Complex Relations between EU Competition and Public Procurement Law

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Summary: Both competition and public procurement law constitute complex and independent, but to a large extent "closed" areas of law, with limited interdisciplinary discussions. An exemption is represented by a specific form of cartel agreements, taking place in the tendering procedure and manipulating with its outcome; these agreement are known as bid rigging. The relationship between competition and public procurement law is nonetheless more complex. We will argue in this article that certain principles, characteristic and indisputably beneficial in one of these disciplines, may be counterproductive in the other unless a right balance in their implementation is struck.

Keywords: bid rigging; competition law; public procurement; transparency

1. Introduction

The principle aim of competition law is to maintain the markets effective. This means in particular that undertakings in the market shall exert competitive pressure upon one another, "forcing" each other to offer goods and services of highest quality for lowest prices in order to win a customer, who significantly benefits from this process. Thus – if effective – competition secures consumer welfare.

Such an effective competition may nonetheless be distorted, on the one hand, by legislation that prevents or limits it, e.g. by creating a legal monopoly, erecting administrative barriers to enter the market, etc. On the other hand, undertakings themselves may wish to limit the level of competition in order to increase their profits or reduce their business risks; a typical example would be any form of collusion – cartelization, allowing the undertakings – instead of competing with one another – to coordinate their future conduct, e.g. in order to increase prices or partition markets.

Even though the aims of public procurement rules are more varied, including anticorruption, public oversight over public resources, good public

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governance etc., efficiency ranks very high among them; an effective tender, able to attract significant number of bidders, secures optimal outcomes for contracting authorities, because the bidders need to compete in order to win the tender, which brings the abovementioned benefits. Thus, the rules on competition and on public procurement are mutually reinforcing. Effective competition among bidders provides efficiencies to contracting authorities, who in turn need to design the tendering procedure in order to enable bidders to compete; conversely, if the bidders collude, the contracting authority cannot reap the benefits brought about by competition.

Competition law and public procurement law may be difficult to reconcile. In particular, the principle of transparency, requiring among others publication of – potentially commercially sensitive – information concerning the tendering procedure and its results, is essential for public oversight over contracting authorities and thus crucial in order to secure good governance, but it may at the same time facilitate cartelization. This is concisely summarised by the Organization for Economic Cooperation and Development (OECD), according to which:

> *"Strategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels. The extent to which transparency is a desirable aspect of a procurement process therefore depends on the circumstances, and may require trade-offs between best practice approaches to avoidance of collusion and corruption".*[1]

This paradox will be discussed in this article. We will first recall the basic principles of EU cartel law, in particular bid rigging and information sharing agreements. We will then proceed to explore the principle of transparency, as stemming from the EU public procurement rules. Finally, taking Czech Republic as an example of implementation of these rules, we will consider to what extent may these transparency rules facilitate cartelization, and to what extent they might be modified to in order to fulfil the aims of both competition and public procurement law.

[1] *Competition and Procurement: Key Findings*. OECD, 2011, p. 19. This material is accessible at: http://www.oecd.org/regreform/sectors/48315205.pdf (1 December 2016).

2. EU Cartel Law

Anticompetitive agreements are defined in Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU), according to which *all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market* are prohibited.

We will not discuss the concept of agreements in detail;[2] it suffices to note that the term agreement comprises any form of cooperation, whether explicit or implicit, among independent undertakings, which is capable of distorting competition. As a matter of principle, the negative consequences of an agreement on competition need to be established by competition authorities; conversely, there is a narrow category of agreements that have the distortion of competition as their object. As the Court of Justice of the European Union (CJ EU) observed,

> *"certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects […].*
>
> *That […] arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition […]".*[3]

Such agreements, e.g. price fixing or market sharing, constitute the most serious infringements of competition law. From the point of view of a competition authority, it is only necessary to establish that such an agreement was concluded, without substantiating its actual effects. Bid rigging, an agreement of (potential) bidders on outcomes of a tendering procedure, belongs to this category as well, as will be described below.

With regard to other forms of agreements, known as "by effect" infringements, the actual or potential distortion of competition caused by them needs to be substantiated; this will typically be the case with information exchange agreements, as described below.

