatment of cases related to the appeals of decisions of the GVH in terms of their time frames.

Another recommendation regarding contest organisers was that they should actually apply the sanction of the Act on Public Procurement which allows the exclusion of undertakings from present procedures should they be found to be in breach of the competition act and fined in a previous procurement procedure by the GVH.

It is not yet known whether and to what extent these recommendations would be heard.

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[7] Ministry of Education, Municipality of Budapest, Paks Nuclear Power Plant, a public undertaking in charge of the construction and maintenance of highways, the public pension fund, the local transport company of Budapest and a number of universities

IRELAND

1. Introduction

Over the last 5 years, the Irish Competition Authority has increasingly been active in the public procurement area in terms of both its enforcement and its advocacy activities. The request for written contributions asked for a brief description of any experience on the following topics:

- Design and operation of public procurement systems to generate optimal competition and minimize the risk of collusive tendering;
- Education of and cooperation with procurement officials;
- Techniques for detecting possible collusive bidding behaviour;
- Advocacy efforts relating to public procurement; and,
- Use of enforcement actions to deter malfeasance by procurement officials.

This submission focuses on topics (a), (b), (c) and (d) with topics (b) and (d) merged as the activities relating to these issues are intertwined.

2. Design and operation of public procurement system

The Irish Competition Authority has commented on the design and operation of public procurement on two types of occasions: following complaints received on the operation of procurement procedures and as part of the Competition Authority's Market Study - *Competition in Professional Services: Architects*[1] published in March 2006.

2.1 Complaints regarding the Operation of Procurement Procedures

Every year, a handful of complaints relate to the manner in which contracting authorities tender for contracts. Complainants often make one of the following allegations:

- "eligibility criteria for participating in the tendering process or for short listing are too restrictive";
- "the tender was designed with one company in mind".

The Irish Competition Authority has no formal powers in relation to the design of tendering procedures. Parties aggrieved by the decision of a contracting authority can ask for a judicial review of the decision by the Court. The Competition Authority therefore follows up on complaints relating to tendering

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1 Study available for download on the following website: http://www.tca.ie/templates/index.aspx?pageid=930

procedures via the "advocacy function"[2]. In its correspondence with the party complained about, the Competition Authority acknowledges that it is not in a position to adjudicate on the merit of particular minimum requirements for participating in the tendering process but merely highlights the broader policy issue:

> "as a matter of policy, tendering bodies should be mindful of proportionality in setting the minimum requirements for tendering. When minimum requirements unnecessarily reduce competition, value for money for the contracting authority is reduced".

2.2 Study on Competition in Professional Services: Architects

In its Market Study - *Competition in Professional Services: Architects* published in March 2006, the Competition Authority examined the administration by the Royal Institute of Architects of Ireland of architectural competitions on behalf of buyers of architectural services (typically Local Authorities). The Competition Authority commented on the following:

- The eligibility criteria which prevented practically trained architects from participating in architectural competitions when they provide architectural services to private clients; and,
- The fact that a representative body – a body representing a subset of the professionals – was running the architectural competitions on behalf of public clients (e.g. Local Authorities).

The criteria for entry to architectural competitions unnecessarily confined eligibility to a specific pool of competitors: Architects qualifying under the Architects Directive and those on the "Ministers' List[3]". The list was compiled in 1996 to recognise as architects individuals with sufficient experience and practical training. The report identified two possible avenues to broaden the pool of **all** potential providers of architectural services:

- The introduction of a mechanism for updating the "Ministers' List" to ensure that **all** architects with adequate training and experience to provide architectural services can participate in architectural competitions for publicly-funded projects. Such a mechanism would allow for the inclusion on the "Ministers' List" all practically trained architects; and,
- Allowing all registered architects to enter competitions for publicly-funded projects in the event of the introduction of a statutory system of registration (independent from the professional association(s)).

3. Education of and cooperation with procurement officials and Advocacy efforts relating to public procurement

The Competition Authority organised a number of presentations for officials from Government Departments (including Department of Finance officials responsible for procurement policy), State bodies and Agencies. The presentations focused on two issues:

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2 Under Section 30 (e) of the Competition Act, 2002 the Competition Authority can "advise public authorities generally on issues concerning competition which may arise in the performance of their functions."

3 The Minister's List was created in 1996 to take account of the fact that a significant minority of architects are practically-trained, having acquired the necessary experience over many years of working under the supervision of other architects. The List consists of Architects considered by the Minister for Environment, Heritage and Local Government to be sufficiently experienced and skilled to be recognised as architects.

- Bid-rigging: When is it likely to happen? How is it investigated?
- The relationship between procurement policy and competition policy.

The presentations focused on the interrelation between procurement and competition policy and aimed at fostering a better understanding of how procurement processes impact on competition and value-for-money.

While the "Bid-rigging" presentations fell short of a "Road Show" on bid rigging detection and investigation, the idea was to increase awareness of cartel behaviour and to foster a working relationship between procurement officials and the Competition Authority. As a direct result of one of these meetings, the revised 2004 Procurement Guidelines[4] stated that "*Contracting authorities should watch for anti-competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority*".

4. Techniques for detecting possible collusive bidding behaviour

The Competition Authority has initiated cartel investigations based upon allegations of bid rigging received from public procurement officials who have provided information that has come to their attention in the course of public tenders. Whistleblowers with inside knowledge of public procurements have also provided information to the Competition Authority concerning allegations of collusive tendering on public contracts. Some of those investigations are on-going. At present, Ireland's rules concerning public tendering do not require a certification of independent bid determination or a statement of non-collusion to accompany the tender.

5. Concluding Comment

The Competition Authority is currently revising certain Guidance Notes and Information Booklets. One new information booklet that is to be drafted this year concerns public procurement. The purpose of the information booklet will be to advise procuring authorities in the public sector on how to design procurement procedures to optimise value for money and how to identify possible instances of collusive behaviour.

4 National Public Procurement Policy Unit (2004) *Public Procurement Guidelines - Competitive Process.*

JAPAN

1. JFTC's strict and proactive enforcement of the Antimonopoly Act against bid rigging

Bid rigging is a typical cartel behavior and one of the most serious breaches of the Antimonopoly Act ("AMA"), so the Japan Fair Trade Commission ("JFTC") has continued to strictly and proactively take actions against bid-rigging based on the AMA. In FY 2006, the JFTC ordered companies which violated the AMA to pay 36.26 billion yen total in surcharges, including 33.37 billion yen in bid-rigging cases.

Fiscal Year	2002	2003	2004	2005	2006
Amount of Surcharge (billion yen)	4.33	3.87	11.15	18.87	36.26
Bid Rigging	3.22	3.83	3.45	18.80	33.37
Number of Companies Surcharged	561	468	219	399	163
Bid Rigging	546	467	194	392	142

Note: There is a possibility that the effect of orders for five companies to pay 27.00 billion yen total in 2006 will be lost due to the initiation of hearing procedures.

This strict and proactive enforcement against bid-rigging has served to maintain and promote fair and free competition in public procurement markets, thereby creating economic benefits such as a decline in contract prices. For example, following the initiation of investigations by the JFTC, the rate of contract prices to expected prices decreased by 18.6% on average in 22 bid-rigging cases in which legal measures were taken between 1996 and March 2003.[1]

The amendment of the AMA, which increased the surcharge rates and introduced a leniency program and criminal investigative powers for the JFTC, came into effect in January 2006, and deterrent effects against violations of the AMA, including bid-rigging, were enhanced. At this moment, the amended AMA is showing successful results; for example, the leniency system is being actively used in bid-rigging cases; the JFTC has referred bid-rigging cases to the prosecution agency by conducting criminal investigations.

2. JFTC's enforcement of the "Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc." against malfeasance by procurement agencies

In Japan in recent years, there have been cases where the officials of procurement agencies were involved in bid-rigging. (This kind of bid-rigging is called "*Kansei-dango*".) In these cases, it is possible to take actions against companies by using the AMA, but no legal measures can be taken against the officials. In order to address this problem and prevent this kind of bid-rigging, the Act Concerning Elimination and Prevention of Involvement in Bid-Rigging, etc. ("Involvement Prevention Act") was enacted in July 2002 and enforced in January 2003. The outline of the Involvement Prevention Act is as follows.

Outline of the Involvement Prevention Act

When the JFTC recognizes that the officials of procurement agencies have been involved in bid-rigging, it may demand that the heads of the procurement agencies implement improvement measures

[1] The data was prepared based on materials and other items that were submitted by the procurement agencies during the investigations.

based on the Involvement Prevention Act and it will implement elimination measures as well against companies based on the AMA. When the procurement agencies receive the demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

After the Involvement Prevention Act came into effect, the JFTC demanded each of those procurement agencies to implement improvement measures in three bid rigging cases on construction works procured by Iwamizawa City, Niigata City and the Japan Highway Public Corporation, respectively. As a result, these procurement agencies implemented improvement measures, such as the establishment of a compliance system. More recently, the JFTC demanded the Ministry of Land, Infrastructure and Transport ("MLIT") to implement improvement measures in a bid-rigging case on floodgate projects procured by the ministry. In addition, since several bid-riggings at the initiative of procurement officers were detected even after the Involvement Prevention Act was enforced, the act was revised in December 2006, introducing a criminal penal provision on the officers of procurement agencies and expanding the scope of illegal involvement. The amended Involvement Prevention Act came into effect on March 14, 2007.

JFTC's demand to Iwamizawa City (January 30, 2003)

It was found that the officers of Iwamizawa City continued to repeatedly select the expected successful bidders and disclosed the names of these bidders and the expected construction prices to the executive members of a trade association. The JFTC demanded the mayor of the city to immediately implement improvement measures necessary to confirm that the involvement of the said officers was eliminated in the city's procurement of the construction works.

JFTC's demand to Niigata City (July 28, 2004)

It was found that the officers of Niigata City continuously disclosed the expected construction prices, which should have been kept confidential before bidding was conducted. The JFTC demanded the mayor of the city to immediately implement improvement measures necessary to ensure that the involvement of the said officers was eliminated in the city's procurement of the construction works.

JFTC's demand to the Japan Highway Public Corporation (September 29, 2005)

It was found that the officers of the Japan Highway Public Corporation (i) accepted the submission of "allocation tables," which showed the expected successful bidders for competitive bids of construction works for the upper part of steel bridges, from the retirees of the corporation and approved the allocation tables on each occasion, (ii) placed split orders for the construction works, for which a bulk order had been originally planned, at the request of the retirees, and (iii) lowered the standard for order placement from 1.5 billion yen or more in the past to 1.0 billion yen or more at the request of the retirees. The purpose of these (i) to (iii) activities was to secure reemployment for retirees from the corporation, and the officers not only gave tacit approval to and authorized bid-rigging but also encouraged companies to engage in it. In addition, the officers were found to disclose unpublished information such as the expected time for order placement. The JFTC demanded the president of the corporation to immediately implement the improvement measures necessary to ensure that the involvement of the said officers was eliminated in the corporation's procurement of the construction works.

JFTC's demand to the MLIT (March 8, 2007)

It was found that the officers of the MLIT indicated their intentions regarding the expected successful bidders for floodgate projects to companies, which were referred to as "coordinators" and enabled the

cartel to be conducted smoothly, before ordering the projects. The JFTC demanded the Minister of Land, Infrastructure and Transport to immediately implement the improvement measures necessary to ensure the involvement of the said officers was eliminated in the ministry's procurement of the projects.

3. JFTC's promotion of improvement in ordering systems for public procurement

In 2003, the JFTC held a study group on public procurement and competition policy from the viewpoint of creating a more competitive environment for public procurement and aiming at the effective prevention of bid-rigging. The study group identified problems with bidding and contracting systems for public procurement and examined measures to improve the problems with the aim of enhancing competition in public procurement. The JFTC published a report summarizing the results of the study in November 2003.

The report said that it is important to ensure as much competition as possible based on the basic idea of "value for money," which means obtaining the most valuable things at a certain cost, for public procurement by the national and local governments. The report recommended (i) the use of bidding procedures in consideration of prices, technologies and qualities as specific measures (overall evaluation bidding methods), (ii) the expansion of the scope of general competitive bidding (open tendering) and (iii) the development of ordering systems.

More recently, the JFTC has been carrying out surveys on bidding and contracting systems in public bodies such as local governments. In 2006, it conducted a questionnaire survey against government-sponsored corporations, in which the national government had equity of 50% or more, and local governments with the aim of understanding (i) reforms for the bidding and contracting systems of procurement agencies and (ii) measures to improve the compliance of the officers of procurement agencies. The results were summarized in the "Survey Report on the Actual State of Tendering and Contracting System in the Public Procurement" published in October 2006.

The main points of the report are as follows.

- In order to deal with complicated paperwork and difficulties in the elimination of bad/unqualified companies, which are problems with the expansion of general competitive bidding, measures such as the rationalization of paperwork through the introduction of information technology or the implementation of spot inspections against the companies may be effective. For small procurement agencies, support by prefectures and supervisory national authorities may also be effective.

- In order for the national and local governments to take integrated measures to prevent bid-rigging, a leniency system and measures to debar collusive companies from participating bids should be consistent.

- The timing of taking measures to debar collusive companies from participating bids should be the same as the timing of issuing a cease and desist order by the JFTC, so the current debarment system should be revised.

- Procurement agencies should implement measures to disseminate information and provide training to their officers for the purpose of preventing bid-rigging at the initiative of their officers since several examples of this kind of bid-rigging were recently detected.

- Procurement agencies should make an effort to systematically implement measures to oblige their officers to make a report if the officers are approached by companies and retirees from the agencies.

4. JFTC's efforts to prevent bid-rigging

From the viewpoint that the effort of procurement agencies is very important to prevent bid-rigging, an officer in charge of procurement affairs at each ministry or agency is appointed as a liaison officer with the JFTC regarding public procurement so that each ministry or agency may smoothly provide the JFTC with information on activities that may violate the AMA.

The JFTC has held meetings on public bidding with the liaison officers since FY 1993. In FY 2006, a meeting with the liaison officers of ministries and agencies was held on November 21, 2006, and meetings with the liaison officers of the local bureaus of ministries and agencies were held at nine locations all over the country.

Also, since FY 1994, the JFTC has cooperated in dispatching lecturers to and providing materials for seminars for procurement officers which are held by the national and local governments, and has held seminars for the procurement officers of public corporations. In FY 2006, the JFTC dispatched lecturers 75 times to the national and local governments and government-sponsored corporations.

In addition, in order to disseminate the amendment of the Involvement Prevention Act (Law No. 110 of 2006), which was enacted through legislation by Diet members in December 2006, the JFTC prepared and distributed leaflets and other materials to explain the details of the amended act. Moreover, it held ad-hoc meetings with the liaison officers of ministries, agencies and their local bureaus, and held seminars for the procurement officers of public corporations. Furthermore, the JFTC dispatched its staff members as lecturers to explanatory meetings for prefectures and municipalities which were hosted by 47 prefectures (at 58 locations) all over the country.

5. Recent reforms of bidding and contracting systems in Japan

Regarding public procurement, bidding and contracting systems have been revised in recent years; for example, competition has been promoted; transparency has been increased by improving the publication of bidding information; measures against bid-riggers have been strengthened; means for assuring quality have been promoted.

In the area of public construction works, the Act for Promoting Proper Tendering and Contracting for Public Works was enforced in 2001. The act requires the national and local governments and government-sponsored corporations which are continuously engaged in public construction works to disclose information on bids and contracts and to take measures against illegal activities, etc. The act also provides that the government shall develop guidelines concerning measures to promote proper bids and contracts for public construction works through a cabinet decision. (The guidelines were established by a cabinet decision on March 9, 2001. Hereinafter referred to as "Guidelines.") The Guidelines provide for such items as the publication of information on the bidding and contracting process and the details of contracts, the incorporation of the opinions of third parties, and the promotion of proper bidding and contracting methods to facilitate fair competition. The national and local governments and government-sponsored corporations are required to make an effort to implement the measures necessary to improve bids and contracts for public construction works in accordance with the Guidelines.

In 2005, the Act for Promoting Quality Assurance in Public Works was enforced, and overall evaluation methods, which evaluated not only prices but also qualities, were promoted for public procurement.

Thereafter, in February 2006, the liaison meeting on the promotion of proper bids and contracts among concerned ministries and agencies compiled measures to promote proper public procurement (as a liaison meeting decision on February 24, 2006), and decided on a policy for the entire government to promote the ongoing reforms of bidding and contracting systems, including the expansion of general competitive bids and overall evaluation methods. In accordance with the policy, the government has to conduct general competitive bids for public construction works whose expected price is 200 million yen or more, while these criteria were 4.5 million SDR (730 million yen at the rate of FY 2004-2006) in the past. In addition, they have to make an effort to conduct general competitive bids for public construction works whose expected price is less than 200 million yen whenever possible.

The Guidelines were revised through a cabinet decision on May 23, 2006, and not only the national government but also local governments and government-sponsored corporations are required to continue to tackle the reform of bidding and contracting systems.

In response to these trends, as of March 29, 2007, more than 70% of prefectures have really expanded the scope of general competitive bids and more than 80% have set goals to implement overall evaluation methods, in comparison with October 1, 2006.

KOREA

1. Introduction

Public procurement refers to the government and public institution's purchase of goods and services and facility construction required for administrative services and production of public goods. Efficient design and management of public procurement system is essential to provide quality public services.

Public procurement holds significance beyond its function of supplying goods to public institutions as it has a massive influence over the country's real economic activities with large purchasing power. In particular, in national monopoly industries, such as railway, postal and electricity services, the concerned public institution's procurement system greatly affects the industries involved in public procurement.

Therefore, boosting efficiency of the public procurement market through competition is a very important national task.

Below is a brief introduction of Korea's public procurement system, policies to promote competition in the public procurement market and the role of the Korea Fair Trade Commission (hereinafter "KFTC").

2. Overview of Korea's public procurement system

2.1 Procurement agencies

In Korea, general procurement is handled by the Public Procurement Service (PPS) and each buyer while military procurement is overseen by the Ministry of National Defense. The national contracts law adopts a central procurement system, under which state and local government procurements of large size must be entrusted to the PPS in principle.

Korea's public procurement market was worth 85 trillion won as of 2006, accounting for about 10 percent of GDP (approximately 848 trillion won). Out of the total, goods and services procurement accounted for about 37 trillion won and facility construction procurement amounted to about 48 trillion won, and Korea's central procurement agency, the PPS, handled 27.6 percent (about 23 trillion won) of the total public procurement.

Public procurement market size and the share of the PPS in 2006

(Unit: hundred million won)

	public procurement (A)	PPS contract (B)	PPS share (B/A)
Total	846,878	234,090	27.6%
goods and services	366,271	107,608	29.4%
facility construction	480,607	126,482	26.3%

* Source: PPS

2.2 Procurement method

The national contracts law stipulates that public procurements shall be done, in principle, by competitive bidding. Bidding for public procurement must be fully competitive bidding open to all, without constraints. However, there can be exceptions, when deemed necessary in light of the purpose, nature and size of the contract, to limit the qualifications of bidders, to designate certain bidders to participate in the competition or to use private contracts (to award the contract in question to specific companies at the contract issuers' discretion).

In March 2000, the PPS introduced an electronic bidding system[1], which is greatly contributing to saving bidding costs for both the ordering institutions and the bidders and also to preventing corruption by minimizing the contact between bidding companies and ordering institutions. Moreover, online bidding notice and participation have enabled companies to easily access bidding information and join in bidding, thereby increasing the number of bidders and promoting competition.

3. The KFTC's role and efforts for promotion of competition in the procurement market

3.1 Strong enforcement against bid-rigging in the public sector

The KFTC' cartel regulation efforts put the foremost priority on detection and correction of public sector bid-rigging[2]. This is because private sector companies' bid-rigging in trying to win large-scale contracts in the public sector, such as public construction, electricity generation facilities and railway facilities, is frequently exposed in Korea.

Between 1998 and 2004, the KFTC handled 208 cartel cases, 47 (22.6 percent) of which were bid-rigging cases. The examinees imposed with remedies for bid-rigging numbered 277 out of 1,271 sanctioned for cartels (21.8 percent), and the surcharge imposed for bid-rigging amounted to 154 billion won out of 399.4 billion won imposed for cartels (38.8 percent).

One of the major examples of public sector bid-rigging involved five oil refiners which engaged in a bid-rigging scheme to win a contract for oil supply to the military. In 1998, 1999 and 2000, the five companies participated in bids for contract for oil for the military ordered by the procurement headquarters of the Ministry of National Defense, before which the companies' executives and officials in charge of military supply contract held meetings to agree on the winning bidder for each type of oil and the contract price regarding all bids scheduled in each year. Thus, the KFTC imposed corrective orders on them with a total surcharge of 121.1 billion won, the biggest amount of surcharge the KFTC imposed in a single case.

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1 Electronic bidding refers to a system which does not require the bidder to visit the bid office for submission of bid as it can be done through the Internet. Previously, for public procurement, each public institution had to make requests to the central procurement agency in writing, after which the central procurement agency, PPS, conducted on-site bidding. But with the PPS' introduction of an electronic bidding system in 2000, bid notice, participation and clearance can now be done online. According to a PPS survey in Jul. 2005, 70 percent of respondents said the fairness and transparency of public procurement have improved since the introduction of the electronic bidding system while others expressed neutral opinions. As of 2005, more than 90 percent of public procurement was done through electronic bidding.

2 In Korea, the KFTC is responsible for uncovering bid-riggings and imposing administrative punishments, including remedies and surcharges, on bid-riggers, while the Ministry of Justice handles criminal punishments.

In order to eradicate bid-rigging, there must be strict punishment on both the bid-riggers and the officials of public institutions aiding and abetting bid-rigging. In Korea, criminal punishment can be imposed on public officials in charge of procurement for aiding and abetting bid-rigging according to the criminal law (malfeasance in office) and the Monopoly Regulation and Fair Trade Act (aiding and abetting cartel), but there has not been an example of such punishment.

3.2 Development of bid-rigging identification method

To improve the capacity to detect cartels, including bid-rigging, the KFTC has improved the transparency of the Leniency Program and introduced an informant reward system[3]. In addition, the KFTC is trying to develop new investigation methods through study groups.

In particular, the KFTC has been running "***Bid Rigging Indicator Analysis System (BRIAS)*** "[4] since early 2006 to strengthen monitoring bid-rigging in the public sector.

BRIAS automatically analyzes and measures the possibility of bid-rigging in large-scale bids ordered by public institutions, such as the state, local government and government-invested institutions, based on information received from the PPS online.

The system scores the possibility of bid-rigging by weighing each of the evaluation items including the clearance rate, the number of bidders, bid prices, competition method, the number of failed bids and estimated contract price raises and conversion to private contract. For instance, according to the statistics, higher clearance rate and fewer bidders often mean greater likelihood of bid-rigging. Under the analysis system, such evaluation items are scored into several categories, whose scores are all added up in the end.

Of course, the system is only effective in looking at bid results to identify bids with high bid-rigging potential based on statistics and experience. Thus, agreement between enterprisers must be proven through other evidence. However, considering that the system's analysis method itself applies statistics, the very fact that there is a high likelihood of bid-rigging can serve as a circumstantial evidence.

Since 1997, the KFTC has been analyzing the possibility of bid-riggings based on related documents provided by public institutions placing large-scale orders of goods or construction and has been expanding the scope of bids subject to monitoring. However, as the information was usually in the form of written documents, it was physically impossible for the Commission to thoroughly review and analyze all of the submitted information.

Then with the introduction of an electronic bidding system in 2000, an idea was proposed that more efficient monitoring of public sector bid-rigging would be possible if the KFTC could directly receive bid-related documents from procurement departments via the Internet for automatic calculation of the possibility of bid-rigging. This idea motivated the KFTC's planning of BRIAS development at the end of 2004, which was followed by consultations with the PPS, program development and test run before the system was put to operation in early 2006.

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3 This system was introduced in 2002 to reward cartel informants (except for cartel participants) with as much as one billion won.

4 Please refer to "Roundtable on Competition Bidding Markets –Note by Korea-" (DAF/COMP/WD/(2006)59) and "Measures to improve identification capacity apart from the leniency program (Presentation at Seoul Cartel Workshop in Nov. 2005)"

The introduction of the system has enabled close cooperation between the procurement agency and the competition authority, through which systematic gathering and scientific analysis of bid information have been made possible.

In fact, the KFTC is currently conducting investigations on several bid-riggings identified upon scrutinizing cases that scored high in the BRIAS.

The KFTC is pursuing improvement of the system in order to optimize the evaluation items and the scores and to expand the scope of the analysis. At the moment, a revision bill aimed at expanding the subject of the analysis to all public institution's large-scale bids is pending at the National Assembly.

3.3 Cooperation with procurement agencies

Since Korea has a central procurement system, cooperation with procurement agencies is very important. The bidding system design is done by the Ministry of Finance and Economy while the system operation is overseen by the PPS. The cooperation between the competition authority and procurement agencies is pursued in various forms.

1. In case statutes stipulating public procurement method and procedure include anti-competitive provisions, the competition authority and procurement agencies hold statutory consultations to address the issue in advance[5]. This can be a very effective means of preventing introduction of anti-competitive institutions in advance.

2. When public institutions, including procurement agencies and ordering institutions, identify signs of bid-rigging while conducting their business, they notify the fact to the KFTC. The KFTC's investigation on the aforementioned bid-rigging by oil refiners was also triggered by a notice from the Board of Audit and Inspection. In addition, as mentioned earlier, public procurement-related information is delivered to the KFTC in real time from the PPS through the BRIAS.

3. Upon identifying public sector bid-rigging, the KFTC notifies the fact to the ordering institution, which then limits the bid-riggers' participation in bids for a certain period of time according to the national contracts law. This has a significant deterrence effect since limited participation in bids would mean a great loss for companies which are heavily reliant on the business with the public sector.

4. The KFTC holds irregular meetings of procurement officers of public institutions to exchange and share the expertise and experience of central procurement agency and ordering institutions and also to spread the BIRAS.

5. In addition, when necessary, the competition authority and procurement agencies can discuss ways to promote competition in the public procurement sector through various consultation channels available for policy coordination.

[5] In Korea, President can submit bills to the National Assembly, and in reality, legislations are often made by the government's submission of a bill. In such a case, relevant institutions hold consultations before submission of a bill.

3.4 Future policy direction

As introduced above, the KFTC has continuously strengthened law enforcement and improved related institutions to promote competition in the government procurement sector and will continue to do so in the future.

As part of that effort, the KFTC is seeking to come up with a comprehensive measure to identify and improve anti-competitive institutions and practices in the government procurement sector within this year.

The measure will include the current status of Korea's public procurement market, current institutions and problems and plans for designing a bidding system that can eradicate bid-rigging. At the same time, the KFTC will conduct comparative review of foreign institutions.

Once the measure is completed, it will not only be used in law enforcement but also be reflected in revision of procurement-related statutes through consultations with relevant institutions.

4. Desired role of the competition authority

The most direct way for the competition authority to promote competition in the public procurement market is to identify and correct bid-riggings through strict law enforcement. By increasing the bid-rigging detection rate and heavily punishing identified bid-riggers, the competition authority can effectively prevent bid-rigging as companies will learn that the benefits of bid-rigging is smaller than the loss they will suffer once their collusion is identified.

In this regard, prompt and efficient gathering of evidence of bid-ridding calls for an organic cooperation between the competition authority and procurement agencies in addition to the competition authority's efforts to improve investigation methods, for procurement agencies are in a position to catch signs of bid-rigging before others. If the competition authority and procurement agencies can share procurement-related information in real time through systems like Korea's BRIAS, it will be very useful in monitoring of bid-rigging.

Another important role of the competition authority is to induce design and operation of a competition-friendly public procurement system.

This requires the competition authority to actively express its opinion on procurement-related institutions, statutes and practices on top of its competition advocacy activities targeted at the public and the business. Naturally, the competition authority needs to have an in-depth understanding of the government procurement policy.

MEXICO

1. Introduction

This note summarizes Mexico's experience in public procurement contracts with special emphasis on the pharmaceutical sector. Section 2 outlines the regulatory framework for these contracts and identifies competition concerns derived from this regulation. Section 3 summarizes some bid rigging cases investigated by the Federal Competition Commission (CFC) in the health sector, and presents the outcomes of some public auctions in the pharmaceutical sector that may bring up competition concerns. Section 4 summarizes important advocacy efforts undertaken by the CFC to increase competition in the allocation of public expenditures on pharmaceuticals. Finally, section 5 contains some concluding remarks.

2. Public expenditures on pharmaceuticals

Public expenditures on pharmaceuticals in Mexico during 2006 are estimated at US$2.3 billion, which represents 0.3% of the GDP. The great majority of these expenditures are allocated through public auctions called by the two main public health institutions: Mexican Institute for Social Security (IMSS), which provides health care services to employees (and their families) of the formal private sector; and the Institute for the Security and Social Services of State Employees (ISSSTE), which provides health care services to government employees (and their families). The following table presents the public health institutions shares of total public expenditures on pharmaceuticals.

Public expenditures on pharmaceuticals, 2006

Total expenditures	**US$2.3 billion**
Institution	**Share**
IMSS	76.3%
ISSSTE	18.5%
Others*	5.2%
Total	100.0%

* Mainly health services provided at the state level

2.1 Regulatory framework

Public expenditures on pharmaceuticals, as well as other public expenditures on goods and services, are regulated by the Law of Public Sector Acquisitions, Leasing and Services (Acquisition Law or AL), its Regulations (ALR), and associated provisions under free trade agreements (FTAs).

The AL establishes that, as a general rule, public expenditures in pharmaceuticals must be allocated through public auctions and that all providers must face similar terms and conditions.[1]

The AL and its Regulations set out the following general auction rules:

- *Lowest-price sealed-bid auctions*. Bids are secret and contracts are awarded to the lowest bids.[2]

- *Multiple provision.* Contracts may be granted to two or more bidders if their bids do not differ by more than 5% with respect to the lowest bid. The winning bidder would be awarded a 50% share or more of the contract and the other participants would be granted shares previously specified in the auction rules.

- *Joint bids*. Two or more persons or firms may offer joint bids without needing to incorporate into a single firm.

- *Reference prices*. Government entities may set a maximum price, as a reference for bidders to offer discount percentages.

- *Prohibition of price bids below costs*. Entities calling auctions must verify that prices offered are not below costs, and may dismiss tenders on insolvency grounds.

- *Domestic auctions.* Most public procurement contracts are reserved for Mexican nationals and goods with a minimum domestic content of 50 percent.

