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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from France

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- France --

Introduction

1. In France, public procurement is governed by a whole raft of regulations set out in the Public Procurement Code: the procurement process and procedures are each organised at every stage (decision to put out to contract, choice of procedure, choice of bidder and contract performance), significantly restricting the purchaser's room for manoeuvre. In addition to rules that apply specifically to public procurement, there are rules governing the activities of public bodies and of their agents: general principles (principle of legality, concept of public interest), statutory provisions, ethical rules (impartiality, probity, discretion, etc.).

2. This raft of regulations seeks through information transparency and procedural integrity to safeguard both efficiency in public procurement, including the proper use of funds, and the principles of equality in public burden-sharing and free competition and should allow us to approach the optimum in competition, where one firm should gain no advantage over another other than by its own merits.

3. Yet, collusion and corruption still go on in public procurement. For instance the French Central Service for the Prevention of Corruption (SCPC) notes that "*These numerous controls are there as checks and balances designed to ensure the legality of the procurement process... yet, public procurement in France, as in most other countries, is fertile ground for public corruption"*, hence "*the paradox of public procurement in France: on the one hand it is trammelled by red tape and controls while, on the other, public procurement contracts increasingly prime territory for anti-competitive practices.*"[1]

4. However, the paradox is only an apparent one and a closer analysis will provide a better understanding of the link between the distinct but closely related phenomena of collusion and corruption.

5. For instance, observers have noted that corruption is liable to spread wherever there is information asymmetry, which is often inherent in public procurement contracts: purchasers do not have a precise idea of their needs or of the characteristics of the product being proposed and call in a specialist, who takes on the position of intermediary agent/specifier, and acts as adviser to the purchaser or, purely and simply, as their authorised representative.[2]

6. This gives the intermediary agent/specifier power, a power that can potentially be corrupted and competition on the market concerned is likely to be hindered should the intermediary steer the choice of the public contracting authority not towards the best tender, but towards its own interests. From the bidder's point of view, corruption is a means of beating competing firms in order to win the contract.

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1 "L'audit de la corruption dans les marchés publics des collectivités publiques" Rapport annuel 2007.

2 See "Corruption et pratiques anticoncurrentielles" by F. Jenny, in Pratiques et contrôle de la corruption, Montchrestien, 1997.

7. However, corruption can also be the price that a number of firms colluding as a cartel have to pay in order to be able to operate the cartel and conceal its existence; in such cases, anti-competitive practice and corruption are very closely linked. Corruption offers solutions to a cartel's problems. The cartel has to guarantee that rents are shared out, ensure that all members play by the rules and discourage any potential defectors from leaving. Corruption is the basis for the distribution of rents and a means of retaliation against defectors as well as creating barriers to entry

8. Cartels organise a semblance of competition, the aim of which is to secure excess profits for every member of the coalition and to protect the intermediary agent/specifier who is keen to avert any suspicion.[3] They must rig bidding so that the chosen bidder as if it is the most competitive and other bids, termed "covering" bids, conceal the pre-arranged choice. Once in place on a market, one cartel naturally leads to another through a process of trade-offs and so that in exchange for submitting a cover bid each firm can take its turn at being the successful bidder for another public procurement contract.

9. The outcome of such concerted action in cartels involving corruption is excessive for public procurement costs, costs which are ultimately passed on to the taxpayer; the, seriousness of this problem is therefore a recurring cause for concern. In cases in which the loss to the government purchaser has been estimated, the figures for excess costs put down to the absence of competition range from 15 percent to 30 percent.

10. In Competition Authority litigation, the number of cases involving cartels in government procurement contracts shows how frequent collusive practices are, chiefly by means of communications between firms. Yet the fines imposed on the firms involved in such practices can be very large and may even be accompanied by a criminal conviction for those involved.

11. Since bribery of a procurement official and collusion between bidding firms in government procurement often go hand in hand, a combination of both criminal and administrative enforcement is necessary (1). To this end, the Competition Authority and the criminal courts make use of whatever instruments they have at their disposal for the prevention of collusion and corruption in public procurement (2) and interaction and two-way procedural channels between these bodies should help make for more effective enforcement(3).

1. Instruments to Prevent Collusion and Corruption in Public Procurement

1.1 Competition Law, a Weapon against Collusion and Corruption

12. Competition law sanctions collusive practices in public procurement; it can play a role in both deterrence and enforcement as well as making a useful contribution to the official rules on public procurement, under which failure to comply is sanctioned by rendering contracts null and void, by bringing liability proceedings and imposing criminal sanctions.

13. In the field of public procurement, the Competition Authority, the successor to the Competition Council, looks chiefly at the practices of bidders and leaves scrutiny of the behaviour of government procurement officials to the competent administrative, financial or criminal jurisdictions.

14. That said, irrespective of their ultimate administrative or even criminal liability, contracting authorities which have actively abetted the operation of a cartel through facilitation and which themselves conduct an economic activity on a market can be sanctioned for cartels in exactly the same way as firms

[3] See "*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas*", Jean Cartier –Bresson, Petites Affiches, 1 July 1999.

(Decision 05-D-61 of 9 November 2005). Those assisting contracting authorities and any other professional aiding and abetting a cartel may also be held liable for that cartel. This is what happened to a company providing assistance to the contracting authority in case 07-D-15 of 9 May 2007 concerning practices relating to public procurement contracts for schools in the Île de France, which was upheld by the Paris Court of Appeal on 3 July 2008 (Eiffage), (see also the judgment of the Court of First Instance of the European Communities, 8 July 2008, Treuhand AG).

15. While the Competition Authority is competent to assess the practices used by firms to distort competition under the rules of competition law, it is not competent to assess the lawfulness of a call for tender or the delegation of a public service, which can be examined only by the competent administrative review judge.

16. Actually, the administrative courts, whose role is to review the lawfulness of action taken by the administration, are no strangers to litigation on anti-competitive practices, with public entities stepping up their economic activities

17. It is the job of administrative review judges to review action taken by the administration, which is required to comply with the legal framework within which that action should be implemented. In point of fact, competition law and provisions on anticompetitive practices in particular all form part of the whole body of law: the rules of competition apply to the public authorities not only when they are providing economic services, but also when they are overseeing the organisation of those services.

18. In this capacity, an administrative judge hearing an appeal brought on *ultra vires* grounds contesting an act that is separable from a contract, or following referral by the Prefect for contracts put out to tender by local authorities and their public agencies, has the power to review the lawfulness of that act in the light of competition law and to order its annulment. This is a mechanism that enables a review of the choice of bid packages, for instance, or decisions to turn down or accept a tender application by a group or consortium on the grounds that its formation would infringe competition rules. These are mechanisms that can prevent the risk of cartel agreements arising from the procurement authority's choice of modalities in public procurement procedures.

19. Although administrative jurisdictions are unable to impose a sanction, they are still a crucial mechanism of intervention in this area.