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[2] See e.g. WISH, J., BAILEY, D. *Competition Law. Eighth Edition*. Oxford University Press, 2015, p. 84 *et seq*.

[3] CJ EU judgement of 11 September 2014 C-67/13 *Groupement des cartes bancaires (CB)*, par. 49 and 50.

2.1. Bid Rigging

It is universally accepted that bid rigging belongs to the most serious infringements of competition law, because it not only harms the competition as such, but also has a negative effect on public budgets and more broadly, on the quality of public administration. This is fittingly summarised in the OECD recommendation concerning bid rigging, adopted in 2012, according to which

> *"public procurement is a key economic activity of governments that has a wider impact on competition in the market, […] as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy.*
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> *[I]n public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, "value for money" to the benefit of end consumers, users of public services and taxpayers.*
>
> *[C]ollusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers".*[4]

OECD, as well as other international organisations,[5] thus dedicates a significant proportion of their activities to help prevent and uncover bid rigging, not only in their member countries but in other states as well. Specifically, OECD adopted its Guidelines for Fighting Bid Rigging in Public Procurement already in 2009,[6] and since then, these guidelines have been translated into 26 languages. Many national competition authorities have since identified bid rigging as their priority, including the Czech Competition Authority (CCA).[7]

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4 Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, as approved by Council on 17 July 2012 [C(2012)115 – C(2012)115/CORR1 – C/M(2012)9].

5 See e.g. United Nations Conference on Trade and Development (UNCTAD) and its materials on bid rigging, accessible at: http://unctad.org/meetings/en/Contribution/ccpb_SCF_Bid-rigging%20Guidelines_en.pdf (1 December 2016).

6 The material is accessible at: http://www.oecd.org/daf/competition/cartels/42851044.pdf (1 December 2016).

7 The CCA's guidelines on bid rigging are accessible (in Czech only) at: http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (1 December 2016).

Bid rigging may take many forms. The simplest (and most frequent) is called "cover bidding". Under this scheme, undertakings agree to submit bids that are higher than the bid of the designated "winner", to submit bids that are known to be too high to be accepted or bids that contain special terms that are known to be unacceptable to the purchaser, or even bids that do not fulfil requirements of the contracting authority. Cover bidding is thus designed to give the appearance of genuine competition, whereas in fact, the results of the competition were fixed in advance by a cartel agreement.

A similar scheme is known as "bid suppression". It involves agreements among undertakings in which one or more of them agree to refrain from bidding or to withdraw a previously submitted bid so that the designated "winner" will be accepted. In essence, bid suppression means that an undertaking does not submit a bid for final consideration.

Systematic bid suppression may amount to "market allocation", by which the undertakings carve up the market and agree not to compete for certain customers or in certain geographic areas. Undertakings may, for example, allocate specific customers or types of customers to different firms, so that they will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to another undertaking. In return, that undertaking will not competitively bid to a designated group of customers allocated to other cartelists.

More sophisticated, but especially relevant for the topic of this article, is a strategy known as "bid rotation". In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the "winner". The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each of them or to allocate volumes that correspond to their respective sizes. The "losing" undertakings may also be "rewarded" in other forms, e.g. through subcontracts.

It is clearly in the interest of contract authorities to prevent bid rigging. The different guidelines on preventing bid rigging indicate many good practices, e. g. designing the tender procedure, defining the requirements and evaluation criteria and raising awareness about bid rigging among relevant staff, including a concrete checklist for detecting bid rigging in public procurement.[8]

Even if these recommendations are fulfilled, it is still the case that an elementary precondition for any collusion is communication, some exchange of information among the cartelist. In the next chapter, we will therefore explore the approach of EU competition law to information exchange agreements.

[8] See e.g. OECD Guidelines for Fighting Bid Rigging in Public Procurement, quoted above.