- *International auctions*. This type of auctions may only be called if: mandated under FTAs (except for reserves); domestic supply is not available in terms of quality, quantity or at convenient prices; no participants turned out or qualified in a previous domestic auction; and if it is so stated in foreign financing contracts granted to the federal government. In these auctions, economic proposals of domestic products are granted a 10% preferential margin, while bids of handicapped (or firms that employ them) are also favoured.

- *Reserves.* Under FTAs provisions, the Mexican government has the right to except a maximum amount of public expenditures from *international auctions.* In the case of pharmaceuticals the government decided to exercise these reserves. In 2007, for example, the IMSS is expected to exempt US$195 million of expenditures on generic pharmaceuticals from international auctions.

2.2 Competition concerns arising from procurement regulations

The CFC has issued several opinions concerning particular features of the regulatory framework that foster collusive conduct, as explained below.

- The multiple provision feature limits price competition and lays the groundwork for agreements (implicit or explicit) on market sharing. In extreme cases, bids are identical and the procurement contract is allocated among the lowest bidders in equal parts. See illustrative cases presented below.

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1 Under special circumstances, contracts may be directly conferred or granted by contest through invitation to at least three persons.

2 In the procurement of services, multiple criteria may be used (e.g. price and quality), by applying an index where price has a 50% weight.

- Joint bids may be a simple mechanism to collude. These bids should only be allowed insofar as they do not have a negative effect on the competitive process.
- The regulatory framework does not set out a criterion to ensure reference prices are set at a sufficiently low level, hence maximum prices may be used as an easy reference for bidders to collude on prices. See illustrative cases presented below.
- The prohibition of bids below cost may eliminate competition from low price bidders, and limits the power of auctions as an efficient mechanism to discover market information. This prohibition entails a more stringent approach than the predatory price prohibition envisaged under the competition legislation, which is subject to a rule of reason analysis.

2.3 Competition legislation

The Acquisitions Law states that bidders may be disqualified from the auction if they are found to have agreed to increase prices or to attain any kind of advantage over the remaining bidders.

The Federal Law of Economic Competition (FLEC) typifies bid rigging as a *per se* prohibited anticompetitive conduct. Recent reforms to this law[3] strengthened the powers of the CFC to investigate and sanction this type of conduct in the following ways:

- The CFC is now empowered to undertake on-site investigations and to implement a leniency program.
- Maximum sanctions increased from \$1.7 to \$6.6 million US dollars.
- Recidivists are now subject to a double sanction or to a sanction equivalent to 10 percent of their assets or annual sales.

3. Illustrative cases

The CFC has identified two types of problems in public procurement auctions. First, as described above, there are several provisions in the Acquisition Law and its Regulations that inhibit competition and facilitate collusive conduct. Second, government entities tend to organize very frequent auctions to allocate small contracts instead of aggregating them into fewer auctions and larger contracts. Additionally, in many instances, government entities divide the national market into several regional markets and hold a series of regional auctions instead of having a single auction for the whole market. These practices turn what could be a one-shot game into a series of games, which also inhibit competition and facilitate collusive (implicit or explicit) pricing and market segmentation. These problems seem to persist, notably in the health sector.

3.1 Cases investigated by the CFC

The CFC has investigated several cases concerning auctions called by public health institutions, some of which are summarized below.

3 These reforms entered into force on June 28, 2006.

Case	Auctions rules	Outcomes
Purchasing of surgical sutures	- Lowest-price sealed-bid - Multiple provision	-Defendants presented identical or similar bids in a significant number of auctions - the CFC identified a pattern of market segmentation - a significant number of bids qualified for multiple allocation -The CFC fined all defendants
Purchasing of x-ray material	- Lowest-price sealed-bid - Single and multiple provision	- Defendants presented similar or identical bids in a significant number of auctions -identical bids in 11 auctions qualified for multiple allocation -The CFC fined all defendants
Purchasing of chemical developers for x-ray material	- Lowest-price sealed-bid - Multiple provision	-defendants presented identical price bids in 17 auctions -The CFC fined all defendants -defendants unsuccessfully alleged that identical bids were intended to observe the reference price.

3.2 Cases under analysis

As part of an integral strategy to fight cartels, the CFC recently started to analyze several databases containing the outcomes of public auctions called by public health institutions to purchase pharmaceuticals during last few years. The following cases illustrate the type of outcomes that may raise competition concerns. For confidentiality reasons, the tables omit absolute prices, as well as the names of products and bidders.

Case 1: four auctions for the same product within a year; lowest-price sealed-bid; and multiple provision rule.[4]

Price bids (index)

	Auction			
Bidder	1	2	3	4
1	100.07	100.07	100.03	101.45
2	100.00	100.03	Nb	100.07
3	100.03	nb	99.94	100.03
4	102.14	100.00	100.07	100.00

Winners: ▢
nb: no bid was presented

Case 2: four auctions for the same product within a year; lowest-price sealed-bid; and single provision rule.

Price bids (index)

	Auction			
Bidder	1	2	3	4
1	nb	nb	nb	100.21
2	105.49	nb	100.00	nb
3	100.21	100.21	nb	nb

Case 3: four auctions for the same product within a year; lowest-price sealed-bid; and multiple provision rule.

Price bids (index)

	Auction			
Bidder	1	2	3	4
1	100.00	nb	nb	nb
2	nb	100.14	nb	100.14
3	103.79	103.79	100.00	100.00
4	nb	100.00	nb	nb
5	100.07	102.00	100.07	101.86

4 Multiple provision rule: If the difference between the lowest bids is less that 5%, the contract is allocated among the lowest bids.

Case 4: four auctions for the same product within a year; lowest-price sealed-bid; single provision rule.

Price bids (index)

	Auction			
Bidder	1	2	3	4
1	100.00	nb	nb	100.00
2	nb	100.00	100.00	nb

In all these cases, a more aggressive competition environment could have been promoted by consolidating purchases and /or eliminating multiple provisions.

4. Advocacy efforts

The CFC has issued several opinions regarding the need to modify the regulatory framework for public procurement to promote more competition in the allocation of public procurement contracts.

However, the most important advocacy effort in this area since the creation of the CFC began a few months ago. Under the initiative of the CFC and the Ministry of Health, a multidisciplinary team was integrated early this year with the task to identify mechanisms to take full advantage of competition in the allocation of public expenditures on pharmaceuticals. The members of this team are: CFC, IMSS, ISSSTE, and the Ministries of Economy, Health and Public Service.[5]

After reviewing the outcomes of past purchasing strategies of public health institutions, this team reached two key conclusions:

a. Prices paid for equivalent pharmaceutical products vary significantly among institutions, which indicates that important savings can be captured by implementing purchasing strategies that allowed all institutions to purchase at the lowed paid prices; and

b. Auction designs are not taking full advantage of competition among alternative suppliers; this is true even for the institution paying the lowest price, which is not the same across products.

Based on this finding, the team is now focusing on designing and implementing specific purchasing strategies and auction designs to boost the level of competition in this sector.

This collaboration not only allows the CFC to promote pro-competitive auction designs, but also provides information to identify potential bid rigging practices.

5. Concluding remarks

The CFC’s experience illustrates that competition law and policy can play a key role in promoting efficient public procurement. In the case of public expenditures on pharmaceuticals, inadequate regulations

5 The Ministry of Economy is the regulator of pharmaceutical prices and the Ministry of Public Service is the regulator of public expenditures.

and poor auction designs have facilitated collusive pricing and market segmentation, which has increased prices paid by the government.

The CFC faces important challenges to promote efficiency in these markets, and has begun an aggressive strategy to overcome them. First, it recently created a specialized cartel division, which, together with its newly enhanced powers to investigate and sanction anticompetitive conducts, will allow the implementation of an effective program to fight collusive agreements with a special focus on bid rigging. Second, it is constantly advocating for regulations that promote competitive bidding markets. Third, the CFC is actively collaborating with government entities that regularly allocate procurement contracts through public auctions to promote auction designs that prevent collusive behaviour.

PORTUGAL

The Portuguese Competition Authority (PCA) hereby presents its contribution to the discussion on public procurement, describing its own experience on the role of an antitrust agency in promoting competition in this particular field.

In its report, PCA chose to follow the list of topics suggested by the chairman of the working party for an easier comparison of its experience with the results presented by other delegations.

1. Design and operation of public procurement systems to generate optimal competition and minimize risk of collusive tendering

The Portuguese legal regime on public procurement has for some years been characterized by an evident dispersion of its relevant rules in multiple diplomas, which has turned its interpretation and application considerably difficult.

The Decree-Law No. 197/99, of 8 of June gathers the essential core of rules on the award of public contracts to the rental and acquisition of goods and services. However, there is a remarkable number of other pieces of legislation which have to be taken into consideration when tracing the panorama of the laws applicable to public procurement within the Portuguese legal order.

That is the case of the diplomas regulating the administrative contractor agreements, also applicable to concessions (Decree-Law No. 59/99, of 2 March, altered in 2000), the celebration of public contracts for the acquisition of goods and services in certain specific sectors, such as water, energy, transportation and telecommunications (Decree-Law No. 223/2001, of 9 August), informatics (Decree-Law No. 196/99, of 8 June) or the lease and acquisition of goods, services and networks of electronic communications and connected equipments and services (Decree-Law No. 1/2005, of 4 January).

Since the beginning of the current year, it is also possible to add to the legal framework in this domain the definition of the **national public procurement system** and designation of its fundamental principles (Decree-Law No 37/2007, of 19 February): adoption of centralized procedures for the realization of framework agreements in view of the celebration of contracts for public purchases and the subsequent payments of the goods and services acquired; gradual and phased celebration of public contracts, separated by certain categories of works, goods and services; adoption of technological tools and specialized practices in the field of e-purchasing; preference for the acquisition of the goods and services that best protect the environment; and, finally, the promotion of competition and of the diversity of suppliers.

In light of the close relationship between the design of the national public procurement system and the safeguard of competition in the market, PCA has closely examined the legal framework described above and in several occasions issued recommendation to Government regarding the present legal regime with suggestions for its improvement[1].

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[1] Cfr. Recommendation No. 1/2004, described *infra.*

From the point of view of the applicable law, the multiplication of pieces of legislation was considered harmful in view of the interpretation of its norms and clearness of its legal solutions, which has lead to the launch of a Governmental **project for the creation of a code concentrating all the relevant rules on public procurement**, which at this moment is at the stage of public debate.

PCA has closely analyzed this project, which is considered a solid effort of systematic coherence of the legal solution in the area of public procurement, and presented a number of observations to the Government towards the enhancing optimal competition and minimizing the risk of collusive tendering. These can be summarized as follows:

- The need for strengthening the importance of prices in the context of public procurement, avoiding, through a transparent and non-discriminatory process of assessment of the tenders, prices above the competition level with the consequent increase of public expenditure;

- PCA recognizes the relevance attributed to the element price as an exclusionary criterion of tenders in the context of a public procurement procedure. However, specifically for procedures with high level of specialization it the convenience of attentively considerate, it deems necessary to consider other criteria, such as competency and good reputation of the proponents as well as the quality of the service required, as determinant for the selection of the tenders.

- In this regard, PCA is mainly concerned with the importance of ensuring that the awarding process is transparent and non-discriminatory and that the decisions of the contracting authority are justifiable in view of the technical specifications established in tendering documents. This clearness is all the more important if the obligations deriving from the intended contract are particularly complex, namely in procedures relating to complex public works contracts or specialized consultancy assignments.

- Furthermore, if those criteria are met, PCA sees no reason to exclude from the procedure tenders which present an extraordinarily low price. It has therefore rejected the Governmental legislative proposal presented in this field. PCA considers that the purpose pursued by the rule which establishes the rejection of tenders with an extraordinarily low price could be better achieved by requiring to the bidders warranties that could safeguard the legitimate interest of public contracting authorities.

- Taking into consideration that cartels are serious restrictions to competition and the particularly damaging effects produced by collusive tendering in the award of public works contracts, public supply contracts and public service contracts, PCA has advised the Government to the need that the new Public Procurement Code contributes to minimize the risk of collusive tendering. This could be achieved through the establishment of impediments to the eligibility for public procurement procedures of undertakings that have been previously condemned for the infringement of competition rules.

- With the same objective, PCA has also recommended the adoption of a provision instituting a mandatory notification by the contracting authority to PCA in all cases where the contracting authority detects a circumstantial evidence of an anticompetitive conduct even if this factor isn't sufficient to determine the rejection of proposals. The same is true for circumstantial evidences of anticompetitive conducts that are only detected by the contracting authority after the award of the contract, which shouldn't prevent the pursue of an investigation of the conduct from the Competition Law point of view.

- The applicable legislation establishes legal thresholds to the possibility of prioritary adoption of the procedure of direct award as well as exceptional circumstances in which this procedure may be adopted above those thresholds. PCA acknowledges the need for the admission of circumstances which justify I view of legitimate interests of public contracting authority the adoption of direct award but recommended an unambiguous delimitation of those circumstances which turn evident the reasons validating the selection of this modus operandi.

2. Education of and cooperation with procurement officials

In the course of the work developed in the prevention and detection of cartels, PCA has promoted in 2005 the creation of a "**Anticartel Unit**" integrating members from several public authorities with competences in areas considered relevant for the control of competition within the procedures for the award of contracts concluded on behalf of the State, regional or local authorities or other bodies governed by public law entities.

The Unit associates PCA, the Court of Auditors, the Office of the Attorney General, and two departments of the Ministry for Environment, Spatial Planning and Regional Development, with responsibilities in the field of the planning and follow-up of public policies related to public works in general as well as supervision and regulation of constructions and real estate.

Taking advantage of the contacts previously established within this unit, PCA has organized and hosted a **workshop for the promotion of competition in the public works market**, during which the following themes were discussed:

- the early detection of cartels and the instruments and techniques for the identification of anticompetitive conducts by procurement officials prior to the award of public contracts;

- the possible consequences from the transposition of Directives 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and 2004/17/EC, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;

- and the expected impact of the adoption of legislation on leniency.

Considering the negative effects originated by collusive tendering in the public works market, PCA has launched a campaign for raising awareness of procurement officials to the risks of damages to the interests of contracting authorities and competitors, as well as the Treasury and to consumers in the cases where the public procurement systems are used to distort competition.

The education of procurement officials in the area of competition regulation plays a fundamental role in the opening-up of public procurement to competition. Bearing this factor in mind, PCA has approved and publicized a document containing what it considers to be the **best practices** adopted by procurement officials for the promotion of competition in the public works market.

This document enumerates and describes the most common forms of collusive practices adopted by private parties in the context of a public procurement, such as the suppression of a proposal for the benefit of another candidate or the existence of an agreement between competitors for the presentation of coordinated proposals when bids in a certain domain follow a well-known and cyclic calendar that allows candidates to distribute among them the procurement procedures and equally benefit from the award of public contracts.

Moreover, the *Best Practices* document, inspired both by the OECD and several EU countries experiences and by available economic theory, has identified a group of circumstances which could indicate the adoption of an anticompetitive behaviour in a public procurement procedure and constructed an open check-list that can be used by procurement officials as means to assess the situation with which they are confronted.

3. Techniques for detecting possibly collusive bidding behaviour

One of the main contributes of the *Best Practices* document elaborated by PCA rests with the identification of a group of 20 situations that can point towards the existence of a collusive conduct by tenderers.

The **check-list** presented is supposed to be non-exclusionary as to other situations that can be deemed to be anticompetitive and even though it was constructed as a set of guidelines in procurement related to public works contracts, it can be also used in other kind of contests.

For a clearer interpretation of its guiding principles, the list has been divided into four parts which associate the aspects related to:

- the candidates' proposals (for instance, the abnormally reduced number of proposals presented; the contrast between the number of entities which asked for the tendering documents and the number of tenderers which presented proposals; the presentation of a certain proposal by a tenderer in representation of another tenderer; the fact that an entity which didn't ask for the specifications presented a proposal; or the similarity between two or more proposals as far as their graphic aspect, contents or even spelling mistakes are concerned);

- the commercial terms of the proposals presented (for example, the existence of an inexplicable difference between the proposal with the lowest price and the rest of the proposals; the contrast between the high price presented by a certain tenderer in a given contest and the considerably lower prices presented in previous bids; the fact that the prices presented by the winning proposals to procurement for similar works or services remain stable for a long period of time; the presentation of inadmissible commercial demands or term of execution by some of the competitors; or the difference in price for equivalent works or services submitted by the same entities in contests promoted by different local authorities)

- the estimation of costs (that is the case when the prices of the different tenders are considerably higher than the estimated costs considered by the contracting authority; when several tenderers subcontract the same consultants for their assistance in the elaboration of tenders in public procurement; when, upon the analysis of the tenders, the contracting authority reaches the conclusion that several tenderers didn't produce a careful assessment of the costs; or when in the course of the procedure becomes clear that a certain tenderer is aware of the costs or other specific elements submitted by other competitors and not divulgated by the contracting authority) ;

- and, finally, aspects related to the relationships established between the bidders (namely in cases where there is sufficient evidence that the tenderers met for several times before the term of the period for the presentation of tenders, or the winning tenderer comes to subcontract other competitors which presented higher prices for the works in question in the same contest, or even where there is evidence supporting the conclusion that there is a

rotation in the winning entities of public contest which can't be consubstantiated by economic or technical reasons).

When it comes to techniques for detecting possibly collusive behavior in the context of public procurement, it is also important to take notice of a **cooperation protocol** entered into in 5 June 2006 between PCA and the Court of Auditors for the promotion of competition and the principles applicable to public contracts in their respective areas of action.

This protocol has an undeniable importance for PCA due to the powers of the Court of Auditors to conduct *a priori* and concomitant audit, besides its powers to perform *a posteriori* audit. Its *a priori* verification of the legality and the budgetary allocation for acts, contracts or other instruments that generate expenditure or represent direct or indirect financial liabilities of the Central, Regional and Local Public Administration, may act as a relevant means for detection anticompetitive conducts in a earlier stage of their course of action.

Under this protocol, apart from the exchange of experiences and knowledge with relevance for both PCA and the Court of Auditors, the parties agreed to collaborate for the mutual sharing of non-confidential information related to state aids, public contracts and their respective procedures and markets, particularly supplying to the other party all the relevant data about evidence of anticompetitive conduct or other behavior which is deemed significant for their respective supervision activities. It is still too early in time to assess the success of the established understanding, but it is nonetheless expected to become a fruitful initiative.

4. Advocacy efforts related to public procurement

As far as this topic is concerned, it is worth highlighting one of the recommendations made by PCA to the Government following the investigation and analyses of the market of communication services[2].

At the level of the applicable legislation, PCA recommended to the Government an update of the regulation concerning certain specific sectors, such as communication services in which the State is a major buyer.

As for the actual proceedings adopted in public procurement, PCA has alerted the Government to the need to promote compulsory periodic public contests and to regularly renegotiate contracts particularly within the field most subjected to the evolution of technology. In addition, PCA made recommendations concerning the adequate and clear organization of the invitations to tender and a transparent and efficient evaluation of the tenderer's proposals, as well as regarding the disclosure through electronic and centralized means of all the relevant information on public contests.

This set of recommendations made to the Government has lead to the approval of a group of norms specific to this sector[3].

5. Use of enforcement actions to deter malfeasance by procurement officials

In the field of the enforcement of competition rules related to public procurement, it is worth referring two important decisions of PCA both involving cartels in the health sector.

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2 Recommendation No. 1/2004 (Acquisition of communications services by the State central administration).

3 That is Decree-Law No. 1/2005, of 4 January, referred above.

The first decision, issued in 2004, involved the undertakings that operate in the blood glucose reagent market in Portugal. Having concluded that an anti-competitive practice existed, the Authority decided to impose a fine on the five defendant undertakings – Abbott Laboratórios, Bayer Diagnostics Europe, Johnson & Johnson, Menarini Diagnósticos and Roche Farmacêutica Química.

The case originated with a complaint by the CHC (*Centro Hospitalar de Coimbra*) following a public call for tenders for the purchase of reagent strips, a product used to diagnose and control diabetes. At the beginning of 2003, the CHC organized a restricted call for tenders for the purchase, among other things, of four thousand blood sugar reagent packs, marketed in the form of five-strip packs. Bids were submitted by five undertakings, the defendants in this case.

The CHC decided not to award the contract. It considered that the uniformity of prices and the steep price rise in relation to those charged for the same product the year before formed “a strong presumption of collusion” that could constitute an anti-competitive practice. In fact, in the previous call for tenders for the same product, in 2002, the bid prices varied among themselves and were at considerably lower levels. PCA considered that, as there was no possibility of the prices being divulged in the bid presentation phase, the alignment of prices could not have occurred in the case in question without previous collusion. This also explains the fact that the defendants settled on a different increase in percentage terms in relation to the bid prices for the previous call for tenders.

PCA concluded that, in being involved in a concerted practice whose object was to fix uniform prices for a public call for tenders in which they were all bidders, the undertakings breached Article 4 (1) of Law No. 18/2003 of 11 June. Accordingly, taking account of the grounds of this decision, the Authority decided to fine each of the defendants the sum of € 0,7 million, thus imposing a total fine of some € 3,3 million.

Following the above case, PCA was made aware by Johnson and Johnson, freely and spontaneously, that the concerted pricing in that open call for tender had not been an isolated case. As there was strong evidence that, between 2001 and 2004, the same undertakings had committed numerous breaches of the law in connection with other open calls for tender, PCA carried out preliminary investigations that culminated in the opening of a new inquiry.

The case involves concerted practices between undertakings, of which the object or effect was to appreciably prevent, restrict or distort competition by fixing prices in open procurement procedures for goods in the hospital segment, that is, procedures instigated for the purchase of blood glucose monitoring reagents (test strips). The Authority’s investigations further revealed that the aim of these price rises in the hospital segment was also to influence the negotiating basis for the price agreed between the state and pharmaceutical companies for the sale of this product to the public.

The Competition Authority has decided to impose a fine totalling approximately 16 million euros on the five defendant companies in the case, which involved 36 open calls for tender to supply 22 hospitals throughout the country with test strips.

Both these decisions were appealed to the court of first instance and are still pending a final decision.

SLOVAK REPUBLIC

1. Introduction

Public procurement shall in any case pursue the goal of effective allocation of public resources. Therefore public procurement works effectively only in case where bidders compete in submitting the best bid in terms of value and price relation. This happens if bidders submit their bids individually on the basis of their respective economic, technical and other characteristics. In reality not so rare situation is the one where bidders work out different forms of collusion in the process of submitting bids for a public procurement contracts. It is always detriment to the contracting authority when bidders coordinate their conduct, since the outcome is the ineffective use of public resources resulting from higher prices. According to expert studies such coordination may increase prices of purchased goods, works or services by more than 30 %. At the same time it constitutes a violation of the Act N° 136/2001 Coll. on Protection of Competition, since bid rigging is considered to be one of the most serious forms of agreements restricting competition and is therefore forbidden by article 4 (3) citing signs of collusive behavior as a result of which undertakings coordinate their bids, especially in the process of public procurement as a particular form of agreement restricting competition.

The Antimonopoly office of the Slovak Republic (hereinafter as “Office”) receives very little information on possible anticompetitive behavior in the process of public procurement. In order to be able to detect collusive behavior, Office has turned via an initiative to the contractors to encourage them to monitor suspicious conduct of bidders and inform the Office in case one constitutes. The initiative has been published on the web site to inform the public, it also has been sent to the main contractors, central state bodies and the Office for Public Procurement.

Public procurement in Slovakia is governed by the Act N° 25/2006 Coll. on Public Procurement. Several directives of the European Union regarding the rules of public procurement have been implemented, so the act is harmonised with the European Community Law.

Our Office has been an active participant in the legislative process regarding the amendments to the Act on Public Procurement via interministry comment procedure. Since Office has had some experience in the field of bid rigging, it has made significant effort to pursue legislative changes that would minimize the risk of collusion in public procurement. One of the most important provision of the new act (in force from the beginning of 2006) is the one that prohibits the bidder to be the subcontractor of its competitor in the same public procurement contract. This prohibition provides little room for mutual compensation between the bidders and weakens the incentive to collude in the process.

2. Why is public procurement prone to cartels?

There are to observe several favorable conditions that promote collusion, among them the structure of the market. Bidding markets are mostly highly concentrated with relatively small number of competing companies resulting from the fact that goods, works and services purchased via public procurement are often sophisticated, of high value, requiring specific know-how, experience and references only few companies are able to provide. As a result of this, each one of them is able to identify all of its competitors, which makes the collusion more plausible. It often happens to be the case that same competitors repeatedly compete in the same tenders which makes it easier to agree on a win-win solution consisting of a rotation

of winners and mutual compensations. High degree of transparency (public opening of bids, publication of final price bids of the competitors) enables to control if the conduct of cartel members is in conformity with the rules set in advance. Collusive behavior is even more likely, if there are platforms for regular meetings and contacts, such as professional associations or unions.

Product characteristics are also a factor. The more homogeneous and standardized the product is the more likely competitors reach an agreement on common price structure. It also helps the collusion when purchased goods, works or services are not easily substitutable or if there are restrictive specifications regarding the product.

High barriers to entry and a possibility to easily conceal an agreement also promote bid rigging, since competing companies are able to create an impression of fair competition between them.

3. Forms of collusion in public procurement

Most of the collusion and bid rigging takes either the form of price fixing or market sharing.

Generally the aim of price fixing agreements is to achieve a higher price. Most common price fixing agreement in public procurement occurs when companies reach an agreement on the price of the "winning bid". To support the successful implementation of this sort of agreement, competing cartel members submit so called formal bids with less favorable parameters than the agreed "winning bid". The aim of these formal bids is not to win the contract, the aim is to create an impression of fair competition and cover the high prices. It is also possible, that competitors withdraw their bids or decide not to bid at all to support the "winning bid" agreed in advance. This form of bid rigging is very common and comes with the rotation of winners (the criteria are mostly set in the cartel agreement itself). Integral part of bid rigging is the subcontracting. Competing cartel members agree on not to submit bids or to submit only a formal bid to support the winner chosen in advance on condition they receive subcontracts from the winning bidder. The competition principle is de facto negated, since it does not matter which cartel member wins the contract. As mentioned above, the Act on Public Procurement and on Modification and Amendment of Certain Acts provides for prohibition of the unsuccessful bidder to be the subcontractor to the winner in the same tender.

The compensation for other members of the cartel can also take the form of a fee, the agreed winner has to pay to members who give up to submit a bid or the winner agrees to reimburse the costs other members had to incur in connection with preparing and submitting a bid.

4. Uncovering collusion

Any of the mentioned forms of bid rigging are considered hard core cartels and there are no objective justifications to them. To prove the existence of collusion, the antitrust authority might gather direct and indirect evidence. Cartels are as a matter of fact of secret nature, yet there are still certain indications that might signal coordinative behavior of competitors. These hints are connected with the way companies behave in the process of submitting bids and determining a price. In case the contracting authority observes one or more hints to anticompetitive conduct of the bidders it is encouraged to inform the Office, which has put together hints that are most likely to indicate possible bid rigging in order to help contractors to uncover anticompetitive behavior:

- public contracts in a certain industry are most of the time awarded to the same bidder, this might be even more suspicious if one or more companies permanently/constantly submit futile bids;

- bids are submitted by the same bidders over and over, while winners alternate and every bidder becomes the winning bidder at certain time;

- there are less bids submitted than usual;

- winning bidder concludes subcontracts with competitors who submitted futile bids in the same tender;

- only one bidder has contacted the suppliers of components, or indeed has gathered information on the prices of the components needed to submit a bid;

- in case of tenders limited to local markets the prices of local bidders are not different from those from other geographical areas, in spite of the fact that there should be differences at least in some cost items, for example resulting from higher freight costs;

- the price of certain items is much more higher than the prices generally known from publicly available price lists, higher than the prices from previous bids submitted by the same company or estimated costs;

- from time to time a company submits substantially/significantly higher bid in comparison with bids it submitted in other projects comparable in terms of costs;

- bid prices drop every time a new bidder take part in the bidding process or a company which participates only rarely submits a bid;

- the difference between the winning bid and other bids in terms of price is significant and unjustifiable.

Although cartel members strive to keep the agreements undercover, occasional mistakes or lapses, certain behavior patterns and announcements may indicate collusion. It is therefore useful to pay attention to the following situations:

- bids submitted by different companies contain same mistakes, for example same calculation or spelling mistakes; bids are written using the same typeface or same office gear. This might indicate that some or all of bids of unsuccessful bidders could have been prepared by the winning bidder;

- documents contain white spaces or other modifications indicating price changes at the last moment;

- a company delivers its bid together with the bid of other company;

- a company submits a bid even though it is not capable of fulfilling the contract (so called formal bid);

- bidder makes remarks and comments to the prices common in the industry, comments indicating knowledge of prices of competitors that should be confidential, announcements that a certain customer or contract “belongs” to a certain bidder, that a bid has been of “courtesy” nature, “supporting” or “symbolic”, any statements indicating bidders have communicated regarding the prices or have reached an agreement on prices;

- information on meetings and communication between bidders in the process of preparation of bids.

Even though hints mentioned above may indicate collusion, it is necessary to analyze the gathered information and eventually gain more evidence, in order to decide whether the conduct of one or more bidders constitutes bid rigging or not. The office can guarantee the anonymity of contractor who submits this kind of information, the notification itself is not a ground to suspend the process of public procurement and it can be submitted in later stages as well.

5. Case study – Collusion by six companies in public procurement contract for the construction of a highway section

In the previous sections of this paper, several factors were mentioned as characteristics of an industry prone to bid rigging in public procurement. Almost all of those perfectly fit to the building industry, especially the market of building the transport infrastructure including highways. Only big construction companies, national or international, are able to fulfil such contracts. Even they have to set up ad hoc consortiums, since public contracts of this kind require sufficient technical, material and personal resources and references with similar contracts from the past. Therefore the number of companies capable to execute building works of this size and complexity is relatively small, in Slovakia we can talk about 10, who repeatedly compete in public procurement contracts regarding the building infrastructure including highways, conduits, motorways and leads, and recently also the reconstruction of railways. So we can also talk about a homogeneous product and high barriers to entry resulting from capital intensity of the inventory. Above all this, big construction firms often come as vertically integrated companies with access to raw materials and machines, which means that smaller players on the market do not have the opportunity to win a bigger construction contract. The transparency on the market enables at least to assess the cost structure of the competitors.

The Office has so far dealt with two cases regarding possible bid rigging in the building industry. The proceedings in one of them was suspended, since collusion was not proved, the other one however resulted in the record fine of 1,35 bil. Sk for six companies who coordinated their bids in the public procurement contract for the construction of 8 km long section of D1 highway Mengusovce – Janovce. The companies concerned included: Strabag a.s. (Czech Republic), Doprastav, a.s. (Slovak Republic), Betamont, s.r.o. (Slovak Republic), Inzinierske Stavby, a.s. (Slovak Republic), Skanska DS, a.s. (Czech Republic) and Mota – Engil (Portugal).

