The Dickson Poon School of Law
Somerset House East Wing
Strand, London, WC2R 2LS

Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement

Robert D. Anderson, Alison Jones, William E. Kovacic

King's College London Dickson Poon School of Law
Legal Studies Research Paper Series: Paper No. 2019-14

Preventing Corruption, Supplier Collusion, and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement

Robert D. Anderson, Alison Jones and William E. Kovacic[*]

This is pre-publication version of an article to appear in the George Mason Law Review (2019)

INTRODUCTION

Governments around the world face the challenges of preventing corruption and collusion in the public procurement sector.[1] These issues are not principally ones of civic or corporate culture (though these can be contributing factors); rather, they derive directly from the inherent nature of public procurement systems. Under these structures, governments expend vast sums of money according to rules and procedures that differ from those used for private sector purchasing,[2] often by bodies or persons that are inadequately trained or supported in the responsibilities that they exercise and the challenges that they face. The special procedures that characterize public procurement are, essentially, necessary in light of the principal-agent problem and moral hazards that public procurement entails.[3] These control mechanisms cannot, however, eliminate altogether the vulnerability of public procurement systems

[*] Robert D. Anderson is Counsellor and Team Leader for Government Procurement and Competition Policy in the Secretariat of the World Trade Organization (WTO); and Honorary Professor, School of Law, University of Nottingham. Alison Jones is Professor of Law, King's College London. William Kovacic is Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London; and Non-Executive Director, United Kingdom Competition and Markets Authority. The authors are grateful to Damos Anderson, Emma Cronenweth, Tomas Llanos, Antonella Salgueiro, Nadezhda Sporysheva and Christina Volpin for research assistance. They also thank Michael Bowsher, Marianela Lopez-Galdos, Anna Caroline Müller, Caio Mario da Silva Pereira Neto, Peter Picht, Steven Schooner, Christopher Yukins and participants in workshops at George Washington University, Hong Kong University, Stellenbosch University, the Ministry of Planning and Budget of the Government of Brazil and the World Trade Organization, for helpful discussions and/or comments on earlier drafts. The views expressed are the authors' and should not be attributed to any organizations with which they are affiliated.

[1] In this paper, public procurement is defined as the process by which governments, (national, regional or local) and other public bodies, purchase goods and services with public money. Public procurement rules may also regulate procurement by some private bodies such as utilities. 'Corruption', in its strict sense, will be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them through statutory or other means, see section I.C. and note 93 and text. 'Collusion' will generally refer to explicit collusion through cartel agreements between suppliers to fix prices or market outcomes,(in this paper, bid rigging in tender processes), see section I.A.. Having said this, two related points need to (and will be) made: first, supplier collusion and corruption often co-exist and can be mutually reinforcing in powerful ways. Second, some authorities, including the World Bank Group, refer to supplier collusion as a sub-species of corruption. We will treat these problems as analytically separate while emphasizing their mutually reinforcing nature and the need for a 'joined-up' approach in countering therm.

[2] See, generally, J-J Laffont and J Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, Mass.: MIT Press, 1993); RD Anderson, WE Kovacic, and AC Müller, 'Ensuring integrity and competition in public procurement markets: a dual challenge for good governance,' in S Arrowsmith and RD Anderson, eds., *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), chapter 22, pp. 3-58; CR Yukins, 'A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model' (2010) *Public Contract Law Journal* Vol. 40, No. 1, p. 63, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776295.

[3] Principal-agent problems and attendant moral hazards in public procurement derive first and foremost from the fact that spending power is exercised not by the intended beneficiaries of such spending (individual citizens) or those providing the funds (taxpayers) but by government bodies and civil servants acting on their behalf.

to corruption and may render public procurement systems more susceptible to supplier collusion than private sector purchasing.[4]

These concerns carry major implications for public welfare, economic growth, and the credibility and efficacy of governments. First, a significant amount of public money is at stake. Governments around the world spend an estimated $9.5 trillion on goods and services each year.[5] This accounts for roughly one third of government expenditures (29.1 percent on average in OECD countries[6]) and ten to twenty percent of total gross domestic product ("GDP") in many nations.[7] The scale of repeated procurement outlays means that they are an attractive target for wrongdoers.[8] It also means that policy improvements that generate even small reductions in the "tax" imposed on these expenditures by collusion and corruption can yield major financial benefits.

Second, public procurement has a qualitative significance that transcends its importance as a proportion of GDP. Public procurement is an essential input to the delivery of broader public services and functions of government that are vital for growth, development, and social welfare, including: investment in transportation, telecommunications, energy, and other public infrastructure; the construction and maintenance of schools, hospitals, and public sanitation systems; and the efficient delivery of medicines and other aspects of health care. Distortions created by collusion and corruption in these markets not only increase the cost, but also reduce the quality and quantity, of these essential services and infrastructure; impose penalties on those who rely on them, especially the less advantaged; and diminish growth and create public safety risks (e.g., through shoddy contract performance[9]).[10]

Third, problems in public procurement, when they occur, can have a major impact on the credibility and efficacy of governments more generally. Corruption fuels public discontent in what, for many countries, is already a fraught and potentially combustible political environment. Major cases of wrongdoing, such as those exposed by Operation Car Wash in Brazil (or "Caso Lava Jato" as its known

---

[4] RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets,' *Public Procurement Law Review*, issue 2, pp. 67-101 (2009); RC Marshall and LM Marx, *The Economics of Collusion: Cartels and Bidding Rings* (MIT Press, 2012); and A Heimler, 'Cartels in Public Procurement,' *Journal of Competition Law & Economics*, 11-23 (2012).

[5] Presentation of A Capobianco, 'Public Procurement and Competition Policy: Friends or Foes?' LEAR Conference, Rome, 10 July 2017. In 2015, OECD countries were estimated to have spent €6.4 trillion on procurement (see speech of A Gomes, 'Safeguarding Public Procurement against Anticompetitive Conduct: Views from the OECD's 5th BRICS International Competition Conference, 10 November 2017, Brasilia) and the EU was estimated to have spent €1.9 million on procurement, The Economist, 'Rigging the bids: Government contracting is growing less competitive, and often more corrupt' 19 November 2016.

[6] See e.g. Gomes and Capobianco, *ibid*.

[7] See e.g., WTO, 'WTO and government procurement', available at https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. See also OECD, Policy Roundtables: Collusion and Corruption in Public Procurement DAF/COMP/GF(2010)6; Konkurrensverket, 'Screening for Cartels in Procurement Procedures' (2015), available at http://www.konkurrensverket.se/globalassets/press/tal-artiklar/150507_dan-sjobloms-anforande-ecd.pdf.

[8] Unless safeguarded, procurement systems may therefore become the equivalent of heavily funded, thinly protected and regularly replenished banks that will be robbed again and again by illicit coalitions that may include employees of the bank itself.

[9] See e.g., S Kinzer, 'The Turkish Quake's Secret Accomplice: Corruption' New York Times 29 August 1999.

[10] See e.g., European Parliamentary Research Service, 'The Cost of Non-Europe in the area of Organised Crime and Corruption – Annex II Corruption – Research Paper by RAND Europe' (2016) P3579.319 March 2016, 9 (noting that corruption risks during public procurement could cost Europe around €5 billion a year), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf, and section I.D.

there)[11] and the other cases described in Section I *infra*, tear at the fabric of trust between citizens and their public institutions, especially in nations battling high unemployment and weak economic growth. By contrast, increasing the integrity of the procurement system may help a government to build belief in its legitimacy and, more generally, create a civic sense that government institutions are dedicated to improving citizens' lives.

For all these reasons, honest and effective government procurement is widely recognized as being vital to broader efforts to promote development and prosperity in the twenty-first century.[12] Indeed, it can be argued that the success of major elements of the current United Nations Sustainable Development Goals is directly contingent on governments' efforts to grapple effectively with the problems of corruption and supplier collusion in public procurement systems.[13] This is acknowledged to be the case, for example, in the context of public health-related objectives.[14]

Conventional responses to the problems of corruption and supplier collusion in public procurement comprise two broad sets of tools. The first, focusing on corruption issues, involves measures to increase the transparency of public procurement systems—on the basis that "sunshine is the best antiseptic,"—and to strengthen the accountability of responsible public officials for malfeasance. The second, aimed at preventing supplier collusion, focuses on the effective enforcement of national competition (antitrust) laws, including through essential tools such as leniency programs, and related "advocacy" activities to enhance awareness of the requirements of competition law and promote compliance.[15]

These tools and approaches are necessary but proving to be insufficient on their own to address the related challenges. This reflects important systemic issues and concerns. First, there are limits on the ability of governments to deter corruption through enhanced transparency and ex post scrutiny and accountability. These control systems themselves are not costless and an undue emphasis on ex post accountability alone, arguably, runs a risk of chilling innovation, the appropriate exercise of discretion, and places unfair burdens on (frequently) poorly paid and trained administrators. Moreover an important, and neglected, theoretical point is the assumption that the problems lie truly with corrupt "agents" (procurement officials) who need to be controlled by the responsible principals. Evidence suggests, however, that corruption in government procurement sometimes derives from the actions of corrupt principals—that is corrupt governmental authorities, and not their subordinates.[16] These situations necessitate alternative remedial measures.[17]

---

[11] Ministerio Público Federal, 'Caso Lava Jato'. Available at http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato.

[12] See World Bank Group, *Strong, Sustainable and Balanced Growth: Enhancing the Impact of Infrastructure Investment on Growth and Employment,* Background note for the G20, (2014), available at: http://siteresources.worldbank.org/EXTSDNET/Resources/infrastructure-background-note-G20.pdf.

[13] L Casier (International Institute for Trade and Sustainable Development), Presentation on the role of public procurement for implementing the Sustainable Development Goals, World Trade Organization, 10 September 2017.

[14] See World Health Organization, World Intellectual Property Organization and World Trade Organization, *Promoting Access to Medical Technologies and Innovation* (2012); available at http://www.wipo.int/edocs/pubdocs/en/global_challenges/628/wipo_pub_628.pdf.

[15] See section II. An important related tool, developed in the OECD with input from multiple national competition authorities, involves the use of 'certificates of independent bid preparation', see further section III.

[16] See, for a compelling synthesis of related theoretical and empirical work, A Persson, B Rothstein, and J Teorell, 'Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem,' Governance, Volume 26, Issue 3, pp. 449-471 (2013).

[17] See Persson et al, ibid., and related discussion in section III.

Second, as suggested above and elaborated further in Section I, public procurement systems are intrinsically more vulnerable to supplier collusion than are many other markets. This vulnerability derives directly from the structure, rules, and procedures governing them. Thus, while competition law enforcement remains critical, an effective approach to the prevention of supplier collusion will also involve refinements to the procurement process itself. Indeed, an awkward but unavoidable truth in this area is that trade-offs exist between elements of the corrective measures needed to deter corruption (such as enhanced transparency and efforts to limit procurers' discretion) and those needed to reduce the likelihood of supplier collusion.[18] These trade-offs need to be managed carefully: it is patent that strict curtailment or elimination of transparency measures in public procurement markets would invite (arguably) even worse abuses than supplier collusion, including unfettered self-dealing and the routine theft of public funds.[19]

This Paper consequently seeks to develop the parameters of a more comprehensive and holistic approach to the public procurement problems and to propose a set of measures that can deter, and increase the resistance of these systems to, supplier collusion without necessarily increasing their vulnerability to corruption. Indeed, in important ways these measures and tools may also act to deter corruption.

Section I begins by examining some examples of bid rigging and bribery that have been uncovered in public procurement processes and the factors that facilitate such practices. It also notes quantitative indicators of the harm caused by both sets of practices. Section II outlines the main tools that are conventionally employed to address both supplier collusion and corruption in the procurement process, namely competition law enforcement and related advocacy and prevention measures, and anti-corruption enforcement. It also considers various ways in which the effectiveness of these tools can be strengthened, for example, through the use of sophisticated screening and data management tools,[20] through enhanced enforcement, sanctions, and remedies and by multilateral development banks ("MDBs") acting to prevent and deter corruption.[21]

Section III develops the more comprehensive approach to address the twin scourges of supplier collusion and corruption in public procurement markets (beyond the activities profiled in Part II) through: (i) systematic and better efforts to ensure procompetitive approaches to tender design, including through the use of international performance-based standards rather than national ones; (ii) careful market research as a core element of strengthening and fine-tuning public procurement processes and more advanced and targeted competition advocacy promoting compliance with competition law and the reduction of barriers to procurement markets for new entrepreneurs; (iii) professionalization of the procurement workforce, including but

[18] RD Anderson, AC Müller and WE Kovacic, 'Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation' (2017) *Public Procurement Law Review*, preliminary text available at http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation/.