2.2. Information Exchange Agreements

The theory of competition law dedicates significant amount of attention to information exchange agreements, it will nonetheless not be discussed in detail in this article.[9]

Two forms information exchange agreements may be distinguished. Under the first scenario, the exchange of information is not the actual aim of the collusion, but only a means to achieve it. For example, the mechanism of regular exchange of information concerning volume of sales and prices may facilitate functioning of a price fixing cartel. Such agreements are not perceived as self-standing agreements, but only as a tool employed for the purposes of executing the "main" one. Thus, such information exchange mechanisms will be judged illegal, should the agreement itself be anticompetitive, but legal, if pursued through an agreement in line with competition law.[10]

The other form stands for "pure" or "self-standing" information exchange agreements. As the CJ EU ruled in the *T-Mobile Netherlands* case:

> *"the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted".* [11]

A subset of such agreements may be considered as "by object" infringements, prohibited without the need to substantiate their precise anticompetitive effects (see above); in particular, this will be the case with exchange of future pricing information.[12] Because with regard to public information, only "historic" information is being published, this situation will not be discussed any further.

Exchange of information may nonetheless be classified as "by effect" infringement as well. Under such scenario, a thorough analysis of concrete effects of the collusion in question needs to be undertaken, considering the specific characteristics of the affected market, the information exchanged as well as the exchange mechanism.[13] Arguably, the sharing of information, as mandated by the public procurement rules, may produce such anticompetitive effects.

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[9] See e.g. WISH, J., BAILEY, D., *op. cit.*, p. 575–583.

[10] This may be the case with research and development agreements, see WISH, J., BAILEY, D., *op. cit*., p. 576.

[11] CJ EU judgement of 4 June 2009 C-8/08 *T Mobile Netherlands and others*, par. 35.

[12] Communication from the Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/C 11/01), par. 72–74.

[13] *Ibid*, par. 76–94.

This conclusion is supported by the abovementioned OECD study, according to which:

> *"Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a procurement procedure predictable, which can further assist collusion".*[14]

Taking into account these observations, we will further concentrate on two ways in which anticompetitive effects may be produced by dissemination of commercially sensitive information. Firstly, such sharing of information may facilitate functioning of a cartel already in place. And secondly, it may enable a new cartel to be concluded.

2.2.1. Publication of information as a means of monitoring existing cartels

As a matter of principle, it needs to be observed that information exchange agreements typically concern secret information, i.e. information not available to public. At the same time, market transparency, i.e. availability of relevant information to undertakings as well as consumers, is generally perceived as pro-competitive, stimulating a more intensive competition and hence benefiting consumers.[15]

At the same, exchange of information may under specific conditions produce anticompetitive effects. As observed by the Commission,

> *"[...] information exchange can lead to restrictive effects on competition [...] by increasing the internal stability of a collusive outcome on the market. [...] Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This [...] can increase the stability of a collusive outcome already present on the market".*[16]

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[14] *Competition and Procurement: Key Findings*, str. 19.

[15] See e.g. FAULL, J., NIKPAY, A. *The EC Law of Competition. Second Edition.* Oxford University Press, 2007, p. 732.

[16] *Guidelines on the applicability of Article 101*, *op. cit.*, par. 67.

As discussed above, information exchange as a means of monitoring existing cartels would not be perceived as a self-standing agreement, but "only" as a monitoring mechanism for the "main" cartel. Such arrangements are relatively common in bid rigging schemes,[17] it nonetheless needs to be admitted that the exchanged information identified in the relevant case-law were secret, commercially sensitive and not publicly available. As the Commission summarizes in its Guidelines, *"exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 [TFEU]"*,[18] even though *"the possibility cannot be entirely excluded that even genuinely public exchanges of information may facilitate a collusive outcome in the market"*.[19]

With relation to public procurement, certain information is made public (or readily available) *ex lege*, as will be described in the next chapter. It therefore needs to be discussed whether even such "genuinely public" information may produce anticompetitive effects. We put forward that it may. The information is not public because of inherent characteristics of the market (as would be the case e.g. with regard to stock-exchanges, where the price information is public by definition) or because of specific activity or certain market players (e. g. certain price-comparison websites, produced in order to provide consumers with additional information to enable them to make a more informed choice). Arguably, the information published under the public procurement rules is only publicly available because the legislation requires so; otherwise, it would rather be kept undisclosed as a business secret.

We therefore believe that such *ex lege* publication of the information concerned does not relieve it of its ability to distort competition and produce anticompetitive effects.[20]

2.2.2. Publication of information as a means of cartelization

The other risk connected with publication of the public procurement information is that it may facilitate cartelization, in particular conclusion of price fixing or bid rigging agreements, in markets where no such cartelization prevailed before.[21]

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[17] See e.g. the Commission's Decision of 24 January 2007, COMP/F/38.899 (*Gas Insulated Switchgear*).