The conclusions of the first instance proceedings were mainly based on the fact that the ratios of the submitted bids in terms of prices item by item were of unusually constant value. The prices itself have been set on different levels, but overall item by item the same ratio was observed. National highway company as a contractor stated that such a coincidence of prices of independent competitors has never before occurred and could not have been caused by the use of the same software which was put forward as one of the arguments by the companies.

Second instance proceedings confirmed the decision and to underpin it, the Office carried out an inspection in the premises of two companies, where indirect evidence has been found proving the existence of a communication platform between the competitors in the relevant period. Nevertheless the Council highlighted the coincidence in the prices as the main evidence of the collusion and has found all of the arguments put forward by the companies as ungrounded and unable to justify the obvious indexation of the item prices by the same multiple. This fact has been sufficiently validated by several independent sources – the statement of the contractor in charge of realization of Slovak national highway program, the statement of an expert, economic analysis of the bids in comparable public procurements contracts and the

comparison with the public procurement contract in question. Parties to the proceedings did not put forward any satisfactory and objective justifications of such a coincidence. None of the explanations (the use of the same software from the contractor, use of the recommended price lists, identical sub suppliers etc.) could have caused the coincidence and the arguments of the parties have been refuted. It has been proved that these companies did have a communication platform and indeed they communicated about the price bids for the D1 section Mengusovce – Janovce in the relevant period (meeting on management level, fax message sent to one of the companies by its competitors demanding the price offer for D1 Mengusovce - Janovce; the fax message itself has been destroyed and could not have been presented to the Office, yet the notation in the register of incoming mail proves the existence of the document). Exchange of information on the prices between competitors is forbidden by competition law. The negative effect of bid rigging in this particular case can be demonstrated by the fact, that the lowest bidding price significantly exceeded the state expertise budget and therefore the public procurement procedure had to be cancelled. In case of anticompetitive conduct where the aim is clear, the fact that the agreement restricting competition has not been implemented, is irrelevant. The existence of the intention itself is sufficient to prove negative effects on the market.

The six companies have appealed the decision of the Office to the court, the case is pending.

In connection with the decision of the Office, the Office for Public Procurement of the Slovak Republic has issued a methodical guide to contractors stating that collusion of the six companies is considered to be the ground for not allowing them to bid in public procurement for the following 5 years, since by concluding an agreement restricting competition they infridged law and are not fulfilling conditions of public procurement. The guide however is not binding for the contractors and refers only to the companies mentioned in the decision of the Office and not to their respective affiliates or parent companies. Our Office continues to monitor public procurement contracts regarding the building of the transport infrastructure in Slovakia.

In terms of advocacy, the Office continues to take any chance to point out the need to fight collusion in public procurement. Recently, there have been contributions by the chairwoman and deputy chairwoman on this topic at several conferences, organized by Institute for International Research or Erazmus among others.

SWEDEN

1. Design and operation of public procurement systems to generate optimal competition and minimize risk of collusive tendering

The Swedish Act on Public Procurement (LOU) is based on EU directives for contracts with amounts that exceed specific threshold values. Contracts that amount to lower values below these thresholds are only subject to national provisions. This means that all public procurement over as well as under the thresholds are regulated by procurement rules. However, it should be stated that the vast majority of all contracts that are awarded have amounts below the threshold values. The procuring entities buy goods, services and public works for about 400 billion SEK per year (equals approximately 43 billion euro).

All procurement according to the LOU must be conducted in a businesslike manner and the contracting entity must take advantage of existing competition. Tenderers, candidates for tenders and tenders must be treated impartially.

1.1 How to promote competition

The National Board for Public Procurement (NOU) is an independent public authority, and the NOU has as its major tasks to supervise compliance with the LOU and to distribute information by means of telephone, newsletters, seminars and conferences. From 1 September 2007 these tasks will be transferred to and integrated with the Swedish Competition Authority (SCA). This is an important step from a competition policy point of view. It will increase the possibility to put procurement in a broader competition oriented context. It will also make it easier to exploit the various links between competition policy and different problems which originate from the procurement process.

Given a broader competition perspective on procurement, three goals may be distinguished concerning all public procurement:

- The procurement should contribute to well functioning markets
- Public entities can use procurement instead of in-house production and thereby increase the part of the economy exposed to competition
- The procurement process should secure and promote efficient competition to the benefit of the consumers/taxpayers

By shifting from in-house activities state owned agencies, regional and local authorities could expose their production to competition and let companies solve parts of the running operation in new ways and in a more efficient manner. All three goals mentioned will then be met (with the underlying presumption of full compliance with both the LOU and the competition rules).

If focus shifts from goals to means some obvious aspects ought to be mentioned:

- professional staff at procuring entities is a necessity

- the need for sound rules governing the procurement process (in Sweden there is a lack of effective sanctions for entities that do not respect the procurement rules)
- a great variety of procedures how to invite tenders
- awareness of when and where framework or call up-agreements is useful
- knowledge and attitude related issues (for example give procurement higher status within many agencies).

1.2 How to lower the risk of collusive tendering

All commercial activity, including procurement, is favoured by robust and transparent rules. And no rules function well without proper sanctions. Unfortunately, the public procurement remedies for breaches of the law are not well adapted compared with the system for counteracting anti-competitive actions under the competition rules. A revision of the remedies is an important mission in Sweden.

Making suppliers refrain from collusive behaviour is no easy task. An open and transparent process, high professional standard in the part of the contracting entity responsible for procurement combined with well spread knowledge about the powerful sanctions (administrative fines) in the Competition Act could underpin a deterrent effect.

How the contracting entity is framing the contract documents is of great importance for competition. First of all they ought to consider small and medium size enterprises (SMEs) limited resources and ability to deal with detailed, extensive tender documents and high administrative burden. Secondly, broad contracts which amount to high contract values could also risk excluding SME:s from bidding. On the other hand, if smaller firms are given a fair chance to bid there will be much harder for bigger suppliers to control who is bidding and at what price level. Thus, collusive behaviour is more unlikely to appear when there is a large number of potential suppliers.

2. Advocacy efforts related to public procurement

The Competition Authority is of the view that general guidelines for all public agencies are needed. Such guidelines could be very useful for procuring officials who often face situations where several socio economic aims (environmental, social concern etc.) are at stake. It is also fair to say that the procurement process has become much more complex over time, which makes it harder for officials to deal correctly with priorities and to strike the right balance between different kinds of political and socio-economic goals.

When the Competition Authority has an opportunity to have a dialogue with procuring entities we generally stress that analysis of the market structure must be the starting point together with a clear definition of the entity's demand. Without basic knowledge of the prevailing market conditions, the agencies run the risk to overestimate short run benefits at the expense of diminishing competition pressure in the future, for example due to higher market concentration (fewer interested bidders). Consciousness about the fact that market structure could be affected in many ways depending of how the invitation to suppliers is designed, is not always found amongst agencies. The way officials formulate basic conditions in the documentation for potential suppliers is of outmost importance from a competition point of view.

Competition is favoured by clear and simplified rules, especially for contracts where the contract value is reasonably low (well under the EU threshold values). There is a tendency in many cases to overcomplicate the terms that bidders have to meet and both sellers and buyers would be better off if this was observed to a higher degree.

In Sweden some major contracting entities enter framework or call up-agreements. By centralising a substantial part of total demand these entities make it hard for SMEs to take part in the bidding process. The Competition Authority has questioned the effectiveness of far driven centralisation, from a competition point of view and also for the poor economic outcome for the agencies that call upon them.

The Government has recently assigned the Competition Authority to investigate how to promote SMEs to be more active as bidders and potential suppliers. Since there exist over 10 000 contracting entities which make at least 200 000 procurements on a yearly basis, there should be chances to attract more interest from SMEs to participate in procuring processes.

During an ongoing procedure a supplier who considers that he has been harmed or risks harm, may appeal to a County Administrative Court. In the beginning of 2007 the Competition Authority gave a law firm an assignment to analyse all 572 Court decisions taken during the first half of 2006. The aim of this study was to find out on what ground suppliers appeal, the outcome of the verdicts but also the quality of arguments in the Court decisions. One of the main results from this study was that one and the same issue could be dealt with in different ways and that there seemed to be lack of consistency amongst the county courts in Sweden. The response from the Government on this initiative has been positive and the proposals will be considered in a planned review of the Court structure regarding public procurement.

3. Education of and co-operation with other agencies and procurement officials

The Competition Authority has launched a program to educate procurement agencies about factors that may indicate collusive behaviour in the procurement process. A checklist has been elaborated on the basis of, or merely copied from, a similar checklist from the US Department of Justice.

This initiative was triggered by the Competition Authority's detection of a major bid-rigging cartel in 2003. The cartel members had cheated on several municipalities and government bodies in procurement processes in the asphalt industry and thereby caused important welfare losses for taxpayers/consumers. The detection of this cartel led to an explicit interest from the Swedish Association of Local Authorities and Regions and from other organisations to learn more about how bid-rigging cartels in procurement processes could be suspected and identified. Some organisations have also published the checklist below (Annex 1) on their websites.

According to our experience, bid-rigging and cartel activities could quite often also breach other legislation than the competition rules, for example regarding corruption. On these grounds, the Competition Authority has initiated informal co-operation with the Swedish National Economic Crimes Bureau (EBM). EBM's operational area primarily concerns dishonesty to creditors and tax crime as well as infringements of the Insider Penal Act, but EBM also handles other cases like serious fraud, serious embezzlement and serious swindle. In the same fashion, the Competition Authority has informal contacts with the Swedish Anti-Corruption Unit, which is a specialist unit within the Swedish Prosecution Authority.

Officials from the Competition Authority participate in several seminars and workshops on a regular basis and give information about cartels and in particular bid-rigging cartels and the factors that may indicate their existence. These activities will become even more in focus when the Competition Authority takes over the responsibility to supervise the compliance with the Swedish procurement rules.

ANNEX 1

Checklist

Certain patterns of conduct suggest that illegal restraints on trade have been established by undertakings. The following is a checklist of some factors, any one of which may indicate collusion in a procurement context. Personnel at purchasing agencies should be especially sensitive to the occurrence of these factors.

Some factors which may indicate bid-rigging cartels and other infringements of the competition rules:

1. Some bids are much higher than previous bids, published price lists, or the estimated costs for the product or service concerned. (This could indicate "shadow bidding", i.e., when undertakings submit token bids which are not intended to secure the buyer's acceptance.)

2. Fewer undertakings than normal submit bids. (This could indicate a deliberate plan to withhold one or several undertakings from bidding.)

3. The same undertaking has been the low bidder and has been awarded the contract on successive occasions over a period of time.

4. There is an inexplicably large margin (in SEK) between the winning bid and all other bids.

5. There is an apparent pattern of low bids regularly recurring, such as the same undertaking always winning a bid in a certain geographical area for a particular product or service, or in a fixed rotation with other bidders.

6. A certain undertaking appears to be bidding substantially higher on some bids than on other bids, with no logical cost difference to account for the difference.

7. A successful bidder repeatedly subcontracts work to undertakings that submitted higher bids on the same projects.

8. There are irregularities in the bids e.g., identical calculation errors in the physical appearance of the proposals, or in the method of their submission e.g., use of identical forms or stationery, suggesting that competitors had copies, discussed, or planned one another's bids or proposals. If the bids are obtained by mail, and there are similarities of postmark or post metering machine marks.

9. Two or more undertakings file a "joint bid" even though at least one of the undertakings could have bid on its own.

10. A bidder appears in person to present his bid and also submits the bid of a competitor.

11. Competitors submit identical bids or frequently change prices at about the same time and to the same extent.

12. Bid prices appear to drop whenever a new or infrequent bidder submits a bid.

13. Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.

14. Local competitors are bidding higher prices for local delivery than for delivery to points farther away.

15. Competitors meet as a group to exchange any form of price information among themselves.

TURKEY

Turkish Competition Authority has a role to advocate competition as part of its activities regulated in the Act No 4054 on the Protection of Competition (the Competition Act). One of the occasions that it may carry out its advocacy role may be upon its findings during its enforcements activities. This may be exemplified by reference to one decision[1] related to public procurement which has been taken following an investigation concerning decisions and practices by Turkish Pharmacists' Association (TEB) and related chambers of pharmacists to fix discount rates while selling medicines to governmental and private authorities and establishments.

TEB is a public professional organisation established by law and it, like other professional organisations, has its roots in the Turkish Constitution.[2] According to the law establishing TEB, TEB can conclude agreements such as protocols with the relevant public and private authorities and establishments on behalf of pharmacists. It should be mentioned that decisions of TEB and such protocols are binding on the pharmacists according to the law establishing TEB and TEB monitors whether pharmacists comply with the decisions and imposes fines on those failing to comply. However, it should be mentioned that in case no such protocol exists, conditions of sale can be determined by the pharmacies and the relevant authorities and establishments independently of TEB.

As TEB represents the pharmacists and has a legal authority to sign agreements with public as well as private authorities and establishments, it signs a protocol with the Ministry of Finance representing various governmental authorities each year whereby conditions of sale of medicines to employees of the public authorities and establishments are regulated. The discount rate for medicines had been fixed in the protocol at 5% in 2001 whereas it decreased to 2,5% in 2002 and 2003 meaning that pharmacists had to make a discount of the fixed rate over the value of the prescription.

Competition Board, in this case, imposed fines on TEB due to its decisions and practices fixing discount rates. It should be mentioned that the Competition Board could impose fines in this case as TEB tried to extend the practice of fixing the discount rates to be followed by pharmacists regarding their sale of medicines within the context of procurement by public (and private) authorities and establishments that were not subject to the above-mentioned protocol.

However, the Competition Board, being aware of the negative effects of the Protocol on competition in the public procurement of medicines, has decided to send its Opinion including its findings on regulations and practices affecting competitive conditions for the sale of medicines to the Ministry of Finance and Ministry of Health as part of its advocacy role.

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1 *TEB,* 4.11.2004, 04-70/1012-247.

2 According to Turkish Constitution; "*Public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public ...*"

The Opinion sent has, among others, the following explanations:

- First of all, it should be mentioned that the protocol signed by the Ministry of Finance on behalf of various governmental authorities is not devoid of any beneficial effects as it would, otherwise, be burdensome for various authorities having an organisational structure scattered all over the country to negotiate with thousands of pharmacists the terms of procurement of medicines. However, it is also obvious that fixing the discount rates prevents competition among pharmacists and increases the financial burden on the public authorities caused by procurement of medicines. In fact, during the investigation by the Competition Board, it was seen that various authorities and establishments outside the scope of the Protocol could secure discount rates reaching as high as 20% by prompting competition among pharmacists and as a result they could decrease their financial burden.

- The Opinion, as a result, recommends that it would be more competitive and cost effective if the Protocol determines a minimum rate of discount and enables the relevant authorities to consider higher discount rates that might be offered by the pharmacists. The Opinion argues that this could guarantee not only the payment with a pre-determined rate of discount but also a higher rate of discount depending on competitive conditions in various regions in the country as can be seen from examples observed during the investigation.

Following this Opinion, another Opinion has been sent to the Ministry of Finance upon a communiqué issued by it which has foreseen that instead of a single fixed discount rate to be applied by all pharmacists, the pharmacists should apply different fixed discount rates (of 3%, 3,5%, 4% and 4,5%) depending on their sales revenue. The Opinion mentions that categorising the pharmacists into 4 groups and fixing the discount rate for each group bring different alternatives for the public authorities who undertake the payment albeit in a limited range. However, the Opinion mentions that this system is not compatible with the previous Opinion and the new system also prevents competition among pharmacists regarding the procurement of medicines by public authorities and establishments. As a result, the Opinion reiterates the findings and recommendations of the previous one in this respect. As a final remark, it can be mentioned that although the system of categorisation of pharmacists into four groups with different discount rates is not as competitive as the one recommended by the Turkish Competition Authority, it, nevertheless, provides alternatives for the relevant authorities and establishments who can direct their employees to pharmacists who offer the highest discount rate cited in the communiqué of the Ministry of Finance.

UNITED KINGDOM

1. Introduction

The value of public procurement in the UK currently stands at an estimated £125 billion[1]. Like any buyer, the government aims to secure value for money through its purchases. Competition is a crucial part of this.

This paper addresses two aspects of the procurement and competition debate. The first part looks at why competition is so important for effective procurement. The second part considers how public bodies can encourage innovation through competitive procurement and the OFT's role in advocating better use of competition[2].

2. Why is competition in procurement so important?

Competition incentivises efficiency and cost minimisation. Where firms can be sure that they will recoup the value of their investment, competitive procurement practices encourage innovative ways of working and the development of new products.

The importance of competition for procurement is widely recognized in the UK. Current HM Treasury proposals to reform public procurement[3] encourage departments to maintain their competitive, efficient and fair procurement practices in order to achieve the best outcomes. The National Audit Office has also acknowledged that competition remains one of the best ways of ensuring that the optimal combination of whole-life costs and quality is achieved[4].

3. Encouraging innovation through competition

Although competition can deliver significant benefits, there is a risk that procurement practices will focus too much on short-term gains at the expense of developing the longer-term benefits of competition. Where bids are evaluated solely on price, firms have an incentive to offer unrealistically low prices. This can not only lead to 'winner's curse' problems[5] but may also deter companies from investing in innovation.

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1 Speech by the Financial Secretary to the Treasury, John Healey, to the *Best Value in Public Sector Procurement Conference* (London, 23 January 2007).

2 For a more comprehensive assessment of how procurement systems can be designed to make the most of competition, see *Assessing the impact of public sector procurement on competition* (OFT, 2004).

3 *Transforming government procurement* (HMT, 2007)

4 National Audit Office *Getting value for money from procurement* (undated)

5 'Winner's curse' refers to the risk that contracts will be awarded to bidders that submit bids based on unrealistically optimistic cost calculations. For more information, see Box 4.1 *Assessing the impact of public sector procurement on competition* (OFT, 2004)

As the two examples below demonstrate, the core elements of competition need not be abandoned in order for innovation to be encouraged. In fact, maintaining competition can be a crucial part of providing firms with the incentive to innovate.

This paper looks at two recent studies carried out by the OFT that advocate the use of government purchasing power to incentivise innovation through competition. In both these examples, there are opportunities for the government to use its position as a dominant buyer to influence the investment decisions of firms.

3.1 Municipal waste management sector

Historically, the UK has been very reliant on landfill as a means of waste disposal, with 72 per cent of municipal waste sent to landfill in 2003-04[6]. However, as the environmental costs of landfill become more evident, there is great pressure on local authorities to find other ways of disposing of waste. Part of this pressure comes in the form of legally-binding EU Landfill Directive targets which, if the UK fails to meet, could result in fines of up to £180 million per year.

One problem facing local authorities has been that, in certain regions, a single firm holds a substantial share of the market. This has led to firms having dulled incentives:

- to find the most efficient methods of production, and
- to look for competitive, new ways to treat waste.

In 2006, the OFT looked at ways in which local authorities could use procurement practices to encourage disposal firms to develop innovative ways to treat waste that would provide an alternative to landfill[7]. This report drew on evidence from the Office of Government Commerce Second Kelly Market waste management report[8].

The OFT report considered a number of ways that the competitive procurement system could be altered to encourage more innovation. In particular, the OFT recommended:

- That local authorities only aggregate contracts for collection and disposal where there is strong evidence of administrative or productive efficiency gains from doing so. Research into the procurement of waste management services discovered that local authorities often aggregated the contracts for collection and disposal without fully considering the potential impact on competition. The OFT found that, because of contract aggregation, firms only offering treatment facilities but no collection services were unable to bid even if their disposal methods were more efficient or innovative than conglomerate firms.
- That local authorities should ensure that contracts were long enough for waste treatment firms to recover the cost of their investment. This is particularly important where landfill and treatment

6 *Municipal Waste Management Survey 2003-04* (Defra, 2004)

7 *More Competition, Less Waste* (OFT, 2006)

8 The OGC Kelly Programme was set up to consider what steps could be taken to increase competition and long-term capacity planning in markets where the government has significant purchasing power. See http://www.ogc.gov.uk/procurement_initiatives_the_kelly_programme.asp for more information.

companies are in competition for the same contract since disposal by landfill typically requires lower upfront investment.

- That contracts should be drawn up to specify the desired output rather than prescribing the inputs that firms should use. Local authorities should not specify what type of treatment technology is to be used in the disposal of waste if it is possible to avoid this. Instead, firms should compete in offering the best, and in some cases, the most innovative, treatment technology that will deliver the desired output for the local authority.

3.2 Pharmaceutical Price Regulation Scheme

A rather different example of where the OFT has recommended that government procurement practices be amended to make better use of competition is the recent study into the Pharmaceutical Price Regulation Scheme (PPRS)[9].

The PPRS is the method by which the Department of Health seeks to control the prices of branded prescription medicines used by the National Health Service (NHS). The scheme does not control the prices of individual products. Rather, it places a cap on the profits that pharmaceutical companies can earn on their sales of branded medicines to the NHS and also provides a system by which all branded prescription medicines receive a price cut every five years. Part of the justification for the PPRS when it was set up was that it would support innovation by giving firms greater certainty over their financial returns while preventing average prices that are 'too high'.

However, there are two reasons to question this justification. Firstly, by creating a profit ceiling, firms have dulled incentive to innovate. The opportunity to yield high returns from a pioneering development are constrained.

Secondly, prices under the current PPRS are not linked to the therapeutic benefit of products. There is, therefore, less of an incentive for pharmaceutical companies to invest in developing medicines that will provide the best outcome for patients.

To address these problems, the OFT has recommended that the PPRS should be reformed to replace the profit cap and price cuts system with a value-based mechanism. Value-based pricing relates the prices of individual medicines to the health benefits they provide as evaluated in comparison with existing treatments. New medicines that deliver greater benefits to patients than existing products are awarded higher prices than those where improvements are less significant. As a result, pharmaceutical companies have an incentive to channel their investment towards developing products that offer the highest value to patients.

It is, however, recognised that it can be difficult to assess the likely clinical value of certain medicines before they are launched into the market. For this reason, the OFT's proposed reforms to the PPRS include mechanisms for periodically reviewing the prices of branded medicines. Reviews would aim to ensure that prices would continue to reflect the proven benefits of medicines as information emerges over time.

The accurate assessment of the clinical value of medicines is an important part of encouraging innovation in products that most benefit patients. Without this, it will still be the case that, due to the NHS procurement process, firms have dulled incentives to invest in innovation of medicines that most benefit patients.

9 *The Pharmaceutical Price Regulation Scheme: an OFT market study* (OFT, 2007)

4. Conclusion

Competition is an essential part of obtaining value for money in public procurement. It can help government to secure bids that offer low price and high quality products and is, in some circumstances, a crucial part of providing firms with an incentive to innovate.

UNITED STATES

1. Introduction

In the United States, government attorneys at the Antitrust Division of the U.S. Department of Justice have for many years spent considerable time conducting outreach and training programs for public procurement officials and government investigators, including investigators who work for government agencies which solicit bids for various projects. These outreach programs help develop an effective working relationship between the government attorneys who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. Government attorneys advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and government attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

2. Purposes of Public Procurement Outreach and Training Programs

Public procurement outreach and training programs serve a number of purposes. First, these programs help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, 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.

Second, outreach programs help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, which results in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 14 below.

Third, outreach programs educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Government attorneys provide advice about techniques that procurement officials can use to make it less likely that their program will be victimized. For example, in certain circumstances government attorneys have advised procurement officials to combine work into larger contracts so that competitors outside of a local geographic area will decide that it is profitable for them to bid on the contracts, resulting in more competition for each contract. Government attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 16-18 below.

Fourth, outreach programs help develop a close working relationship between public procurement officials, government investigators, and government attorneys. This is the ultimate goal of an outreach program. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for not preventing the illegal activity from occurring. During outreach programs, government attorneys should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy which was carried out in secret without their knowledge, and that they and government attorneys have the same interests in trying to prevent and prosecute bid rigging. The statistics concerning the number of prosecutions in the United States which are bid-rigging prosecutions rather than price-fixing prosecutions indicates that the joint efforts of public procurement officials, government investigators, and government attorneys have significantly reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the number of bid-rigging prosecutions has dropped dramatically. For example, during the past three years less than five percent of the criminal antitrust prosecutions in the United States were for bid rigging.

Finally, as will be discussed more fully below in paragraphs 19-21, sometimes public procurement officials <u>are</u> involved in bid rigging and other illegal conduct which undermines competition as a result of receiving kickbacks or other remuneration from companies which submit bids. Outreach programs serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

3. The Use of Publications to Make an Outreach Program More Effective

Brochures – In the United States, government attorneys provide brochures to public procurement officials and government investigators to make outreach programs more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For" ("Bid Rigging Brochure") can be found at www.atrnet.gov/subdocs/211578.pdf; and "An Antitrust Primer For Federal Law Enforcement Personnel" can be found at www.atrnet.gov/policies/guidance/209114.pdf. Copies of these brochures have also been provided as handouts.

Newsletters – Offices within the Antitrust Division publish newsletters which discuss certain cases which have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. An example of a newsletter published by the Chicago Field Office has been provided as a handout. In the fall of 2006, this newsletter was distributed to about 1,700 recipients, including federal, state, and local public procurement officials and government investigators.

4. Key Features of an Effective Outreach Presentation

Explains the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the agreement to rig bids is the crime. In other countries, the legal standard may be different, but it is important for government attorneys to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand what constitutes the violation, they will not know what to look for

and report to the authorities. In U.S. outreach programs, government attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

Explains how antitrust investigations are conducted – During outreach programs, government attorneys should explain the procedures used to conduct the investigation, which, of course, will vary from country to country. In the United States, these procedures would include taping conversations with the assistance of cooperating witnesses, using search warrants and wiretaps, conducting unannounced "drop-in" interviews, and serving grand jury subpoenas for documents and testimony. Also, government attorneys discuss the Corporate Leniency Policy which may enable a cooperating company to avoid prosecution.

Discusses Penalties for Bid Rigging and Other Antitrust Violations – Outreach programs provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

Discusses Indicators of Bid Rigging – A key part of U.S. outreach programs is a discussion of certain patterns indicating bid rigging which procurement officials and investigators should look for. For example, if company A wins a contract one year, then company B wins the next year, then A, then B, this pattern may mean that the companies have agreed to allocate the contracts by taking turns winning it – a bid rotation scheme. Another example is that sometimes the same errors (misspelled words and typographical or arithmetic errors) are evident in bids submitted by competing companies, indicating that the companies prepared the bids in concert. A third example is when a new company enters the bidding unexpectedly, and at a much lower price, than the bids of the other companies which traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging the bids and winning the contract at a high, non-competitive price. Additional examples of indicators of bid rigging can be found on pages 3 - 5 of the Bid Rigging Brochure.

Encourages procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report suspicions which they have that illegal conduct is occurring. Government attorneys should encourage procurement officials and investigators to contact them if the procurement officials or investigators have <u>any</u> concerns that bid rigging or other procurement violations may be occurring and assure them that they are always willing to talk to them about their concerns. Sometimes government attorneys will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

Gives examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of public procurement officials. This will encourage procurement officials to believe that action will be taken if they report their suspicions. Each country will have its own examples to use, but in the United States government attorneys have used the following examples in outreach programs:

1. Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were a series of ninety contracts over seven years. The two companies coordinated their bidding so that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their concerns, and the companies and their executives were successfully prosecuted for bid rigging.

2. Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter had the same typographical error (an unnecessary word): "Please give us a call **us** if you have any question." The procurement official was concerned that the companies had colluded on their bids and reported his concerns to the Antitrust Division of the U.S. Department of Justice. The companies and individuals involved were subsequently prosecuted and convicted for bid rigging and other violations.

3. The government sought to buy four type of gloves: 1) women's dress gloves; 2) women's outdoor gloves; 3) men's dress gloves, and 4) men's outdoor gloves. The government intended to award four contracts, one contract for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. The companies and culpable individuals were subsequently successfully prosecuted for bid rigging.

Discusses Other Crimes Which May Be Prosecuted – In U.S. outreach programs, government attorneys explain to public procurement officials and government investigators that the government prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the competitive process, such as kickback schemes, may not be violations of U.S. antitrust laws – this conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when we investigate these schemes we may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement will be discussed in more detail below in paragraphs 19-21.

5. Certificate of Independent Price Determination – What It Is and Why It Is Important

An example of a Certificate of Independent Price Determination used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985 has been provided as a handout. The key part of this certificate states:

The offeror certifies that:

- The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered.

- The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law; and

- No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

Basically, this document requires each company which submits a bid to sign a statement under oath that it has not only not agreed with its competitors about the bids which it will submit, but has also not even disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids.

Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even though there is insufficient evidence to prove that the competitors actually agreed on prices or who would win the project for which bids were submitted.

Because the evidence needed to prove a violation of the Certificate of Independent Price Determination is significantly less than the evidence needed to prove an illegal agreement, the violation of the terms of the certificate gives government attorneys leverage which they can use to convince companies to cooperate with the government's investigation in return for not charging them with lying on the certificate or for a favourable sentencing recommendation.

6. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials

In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may be not be clear whether or not the companies involved are also engaged in bid rigging. However, in a number of cases in the United States government attorneys have developed evidence that corrupt procurement officials are being paid off to facilitate a bid-rigging scheme.

It is important to determine whether corrupt procurement officials are also assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official.

Consequently, evidence of kickbacks or bribes provides very good leverage to enable government attorneys to obtain cooperation from culpable individuals and determine whether bid rigging is also occurring.

These types of cases are also important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is fair and competitive.

7. Summary and Conclusion

A comprehensive outreach and training program for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist government attorneys in investigating and prosecuting bid rigging, but in order for that to happen government attorneys need to educate these procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Government attorneys also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

The ultimate goal of an outreach and training program is that the public procurement officials, government investigators, and government attorneys will work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programs.

BRAZIL

In Brazil, the principle of obligatory bidding procedures is rooted in the 1988 constitutional text. Article 37, item XXI of the 1988 Constitution determines that public bidding procedures must be followed in all public sector contracting operations involving construction projects, services, acquisitions and property transfers, in such a way as to ensure equal conditions to all participants.

Article 22, item XXVII of the 1988 Constitution determined that the Federal Government would be exclusively responsible for defining the general rules and procedures to be followed in public bidding processes and for issuing specific instructions regarding their implementation. These general rules are to be followed by the direct and indirect (autonomous agencies and foundations created and maintained by the Government) public administration, states, municipalities, Federal District and state-owned companies and joint capital corporations. Federal Law n. 8,666, dated June 21, 1993, regulated public sector procurements and contracting of services in Brazil.