[19] Anderson, Müller and Kovacic, *ibid*.

[20] See 'Curbing Corruption in Government Contracting' funded by the DFID Anti-Corruption Evidence (ACE) Programme and available at: http://ba-dfid.govtransparency.eu. See also Anna Caroline Müller, Preventing corruption and fostering competition in public procurement markets: the role of international trade, electronic data availability and eCitizenship, Presentation to the WTO Advanced Global Workshop on Government Procurement, September 2018.

[21] See e.g., L Folliot-Lalliot, 'Introduction to the WBG's policies in the fight against corruption and conflicts of interest in public contracts', in J-B Auby et al. (*eds*), Corruption and Conflicts of Interest – A Comparative Law Approach (Edward Elgar Publishing, 2014), 237.

not limited to training the responsible officials to detect the signs of bid rigging and corrupt practices; (iv) fine-tuning, where appropriate, the interaction between anti-corruption and anti-competition measures; (v) the liberalization of trade in government procurement markets as a tool to strengthen competition and deter corruption[22]; and (vi) a contextualized approach to reform and consideration of both incremental and systemic changes. Underlying all of these suggestions is the need for a political commitment to the strengthening of procurement, competition, and related anti-corruption systems and a recognition of their centrality both to the welfare of citizens and to the effectiveness and credibility of states.

I. Supplier Collusion and Corruption in Public Procurement Markets: Delineating the Scope and Sources of the Problem

This section examines examples of bid rigging and bribery that have been uncovered in public procurement processes and the factors that render such processes prone to them. It also discusses some quantitative indicators of harm resulting from both sets of practices. It thus seeks to indicate the benefits that can be achieved from fighting collusion and corruption in public procurement markets and to identify some of the factors that need to be tackled in order for such a fight to be successful.

A. *Bid Rigging and Bribery in Public Procurement Markets: Current Examples*

Despite concerted efforts by competition agencies to detect, prosecute, and deter cartel activity (anticompetitive arrangements between competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets[23]), cases of collusive tendering in public procurement markets certainly have not been eliminated. On the contrary, competition agencies across the world continue to expose bid rigging on a regular basis.[24]

Further, although some illicit bid rigging schemes have only been established to be horizontal cartels orchestrated by private actors,[25] a number have also been found to involve corruption,[26] a vertical alliance between a private firm (or firms) and

---

[22] As elaborated in section III, the opening of markets through trade liberalization can help to reduce their susceptibility to supplier collusion, by increasing both the number and the diversity of potential competitors. It can also help in preventing corruption by exposing procurement systems, and consequential individual procurements, to heightened scrutiny by a more diverse set of interested players, including foreign suppliers. The contribution of market opening is not wholly neglected in relevant literature and policy advocacy. The OECD Recommendation on Public Procurement refers, for example, to the potential benefits of market opening; still, in our experience, the benefits of market opening are rarely cited in competition agencies' public advocacy regarding problems and solutions in this area.

[23] See OECD Publication, 'Recommendation of the Council Concerning Effective action Against Hard Core Cartels' C(98)35/FINAL, May 1998. Although competition agencies increasingly prioritise their scare resources on cartel enforcement, the reality is that most authorities can only bring a small number of cartel cases each year and only a relatively small proportion of these relate to bid rigging, see RM Abrantes-Metz, 'Proactive *vs* Reactive Anti-Cartel Policy: The Role of Empirical Screens' (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740 ('Despite the successes of cartel detection over the last twenty years, there are many who believe that competition authorities have just started to scratch the surface.').

[24] See note 32 and text.

[25] Suppliers, perhaps with contributions from other private actors (such as an accounting firm that helps organize the cartel).

[26] Often referred to as abuse of entrusted power for private gain or the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party, see e.g., 'Corruption' [2008] Organisation of Economic Cooperation and Development ('OECD') Glossary of International Standards in Criminal Law, 'How do you define corruption?', Transparency International (TI), at http://www.transparency.org/news_room/faq/ corruption_faq and JM Díaz, 'A Taxonomy of Corruption in EU Public Procurement' (2017) 12(4) *European Public Private Partnership Law Review* 383.

government insiders. In such cases, an insider accepts bribes or other rewards to influence the design of a tender, to manipulate the selection process in favor of specific suppliers, or to ensure the bid rigging scheme achieves its aims. Indeed, evidence indicates that corruption may often occur throughout the three stages of the procurement lifecycle—tender design, bidding, and contract performance (for example, through contract changes and extensions)[27]; bid rigging and kickbacks are to be found in a number of procurement contracts[28]; and the overall level of competition for government contracts may be falling, given that in a high proportion of cases (up to thirty percent of large contracts) there is only a single bidder for government contracts.[29] Transparency International's Corruption Perceptions Index (a composite index based on a variety of business surveys and expert panels[30]) also records that over two-thirds of countries fall below the midpoint of their scale of zero (highly corrupt) and one hundred (very clean), thereby indicating endemic corruption across public sectors.[31]

Box 1 highlights a significant current example of an official investigation into relevant conduct, Brazil's Operation Car Wash. Box 2 sets out some other examples drawn from diverse economies around the globe.[32]

---

[27] See e.g., T Gong and N Zhou, 'Corruption and marketization: Formal and informal rules in Chinese public procurement' (2015) 9 *Regulation and Governance* 63 and F Boehm and J Olaya, 'Corruption in Public Contracting Auctions: The Role of Transparency in Bidding Processes' (2006) 77(4) *Annals of Public and Cooperative Economics* 431.

[28] See PwC, 'Public Procurement: costs we pay for corruption Identifying and Reducing Corruption in Public Procurement in the EU' (2013), available at https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/pwc_olaf_study_en.pdf.

[29] See The Economist, note 5 and Tenders Electronic Daily database, at http://ted.europa.eu/TED/main/HomePage.do.

[30] See https://www.transparency.org/news/feature/corruption_perceptions_index_2017 and note 118 and text.

[31] See, e.g., E Auriol, note 123, 2-3 ('Corruption is […] a major problem. The OECD Antibribery Convention, which came into force in February 1999, has apparently failed to cure it. It has resulted in only a handful of investigations and no conviction in the 35 signatory countries. In a study conducted by TI to build its second Bribe Payers Index of leading exporting countries, in 2002, 60% of the respondents claimed that corruption in international business had increased or remained the same … Anecdotal evidences support the survey results …')

[32] For numerous other examples, see e.g.: the World Bank Group (WBG), Integrity Vice Presidency, '*Curbing Fraud, Collusion and Corruption in the Road Sector*' (2011) (suggesting collusion in roads projects in developed and developing countries is significant), available at http://documents.worldbank.org/curated/en/975181468151765134/pdf/642830WP0Curbi00Box0361535B0PUBLIC0.pdf; Sanchez Graells, note 68; OECD, Collusion and Corruption, note 7; in Public Procurement, available at https://www.oecd.org/competition/cartels/46235884.pdf; OECD, Report on Implementing the 2012 Recommendation on Fighting Bid Rigging in Public Procurement (2016), http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf, 19; OECD, Recommendation on Fighting Bid Rigging in Public Procurement (2012), http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf; International Competition Network (ICN), 'Anti-Cartel Enforcement Manual - Relationships between Competition Agencies and Public Procurement Bodies' (2015), Annex B, available at http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf; L Brinker, 'Introducing New Weapons in the Fight against Bid Rigging to Achieve a More Competitive U.S. Procurement Market' (2014) 43(3) *Public Contract Law Journal* 547; Á Hargita and T Tóth, 'God Forbid Bid-Riggers: Developments under the Hungarian Competition Act' (2005) 28(2) *World Competition* 205; R Ishii, 'Collusion in Repeated Procurement Auction: A Study of a Paving Market in Japan', ISER Discussion Paper No. 710; the Korean Fair Trade Commission (KFTC) decision imposing fines on 21 construction companies for collusive tendering in relation to work on subway stations, 2 January 2014, www.eng.ftc.go.kr; Case number 10-03-2006, *Resolution on Baxter* (bid rotation in acquisition of human insulin and injectable serums between 2003-2006 in Mexico); discussion of Christchurch bus cartel in New Zealand Commerce Commission, 'Guidelines for Procurers – How to Recognise and Deter Bid Rigging' (September 2010); Spanish competition authority decision imposing fines of more than €16 million for price fixing and bid rigging on tenders for asphalt affecting more than 900 projects in Northern Spain(2013), see ICN, above, Annex B, 37; TDC Decision of 12 December 1996 in Case 364/95 *Orthopaedists of Castilla-León* and TDC Decision of 30 Sept 1998 in Case 395/97, *Flu vaccines* (seven

Box 1. Operation Car Wash (centred in Brazil, but with effects spilling over to other Latin American countries)

Operation Car Wash, Caso Lava Jato, is the largest anti-corruption, money laundering and supplier collusion investigation in Brazil's history. Its name originates from the use, by one of the criminal organizations initially involved, of a car wash to launder money. The investigation commenced in March 2014 in the State of Parana with inquiries into dealing in the black market for currency exchange. These led to the finding of irregularities in Petrobras, a huge state-owned enterprise, and in relation to the conclusion of large works contracts.

Under the scheme uncovered, which lasted at least ten years, contractors organized in cartels paid bribes to ruling political parties and senior government officials, ranging from one to five percent of already inflated billion-dollar contracts, to win contracts with Petrobras and other state firms.[33] Confidential information exchanged by investigated firms, including Odebrecht SA, in return for leniency, played a crucial part in the investigation and led to its snowballing.[34] Odebrecht SA was found to be at the center of the corruption investigation and paid a fine of 2.77 billion Reais ($715.84 million) as part of the leniency settlements negotiated with Conselho Administrativo de Defesa Econômica ("CADE," Brazil's powerful competition agency), and the Attorney General.[35] Its CEO, Marcelo Odebrecht, was also sentenced to nineteen years in prison for paying $30 million in bribes to Petrobras.[36]

The effects of Operation Car Wash spread outside of Brazil and into other parts of Latin America. Politicians in a half-dozen countries across the region are now under

identical sealed bids received), Comision Nacional de la Competencia, 'Guide on Public Procurement and Competition', 34; J Moore 'Cartels Facing Competition in Public Procurement: An Empirical Analysis' EPPP Discussion Paper No. 2012-09, September 2012 (between 1991-2010 the French Competition Authority issued more than 221 decisions finding collusion in public procurement (135 of which were in the construction industry) leading to the fining of more than 750 firms); R Molden, 'Public Procurement and Competition Law from a Swedish Perspective — Some proposals for Better Interaction' (discussing in detail five Swedish bid rigging cases from 2009-2010); L Froeb, 'Auctions and Antitrust' (1989) U.S. Department of Justice manuscript (81% of U.S. criminal cartel cases 1979-1988 were in auction markets); the Indian Competition Commission decision imposing penalties on 10 companies for bid rigging in coal and sand transportation tenders, 14 September 2017; the Czech competition authority decision fining three window suppliers for colluding in relation to a public contract, March 2018.

[33] Ministerio Público Federal 'Entenda o Caso'. Available at http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/entenda-o-caso.

[34] For a discussion of leniency, see note 152 and text.