1.2 Competition Authority Practice in Cases of Collusion in Public Procurement

20. An analysis of the decision-making practice of, first, the Competition Council, then the Competition Authority clearly shows that collusion in public procurement can affect the whole of government, including central government, local and regional authorities and the social security administration, and that it is the construction and civil works sector of the market that is the most affected. These practices generate a cost for the public and do real damage to the economy, which is why the Authority is working hard to prosecute and sanction this type of behaviour.

21. Each year between 16 and 28 percent of the sanctions imposed by the Authority in its litigation capacity are in cases involving public procurement, or an average of 13 cases per year from 2004 to 2008.

22. *Information exchanges*, on a more or less formal and organised basis is the first (and sometimes the only) step in setting up a cartel and it can seriously undermine the fairness of a call for tender and distort the free operation of competition. They may also be the only signs of a cartel agreement, since proof of market sharing may be lacking.

23. Only recently, the Competition Authority stressed that "on several occasions the Competition Council had pointed out that in public procurement contracts subject to tender, firms are deemed to have entered into an cartel agreement once proof is brought either that they have co-ordinated their bids or that they exchanged information prior to the date on which the outcome of the tender process is known or could be known."[4]

24. While certain practices may clearly be aimed at price fixing for the tenders to be submitted or at pre-designating the future contractor by ensuring that it appears to be the cheapest bidder, it is nonetheless true that *"simply exchanging information on any competitors there may be, their name, size, personnel or equipment availability, their interest or lack of interest in the contract in question, or the prices they are thinking of proposing, is also detrimental to free competition because it limits the independence of tenders."*[5]

25. The practice of *cover bids* (simulating competition by submitting bids deliberately designed so as not to be selected, hence ensuring that the contract will be awarded to the bid that they are covering) *and market sharing agreements* are the most successful, often related, forms of anti-competitive practice. In the case of complex invitations to tender, in particular, a cartel agreement is not feasible without *organised concerted action,* which requires meetings and trade-offs. It is accepted that proof can be constituted by a body of evidence, no one item of which taken singly would be proof by itself, but which is serious, accurate, and consistent enough when taken cumulatively to establish that such practice has taken place.

26. One case on an extraordinarily large scale warrants mention under this heading.

27. In a 2006 Decision regarding practices in the civil engineering sector in the Île-de-France Region, the Competition Council fined 34 construction firms EUR 48 million, for widespread cartels in public procurement contracts in the Île-de-France, a decision upheld by the Court of Appeal and the *Cour de Cassation*, France's highest appellate court.[6]

28. From 1991 to 1997, the leading firms in the sector had colluded to share out contracts for civil engineering works among themselves or their subsidiaries in the Île-de-France and had involved several other firms into the bargain. In all, invitations to tender for around 40 contracts were distorted. Under this widespread cartel, the major firms in the sector shared future work out among the companies in their group through "round tables" at which the managers of the firms met to express their interest in future contracts and see to it that the planned share-outs were adhered to. The share out of these contracts operated over a long period and was based on a very sophisticated allocation system; it was done by exchanging a steady flow of information and the practice of cover bidding. Adherence to the basis for the distribution of shares was ensured by keeping accounts of advances and delays for each company and by a system of compensation that might take the form of the payment of sums of money, the provision of sub-contract work officially or unofficially or the formation of jointly owned companies.

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4 Decision no. 09-D-18 of 2 June 2009 concerning the practice of setting up a temporary RTM-Veolia consortium with a view to its becoming a bidder for a delegated public service contract from the Urban Community of Marseille Provence Metropolis (CUMPM) for the operation of a tramway network in the city of Marseille and Decision no.09-D-34 of 18 November 2009 concerning civil works contracts for electricity and public lighting in Corsica.

5 Decision no. 09-D-25 of 29 July 2009 concerning the practices of firms specialising in railway construction work (the outcome on an appeal before the Paris Court of Appeal is pending).

6 Decision 06-D-07 of 21 March regarding practices in the civil engineering sector in the Île-de-France region, Paris Court of Appeal, order of 24 June 2008 (France Travaux), *Cour de Cassation*, order of 13 October 2009**.**

29. However, firms can also reach an agreement not to respond to an invitation to tender, in which case the *exchanges of information are aimed at abstaining from submitting a tender*. For instance, the Council fined five companies marketing implantable cardiac defibrillators a total of EUR 2.6 million for agreeing not to respond to a nation-wide invitation to tender launched in 2001 by 17 hospital centres which had grouped together to purchase their defibrillators over 2 years in order to secure the best price and terms of service.[7] The firms in question had met together several times, right from the announcement of the plan to issue a joint call for tender to two weeks prior to the deadline for submitting tenders, and had devised a joint strategy which was to abstain from replying to the invitation to tender and instead write to the contracting authority to raise technical points, each of them explaining why it had not taken up the invitation to tender. This cartel agreement caused the failure of the new joint purchasing procedure and deterred its future use for medical devices. This decision was upheld by the Court of Appeal.[8]

30. A point to note is that the Council had repeatedly reminded contracting authorities of the need to be vigilant and of their role in fostering competition, particularly in invitations to groupings and the subdivision of tenders into packages: they always have the option of rejecting a tender from a grouping if they so much as suspect that its aim is anti-competitive and "can always split up the contract proposed and draft the tender regulations to cover packages so that the largest number of firms can compete on an individual basis and so that they reserve the option to reject bids from grouping of firms in principle, in accordance with criteria which remain at their own discretion."[9]

31. The procurement authority is also responsible for seeing that the bidders all have equal access to the information available (particularly where a contract renewal or delegation is involved, so that the incumbent firm does not have too great a comparative advantage over other competitors). It is responsible for drafting the terms and conditions so that it does not give certain firms an advantage, primarily if it selects technical specifications which give their products or services an advantage[10] or has unclear tender regulations, which could lend themselves to discrimination among competitors.[11]

32. Administrative courts confirm that contracting authorities, local authority purchasers and other procurement bodies bear special responsibility for preventing cartel agreements between firms. They must set aside bids that they know to be the result of anti-competitive practices by bidders and, more generally, ensure effective compliance with the rules of free competition.[12]

33. Although it is not up to contracting authorities to take the place of competition authorities and the courts in establishing that unlawful practices are going on or to sanction them, they still have several ways of contributing to the prevention of cartels: they can prevent cartel agreements through their policies on invitations to tender, detect firms that have exchanged information and inform the Competition Authority, in liaison with government competition watchdog agents.

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7 Decision 07-D-49 of 19 December 2007.

8 Judgment of 8 April 2009.

9 Decision 05-D-19, 05-D-26 and 05-D-70.

10 Decision 92-D-62 of the Competition Council; Paris Court of Appeal, 7 May 1997 and *Cour de cassation*, 18 May 1999: Biwater case.

11 Decision 03-MC-01.

12 Judgment of 6 February 2003 of the Bastia *Tribunal administratif*, judgment of the *CE*, 28 April 2003, Fédération nationale des géomètres experts.