Aside from Law n. 8,666/1993, which is the basic statute covering public procurements in Brazil, two other laws also deserve mention: Law n. 8,987, dated December 13, 1995, and Law n. 10,520, dated July 17, 2002. The first of these defines the procedures to be followed in delegating performance of public services to private entities through authorizations, permissions or concessions. In its turn, the second of these laws introduced a new bidding modality known as the reverse auction designed to enhance the speed and transparency of the administrative activities involved in choosing future suppliers of common goods and services[1]. Though these laws are specific in nature and are applied to well-defined situations, it is important to stress that the general law on bidding procedures is also applied in a subsidiary manner to cases involving public service concessions and the new reverse auction modality.

In general, the bidding procedures used by the Public Administration are open to all interested parties who, in order to participate, must submit to conditions defined beforehand in the tender notification. The Public Administration receives the bids and chooses that considered most appropriate, almost always on the basis of price and quality. In Brazil, bidding procedures are governed by a vast variety of principles, among which one should highlight the principles of free competition, equality among competitors, publicity, strict observance of the terms of the tender notification, objective judgment and compulsory awarding. However, the greatest of all principles is the supremacy of the public interest, which interacts with all of the other principles involved.

One question of particular interest to this study is the analysis of how the principles of free competition and equality among competitors, both of which are essential to the bidding process, are effectively supported by a legislative structure capable of ensuring compliance, particularly when one considers the required interdisciplinarity between the Public Procurement Law and the Brazilian Antitrust Law – Law n. 8,884, dated June 11, 1994.

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[1] Decree n. 3,555, dated August 8, 2000, disciplined the concept of common goods and services. Common goods are subdivided into supplies (items acquired frequently) and permanent goods (furniture, vehicles, etc.). There are varied types of common services, including administrative support services, hospital services, conservation and cleaning, security services, transportation, events, periodical subscriptions, printing services, information services, hotel services, etc.

In order to enhance the efficacy of legislation and stimulate free competition and equality among competitors, the Statute on Public Sector Bidding Procedures classifies the following types of conduct as felonies: i) impede, perturb or defraud performance of any act included in a bidding procedure; ii) defraud a bidding procedure designed to acquire or sell goods or merchandise, generating losses to the National Treasury; and iii) frustrate or defraud the competitive character of bidding procedures through acts defined as collusion.

Aside from criminalizing certain types of conduct, the Brazilian Statute on Public Procurement provides government entities and society as a whole with the possibility of demanding that authorities take action should irregularities be found to exist. The wide-ranging publicity required by bidding procedures, coupled with provisions allowing for general participation, make it possible for any citizen to challenge an irregular or biased notification, while ensuring that the Public Administration will be able to carry out procurement processes in more favourable conditions.

Mention should also be made of the external and internal controls exercised by the entities responsible for bidding procedures. The Statute in question determines that Courts of Audit are responsible for inspecting bidding procedures and judging whether procurements have effectively resulted in savings. Should such crimes as collusion be found to exist, the Statute assigns responsibility for investigating and punishing those involved to the Office of the Public Prosecutor and the Judiciary. Finally, the legislation demands that, whenever irregularities or criminal activities, including collusion in bidding procedures, are found to exist, the Public Administration must immediately repeal all acts consequent upon such procedures and declare any contracts formalized with the private sector entity involved to be null and void.

Even though the Brazilian Statute on Public Procurement does not expressly call for the involvement of entities active in the defense of competition, this is not a barrier to their participation. The reason for this is that the Brazilian Antitrust Law expressly typifies price-fixing and negotiation of advantages in public or administrative bidding procedures as anti-competitive behavior. In this sense, the possibility of involving entities charged with defending competition in bidding procedures is solidly backed by legislation.

In order to instrumentalise and make the involvement of the agencies of the Brazilian Competition Policy System – BCPS[2] feasible, article 30 of Law n. 8,884/1994 states that any concerned party may resort to the Secretariat of Economic Law (SDE) to denounce anti-competitive conduct in general or, more specifically, in bidding procedures involving government procurements. Another provision that has been quite useful in ensuring the participation of such entities in investigations of anti-competitive behavior is that which allows the Secretariat for Economic Monitoring (SEAE) to initiate investigations. The records of such investigations are subsequently sent to the SDE, whenever indications of violations of the principle of free competition are found to exist, including cases of collusion in public bidding procedures.

It should be mentioned that the SEAE was complying with this responsibility in 2003 when it recommended administrative proceedings against 20 security companies from the State of Rio Grande do Sul, the Association of Security Companies of Rio Grande do Sul and the Union of Security Employees, accusing them of formation of a cartel in public bidding procedures.

The cartel distributed contracts into batches to be assigned to the different participating companies. In exchange for advantages in the contracts assigned to them, the companies refrained from participating in tenders involving other contracts by submitting documents containing errors that would necessarily lead to

[2] The Brazilian Competition Policy System (BCPS) is composed of the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE), an autonomous agency linked to the Ministry of Justice.

their disqualification or by proposing prices well above those submitted by the preordained victorious company.

By way of example, we could cite the fact that the same company called Rota-Sul was awarded 14 consecutive contracts in bidding procedures implemented by the Ministry of Finance in the State of Rio Grande do Sul. In these cases, the disqualified companies simply failed to send a legally authorized representative to the session in which the bids were opened or failed to submit or even sign all of the documents requested. In cases in which companies were considered apt in the classification stage and permitted to participate in the next stage of the process, other ploys were utilized, such as submission of price proposals above the maximum limits permitted in the notification or exclusion of one or more of the security posts required to be cited in the proposals submitted by the companies.

Another example that deserves mention demonstrates how important the involvement of antitrust authorities can be. This particular case involves SEAE experience in competition advocacy in processes involving public service concessions covered by Law n. 8,987/1995. The specific cases involved long-term contracts almost always judged to be incomplete, clearly demonstrating that the best moment (and often the only moment) for stimulating competition is during the bidding procedure itself.

One should underline this fact since experience in competition advocacy during bidding procedures involving public service concessions has made it possible to draw very important lessons to be applied by the Brazilian Competition Policy System (BCPS) in procurements. The reason for this is that concerns that arise in the granting of public service concessions almost always involve collusion and are basically the same concerns that must be coped with in ensuring competition in procurements. In both concessions and procurements, there are important questions involving the eligibility rules applied to participants (for example, financial qualification clauses) since these rules can be overly restrictive and act as an artificial barrier to the participation of a larger number of players. At the same time, auctions can be structured in such a way as to make collusion more difficult in both concessions and procurements.

Currently, the SEAE is participating in an ongoing discussion of the rules to be adopted in the second stage of a federal highway concession process involving seven highway segments. The Secretariat has emphasized its concern with guaranteeing that the rules governing bidding procedures will enhance competition.

For example, during public hearings on the draft notification and concession contract, the Secretariat recommended that contract value be defined on the basis of investments to be made in the highways and not the estimated value of toll-based revenues. The question of contract value is important since it determines the required net worth of potential participants and the value of the guarantees to be submitted. In the Brazilian case, experience has shown that revenue-based contracts tend to have values three times greater than investment-based contracts. Consequently, the greater the contract value, the greater will be the barriers to participation in the process, thus making it less competitive. It should be underscored that, in this case, the Secretariat took the same position as the Brazilian Court of Audit (TCU), agreeing that investment-based contracts should be utilized as a means of enhancing competition.

Another question targeted by the Secretariat involved the auction modality. Initially, a sequential auction involving the seven highway segments was planned. This modality also had two stages, the first of which consisted of bids in sealed envelopes stating the minimum toll proposed by each company. In the second stage, the participants would publicly state the highest price they were willing to pay for the concession. Participation in this stage would be limited to those companies willing to match the lowest toll proposal offered in the first stage. During the entire discussion period, the Secretariat insisted that the auction format be altered in such a way as to substitute the sequential auction for a simultaneous auction of the seven highway segments. The major objective of this alteration would be to avoid possible collusion,

since revelation of the strategy adopted by each participant during the sequential auction could lead to possible tacit collusion or even facilitate collusion negotiated beforehand among the participants. Once discussions were terminated, it was decided that the sequential auction format would be replaced by the simultaneous auction, while the entire process would be simplified, reducing it to just one stage in which the participants would offer their lowest toll proposals in closed envelopes.

Though previous experience demonstrates the involvement of antitrust authorities in procurements proceedings, the BCPS supports even greater participation, clearly recognizing the importance of stimulating competition in Government procurements. In this context, one should mention that the Secretariat of Economic Law of the Ministry of Justice recently created a Government Procurements General-Coordination, which through technical cooperation with the General Federal Government Comptroller (the entity charged with internal federal government controls), has the objective of increasing the effectiveness of investigations of cartels in public sector bidding procedures. Various agreements are to be signed in the near future between the Secretariat of Economic Law of the Ministry of Justice and public sector companies active in strategic sectors. At the same time, an effort is being made to work more closely with the Federal Police in combating bid-rigging.

With regard to the role of the BCPS agencies in public-sector procurements, it is worth recalling that an agreement will soon be formalized between SABESP, the water and sewer company of the State of São Paulo, and the Secretariats for Economic Monitoring of the Ministry of Finance and of Economic Law of the Ministry of Justice determining that assistance will be provided in the bidding procedures implemented by that company, together with cooperation in elaborating a regulatory framework capable of stimulating increased competition.

Finally, it is important to emphasize that Brazil is now going through a unique moment in which, at one and the same time, it is revising the rules set out in the Brazilian Antitrust Law and in the Public Procurement Law. Therefore, this is an opportune moment for discussion of the ways in which increased competition can be fostered in Government procurements, while garnering constantly greater knowledge of the best international practices in this area of activity.

INDONESIA

1. Introduction

Government's policies in commerce liberalization push the make-up of competition between business parties to be more efficient in their operational activity. So that competition can be executed properly, a conducive competitive environment and equal opportunity is needed. With this condition, concentration of economics strength at selected parties can be reduced. But in reality, there are quite a lot of perpetrators which try to get market power through competitor disservice, either through demarcation of market and creation of agreement through cartelization. Winning tender through collusion is one of the examples conducted by business actors to improve his market power. For Indonesian Competition Authority (KPPU), collusive tender are cases which pull its most attention in case handling, because from 560 reports obtained since year 2000 to 2006, half of them related to tender, either public procurement or auction.

2. Definition of Tender

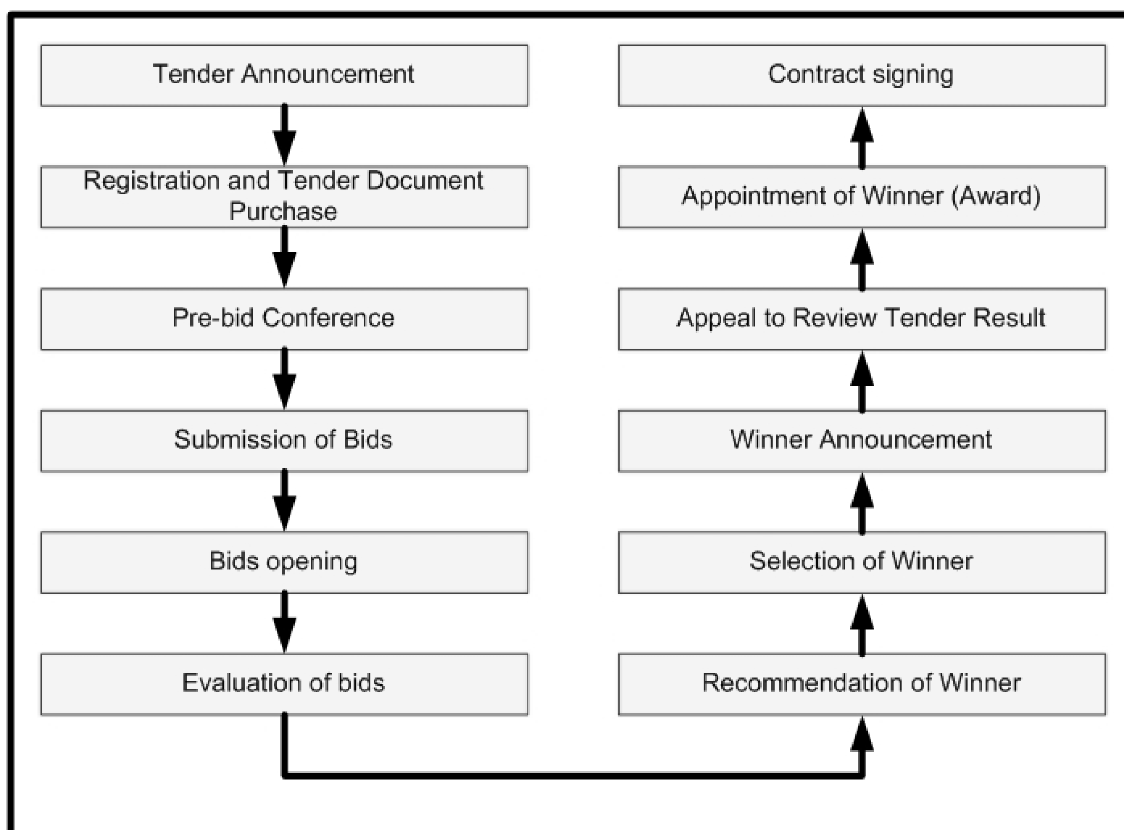
Tender in Indonesia is recognized by two terms, that is public procurement for the purchase of goods/services and auction for the sale of goods/services. Pursuant to definition in Presidential Decree No. 80/2003 and its several revisions, public procurement is provision of goods/services through self undertaking or by the supplier of goods/services. Auction is sale of goods in public led by Auction Officer through open/oral bidding or closed/written bidding, preceded by auction notice. By definition, public procurement is purchasing of goods/services, while auction is sale of goods. Both types of tender can be executed by any party, both private sector and government. Law No. 5/1999 gives authority to KPPU to observe collusive tender, public procurement and auction, conducted by government, public companies, Central Bank, and private enterprises having broad public interest.

Bidding market in Indonesia, as so also in many other countries, consists of public procurement of goods and or services and auction. Public procurement in Indonesia is differentiated to several methods:

- public tender is selection of provider or purchaser of goods/services, conducted by open announcement so that interested and competent players can follow;
- limited auction is selection of provider or purchaser of goods/services, conducted for limited number of qualified players;
- direct election or appointment of one player under certain justified condition;

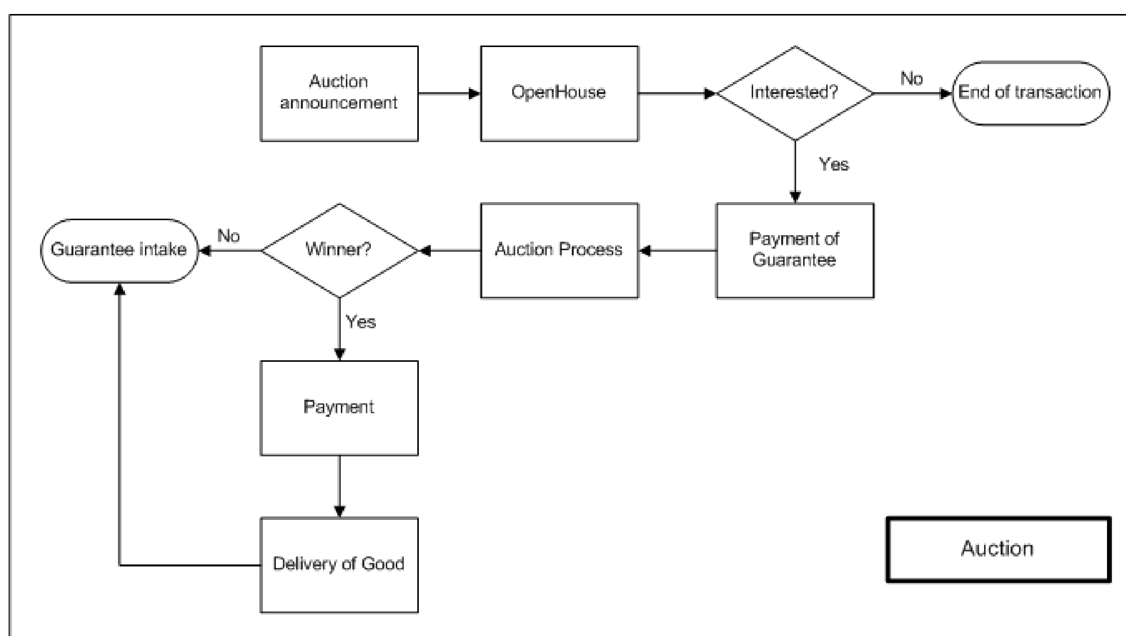
3. Process of Tender

Procedure of public procurement set up by government through Presidential Decree No. 80/2003 with its several revisions. Procurement procedure conducted by private sector and donor institute is set up by themselves. The process for public procurement of goods/service is a little different with auction in the case of duration and procedure. Following is a procedure for public procurement in Indonesia.



Process of tender started with tender announcement, followed by registration and purchase of tender document. After document obtained, a pre-bid conference will be organized. Pursuant to the pre-bid conference, tender participants are given sufficient time to prepare and hence submit their bid. After submission of bids closed, public opening of bids and evaluation of bid documents will be held. Result of bid documents evaluation will be used as base for recommending the winner. Bidders are given expostulating period to review tender result, and only after that tender winner is decided and award is given, followed by signing of contract.

Different with public procurement of goods and services, auction followed more simple process. Auction is usually started with announcement, followed with an open house. Payment of auction guarantee is made along with registration to participate. Through bargain process in open auction, winner decided to the highest bidder. This is different with public procurement which also can involve quality as one of the winner criteria. Following is a procedure for auction in Indonesia.



4. Relevant Competition Issues in Tender

There are several important issues related to promotion of competitive environment in tender, i.e. preparation, announcement, owner's price estimate, and evaluation criteria.

4.1 Tender preparation

Planning stage is an important step in tender process because setting up of conditions and specifications will determine the quality of goods/services to be obtained. Appointment of independent tender committee, not related to any participant is a must. In many cases handled by KPPU, the stage of tender preparation is the phase where collusion is mostly conducted. Unfortunately, the government only stipulates the no-blood relation with official who appoints members of tender committee, and not stipulates yet any affiliate with business players.

4.2 Tender Announcement

Government sets that for an open tender valued up to Rp 1.000.000.000 (US$ 110.000) is announced in at least one local newspaper or one national newspaper for tender with less than three players in the area could participate. Open tender valued more than Rp 1.000.000.000 (US$ 110.000), announcement is obliged to be executed at both newspapers (local and national). Government official in charge decides national and local newspaper. National newspaper decided by Head of National Planning and Development Agency pursuant to recommendation of Minister of Communications and Information, while local newspaper decided by Governor. Selection process of the newspapers is made through open tender.

Another point, which invites attention of KPPU in tender announcement, is the inclusion of candidate participants in a limited tender notice. Inclusion of the names of invited participant candidates will surely open opportunity for the perpetrator to conduct collusion. A case like this had advocated by KPPU to a regent when it announced a limited tender for development of stadium in his regency.

4.3 Owner's Price Estimate

User of goods/services is obliged to have owner estimate (OE) calculated by proper expertise based on relevant data. Owner estimate is made by tender committee and decided by user of goods/service. Owner estimate used as a means to evaluate the genuity of his, including the detail, and to decide the amount of bond value, but cannot be made as basis to disqualify. In practice, members of tender committee who collude with tender participant often leak owner estimate; so that in several cases KPPU found that some bid prices came very near to owner's estimate.

4.4 Assessment Criteria

There are three assessment methods of tender document in Indonesia; they are the one envelope method; the two envelopes method, and the two stages method. One envelope method is submission of bid document, which consists of clauses of administration, technical, and price put into one envelope. The two envelopes method is submission of bid document, which consists of clauses of administration and technical packed into one envelope, while bid price is packed into another envelope. Finally, the two stages method is submission of bid document, which consists of clauses of administration and technical submitted first, while bid price is submitted sometime later after the evaluation of the first bid document.

Whichever method is followed, the evaluation criteria should specify the score of each criterion: administration, technical and price.

5. KPPU's Effort in Promoting Fair Competition in Tender

Various efforts have been undertaken by KPPU in preventing collusive behaviour in tender, for example conducting various socialization and advocacy with central and local government, public enterprises, academicians and students, business actors, and trade associations. To support the law enforcement in tender, KPPU has also signed memorandum of understanding with Anti-Corruption Commission, to handle tender cases that involves government officials. Besides that, KPPU has also published a Guideline of Prohibition of Collusive Tender according to the Law No. 5/1999 comprises coverage of tender targeted by competition law, explanation of types of collusion, and various indications of collusive behaviour which often happened in each step of tender. To socialize the guideline, KPPU has disseminated it to entire central and local government offices throughout Indonesia.

Since last year, Indonesia has launched the acceleration program of infrastructure development through Infrastructure Summit 2005 and Indonesia Infrastructure 2006 next month in many sectors i.e.: telecommunication, toll road, airport, seaport, energy and mining. Most of the projects are offered through tender. KPPU's focus its attention to observe on how the tender is executed so that fair competition ***for*** the market can be maintained and after the tender, where often monopoly or regulated sector policy involved, competition ***in*** the market is also fairly maintained.

6. Case Handling Related to Tender

Indonesia as a developing country, certainly need to develop infrastructure in many fields with a huge amount of number and value. According the regulation, infrastructure development that reached the certain value must be tender.

KPPU received many reports of collusive tendering in government procurement. Besides become the most receive report, collusive tendering also affect to high economic cost.

Tender collusion cases, which have been handled by KPPU, were varieties, involved public procurement and auction in regional and national level. Types of collusion faced cover all types of

collusion: vertical, horizontal, and combination of both. Types of industry or business activities coped with are also very wide, for example oil and gas industry, telecommunication, capital market, insurance, pharmacy, and transportation. Follows are some cases in casing and tubing tender, procurement of indelible election ink for National Election and tender of security service.

6.1 Case of Casing and Tubing tender by Caltex Pacific Indonesia (CPI)

The Commission for the Supervision of Business Competition (KPPU) found CPI, an oil company, and three pipe processors, Citra, Purna, and Patraindo, guilty of bid-rigging in violation of Article 22 of Law Number 5 of 1999, resulting from a tender by CPI to supply it with pipe. Citra, Purna dan Patraindo (pipe suppliers) was found to have exchanged their prices with each other at a meeting the evening before the bids were opened. CPI, in turn, was held responsible for failing to "exercise adequate prudence in ensuring fair business competition," because in setting up the tender process it "should have expected from the beginning that a collusion would occur." Purna and Patraindo were compelled to obtain a support letter from Citra in order to complete tender requirement.

As a consequence of the violation, the KPPU required that the contract entered between CPI and Citra, the low bidder, be undone, and that the entire tender process be re-done. CPI has accepted the KPPU's verdict and has not sought an appeal to the district court.

The procurement process required that bidders be able to deliver both low-and high-grade pipe. It specified that only one vendor would be awarded the contract; it established the contract term for three years; it limited the source of the pipe to Indonesian companies; and it required that the winning bidder had to have the ability to perform in–country heat treatment for its pipe. Companies that could only process low-grade pipe were permitted to submit bids, but only if they included a "letter of support" form a high-grade pipe processing company, agreeing to supply the low-grade processor with thigh-grade pipe. The use of letters of support is a common practice in this industry.

Before beginning the tender process, CPI assessed eight potential contractors. These assessments included an evaluation of the source of the pipe, a review of each company's financial capabilities, and other factors. Based on the assessments and a meeting of the Joint Committee of the Government and CPI, CPI determined that only four processors – Citra, Purna, Patraindo, and Seamless -- would be invited to submit bids. Furthermore, CPI deemed three partnerships acceptable for submitting joint bids: (1) Seamless and Bakrie; 2(Citra; and (3) Patra, Purna, and Multi Guna.

Two months before the bids were to be submitted; Citra sought permission from CPI to form a "consortium" to manage the entire contract, in lieu of using the tender process. CPI rejected Citra's proposal as inconsistent with its procurement system, and Indonesian government representatives approved this rejection.

On May 1, 2000, the day before the bids were to be open, Citra, Purna, and Patraindo met in a hotel in Jakarta to discuss their bids. At this meeting, Citra agreed to give both Purna and Patraindo letters of support, conditioned on Purna and Patraindo agreeing to reveal to Citra the bids they intended to submit to CPI. Purna and Patraindo shared their bids with Citra, and Citra gave them letters of support. Additionally, Citra promised Purna some work under the contract, should Citra be awarded the contract.

The KPPU uncovered substantial evidence of a bid-rigging conspiracy. In particular, the events that took place at the meeting in the Jakarta hotel between Citra, Purna and Patraindo, on May 1, 2000, in which the parties exchanged their bids the day before they were to be opened by CPI, constitutes sufficient evidence of illegal bid rigging under most nations' antitrust regimes.

6.2 Case of Procurement of Indelible Election Ink

The case was based on the report concerning a collusion indication in indelible election ink procurement for legislative general election of 2004 held by National Election Commission (KPU). The case is combination of vertical and horizontal collusion, between the Tender Committee and the business players, among the business players, and between the Tender Committee and the consortium of business players. According to investigation conducted, KPPU found that collusive conduct is made through limiting the source of ink from India, memorandum of understanding among the tender participants, narrowing the criterion on experience of import to facilitate a consortium to pass, illegal changes on bid price, and a journey of Tender Committee to India financed by tender participants.

Evidences of collusive conduct in this case come from the following findings:

- Clauses to form consortium with unclear criteria that opened entrance for perpetrator of unknown business actors;
- Special opportunity given to an unqualified consortium to participate in the tender;
- Additional clauses to disqualify certain tender participant, while others had passed under same clauses;
- Limiting in ink source to India;
- Special opportunity given to certain participant to detail bid document to meet tender requirement after closing;
- Agreement of price arrangement and division works among the members of consortium after receipt of award;
- Appointment of a consortium though not fully qualified;
- Price negotiation to adjust price required each zones to facilitate certain tender participant as winner.

By those evidences, KPPU decided that the conducts of the Tender Committee with the business actors involved were legally and proven as contravened to Article 22 Law No. 5/1999, and therefore fined and banned all perpetrators to participate in public procurement of goods and or services in National Election Commission (KPU) and its branches for 2 years. KPPU further suggested General Election Committee to take necessary follow up with Tender Committee members and public prosecutors to conduct further inspection on the conducts of the Tender Committee.

6.3 Case of Security Service Procurement

Security Department of Thames PAM Jaya (TPJ), a drinking water joint venture company, delivered purchase requisition to Department Procurement TPJ for procurement of security service. Pursuant to request, Tender Committee and Supervisor Committee formed to undertake a tender. Through a long process, finally PT. IST specified as tender winner.

This case is a vertical collusion between the TPJ with incumbent security service provider (IST). Based on the investigation, KPPU found that a conspiracy was done by giving the exclusive opportunity by tender committee to IST. These are based on the following facts:

- There was an oral and written communication between Director of TPJ and IST, allowing IST to participate in the tender although IST didn't enlist for pre-qualification;
- TPJ had an internal meeting to accept IST as a bidder, although it didn't enlist to follow prequalification, only because it was a current security service provider.
- Tender Supervisory Committee of TPJ added additional assessment criteria after Tender Committee finalized evaluation;
- There was an internal memo from Tender Supervisory Committee stating there was no intention by TPJ to replace IST as its supplier in security service, claiming the tender held merely to obtain a market price for future contract. This statement was made after tender evaluation;
- Tender Committee held price negotiation with IST, but not with another bidder recommended by Tender Committee as a first pick;

Through those evidences, KPPU decided that TPJ and IST were legally and proven contravened to Article 22 Law No. 5/1999. Pursuant to this verdict, KPPU punished TPJ and IST to discontinue security service activities stipulated in a contract made based on the tender result. KPPU punished TPJ to pay for penalty for the collusive conduct and asked TPJ to hold a new tender for security service with great transparency, competitiveness, and fairness for all business actors that qualified. KPPU also banned IST from participation in procurement of good/services held by TPJ for two years.

7. Conclusion

Collusion in tender cases dominates the law enforcement activities of KPPU. Collusion found in many cases started at planning stage by setting up requirement and specification that lead to certain business players.

KPPU realises that KPPU alone cannot wipe out bid rigging through its enforcement of the law, so that various cooperation efforts either in national level and regional level is necessary, with the policy makers, sector regulators as well as with other law enforcers.

To reduce the collusion in tender, KPPU has taken various efforts, such as establishing a minute of understanding with Anti Corruption Commission, publication of guidelines on prohibition of bid-rigging, advocacy through policy recommendation, also in cooperation with Anti Corruption Commission and National Development Planning Agency held many seminars on prohibition on bid-rigging.

ISRAEL

1. Introduction

Competition in public procurement is too often vulnerable to anti-competitive practices such as collusion and bid-rigging. In recent years the Israel Antitrust Authority (hereinafter – IAA) has taken decisive action to promote competition in public procurement, by deploying a strategy based on focused advocacy efforts alongside uncompromising enforcement.

One of the intriguing features in the context of competition in public procurement relates to the fact that the public procurer's perception of competition does not necessarily coincide with the views of the competition agency itself. More specifically, the experiences of the IAA show that, under certain circumstances, a public procurer might be willing to compromise the degree of competition in the procurement process. The possible tension between the role of competition agencies and the conduct of public procurers is one of the issues illustrated in this short report. The following report comprises of three key examples, which summarize different types of experiences in promoting competition in public procurement by means of enforcement or advocacy, in which the IAA was involved.

2. The "Envelopes Manufacturers Cartel"[1]

The "Envelopes Manufacturers Cartel" is a prominent example for a case in which government procurement has fallen victim to cartel activity that included price fixing and market allocation through governmental bids and tenders.[2]

In this case, three principal envelope manufacturers, with a joined market share estimated at 80%-90% of the overall production and distribution of envelopes in Israel, were indicted with bid rigging offences in the period between 1995-2002. During that period, envelopes were collectively purchased by the government and then distributed among the various ministries and governmental Agencies.

The cartel investigation was initiated due to intelligence that was gathered from ex-employees of one of the parties to the cartel. During the investigation, a significant amount of information and documentation was received at the IAA *inter alia* from the government. It contained data relating to the different bids and details of the offers submitted by cartel members and other firms. This information furnished the IAA with circumstantial evidence about the cartel and its conduct. For instance, the high rate of tenders that were disqualified due to technical flaws, which are believed by the IAA to be artificial. The information received also demonstrated a decline in prices of envelopes after the overt phase of the investigation started.