[18] *Guidelines on the applicability of Article 101*, *op. cit.*, par. 92.

[19] *Ibid*, par. 94.

[20] To the same conclusion, see e.g. BENNETT, M., COLLINS, P. *The Law and Economics of Information Sharing: the Good, the Bad and the Ugly*. European Competition Journal, 2010 (8), p. 311.

[21] SKRZYPACZ, A., HOPENHAYN, H. *Tacit Collusion in Repeated Auctions*. Journal of Economic Theory, 2004 (1), p. 153. Similarly, according to the Commission's *Guidelines on the applicability of Article 101*, *op. cit.*, par. 67, "*information exchange can make the market*

According to economic science – especially with regard to frequent and repeated tendering – the availability of information on winners of the previous tender and the essential elements of their bids, in particular the price, may produce a focal point for creation of a price equilibrium, serving as a starting point for future collusion.[22]

We will not go into further details concerning the economics of competition law.[23] It would go beyond the scope of this article, as the concrete characteristics of a specific bidding market and nature of the information exchanged would need to be taken into account. We nonetheless argue that publication of information, as mandated by the public procurement rules, is in principle capable of facilitating cartelization.

With this information in mind, we may proceed to analyse the specific publication requirements of public procurement legislation.

3. EU Public Procurement Law

Public procurement belongs to the largest government spending activities and a means through which public services are delivered to citizens; important policy goals – such as job creation, support to small and medium enterprises, environmental sustainability or innovation – are pursued through public procurement, which represents approximately 13% of gross domestic product in OECD Members and 29 % of general government expenditure. On average, 63% of total general government procurement spending across OECD Members occurs at sub-national levels.[24]

Public procurement is thus crucial from the point of view of budgetary policy of individual countries. At the same time – in the EU context – due to the extent of public expenditure, public procurement is also capable of affecting functioning of the Single Market. Specific rules on public procurement, harmonizing the legislation of member states and ensuring effective functioning of the Single Market, where thus designed. Currently, the EU public procurement

sufficiently transparent […][in order to] enable companies to achieve a collusive outcome on markets where they would otherwise not have been able to do so *[…]*".

[22] See e.g. SÁNCHEZ-GRAELLS, A. *Public Procurement and the EU Competition Rules. Second Edition.* Hart Publishing, 2015, p. 73, and the literature cited there.

[23] See e.g. GUNNAR, N., JENKINS, H., KAVANAGH, J. *Economics for Competition Lawyers. Second Edition.* Oxford University Press, 2016.

[24] *Fighting Bid Rigging in Public Procurement. Report on Implementing the OECD Recommendation 2016*. Accessible at: http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf (1 December 2016), p. 9.

rules are enshrined in a number of directives;[25] for the purposes of this article, we will only comment on the general Directive on public procurement (Directive).[26] According to its first recital:

> *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty […], and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition".*

The Directive thus establishes rules on the procedures for procurement by contracting authorities with respect to public contracts, whose value is estimated to be not less than the financial thresholds set therein.[27] Only procurements above these thresholds are thus covered by the Directive; Member States, while implementing it, nonetheless apply similar requirements to below-the-threshold procurement as well; for example, this is the case of the Czech Republic, as will be described below.

The procurement process itself will not be discussed in this article;[28] we will further focus only on the Directive's requirements on publication and disclosure of certain information.

3.1. Publication of Information under the Public Procurement Rules

The Directive prescribes the transparency rules with their anticorruption potential in mind:

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[25] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in water, energy, transport and postal services and repealing Directive 2004/17/EC.

[26] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[27] Directive, Art. 1 (1).

[28] See e.g. BOVIS, C. *The Law of EU Public Procurement*. Oxford University Press, 2015.