34. However, it should be stressed that, according to established practice in issuing decisions, the behaviour or inexperience of a contracting authority which issues an invitation to tender, even where it may facilitate the improper practices of firms, cannot frustrate the enforcement of competition law.

35. For instance, in a recent decision on the practices employed in the school and intercity coach transport sector in the Pyrénées-Orientales, the Competition Authority pointed out that "*according to case law, the practices employed by the contracting authority in issuing an invitation to tender, even if they facilitate improper practices, cannot frustrate the enforcement of the provisions of (...) Article L. 420-1 of the Commercial Code, if it is established that companies have conducted practices tending to distort the free play of competition (Commercial Chamber of the Cour de Cassation, 12 January 1993, SA Sogea.*)"[13]

36. The transport companies which had been accused of taking part in anti-competitive concerted action by forming one consortium for each package in order to share out the school transport market in the *Département* among themselves, had attempted to put forward the role played by the Principal, which had allegedly suggested that consortia should be set up to respond to the invitation to tender.

1.3 Tools for Criminal Prosecution in Public Procurement

1.3.1 Specific Offences: Anti-competitive Practices and Favouritism

Article L. 420-6 of the Criminal Code

37. Prior to 1986, all cartel agreements and abuses of dominant position were punishable by a prison sentence of up to 4 years.[14] The responsibility for the scrutiny and sanctioning such practices rested with the criminal courts. The Ordinance of 1 December 1986[15] largely decriminalised competition law, resulting in fewer criminal liability cases for anti-competitive practices. Henceforward, Article L. 420-6 of the Commercial Code provides for "*4 years imprisonment and a fine of EUR 75 000 for any natural person who fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L. 420-1 and L. 420-2".*

38. The ability to hold natural persons criminally liable is an indispensable adjunct to the powers of the Competition Authority, which itself has the power to sanction only legal persons.

39. However, criminal sanctions for this offence are still very common;[16] the fact that the practice has to be fraudulent in nature, which excludes straightforward negligence on the part of the person being prosecuted, for instance, actually makes it quite difficult to assess the facts of the case. This explains why convictions for this offence are handed down mainly for cartel agreements in public procurement contracts and when there is an accompanying charge of corruption, for instance, which makes it easier to establish the fraudulent nature of the offence.

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13 Decision 09-D-03 (appeal brought before the Paris Appeals Court, case pending).

14 Ordinances no.45-1483 and 45-1484 of 30 June 1945.

15 Ordinance no. 86-1243, 1 December 1986.

16 Nevertheless, over the past 8 years, for practices liable to criminal sanctions in public procurement (whether for 420-6 or favouritism), 22 cases per year on average are "referred" to prosecutors by the DGCCRF; given an average dismissal rate of 40 percent, that makes 13 different cases in the public procurement sector ruled on each year by criminal courts (the total number of criminal cases in the public procurement sector is actually higher than that as the procedure provided for under Article 40 of the CPP can be instigated by any civil servant).

40. The different elements that constitute a criminal offence are largely based on the same practices as the administrative offences punishable by the Competition Authority: the practices referred to in Articles L.420-1 (cartel) and L. 420-2 (abuse of dominant position) of the Commercial Code have to be established.

41. A point to note is that this offence is sometimes the key to prosecution for other criminal offences (corruption, favouritism, defalcation, etc.) given that cartel agreements in public procurement are often linked to such offences and often require "the passive or active complicity of administrative bodies which are capable of detecting, or at the very least suspecting, cartels"[17].

1.3.2 Favouritism as an Offence

42. The offence of "granting unfair advantage", more widely known as "favouritism**",** instituted en 1991[18] and punishable under Article 432-14 of the Criminal Code, currently accounts for the bulk of criminal litigation in the public procurement sector.

43. This is a criminal offence specific to public procurement law which serves to sanction breaches of competition law, particularly by public procurement officials.

44. Under the terms of this Article : "*An offence punishable by two years' imprisonment and a fine of EUR 30 000 is committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services*."

45. It applies, for instance, to granting privileged information to one bidder for the contract,[19] failing to divide the contract into packages (letting an entire contract when its lack of uniformity would have justified subdivision into packages, if competitive tendering was organised in such a way that the successful bidder was the only bidder in a position to tender for the contract),[20] inserting technical clauses into the conditions of contract which only one company can meet, to reissuing invitations to tender or declaring no bidder successful with the aim of enabling a particular bidder to secure the contract.[21]

46. Moreover, as well as constituting an offence under the legislation on favouritism the same practices may also constitute a breach of competition law.

47. Economic operators which have benefited from an offence under the legislation on favouritism or anti-competitive practices may also be prosecuted as an accessory after the fact to the offence of favouritism or to the offence referred to in L. 420-6 of the Commercial Code. A charge of complicity in these offences may also be brought against persons not charged with the predicate offence.

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17 Jean Cartier –Bresson, "*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas*", Petites Affiches, 1 July 1999.

18 Law no. 91-3 of 3 January 1991.

19 *Cass. crim*., 23 May 2007, no. 06-87.898.

20 *Cass. crim*., 20 May 2009, no. 08-87.354.

21 Id note23.

1.3.3 Corruption as an Offence

48. Furthermore, corruption is traditionally punishable under the Criminal Code as passive corruption, influence peddling[22] and active corruption, which are all offences.[23]

49. There are two sides to the crime of corruption: the first is the passive corruption of the person being bribed, who holds the power and accepts or solicits a gift or advantage of any kind in return for carrying out a service that is part of his/her mission for the benefit of the person offering the bribe; the second is the active corruption of the person offering a gift or advantage in exchange for services rendered by the civil servant, elected representative, manager, etc. One of the forms that the deal between the person accepting the bribe and the person offering may take is under-the-table payments to speed up the procedure for securing a public contract. The main distinction between this and the offence of favouritism is the notion of payment for services rendered

50. Influence peddling has a different purpose; the perpetrator is supposed to improperly use his/her real or supposed influence in order to secure a contract; such persons introduce themselves as the intermediary between the potential beneficiary and the victim of the improper behaviour. When a private individual takes the initiative and asks a person who has influence to make improper use of it, this is termed active peddling; when the person with influence takes the initiative, this is termed passive peddling.

51. With the very heavy sanctions risked, the sanctions for corruption and influence peddling are the stiffest penalties in the enforcement arsenal in the public procurement field.

52. There are also numerous other offences, chiefly financial, under ordinary law which can sometimes be applicable to breaches of competition law in public procurement: the unlawful taking of interest (Article 432-12 of the Criminal Code), breach of trust (Article 314-1 of the Criminal Code), fraud (Article 313-1 of the Criminal Code), misappropriation of funds (Articles L. 242-6 and L. 242-30 of the

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22 Article 432-11 of the Criminal Code: "*The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of EUR 150 000 where it is committed either:*

1° *to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision."

23 Article 433-1 of the Criminal Code: "*Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:*

1° *to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

2° *or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;*

is punishable by ten years' imprisonment and a fine of EUR 150 000.

The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2° above."

Commercial Code), forgery (Article 441-1 of the Criminal Code) or the subornation of witnesses (Article 434-15 of the Criminal Code), etc.