Interestingly enough, testimonies taken by IAA investigators showed that some government officials who were in charge of envelopes procurement suspected that bid-rigging might be taking place. These suspicions stemmed from patterns of rotation among the leading manufacturers who won public tenders, as

[1] Criminal case 377/04 (District court Jerusalem) State of Israel v. Gvaram et al.

well as from prevalent instances of identical tenders. However, the officials did not report their suspicions to the IAA, since they had no solid evidence on which they could rely. Eventually, the cartel was exposed by ex-employees of one of the parties to the cartel who contacted the IAA.

During the proceeding of this case there was some interaction between the IAA and the Civil Division of the State's Attorney's office, exploring the possibility that the State will sue its damages from cartel members – a precedent action, which has not taken place in Israel thus far. To this end, the state is awaiting the verdict, which is due at the end of upcoming June, since a conviction could serve as a *prima facie* evidence in a damages case.

3. The "Traffic Lights Cartel"[3]

A second example concerns a cartel in the traffic lights market. Contrary to the previous example, the relationship between the public procurer and the bidding parties in the traffic lights case was more complex and somewhat problematic from a competition policy perspective, as explained hereunder.

In 1992 the municipality of Haifa, the 3rd major city in Israel, published a bid for the maintenance and installment of traffic lights in various locations within the city limits.

The publication of the bid was preceded by several attempts by the municipality to receive an exemption from publishing a bid. The main argument claimed by the municipality in Court was that due to *safety reasons* only one company, "Menorah", could successfully install and maintain the traffic lights. The municipality argued that Menorah was the only company that was in possession of the technical know-how needed to connect the installed traffic lights to the recently established traffic control center. Subsequently, the municipality argued that it should be exempted from publishing a tender.

"Ariel", Menorah's main competitor and a major electricity and traffic lights company, appealed to Court and asked for an order against the municipality to publish a tender. Ariel claimed that it could also connect the traffic lights to the traffic control center and the Court decided to order the municipality to publish a tender. A few days before the deadline of the tender, the CEOs of Menorah and Ariel agreed that Ariel will give up the bid in return to a 1 million NIS payment from Menora plus the sub-contractor rights for all the maintenance of the traffic lights in Jerusalem. Subsequently, Ariel did not apply for the tender and Menorah eventually won the tender, although its bid was more than 1 million NIS above what the municipality estimates.

The IAA charged both parties and their CEO's in conspiring to bid-rigging offences. Menorah and its CEO signed a plea bargain in which the company paid 900,000 NIS; the CEO paid a fine of 100,000 NIS in addition to 3 months community service. Ariel and its CEO were acquitted by the District Court on the grounds that technical barriers related to the traffic control center made competition impossible. The IAA appealed to the Supreme Court claiming that the District Court was wrong giving consideration to the supposed technical barriers, and that bid rigging is prohibited under any circumstances. The Supreme Court accepted the IAA's appeal, convicted Ariel and its CEO and stated that the municipality's view, according to which there was no need to publish a tender, was detrimental to competition and not in line with the public interest. The Supreme Court added that the agreement between the parties damaged the competition and the public. The sentence has not yet been determined.

[3] Criminal appeal (Supreme Court) 7829/03 State of Israel v. Ariel et al

4. Promoting competition in public procurement of defense industry products

A third example relates to the IAA's advocacy efforts with respect to competition in public procurement of defense products. The Ministry of Defense (hereinafter MOD) has a double role in the market for defense products. The MOD is the single substantial buyer of locally produced defense products and at the same time it is in charge of regulating the same industries from which it procures. The fact that the MOD is in charge of granting sales and export permits alongside regulating security matters concerning their operation demonstrates the substantial degree of state involvement in the market. Although a considerable share of revenues comes from export, the defense industries are still highly dependent on the local market especially when launching new products. On top of that, all but one out of four major defense industries in Israel are state owned. The structural constellation of the market is one of the key factors which lead to competitive concerns in public procurement.

In light of the above, the IAA devotes considerable efforts to advocate the importance of competition in the defense industries market, through routine discussions with MOD officials.

In those discussions, the MOD has repeatedly stated that the *local* knowledge development and production of defense systems are a fundamental requirement which cannot be compromised. To this end, it considers parallel products, manufactured by competitors from abroad, as *non-substitutes* to the local products. The reason provided by the MOD, is that local products are superior in terms of quality and technological advantage and therefore their procurement is vital. In addition, MOD officials often argue that procurement of local defense products helps in minimizing the reliance on foreign supply and leads to greater investment in R&D among local companies.

In recent years the IAA received many requests to approve joint ventures between major defense industries, aimed at developing high quality technological products. The MOD is generally in favor of such joint ventures since according to its view, a combination of expertise, skills and existing knowledge of each of the parties to the venture would yield the optimal technological solution in short time.

In its decisions, and earlier, in discussions with MOD's officials, the IAA expressed its concerns that large scale joint ventures would undermine competition in the product market and would reduce the overall intensity of competition in the market. The IAA also expressed its concern over a possible anti-competitive spillover effect due to convergence in economic interest among competitors in the defense industries. In this respect, the possibility for sharing commercial information between the parties to the joint venture is one of the key concerns since it may lead to a detrimental effect on competition.

One of the recent cases concerned a joint venture between Elbit Ltd. and Israeli Aircraft Industries Ltd. that related to the development of an advanced vehicle. According to the MOD, there was an urgent demand for the specific product. The IAA recognized the operational importance of allowing the joint venture to develop the product, however it insisted that the joint development would be limited to specific functions of the product and that all other functions would be developed separately and would remain outside the scope of the joint venture. Aside limitations on transferring information between the parties, the IAA approved the joint venture under the condition that ownership of information (and other forms of intellectual property) developed by the parties to joint venture would remain in their possession. The purpose behind the condition is to allow each party to use the information in other fields of operation without any need to gain the other party's consent. In addition, the abovementioned condition foresees the potential competition over development of future generations of the product. To this end it assures that the companies would be in a better position to compete with one another as well as with third parties.

5. Conclusion

It is possible to derive two principal lessons from the different types of examples illustrated above. One lesson is that in order to promote competition in public procurement, it is necessary to take a proactive approach which is based on advocacy alongside enforcement. Such a combined strategy will be more effective and is likely to have a better impact on the promotion of competition. The other lesson is that the specific market attributes and the role played by the procurer itself, have a strong impact on the overall level of competition in public procurement process. To this end, special attention should be given to areas in which the competition agency recognizes structural problems and potential conflicts of interest with public procurement entities.

LITHUANIA

1. Oversight of public procurements and inter-institutional cooperation

In Lithuania public procurement tenders in accordance with the Law on Public Procurement are regulated and executed by appropriate institutions and organisations among which the most important are the Public Procurement Office[1], the Central Project Management Agency[2] and the Lithuanian Business Support Agency[3], that within the limits of their respective competence carries out the examination and check-up of such tenders.

Public procurement tenders are the vehicles that attract as participants huge numbers of companies and realise significant funds that are increasing on a year-on-year basis. Whereas in 2004, in Lithuania via the public tender procedures the amounts of the funds realised by way of public tenders reached about LTL 3.8 bn[4], in 2005, the total value of public tenders in 2005 grew to a significant extent and accounted for LTL 5.5 bn[5], with as much as LTL 1.6 bn during the second quarter of 2006[6]. Naturally, in the course of the last several years competition in the area of public procurement tenders has gained very soon. Accordingly did strengthen the cooperation between the Competition Council of the Republic of Lithuania and all other authorities operating in the area of public procurement. The legal basis for this cooperation has been established in Article 8 of the Law on Public Procurement. On the basis of the information provided by the above institutions and authorities the Competition Council conducted a number of investigations (Resolution No. 2S-9 of 22 June 2006, Resolution No. 2S-3 of 1 February 2007, Resolution No. 2S-6 of 15 March 2007 of the Competition Council and other Resolutions). However, no special training activities tailored for officers in charge of the oversight of public procurement in conjunction with the specialists of the Competition Council have been launched as of today. Lately, the need for this kind of training has become specifically actual, therefore a possibility to launch training of officers of the above institutions and authorities has been provided.

1.1 Relation of the Law on Public Procurement with the Law on Competition of the Republic of Lithuania

The authorities announcing and supervising the public tenders act in accordance with the Law on Public Procurement and a number of the European Union rules governing public procurements. In Lithuania the oversight of the public procurement procedures is executed by the purchasing bodies and the Public Procurement Office. The contracting authority shall ensure in the course of performance of procurement procedures and award of contracts compliance with the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the

1 http://www.vpt.lt/index.php?lan=LT

2 http://www.apva.lt/lt/main/about_us/apva

3 http://www.lvpa.lt

4 http://www.vpt.lt/index.php?lan=LT&pid=1089185360&cid=1143702725

5 http://www.vpt.lt/index.php?lan=LT&pid=1089185360&cid=1143702725

6 http://www.vpt.lt/index.php?lan=LT&pid=1089185360&cid=1167719431

principle of transparency. In terms of competition the procuring body is obligated to execute such tender documents that establish non-discriminatory selection criteria able to ensure a genuine competition, i.e., the technical specifications provided in the contract documents shall ensure competition and non-discrimination in respect of suppliers, and the qualification selection criteria shall be clear and established in observance of the principles of non-discrimination and equal treatment of suppliers. The minimum levels of qualification requirements for candidates or tenderers fixed by the contracting authority may not have the restrictive effect on competition, and must be reasonable, clear and precise.

The procedural issues related to public procurement within the limits of their respective competence shall be addressed by the purchasing organisation and the Public Procurement Office, and the court in cases provided by the law. Upon suspicion of an infringement of the Law on Competition in the course of the public procurement procedures the purchasing organisation shall suspend the procurement course and notify the Competition Council accordingly. However, both the procuring body and the Public Procurement Office may act only within the limits of a specific procurement, i.e., from the moment of announcement of a procurement until the conclusion of the public procurement contract. Therefore, upon the completion of the public procurement procedure these authorities do not have the power to declare the results of the tender non-valid.

2. Investigation techniques in public procurement tenders

2.1 The activity of the Competition Council in investigating the agreements in the area of public procurement tenders.

Such cases of agreements fall within the scope of Article 5 of the Law on Competition “Prohibited Agreements”[7]. The public procurement tenders constitute a form of direct competition that is sufficiently intense and short-tem, in which the awarded companies may shortly enjoy the result of the tender in the form of the awarded tender object. Although the Competition Council does not directly exercise the enforcement of the Law on Public Procurement, the competition behaviour of such companies in the course of the tender, i.e., the method of obtaining the tender award has a potential of affecting competition and distorting it where the tender is awarded to the tendering companies by way of unfair competition through mutual agreements. The Competition Council carried out in total 8 investigations on alleged agreements in the area of public procurement tenders[8;9]; only two of the cases were examined in courts and won by the Competition Council. In three cases companies presented the admissions and the Leniency programme were applied.

The agreements between the companies for the purpose of the participation in the tenders do adversely affect competition in general, both in term of a long-term and the short-term perspective. First, it is a short-term effect of "now and there", where the tendering companies conclude an agreement and win a tender thus dramatically distorting normal competition between the tendering companies in respect of a single specific tender, thus incurring damage to the organisers of the tender and the ultimate consumers especially in cases of increase of the price agreed upon among the tenderers. Second, the long-term affect, since such “successful” tender awards gained through the agreement between the tendering parties may serve as a signal to other participants of the relevant market of a possibility to win a tender through the conclusion of an agreement. Furthermore, certain relevant markets may start serving as a grounds for emerging of permanent company groups on a regular basis tendering for the public procurement awards.

7 http://www.konkuren.lt/english/antitrust/legislation.htm

8 http://www.konkuren.lt/english/cases/cases.htm

9 http://www.konkuren.lt/english/antitrust/legislation.htm

For example, in the investigation carried out by the Competition Council in response to the letter of the Government of the Republic of Lithuania concerning a possible agreement for the purpose of a public procurement, *JSC Sobo sistemos, JSC Lamberta* and *JSC Termofora* were established to have been participating in the tender announced by 2005-2006 by the Educational institutions services of the Klaipėda city municipality for the public procurement for the general education schools and pre-school educational establishments and had agreed that *JSC Lamberta* will be awarded the tender for the general educational schools and *JSC Sobo sistemos* – for pre-school educational establishments. The companies furthermore had been preparing the tenders in assistance to each other and were establishing the prices in respect of their competitors. In the course of the investigation all companies concerned furnished to the Competition Council admissions that their employees in charge had agreed with the competing companies concerning the sharing of the tenders in question (Resolution No. 2S-6 of 15 March 2007 of the Competition Council[10]). In another investigation conducted on the basis of the application filed by the Lithuanian Business Support Agency the Competition Council sought to assess the compliance with the requirements of Article 5 of the Competition Council of companies participating in public tenders for the preparation of projects for the EU structural support for the energy projects procurements. The investigation found out that the tenderers for the building energy audit, investment projects and the drafting of applications for the EU structural support were *JSC Eurointegracijos projektai*, *PE Perspektyvių inovacijų agentūra* and *JSC Apskaitos sprendimai*, that had agreed that 14 tenders will be awarded to *JSC Eurointegracijos projektai* (Resolution No. 2S-9 [11] of 22 June 2006 of the Competition Council).

2.2 The concept of a relevant market in public procurement tenders

The tenders carried out on the basis of public procurement are limited in terms of time, location and the number of participants. The tender itself is a certain arena of an extremely intensive and direct competition between the competing companies. In the broad sense of the word the procurement tender is part of the relevant market of the country involving a small share of the companies being part of the relevant market. The companies participating in such tenders remain free from any competitive pressure of other companies not participating in the tender, but nevertheless active in the entire relevant market on the national scale.

For the purpose of the prohibited agreement investigations conducted by the Competition Council of the Republic of Lithuania the public procurement tender is defined as a relevant market in which companies seeking to ensure the award in the tender may participate having made an agreement in this respect. Such relevant market of the public procurement tender is highly concentrated[12] and provides a potential for the emergence of the relations between companies equivalent to those existing in the general relevant market of the country (dominance, agreements, etc.)

2.3 The impact of the position of the companies upon the public procurement tenders

The experience accumulated by the Competition Council has shown that the position of the companies in respect of each other in the relevant markets, whether they are strong competitors, their market shares, market power in particular when the companies hold dominant positions may affect the behaviour of other companies in public procurement tenders. In this respect the public procurement tenders exactly in the same way as the in the relevant markets may be affected by the dominance of major

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10 http://www.konkuren.lt/nutarimai/bendri.htm

11 http://www.konkuren.lt/nutarimai/bendri.htm

12 Bidding Markets, P. Klemperer, 2005, UK Competition Commission, 2005, http://www.paulklemperer.org/; P. Klemperer, Auctions: Theory and Practice, Princeton University Press, 2004, http://www.paulklemperer.org/;

companies that may eventually distort normal competition between companies. In such cases other companies should seek possibilities to join their efforts for the purpose of tendering through the formation of a variety of forms of legal combinations. The Lithuanian experience, however, show that such cases in the public procurement tenders are yet not frequent. Such market power effect may often be manifested in the situations where companies apply to the tenders jointly with their satellites, thus monopolising the relevant public procurement tender market, irrespective of whether the tender is an isolated undertaking, or whether there is a series of similar tenders in the same area, i.e., the relevant market (see for comparison[13,14]).

2.4 The impact of the level of linkage between the companies upon their behaviour in the public procurement tenders

The behaviour of tenderers for public procurement may also be influenced by the level of the inter-linkage of the participating companies. The participating companies may be related through their cross-holdings. In such cases a natural question arises to what extent companies may be interlinked in order to be able to independently participate in such tenders.

The companies do have a right to enter into competition even when they are inter-related. However, for the purpose of the prohibited agreements investigations carried out by the Competition Council, in particular when acting upon a complaint concerning an alleged agreement between related companies, there is a space for legal uncertainty. The Law on Public Procurement of the Republic of Lithuania does no provide for any procedures for the assessment of the inter-linkage of the companies in terms of providing a clear-cut answer as to the possibility of inter-linked companies to participate in the tenders. No such procedures have been made operational equally by other authorities related to the public procurement.

In this respect there should be a sufficiently clear cut interrelation between the provisions of the Law on Public Procurement and the Law on Competition. Since in theory one company could be well aware of the tender price offered by one of its branches, the question is whether in this situation the company is still entitled to independently participate in the tender by submitting its individual tender. Therefore it is of utmost importance to draw up an unambiguous conclusion on the presence of the legal basis from the point of view of competition for the investigation of possible agreement in view of a suspicion regarding the agreement between companies related up to this degree. The experience of the Competition Council has recorded possible cases where, due to an extensive linkage between the companies that in accordance with the Law on Competition, exceeds the limit of 25 % investigations concerning the prohibited agreements in case of the participation of the companies in public procurement tenders may be terminated.

2.5 Other factors possibly influencing the agreements among companies in public procurement tenders

The larger is the number of tender participants, the smaller is the probability of the agreements between them. Experience has shown that agreements for the purpose of tendering are concluded between 2-3, more rarely between 4-5 tender participants. The impact of the number of participants upon the tenders have been thoroughly analysed and described in analytical studies[15].

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13 P. Kemplerer, Bidding markets, June 2005, http://ideas.repec.org/p/wpa/wuwple/0508007.html

14 P. Klemperer, Auctions: theory and practice, Princeton Univer. Press, 2004; and OECD introductory letter to Roundtable, OECD COMP/2006.69, 3 July 2006

15 P. Klemperer, Auctions: theory and practice, Princeton Univer. Press, 2004 (Chapter 1: A survey of Auction theory), http://www.paulklemperer.org

The issue then is whether in view of a larger number, say 5 or 7, of participants of a public procurement, and having established an agreement to have been concluded by 2 or 3 companies, there is an *a priori* ground for a suspicion that the remaining companies could have also been part of the agreement. Where the purpose of the agreement is to win the tender or increase the tender price, the question arises whether other companies that had not been part of the agreement could have possibly won the tender by having offered a lower price? On the other hand, grounds for a suspicion can be provided by any tender applied to by only two or three companies of which one is a clear market leader, others being smaller players and week competitors of the leading company.

The experience of the Competition Council has shown that tender participants are not equivalent or identical and there are always some companies able to perform the tender works at lower prices (for instance, where the tender object is in the vicinity of the companies' locations) therefore they could easily offer lower prices. Therefore for the purpose of an investigation often an attempt is being made to exclude companies potential winners and compare the analogous tenders in which such companies had been announced the winners. The trend has been particularly evident in targeted public procurement tenders in individual regions. The issues still need to be further examined and analysed with due reference to the experience accumulated in the field.

2.6 Analysis of the strategy of participation of the companies in public procurement tenders under agreement

Having examined the prohibited agreements in the public procurements tenders the Competition Council has established a number of methods and motives driving the companies in coordination of mutual actions prior to the submission of their tenders

The principal issues that the tendering companies seek to agree on are the winner of the tender and a possible ultimate price of the winning tender. Other companies that are not awarded the tender must be also sufficiently motivated not to compete and surrender to the winning company. For that purpose the winning tenderers often undertake to contract works or purchase goods or services from such surrenders.

Another method quite frequently observed referred to by the tenderers for the purpose of coming into agreements is a refusal by potential competitors in turn to participate in analogous tenders not applied to by the winner of a previous tender. An opposite situation emerge with a certain sequence of winners or a repeated occurrence (rotation) in series of analogous tenders. In such cases the winner of other tenders play a role of a supernumerary who place a tender with an expressly higher price or containing a range of technical inadequacies in view of which the tender will be knowingly rejected.

According to the experience accumulated to date the comparison of the amounts awarded through the public procurement tenders to the winners in particular those dominating in the relevant markets in the course of a year or in long-term periods remain on more or less similar levels, i.e., the winners ordinarily generate similar or at least comparable profits (the trend has been in particular notable in the relevant markets for construction and road building).

2.7 The strategy of tendering in permanent groups

This actually represents one of the participation strategies overall prohibited by the Competition Council in relation to the participation in tenders and which is closely related to the position of competing companies in the relevant markets. Such agreements have been noticed as occurring in tenders involving companies from the markets with a few larger companies, often of regional scale and a number of small companies (e.g., in the relevant markets of construction and road building).

In such cases one or another major companies will be nearly in all cases participating in the tenders with their permanent “satellites” that for a number of years “have failed to win”. In such cases the tender is being dominated by a group having its own leader, which in essence means that the tender, as a relevant market, is monopolised.

It has also become evident that companies that never win in the tenders still benefit from such "regular" or "loyal" participation in the tenders jointly with major participants leading in the markets concerned. This includes contracted works, subsequent minor tenders, the overall “deterrent” effect, since externally it looks like the tenderers are only the best performers of the region, operating in the vicinity of the tender object and for the “outsiders” it is not really worth while even participating in the tender. In theory, entry of a company from the outside is not impossible, but often they prefer not to take the risk knowing that in response the winners of the tender may appear on the stage on the occasion of the next tender in their region.

2.8 Methods of establishment of the prices for the agreed tenders

When entering into an agreement concerning the tender price companies most often refer to the preparation of a tender price for their competitor. Where the companies prepare their tenders individually, they agree to increase the tender price offered by the competitor by a certain percentage or a coefficient, by multiplying the actual price. Upon the agreement concerning the winner the companies would normally seek to increase the price above the competitive levels, therefore any appearance of a new company that could destroy the “plans” conceived by the participants seeking an agreement, pose a threat to the tender participants. Where the companies tender having formed certain groups, such monopoly effect enable the agreement members to significantly increase the tender prices.

Where the purpose is to imitate an “intensive” competition in the tender the companies, members of the agreement may refer to a slightly more elaborated pricing strategy – some will offer lower tender prices while on purpose making certain “errors” of technical character rendering the tenders obviously ineligible.

3. Further strengthening of competition in the public procurement area

Public procurement tenders involve large numbers of companies therefore it is absolutely necessary, in conjunction and cooperation with other authorities governing the public tender procedures, to develop a joint programme not only establishing the procedures and requirements of public procurement, but also contain an explanation of competition peculiarities in relation to such tenders, the possibility of enforcement of the Law on Competition and the possible statutory sanctions.

3.1 The methods of establishment of the fine for companies participating in tenders having concluded an agreement

The examination of cases concerning the participation in the tenders under an agreement raises a number of issues that could play a role in the setting up of a final amount of the fine. In public procurement cases the duration of the infringement is defined as the duration of the tender itself from the moment of its announcement to the conclusion date, normally 2-3 months. The tenders thus shall not be attributed to long-term undertakings, therefore the fine excludes the component thereof that could be otherwise imposed for the duration of the infringement.

Normally in addressing the issue of the fine imposition the Competition Council is being guided by a practical consideration that the amount of the fine must ensure the recovery of the illegitimate income gained by the "successful” tenderer, i.e., the amount of the tender order awarded through an unfair competition. Naturally, the imposition of the fine shall take into account the economic position of the

infringer, its market share and the market pore in the entire relevant market, which actually shows the damage that can be possibly incurred to competition in such market by the behaviour in tenders by the company concerned.

3.2 Possible imposition of a non-participation sanction upon members of the agreement

As seen from the experience of a number of foreign organisations (e.g., the World Bank, and others, Competition Council Case No. 16/b[16]), there is a practice where the companies having been punished for tendering in agreement are deprived of a right to participate for a certain time (1-2 years) in tenders announced by the same authority. The experience of the Competition Council[17] shows that the expediency of the imposition of such sanctions by all authorities responsible for the public procurement oversight, in particular considering information on repeated attempts of companies that had once been sanctioned for prohibited agreements under the Law on Competition, again to conclude agreements in other public tenders.

4. Conclusions

Additional disciplinary and deterring measures must be introduced in the area of public procurement tenders to be imposed upon the tender participants concluding agreements. Such sanction could be in the form of a depriving of the infringing companies of the right, for a certain period of time, to participate in public procurement tenders announced by a certain institution.

It is necessary to further increase the awareness of the peculiarities of the application of the competition law in public procurement tenders. The participants of such tenders should well comprehend that competition law is in an increasing extent being applied in public procurement procedures and the fines for the agreements for the tendering purposes are sufficient to serve as an efficient deterrent factor to enter into such agreements.

Provisions should be sought to ensure a closer and clearer link between the Law on Competition and the Law on Public Procurement. The public procurement tenders carried out in accordance with the public procurement procedures should involve the analysis of the links between the participating companies. In the event the companies are related to the extent that from the point of view of concentration provisions laid down in the Law on Competition such companies should be regarded as one entity, they should be required to submit one joint tender. In an opposite case such related companies for the purpose of the investigation of prohibited agreements should be treated as independent companies able to conclude prohibited agreements.

Efforts are being taken to further strengthen cooperation with other institutions and authorities organising and supervising public procurement tenders, including the Public Procurement Office. A conclusion offers itself that the bilateral contacts and cooperation between the Competition Council and the other authorities have not been adequate in order to be instrumental in identifying as many as possible cartel agreements in the area of public procurement. With the purpose to strengthen the prevention of agreements in public procurement tenders the Competition Council intends to develop a special data base to accumulate and analyse the information about all the previous and current public procurement tenders in Lithuania.

Further the cooperation with all organisations in charge of organising and supervising the public procurement tenders; with reference to the experience accumulated by the Competition Council, it is

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16 http://www.konkuren.lt/english/cases/cases.htm

17 http://www.konkuren.lt/english/antitrust/legislation.htm

necessary to organise and launch workshops and training sessions for officers of such authorities to enable them to notify as promptly as possible of any detected irregularities related to the companies' participation in public procurement tenders. It is also necessary to seek that sanctions for the infringements of competition law in combination with the sanctions imposed in relation to the public procurement procedures would result in a single infringement prevention system.

SUMMARY OF DISCUSSION

The Chairman, Thomas Barnett, opened the discussion and thanked the delegations for their numerous and interesting written contributions to the roundtable. The Chair also welcomed Ms Ehlermann-Cache from the OECD Anti-Corruption Unit and Ms Beth from the OECD Public Governance and Territorial Development Directorate. Ms Beth and Ms Ehlermann-Cache attended the roundtable to illustrate to the Working Party the wider OECD efforts in the field public procurement. To start the roundtable, the Chair gave the floor to three delegations for initial presentations on the topic: Japan, UK and Norway.

Japan's presentation focussed on the recent activities of the Japanese Fair Trade Commission (JFTC) for the promotion of competition in public procurement. Japan stressed that a rigorous enforcement of competition law against bid-rigging is the most effective way of promoting competition in public procurement. Active enforcement, however, should also be supported by advocacy initiatives to raise the awareness of procurement officials to the risks of collusion. As demonstrated by recent enforcement cases, rigorous law enforcement in particularly large cases has the effect of creating a context where competition advocacy can produce maximum results.

In recent years, the JFTC has been very successful in enforcing the provisions of the Japanese Anti-Monopoly Act against bid-rigging. According to an estimate based on 22 bid-rigging cases pursued between 1986 and 2003, the effects of the enforcement activity have been significant. The actual contract prices declined on average by 18% following a JFTC antitrust investigation on alleged bid-rigging practices. Japan is confident that this positive trend will continue in the future, thanks to the recent amendments to the Anti-Monopoly Act, which came into effect in January 2006. Such amendments allow the JFTC to impose increased surcharges in bid-rigging cases. They also introduced in Japan for the first time a leniency program and they granted the JFTC criminal investigative powers. Such amendments have already shown positive results. For example, the JFTC has received more than 100 applications for leniency since January 2006 and has referred several bid-rigging cases to the Prosecutor General based upon its new criminal investigative powers.

Bid-rigging activities are deeply rooted in the Japanese economy. Some bid-rigging conspiracies were organised, coordinated or facilitated by officials of procurement agencies. For this reason, the JFTC has taken specific enforcement actions against malfeasance by procurement officials. In the recent steel bridge construction case, for instance, approximately fifty building companies colluded with the help of executive officials of the procurement entity (the Japan Highway Public Corp.). For example, a company's employee who used to be an executive of Japan Highway submitted to the Japan Highway executives a so-called 'allocation table' for approval. The 'allocation table' indicated expected bid winners for each of the forthcoming tenders and was approved by the Japan Highway executives.

In this particular case, the JFTC imposed an increased surcharges on the companies, based on the new provisions in the Anti-Monopoly Act, and asked the President of Japan Highway to take the necessary measures against the officials involved on the basis of the 2002 Act on the Elimination and Prevention of Involvement in Bid-Rigging. This law was enacted in 2002 to prevent bid-riggings in which public officials were involved. More importantly, following the administrative investigation, the JFTC concluded that such serious infringement had a great impact on the national economy and decided that it should also be prosecuted criminally. Therefore, the JFTC filed criminal charges with the Public Prosecutor's office against six companies and seven individuals including two Japan Highway executives.

This and other bid-rigging cases had a significant impact on the Japanese public opinion. The extensive media coverage of the JFTC investigations significantly affected the views of Japanese people on bid-rigging. Today, bid-rigging is widely considered to be an unacceptable and an unjustifiable conduct in a market economy. Consequently, the Japanese government has undertaken an extensive review of the public procurement systems in order to enhance competition and transparency, to tighten sanctions against bid-riggers and to ensure better quality in public procurement. It is thanks to this public sentiment against bid-rigging that the Japanese parliament took the initiative to amend the Involvement Prevention Act in December 2006 and to introduce a penal provision against procurement officials involved in bid-rigging. The Japanese Parliament is now discussing a further regulation on the re-employment of retired officials in the private sector, which is viewed as one of the main causes of the involvement of public officials in bid-rigging practices.

The Chair thanked Japan for this interesting contribution and gave the floor to the United Kingdom for its presentation.

The United Kingdom's presentation focussed on two recent examples of how the Office of Fair Trading (OFT) tries to ensure that competition is fully considered when agencies take decisions on public procurement. The first advocacy project concerned municipal waste management, which is a major industry in most countries and in Europe is an industry raising increasingly important environment issues. The second project concerned the pharmaceutical price regulation scheme which is the way the National Health Service (NHS) handles drug prices within the public health system in the UK.

On municipal waste management, the United Kingdom made three preliminary observations. First, the UK heavily relies on landfills for waste disposal. Approximately 72% of the waste in the UK is disposed through landfills. This is hardly sustainable because of lack of available fields and because of strict European regulations. Second, the UK is exposed to the risk of fines potentially up to a couple of a hundred million pounds a year if it does not find an acceptable solution to the problem of waste management. Third, the UK market has changed substantially in the last ten years, with a trend towards industry concentration as disposal activities are becoming more complex and technical, and firms are getting bigger.