> *"The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report".*[29]

This general presumption is implemented by an obligation to publish contract award notices;[30] for the purposes of this article it is sufficient to note the contract award notice needs to contain, among other information, description of the procurement, including nature and extent or value of works, supplies or services demanded, number of tenders received, identification of the successful tenderer, value of the successful tender and value and the proportion of contracts likely to be subcontracted to third parties.[31] At the same time, the contracting authority is obliged to inform – upon written request – any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.[32]

It ought to be stressed that the abovementioned information may be withheld if their disclosure *might prejudice fair competition between economic operators*.[33] It is nonetheless not clear what precisely is to be understood by this exemption. The Directive itself does not elaborate on it, nor does the CJ EU's jurisprudence; conversely, most of the relevant case law mandates publication of the abovementioned information.[34]

For the purposes of comparison, let us consider how were the EU public procurement rules on information disclosure transposed into the Czech law. A new Public Procurement Act (PPA), implementing the Directive as well as other relevant EU legislation, entered into force in October 2016.[35] Increased transparency was one of the guiding principles behind the PPA, perceived as

[29] Directive, recital 126.
[30] Directive, Art. 50.
[31] Directive, Annex V, Part D.
[32] Directive, Art. 55.
[33] Directive, Articles 50 (4) and 55 (3).
[34] In detail, see SANCHEZ-GRAELLS, A. *The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives.* University of Leicester School of Law Research Paper 13-11, 2013, accessible at: ssrn.com/abstract=2353005 (1 December 2016).
[35] Act. No. 134/2016 Coll., on public procurement.

a crucial tool to combat corruption.[36] Pursuing the same goal, a specific law on mandatory publication of certain contracts concluded by public authorities entered into force in July 2016.[37]

The information identified by the Directive, as described above, are published using specific forms in the Public Procurement Journal, an information system run by the Ministry of Regional Development, which is generally responsible for public procurement. This obligation falls on both below-the-threshold and above-the-threshold procurement; information on above-the-threshold procurement, to which the EU rules apply, is also published in the Official Journal.[38]

In addition to that, contracting authorities are also obliged to prepare a written report, which includes more mandatory information than prescribed by the Directive,[39] in particular the identity of all the tenderers and subcontractors; this report is to be published at the contracting authority's profile, an electronically accessible place where contracting authorities need to publish all the information concerning their procurement.[40]

Similarly to the EU legislation, there is a general provision that the contracting authority is not obliged to make public certain information, if their publication *would be able to influence economic competition*;[41] to our knowledge, there is no practical experience with this provision.

In addition to this, public authorities are obliged to store all their contracts, including the public procurement contracts, in a single electronic register.[42]

3.2. Impact of the Published Information on Effective Competition

The doctrine on anticompetitive effects of information exchange agreements, as described above, is concerned with *agreements*, i. e. illegal coordination among

[36] *Governmental Anticorruption Action Plan 2015*, accessible at: http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf (1 December 2016).

[37] Act No. 340/2015 Coll., on specific conditions for validity of certain contracts, publication of such contracts and the register of contracts (Act on the Register of Contracts).

[38] PPA, Sec. 126 and 212. Concerning the forms, see Commission Implementing regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011, and Decree of the Ministry of Regional Development No. 168/2016 Coll., on publication of certain forms for the purposes of public procurement act and on the requirements on the profile of the contracting authority.

[39] Directive, Art. 84.

[40] PPA, Sec. 217.

[41] PPA, Sec. 218 (3).

[42] Act on the Register of Contracts, Sec. 2 (1).

independent undertakings. With regard to public procurement, it is however not necessary to adopt any such agreements as the relevant information is disclosed *ex lege*. Hence, the disclosure itself may produce the same effects as an agreement might have had, and the analysis of these effects should therefore take into consideration the same criteria. We argue that the system mandating disclosure of commercially sensitive information produces the same effects as an information exchange agreement would have.

As is evident from the discussion above, sharing of *historic* information concerning past tenders may facilitate collusion concerning future ones, either by reinforcing existing cartels by providing an effective monitoring mechanism or by establishing conditions under which collusion is easier.

Concerning specifically the EU public procurement rules, we put forward that taking into account the extent of information disclosed or made publicly available, it may produce anticompetitive effects. This conclusion is supported by findings of economic science:

> *A greater than necessary amount of information is divulged […]. Relevant information regarding the selected bid, the name of the winning bidder and the reason for the rejection must be provided upon request by the tendering authority. While this is, of course, desirable from and administrative law perspective, the degree of transparency exceeds the level desirable from a law and economics perspective.*[43]

Under the Czech public procurement rules, the extent of disclosure is even more far reaching. In our opinion, this regulation may produce anticompetitive effects as well.