53. While a complex cartel may sometimes involve a mix of several criminal offences, breaches of competition law in public procurement do not always constitute offences under criminal law with the result that criminal law can only be applied on a case-by-case basis.

2. Interaction of Collusion Prevention and Corruption Prevention

2.1 Île de France High Schools Case

54. In a 2007 decision on practices employed in public procurement contracts for high schools in the Île de France,[24] the Council sanctioned a widespread cartel which shared out contracts for the region's high school renovation programme between the major French construction and civil engineering groups and their subsidiaries. The case involved 88 contracts with civil engineering firms over the period 1989 to 1997 in seven successive waves and a total of FF 10 billion.

55. This widespread cartel was formed right at the launch of the construction programme through meetings to allocate shares, direct contacts and the exchange of information between firms. It operated for 7 years under the aegis of Patrimoine Ingénierie, consultant to the contracting authority and always used the exact same operating method. Each of the firms, all pre-selected, either ensured that it would obtain the contract by letting its "competitors" know which contracts it had chosen and for what price, or ensured that it did not obtain the contract by submitting a bid that was deliberately higher (a cover bid). The smooth operation of this general share-out of contracts was ensured by Patrimoine Ingénierie, which gave the firms advance information about upcoming operations and afterwards ensured that the correct firm was indeed awarded the contract.

56. The Council stated, when handing down this decision, that the fact that the firms could show that this practice would not have had an anti-competitive impact (such as an increase in prices) in no way exonerated them from liability since, to impose a sanction, all that was required was to demonstrate that the aim of the agreement was anti-competitive, nor did the fact that the contracting authority was behind the arrangement or had actively participated in its operation, since the liability of the instigator and ring-leader did not absolve those who went along with the scheme, unless they could demonstrate duress.

57. Underlining the extreme gravity of the firms' behaviour and the particularly serious damage done to the economy, the Council imposed exemplary sanctions amounting to 5 percent of the turnover of the firms concerned – i.e. the maximum authorised by the legislation applicable at the time.

58. Alongside the Council proceedings, this case led to criminal proceedings and sanctions which illustrated, on an extraordinary scale, how the practices of collusion, favouritism and corruption could be closely interwoven and how, together, they had been instrumental in setting up a system of funding for political parties.

59. It appeared that the Regional Executive and its representatives had encouraged the cartel agreement between the subsidiaries of the leading civil engineering groups with a view to sharing contracts for work on high schools in the Île de France "fairly" between them and had demanded, in return, that the

[24] Decision 07-D-15 of 9 May 2007 concerning practices employed in public procurement contracts for high schools in the Île de France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, Société Spie.

firms provide kickbacks to finance the political parties represented at Region level, whose members sat on the Committee for Invitations to Tender.

60. This fraudulent scheme had operated at the price of breaching the rules of the Public Procurement Code (CPP), the rules on competition and criminal law.

61. It had been able to operate for a number of years chiefly because of the involvement of the consultancy firm, Patrimoine Ingénierie, (practices relating to the offence of favouritism made this latter firm the winning bidder for 170 contracting authority consultancy contracts out of the 214 let by the Regional Council), whose very broad brief (analysis of tender documentation drafted by the contracting authority and tender submissions, finalisation of contracts and organisation of contract performance, etc.) reflected "*the intent of the (Regional Council) to have (it as) a permanent assistant and to delegate to it a substantial share of its prerogatives so as to make it the (...) lynchpin of the fraudulent scheme.*"[25]

62. Under the outward semblance of legality, the criminal courts had also noted, contrary to the rules applicable to public procurement contracts, that there had been systematic recourse to a special procedure for civil engineering contracts, which permitted restricted invitations to tender, as well as anomalies in the operation of the Committee for Invitations to Tender, which was found to have employed corrupt practices which had been a contributing factor to the entire scheme.

63. Firms that had benefited from public procurement contracts had taken concerted action and had obtained from the Office of the Regional Executive of the Île de France and the aforementioned mentioned consultancy privileged information on the provisional estimates for each operation, the names of other selected bidders or consortia and the prices they proposed, which had enabled them to align their bids accordingly, although remaining within the parameters of a broader share-out between the major groups in the sector, imposed by the Regional Executive itself. The aim of favouritism in this case was to operate a cartel among the affiliate firms of the big civil engineering and construction groups with a view to sharing public procurement between them.

64. Accordingly, the Court of Appeal found that the political parties had required an undertaking from firms to pay them a percentage of the price of the contracts obtained, as a condition of access to public procurement contracts.

65. It also found that the "cartel organised among the firms, with the assent of the contracting authority, had given the members of the Regional Executive and political parties greater powers to influence those firms, which felt that they "owed" the financial contributions that they were being asked to pay", thereby establishing the intent behind the pact as constituting corruption and influence peddling.

66. The executives and directors of the firms were convicted on charges of fraud, misappropriation of funds, corruption and illicit agreements to distort or restrict the free interplay of competition, the regional public officials and the Regional Council's delegate on charges of favouritism and breaches of the rules on free and equal access to public procurement contracts, lastly, the treasurers, fund collectors and elected representatives of political parties were found guilty of being accomplices and accessories to corruption and influence peddling.

67. A point to note is that when hearing this case, the *Cour de Cassation* stated that to be an accessory to corruption one did not have to have personally profited from non disclosure and upheld the conviction of a director of one civil engineering firm, pointing out that a cover bid that purported to be a

[25] Judgment, Paris Court of Appeal, 27 February 2007.

competitive bid in order to make another bidder seem cheaper, was indeed of a nature to hinder the free interplay of competition and likely to artificially inflate prices.[26]

2.2 The Seine-Maritime Asphalt Case

68. The Seine-Maritime asphalt case is emblematic of a situation involving collusion and corruption in the public procurement sector, both in that the practices in question went on for such a long time, almost 10 years, and in the overcosts to the community, which amounted to more than EUR 24.8 million over the period 1992 to 1998 (or a little more than 10 percent of the contract total) according to a conservative estimate.

69. In the late 1980s, the Seine-Maritime General Council decided to launch a vast programme to renovate 2 500 km of its road network. The contract required the pouring of 200 000 to 350 000 tonnes of asphalt and had an annual budget of EUR 23 to 38 millions.

70. On 14 March 1994, following information given by a plaintiff firm, the Ministry of the Economy requested the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) to conduct an enquiry into road works, particularly the supply of asphalt, in the Seine-Maritime Department.

71. With the authorisation of the presidents of the Rouen and Dieppe regional courts (*Tribunaux de grande instance*), the DGCCRF served warrants on the firms; it then proceeded to seize documents and interview senior company managers.

72. A report of the enquiry giving an account of the procedures and presenting the evidence gathered was then drafted.

73. After examining the case, the Competition Council convicted several civil engineering companies, most of them subsidiaries of large groups, on 15 December 2005. The Council fined the companies -- which had formed consortia to set up asphalt plants and respond to invitations to tender -- a total of EUR 33.66 million for breaches of the regulations on concerted action, cartels or coalitions, the aim or potential effect of which was to prevent, restrict or distort the free interplay of competition on a market.