[35] See e.g., CADE Press release, 'Cade celebra acordo de leniência no âmbito da Operação Lava Jato'. 20 March 2015, Available at http://www.cade.gov.br/noticias/cade-celebra-acordo-de-leniencia-no-ambito-da-201coperacao-lava-jato201d, CADE Press release, 'Cade investiga cartel em licitações de edificações especiais da Petrobras no âmbito da Operação Lava Jato'. 2 December 2016. Available at http://www.cade.gov.br/noticias/cade-investiga-cartel-em-licitacoes-de-edificacoes-especiais-da-petrobras-no-ambito-da-operacao-lava-jato, CADE Press reléase, ' Cade investiga cartel em licitações de estádios da Copa do Mundo de 2014'. 5 December 2016. Available at http://www.cade.gov.br/noticias/cade-investiga-cartel-em-licitacoes-de-estadios-da-copa-do-mundo-de-2014 and Reuters, 'Odebrecht signs new leniency deal with Brazil authorities' 10 July 2018. Available at https://www.reuters.com/article/us-brazil-corruption-odebrecht/odebrecht-signs-new-leniency-deal-with-brazil-authorities-idUSKBN1JZ2U9, Reuters, 'Odebrecht signs new leniency deal with Brazil authorities' 10 July 2018. Available at https://www.reuters.com/article/us-brazil-corruption-odebrecht/odebrecht-signs-new-leniency-deal-with-brazil-authorities-idUSKBN1JZ2U9,, .https://www.reuters.com/article/us-brazil-corruption-odebrecht/odebrecht-signs-new-leniency-deal-with-brazil-authorities-idUSKBN1JZ2U9.

[36] See BBC, ' Brasil: condenan a 19 años de cárcel a Marcelo Odebrecht, expresidente de la mayor constructora de América Latina'. Available at https://www.bbc.com/mundo/noticias/2016/03/160308_brasil_marcelo_odebrecht_condena_corrupcion_petrobras_ab.

investigation for similar bribery allegations, including the current and former presidents of Peru and Colombia.[37] Moreover, the Paradise Papers, a set of confidential electronic documents relating to offshore investment, revealed that Odebrecht used at least one offshore company as a vehicle to pay bribes.[38]

Box 2. Examples of recent publicly disclosed cases of corruption and/or supplier collusion in other jurisdictions

- *Canada*. In 2015 the Commission d'enquete sur l'octroi et la gestion des contrats publics dans l'industrie de la construction of Quebec (the "Tharbonneau Commission") and the Competition Bureau of Canada reported on corruption and collusion[39] in Quebec's construction industry. They set out allegations of widespread and systemic illicit payments and other favors to public officials and pervasive bid rigging.[40]
- *China*. In 2015, the National Development and Reform Commission of China ("NDRC") found that eight international RORO shipping companies[41] repeatedly implemented agreements to set minimum quotes for RORO shipping services (between China and other countries) for RORO cargo suppliers.[42]
- *European Union*. In the EU, the European Commission has imposed significant fines for bid rigging. In one example, the *Elevators and Escalators* case,[43] the Commission found that four firms (Kone, Schindler, Otis, and ThyssenKrupp) had operated a number of bid rigging cartels for the sale, installation, and maintenance of elevators and escalators in Belgium, Germany, Luxembourg, and the

[37] The Globe and Mail, 'Corruption beyond Brazil: Where the 'Car Wash' scandal has splashed across Latin America'. 12 November 2017. Available at https://www.theglobeandmail.com/news/world/brazil-odebrecht-lava-jato-explainer/article35231409/.

[38] 'Paradise Papers: Salen a la luz 17 offshore de Odebrecht y al menos una se usó para sobornos' 8 November 2017. Available at http://www.perfil.com/noticias/paradisepapers/paradise-papers-salen-a-la-luz-17-offshore-de-odebrecht-y-al-menos-una-se-uso-para-sobornos.phtml.

[39] 123 of the 654 immunity and leniency applications received by the Competition Bureau of Canada between 1996-2014 related to bid rotation, cover bidding and side payments in the Quebec construction industry. Bid-rigging charges were brought against companies and individuals in the construction industry in relation to collusion in Montreal after a joint investigation by the Anti-Corruption Unit of Quebec's provincial police force and Canada's Competition Bureau; ICN, note 32.

[40] See RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67. For most of the period of alleged illegal practices, Quebec's government procurements were excluded from Canada's market access commitments under the Agreement on Government Procurement (see further discussion of the GPA, section IV and note 302, a factor that arguably facilitated the apparent illegality by eliminating a source of potential competition (foreign suppliers) and minimizing external scrutiny of the relevant markets and practices. Recently, Canada has extended its GPA market opening commitments to cover Quebec and other provincial government procurements — a development that will surely strengthen competition and make corruption more difficult, see Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction [the 'Charbonneau Commission']; and Competition Bureau, 'Serial Offenders: A Discussion on Why Some Industries Seem Prone to Endemic Collusion,' (2015), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03989.html; see also Anderson, Müller and Kovacic, note 19. For further information, see also R Clark, D Coviello, JF Gauthier and A Shneyerov, Bid rigging and entry deterrence in public procurement: Evidence from an investigation into collusion and corruption in Quebec (No. 1401), 2018, available at http://qed.econ.queensu.ca/working_papers/papers/qed_wp_1401.pdf.

[41] RORO (roll on, roll off) cargo refers to wheeled cargo, such as automobiles, construction machinery, and trucks.

[42] S Lai, 'Bid Rigging, a Faintly Discernible Enumeration Under Article 13 of the Anti-Monopoly Law In China' (2017) Penn Law: Legal Scholarship Repository, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1020&context=alr.

[43] See COMP/38.823 - PO/Elevators and Escalators, 21 February 2007 and on appeal e.g., C-557/12, *Kone AG v ÖBB-Infrastruktur AG* EU:C:2014:1317.

Netherlands (including in the buildings of the Commission itself and the EU courts in Luxembourg).

- *Germany*. The Federal Cartel Office established that six firms had used a quota system to rig bids to supply combat boots for the German Armed Forces. An employee of the Armed Forces Procurement Agency facilitated the scheme—one part of a striking pattern of corrupt insider-outsider collaboration that German prosecutors have identified in other bid rigging schemes.[44]
- *India*. In 2017, the Competition Commission of India imposed fines on a number of firms for rigging tenders for the supply of a water purification product.[45]
- *Japan.* The Japanese Fair Trading Commission ("JFTC") has uncovered numerous cases of collusion and corruption involving construction and engineering services on public contracts.[46] In one case involving steel bridges, the JFTC alleged that twenty public officials had supported bid rigging schemes to secure future jobs with the companies after they retired from public service.[47]
- *Russia*. In Russia, the Federal Antimonopoly Service uncovered a complex anticompetitive bid rigging scheme, described as "ram"[48] by using electronic trade spot resources.[49] The scheme was carefully designed to exclude non-cartelists from the process.
- *Singapore*. The Competition Commission of Singapore has fined undertakings which rigged bids on electrical works contracts, motor trader vehicles, asset tagging services for the GEMS world academy tender, and electrical services for the Singapore F1.[50]
- *Spain.* In 2016 Spain's "biggest corruption case" in decades yielded allegations that thirty-seven businessmen and former politicians (including members of the ruling People's party) manipulated the public procurement system to steer construction contracts to "their buddies."[51] The colorful nature of the characters involved, who went by names such as Don Vito, El Bigotes, and El Albondiguilla, along with kickbacks in the form of Caribbean holidays, Louis Vuitton products, and call girls, ensured that the case attracted popular attention. The scandal led to the arrest, and imprisonment of several business officials and politicians.[52]

---

[44] See e.g., OECD, Collusion and Corruption, note 7, 195-199.

[45] Lexocology, *India: CCI imposes penalty for Bid Rigging, restricts the scope of single economic entity,* 7 December 2017, available at https://www.lexology.com/library/detail.aspx?g=0d714513-6259-4e73-8826-b7202897743f.

[46] See e.g., M Wakui, 'Bid Rigging Initiated by Government Officials: The Conjuncture of Collusion and Corruption in Japan', in T Cheng, S Marco Colino and B Ong (*eds*), *Cartels in Asia: law and practice* (Wolters Kluwer, 2015) (between 2003 and 2015, 12 cases of government involvement in 10 bid rigging cases were found, resulting in requests for investigation to the head of the procuring office).

[47] OECD, Collusion and Corruption, note 7.

[48] 'Ram' is a concerted bidding practice that does not directly fit into a definition of 'hard core' cartel, i.e. an agreement on price fixing and/or market allocation by territory, product or customer. However, this practice leads to the exclusion of conscientious bidders and allows the participants of such arrangements to receive excessive wealth. For further information see ICN, note 32.

[49] See ICN, note 32.

[50] See e.g., Case CS700/003/15, 28 November 2017, available at https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-issues-infringement-decision-for-bidrigging-in-electrical-services-and-asset-tagging-tenders.

[51] The Economist, note 5.

[52] *Ibid* and The Guardian, 'Court finds Spain's Ruling Party Benefited from Bribery Scheme' 24 May 2018 and 'Spain's Watergate: inside the corruption scandal that changed a nation' 1 March 2019.

- *United States*. In the U.S., cases of bid rigging have been uncovered and prosecuted criminally. In one recent example in 2017 involving an auction for public school bus transportation services in Puerto Rico, Yuval Marshak was sentenced to thirty months in prison for falsifying bid documents to make it appear that contracts were won in a competitive bid process,[53] and four individuals were convicted for participating in bid rigging (and fraud).[54] The defendants allocated contracts among themselves, predetermining the winning bidder for each contract, and then submitting inflated complementary bids.

  Bribery has also been exposed in public procurement. Earlier this decade, Leonard Francis obtained tens of millions of dollars of marine services contracts by bribing U.S. naval officers and Department of Defense civilian personnel with cash, prostitutes, and luxury travel. Further, the Department of Justice ("DOJ") obtained convictions of private individuals for rigging bids on disaster recovery projects following Typhoon Paka, which left thousands of people homeless. One public official was sentenced to eight years in prison for helping organize the conspiracies and for soliciting and receiving bribes for contracts awarded to repair typhoon damage.[55]

The integrity units of MDBs have also uncovered numerous incidents of collusive tendering.[56] A common pattern involves corporations using the same agent to prepare and submit the relevant offers in a public tender.[57] In 2016, the World Bank Group ("WBG") reported[58] that it had investigated nine collusion cases relating to public procurement and debarred a Ukrainian company (for over twenty-two years) for having participated in a corrupt and collusive scheme rigging contracts amounting to $43 million.[59] It also refused to award contracts, and dismantled a collusion case, relating to a health project where $29 million in medical supplies to support disease control was at stake. Further, a WBG Report indicates that collusion schemes in relation to road building contracts are "significant" across the globe, even if difficult to establish definitively.[60]

B. Incentives and Conditions Facilitating Collusion In Public Procurement Processes

An extensive body of scholarship identifies the conditions in which cartels, bid rigging, and other collusive schemes to limit rivalry on price or quality, are likely to

[53] See e.g., Speech of R Alford, Deputy Assistant Attorney General, Antitrust Division, U.S. DOJ, 'Antitrust Enforcement and the Fight against Corruption', 3 October 2017, https://www.justice.gov/opa/speech/file/1001076/download.

[54] Along with their bids, they submitted fraudulent certifications of non-collusion.

[55] See, C Whitlock, 'The man who seduced the 7th Fleet', Washington Post, May 27, 2016. Available at https://www.washingtonpost.com/sf/investigative/2016/05/27/the-man-who-seduced-the-7th-fleet/?tid=a_inl_manual&utm_term=.22bc3c9607a9.

[56] See section II:B.

[57] See Contribution from the IDB Secretariat at Latin American and Caribbean Competition Forum 12-13 April 2016, Mexico, 'Corruption and Collusion: Two Sides of the Same Coin against Productivity' DAF/COMP/LACF(2016)32, 8; and EU Case C-542/14, *SIA 'VM Remonts' and Others v Konkurences padome* [2016] EU:C:2016:578.

[58] WBG, Annual Update Integrity Vice Presidency, Fiscal Year 2016, available at http://documents.worldbank.org/curated/en/330521476191334505/pdf/INT-FY16-Annual-Update-10062016.pdf

[59] The sanction was recognized by the rest of the MDBs, see further discussion in section II.B.

[60] WBG, note 32.

flourish.[61] By illustrating how various characteristics of public procurement markets make them particularly prone to collusion, this literature both explains the number of cases uncovered and provides a useful starting point to devise countermeasures.