4. Published Information as a Means of Cartel Detection

We have so far concluded that the obligation to make public certain information concerning past tenders, both according to the EU public procurement law and the Czech one, may pose a significant risk to efficient competition, as it may facilitate bid rigging. As a remedy, it is sometimes suggested that the level of

[43] WEISHAAR, S. E. *Cartels, Competition and Public Procurement. Law and Economic Approaches to bid rigging.* Edward Elgar Publishing, 2013, p. 103. See also SKRZYPACZ, A., HOPENHAYN, H. *Tacit Collusion and Repeated Auctions*. Journal of Economic Theory, 2004 (1), p. 153.

transparency should be limited, i.e. that some information should not be so easily accessible and some information should not be disclosed to public at all, only to supervisory authorities or courts.[44, 45]

We respectfully argue that this is not a feasible strategy. As a non-legal argument, any limitation of transparency would in our opinion be perceived as pro-corruption, and hence be impossible to adopt. On the other hand, even though historic information concerning public procurement may be "misused" by bid riggers, it may also be "used" by competition authorities. We therefore suggest that the extent of transparency should be increased and the accessibility of relevant information enhanced, making detection of bid rigging easier for competition authorities.

Information on bidders in a tender, its winners, the price they won with, the bidders who withdrew their bids etc., available over a long period of time, may be used to identify patterns in bidding strategies, and thus to reveal that bid rigging might have been taking place. In this regard, software used by the Korean Competition Authority (KFTC – Korean Fair Trade Commission) called BRIAS (standing for *Bid Rigging Detection System*) has been frequently presented.[46] We believe that similar software is being developed (or is already employed) by other competition authorities as well.

Sufficient source-data are indispensable for effective operation of such software. The amount of information published under the EU rules, though excessive form the point of view of competition law itself, may not be sufficiently detailed and readily available for the purposes of such software. Other information, including at least the price expected by the contracting authority, the price actually offered by the winning tenderer, the identity of other bidders and the identity of the bidders who withdrew their offers or were disqualified should be made public as well, in a single database enabling machine search.

As has already been observed, the publication requirements in the Czech Republic correspond with this desired amount of information, the problem is that the information is not contained in a single database, but on individual contracting authorities' profiles, what complicates automated search. Making

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[44] SÁNCHEZ-GRAELLS, A. *Public Procurement and the EU Competition Rules. Second Edition.* Hart Publishing, 2015, p. 74.

[45] The same effect might be achieved by employing the exemption from mandatory publication of certain information because *it might prejudice fair competition between economic operators*; it would nonetheless limit the public oversight over the procurement process and we do not argue in favour of it either.

[46] The presentations are accessible at numerous international fora on competition policy, e.g. UNCTAD (in 2012) at: http://unctad.org/meetings/en/Presentation/ciclp2012_RT_PP_JaehoMoon_en.pdf, or ICN Cartel Workshop (2013), at: www.icncartel2013.co.za/assets/10h00-12h00-dae-young-kim.pptx (1December 2016).

publication of this information mandatory in a single database, for example the Public Procurement Journal where other information concerning procurement are already published, would not further increase the level of transparency in the market, but would be able to significantly increase the capability of the CCA to search for patterns in past tenders.

In this regard, it is surprising that even though a single authority – the CCA – is responsible for both the competition and public procurement policy, such a request has not been successfully raised.

5. Conclusions

In this article, we put forward that the current public procurement requirements on transparency, in particular the extent of published or readily disclosable information, may increase the risk of bid rigging, thus potentially depriving the tendering procedure of its procompetitive effects.

We also argue that to remedy this risk, it would not be appropriate to limit the extent of transparency, as such a move would undermine the anticorruption efforts enshrined in the principle of transparency. Conversely, we suggest that the level of transparency should be increased. Information corresponding in its extent at least to the level prescribed by Czech public procurement law should be listed in a single database allowing machine search. Thus, the potential risk of bid rigging might be offset by an actual increase in competition authorities' capability to detect bid rigging.