74. The conviction was upheld and an appeal on a point of law was dismissed.

75. At the same time, an action was brought in order to establish any potential criminal liability of the natural persons who had fraudulently taken a personal and decisive part in the organisation of this cartel.

2.3 The asphalt market in Seine-Maritime

76. Professionals use two types of plants to manufacture asphalt. In both cases, these plants, which can have an impact on the environment, can only be established with authorisation by the prefect.

- A *portable plant*, used to provide a continuous flow of asphalt, is suitable for a specific work project that will use all of its production and which must therefore be large enough to make it cost-effective to install this type of plant.

[26] *Cass. Crim*, judgment of 20 February 2008.

- For an investment ranging between one and a half and four and a half million euros, a *fixed plant* can be used, which can store different qualities of asphalt and supply a variety of customers at work sites requiring lower tonnages than a mobile plant. This type of plant met the needs of the *Département* of Seine-Maritime, which signed a variety of contracts for asphalt involving multiannual purchase orders that consolidated orders of varying size across different geographical locations.

77. In its judgment of 11 September 2008, the Court of Rouen also pointed out that the costs of manufacturing and transporting asphalt accounted for 80 % and 10 % respectively of the cost of the work, which gave a "significant advantage" to civil engineering companies that were shareholders in plants, where they could source their supply at special rates.

2.4 The Collusive Behaviour of Asphalt Companies

78. In the 1990s, these civil engineering companies had agreed on a scheme for apportioning the tonnages of asphalt for the roads of Seine-Maritime for all contracts. They exchanged information on the tonnages delivered to ensure that everyone respected their quota and to correct any imbalance, if necessary by subcontracting.

79. The members of the cartel met regularly when the *Département* issued calls for tenders in order to determine which consortia of bidders would be awarded each package, while their competitors merely made cover bids; they then met again when the programmes of work were published at the beginning of the year in order to divide up the work among themselves according to the respective tonnages agreed for each of them.

80. They submitted their bids in consortia that lacked any economic or financial justification. These consortia distorted prices, which were no longer set through the free play of the market since the cover bids necessarily misled the contracting authority about the reality and extent of competition on the asphalt market.

81. These companies even went so far as to scheme against competitors who might disturb the cartel, for example by setting up bogus associations for the protection of the environment to prevent the construction of a rival asphalt plant.

82. These practices were able to continue for some time because of the support provided by government officials who enabled this system to survive through the action they took.

83. Two government officials in the *Département*'s infrastructure directorate had noticed that the same packages were awarded to the same consortia and that the prices of bids were the same from one call for tenders to another.

84. On this basis, they had concluded that there was a cartel agreement.

85. However, they did not do anything to prevent these consortia and did not alert elected officials, who nevertheless relied on them heavily because of their technical knowledge. They even went as far as to consolidate the cartel by their actions, firstly by requiring a deposit covering 100 % of the contract, which placed at a disadvantage small companies that might compete with the already established major companies, and secondly by including a clause requiring prospective bidders to have an operational plant at the date when they submitted their bids. Given the very short time between the publication of the call for tenders and the deadline for submitting bids, this requirement, of limited interest, could not be met by any bidder that did already not have a fixed plant in the *Département*.

86. These actions therefore favoured the companies that had been awarded the previous contracts, which already had asphalt plants. Consequently, there was a barrier to market entry of a contractual nature, which had been included in the specifications of the call for tenders.

87. Certain officials received benefits at the expense of civil engineering companies.

88. These two officials benefitted from having asphalt surfacing laid on their property free of charge. They were also given holiday trips for themselves and their families, the free loan of a car and payment for the hours of flight time required to maintain a valid pilot's licence.

2.5 Compensation for Damage

89. The Competition Council considered that the loss to the economy was the result of the long duration of the practices and the higher prices charged in the absence of competition during this period. According to a low estimate, it was calculated that the public purchaser overpaid, between 1992 and 1998, approximately three and a half million euros annually, and a 16.45 % overcharge was estimated in 1998 alone, i.e. 4.95 million euros.

90. The Competition Council is not able to compensate victims for the damage sustained. They must therefore gain redress in the courts.

91. The public purchaser therefore initiated civil proceedings in the *Tribunal de Grande Instance* against the natural persons responsible in the companies and the two officials in its procurement department. Eleven natural persons and seven companies were subsequently ordered to pay a total amount of 4.95 million euros in compensation for the material losses sustained.

92. With regard to non-material damage, the court awarded the public purchaser symbolic damages of one euro to be paid by both of the public officials involved.

2.6 Criminal Convictions

93. The natural persons convicted of playing a key personal role in organising the cartel were given suspended sentences of up to 18 months imprisonment and a 40 000 euro fine, for a total of 144 months of imprisonment with suspended sentences and 269 000 euros in fines. This system of criminal convictions reinforces the system of sanctions against anti-competitive practices in France.

94. This cartel agreement between companies in public procurement contracts lasted for years thanks to the support of public officials who had technical knowledge and a privileged position in advising elected officials as to the choice of bidders.

95. This example highlights the close relationship between the anti-competitive practices of companies and the development of practices that are criminally publishable as forms of corruption. The continuation of an anti-competitive practice over a number of years is obviously facilitated by the presence of accomplices inside the procurement department.

96. The role played by accomplices can guide investigation officials in a programme aimed at detecting potential anti-competitive practices.

97. It is always difficult to detect the existence of a cartel without special information that makes it possible to target a specific procurement department in order to analyse carefully the results of calls for tenders. However, it may be easier to look for whether any "compensation" is being provided to accomplices by companies involved in a cartel.

98. In the case studied, this compensation took the form of services rendered by outside providers that billed their customers for these services. In such cases, a systematic search on the basis of copies of these bills can target the corporate customers of these providers that are regularly awarded public procurement contracts. For some of these services, the individual recipients can be identified for security-related reasons – this is the case for travel and vehicle rental services. At this stage, the investigators need only to search whether public procurement officials and even elected officials are on these lists of recipients.

99. The final stage of this specific targeting consists of identifying the procurement department to which these recipients of services belong, which makes it possible to look for any signs of anti-competitive practices in the results of calls for tender and then obtain search warrants to collect evidence of the suspected practices.

100. Thus far, this method has been implemented on an experimental basis. The initial results have been inconclusive. Nevertheless, this type of search should be continued, for the detection of anti-competitive practices through specific targeting can never be successful without perseverance.

101. This case of asphalt provision in the *Département* of Seine-Maritime might have been prevented if the public procurement department had been careful to change regularly the officials assigned to these sensitive positions, since keeping officials in these jobs for many years creates a close relationship with companies that can facilitate practices of passive corruption by the officials involved.