To collude effectively, firms must do three things: (1) cooperate in a way which allows them to align their behavior, that is to reach an understanding as to how to cut their output and allocate the increased revenues from the affected market; (2) ensure the internal stability of the collusive scheme by detecting and punishing cheating,[62] or deviations, from it; and (3) cope with external threats that could boost supply to competitive levels, especially new entry.

The art of successful collusion thus consists of: creating incentives that make continued cooperation, rather than unilateral action and cheating, the most profitable strategy for the participants[63]; and designing organizational and operational structures that cope with internal and external threats to the scheme, in particular, by monitoring the market for, and acting against, internal deviations from the collusive scheme and discouraging external competitive inroads and buyer resistance.[64] Repeated interaction and "the shadow of the future," involving punishment and rewards, are usually essential to overcome temptations to cheat and[65] to ensure the expected profit from colluding today outweighs the expected profit of deviating from the cooperative arrangement. As most competition law systems categorically prohibit and severely punish explicit collusion,[66] cartelists ordinarily also have to strive to conceal their cooperation.

Public procurement typically involves significant regulation both to prevent corrupt practices and to ensure that the procurement goals are achieved, in particular that goods and services are obtained in ways that maximize value from taxpayer money.[67] While these objectives are of paramount importance, the design of the procurement system, combined with the value, volume, and frequency of public purchasing activity, can undeniably have adverse side effects and make government procurement markets vulnerable to persistent supplier collusion over extended periods.[68] Conditions conducive to procurement collusion include:[69]

---

[61] See especially, GJ Stigler, 'A Theory of Oligopoly' (1964) 72 *Journal of Political Economy* 44, J Tirole, *The Theory of Industrial Organisation* (MIT Press, 1988) and C Shapiro, 'Theories of Oligopoly Behavior', in M Armstrong and RH Porter, *Handbook of Industrial Organization*, Volume 3 (North Holland, 2007), chapter 6.

[62] Cheating on a cartel is easier the less transparent the market, the greater the number of firms, where products are differentiated, and where demand is unpredictable. The incentive to deviate from the collusive strategy is also affected by the 'punishment' (which usually takes the form of a promise of loss of profits) that can be levied on a firm that cheats. Operating an internal enforcement mechanism is time-consuming, expensive and difficult and makes the cartel more vulnerable to detection.

[63] See Marshall and Marx, note 4; C Harding and J Joshua, *Regulating Cartels in Europe* (OUP, 2 ed, 2010), 230-231.

[64] See e.g., COMP/35.691, Pre-Insulated Pipe [1999] OJ L24/1 (the cartel members had sought to win over, then threaten, boycott and drive out a non-participating competitor) and Moore, note 32.

[65] See P Dal Bó and GR Fréchette, 'On the Determinants of Cooperation in Infinitely Repeated games: A Survey' (2018) 56(1) *Journal of Economic Literature* 60, but see also D Berhnheim and E Madsen, 'Price Cutting and Business Stealing in Imperfect Cartels' (2017) 107(2) *American Economic Review* 387.

[66] Collusion on a market can be explicit, where the mutual understanding arises through express communication among firms through verbal or other communication as to the strategies to be deployed, or tacit, where the mutual understanding occurs without express communication. Although most competition law systems struggle to deal satisfactorily with tacit cooperation and the line between it and explicit collusion is difficult to draw, it is widely accepted that cartel activity, including bid rigging, through explicit collusion should be condemned under antitrust laws.

[67] But the objectives of public procurement may be complex, see note 253 and text.

[68] See e.g., A Heimler, 'Cartels in Public Procurement' (2012) 8(4) *Journal of Competition Law & Economics* 11; RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law*

(i) *Constant, predictable demand*. Collusion is more difficult to maintain in markets where there are cyclical changes in demand[70] and/or where large orders are put in for a product occasionally rather than on a regular basis. In such cases, the gains to individual firms from cheating, and consequently the temptation to cheat, are significant. By contrast, government's demand in public procurement markets tends to be inelastic[71] and governments often resort to a regular, predictable flow of auctions and tendering events. Repetitive tendering increases the opportunity for bidders to divide contracts and makes it less likely that the benefits from deviating to win a single contract will outweigh those that derive from colluding over a series of contracts. If, however, the distance in time between tenders is long or irregular and if tender opportunities vary in size and content, successful collusion becomes more complex.

(ii) *Few competitors, barriers to entry and (often) the exclusion of foreign competitors*. The more concentrated the market, the simpler it is for firms to form a consensus, detect cheating, and maintain secrecy. A smaller group of competitors are also likely to know each other well and to communicate among themselves more readily. Further, the larger the market share that each firm has, the greater the potential profits to be earned from successful collusion (the bigger the share that each will receive of the collusive "pie") and the more likely firms are to be willing to accept the risk of eventual detection. Procurement regulation sometimes increases concentration by artificially restricting the number of potential offerors, for example, by imposing onerous conditions or reserving contracts to domestic suppliers.[72] In particular, domestic content requirements that exclude foreign suppliers may obstruct entry from potential competitors, which might otherwise undermine and destabilize collusion.[73]

(iii) *Standardization and restrictive product specifications*. Collusion is more likely to flourish in markets where competition mainly occurs on one dimension (for example, price) rather than on several dimensions[74] and when there are few or no alternatives to the product or service. In such cases the possibility for non-price competition through disruptive product differentiation or innovation is reduced, as are the costs of collusion. Procurement processes sometimes reduce the scope for

---

Review 67; and A Sanchez Graells, 'Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement,' in G Racca and C Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014).

[69] Heimler, *ibid*.

[70] In these circumstances, firms may find it difficult to determine whether or not the decline in demand is due to market changes or cheating, causing deviations from the terms of the cartel.

[71] Procurement markets often lack the elasticity of demand that is a primary defence of consumers: once the government has determined the need for a particular purchase, the procurement officer will generally go ahead with the procurement, provided that enough bids are made, see e.g., J Haltiwanger & J Harrington, 'The Impact of Cyclical Demand Movements on Collusive 'Behavior' (1991) *RAND Journal of Economics* 22, and GL Albano, P Uccirossi, G Spagnolo and M Zanza, 'Preventing Collusion in Procurement: a Primer' in N Dimitri, G Piga, G Spanolo (eds), *Handbook of Procurement* (Cambridge University Press, 2006).

[72] Anderson, Müller and Kovacic, note 18. ('The scale and importance of the government procurement sector are such that governments often seek to harness it in different ways, for example, through policies and regulations that reserve contracts to national suppliers or particular groups of suppliers … Much experience suggests, though, that such reservations are a costly way of assisting the targeted groups, relative to direct transfers or similar measures.').

[73] Anderson and Kovacic, note 61; R Anderson et al., 'Ensuring integrity and competition in public procurement markets: a dual challenge for good governance,' in S Arrowsmith and RD Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), 681.

[74] R Porter and JD Zona, 'Ohio School Milk Markets: An Analysis of Bidding' (1999) 30 *Rand Journal of Economics* 263, and RH Porter and JD Zona, 'Detection of Bid Rigging in Procurement Auctions' (1993) Journal of Political Economy 101.

differentiation through standardizing requirements or restrictive product specifications, which can be intended to limit procurers' broad discretion and opportunities for making corrupt contract awards.[75]

(iv) *The incentives of procurement officials*. As Heimler observes, in many cases, procurement officers themselves may have weak or nonexistent incentives to identify cartels:

> The public official [typically] is not evaluated on how many cartels he discovers but on his ability to set up and to run bidding processes and how quickly the goods and services he purchases are actually delivered. Suspicion that there is a cartel delays the whole process of purchasing. Furthermore, the money that is being saved because of the dismantling of a cartel usually does not remain in the administration that actually discovered or helped discover the cartel, but is redistributed to the general administration's budget.[76]

If efforts to detect and deter cartels in public procurement are to succeed this issue must be addressed, for example, through the provision of incentives (such as financial awards) for procurement officers that successfully detect collusive arrangements.[77]

(v) *Overly sweeping transparency requirements*. While the imposition of transparency requirements is essential to ensure the integrity of public procurement processes,[78] transparency increases the risk of collusion. Being able to easily observe identity and terms of transactions may potentially facilitate collusion by allowing firms to monitor the conduct of their competitors and detect deviations from a cartel agreement, especially when procurement rules mandate the disclosure of both winning and losing bids.[79] Unless appropriately tailored, therefore transparency requirements can actually facilitate bid rigging schemes.[80] In contrast, carefully designed transparency requirements can serve a variety of procompetitive purposes.[81]

(vi) *Procurement Models*. Procurement design may also create potential risks. For example, sealed bidding tenders are easier to rig than negotiated procurements, which allow the buyer to push for better terms, potentially inducing a cartel to cheat.

---

[75] Although it can be difficult to address such measures effectively through competition law enforcement, competition law and competition advocacy have an important role to play, see E Fox and D Healey, 'When the State Harms Competition – the Role for Competition Law' (2014) 79 *Antitrust Law Journal* 769; also, see section III.B.

[76] Heimler, note 68 and see section III.C.

[77] See note 281 and text.

[78] See note 7 and text and RA Burton, 'Improving Integrity in Public Procurement: The Role of Transparency and Accountability,' in *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris: OECD 2005), chapter 2, (2005), available at: http://www.oecd-ilibrary.org/fr/governance/fighting-corruption-and-promoting-integrity-in-public-procurement_9789264014008-en.

[79] It is harder for bidders to collude if sensitive bid data and tenderer information is not made publicly available during the course of, or subsequent to, an auction, (see e.g., H Wang & H-M Chen, 'Deterring Bidder Collusion: Auction Design Complements Antitrust Policy' (2016) 12(1) *Journal of Competition Law & Economics*, 31, - Stigler, note 61, E Green and R Porter, 'Noncooperative collusion under imperfect price information' (1984) Econometrica 52, 87-100, D Abreu, 'External equilibria of oligopolistic supergames' (1986) 39 *Journal of Economic Theory* 191-225).

[80] Transparency measures should not be abandoned but their ability to facilitate collusion must be recognized, see e.g., Marshall and Marx, note 4, and section III.

[81] See section III.A and B.

Nonetheless, negotiated procurements can also entail risks in corrupt systems where the negotiation is treated as an opportunity to broker a bribe.[82]

(vii) *Corrupt Advisors*. Cartels sometimes enlist the assistance of trade associations and consultants to design and manage their operations. Such assistance may be critical as the complexity of a collusive scheme increases.[83] In the EU, for example, Fides/AC Treuhand, an association-management company, was found to have helped guide the implementation of a number of chemical sector cartels.[84] In public procurement, corrupt government officials may also sometimes play a role in facilitating the operation of cartels (see Section I.C. *infra*).

In a study of bid rigging in relation to U.S. public school milk, Porter and Zona[85] noted several market traits that encouraged collusion. They found that: price competition was the only dimension of competition; demand was inelastic and stable; firms faced similar costs of production; opportunities for new entry were limited; markets were concentrated and localized given relatively high transport costs; bidding was a repeated game, carried out in small lots; multi-market contact was enhanced by disaggregated contracts staggered throughout the year; bids and bidders were made public after sealed bid auctions allowing any cheating to be observed; pricing was transparent; and parties often met through trade associations or through being customers of one another.

Procurement markets may, therefore, be susceptible to well-documented collusive techniques such as those listed in Box 3 below.

Box 3. Common bid rigging practices

- *Bid suppression*. One or more competitors agree not to bid or to withdraw a bid to ensure that a designated firm wins;
- *Cover, courtesy, or complementary bidding*. One or more cartelists agree to submit bids they know will be unacceptable because they are too high or do not comply with other important terms. These bids seek to deceive the buyer by creating the illusion of a genuine competitive bidding process[86];
- *Market or customer allocation*. Firms agree not to bid against competitors in certain geographic areas or to avoid competing for business from certain tenderers[87]—for example, by submitting only complementary bids;
- *Bid rotation*. Cartel members all submit bids, but take turns submitting a winning bid;
- *Identical tendering, joint tendering, or subcontracting*. Although joint tendering[88] and subcontracting[89] can be legitimate, for example where allowing firms to be

[82] See further section III.A.