Waste management is an area where local authorities spend increasingly large sums of money and the government body responsible for procurement flagged it as an area of concern. The OFT worked closely with local authorities to see what might be done to improve competition in this area. In particular, the OFT looked at how tenders were handled and how they fitted with the various industry specificities. As a result of this activity, the OFT made three simple but important recommendations, which were agreed with the Office of Government Commerce and then published for the benefit of the whole industry:

- The procurement entity should not bundle contracts for both collection and disposal of waste in the same tender, unless there are very clear justifications for doing so. Aggregation of contracts may exclude a number of firms (i.e. those who cannot bid for the bundle but could bid for one or more services in the bundle) and therefore reduce competition for the contract. In addition, bundling can favour further consolidation in the industry, consolidation which is driven by the procurement process rather than by the nature of the industry itself.

- Contract duration should be long enough for companies to repay on their investments in waste facilities, but not too long to foreclose competition. In one case, the OFT found a 26 year contract, which entirely stifled competition in that part of the market.

- Procurement entities should draw up contracts specifying outputs rather than inputs. This is a wider issue in the public sector: public procurement entities should define outputs or outcomes and then leave private companies to get on with the achievement of that.

The second example of recent advocacy work done by the OFT in the field of public procurement concerns the national pharmaceutical price regulation scheme. Unlike the waste management advocacy project, which was carried out by a team in the Chief Economist office of the OFT, the pharmaceutical price regulation project was carried out by the OFT as a market study. The market study lasted 18 months and its results were published recently. This project was meant to look at this very substantial piece of purchasing activity carried out by the NHS, which is worth about 8 billion pounds a year or roughly 10% of the health budget. The scheme very briefly provides for a 'profit cap' to try and control spending on branded pharmaceutical drugs. The key issue is whether the current system provides the industry with adequate rewards and incentives for innovation.

Probably the most important and valuable result of this project was that the OFT officials involved spent a significant amount of time talking with individual companies and trade bodies to make sure that they understood each company's different point of view. The OFT had over 50 meetings with those companies and one of the key objectives was to make sure that the OFT team had credibility and was perceived to understand the industry, the market and the issues at stake. The OFT also made extensive use of international comparisons because different countries handle their pharmaceutical licensing in different ways and this is an area where it is actually possible to learn from the way other countries handle these matters and from their mistakes. Finally the OFT convened panels of clinicians and academics to actually help analyse the expected savings under the different options discussed. The result of this intense activity was a substantial paper with a series of recommendations to the government. The government is currently considering these recommendations.

To conclude, the United Kingdom stressed that in both cases the OFT was working with other government bodies to try and promote changes and improve the results for consumers and taxpayers. A successful advocacy project requires not only the standard skills required in competition enforcement activities but also other kinds of skills: managing stakeholders and understanding the industry. If one can do that, the results can be very successful.

The Chair thanked the delegation from the United Kingdom for its presentation and then turned to the delegation from Norway who will be speaking on the use of enforcement actions to deter malfeasance by public procurement officials.

The presentation from Norway focussed in particular on the concept of "unlawful direct purchasing" and its legal treatment, because that goes against what public procurement and competition are meant to achieve: value for money. Norway started its presentation by describing the Complaints Board for Public Procurement and its functions. The Complaints Board is an independent administrative board for the settling of disputes on alleged violation of the European rules for the award of public contracts. Article 35 of the European Directive 2004/18 for the public sector (which is fully implemented under Norwegian law) states that "the contracting authorities which wished to award a public contract or a framework agreement by open restricted procedures shall make known their intention by means of a contract notice". This is a key provision in public procurement: the procurement entity has to publicise a contract notice so that potential suppliers are aware that a contract will be awarded. This increases transparency, prevents corruption, increases competition and presumably leads to a more efficient procurement.

Publication of the contract notice is also an important element of the Norwegian law against unauthorised direct purchasing. Unauthorised direct purchasing occurs when the procuring contractor makes contact directly with a private supplier and awards the contract without the prior publication of the contract notice. Unauthorised direct purchasing can take various forms: it could, for example, take the form of an unauthorised extension of a framework agreement or it could be the unauthorised use of the urgency procedure, which allows derogation from the notification procedure. In Norway, traditionally there were no effective sanctions against unauthorised direct purchasing. Claims for compensation, which is the usual sanction against a contracting authority, have never been very effective because it is very difficult for a potential supplier to show that it would have won the contract had there been a contract notice. In theory, one could try to seek a court order preventing the signing of the contract but the plaintiff has to act quickly

because the court can only intervene before the contract is signed as it does not have the power to repudiate a signed contract. Also this possibility has never been very effective because it is often impossible to know if the procurement contract is concluded without a tender.

Since January 1st, 2007, in Norway it is now possible to impose a fine on that contracting entity for entering into an unauthorised direct purchasing. The maximum fine is set at 15% of the contract value and that can be a pretty heavy fine. The condition for imposing such a fine is that the breech of the procurement rules is either wilful or the procurement has shown great negligence in ignoring the obligation to publish a contract notice. The authority that can impose the fine in the first instance is the Complaints Board. The Board cannot proceed on its own initiative but can only investigate alleged infringements of procurement rules upon a written and signed complaint from a third party. The Complaints Board has a wide discretion. Even if it can establish that there has been a breach of the procurement rules and that the breach is wilful or due to gross negligence, it may decide not to impose a fine but it has to motivate its decision. The fine can be appealed in the regular courts.

Norway concluded its presentation, listing the weaknesses of the current system. First, the Complaints Board cannot proceed on its own initiative which limits its enforcement activity. Second, in the Norwegian system there is no personal responsibility for the procuring official, so fines can only be imposed on the contracting entity. Personal responsibility could have a broader deterring effect. Finally, the Complaints Board has limited enforcement powers when it comes to obtaining information from the procuring entity. Even if the procuring entity is under the obligation to provide the Complaints Board with the information that it has requested, the Complaints Board cannot force the procuring entity to provide the information if it refuses to do so, nor can it impose a fine.

The Chair thanked each of the delegations for putting together their presentations. The presentations were very interesting and helped to introduce many of the topics that will be discussed in the next sessions of this roundtable.

1. How to design and operate a public procurement system to generate optimal competition and minimise risk of collusive tendering

The way in which a procurement system is set up can affect both the competitiveness of the procurement process as well as the risk of collusion. The **Chair** encouraged delegations to share their experiences in this regard and to focus on what has worked and what has not when it comes to designing the procurement process. To open the discussion, the Chair asked the delegation from the European Commission to explain the initiatives at European level on this aspect and to describe what features in the EU Directive on public procurement may prevent collusion in tenders.

The delegation from the European Commission explained that certain aspects of the European public procurement legislation may prevent collusive tendering. The European Directives on public procurement may not address collusion directly, but there are provisions in them which indirectly affect the risk of collusion to arise during procurement tenders. For example, the 2004 EU Directives on public procurement oblige the contracting authorities to exclude from tenders, participants who have been convicted for organised crime, corruption, fraud or money laundering. These companies could easily be considered to be at high risk of participation in a bid-rigging conspiracy. The contracting authority can also exclude from tenders economic operators that have been convicted for infringing domestic rules on professional conduct. The contracting authority can also exclude companies who are just suspected of serious professional misconduct, but in this case the contracting authority bears the burden of proof. Finally, it can be argued that the principle established in the European directives that tenders can be awarded according to a multitude of criteria (price, quality, delivery time, environmental aspects and other aspects of the contract, etc.) can make collusion less likely, since it makes coordination on the awarding criteria more difficult.

The European Commission also discussed a bid-rigging cartel case that it concluded in February 2007 with the imposition of a substantial fine on the companies involved. The case concerned the markets

for elevators and escalators. This cartel, which operated primarily as a bid-rigging cartel, is interesting because it shows how the members of the cartel managed to systematically rig bids despite the legal framework set up by the EU Directives on public procurement and national procurement rules. The Commission found systematic infringements of EU competition law and the investigation showed that the collusion affected private and public tenders alike. The cartel was well organised, using continually updated lists featuring hundreds of projects to be rigged and also had a sophisticated compensation mechanism in place. It operated in four countries in parallel, equally colluded on a significant number of very large, public and private infrastructure projects ranging from train stations to hospitals and to all kinds of private buildings, irrespectively of whether the EU regulatory framework on public procurement applied or not. According to the European Commission, the investigation confirmed a number of the findings in the background paper of the OECD Secretariat, particularly that bid-rigging is more likely in markets which are characterized by a significant level of concentration and high barriers to entry.

The Chair then asked the Brazilian delegation to describe its recent experiences in the granting of concessions for federal highways, which show how the design of an effective procurement system helps reduce the risk of collusion.

At the outset, the Brazilian delegation clarified that in Brazil the cooperation between anti-trust authorities and procurement officials is still incipient. The government has recently made some efforts to improve the role of competition authorities in preventing bid-rigging in public procurement. For example, the Secretariat of Economic Laws within the Ministry of Justice has recently established a general coordination framework for the analysis of public procurement recognising that bid-rigging is a major concern and consequently setting it as public priority. The creation of the general coordination system, together with closer cooperation with the General Federal Government Controller - which is the entity in charge of internal federal government controls – is expected to improve the effectiveness of cartel investigations in public bidding procedures.

On the issue of auction design, Brazil does not have a lot of experience in the field of public procurement. However, lessons can be drawn from the award of concessions to private entities for the provision of public services or infrastructure services. For instance, the Secretariat for Economic Monitoring of the Ministry of Finance is currently in technical discussions concerning the concession of seven federal highway segments. In these discussions, the Secretariat has played an important advocacy role aimed at designing an auction mechanism that could prevent or at least reduce considerably the scope for bid-rigging. For example, the Secretariat advised against the adoption of a sequential auction mechanism (i.e. the auction for the second highway segment would begin only after announcing the winner of the first highway segment and so on). The Secretariat argued that a sequential auction could facilitate monitoring of a collusive agreement particularly because participants were supposed to place their bids in an open ascending auction where signalling could occur. Through its advocacy efforts, the Secretariat managed to modify the proposed auction system in the direction of a simultaneous auction for the seven highway segments. The Secretariat also managed to change the auction model in a first price sealed-bid auction, which is at least theoretically less susceptible to collusion. Reduction of barriers to entry is also an important factor in auction design. Brazil has an electronic procurement system (Comprasnet) which works as an open auction and contributed to a significant reduction of the barriers to entry, particularly for SMEs, as electronic bidding reduces administrative costs.

The Chair then asked the Irish delegation to describe the recent opportunity that the Irish Competition Authority had to comment publicly on specific features in procurement tenders (such as eligibility criteria) and the agency's recommendations on how to increase competition in tenders.

Collusion in public procurement is a serious issue in Ireland as it is in many other countries. The Irish Competition Authority has not yet developed a comprehensive competition policy on public procurement, but it is planning to publish an information booklet in this area to draw on its experience based on a number of on-going investigations in this area. Recently, however, the Irish Competition Authority had the opportunity to comment on some features of the Department of Finance's guidelines on

public procurement. These comments, which were not intended to be comprehensive, focussed on the need to broaden eligibility criteria to allow a wider participation to public tenders. Another important observation that was made concerned the absence of a general requirement for respondents to public tenders to certify their independence in arriving at their bids.

The Chair thanked Ireland and invited the Indonesian delegation to follow up on the Irish intervention and to share with the other delegations their views on how collusion can be favoured in tenders by participation requirements which are too selective.

The Indonesian delegation stressed that the fight against collusion in public tenders is a key priority for the KPPU, the Indonesian Competition Authority. Out of the 560 complaints received by the KPPU in the years 2000-2006, approximately one half of them concerned collusion in public procurement tenders or auctions. After having described in detail the Indonesian legal framework for public tenders, the Indonesian delegation described two recent bid-rigging cases, one in the market for casing and pipes and one in the market for indelible election ink for national elections. According to Indonesia, these cases (and particularly the latter) show how collusion in many cases starts at the planning stage of the tender by setting up requirements and specifications that restrict significantly the number of participants.

The Chair thanked Indonesia for its intervention and asked Israel to address the issue of the role of joint ventures and consortia as factors which may facilitate collusion in a tender process.

In response to the questions from the Chair, Israel outlined some aspects of government procurement in the defence industry and addressed some of the competition concerns that it identified in the procurement activities of the Ministry of Defence (MOD). The Israeli Antitrust Authority (IAA) devoted considerable efforts to advocate the importance of competition to the MOD. In recent years IAA received many requests to approve joint ventures between major corporations in the defence industry aimed to developing high-quality technological products. The MOD is generally in favour of such joint ventures since they combine expertise, skills and existing knowledge of each of the partners, yielding the optimal technological solutions in a short time. The IAA, however, expressed concerns that a large-scale joint venture would undermine competition and would reduce the overall intensity of competition in the market. The IAA also expressed concerns over possible anti-competitive spill-over effects due to convergence in economic interests among competitors in the same industry. In this respect the possibility of sharing commercial information between the parties to the joint venture has always been a key concern.

In a recent case concerning a JV for the development of advanced vehicles, the IAA recognised the operational importance of allowing the joint venture to develop the product, but it insisted on the fact that the JV's activities would be limited to specific functions of the product and that all other functions would be developed separately and outside the scope of the joint venture. The IAA approved the joint venture under the condition that information developed by the parties to the joint venture would remain in their possession so that each party would be entitled to use the knowledge in other fields of operation without any need to gain the other party's consent. This eliminated the risk of spill-over effects that was possible in these types of joint ventures.

On this same issue, the Chair solicited the intervention from Mexico which has had some experience with respect to provisions of public laws that have impeded competition in the public health sector.

In the case of public expenditures on pharmaceuticals, Mexico has legal provisions in place, which may facilitate an inefficient tendering process and may promote concentration in markets as well as collusion. For instance, in Mexico there is a provision (called multiple provision or split awards) which is particularly problematic. Under this provision, if competing bids differ by less than 5%, the contracts are split among bidders. This provision, which recently applied in three instances involving medical equipments, limits price competition and lays the groundwork for agreements (implicit or explicit) on market sharing. Antitrust investigations into procurement of pharmaceutical products also showed that the practice of publishing a reference price - which is a very common in Mexico –favours collusion since the reference price often serves as a focal point. In order to address these concerns, the Mexican Competition

Commission, in coordination with other public health care institutions, has recently launched a wide advocacy effort aimed at modifying the regulatory framework for public procurement in this sector in order to promote more competition in the allocation of public procurement contracts.

After a short break, the Chair gave the floor to Ms Beth from the OECD Public Governance and Territorial Development Directorate to expand on the interesting pointes raised so far and to discuss how procurement design should also look at how to reduce corruption of public officials.

Ms Beth presented the work on integrity in public procurement carried out by the Public Governance Committee and in particular she highlighted the results of an extensive survey recently carried out by the Committee. This exercise started with the 2004 Global Forum on Governance in response to a growing recognition that public procurement is the government activity that is most vulnerable to corruption. What was particularly striking from a good governance perspective was that the lack of transparency and accountability were identified as the key threat to the integrity of the public procurement process. The exercise therefore focussed on identifying good practices for promoting integrity in public procurement through transparency and accountability in the whole procurement cycle, from needs assessment to contract management.

The Committee collected information on good practices among a network of public procurement officials as well as anti-corruption and competition specialists. The survey confirmed the importance of transparency, accountability and control in ensuring integrity. It also highlighted that public procurement is a strategic profession rather a simple administrative function that plays a central role for preventing corruption in the management of public funds. The results of the survey are published in an OECD publication called: '*Integrity in Public Procurement - Good Practice from A to Z*'. It takes a holistic approach by mapping out risks and good practices in the whole procurement cycle. It provides a global view of procurement by including elements of good practice not only in OECD countries, but also in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa. The next step of the project is to develop a *Checklist for enhancing integrity in public procurement* building on identified good practice. The Checklist will guide policy makers in instilling a culture of integrity throughout the whole public procurement cycle, from needs assessment to contract management.

The survey also found confirmation of the difficulties in ensuring that transparency, which is a very good mean for reducing the risk of corruption, is balanced to some extent with other policy objectives such as avoiding collusion and ensuring fair competition. In terms of concrete suggestions, the survey showed that the use of electronic auctions helps to reduce collusion and corruption because it avoids contact in the long term between procurement officials and the private sector. Also anonymity can help prevent competitors from monitoring the behaviour of other companies. Furthermore, Ms. Beth encouraged closer co-operation between procurement and competition officials to prevent bid-rigging.

The Chair thanked Ms Beth for her useful contribution which adequately introduces the next topic for discussion. Public officials, investigators, competition enforcers and public procurement officials all have a common interest in maintaining the integrity of the procurement process. One way in which to achieve that is to help educate public procurement officials about the issues and ways in which they can conduct their procurement activities.

2. Promoting competition through advocacy efforts; educational and cooperation programmes between competition and procurement agencies.

To introduce this topic, the Chair gave the floor to the Canadian delegation, who had agreed to make a short presentation on education and outreach programs in Canada.

The Canadian Bureau has the mandate to promote and maintain competition in Canadian markets, can inquire about potential anti-competitive activities that are taking place in the procurement process and must ensure compliance with the laws under its jurisdiction. The Bureau is responsible for the

administration and enforcement of the *Competition Act*, which contains criminal provisions against conspiracy and bid-rigging. These criminal conducts are frequently observed in the public procurement process. Under the bid-rigging provisions, individuals and corporations are subject to a fine within the discretion of the court. Individuals may be sentenced to a term of imprisonment for up to five years. Bid-rigging is a Bureau priority, both in terms of advocacy and enforcement, and is being actively addressed throughout the county through the Bureau regional office network. Part of the Bureau's outreach activities involves giving presentations to procurement officials throughout Canada. Since 2005 the Bureau has given over 80 presentations to procurement officials and at the end of 2007 almost 3 000 persons involved with the public procurement process will have attended the Bureau's outreach activities. During their presentations the Bureau's officers give general explanations about the *Competition Act* and then focus on the way it applies to procurement processes. The presentations are done by Bureau officers from both the headquarters and the regional offices. This has allowed the Bureau to build strong links with other law enforcement agencies in the regions. This outreach strategy is generating not only greater awareness of economic crimes but also more enquiries and an influx of complaints.

The Bureau's first goal is to increase the awareness of competition law offences among organisations that are engaged in public procurement. Officers provide the procurement officials with a list of some of the characteristics of the industry that are more at risk to the formation of secret arrangements between suppliers. Examples of these characteristics include markets with homogenous products and high industry concentration; markets where a trade association is active; markets where the product or service is relatively simple and is not subject to significant technological changes. Officers also give examples of existing cases and previous enforcement actions. The Bureau's second goal is to help procurement officials detect collusive schemes in the procurement process. Officers help officials to identify warning signs involving irregularities or potential criminal activities such as bid-rigging and price-fixing.

Because the Bureau believes there is more to prevention than detection, the Bureau officers also brief procurement officials on the steps that they can take to help avoid an investigation in the first place. Examples include: seeking bidders; taking preventive steps when drafting tender specifications; asking questions if something seems odd when awarding the contract; providing training on possible irregularities and offences to staff involved in procurement; and requiring certificate of Independent Bid Determination. Bureau officers also encourage procurement officials to report suspect practices by contacting the Bureau. This has generated a great number of bid-rigging complaints from the public sector. Officers also educate procurement officials about what to do if they suspect that anticompetitive activities are taking place. For example, they stress the importance of keeping detailed procurement records, of making timely notes of communications and suspicious behaviour and of maintaining confidentiality about their suspicion. Bureau officers also educate government or other public organisations about the cost of anti-competitive acts and emphasise that these practices can cause the public sector to pay more and eventually can cause the public to pay more for the services.

The Chair then called upon the US delegation to talk about outreach efforts in the United States.

Outreach programs in the United States serve a number of purposes but the main one is to develop close working relationships with public procurement officials and investigators. Procurement officials often provide key evidence which results in a successful bid-rigging prosecution. For this reason, during outreach programs for procurement officials, competition agents always encourage the audience to contact the antitrust agencies if there is any evidence that bid-rigging is happening. Outreach presentations emphasise that even if there is no actual evidence of bid-rigging, but a simple suspicion based on certain bidding patterns or conduct by the bidders, the antitrust agencies are willing to look into any such allegation before deciding whether to open a formal investigation. The outreach programs also help educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conduct which may indicate that bid-rigging is occurring.

Another objective of US outreach programs is to help educate public procurement officials and government investigators about the cost of bid-rigging. Because these illegal activities can last for many

years, they obviously impose significant costs on the government and ultimately on the taxpayers. That is because the public purchaser pays more for the goods/services than they would have if there had been true competition. Another important purpose of these programs is to educate public procurement officials about what they can do to protect themselves from bid-rigging. For example, the US outreach programs advise procurement officials on how to structure the contract notice in order to attract the largest number of bidders. Outreach programs also emphasise the importance that each bidder is required to submit and sign a certificate of independent price determination. One of the big advantages of using this certificate is that proving that someone lied on the certificate is much easier than proving bid-rigging. Consequently the fact that prosecutors can prosecute better for lying on a certificate gives them leverage and enables them to get companies to collaborate with them in prosecuting others for bid-rigging.

Finally these programs are meant to warn procurement officials not to participate in bid-rigging and other illegal conduct which undermines competition. Of course this usually happens when procurement officials receive kick-backs or pay-offs from a company which submits bids. This may not be an infringement of antitrust rules as sometimes it is just one company paying the procurement official to select that company and does not involve an agreement among all the companies involved. However, it is still very important to investigate these situations because corrupt procurement officials may be orchestrating bid-rigging and certainly bribes typically leave a very good paper trail that provide very strong evidence that enables prosecutors to convince those involved to cooperate with them in investigating whether bid-rigging is also occurring.

The Chair then asked the French delegation to explain the importance of developing a close relationship with the public purchasing entities.

The delegation from France explained that bid-rigging is a recurrent problem in the country. Approximately 40% of the fines that the Conseil de la Concurrence imposes each year for anticompetitive practices concern infringements on public procurement markets. The analysis of the cases submitted to the Conseil reveals three main types of anticompetitive conduct. First, the tacit rule "each one remains at one’s place" enables companies to perpetuate an initial allocation of markets without the need for implementing an explicit co-operation scheme. Second, exchange of sensitive information between competitors may be sufficient to reduce significantly the uncertainty as to the likely content of the others’ bids, with an impact on the overall level of prices. The third and the most sophisticated case is that of coordination on multiple markets, which often gives rise to complex compensation mechanisms amongst the participants.

Because it is often difficult to prove the infringement and this difficulty limits the effectiveness of the action of the agencies, agencies are working on ways to improve the relationship and the coordination between competition authorities and procurement agencies. An effective coordination is necessary not just to facilitate the enforcement ex-post of competition rules but also to reduce the incentives of the bidders to collude by creating a context in which it is easier to gather evidence of the collusive behaviour for future prosecution. The Conseil has identified three possible ways to do so:

- When the absence of competition is due to a parallelism of conduct, with each company keeping its market without seeking to conquer that of the others, a simple and easy solution to implement consists in breaking the routine by modifying the size, the number, the structure, etc. of the products or services which are up for tender.

- Companies often group together to respond to a call for a tender. These practices, which are often pro-competitive, could become anti-competitive when they concern companies which are capable of competing on their own or when they facilitate information exchanges between competitors. Public purchasers must have the possibility to refuse, ex-ante, joint bidding if a doubt exists as to whether it hides illegal practices.

- Collecting and analysing bidding data is also very important, particularly for the data of those companies belonging to major groups of national or even international size. This contributes to a

reduction in the asymmetry of information between large bidders and competition authorities. Detecting an agreement and seeking the evidence to prove it is easier if competition authorities can simultaneously examine bidding data on a large number of procurement markets.

The Chair thanked the French delegation for its intervention and turned to the delegation from Finland. In particular, the Chair asked them to describe the Finnish public sector partnership project and how it contributes to outreach and education efforts.

Finland explained that the Finnish Competition Authority is a small organisation with limited resources. However, educational programs on the risks of bid-rigging have always been an important objective. Following a cartel case involving bid-rigging in the asphalt paving sector, the authority approached the organisation of the 14 major cities in Finland (more than a third of the population in the country) in order to exchange views with them on what bid-rigging is and what in particular these purchasing organisations could do to avoid becoming victims of bid-rigging. The primary objective of these meetings was to educate the organisations or the persons responsible for the purchasing process on what cartels are, how they work, and how they can be discovered. This exercise was extremely useful and gave very positive results. It was particularly important to bring together competition officials and purchasing officials because this allowed them to establish personal links and communication channels. This also helped the purchasing organisations or individuals to discuss and analyse in a very informal way with competition experts, situations in which it was unclear whether bid-rigging occurred or not.

The Chair asked the Swedish delegation to describe the legislative changes which will take place on 1st September 2007, and which will transfer to the Swedish Competition Authority the competence to enforce the Swedish Act on Public Procurement.

Sweden clarified that the decision to transfer the new competencies on public procurement to the Competition Authority should be taken at the end of the month of June. The Swedish Competition Authority sees this as a very important development, as it considers that public procurement policy is actually a part of the competition policy. The Authority’s task is to promote competition in Sweden, not only via competition law enforcement but also through other initiatives that contribute to an efficient functioning of the market. In this respect, advocacy has a very important role. In this respect, the Competition Authority’s efforts in the field of public procurement will certainly benefit from the new surveillance competencies. Public entities are not always aware of the importance of competition when they engage in public procurement. For this reason, the Competition Authority has repeatedly stressed the importance that procurement entities carry out at least a “light” competition analysis of the competitive conditions of the markets in which they are purchasing. Often, competition could be preserved if the purchasing entities would look at the effect of their procurement activities from a wider perspective rather than focussing only on the short-term benefits of the procurement. The Competition Authority has always been in favour of promoting participation of SMEs in public procurement. In this respect, the common practice of government agencies to enter into framework agreements for the purchase of services and goods (such as IT services, computers, stationary, etc.) may lead to the elimination of many small suppliers because they cannot achieve the volumes required to compete for such framework agreements, leaving this activity only to the large suppliers.

Finally, to conclude on the topic of education and outreach programs, the Chair asked the delegation from Hungary to describe their recent advocacy efforts in this area.

The delegation from Hungary explained that GVH, the Competition Authority of Hungary, has recently taken a number of advocacy initiatives in the field of public procurement. In February 2007, the authority organised an international conference with the participation of senior officials from the US Department of Justice, the Directorate General for Competition of the European Commission and from other important national competition authorities. The audience consisted of politicians and representatives of the business community, including the Prime Minister and high-ranking officials from the Ministry of Economy and other ministries. Bid-rigging and public procurement had a prominent role on the agenda,

although the conference itself aimed not only at bid-rigging but at hard-core cartels generally. One of the events concerning cartels in public procurement procedures was that the President of the GVH sent letters to procurement agencies raising their attention to the fact that the GVH established in a decision that a hard core cartel affected their respective procedure(s) and that they are entitled to compensation available in court proceedings. The letters stated that the decisions of the GVH are binding on the courts in respect of the existence of the infringement. The GVH offered all possible cooperation with the procurement agencies.

The competition authority is also making good use of the material produced by the OECD, and in particular material from the recent roundtable on bidding markets which was sent to a number of public procurement agencies and municipalities to provide them with effective guidance on how to discover and identify infringements of competition law. There are also plans to publish a new leaflet which would deal more in depth with how to design appropriate public procurement procedures and with how to detect instances of possible bidders' collusion. The material of the present roundtable will also be extremely useful to develop the approach of the competition authority to help and assist public procurement agencies. The Finnish example is very interesting in that it demonstrates how competition agencies can provide direct guidance to procurement agencies that have been exposed to bid-rigging in the past. GVH is presently considering engaging in a similar educational program.

The Chair thanked all the delegations for their interesting contributions on the importance of outreach programs and introduced the next topic for discussion. Turning away from the overall design of an effective procurement system, the next session will focus more on actual enforcement actions and on the techniques used for detecting bidding patterns and other behaviour which are not consistent with the competitive process.

3. Techniques for detecting bidding patterns/behaviour which are not consistent with a competitive process: complaint systems, checklists and monitoring of bidding data as possible tools to detect anti-competitive behaviour.

To introduce this topic, the Chair gave the floor to the Russian delegation for a presentation on the recent changes in the Russian legislation which are designed to favour findings of illegal conduct in public procurement.

The delegation from Russia first summarised the recent legislative changes which transferred to the Russian competition authority powers of control over the procurement of goods, works and services for the Russian Federal state. A new law was also passed in 2007 which introduced an electronic tendering system. Using its new powers, the competition authority significantly increased its activities in the field of public procurement, performing 625 planned inspections and 2.450 unplanned inspections in 2006. These inspections revealed major breaches of the public procurement law, such as failure to meet the statutory deadlines for publishing the tender notice and the setting of unnecessary requirements for participating in tenders. In order to enhance the efficiency of its control activities, the competition authority has also defined a number of priorities. These priorities include the establishment of a unitary system for complaints; preparation of classification of infringements in order to ensure uniform administrative practices; ensuring closer interaction between the authorities responsible for control and law enforcement actions.

The Chair then asked the delegation from France to address the importance of a close relationship and effective communication between competition officials and all those who are setting up and executing a public procurement process.

The delegation from France described the initiatives put in place by the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF) to prevent and detect bid-rigging practices in France. The French public procurement markets, as in many other countries, have very particular characteristics: (1) Public procurements are subject to detailed regulations, which are often

amended, forcing local authorities to constantly update their procurement procedures and practices; (2) The public entities which engage in procurement activities are very numerous (more than 50,000 in France) and geographically dispersed; and (3) Procurement markets are exposed to corruption and are subject to moral and ethical considerations. These characteristics lead the French government to reflect on an organisation of public markets which would ensure the prevention and detection of illegal practices. In this respect the DGCCRF plays an important role as its inspectors on the ground are closer to the purchasing entities and can participate in the tender process and assist local authorities as the need occurs.

As for prevention of bid-rigging practices, French public procurement regulation requires explicitly that officials from the DGCCRF be invited to participate in the tendering process. Each year the DGCCRF receives more than 100,000 invitations and sends officials to approximately 10,000 tenders. This activity, which involves approximately 100 officials, allows the DGCCRF to play an important advisory role for the procurement entities. For example, officials from the DGCCRF submitted remarks and suggestions to improve the procurement process in approximately 30% of the procedures attended. In some cases these remarks forced the procurement entity to re-launch the tender procedure under different rules if the outcome of the first tender was not satisfactory from a competitive perspective. When it comes to detecting illegal practices in public procurement markets, the DGCCRF has always been extremely active. To give some indications, the DGCCRF launches every year approximately 50 in-depth investigations into alleged infringements in a public procurement context and approximately 50% of the 15-20 referrals that the DGCCRF makes every year to the Conseil de la Concurrence on possible infringements of the competition rules concern public procurement markets.