3. The Interaction Between the Criminal and Administrative Procedures

3.1 The Communication of Documents from Criminal Cases to the Competition Authority and the Use of these Documents as the Basis for Charges Brought

102. Under Article L.463-5 of the Commercial Code: "Investigating authorities and courts may forward to the Competition Authority, at its request, court records, investigation reports and other documents from criminal proceedings having a direct relationship with matters that have been referred to the Authority."

103. The Competition Council has used this procedure on a number of occasions, under the supervision of the Paris Court of Appeal and the *Cour de Cassation*, which interpreted the terms of Article L.463-5 flexibly, thereby ensuring that it is genuinely effective.

104. Three cases concerning respectively public roadwork in Seine-Maritime, public procurement in Île-de-France and high schools in Île-de-France, which involved cartel agreements in the field of public procurement, illustrate quite clearly how the coercive power of the criminal procedure (searches, wiretapping, police custody, etc.) can used by the Competition Authority in the most serious cases in which the natural persons behind cartel agreements have been identified.

105. By a decision of 15 December 2005, the Competition Council imposed a fine of 33.6 million euros on 6 civil engineering companies specialised in asphalt provision for having engaged in a complex and ongoing cartel in various contracts for *public road work in Seine-Maritime* from 1992 to 1998.[27]

106. These companies had reached an agreement on a scheme for apportioning the tonnages of asphalt for all contracts with the central government and General Council and had regularly exchanged

[27] Decision 05-D-69 of 15 December 2005 concerning anti-competitive practices detected in the road work sector in Seine-Maritime.

information on prices before submitting bids. The main evidence on which the Competition Council based its analysis was derived from the criminal proceedings being held at the same time.

107. The Court of Appeal and the *Cour de cassation* each rejected the requests for annulment and the appeals lodged against this decision.[28]

108. Regarding whether it is valid to use documents from criminal proceedings and whether the Competition Council can base its accusation on such documents, the *Cour de cassation* confirmed that documents from the criminal file could be validly be used as evidence against parties, without the "equality of arms" principle being compromised. Although the companies argued that, since they were not all involved in the criminal proceedings and therefore did not have access to the criminal file, they were unable to ensure that any exonerating documents might not have been removed by the Council's *rapporteur*, the Court considered that the parties' rights had been sufficiently protected by the fact that the charges were based on documents from criminal proceedings for which a list had been compiled, all of which had been cited and included in the file and made available to be consulted and challenged by the parties.

109. It was also considered permissible for the *rapporteur* to go to the office of the investigating magistrate and consult the entire criminal file under this magistrate's supervision, without violating the confidentiality of the investigation or the rights of the defence, since all of the incriminating evidence selected was contained in the file.

110. In the case of the *cartel in public procurement in Île-de-France,*[29] the Competition Council took up this case on its own initiative in follow up to criminal proceedings brought against a number of natural persons in 1994, and which had concluded with dismissal of the case in November 2002 because the statute of limitations had expired. The Council based its decision to impose sanctions on the evidence and documents transmitted to it by the investigating magistrate.

111. The *Cour de cassation* specified that the tie established between the criminal and administrative procedure was limited to recognising that any interruption of the statute of limitations for the former also applied to the statute of limitations for the latter, but that these two procedures, which concerned different types of persons – natural persons for the former and legal persons for the latter – and pursued different objectives, remained clearly separate. This being the case, the continuation of the administrative procedure and the running of the statute of limitations for administrative action were in no way affected by the fact that the criminal procedure had been dismissed on 26 November 2002 by the investigating magistrate, who had ruled that the statute of limitations had expired following the decision by the Versailles Court of Appeal to annul two counts of the indictment.

112. It was also on documents drawn from criminal proceedings that the Council based its decision concerning the *high schools of Île-de-France* mentioned above.[30]

113. In the case of public procurement in Île-de-France and the case of the high schools of Île-de-France, the appeals to the *Cour de cassation* were aimed at challenging Article L. 463-5 in the light

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28 Judgment of the Paris Court of Appeal of 30 January 2007 Le Foll TP, Judgment *Cass. Com*, 15 January 2008, Colas Île de France (D 05-D-69).

29 Decision 06-D-07 of 21 March 2006 on practices used in the public works sector in the Île-de-France Region, Judgment of Paris Court of Appeal, Judgment of 24 June 2008 (firm *France Travaux*), *C. Cass*. com, Judgment of 13 October 2009.

30 Decision 07-D-15 of 9 May 2007 on practices used in public procurement concerning the high schools of Île-de-France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, firm Spie.

of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, on grounds that this procedure violated the "equality of arms" principle.

114. In its two judgments the *Cour de cassation* rejected this analysis and broadly approved that of the Court of Appeal and the Competition Council. Firstly, it considered that "*the fact that, under Article L. 463-5 of the Commercial Code, the Council alone is entitled, acting at the request of the rapporteur vested with the investigative powers conferred upon him by Article L. 450-1 of said Code, to request that the investigating magistrate, who alone may decide to grant or deny this request, communicate court records or investigation reports directly related to matters that the Council is considering, is not in itself contrary to the principle of equality of arms and impartiality stemming from Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms.*"

115. Secondly, it considered that "since, after they were notified of the charges, the companies involved had had the opportunity to debate before the Council and then before the Paris Court of Appeal both the conditions under which elements of the criminal investigation were communicated, the legality of which can be challenged by the persons concerned, and the content of all the documents drawn from the criminal file that the investigating magistrate allowed to be communicated to the *rapporteur*, and to present any documents that they considered useful, the judgment was correct in indicating that the provisions of Article L. 463-5 of the Commercial Code are not contrary to Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms".

116. Regarding the methods used to communicate the documents of criminal proceedings, the Court pointed out that no particular form was specified by the text.

3.2 The Influence of the Competition Authority on the Criminal Procedure

3.2.1 The Authority's Opinions

117. The Competition Council – now the Competition Authority – advises the criminal courts on practices in the cases that they hear, under Article L. 462-3 of the Commercial Code. Consequently, since 1986, the Council has responded to 46 requests for opinions from all courts (civil and criminal).

118. Since the core of the criminal offence is constituted, as was shown earlier, by practices of cartels and abuse of dominant position defined by the Commercial Code, this "bridge" is welcome, even though the Authority's opinion does not bind the court, which does, however, take it into account in practice.

3.2.2 Provision of Information by the Competition Authority to Criminal Courts; Transmission of Information to the Public Prosecutor

119. The second paragraph of Article L.462-6 of the Commercial Code specifies that when the facts appear to warrant the application of Article L.420-6, the Authority shall send the file to the public prosecutor.

120. The Council has made a moderate use of this provision, having sent ten files to the public prosecutor since 1994, although the frequency has increased somewhat since 2000. Most of these cases involve cartel agreements in public procurement or price cartels.