[83] See e.g., S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd edn, Sweet & Maxwell, 2010), para. 5.016.

[84] Case C-194/14 P, *AC-Treuhand AG v Commission* EU:C:2015:717, paras. 26-47. See also Case C-542/14, *Remonts* note 57 and text , RC Marshall, 'Unobserved collusion: warning signs and concerns' (2017) 5(3) *Journal of Antitrust Enforcement* 329 and W Kovacic, R Marshall, and M Meurer, 'Serial Collusion by Multi-Product Firms' (2018) Boston Univ. School of Law, Law and Economics Research Paper No. 18-18; King's College London Law School Research Paper No. 2018-28. Available at SSRN: https://ssrn.com/abstract=3235398 or http://dx.doi.org/10.2139/ssrn.3235398.

[85] Porter and Zona, note 74.

[86] Anderson, Kovacic, and Müller, note 73.

[87] Firms may also engage in allocation of batches divided in a single tender.

able to tender at all or to tender more efficiently, it may constitute anticompetitive bid rigging when used in relation to projects which could be undertaken individually.

Each of these practices is designed to mask collusion and create a false impression of a competitive environment.[90] Instead of competing to submit the lowest possible tender at the tightest possible margin, the parties thwart the essence of the tendering process—to extract the most competitive, cost-effective bid for the products or services through tendering—by limiting price competition or sharing markets between bidders.[91] In many cases the schemes incorporate mechanisms to apportion and distribute profits among parties, for example, through compensation or side payments, or by having the winning bidder subcontract work to losing or non-tendering firms.

C. Incentives and Conditions Facilitating Corruption in Public Procurement Markets

Corruption is another major obstacle to achieving efficiency and optimizing the use of public money.[92] In a broad sense, corruption in public administration may be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them.[93] In the context of public procurement markets, these abuses typically involve conduct such as the awarding of contracts, the placing of suppliers on relevant lists, or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (e.g., bribes, lavish holidays, the promise of subsequent employment, also known as golden parachutes,[94] or contribution to political funds).

As emphasized in Parts I.A and I.B *supra*, corruption often coexists with, and supports or reinforces, supplier collusion. In bid rigging schemes it may not be easy for members to find a mechanism for agreeing who will win each tender and the winning price, to curb cheating, or to prevent non-members from disrupting the arrangement by submitting a lower bid. In this sense, the enlistment of a public official into the scheme, through bribes or otherwise, may facilitate the policing and smooth operation of the cartel, boost its stability, protect firms' rents,[95] and minimize

---

[88] For a discussion of how a line can be drawn under EU competition law between legitimate joint tendering/ selling (e.g., where it allows two firms to produce efficiencies that outweigh the competition concerns, or to be able to tender at all) and anti-competitive bid rigging see e.g., C Ritter, 'Joint Tendering under EU Competition Law' May 2017, *Concurrences Review* No. 2-2017, Art. No. 84019, 60-69 and C Thomas 'Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting under EU Competition Law, (2015) 6(9) *Journal of European Competition Law & Practice* 629.

[89] Subcontracting is not necessarily anti-competitive, however, e.g., if it is not done in furtherance of efforts to limit competition in the award of the main contract.

[90] See e.g., RC Marshall, LS Marx and MJ Meurer, 'The Economics of Auctions and Bidder Collusion' in K Chatterjee & WF Samuelson (*eds.*), *Game Theory and Business Applications* (Kluwer, 2001), 339. In procurement markets customers may be vigilant for cartel behavior; even if bid rigging is stable on the supply side, therefore, it may be vulnerable to detection on the buyer side, see Heimler, note 69 and further Section II.B.1.

[91] It is distinct from joint bidding made openly and with knowledge of the party seeking the tenders, note **Error! Bookmark not defined.**.

[92] See note 253 and text.

[93] See, e.g., 'How do you define corruption?' on the website of Transparency International, at http://www.transparency.org/news_room/faq/ corruption_faq.

[94] Known as 'amakudari' in Japan, where this has been a particular problem, see S Van Uytsel, 'Am I a Bid Rigger ? How Bureaucrats came within the Focus of Regulating Bid Rigging in Japan' presentation at Asian Competition Forum, 12 December 2017, available at https://asiancompetitionforum.com/new-page/.

[95] See ibid and e.g., A Lambert-Mogiliansky, 'Corruption and Collusion in Procurement – Strategic complements' in S Rose-Ackerman and T Søreide (eds), *International handbook on the economics of corruption*, Volume 2

the risk of its detection. Particularly in industries where bidders and officials are in regular contact and have close and repeated interaction, public officials may, in return for cash or other improper compensation, turn a blind eye to, and bolster, the unlawful collusive arrangements by tailoring procurement specifications, directing contracts to favored bidders, informing cartelists about outsider bids, or allowing adjustment of bids at the unsealing stage.[96] In some situations, procurement officials may even instigate or orchestrate the cartel. Bribery may therefore have a demand side ingredient (where the public officials solicit or extort pecuniary or other benefits) and/or a supply side component (where businesses offer bribes and/or other advantages to public officials).

Indeed, procurement processes provide particularly severe temptations for government officials to sell their office and are among those most prone to corrupt practices.[97] One commentator has observed that "[f]ew government activities create greater temptations or offer more opportunities for corruption than public sector procurement."[98] For example, incentives for corruption are exacerbated when poorly paid officials confront the opportunity for large financial gains or other rewards, while weak systems of public administration minimize the risk of detection or punishment. The large sums of money involved in government contracts makes the allure of skimming powerful: "The potential reward for a single contract directed to the right winner can exceed the legitimate lifetime salary earnings of decision-maker."[99] In addition where a culture of corruption is perceived to exist, all bidders may offer bribes even if they would be better off without corruption.[100] Tenderers may feel compelled to do so out of fear that, if they do not, they will be bound to lose a contract.

D. Harm Caused

1. Collusion

Successful cartels result in higher prices, deadweight loss, productive inefficiency, and dynamic harm from reduced incentives to innovate. The costs of forming and enforcing a cartel also reduce consumer welfare.[101] Further, bid rigging in public procurement wastes public funds, diminishes public confidence in, and the benefits, of the competitive process, and denies citizens, especially the disadvantaged, improvements in vital social services.[102] It may also be "detrimental for democracy

(Cheltenham: Edward Elgar Publishing, 2011); D Gambetta and P Reuter, 'Conspiracy among the many: the mafia in legitimate industries' (1995), in NG Fielding, A Clarke and R Witt (*eds*), *The Economic Dimension of Crime* (Macmillan Press Ltd, 2000) (comparing government officials with family members policing organised crime in Sicily and New York).

[96] A Ingraham, 'A test for collusion between a bidder and an auctioneer in sealed-bid auctions' (2005) 4(1) *Contributions in Economic Analysis and Policy* (referring to a case involving New York City School Construction Authority auctions).

[97] Anderson, Müller and Kovacic, note 19.

[98] Transparency International, 'Curbing corruption in public procurement: a practical guide' (2014), 8, available at http://files.transparency.org/content/download/1438/10750/file/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf.

[99] D Strombom, 'Corruption in Procurement' (1998) *Economic Perspectives* 3(5), 22-26; See also e.g., Søreide, note 100. But see Wakui, note 46, 2-030 (procurement agents are also sometimes motivated by a desire to favour local suppliers (and grow the regional economy), to ensure continuity, reward suppliers with good reputation or past performance and to ensure high quality of performance; so private financial interest may not be sole/ major reason for officials' involvement).

[100] T Søreide 'Corruption in public procurement: Causes, consequences and cures' (2002) Chr. Michelsen Institute – CMI Report R 2002:1, 33 and also note 16 and text.

[101] M Monti, 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behavior?' 3rd Nordic Competition Policy Conference, Stockholm, 11-12 Sept. 2000.

[102] OECD, 'Competition and Procurement — Key Findings' (2011), 10.

and sound public governance" and inhibit "investment and economic development. In this way, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement."[103]

Although assessing cartel harm precisely is not easy, a paper focussing on bid rigging in Japan, suggests that procurers paid sixteen to thirty-three percent more than they would have paid in a competitive bid process.[104] A report published by the WBG in 2011[105] investigating misconduct in WBG funded road projects, provides evidence that bid rigging in procurement markets leads to sharply inflated prices[106] and/or reductions in quality or safety of products and services provided.[107] Further, it documents examples of bid rigging which reportedly increased prices in Korea, the Netherlands, the Philippines, Romania, Tanzania, Turkey, and the U.S., by up to sixty percent in some cases[108]

More generally, some competition agencies estimate that cartels charge at least ten percent over the competitive price.[109] A number of empirical studies suggest, however, that this figure is conservative and cartels "lead to prices well in excess of 10 per[]cent, and sometimes in excess of 20 per[]cent, of competitive levels."[110] In his studies of U.S. cartel decisions, John Connor concludes that the median cartel overcharge is closer to twenty-five percent.[111] Although for the reasons described above, bid rigging conspiracies are often considered to be especially harmful, their economic harm resembles that of other cartel activity.[112] It may be, however, that they occur more frequently and tend to last longer.[113]

---

[103] Ibid.

[104] See J McMillan, '*Dango*: Japan's Price Fixing Conspiracies' (1991) *Economics & Politics* 3(3). See also e.g., M. Nihashi, T Saijo, and M Une, 'The Outsider and Sunk Cost Effects on 'Dango' in Public Procurement Bidding: An Experimental Analysis' (2000) Discussion Paper No. 514, Osaka University.

[105] WBG, note 32.

[106] *Ibid*, 2 ('In the Cambodia Provincial Rural Infrastructure Project, collusion sharply inflated construction costs').

[107] *Ibid*, 2 ('In Indonesia, the use of substandard construction materials reduced the useful life of a road and damaged the vehicles using it ... INT also saw contractors fraudulently failing to comply with such essential safety features as lane markings, resulting in a sharply increased risk of accidents.')

[108] Ibid.

[109] OECD, 'Guide for helping competition authorities assess the expected impact of their activities' (2014), available at http://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf. The EU Commission does not provide a formal analysis of how much higher prices were paid during a cartel in its decisions but e.g., in *Preinsulated Pipes*, note 23, there was a suggestion that the cartel had inflated prices in Denmark by 15-20%. According to the CMA, evidence suggests that cartels — including bid-rigging –lead to overcharges of up to 20%, see CMA, 'Press Release – Procurement e-learning module targets bid-rigging cheats' (2016), available at https://www.gov.uk/government/news/procurement-tool-targets-bid-rigging-cheats.

[110] LM Froeb, RA Koyak and GJ Werden, 'What is the effect of bid rigging on prices' (1993) 42(4) *Economics Letters* 419.

[111] See e.g., See e.g., JM Connor, *Price-Fixing Overcharges*: Revised 3rd Edition, (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780 (study of more than 700 economic studies and judicial decisions (and 2,041 quantitative estimates of overcharges), estimating a long-run median overcharge of 23% for all cartels, but with 25% lower mark-ups in bid rigging cases); JM Connor and RH Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 *Tulane Law Review* 513 and MC Levenstein and VY Suslow, 'What determines cartel success? (2006) *Journal of Economic Literature*, Vol 44, No.1.

[112] See e.g., Connor, *ibid*; but see Froeb, Koyak and Werden, note 110 (bid rigging of frozen seafood contracts raised prices by 23.1%) and Anderson and Kovacic, note 73, 71 (estimating that bid rigging overcharges add 20-30% to the cost of public contracting).

[113] See e.g., M Hellwig and K Hüschelrath, 'Cartel Cases and the Cartel Enforcement Process in the European Union 2001-2015: A Quantitative Assessment' (2017) 62(2) *Antitrust Bulletin* 400, J Zimmerman and J Connor, 'Determinants of Cartel Duration: A Cross-Sectional Study of Modern Private International Cartels' (2005) Working Paper, West Lafayette, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158577, and R Abrantes-Metz, J Connor and A Metz, 'The Determinants of Cartel Duration' (2013), Working Paper, Purdue University, West Lafayette.