The Chair thanked the French delegation and invited the Portuguese delegation to talk about some of the best practices for public procurement that the Portuguese Competition Authority has recently identified.

Portugal explained that the Portuguese Competition Authority has recently issued a set of guidelines on ‘early detection of potential anti-competitive conduct’ by procurement officials. In preparing the guidelines, which are a joint effort of various governmental agencies and ministries, the Portuguese competition authority relied extensively on the work carried out by the OECD as well as by the US and by Sweden in this field. The guidelines focus on four aspects of the procurement process: the bid, the price, the relationship with the bidders and the unit cost proposal.

- When looking at bids, procurement officials are advised to go through a checklist of indicators on anticompetitive activity. For example, the checklist suggests to verify whether the proposed bid is below the expectations, if the bid was submitted by bidders who did not previously request specifications (which may alone indicate a degree of collusion) and to focus on simple things like graphic similarities between bids, including spelling mistakes.

- When it comes to the price, the general advice is to look at the range of price variations within the same bidding process. For example systematically low bids or one very low bid and the others systematically very high may be indication of collusion. Procurement officials should also look at variations of prices with respect to other tenders, in other words to compare the bidding behaviour of companies which have submitted bids for the same type of product in separate tenders.

- The third element is the relationship existing among the bidders. Here the guidelines refer to practices such as subcontracting, joint bidding and rotation in winning bidders.

- The last element is the unit cost proposal. This applies particularly to procurement of civil works. If the proposed unit cost is well above the engineering estimate or if competing bids contain cost estimates that are identical, these may be taken as indications of coordination between bidders.

To close the roundtable on public procurement, the Chair gave the floor to another guest from the OECD, Ms Ehlermann-Cache, and asked her to talk about her experience and work at the Anti-Corruption Unit as it relates very closely to many of the issues that were discussed during the roundtable.

Ms Ehlermann-Cache thanked the Working Party for the invitation and explained that she works for the Anti-Corruption Division, which is the Secretariat to what is called the OECD Working Group on bribery and international business transactions. This Working Group has the mandate to ensure implementation and enforcement of an OECD convention for the fighting of bribery of foreign public officials. The convention, which is an international binding instrument, is almost ten years old and is focused on bribery of foreign public officials in international business transactions. The Working Group on bribery ensures that the signatory countries implement the convention in their legislation. It also monitors the developments in the enforcement of the convention, which is a criminal law convention. To ensure that countries enforce the convention, the Working Group monitors the signatory countries and visits them regularly. One question that is often raised during these regular visits is whether more corruption cases could be detected if competition authorities had a stronger role in fighting corruption as well as anti-competitive practices. Based on the Working Group's experience, competition authorities are rarely alerted to the risks of bribery and their investigations are not structured to finding instances of corruption.

The Working Group also undertook to define a typology of the different criminal activities that can take place in public procurement. These categories were discussed at a meeting in March 2006 with experts from law enforcement, procurement specialists, accountants, competition experts from 12 countries and international organisations including the World Bank, the Inter American Development Bank and the European Anti-Fraud Office. These experts analysed anonymous cases of bribery in public procurement and the results of this analysis were published in a book titled '*Bribery and Procurement Methods: Actors and Countermeasures*'. The main finding of this exercise was that illegal activities can take different forms and can occur at different stages of the procurement process. Public procurement is a long and complex process that may take many years and pass through many stages before it comes to end. All along the chain of the public procurement process there are ways in which companies can bribe and corrupt. This work also highlighted that bribery and corruption are frequently associated with other crimes such as money laundering, accounting fraud, tax evasion, extortion.

To conclude, Ms Ehlermann-Cache noted that there are many overlaps between competition policy and anti-corruption policy in public procurement. Competition authorities, procurement officials and anti-corruption enforcers should find ways to work together in a better and more efficient way in order to prevent corruption, while ensuring fair competition. More importantly, she emphasised that more work has to be done in order to ensure that there is no trade-off between fighting corruption and fighting collusion.

The Chair thanked Ms Ehlermann-Cache for her intervention which concluded the roundtable discussion. The Chair also thanked all the participants for the very productive discussion on a topic which has raised considerable interest among the delegations.

RESUMÉ DES DISCUSSIONS

Le Président, Thomas Barnett, ouvre les débats et remercie les délégations pour leurs contributions écrites aussi nombreuses qu'intéressantes. Il souhaite également la bienvenue à Mme Ehlermann-Cache, de l'Unité anticorruption de l'OCDE, et Mme Beth, de la Direction de la Gouvernance publique et du développement territorial de l'OCDE. Mmes Beth et Elhermann-Cache participent à la table ronde pour présenter au Groupe de travail les initiatives de plus grande ampleur lancées par l'OCDE dans le domaine des marchés publics. Pour commencer, le Président donne la parole aux délégations japonaise, britannique et norvégienne, qui se chargent des premiers exposés.

L'exposé du Japon se concentre sur les activités récentes de la Commission japonaise de la concurrence (*Japanese Fair Trade Commission*, JFTC) pour promouvoir la concurrence dans les marchés publics. Le Japon souligne que l'application rigoureuse des règles de la concurrence destinées à lutter contre les soumissions concertées est le moyen le plus efficace de promouvoir cette concurrence. Les mesures actives d'application du droit devraient toutefois se doubler d'initiatives visant à sensibiliser les entités adjudicatrices aux risques de collusion. Comme l'ont montré de récentes affaires, veiller à la stricte application des règles du droit dans le cadre de gros dossiers tend à créer un climat favorisant au maximum le travail de promotion de la concurrence.

Ces dernières années, la JFTC a très largement réussi à faire appliquer les dispositions de la Loi antimonopole japonaise pour lutter contre les soumissions concertées. D'après une estimation portant sur 22 affaires ayant donné lieu à des poursuites entre 1986 et 2003, les effets des mesures d'application ont été significatifs. Les prix contractuels constatés ont baissé d'en moyenne 18 % après une enquête de la JFTC sur des pratiques présumées de trucage des offres. Le Japon pense que cette évolution positive va se poursuivre grâce aux amendements de la Loi antimonopole entrés en vigueur en janvier 2006. Ces amendements permettent à la JFTC d'infliger des surtaxes plus lourdes en cas de trucage avéré. Ils instaurent également des programmes de clémence, qui n'existaient pas encore au Japon, et confèrent des pouvoirs d'instruction à la JFTC. Ces amendements ont déjà produit des résultats positifs. Par exemple, la JFTC a reçu une centaine de demandes de clémence depuis janvier 2006 et, en vertu des nouveaux pouvoirs d'enquête que lui ont été conférés, a transmis plusieurs dossiers de trucage au Procureur général.

Les pratiques de soumissions concertées sont profondément enracinées dans l'économie japonaise. Certaines ententes ont même été organisées, coordonnées ou facilitées par des agents des organismes chargés des marchés publics. C'est ce qui a conduit la JFTC à prendre des mesures spécifiques pour lutter contre de tels agissements au sein de l'administration. Dans le récent dossier des ponts en acier, par exemple, une cinquantaine d'entrepreneurs se sont concertés avec l'aide de responsables de l'entité adjudicatrice (Japan Highway Public Corp.). Ancien cadre de Japan Highway, l'un des salariés d'une des entreprises candidates a soumis aux dirigeants de Japan Highway, qui l'ont approuvé, un « tableau d'attribution des marchés » où figuraient la liste des adjudicataires souhaités pour chaque appel d'offres à venir.

Dans ce cas particulier, la JFTC s'est appuyée sur les nouvelles dispositions de la Loi antimonopole pour infliger une surtaxe aux entreprises incriminées et a demandé au président de Japan Highway de prendre les mesures qui s'imposaient contre les cadres impliqués, en application de la Loi de répression et de prévention des soumissions concertées. Promulguée en 2002, cette loi est destinée à prévenir les affaires de soumissions concertées impliquant des agents publics. Surtout, dans le sillage de l'enquête

administrative, la JFTC a conclu qu'une infraction aussi grave n'était pas sans conséquences sur l'économie nationale et a décidé que des poursuites pénales étaient également nécessaires. Elle a donc déposé une plainte au pénal contre six personnes morales et sept personnes physiques, dont deux cadres de Japan Highway.

Cette affaire et d'autres affaires de soumissions concertées ont ébranlé l'opinion publique japonaise. Les enquêtes de la JFTC ont bénéficié d'une très importante couverture médiatique, modifiant en profondeur la vision qu'avaient les Japonais de ce type de dossiers. Désormais, la grande majorité de la population considère que le trucage des offres est un comportement inacceptable et injustifiable dans une économie de marché. Le gouvernement japonais a donc entrepris un vaste réexamen des systèmes de passation des marchés publics pour qu'ils soient plus concurrentiels et transparents, pour que les sanctions soient plus sévères et pour améliorer la qualité des procédures. C'est l'hostilité de l'opinion vis-à-vis de ces pratiques qui a conduit le Parlement japonais à décider d'amender la Loi de prévention, en décembre 2006, et à instaurer des poursuites pénales contre les agents publics impliqués dans des soumissions concertées. À l'heure actuelle, le Parlement étudie une nouvelle règle concernant le recrutement par le secteur privé d'agents retraités, une pratique considérée comme l'une des principales causes de la participation de certains agents à des soumissions concertées.

Le Président remercie le Japon pour son exposé intéressant et cède la parole à la délégation britannique.

L'exposé du Royaume-Uni se concentre sur deux exemples récents de ce que s'efforce de faire l'Office of Fair Trading pour que les organismes chargés d'attribuer les marchés publics prennent pleinement en compte la question de la concurrence. Le premier projet de promotion de la concurrence a trait à la gestion des ordures ménagères, qui constitue un secteur d'activité important dans la plupart des pays et soulève de plus en plus de questions cruciales liées à l'environnement en Europe. Le second projet concerne le mécanisme de réglementation des prix des médicaments qu'utilise le National Health Service (NHS) dans le cadre du système public de santé britannique.

Au sujet de la gestion des déchets ménagers, le Royaume-Uni fait trois remarques préliminaires. Premièrement, la mise en décharge est la solution la plus couramment mise en œuvre. Environ 72 % des déchets britanniques sont évacués vers des décharges. La pénurie de terrains utilisables à cet effet et la sévérité de la réglementation européenne rendent cette formule difficilement pérennisable. Deuxièmement, le Royaume-Uni risque des amendes pouvant atteindre quelques centaines de millions de livres s'il ne trouve pas de solution acceptable au problème de la gestion des déchets. Troisièmement, le marché britannique a considérablement changé au cours des dix dernières années, la tendance étant à une concentration du secteur liée à la complexité et la technicité croissantes des activités d'élimination et à l'augmentation de la taille des entreprises.

La gestion des déchets est une activité à laquelle les collectivités locales consacrent des sommes de plus en plus importantes et l'organisme public chargé des marchés considère qu'il s'agit d'un « sujet préoccupant ». L'OFT a travaillé en étroite collaboration avec les collectivités pour voir ce qui pourrait être tenté afin de stimuler la concurrence. L'OFT s'est intéressée en particulier à la façon dont les appels d'offres sont gérés et adaptés aux diverses spécificités de ce secteur. À l'issue de cette réflexion et en accord avec le Bureau des transactions avec l'administration, elle a formulé trois recommandations simples mais capitales et les a publiées pour que l'ensemble des entreprises du secteur en aient connaissance.

- L'entité adjudicatrice ne doit pas grouper les marchés de collecte et d'évacuation, sauf si certains éléments le justifient très clairement. La combinaison de plusieurs marchés risque en effet d'exclure un certain nombre d'entreprises (notamment celles qui ne pourraient pas concourir pour les deux volets mais seraient susceptibles de fournir un ou plusieurs des services couverts par

l'appel d'offres global) et donc de diminuer la concurrence pour l'obtention du marché. En outre, le regroupement de marchés peut favoriser la concentration qui, dès lors, serait due à la procédure de passation plus qu'à la nature même du secteur.

- Les marchés doivent être attribués pour une période suffisamment longue pour que les entreprises puissent rentabiliser leurs investissements dans les équipements de traitement des déchets, mais pas trop longue afin de ne pas verrouiller la concurrence. L'OFT avait en effet découvert le cas d'un marché attribué pour 26 ans, ce qui avait totalement sclérosé la concurrence sur le segment concerné.

- Les entités adjudicatrices doivent définir des marchés en précisant les résultats à atteindre et non les moyens à mettre en œuvre. Cet aspect est plus important encore dans le secteur public : les entités chargées de l'attribution des marchés devraient définir des objectifs et laisser aux entrepreneurs privés le soin de les atteindre.

Le second exemple récent de promotion de la concurrence assurée par l'OFT dans le domaine des marchés publics a trait au programme national de réglementation des prix dans le secteur pharmaceutique. Contrairement au projet de défense de la concurrence dans le secteur de la gestion des déchets, qui avait été réalisé par une équipe du bureau de l'économiste en chef de l'OFT, le projet concernant la réglementation du prix des médicaments a été conduit par l'OFT comme une étude de marché. L'étude a duré 18 mois et ses résultats ont été publiés dernièrement. L'objectif était d'examiner l'activité d'achat extrêmement significative de la NHS : elle représente environ 8 milliards de livres par an, soit approximativement 10 % du budget de la santé. Le programme prévoit un plafonnement des bénéfices pour tenter de maîtriser les dépenses liées aux spécialités pharmaceutiques. L'enjeu principal est de savoir si le système actuel est suffisamment rémunérateur et incitatif pour que les laboratoires veuillent innover.

Le résultat le plus important et le plus appréciable de ce projet est sans doute que les responsables de l'OFT ont passé du temps à s'entretenir avec différentes entreprises et instances commerciale pour être sûrs de bien comprendre le point de vue de tous les acteurs en présence. Une cinquantaine de rencontres ont été organisées, l'un des principaux objectifs étant de s'assurer que les entreprises considéraient l'équipe de l'OFT comme un interlocuteur crédible, capable de cerner le secteur, le marché et les enjeux. L'OFT a également procédé à de très nombreuses comparaisons internationales, car chaque pays gère les brevets pharmaceutiques à sa façon et il s'agit d'un domaine où il est réellement possible de tirer des enseignements des erreurs commises par les autres pays mais aussi de leur méthode de gestion des problèmes. Enfin, l'OFT a constitué des panels de praticiens et d'universitaires pour qu'ils l'aident à analyser les économies réalisables avec les différentes formules étudiées. Cette intense activité a débouché sur la rédaction d'un document substantiel contenant une série de recommandations à l'intention des pouvoirs publics. Ces derniers sont en train de les examiner.

Pour finir, le Royaume-Uni souligne que, dans l'un et l'autre cas, l'OFT a travaillé avec d'autres organismes publics afin d'encourager les changements et d'obtenir de meilleurs résultats tant pour les consommateurs que pour les contribuables. Pour qu'un projet de promotion de la concurrence réussisse, il faut non seulement disposer des compétences habituellement requises pour faire appliquer le droit, mais il faut aussi savoir gérer les parties prenantes et comprendre le fonctionnement du secteur. C'est à cette condition que l'on peut espérer des résultats très positifs.

Le Président remercie la délégation britannique pour son exposé et se tourne vers la délégation norvégienne, qui doit traiter des mesures répressives destinées à dissuader les agents chargés des marchés publics de tout agissement illicite.

L'exposé de la Norvège est plus particulièrement axé sur le concept des « achats directs illégaux » et sur le traitement juridique de cette pratique qui va à l'encontre de l'objectif visé par les marchés publics et la concurrence (la garantie d'un bon rapport qualité-prix). La Norvège commence sa présentation en décrivant la Commission de règlement des litiges liés aux marchés publics (Complaints Board for Public Procurement) et ses fonctions. Il s'agit d'un organe administratif indépendant chargé de régler les litiges concernant des infractions présumées au droit communautaire relatif à l'attribution des marchés publics. L'article 35 de la directive 2004/18/CE (qui est intégralement transposée dans le droit norvégien) indique au sujet du secteur public : « Les pouvoirs adjudicateurs désireux de passer un marché public ou un accord-cadre en recourant à une procédure ouverte, restreinte [...] font connaître leur intention au moyen d'un avis de marché. » C'est une des dispositions essentielles du droit relatif aux marchés publics : l'entité adjudicatrice doit publier un avis pour que les fournisseurs potentiels sachent qu'un marché va être attribué. Cette méthode rend la procédure plus transparente et vraisemblablement plus efficiente, prévient la corruption et stimule la concurrence.

La publication d'avis de marchés est également un élément important du droit norvégien dans la lutte contre certaines formes d'achats directs. Les achats directs sont prohibés quand l'entité adjudicatrice contacte directement un fournisseur privé et lui attribue le marché sans avoir publié d'avis de marché au préalable. La pratique peut prendre diverses formes : prolongation non autorisée d'un accord-cadre, recours non autorisé à la procédure d'urgence qui permet de ne pas publier d'avis de marché, etc. Traditionnellement, les achats directs non autorisés ne sont pas vraiment sanctionnés. La demande d'indemnisation, qui constitue la sanction habituellement infligée à une entité adjudicatrice, n'est jamais très efficace car il est extrêmement difficile pour un fournisseur potentiel de prouver qu'il aurait remporté le marché si l'avis avait été publié. Il est théoriquement possible d'aller en justice pour empêcher la signature d'un contrat de fourniture, mais le plaignant doit agir rapidement : le tribunal ne peut plus intervenir après la signature car il n'a pas le pouvoir d'annuler un contrat signé. En outre, cette solution est rarement efficace parce que, sans appel d'offres, il est souvent impossible de savoir si le marché a été conclu.

Depuis le 1er janvier 2007, le droit norvégien rend passible d'une amende toute entité adjudicatrice reconnue coupable d'un achat direct non autorisé. L'amende maximale correspond à 15 % de la valeur du marché, ce qui peut représenter une somme substantielle. Elle ne peut être infligée que si la violation des règles de passation est intentionnelle ou si l'adjudicateur a commis une faute lourde en ignorant l'obligation de publication d'un avis de marché. L'autorité habilitée à infliger une amende en première instance est le Complaints Board. Il ne peut pas s'autosaisir et ne peut enquêter sur des délits présumés qu'après le dépôt par une tierce partie d'une plainte signée. En revanche, son pouvoir discrétionnaire est important : même s'il peut établir que l'infraction est avérée et intentionnelle ou consécutive à une faute lourde, il peut ne pas infliger d'amende, à condition de motiver sa décision. Il peut être fait appel des peines d'amende devant les juridictions ordinaires.

La Norvège conclut son exposé par une énumération des faiblesses du système en vigueur. Premièrement, le Complaints Board ne peut pas s'autosaisir, ce qui limite ses possibilités de faire appliquer le droit. Deuxièmement, la responsabilité personnelle de l'agent chargé des marchés publics ne peut pas être engagée et les amendes ne peuvent donc être infligées qu'à l'entité adjudicatrice. La mise en cause de la responsabilité personnelle pourrait avoir un effet plus dissuasif. Enfin, le Complaints Board dispose de moyens de coercition limités lorsqu'il faut obtenir des informations de l'entité adjudicatrice. Même si cette dernière est tenue de fournir les informations demandées, le Complaints Board ne peut pas l'y contraindre ni lui infliger une amende.

Le Président remercie toutes les délégations pour leurs exposés. Très intéressants, ils constituent également une introduction à nombre des sujets qui seront traités dans les sessions suivantes de la table ronde

1. Concevoir et faire fonctionner un système de passation des marchés publics garantissant une concurrence optimale et un risque de collusion minimal

La manière dont un système de passation est conçu peut influer à la fois sur le caractère concurrentiel de la procédure et sur le risque de collusion. Le Président encourage les délégations à échanger leurs expériences dans ce domaine et à indiquer concrètement ce qui a marché et ce qui a échoué. Pour ouvrir les débats, le Président demande à la délégation de la Commission européenne de présenter les initiatives communautaires et de préciser quelles sont les dispositions de la directive communautaire relative à la passation des marchés publics qui peuvent prévenir la collusion dans le cadre d'appels d'offres.

La délégation de la Commission européenne explique comment certains aspects du droit européen relatifs aux marchés publics peuvent empêcher les soumissions concertées. Les directives européennes peuvent ne pas traiter directement de la collusion mais elles contiennent des dispositions influant indirectement sur le risque de collusion dans le cadre d'un appel d'offres. Les directives de 2004, par exemple, obligent les autorités adjudicatrices à exclure des appels d'offres tout candidat ayant été condamné pour crime organisé, corruption, fraude ou blanchiment de capitaux. De telles entreprises pourraient facilement être considérées comme très susceptibles de participer à une soumission concertée. L'entité adjudicatrice peut également exclure les acteurs économiques condamnés pour violation des règles nationales de conduite professionnelle. Les entreprises simplement suspectées de fautes professionnelles graves peuvent aussi être écartées des appels d'offres, mais la charge de la preuve incombe alors à l'entité adjudicatrice. Enfin, on peut considérer que le principe – inscrit dans les directives européennes – selon lequel les marchés peuvent être attribués en fonction de divers critères (prix, qualité, délais de livraison, aspects environnementaux, autres aspects…) est susceptible d'atténuer le risque de collusion : la multiplicité des critères rend plus la concertation plus difficile.

La Commission européenne évoque ensuite un dossier de soumission concertée qu'elle a clos en février 2007 en condamnant les entreprises incriminées à une peine d'amende substantielle. Le marché concerné était celui des ascenseurs et des escalators. Cette entente, constituée principalement en vue de truquer les offres, est intéressante parce qu'elle montre comment ses membres ont toujours réussi à se concerter, malgré le cadre juridique instauré par les directives communautaires et les règles nationales qui régissaient la passation des marchés publics. La Commission a établi qu'il y avait eu des violations systématiques du droit européen de la concurrence et l'enquête a montré que les collusions concernaient aussi bien des appels d'offres privés que publics. Bien organisés, les membres de l'entente tenaient à jour des listes où figuraient des centaines de projets de soumissions concertées et avaient mis au point un mécanisme de rémunération sophistiqué. Le système fonctionnait simultanément dans quatre pays et les collusions portaient sur un nombre significatif de très gros projets d'infrastructure publics et privés. Les projets pouvaient concerner aussi bien des gares ferroviaires que des hôpitaux ou toutes sortes de bâtiments privés, qu'ils soient ou non soumis aux dispositions du cadre réglementaire de l'UE relatif aux marchés publics. D'après la Commission européenne, l'enquête est venue confirmer plusieurs des constats figurant dans le document de référence du Secrétariat de l'OCDE, en particulier le fait que le risque de soumission concertée est plus important lorsque les marchés se caractérisent par une concentration significative et des barrières élevées à l'entrée.

Le Président demande ensuite à la délégation brésilienne de revenir sur ses expériences récentes en matière d'octroi de concessions pour des autoroutes fédérales ; celles-ci montrent en effet comment l'efficacité du système d'attribution des marchés contribue à réduire le risque de collusion.

Pour commencer, la délégation brésilienne précise que la coopération entre autorités de la concurrence et responsables des marchés publics n'en est qu'à ses débuts. Depuis quelque temps, le gouvernement cherche à renforcer le rôle des autorités de la concurrence dans la prévention des soumissions concertées liées aux marchés publics. Par exemple, le Secrétariat chargé de l'application du

droit économique au sein du ministère de la Justice vient de définir un cadre de coordination générale pour l'analyse des marchés publics. Le Secrétariat reconnaît que les soumissions concertées constituent un problème majeur, dont la résolution est une priorité nationale. La création du système de coordination générale ainsi que la coopération plus étroite avec le Contrôleur général de l'administration fédérale, qui est responsable des audits internes, devraient augmenter l'efficacité des enquêtes sur les ententes visant des marchés publics.

S'agissant de la conception des enchères, il convient de noter le manque d'expérience du Brésil dans le domaine des marchés publics. Ce pays peut toutefois tirer des leçons des concessions attribuées à des fournisseurs privés de services publics ou de services d'infrastructure. Au sein du ministère des Finances, par exemple, le Secrétariat du suivi de l'économie est en train d'étudier les questions techniques soulevées par la concession de sept tronçons d'autoroutes fédérales. Dans ce cadre, le Secrétariat contribue fortement à promouvoir la concurrence en cherchant à mettre au point un système d'enchères susceptible d'empêcher les soumissions concertées ou de réduire considérablement les possibilités de trucage des offres. Il a notamment déconseillé l'adoption d'un mécanisme d'enchères à plusieurs tours (enchères séquentielles) dans le cadre duquel les enchères pour le deuxième tronçon autoroutier commenceraient quand l'identité de l'adjudicataire du premier tronçon aurait été annoncée et ainsi de suite. Le Secrétariat a fait valoir que des enchères séquentielles peuvent faciliter un éventuel accord collusif, en particulier parce que les enchérisseurs sont supposés participer à des enchères ouvertes ascendantes où les envois de signaux sont possibles. Les arguments du Secrétariat ont porté puisqu'il a réussi à faire modifier le système d'enchères proposé et à lui substituer la tenue d'enchères simultanées pour les sept tronçons d'autoroutes. Le Secrétariat est également parvenu à faire remplacer le modèle d'enchères choisi par celui des enchères scellées au premier prix qui, théoriquement au moins, favorise moins les collusions. La réduction des barrières à l'entrée est un autre élément clé à prendre en compte. Le Brésil s'est doté d'un système d'adjudication électronique (Comprasnet). Fonctionnant selon le principe des enchères ouvertes, il a contribué à abaisser notablement les barrières à l'entrée, en particulier pour les PME, car la procédure électronique réduit les coûts administratifs de préparation des offres.

Le Président demande ensuite à la délégation irlandaise de relater à quelle occasion récente l'autorité irlandaise de la concurrence a pu s'exprimer publiquement sur certaines spécificités des procédures d'appel d'offres (critères d'admissibilité, par exemple) et d'indiquer ce qu'elle a préconisé pour rendre les procédures plus concurrentielles.

En Irlande, comme dans nombre d'autres pays, les affaires de collusion liées aux marchés publics sont un problème préoccupant. L'autorité de la concurrence n'a pas encore défini de cadre détaillé pour promouvoir la concurrence dans les marchés publics, mais elle envisage de publier une brochure d'information s'appuyant sur son expérience dans ce domaine, en particulier sur un certain nombre d'enquêtes en cours. Récemment, elle a eu l'occasion de s'exprimer sur certains aspects des lignes directrices du ministère des Finances relatives aux marchés publics. Ne visant pas à être exhaustive sur le sujet, elle a surtout souligné la nécessité d'assouplir les critères d'accès pour élargir la participation aux appels d'offres publics. L'autre observation importante formulée à cette occasion concernait l'absence de clause générale exigeant des candidats à un appel d'offres public qu'ils attestent de leur indépendance.

Après avoir remercié l'Irlande, le Président invite la délégation indonésienne à intervenir à son tour et à expliquer aux autres délégations pourquoi elle estime que des critères de participation trop sélectifs peuvent favoriser la collusion durant la passation de marchés.

La délégation indonésienne souligne que la lutte contre la collusion dans les marchés publics est une priorité essentielle de la KPPU, l'autorité de la concurrence en Indonésie. Sur les 560 plaintes reçues par la KPPU au cours de la période 2000-06, près de la moitié se rapportait à des accords collusifs en relation avec des appels d'offres publics ou des enchères. Après avoir décrit en détail le cadre juridique régissant

les appels d'offres publics, la délégation indonésienne commente deux affaires récentes de trucage des offres concernant, respectivement, le marché des coffrages et des conduites et le marché de l'encre indélébile employée pour les scrutins nationaux. D'après l'Indonésie, ces affaires (et plus particulièrement la seconde) montrent que, dans bien des cas, la collusion débute dès la phase de planification de l'appel d'offres, par la fixation de critères et d'exigences qui limitent considérablement le nombre de candidats.

Le Président remercie l'Indonésie et demande à Israël de traiter des coentreprises et des consortiums en tant que facteurs susceptibles de favoriser la collusion lors d'un appel d'offres.

Pour répondre à la demande du Président, Israël présente certaines caractéristiques des marchés publics liés au secteur de la défense et quelques-uns des problèmes de concurrence qu'il a identifiés en relation avec les marchés attribués par le ministère de la Défense. L'autorité israélienne de la concurrence (Israeli Antitrust Authority, IAA) a déployé des efforts considérables pour sensibiliser le ministère à l'importance de la concurrence. Au cours des dernières années, l'IAA a reçu de nombreuses demandes d'approbation de coentreprises qui émanaient de grands groupes d'armement et visaient à mettre au point des produits technologiques de premier ordre. En règle générale, le ministère favorise ce type de rapprochements car ils permettent de conjuguer l'expertise, les compétences et les connaissances des différents partenaires, ce qui débouche en peu de temps sur des solutions technologiques optimales. Mais, en l'occurrence, l'IAA a dit redouter que la création de coentreprises d'une telle taille ne restreigne et n'affaiblisse la concurrence. Elle a également fait part de son inquiétude quant aux éventuels effets anticoncurrentiels qu'induirait la convergence des intérêts économiques des différentes entreprises du secteur. Dans ce contexte, le fait que les parties à une coentreprise puissent partager des informations commerciales a toujours été un sujet de préoccupation majeur.

Dans le cadre d'une affaire récente concernant une coentreprise destinée à mettre au point des véhicules fondés sur des technologies avancées, l'IAA a reconnu qu'il était important, sur le plan opérationnel, de permettre à la coentreprise de concevoir le produit, tout en insistant sur le fait que ses activités se limiteraient à certaines fonctions spécifiques du produit et que toutes les autres fonctions seraient élaborées dans un autre cadre industriel. L'IAA a donc approuvé la création de la coentreprise sous réserve que les informations en possession des parties le restent et que chacune ait le droit de les exploiter dans d'autres secteurs d'activité sans avoir à obtenir l'accord de l'autre partie. C'est de cette manière que le risque d'effets anticoncurrentiels potentiellement associé aux coentreprises de ce type a été supprimé.

Sur cette même question, le Président demande au Mexique d'intervenir pour relater son expérience en ce qui concerne les dispositions légales qui restreignent la concurrence dans le secteur de la santé publique.

S'agissant des dépenses publiques liées aux médicaments, le droit en vigueur au Mexique comporte des dispositions susceptibles de faciliter une adjudication inefficiente des marchés et de favoriser la concentration et les accords collusifs. Il existe ainsi une disposition particulièrement problématique, appelée clause des fournisseurs multiples (ou des adjudications fractionnées) : si les offres diffèrent de moins de 5 %, les marchés sont fractionnés entre les candidats. Cette clause, appliquée récemment dans trois appels d'offres pour du matériel médical, restreint la concurrence par les prix et facilite la conclusion d'accords (implicites ou explicites) de partage du marché. Les enquêtes de l'autorité de la concurrence sur l'attribution des marchés de produits pharmaceutiques ont également montré que la publication d'un prix de référence – une pratique très courante au Mexique – favorise la collusion car le prix de référence sert souvent de « repère ». Pour remédier à ces problèmes, la Commission mexicaine de la concurrence, en coordination avec d'autres organismes de santé publique, a lancé dernièrement une vaste action de sensibilisation pour que le cadre réglementaire de l'attribution des marchés publics dans ce secteur soit modifié et favorise une concurrence plus active entre les soumissionnaires.