121. For example, in a decision of 3 December 2008, the Council imposed sanctions on companies for having submitted separate bids at the time of tenders for a number of public contracts for maintenance work involving joinery and locksmith work, although these companies belonged to the same group and prepared their bids in a centralised manner. Having learned that the chief executive of the two companies involved, because of his lengthy experience with public procurement, was perfectly well informed of the

applicable rules of competition, which he had deliberately ignored, the Council decided that the acts could be considered as criminal under the provisions of Article L. 420-6 of the Commercial Code and sent the entire file to the public prosecutor at the *Tribunal de Grande Instance* of Créteil.[31]

122. The action taken subsequently on the basis of this information is up to the public prosecutor concerned. Nevertheless, the fact that it can forward a file to the public prosecutor's office gives the Authority a strong tool of dissuasion because of the publicity generated, and enables it to stigmatise the most serious practices and make its views known, even though it is up to the public prosecutor to decide whether the case should be prosecuted and the courts are not bound by the Authority's decisions.

123. In recent years, lawmakers have shown their determination to improve the effectiveness of this procedure and of criminal prosecution more generally by ensuring better co-ordination with the administrative procedure; for example, they passed legislation to ensure that acts that interrupt the statute of limitations for the Authority also do so for public action to prosecute the offense covered by Article L.420-6 of the Commercial Code,[32] and they then introduced a reciprocal rule in Article L. 462-7.[33]

124. By doing so, the lawmakers put an end to what legal theory and practitioners presented as an obstacle to the implementation of Article L. 420-6 and criminal prosecution, for example in cases in which the statute of limitations for the practices constituting the criminal offence had already expired when the file was transmitted to the public prosecutor.

125. In addition, the general rules of the Code of Criminal Procedure concerning the communication of documents applies to documents held by the Competition Authority: the public prosecutor, the judicial police officer or the investigating magistrate may require that any documents of interest to their enquiry or investigation be handed over to them.[34]

3.2.3 Co-ordination of Criminal and Administrative Action in the Case of Leniency Programmes

126. Although criminal sanctions for natural persons can be a major tool of dissuasion and enforcement against the most serious offences, they must be reconciled and co-ordinated with the action of authorities such as the Competition Authority that impose administrative sanctions on companies.

127. For example, when a clemency programme was introduced, it did not immediately lead to better co-ordination between the two categories of action. As a result, the exemption from sanctions that the Competition Authorities can grant to companies under the leniency programme does not guarantee natural persons immunity from sanctions in a criminal court, which can discourage them from using the leniency procedure.

128. Admittedly, the consequences of this situation should not be overstated since there is in fact no known case of anyone undergoing criminal prosecution after their company had requested leniency from the Council. In addition, the practice of the Council, and now of the Authority, has been not to transmit to the public prosecutor those files in which the persons covered by leniency programmes seem to be liable to criminal prosecution.

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31 Decision 08-D-29 of 3 December 2008 concerning practices detected in the sector of public contracts for maintenance work involving joinery, metalworking and locksmith work.

32 Law n°2001-420 of 15 May 2001, paragraph 3 of Article L. 420-6.

33 Ordinance n°2008-1161 of 13 November 2008.

34 Articles 60-1 and 99-3 of the Code of Criminal Procedure.

129. Nevertheless, as this situation is not satisfactory, a bill is being drafted aimed at enabling the managers of companies who have provided key evidence enabling their companies to qualify for a leniency programme to then be eligible for a provision by which the criminal court will cancel their sentence or reduce it by half.

130. Public procurement remains a high-risk sector both with regard to the rules of competition and the possible corruption of public officials.

3.3 The Role and Activities of the Central Corruption Prevention Service (Service Central de Prévention de la Corruption, SCPC)

131. The *sector of government contracting*, and of *public procurement* more generally, has always and everywhere been the sector of predilection for corruption and anti-competitive practices.

132. According to some estimates, in the construction and civil engineering sector, the amounts misappropriated are in the range of 3% to 5% of public contracts in Western Europe.

133. Paradoxically, the fact that there are particularly precise procedures and regulations and sometimes exacting administrative controls does not always make it possible to guarantee transparency, competition or the equal treatment of bidders, etc.

134. What is more, the people behind fraudulent schemes often have *sufficient technical knowledge* and advice to make it appear that their operations are in compliance with the legislation and procedures.

135. At the same time, the risk factors have not disappeared and are even on the rise.

136. The high level of complexity of legislation and the frequent changes that have characterised it in recent years are creating *additional risks* of unintentional irregularities, but also of deliberate acts of non-compliance.

137. Beyond the legal aspects, *public procurement and its environment* are undergoing profound changes and are increasingly frequently out of step with traditional administrative practices.

138. On the one hand, public procurement has both expanded and become more complex; with the trend towards the *liberalisation* of the economy combined with the broader responsibilities given to local and regional governments, areas that were previously governed in a sovereign and centralised manner have now shifted to the contractual and private sphere, as has happened, for example, with telephone services, rail transport, gas and electricity supply, etc., and with the new sectors developing through Internet.

139. At the same time, *changes* have affected the economic, social and policy environment of public procurement. At the national level, the most significant changes concern the *modernisation* of public spending and the easing of central government controls. The opening up of borders and the development of international trade have also given rise to new risks that the national legislative and regulatory framework often finds it difficult to take into account.

140. Lastly, technological changes, such as Internet, create new opportunities but also invariably lead to the emergence of new "grey areas"[35].

[35] For example, the piracy of unprotected data.

141. At the same time that it develops and becomes more complex, public procurement itself is tending to become an activity fraught with risk.

142. Even before the principle of the *accountability* of public procurement officials was affirmed by reformers in 2006, there was an underlying trend in recent years towards increasingly holding public procurement authorities liable both in court cases and through complaints to administrative bodies.

143. Public procurement has not escaped from the trend towards litigation that now affects all activities of governments at all levels. It is striking to see that it is now occurring *increasingly earlier* in the procedure, as unsuccessful competitors and adversely affected citizens are increasingly willing to seek redress against decision-makers suspected of having failed to carry out their procurement duties properly. This is why pre-contract referral arrangements are now a full-fledged component of public procurement disputes. The *Conseil d'Etat* has itself contributed to increasing this trend by broadening the channels of appeal open to claimants[36].

144. Another recent development, which emerged in the 1990s, is the "*criminalisation of public procurement law.*[37]" Even though this development is largely due to the creation of the offence of favouritism and should not be overstated[38], it shows that there is a trend towards greater legal risk in public procurement activities; depending on the seriousness of their misjudgement, any elected or public official involved in any capacity in the public procurement chain will be able to be held criminally liable. This explains the feeling of uncertainty, insecurity, instability and even of "loneliness[39]" that is now experienced by many public procurement officials, not to mention the obvious risk of manipulation.

145. This being the case, steps should be taken to strengthen the systems aimed at preventing any problematic developments that may affect procurement practices.

146. Enforcement policy now seems to have reached its limits,[40] and in many countries most of the cases of corruption punished in courts involve public procurement.

147. In France, the *means of enforcement* are wide ranging. They apply to both natural and legal persons and can be used to punish any lack of integrity in public procurement in France or abroad.

148. The legal treatment of public procurement has admittedly undergone some major developments in recent years and has to some extent contributed to preventing these practices, in particular through the introduction of the offence of favouritism.