If bid riggers can set prices at approximately twenty percent above competitive prices, reducing the volume of bid rigging, even by a small percentage, can yield significant savings to the public purse and ensure better quality work and the provision of more and improved public services.[114] There is, consequently, an attractive rate of return to be had from expanded antitrust enforcement work in this sphere.

2. Corruption

The cost and incidence of corruption[115] is, like cartel behavior, difficult to identify[116] and measure because of its hidden nature.[117] Further, it is hard to create robust corruption indicators. Those utilized tend to be derived from, for example, surveys of stakeholder attitudes and perceptions, reviews of institutional features controlling corruption, and/or audits and investigations of individual cases.[118]

Nonetheless, studies draw attention to a correlation between the level of corruption, competitiveness, economic development, and growth[119]—"a high level of corruption has a negative impact on economic development"[120] especially because it leads to political instability—and between corruption, inequality, and populism.[121] More specifically, research suggests that procurement-related bribery: squanders resources that the government otherwise could invest productively in public goods, services, infrastructure, and social services (especially in education and healthcare) by increasing the cost of public procurement projects and draining public funds; undermines the effectiveness of procurement systems in selecting the most efficient contractor; hinders the efficient allocation of resources and reduces innovation incentives; curbs productivity, economic growth, and development; discourages foreign investment; lowers the quality of procured goods, services, and infrastructure and leads to corrupt strategies during contract implementation; leads to the implementation of unnecessary contracts; contributes to the creation of unequal societies and higher levels of organized crime; weakens the institutional foundations on which economic growth depends and leads to the capture of state institutions by private firms; distorts the rule of law and undermines the reputation, credibility of and

[114] Anderson and Kovacic, note 73.

[115] OECD, 'OECD Business and Finance Outlook 2017' (2017), 2.10 ('Bribery and corruption are vast global industries'), J Svensson, 'Eight questions about corruption' (2005) 19(3) *Journal of Economic Perspectives* 19, 25-26 (corruption is driven by a country's wealth, its culture, whether citizens have a voice in a democratic process and good governance structures, such as freedom of the press).

[116] R Burguet and Y-K Che, 'Competitive Procurement with Corruption' (2004) 35(1) *The RAND Journal of Economics* 50.

[117] And because of the variety of forms it takes, see Svensson, note 115, 21.

[118] 'The two most widely used attitude/perception surveys are the World Bank's Control of Corruption […] and Transparency International's Corruption Perceptions Index […] Both of these have received extensive criticism […] ' M Fazekas and G Kocsis, 'Uncovering High-Level Corruption: Cross-National Corruption Proxies Using Government Contracting Data' Working Paper series: GTI-WP/2015:02 (2015) 4-5, available at http://www.govtransparency.eu/wp-content/uploads/2015/11/GTI_WP2015_2_Fazekas_Kocsis_151015.pdf. See also Svensson note 115.

[119] See e.g. RP Alford, 'A Broken Windows Theory of International Corruption' (2012) 73 *Ohio St. L J* 1253 (2012); S-J Wei, 'How Taxing is Corruption on International Investors' 82 *Rev. Econ. & Stat*. 1, 10 (2000); JG Lambsdorff, 'How Corruption Affects Persistent Capital Flows' (2003) 4 *ECON. GOVERNANCE* 229, 230; S Gupta et al., 'Corruption and the Provision of Health Care and Education Services' in AK Jain (ed) *The Political Economy of Corruption*, (2001) 111, 115-119; PM Emerson, 'Corruption, Competition and Democracy' (2006) 81 J. *Dev. Econ*. 193, 208, 211, R Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 2003).

[120] R Fisman and R Gatti, 'Bargaining for bribes: the role of institutions' in Susan Rose-Ackerman (ed), *International Handbook on the economics of corruption* (Edward Elgar Publishing, Cheltenham, 2006), 127. See also Svensson, note 115.

[121] See Transparency International, note 98.

trust in government which threatens democracy; and lowers voter turnout in elections.[122]

Older work estimated that the volume of bribes changing hands for public sector procurement was approximately $200 billion per year (2004);[123] three percent of world GDP, and 3.5 percent of world procurement spending has been paid in bribes in developing and developed economies each year; sixty percent of companies admit to paying bribes;[124] and the cost of bribery in procurement auctions amount to twelve percent.[125] Further, an OECD study documents significant savings (sometimes of up to nearly fifty percent) in certain procurement costs in some countries following the introduction, or improvement, of transparency and procurement procedures,[126] and studies prepared for the European Commission have found substantial savings following implementation of the EU Public Procurement Directives.[127]

More recently, it has been estimated that between ten and thirty percent of the investment in publicly funded construction projects may be lost through mismanagement and corruption.[128] A 2016 European Parliamentary research report assessed the cost of corruption risk in public procurement in the EU to be €5

[122] See e.g., note 9, Burguet and Che, note 116, Søreide, note 100, Boehm & Olaya, note 27, 439, V Tanzi, 'Corruption around the world' (1998) IMF Staff Papers Vol 45 No. 4 (December 1998), P Mauro, 'Corruption and Growth' (1995) The Quarterly Journal of Economics, August 1995, PH Mo, 'Corruption and Economic Growth' (2001) 29 *Journal of Comparative Economics* 66-69, OECD, Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development (2015), available at http://www.oecd.org/publications/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development-9789264230781-en.htm, JG Lambsdorff, 'Causes and consequences of corruption: what do we know from a cross-section of countries?' in S Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar, Cheltenham, 2016), 3 (reviewing investigations suggesting that corruption lowers GDP growth, robust empirical findings that foreign investments are significantly deterred by corruption and evidence that corruption is also caused by inequality), M Habib & L Zurawicki, 'Corruption and Foreign Direct Investment' (2002) *Journal of International Business Studies* 291, and OECD, Business and Finance Outlook 2017, note 116, 2.10 (noting that less corrupt countries are likely to invest more abroad and so to benefit via foreign sales and scale economics), OECD, Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development (2015), note 121, and S Richey, 'The Impact of Corruption on Social Trust' (2010) 38 *AM. POL. RES*. 676 and remarks of Acting Principal Deputy Assistant Attorney General TN McFadden before the American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfaddenspeaks-american.

[123] Y Lengwiler and E Wolfstetter, 'Corruption in Procurement Auctions' in N Dimitri, G Piga and G Spagnolo (*eds*), *Handbook of Procurement* (Cambridge University Press, 2006). See also e.g., E Auriol, 'Corruption in Procurement and Public Purchase' (2005) ('According to an ongoing research at the World Bank, the total amount of bribery for public procurement can hence be estimated in the vicinity of USD 200 billion per year. That is, approximately 3.5% of the world procurement spending. Assuming this figure is accurate, it represents only one part of the overall cost of corruption because corruption usually involves allocative inefficiency on top of the bribes'); and KN Schefer and MG Woldesenbet, 'The Revised Agreement on Government Procurement and Corruption' (2013) *Journal of World Trade* 47 No.5, 1131 (estimating the total amount of bribes globally to be $830 billion-1.5 trillion per annum or 2-4% of GDP).

[124] In a study conducted by TI in 2002 to build its second Bribe Payers Index of leading exporting countries, 60% of the respondents claimed that corruption in international business, especially in public works contracts, construction and arms and defence industries, had either increased or remained the same, see www.transparency.org/surveys/index.html#bpi.

[125] See World Bank, World Business Environment Study 2000 (WBES 2000).

[126] OECD, 'Transparency in Government Procurement: The Benefits of Efficient Governance', TD/TC/WP.(2002)31/Rev2/14, April 2003 (e.g., Colombia, Guatemala, Bangladesh, Nicaragua and Pakistan).

[127] See https://ec.europa.eu/growth/single-market/public-procurement/studies-networks_en.

[128] See e.g., Construction Sector Transparency Initiative (CoST), Press Release, 22 October 2012 (annual losses from mismanagement, inefficiency and corruption in global construction could amount to $2.5 trillion annually by 2020) and J Wells, 'Corruption and Collusion in Construction: A view from the industry' in T Søreide and A Williams (eds) *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing, 2014).

billion,[129] while an OECD report[130] estimated that individuals and companies pay bribes in the vicinity of $2-2.6 trillion (five percent of global GDP) each year. Transparency International also estimates that roughly $2 trillion disappears annually from procurement budgets and that "few examples of corruption cause greater damage to the public purse and harm public interests to such a grave extent."[131] Others have calculated that systemic corruption can add twenty to twenty-five percent to the cost of government procurement or roughly $200 billion per year[132] and that the bribes paid per annum amounts to "more than half of the global economy's needs for productivity-enhancing infrastructure investment to 2030. Nor do bribes help growth in host countries where foreign investment is concerned, but instead money disappears into shelf companies and foreign bank account of corrupt politicians and officials."[133]

In addition, the OECD's Foreign Bribery Report for 2014 indicates that nearly sixty percent of foreign bribery relates to public procurement (especially in the extractive, construction, transportation and storage, and information and communication sectors) and in a majority of cases senior corporate management knew of the bribery, dispelling the idea that the conduct was merely that of a proverbial rogue low-level employee. This is partly perhaps because of the close interaction between the public and the private sectors and the size of the financial flows public procurement generates. The OECD's Business and Finance Outlook for 2017 observes that "[o]btaining and retaining government contracts is, by far, the most common motivation for financial intermediaries" bribes to public officials (it was a motivating factor in seventy-three percent of the cases). The desire to obtain or retain government business was the dominant motivation for foreign bribery in all sectors, and even more so in the financial sector. One judge from the Pole Financier reportedly stated there are few cases of large-scale collusion in procurement where corruption is absent; it is frequently necessary to buy the official's silence or to achieve strategic complementarities.[134]

II. Strengthening Conventional Tools to Address Supplier Collusion and Corruption in Public Procurement Markets

The high risk of bid rigging and bribery in public procurement, and their resulting harm, underlines the need for clear rules outlawing such conduct and effective enforcement of such rules.

A. Putting the Requisite Frameworks in Place

1. Competition Law

More than 130 jurisdictions around the world now have competition systems in place,[135] which may be enforced publicly by competition agencies and privately by

[129] Study by European Parliamentary Research Service, note 10, 50 (estimating that 10-30% of publicly funded construction projects in EU Member States is lost due to corruption).
[130] OECD, 'Business and Finance Outlook 2017', 2.10 (note 116). See, CleanGovBiz, 'The rationale for fighting corruption' (2014) available at http://www.oecd.org/cleangovbiz/49693613.pdf.
[131] Transparency International, note 98.
[132] KV Thai, 'International Public Procurement: Concepts and Practices' in KV Thai (ed) *International Handbook of Public Procurement* (CRC Press, 2009), relying on United Nations Development Programme (UNDP), 'Capacity Development Practice Note' (2006) and D Kaufmann, 'The Costs of Corruption' (2004).
[133] OECD, 'Business and Finance Outlook 2017', 2.10 (note 116), 96
[134] Lambert-Mogiliansky, note 95.
[135] WE Kovacic and M Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Systems', 79 *Journal of Law and Contemporary Problems* (2016) at 85.

individuals harmed by violations. Most of these, to prevent firms from distorting competition, stand upon three main substantive pillars, one of which prohibits restrictive agreements and cartel activity, including bid rigging or collusive tendering. Indeed, as consensus over the economic harm caused by cartels has emerged, international initiatives[136] and greater multilateral and bilateral cooperation between international competition authorities have contributed significantly to the dramatic shift in perceptions of, and attitudes towards, cartels and to the development of an international fight against them. A "truly global effort against hardcore cartels"[137] has emerged.

As a result, modern antitrust systems clearly prohibit cartel activity, summarily condemning it through the application of a per se rule or a strong presumption of illegality.[138] Rather than the question of how substantive analysis should be conducted, therefore, the core issues in the context of cartels have become how can cartel activity be combatted, detected, deterred, and sanctioned?