Après une courte pause, le Président cède la place à Mme Beth, de la Direction de la Gouvernance publique et du développement territorial de l'OCDE pour qu'elle développe les points intéressants soulevés jusqu'ici et s'exprime sur la façon dont on pourrait concevoir les appels d'offres pour que le risque de corruption des agents publics soit pris en compte.

Mme Beth présente le travail que le Comité de la gouvernance publique a consacré à l'intégrité dans les marchés publics et souligne plus particulièrement les résultats d'une enquête très complète réalisée dernièrement par le Comité. L'exercice a débuté avec le Forum mondial sur la gouvernance de 2004, un nombre croissant d'observateurs ayant constaté que la passation des marchés publics était l'activité des pouvoirs publics la plus exposée au risque de corruption. Du point de vue de la bonne gouvernance, un des aspects les plus marquants était que le manque de transparence et de responsabilité avait été identifié comme la principale menace pour l'intégrité du processus d'adjudication des marchés publics. L'exercice s'est donc concentré sur l'identification des bonnes pratiques qui permettent de promouvoir l'intégrité dans les marchés publics en garantissant la transparence et la responsabilité tout au long du processus, c'est-à-dire de l'évaluation des besoins à la gestion des contrats.

Le Comité a recueilli des informations sur les bonnes pratiques auprès d'un réseau d'agents chargés des marchés publics et de spécialistes de la concurrence et de la lutte contre la corruption. L'étude a confirmé que la transparence, la responsabilité et le contrôle contribuaient largement à l'intégrité des procédures. Elle a également souligné que la passation des marchés publics est plus une activité stratégique qu'une simple fonction administrative et qu'elle est un facteur essentiel de prévention de la corruption dans le cadre de la gestion des finances publiques. Les résultats de l'étude sont publiés par l'OCDE sous le titre *L'intégrité dans les marchés publics : les bonnes pratiques de A à Z*. L'approche est globale, inventoriant les risques et les bonnes pratiques qui ont été identifiés pour la totalité du cycle de passation des marchés publics. Cette vue d'ensemble intègre des éléments de bonnes pratiques observés dans les pays de l'OCDE ainsi qu'au Brésil, au Chili, à Dubaï, en Inde, au Pakistan, en Roumanie, en Slovénie et en Afrique du Sud. L'étape suivante du projet est l'établissement, à partir des bonnes pratiques identifiées, d'une *liste de contrôle visant à améliorer l'intégrité dans les marchés publics*. Cet outil aidera les décideurs politiques à instaurer progressivement une culture de l'intégrité dans l'ensemble du cycle de passation des marchés publics, de l'évaluation des besoins à la gestion des contrats.

L'étude a également trouvé des éléments confirmant qu'il est difficile de concilier l'impératif de transparence, qui est un excellent moyen d'atténuer le risque de corruption, avec d'autres impératifs (prévention des accords collusifs, loyauté de la concurrence, etc.). Sur un plan concret, l'étude a montré que l'organisation d'enchères électroniques contribue à réduire la collusion et la corruption, car cette formule permet d'éviter les contacts récurrents entre les responsables de marchés et le secteur privé. L'anonymat peut également empêcher les concurrents de surveiller le comportement des autres entreprises. En outre, Mme Beth encourage une coopération plus étroite entre agents chargés des marchés publics et autorités de la concurrence en vue de prévenir les soumissions concertées.

Le Président remercie Mme Beth pour son utile contribution, qui constitue une excellente introduction au thème de discussion suivant. L'intégrité des procédures est dans l'intérêt des agents publics, aussi bien que des enquêteurs, des autorités de la concurrence et des responsables de la passation des marchés publics. L'un des moyens de garantir cette intégrité est de contribuer à sensibiliser les responsables de marchés aux enjeux et aux méthodes à employer.

2. Promouvoir la concurrence par des actions ad hoc et des programmes de formation et de coopération entre autorités de la concurrence et responsables des marchés publics.

Pour introduire ce thème, le Président donne la parole à la délégation canadienne, qui a accepté de présenter un bref exposé sur les programmes de formation et d'ouverture mis sur pied au Canada.

Mandaté pour promouvoir et préserver la concurrence sur les marchés canadiens, le Bureau canadien de la concurrence peut enquêter sur des activités potentiellement anticoncurrentielles dans le cadre d'une passation de marché et doit veiller au respect de la législation pour laquelle il est compétent. Le Bureau est chargé de faire appliquer la *Loi sur la concurrence*, qui prévoit de poursuivre au pénal les auteurs d'ententes ou de soumissions concertées. Ces infractions sont fréquentes dans le cadre des marchés publics. En vertu des clauses légales en vigueur, les personnes physiques ou morales coupables d'avoir truqué des offres risquent une peine d'amende qui est laissée à l'appréciation des juges. Les personnes physiques sont passibles d'une peine de réclusion de cinq ans. Qu'elle prenne la forme d'actions de sensibilisation ou de mesures de répression, la lutte contre le trucage des offres est une priorité du Bureau et l'ensemble des antennes régionales du bureau s'occupe activement de cette question. Les activités d'ouverture consistent, notamment, à sillonner le pays pour présenter des exposés aux responsables des marchés publics. Depuis 2005, le Bureau s'est livré à cet exercice à plus de 80 reprises et, d'ici 2007, presque 3 000 personnes intervenant dans la passation des marchés publics auront suivi les exposés du Bureau. Durant ces séances, les agents du Bureau font une présentation générale de la *Loi sur la concurrence* avant d'expliquer en détail comment elle s'applique aux procédures d'appels d'offres. Les exposés sont présentés par des agents rattachés au siège du Bureau ou aux antennes régionales, ce qui a permis au Bureau de tisser des liens étroits avec d'autres organismes qui, au niveau régional, sont également chargés d'appliquer la législation. Cette stratégie d'ouverture a pour effet de sensibiliser un public plus large à la délinquance économique et se traduit également par la multiplication des enquêtes et un afflux de dépôts de plainte.

L'objectif premier du Bureau est de mieux faire connaître les infractions à la Loi sur la concurrence aux organismes chargés des marchés publics. Les agents du Bureau remettent aux responsables des adjudications une liste de quelques-unes des caractéristiques de marché qui sont plus ssusceptibles que d'autres d'induire un risque d'arrangement secret entre les fournisseurs. Les marchés les plus exposés sont, par exemple, ceux qui se caractérisent par des produits homogènes et une concentration importante des entreprises, ceux où une association professionnelle active est présente ou encore ceux où le produit ou le service proposé est relativement simple et ne bénéficiera d'aucune avancée technologique significative. Pour illustrer leurs présentations, les agents du Bureau évoquent aussi des affaires réelles et des exemples de sanctions infligées. Le deuxième objectif du Bureau est d'aider les agents chargés de la passation des marchés à repérer les accords collusifs. Ils leur expliquent comment identifier les indices signalant des irrégularités ou des infractions éventuelles (soumissions concertées, fixation des prix, etc.).

Le Bureau étant convaincu que la prévention ne se limite pas à un travail de détection, ses agents renseignent également les responsables de marchés sur les différentes mesures qu'ils peuvent prendre pour éviter d'aller jusqu'à l'ouverture d'une enquête : rechercher des candidats ; prendre des mesures préventives lors de la rédaction du cahier des charges ; poser des questions si quelque chose paraît anormal au cours de l'adjudication ; former les personnels concernés à détecter d'éventuelles irrégularités ou infractions et exiger de chaque candidat une Attestation d'absence de collusion dans l'établissement de soumission. Comme les responsables du Bureau de la concurrence encouragent également les entités adjudicatrices à leur signaler les pratiques suspectes, un nombre considérable de plaintes pour trucage des offres a été déposé par le secteur public. Le Bureau explique aussi aux responsables de marchés comment ils doivent procéder s'ils suspectent des activités anticoncurrentielles. Par exemple, il souligne à quel point il est important de conserver des archives détaillées des appels d'offres, de consigner sans délai toute communication et tout comportement suspect et de tenir ses soupçons secrets. Les responsables du Bureau

informent également les services de l'administration ou d'autres organismes publics du coût des actes anticoncurrentiels et soulignent que ces pratiques peuvent alourdir la facture du secteur public et, *in fine*, augmenter le coût des services pour le public.

Le Président demande ensuite à la délégation américaine de présenter le travail de sensibilisation réalisé aux États-Unis.

Aux États-Unis, les programmes visent plusieurs objectifs, le principal étant d'établir une coopération étroite avec les responsables de la passation des marchés publics et les enquêteurs. En effet, les agents chargés des marchés apportent souvent des preuves essentielles qui permettent aux poursuites d'aboutir. C'est pour cette raison que, dans le cadre des campagnes de sensibilisation destinées aux responsables de marchés publics, les agents de l'autorité de la concurrence encouragent systématiquement les participants à contacter les autorités antitrust s'ils disposent d'indices de trucage des offres. Il est également précisé aux participants que, même en l'absence de véritables preuves, les autorités antitrust sont disposées à examiner les soupçons qu'ont éveillé certaines méthodes de soumission ou le comportement particulier de soumissionnaires avant de décider d'ouvrir une enquête en bonne et due forme. Les programmes de vulgarisation contribuent aussi à former les agents chargés des marchés publics pour qu'ils sachent comment exercer leur vigilance en vue de détecter des soumissions concertées. Des exemples réels de modèles d'offres ou de comportements suspects pouvant dissimuler un trucage des offres leur sont présentés.

Un des autres objectifs des programmes américains est de contribuer à informer les responsables des marchés publics et les enquêteurs de l'administration du coût des soumissions concertées. Comme ces activités illégales peuvent se poursuivre pendant des années, les coûts qu'elles font supporter à la collectivité et donc aux contribuables sont évidemment considérables. En effet, en raison de ces pratiques, l'acheteur public paie plus cher les biens et les services dont il a besoin que ce qu'il paierait si la concurrence jouait véritablement. L'autre objectif important des programmes est d'apprendre aux agents concernés à se protéger eux-mêmes des soumissions concertées. Ils sont conseillés sur la façon de rédiger un avis de marché pour qu'il intéresse le plus de candidats possibles. Les programmes de sensibilisation soulignent également que chaque soumissionnaire doit présenter et signer un document attestant que son offre a été établie en toute indépendance. L'un des principaux avantages de ces attestations est qu'il est bien plus facile de prouver qu'un soumissionnaire a produit une attestation mensongère que de prouver un trucage des offres. Par conséquent, le fait qu'il soit plus facile de sanctionner des soumissionnaires pour attestation mensongère permet au procureur de faire pression sur certaines entreprises pour qu'elles l'aident à poursuivre d'autres entreprises soupçonnées de trucage.

Enfin, ces programmes sont destinés à mettre en garde les responsables des marchés publics pour qu'ils ne participent pas à des soumissions concertées ou à toute autre activité illégale préjudiciable à la concurrence. C'est ce qui arrive habituellement lorsqu'un agent accepte des bakchichs ou des pots-de-vin d'un soumissionnaire. Il n'y a pas nécessairement violation de la législation antitrust, car il peut s'agir simplement d'un candidat isolé cherchant à être sélectionné et non d'une collusion de tous les soumissionnaires. Quoi qu'il en soit, il demeure très important d'enquêter sur ces situations, car les agents corrompus peuvent aussi organiser des soumissions concertées ; or les pots-de-vin laissent des traces écrites très exploitables qui constituent des preuves solides permettant aux procureurs de convaincre les acteurs impliqués de les aider à établir si les faits de corruption se doublent d'un trucage des offres.

Le Président demande ensuite à la délégation française d'expliquer en quoi il est important de tisser des liens de collaboration étroits avec les entités responsables des marchés publics.

La délégation française explique que le problème des soumissions concertées est récurrent. Environ 40 % des amendes infligées chaque année par le Conseil de la concurrence pour pratiques

anticoncurrentielles concerne des infractions aux règles de passation des marchés publics. L'analyse des dossiers soumis au Conseil révèle principalement trois types de comportement anticoncurrentiel. Premièrement, la règle tacite du « chacun reste à sa place » permet aux entreprises existantes de perpétuer la répartition historique des marchés sans qu'il soit nécessaire d'instaurer un mécanisme de coopération explicite. Deuxièmement, les échanges d'informations sensibles entre concurrents peuvent être suffisants pour réduire considérablement les incertitudes concernant la teneur probable des offres concurrentes, ce qui influe sur le niveau global des prix proposés. La troisième formule, qui est aussi la plus complexe, est celle de la coordination entre plusieurs marchés : elle donne souvent lieu à la mise en place de mécanismes de compensation sophistiqués entre les participants.

Comme il est souvent difficile de prouver les infractions, ce qui limite l'efficacité du travail des autorités, celles-ci cherchent à améliorer les relations et la coordination entre autorités de la concurrence et organismes chargés des marchés publics. L'efficacité de la coordination est un impératif, non seulement pour faciliter l'application ex post des règles de la concurrence, mais également pour dissuader dans une certaine mesure les collusions en créant un environnement où il est plus facile de recueillir des preuves en vue de poursuites ultérieures. Le Conseil a identifié trois manières possibles de procéder :

- lorsque l'absence de concurrence résulte d'un parallélisme des comportements, chacune des entreprises se contentant de préserver sa part de marché sans chercher à grignoter celle des autres, une solution simple et facile consiste à rompre avec les habitudes installées, c'est-à-dire à modifier la taille, la quantité, la structure, etc. des produits ou services à fournir ;

- il est fréquent que les entreprises se regroupent pour répondre à un appel d'offres. Cette solution, souvent proconcurrentielle, peut devenir anticoncurrentielle quand elle concerne des entreprises capables de soumissionner seules ou quand elle facilite les échanges d'informations entre concurrents. Les acheteurs publics doivent avoir la possibilité de refuser *ex ante* une soumission conjointe s'ils suspectent qu'elle dissimule des pratiques illégales ;

- il est aussi très important de recueillir et d'analyser les données contenues dans les différentes offres, en particulier quand les candidats appartiennent à de grands groupes nationaux ou internationaux. Ceci contribue à réduire les asymétries d'information entre les soumissionnaires de taille importante et les autorités de la concurrence. Détecter un accord et rechercher les preuves de son existence est plus simple quand les autorités de la concurrence ont la possibilité d'examiner simultanément les offres soumises pour un grand nombre de marchés de fourniture.

Le Président remercie la délégation française et se tourne vers la délégation finlandaise. Il lui demande en particulier de décrire le projet de partenariat mis sur pied par le secteur public et d'indiquer en quoi il contribue aux efforts de sensibilisation et de formation.

La Finlande explique que l'autorité finlandaise de la concurrence est un organisme de taille modeste doté de ressources limitées. Cependant, les programmes de sensibilisation aux risques de trucage des offres ont toujours fait partie de ses priorités. À la suite d'une affaire de cartel avec soumissions concertées dans le secteur des revêtements en asphalte, l'autorité s'est rapprochée des centrales d'achat de 14 grandes villes du pays (représentant au total plus d'un tiers de la population finlandaise) pour discuter de ce que sont les soumissions concertées et de ce que les centrales peuvent faire concrètement pour ne pas être victimes de trucage des offres. L'objectif premier de ces rencontres était de fournir aux centrales ou aux agents chargés des achats des informations sur la nature des cartels, leur fonctionnement et les moyens de les détecter. L'exercice s'est révélé extrêmement utile et a donné des résultats très positifs. Il était essentiel de réunir les autorités de la concurrence et les responsables des achats pour qu'ils établissent des relations et communiquent entre eux. En outre, les centrales et les agents responsables des achats ont eu ainsi l'occasion de rencontrer des spécialistes des problèmes de concurrence et de discuter et d'analyser avec

eux, en dehors de tout protocole, les cas pour lesquels il était difficile de déterminer si les offres étaient ou non truquées.

Le Président demande à la délégation suédoise de présenter les changements législatifs prévus pour le 1er septembre 2007, aux termes desquels l'autorité suédoise de la concurrence sera habilitée à faire appliquer la Loi suédoise relative aux marchés publics.

La Suède précise que la décision de transférer cette nouvelle compétence à l'autorité de la concurrence devrait être prise à la fin du mois de juin. Pour l'autorité de la concurrence, qui considère la politique des marchés publics comme faisant partie intégrante de la politique de la concurrence, il s'agit d'une évolution capitale. La mission de cette autorité est de promouvoir la concurrence en Suède, non seulement en veillant au respect du droit de la concurrence mais menant des actions qui contribuent à l'efficience du marché. À cet égard, le travail de promotion revêt une grande importance. De ce point de vue, les nouvelles fonctions de surveillance assignées à l'autorité de la concurrence viendront appuyer les efforts qu'elle déploie dans le domaine de la passation des marchés. Les entités publiques ne sont pas toujours conscientes de la nécessité de préserver la concurrence quand ils organisent un appel d'offres. C'est pourquoi l'autorité de la concurrence ne cesse de souligner que les entités adjudicatrices devraient analyser, ne serait-ce que très brièvement, la situation de la concurrence sur les marchés où elles se fournissent. Souvent, la concurrence serait préservée si les responsables des achats considéraient les effets de leurs activités sous un angle plus large et ne s'intéressaient pas uniquement aux avantages escomptés à court terme. L'autorité de la concurrence a toujours souhaité promouvoir la participation des PME aux marchés publics. À cet égard, il faut noter que la pratique courante parmi les organismes publics qui consiste à signer des accords-cadres pour l'achat de biens et de services (prestations informatiques, ordinateurs, bureautique, etc.) peut laisser le champ libre aux gros fournisseurs en faisant disparaître de nombreux petits fournisseurs incapables de livrer les quantités spécifiées dans le cahier des charges.

Enfin, pour clore le tour de table sur le thème des programmes de formation et de sensibilisation, le Président demande à la délégation hongroise de présenter les efforts récents entrepris dans ce domaine.

La délégation de la Hongrie précise que le GVH, l'autorité hongroise de la concurrence, a lancé il y a peu un certain nombre d'initiatives liées aux marchés publics. En février 2007, elle a organisé une conférence internationale à laquelle ont participé des responsables haut placés du ministère américain de la Justice, de la Direction générale de la concurrence de la Commission européenne et d'autres instances nationales de premier plan chargées de la concurrence. L'assistance se composait de responsables politiques et de représentants des milieux d'affaires (Premier ministre hongrois, hauts fonctionnaires du ministère de l'Économie et d'autres ministères, etc.). Les soumissions concertées et les marchés publics figuraient en bonne place sur le programme, même si la conférence n'était pas exclusivement consacrée aux soumissions concertées mais, plus généralement, aux ententes injustifiables. L'un des faits marquants concernant les ententes conclues dans le cadre de marchés publics a été l'envoi par le président du GVH de courriers aux organismes chargés des marchés publics : il attirait leur attention sur une décision dans laquelle le GVH indiquait que leurs procédures respectives étaient biaisées par une entente injustifiable et qu'ils pouvaient exiger réparation devant la justice. Les courriers précisaient que les décisions du GVH établissant le caractère effectif de l'infraction étaient opposables aux tribunaux. Le GVH proposait aux organismes concernés de les aider dans toute la mesure de ses moyens.

L'autorité de la concurrence fait également bon usage des travaux de l'OCDE, en particulier le compte rendu de la récente table ronde concernant la concurrence sur les marchés d'enchères, qui avait été envoyé à un certain nombre d'organismes chargés des marchés publics et de municipalités afin de les aider concrètement à détecter et identifier les infractions au droit de la concurrence. Il est également prévu de publier une nouvelle brochure qui expliquera plus en détail comment concevoir des procédures de passation appropriées et détecter les cas de collusion entre soumissionnaires. La présente table ronde

constituera également une base d'informations très utile pour réfléchir à la façon dont l'autorité de la concurrence prêtera main forte aux organismes responsables des marchés publics. L'exemple finlandais est intéressant parce qu'il montre comment les autorités de la concurrence peuvent apporter une aide directe aux responsables de la passation de marchés ayant déjà été confrontés à des soumissions concertées. Actuellement, le GVH envisage de mettre sur pied un programme de formation similaire.

Le Président remercie toutes les délégations pour leurs exposés intéressants sur l'importance des programmes de sensibilisation et introduit le thème de discussion suivant. Succédant à la session sur la conception globale d'un système de passation efficient, la prochaine session se concentrera sur les sanctions prises et sur les techniques servant à détecter les modèles de soumission et autres comportements anticoncurrentiels.

3. Techniques et outils possibles de détection des modèles d'offres et des comportements non compatibles avec le principe de concurrence : systèmes de traitement des plaintes, listes de contrôle et surveillance du contenu des offres.

Pour introduire ce thème, le Président cède la parole à la délégation russe qui va présenter les dernières évolutions du droit russe destinées à encourager la détection des comportements illégaux liés à l'attribution de marchés publics.

Pour commencer, la délégation de la Russie résume les récentes modifications de la loi qui ont transféré à l'autorité russe de la concurrence le pouvoir de contrôler la procédure d'achat de biens, de travaux et de services destinés à l'administration fédérale. Une nouvelle loi également votée en 2007 a introduit le système des appels d'offres électroniques. Forte de ses nouvelles prérogatives, l'autorité de la concurrence a considérablement intensifié ses activités dans le domaine de la passation des marchés publics, effectuant 625 inspections programmées et 2 450 inspections non programmées en 2006. Elles ont mis en lumière de sérieux manquements à la législation sur les marchés publics, notamment le non-respect des délais légaux de publication d'avis de marché et la fixation de critères restreignant inutilement la participation aux appels d'offres. Pour augmenter l'efficacité de son action, l'autorité de la concurrence a également défini un certain nombre de priorités : création d'un mécanisme unique de dépôt et de traitement des plaintes ; préparation d'une classification des infractions destinée à harmoniser les pratiques administratives ; établissement de liens plus étroits entre les autorités chargées du contrôle et des sanctions.

Le Président demande ensuite à la délégation française de s'exprimer sur l'importance d'une relation plus étroite et d'une réelle communication entre les autorités de la concurrence et tous les acteurs qui mettent en place et font fonctionner un système d'adjudication de marchés publics.

La délégation de la France présente les initiatives de la Direction générale de la concurrence, de la consommation et de la répression des Fraudes (DGCCRF) pour empêcher et détecter les soumissions concertées. En France, comme dans de nombreux autres pays, les marchés publics sont des marchés très particuliers : (1) ils sont soumis à une réglementation détaillée, qui évolue souvent, obligeant les collectivités locales à mettre à jour leurs procédures et méthodes de passation ; (2) les entités publiques chargées d'attribuer les marchés publics sont très nombreuses (plus de 50 000 en France) et géographiquement dispersées ; et (3) ces marchés sont exposés au risque de corruption et soulèvent des questions d'éthique et de déontologie. Toutes ces spécificités conduisent les pouvoirs publics français à réfléchir à une organisation des marchés publics qui garantirait la prévention et la détection des pratiques illégales. Dans ce contexte, la DGCCRF joue un rôle important car les inspecteurs qu'elle envoie sur le terrain sont plus proches des entités adjudicatrices et peuvent participer aux procédures d'appel d'offres et, au besoin, assister les collectivités locales.

En matière de prévention des soumissions concertées, la réglementation française relative aux marchés publics exige de manière explicite que des agents de la DGCCRF soient invités à participer à la procédure d'appel d'offres. Chaque année, la DGCCRF reçoit plus de 100 000 invitations et envoie ses agents assister à environ 10 000 appels d'offres. Cette activité, qui mobilise une centaine d'agents, lui permet de jouer un rôle consultatif important auprès des entités adjudicatrices : elle a formulé des observations et des suggestions pour améliorer la passation des marchés dans environ 30 % des adjudications auxquelles elle a assisté. Dans certains cas, ses observations ont contraint l'entité concernée à relancer la procédure d'appel d'offres sur la base de nouvelles règles, lorsque les résultats du premier appel d'offres n'étaient pas satisfaisants du point de vue de la concurrence. S'agissant de la détection des pratiques illégales liées aux marchés publics, la DGCCRF a toujours été extrêmement active. Ainsi, chaque année, elle diligente une cinquantaine d'enquêtes approfondies portant sur des infractions présumées dans ce domaine et la moitié environ des 15 à 20 dossiers qu'elle transmet au Conseil de la concurrence sur des soupçons d'infractions aux règles de la concurrence concernent l'attribution de marchés publics.

Le Président remercie la délégation française et invite la délégation portugaise à évoquer certaines des meilleures pratiques qui ont été identifiées dernièrement par l'autorité portugaise de la concurrence en matière de passation de marchés publics.

Le Portugal explique que l'autorité portugaise de la concurrence a publié il y a peu une série de lignes directrices concernant la « détection précoce des comportements potentiellement anticoncurrentiels » chez les agents chargés de la passation des marchés. Pour rédiger ces lignes directrices, qui sont le fruit d'une initiative conjointe de divers organismes publics et ministères, l'autorité portugaise de la concurrence s'est très largement inspirée du travail réalisé dans ce domaine par l'OCDE, ainsi que par les États-Unis et la Suède. Les lignes directrices sont principalement axées sur quatre aspects de la passation : le dossier d'offre, le prix, les relations des soumissionnaires et le coût unitaire proposé.

- Pour le dépouillement des offres, il est conseillé aux agents adjudicateurs de se servir d'une liste de contrôle contenant des indicateurs d'activité anticoncurrentielle. La liste suggère par exemple de vérifier si l'offre est inférieure au prix anticipé ou encore si l'offre émane de soumissionnaires qui n'avaient pas demandé le cahier des charges (élément qui, à lui seul, peut être le signe d'une collusion) et de prêter attention à des détails tels que des similitudes entre les écritures figurant sur plusieurs offres, y compris des fautes d'orthographe identiques.

- En ce qui concerne le prix, le conseil d'ordre général est d'examiner la fourchette de variation des prix proposés dans le cadre de l'appel d'offres. Le fait que des offres soient systématiquement basses ou qu'une offre soit très basse et que les autres soient systématiquement très élevées peut être le signe d'une collusion. Il faut aussi surveiller les écarts de prix avec d'autres appels d'offres, c'est-à-dire étudier le comportement des entreprises ayant répondu à différents appels d'offres pour un même type de produit

- Le troisième élément est la relation existant entre les soumissionnaires. En l'occurrence, les lignes directrices se réfèrent à des pratiques comme la sous-traitance, les soumissions conjointes et la rotation des adjudicataires.

- Le dernier élément est le coût unitaire proposé. Ceci s'applique en particulier aux marchés de travaux publics. Si le coût unitaire proposé est très supérieur à l'estimation technique initiale ou si les offres concurrentes contiennent des devis identiques, on peut y voir l'indice d'une coordination entre les soumissionnaires.

Pour clore la table ronde sur les marchés publics, le Président donne la parole à une autre invitée en poste à l'OCDE, Mme Ehlermann-Cache, et lui demande de parler de son expérience et de son travail au

sein de l'Unité anticorruption, car ils sont en rapport étroit avec un grand nombre d'aspects dont il vient d'être question.

Mme Ehlermann-Cache remercie le Groupe de travail de l'avoir invitée et précise qu'elle travaille à la Division de lutte contre la corruption de l'OCDE, qui est le Secrétariat du « Groupe de travail de l'OCDE sur la corruption dans les transactions commerciales internationales ». Ce groupe de travail est mandaté pour assurer la mise en œuvre et l'application de la Convention de l'OCDE sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales. Cet instrument international contraignant existe depuis près de dix ans et vise essentiellement la corruption d'agents publics étrangers dans le cadre de transactions commerciales internationales. Le Groupe de travail sur la corruption veille à ce que les pays signataires transposent les dispositions de la convention dans leur droit national. Il surveille également les progrès de l'application de la convention, qui est une convention pénale. Pour garantir sa mise en œuvre, le Groupe de travail surveille les pays signataires et effectue des visites sur le terrain à intervalles réguliers. Lors de ces visites, il est fréquent que l'on demande si un plus grand nombre de cas de corruption seraient découverts si les autorités de la concurrence jouaient un rôle plus important dans la lutte contre la corruption et les pratiques anticoncurrentielles. D'après l'expérience dont dispose le Groupe de travail, les autorités de la concurrence sont rarement sensibilisées aux risques de corruption et leurs enquêtes ne sont pas conçues pour détecter les faits de corruption.

Le Groupe de travail a également entrepris de dresser une typologie des différentes infractions qui peuvent être commises à l'occasion de la passation des marchés publics. Les catégories définies ont été discutées lors d'un séminaire organisé en mars 2006 avec des experts des services chargés de la répression, des spécialistes des achats publics, des comptables et des experts en matière de concurrence. Douze pays étaient représentés, ainsi que des organisations internationales comme la Banque mondiale, la Banque interaméricaine de développement et l'Office européen de lutte antifraude. Les experts ont examiné dix affaires anonymes de corruption liées à des marchés publics et le fruit de leur travail a été publié sous le titre *Corruption dans les marchés publics. Méthodes, acteurs et contre-mesures.* Le principal constat auquel ils ont abouti est que les activités illégales peuvent prendre différentes formes et intervenir à différents stades du processus de passation d'un marché. Long et complexe, ce processus s'étendre sur de nombreuses années et passer par de multiples étapes avant qu'un projet ne se réalise. Tout au long de cette chaîne, les entreprises ont diverses possibilités de verser des pots-de-vin et de corrompre des agents d'autres manières. Ce travail a également révélé que la corruption est souvent associée à d'autres délits, comme le blanchiment de capitaux, les infractions comptables, la fraude fiscale et l'extorsion de fonds.

En conclusion, Mme Ehlermann-Cache note que la promotion de la concurrence et la lutte contre la corruption dans les marchés publics se recoupent sur de nombreux points. Les autorités de la concurrence, les agents chargés des marchés publics et les services de répression de la corruption devraient réfléchir aux moyens de collaborer davantage et plus efficacement afin de prévenir la corruption et la concurrence déloyale. Surtout, elle souligne la nécessité de continuer à travailler pour qu'il n'y ait plus à arbitrer entre lutte contre la corruption et lutte contre la collusion.

Le Président remercie Mme Ehlermann-Cache pour son intervention qui clôt la table ronde. Il remercie également l'ensemble des participants pour ces débats très fructueux sur un thème qui a suscité énormement intérêt au sein des délégations.