149. The existing prevention systems are only of limited effectiveness, and until now this prevention has mainly been ensured through various forms of *monitoring* that are carried out at each stage of the procedure:

- Internal monitoring: managerial oversight, inspections, specialised commissions, etc.

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36 Its most recent case law (*CE Assemblée 16 juillet 2007, Société Tropic Travaux Signalisation*) gives unsuccessful competitors the possibility of requesting the cancellation of a contract after it has been concluded**.**

37 To use the title of the doctoral thesis of Catherine Prébissy Schnall (LGDJ 2001).

38 The author of this thesis only counted 60 convictions for favouritism between 1991 and 2001.

39 Cf. Article on public procurement in the SCPC's report for 2005.

40 For example, the number of convictions for favouritism remains virtually stable (at between 25 and 50 convictions per year).

- External monitoring:[41] review of legality, government audits, judicial review, etc.

150. These different types of monitoring act as safeguards to ensure the regularity of the public procurement process, and they can, if used properly, help to detect certain cases of fraud.

151. However, as currently organised, they also have certain limitations that can reduce their effectiveness.

152. The initial limitation resides in the fact that these forms of monitoring, whether internal or external, are rarely conducted systematically. This is the case for the review of legality carried out by the prefecture's services, which only covers a small portion of the contracts awarded by local and regional governments; for understandable reasons, this cannot always be carried out under optimum conditions due to a lack of time and quite often a lack of resources and sometimes of available skills. Here, *a technical expertise factor* combined with the *volume factor* adds to the difficulty of this monitoring.

153. Even more importantly, these forms of monitoring have until now been designed as *means of monitoring compliance* – compliance with laws and regulations, procedures, budget rules, etc. In this kind of system, any misconduct by a manager is only detected if an action or behaviour formally fails to comply with a standard. However, fraud and corruption sometimes take a form that it is difficult to reduce to a specific, immediate breach of a rule or principle, and that nothing in the various stages of the procurement process would make it possible to detect. In other words, administrative activity and the compliance with rules that it entails leave a certain leeway, a degree of freedom that defrauders do not hesitate to use if they have the technical skill required and are bold enough to do so.

154. This priority given to formal compliance also has the effect of narrowing the focus of the officials performing the monitoring, and can lead, at least initially, to neglecting certain types of behaviour and irregularities that can undermine the entire procedure.

3.4 The Need to Strengthen Prevention Mechanism

155. The effort to prevent infringements of the rules of integrity and competition, and fraud in public procurement more generally, must adopt a *proactive approach*, i.e. one based on *forward thinking* in order to define and implement a *system of organisation* and *working methods* aimed at preventing fraud.

156. This approach has three components:

- Raising the awareness of public procurement actors;
- Developing detection mechanisms;
- Devising investigation methodologies.

3.4.1 Raising the awareness of public procurement actors:

157. This component must pursue the following objectives:

[41] Mention should be made in this regard of the system of "competition watch" in public procurement that consists of assigning officials from the Directorate for Competition, Consumption and Fraud Prevention (some 150 officials nationwide) to work alongside staff in public procurement departments; this system, unique in an OECD country, is an effective means of ensuring both prevention (through advice given to public procurement officials) and enforcement (most cases of favouritism reported to criminal courts were detected through this system).

- To remind officials of the need to *comply with rules and procedures*, but also of the legal consequences if they fail to do so;

- To set up a system for *reporting information* to managers and monitoring bodies;

- To ensure the promotion of *good practices.*

158. This awareness raising can be carried out in *various ways*:

- Through training and/or communication initiatives;

- In a more advanced stage, through a *code of professional behaviour or ethics* aimed at:

  - Defining the *department's position* with regard to conflicts of interest, appropriate contacts with suppliers and confidentiality of information;

  - Setting *standards of behaviour* (declaration of conflicts of interest, mobility requirement, etc.)*;*

  - Specifying the *measures that will be taken* if these standards are not upheld.

3.4.2 Developing Detection Mechanisms

159. The use of audit-based methods to identify corrupt or anticompetitive practices can fill gaps in existing forms of monitoring, through a renewed approach to public procurement that would no longer be focused exclusively on ensuring the proper functioning of the procurement process, but on *identifying and explaining any anomalies detected in this process.*

160. Normally, a fraud or corruption audit comprises four phases:

- A *specific targeting of objectives*: expectations, scope, tools (mapping of risks, IT systems, commercial management and accounting, etc.);

- An *analysis of the existing situation*, through documentary analysis, interviews, etc. It is at this stage that certain indicators of any risks of corruption can be identified;

- A *diagnostic phase*, focusing on assessing the strengths and weaknesses of the organisation and its functioning, the division of tasks and responsibilities;

- A *recommendation* phase: preventive measures, support strategy, good practices, etc. During this stage, *cases may be referred to the prosecuting authorities*.

161. The SCPC, in its 2007 report, presented a *proposal for a methodological guide for an audit to detect corruption in public procurement* intended for public procurement departments within the various levels of government.

3.4.3 Devising an Investigation Methodology

162. This investigation methodology is an extension of the detection methodology described earlier.

163. It is aimed at helping decision-makers to identify and trace the path of corruption or fraud in public procurement within their administration. Like the audit, it is a tool for *internal monitoring* (by mayors and monitoring officials in local and regional governments) and external monitoring (by auditors, outside officials or departments of the Ministry of Financial Affairs). Similarly, if the investigation brings to light a suspected infraction, the decision-maker may use Article 40 of the Code of Criminal Procedure to bring the case to the attention of the judicial authorities. The judicial phase will make it possible to carry out more in-depth investigations, involving measures such as the confiscation of hard disks or software (to extract data on suppliers, purchasers, etc.), hearings, policy custody, searches, etc.

164. In its 2008 report, the SCPC presented the different stages of this methodology and a computerised analysis of fraud in public procurement, a complementary tool made available to investigators in order to facilitate their work of analysing information and gathering evidence on corruption.

4. Conclusion

165. Cartel agreements in public procurement often rely on the active complicity of public procurement officials, in the form of corruption. However, different authorities are responsible for enforcing the laws punishing the criminal offence of corruption and anti-competitive practices.

166. The steps taken to improve the co-ordination of criminal and administrative enforcement efforts and the greater severity of sanctions in recent years show that there is a new awareness of the interaction between these mechanisms and a determination to dissuade these kinds of behaviour as effectively as possible.

167. In addition, as the Central Corruption Prevention Service recently pointed out in proposing an investigation methodology for identifying corruption in public procurement: "*It seems desirable that public decision-makers should themselves be able to identify and trace the path of corruption or fraud in their administrations, in sufficiently effective and secure conditions to be able to report it*."[42]

168. In this regard, the publication of the Competition Authority's decisions imposing sanctions in the field of public procurement, their broad coverage in the specialised press and the provision of information about these decisions to public procurement officials can only contribute to disseminating a competition

[42] 2008 Report by the Central Corruption Prevention Service "Investigation in public procurement".