2. National and International Anti-Corruption Instruments

Corruption in public procurement markets is generally targeted by national criminal justice rules, legislation on ethics in public office, and/or by public procurement regulations.[139] An important, early example of a national instrument with far-reaching international application is the U.S. Foreign Corrupt Practices Act ("FCPA"), signed into law by President Jimmy Carter in 1977. This legislation was enacted for the purpose of making it unlawful for U.S. persons and certain foreign issuers of securities, to make payments to foreign government officials to assist in obtaining or retaining business. Following its 1998 amendment, the anti-bribery provisions of the FCPA also apply to foreign firms, persons, and corrupt payments taking place within the territory of the United States.[140]

Increasingly, corruption is also the subject of international instruments and guidelines.[141] As has been the case for cartels, recent years have brought a global change in thinking towards, and a reshaping of, many national anti-corruption laws; a

---

[136] See e.g., OECD, ibid, OECD, 'Fighting Hard Core Cartels—Harm, Effective Sanctions and Leniency Programmes' (2002), available at https://www.oecd.org/competition/cartels/1841891.pdf, and OECD, 'Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation' (2005), available at https://www.oecd.org/competition/cartels/35863307.pdf. The GPA also promotes competition (and the eradication of collusion) in procurement markets in a number of ways.

[137] ICN Cartels Working Group 'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties'(2005), 5, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf

[138] E.g., in the U.S. cartel arrangements are considered to be illegal per se under section 1 of the Sherman Act of 1890; see e.g. *Northern Pac R Co v United States* 356 US 1, 5 (1958). Similarly, in the EU, cartels generally violate Art 101 TFEU — they automatically infringe Article 101(1) (restrict competition by object) — and, being naked, are incapable of satisfying the conditions for the legal exception set out in Art 101(3), see A Jones and W Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 62(2) Antitrust Bulletin 254.).

[139] SL Schooner, Government procurement and corruption control: lessons from international experience, and implications for institution and human capacity building (Presentation to the WTO Advanced Global Workshop on Government Procurement, Geneva, 10-14 September 2018.

[140] The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. Available at https://www.justice.gov/criminal-fraud/statutes-regulations. Petrobas (see note 33 and text) has agreed to pay $853.2 million to settle charges relating to bribing politicians and seeking to conceal payments in breach of the Act, see Reuters, 'Brazil's Petrobas to Pay $853 million fine in U.S. Car Wash Probe' 28 September 2018.

[141] See, United Nations Office on Drugs and Crime, 'Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption' (2013). Available at https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf.

general acceptance of the economic and other harms caused by corruption; and a multi-pronged strategy for combatting it, including harmonizing regulation and the tying of conditions to infrastructure loans by MDBs.[142] Of particular importance has been the United Nations Convention Against Corruption ("UNCAC"), which seeks to prevent and combat corruption and is designed to bring harmonization across the numerous signatories and ratifying jurisdictions.[143] It tackles demand and supply side corruption issues, and specifically applies to corruption within procurement (especially Article 9) requiring procurement systems to be based on "transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption."[144] UNCAC requires Member States to establish (or in some cases to consider establishing) criminal offenses against a wide range of acts of corruption, including domestic and foreign bribery and embezzlement of public funds.[145] Implementation is monitored through the Conference of States Parties, a peer-review process and a country-based database is kept up to date on the United Nations Office on Drugs and Crime ("UNODC") website.[146]

UNCAC also contains provisions on international cooperation, asset recovery, and a chapter on preventive policies, including the establishment of anti-corruption bodies, the introduction of transparent recruitment processes, codes of conduct for public servants, and the promotion of transparency and accountability in matters of public finance.

The OECD Convention on Bribery of Foreign Officials also promotes the adoption of anti-bribery laws by member nations[147] and the OECD has issued Recommendations on Combatting Bribery and promulgated a set of Principles for Integrity in Public Procurement in 2009, designed to enhance integrity throughout the entire procurement process. Many international trade instruments also require signatories to ensure the procurement process is free of corruption and conflicts of interest.[148]

Numerous jurisdictions have now enacted or revamped bribery or anti-corruption laws to meet international standards, obligations, and/or the UNCAC requirements. The UK's Bribery Act 2010, for example, overhauled ancient laws governing bribery to meet concerns about their effectiveness. It criminalizes bribery (both the offering and receiving of bribes) in both the public and private sector, bribery concerning foreign public officials and officials of public international organizations as well as the failure to prevent bribes from being paid on an organization's behalf. It also contains effective enforcement mechanisms. Like a number of jurisdictions, it also provides that a person convicted for specified bribery or corruption offenses may be

[142] See e.g., I Carr and O Outhwaite, 'Investigating the Impact of Anti-Corruption Strategies on International Business : An Interim Report' (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410642.
[143] See, for a definitive treatment in relation to the subject of public procurement, United Nations Office on Drugs and Crime, note 8.
[144] UNCAC, Art 9(1).
[145] *Ibid*, Chapter 3.
[146] See also e.g., E Bao and K Hall, 'Peer Review and Global Anti-Corruption Conventions: Context, Theory and Practice' August 1, 2017, available at https://ssrn.com/abstract=3025230.
[147] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (entered into force 15 February 1999).
[148] See the World Trade Organization Agreement on Government Procurement, text available at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

debarred or excluded from bidding for public sector contracts and/or have existing contracts terminated.[149]

B. Enhancing Enforcement

In order to deter bid rigging and corruption in public procurement, there must be, in addition to clear rules against them, a high risk of the illegal conduct being uncovered[150] and prohibited and effective sanctions being imposed.

1. Detection of Cartels

Companies operating cartels are generally aware of their illegality. Bid rigging tends therefore to be operated in secrecy and arranged to simulate normal market behaviour, creating a challenge for enforcers to adduce sufficient evidence to piece together, and support, a robust and convincing finding of infringement.[151]

To uncover such conduct competition authorities must therefore be able to collect evidence through a range of measures, including use of both reactive detection techniques (through customer, competitor, or employee complaints and reporting and whistle-blowing mechanisms) and proactive ones (through intelligence, screening, and monitoring of bids). In many jurisdictions, there is scope to improve detection methods through adopting or supplementing the tools described below.

a. Complaints, Leniency, and Whistleblowing

Many competition and criminal enforcement agencies obtain information or evidence of infringements from complainants (such as employees, purchasers, procurement officers, or the general public), leniency or amnesty applicants, and even through broader whistleblowing or bounty-hunting mechanisms involving paying informers for information.

More than fifty competition authorities encourage undertakings to cooperate with them prior to, or during, cartel investigations through the operation of "leniency" regimes.[152] Authorities operating such programs believe that the public interest in terminating and eradicating cartels outweighs the public interest in punishing the violators who are granted full or partial leniency or amnesty.[153] The leniency regime in the U.S., for example, seems to have initially been successful because: it makes a genuinely good offer—complete immunity from a big penalty (both fines and/or imprisonment) for the first cartel member to come forward; and it generates and

---

[149] See section II:C.

[150] Becker's research on major felonies in the U.S. suggests that the probability of detection had a greater impact on the commission of such offences than the level of punishment, G Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169, see note 218 and text. Arguably, competition agencies could prioritise further resources on detecting these cartels. For example, out of 113 cartels uncovered by the European Commission between 2001-2015, only 4 of these related to bid rigging, Hellwig and Hüschelrath, note 113. But see the remarks of Makan Delrahim, Assistant Attorney General (U.S. DOJ) at the American Bar Association Antitrust Section Fall Forum, confirming the Antitrust Division's commitment to effective antitrust enforcement against bid rigging which cheats the US Government and American taxpayer, 15 November 2018, https://www.justice.gov/opa/speech/assistantattorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

[151] See note 90 and M. Monti, 'Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?' 3rd Nordic Competition Policy Conference, Stockholm, 11–12 September 2000. The standard of proof will vary from jurisdiction to jurisdiction and depend in particular on whether the prohibition is a civil or criminal one.

[152] See C Beaton-Wells and C Tan, 'Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion' (Hart Publishing, 2015) and Box 1, e.g. as part of the Task Force investigating Operation Car Wash, at least seven leniency agreements have been concluded by CADE in exchange for confidential information.

[153] See OECD, 'Report on Leniency Programs to Fight Hard Core Cartels' (2001), and ICN, note 32.

exploits the insecure nature of cartels and a nervousness that other cartel members may well be tempted by the same offer and win the race to obtain leniency. This ploy is reinforced by the knowledge that only the first whistle-blower gets the big prize. "It is thus reminiscent of the classical 'Prisoner's Dilemma'—whether to play ball now, and quickly, or risk losing altogether. The strategy thus promotes within the cartel the sense of a higher risk, first, that somebody will blow the whistle and, secondly and consequently, of the other members being convicted. This serves to outweigh the previous benefits of solidarity, that is, of big profit from the offence plus a low risk of detection and conviction."[154]

Although leniency regimes have undoubtedly proved to be an important tool, there is a growing view that such regimes have their limits and antitrust authorities should not over-rely on them.[155] In particular, they may be most successful where a cartel is anyway close to being discovered or breaking up[156] and less effective in situations (such as public procurement) where a cartel is profitable and stable[157]; they may be used by some larger multi-product firms operating a number of cartels as a technique to prevent cheating and deviant conduct by smaller cartel members[158]; the increasing risk of individual sanctions, criminal prosecution, and/or private damages actions may be making persons more wary of submitting leniency applications; and to be successful there must be a good track record of enforcement following use of other detection techniques (without which, there will, of course, be no incentive to seek amnesty).[159] Thus "theory and practical experience seem to suggest that reliance on amnesty/leniency programs alone may produce a sub-optimal probability of cartel detection, which in turn may have a negative effect on deterrence."[160]

As a result, competition enforcement agencies might wish to collect evidence from a broader range of complainants, including, competitors, customers, employees, or other whistleblowers or informants capable of delivering credible evidence. In the EU, for example, the Commission has developed a whistleblowing tool encouraging any individual to provide the Commission with information about cartel behavior or other anticompetitive business practices.[161] In the UK, the Competition and Markets Authority ("CMA") offers, in exceptional circumstances, financial rewards of up to £100,000 to those who offer information about cartel activity.[162] More broadly, the U.S. Federal Civil False Claims Act, known as the *qui tam* statute, offers monetary rewards for exposure of fraud that impacts on the government.[163] Further, Leniency Plus programs, where leniency applicants can get additional credit in one cartel investigation for reporting involvement in another, can be effective especially where

[154] Harding and Joshua, note 63, 235.
[155] Mena-Labarthe, note 190.
[156] JE Harrington, 'Detecting Cartels' in P Buccirossi (*eds*), *Handbook of Antitrust Economics* (MIT Press, 2008).
[157] Heimler, note 69 (Public procurement markets differ from all others because quantities do not adjust with prices but are fixed by the bidding authority. As a result, there is a high incentive for organizing cartels that are quite stable because there are no lasting benefits for cheaters and few incentives to apply for leniency.)
[158] *Marshall*, note 84.
[159] DC Klawiter, 'Enhancing International Cartel Enforcement – Some Modest Suggestions' *Competition Policy International Antitrust Chronicle* September 2011 and DC Klawiter, 'Conspiracy Screens: Practical Defense Perspective' *CompetitionComptition Policy International Antitrust Chronicle* March 2012, Hüschelrath, note 171.
[160] OECD, note 187, see note 165 and text..
[161] See European Commission, 'Cartels – Overview' (Undated), available at http://ec.europa.eu/competition/cartels/overview/index_en.html.
[162] See CMA, 'Cartels – Informant Rewards Policy' (2014), available at https://www.gov.uk/government/publications/cartels-informant-rewards-policy.
[163] See A Dyck, A Morse and L Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) LXV *Journal of Finance* 2213.

bid rigging has been uncovered and where participants may be involved in repeated infringements. In the Brazilian Car Wash case,[164] for example, contractors that were not eligible for leniency in the Petrobas investigation brought new cases to the attention of the authorities in order to obtain leniency in the new cases as well as a discount in the original investigation. These led to several new bid rigging investigations being launched.

In addition, it is crucial that agencies themselves have the ability to detect and expose illegal conduct. Proactive detection measures not only help uncover evidence but also produce "positive externalities in terms of improving the efficacy of amnesty/leniency programmes"[165]; they thus allow agencies to detect and prosecute conduct which would otherwise remain stable under a stand-alone amnesty or leniency regime.[166]

b. Indicators of Bid Rigging, Monitoring, and Screening Tools[167]

Screens (both structural and behavioral) can provide important prima facie evidence that bid rigging may have occurred.[168] A burgeoning literature explores how screens, especially empirical screens based on economic and statistical analysis of variable data, including quantitative techniques (such as price variance analysis),[169] can be applied to flag possible unlawful cartel behavior[170] and demonstrates that screens are becoming increasingly important in the detection of conspiracies and manipulations.[171] Because, however, they typically just flag indicators of possible collusion, and cannot distinguish explicit from tacit collusion, they ordinarily provide just one piece of evidence on which an investigation, or evidence of collusion, can be founded.[172]

Public contract tenders are particularly suitable for the application of screening tools as the identification of a public tender market facilitates structural assessment

---

[164] See note 33 and text.
[165] OECD, note 187, see note 160 and text..
[166] Ibid.
[167] See section II.B for a separate discussion on the application of screening tools and data to advance corruption control.
[168] See e.g., P Bajari and G Summers, 'Detecting Collusion in Procurement Auctions' [2002] 70 *Antitrust Law Journal* 143, K Hüschelrath and T Veith, 'Cartel Detection in Procurement Markets' Discussion Paper No 11-066, Zentrum für Europäische Wirtschaftsforschung GmbH (monitoring procurement markets through screening tools has the potential to yield substantial cost reductions).
[169] See e.g., R Abrantes-Metz, L Froeb, J Geweke and CT Taylor, 'A variance screen for collusion' (2006) 4(3) *International Journal of Industrial Organization* 467-486; F Espito and M Ferrero, 'Variance Screens for Detecting Collusion: An Application to Two Cartel Cases in Italy' (2006), Italian Competition Authority, Working Paper.
[170] RM Abrantes-Metz, note 23,'Proactive *vs* Reactive Anti-Cartel Policy: The Role of Empirical Screens' (2013), 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740 ('A screen is a statistical test based on an econometric model and a theory of the alleged illegal behavior designed to identify whether manipulation, collusion, fraud or any other type of cheating may exist in a particular market, who may be involved, and how long it may have lasted. Screens use commonly available data such as prices, bids, quotes, spreads, market shares, volumes, and other data to identify patterns that are anomalous or highly improbable.')
[171] Abrantes-Metz, note 170 (noting that use of screens have become increasingly popular in the antitrust context and were successfully used to identify the LIBOR conspiracy and manipulation). See also RM Abrantes-Metz and P Bajari, 'The Use and Spread of Screens: Screens for Conspiracies and their Multiple Applications' (2012) 8 *Competition Policy International* 177, K Hüschelrath, 'How Are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements' (2010) 1 *Journal of European Competition Law and Practice* 522, K Hüschelrath, 'Economic Approaches to Fight Bid Rigging' (2013) 4(2) *Journal of European Competition Law & Practice* 185, ME Podkolzina, 'Collusion Detection in Procurement Auctions' Working Papers, Series Economics, BRP 25/EC/2013. Screens can also be used as means to strengthen compliance and audit programs, as a helpful tool for due diligence in M&A activities, during litigation and in quantifying damage claims in private actions, see e.g., DC Klawiter, 'Conspiracy Screens', note 159.
[172] Hüschelrath, note 171, Hüschelrath and Veith, note 168 and Porter and Zona, note 74.

and the data generated by the process facilitates subsequent behavioral assessments.[173] Examination of susceptible markets on the basis of structural factors (see Part I.B),[174] bids, bidding patterns, suspicious behavioral patterns, and a periodic review of past tender information are therefore helpful. In particular, the following "suspicious signs" are recognized as important initial indicators of possible collusion:

- Fewer firms than anticipated bid, or bidders unexpectedly withdraw;
- The same suppliers submit bids and each company seems to take a turn being the successful bidder, or the same company always wins a particular procurement;
- Different bidders have the same contact details;
- There are indications that bids were prepared together: for example, two or more proposals are submitted at the same time and/or with similar handwriting, typeface, paper, calculations, or amendments or with identical errors,[175] or emanate from a common web or IP address[176];
- Unusual or suspicious bidding patterns,[177] when viewed over time or when compared with other bids[178] or prior bids on different tenders and/or where they involve identical prices or costs or persistently or suddenly high prices significantly above list prices or internal agency cost estimates;
- Bid prices drop whenever a new or infrequent bidder submits a bid;
- A winner does not take the contract, or winners routinely subcontract part of the tender to another (losing) bidder;
- There is evidence of communication between bidders, especially shortly before the tender deadline, or of statements indicating knowledge of competitors pricing or price schedules or other bid rigging activity.

Some jurisdictions are now using data on market structure and/or data collected in the course of the bidding process (on tenders and bidders) to devise and run electronic tests to screen[179] for warning signs or red flags which warrant further

[173] See e.g., Hüschelrath, note 171, 187, OECD, note 187, OECD, Guidelines for Fighting Bid Rigging in Public Procurement (2009), Section B, OECD, Report on Fighting Bid Rigging, OECD Report on implementing the 2012 Recommendation (2016), US Department of Justice, 'Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look for' (Undated), available at www.usdoj.gov/atr/public/guidelines/211578.htm.

[174] See e.g., P Grout and S Sonderegger, 'Predicting Cartels', Office of Fair Trading *Economic Discussion Paper*, March 2005.

[175] E.g.,, in the US, in a Storm Damage Repair case (Guam) identical typos were spotted in cover letters and in an ice cream case, identical mistakes were made in bid forms, it was noted that the bids had been mailed at the same time from the same post office and the postage stamps had been ripped from the same roll, see Malaysian Competition Commission 'Bid Rigging : What You Need to Know and What You Need to Do', http://www.mycc.gov.my/sites/default/files/Session-2-Bid-Rigging-What-You-Need-to-Know-and-What-You-Need-to-Do1.pdf.

[176] Anderson, Müller and Kovacic, note 18.

[177] E.g. where there appears to be rotation or allocation of winning bids by time, geography, job description or product line etc.

[178] E.g., when identical, too close or far apart or where bids are exact percentages apart.

[179] Screens can also help firms to improve their corporate governance and find out about potentially infringing behavior. Firms which suspect that they are affected by anti-competitive behavior may also use screens to collate evidence and potentially file a complaint, OXERA, Hide and Seek: the Effective Use of Cartel Screens (2013), available at https://www.oxera.com/getmedia/210bc5bc-0cc9-40ea-8bc9-6c8b2406b485/Cartel-screens.pdf.aspx?ext=.pdf

investigation.[180] Some have warned that such tests can be costly and difficult to operate accurately.[181] They have nonetheless been successful in revealing first evidence of some of the largest conspiracies, manipulations and frauds uncovered to date, including Madoff's Ponzi Scheme, the LIBOR conspiracy,[182] and unlawful bid rigging. For example, the Korean Fair Trade Commission ("KFTC") systematically monitors public procurement through a Bid Rigging Indicator Analysis System ("BRIAS"), Colombia has devised a computer program,[183] Brazil has new technologies and a unit which analyzes procurement databases and identifies patterns of suspicious behavior ("Project Brain"),[184] and the UK's CMA introduced a new screening tool for procurers which it made available to the public in July 2017.[185] BRIAS, for example, automatically analyzes online public procurement data (which public procuring authorities are required to submit to it within thirty days of the tender award) and quantifies the likelihood of bid rigging, by assigning a score representing the statistical likelihood of collusion based on factors such as: the tendering method; the number of bidders, successful and failed bids; bid prices above the estimated price; and the price of the winning bid.[186] It enables the KFTC to analyze huge numbers of tenders each year using search criteria, on average it flags more than eighty tenders per year for investigation[187], and has increased the number of successful bid rigging prosecutions, including in the construction sector.[188]

Further, the Mexican competition authority following an informal complaint from the Mexican Social Security Institute ("IMSS") which had observed strange patterns in the procurement processes of various generic drugs, used empirical and behavioral screening of procurement databases before targeting and launching an investigation and collecting evidence that supported its hypothesis of collusion. Eventually, it issued a decision (which also relied on the screens[189]) and fined four pharmaceutical laboratories for eliminating competition through bid rigging in the market for human insulin (essential for the treatment of diabetes), and three other laboratories for coordinating bids in IMSS's public procurement of serums.[190] Similarly, in Switzerland, the Swiss competition authority uncovered bid rigging by regional road

[180] F Andrei and M Busu, 'Detecting Cartels through Analytical Methods'(2014) *Rom. Competition J*. 24 and the OECD held a workshop on cartel screening in January 2018, see http://www.oecd.org/daf/competition/workshop-on-cartel-screening-in-the-digital-era.htm.

[181] But see C Mena-Labarthe, 'Mexican Experience in Screens for Bid-Rigging' *Competition Policy International Antitrust Chronicle*, March 2012 (screens can be good but also can be costly wasting 'resources and never ending work to find a needle in a haystack where ultimately there is none').

[182] See note 171.

[183] In Chile the competition authority uses procurement data, some acquired through cooperation agreement with central purchasing body ChileCompra, to monitor tenders and perform screening exercises.

[184] See CADE's presentation 'Screening and data mining tools to detect cartels: Brazilian experience', made during the workshop on 'Cartel screening in the digital era' held by the OECD in Paris on 30 January 2018. Available at https://www.slideshare.net/OECD-DAF/cartel-screening-in-the-digital-era-cade-brazil-january-2018-oecd-workshop. At least one publicly known case has been opened using algorithms as an investigation device, see http://en.cade.gov.br/press-releases/cade2019s-general-superintendence-initiates-administrative-proceeding-to-investigate-a-cartel-in-the-market-of-orthoses-prostheses-and-special-medical-supplies.

[185] In June 2016, the CMA launched a bid-rigging awareness campaign and a free e-learning tool. This followed a survey in 2015 which revealed that 40% of businesses did not know that bid rigging was illegal. In July 2017 it produced a data analysis tool, https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool.

[186] For a discussion of BRIAS, see e.g., Brinker, note 32.

[187] OECD, 'Policy Roundtables: Ex Officio Cartel Investigations and the use of screens to detect cartels', 2013, available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

[188] OECD, Collusion and Corruption, note 7, 236-237.

[189] Most jurisdictions are cautious, however, about relying exclusively on economic evidence to establish collusion.

[190] January 2010, upheld by the Mexican Supreme Court of Justice (2015), see e.g., Mena-Labarthe, note 181.

construction companies after atypical price indices for new road construction in some regions in Switzerland (compared to other regions) were observed.[191] Brazilian and U.S. authorities[192] have also relied on screens to identify potential anticompetitive behavior in gasoline markets.[193]

Access to procurement data can therefore increase the ability of reporters, academics, consultants, market experts, procurers, and competition and other relevant agencies to screen for suspicious market behavior.

2. Modern Anti-corruption Techniques and Practices

Public procurement is generally complex, leaving considerable discretion to officials to choose between, and evaluate, multi-dimensional competing bids on the basis of price, quality, and other factors. It is therefore frequently difficult to detect corruption although red or orange flags may be raised where, for example, evidence indicates that: steps have been taken which narrow the pool of bidders;[194] bidders have been arbitrarily excluded or disqualified at the assessment stage; or there have been long delays in contract negotiations or post award order changes that, modify or lengthen the contract or increase the contract price.[195]

The emergence of new technology and data tools, however, have the potential of advancing corruption control. Data mining is now being used to audit public procurement in order to monitor when governments are issuing bids and to identify red flags, patterns of collusion, and false information. Moreover, data visualization is also being used to identify a corrupt intent in payments or transactions. For example: researchers at the Corruption Research Centre Budapest examine significant volumes of data sets of public procurement procedures from EU countries and search for abnormal patterns such as exceptionally short bidding periods or unusual outcomes, i.e. no competition for the winning bid, or bids repeatedly won by the same company[196]; and in Brazil the Public Spending Observatory crosschecks, through computer-assisted audit tracks, procurement expenditure with other government databases to identify atypical situations, such as conflicts of interest or personal relations between suppliers and public officials, inappropriate use of exemptions and waivers, substantial contractual amendments, suspicious patterns of bidding, or use of government payment cards, which warrant further investigation.[197] Other benefits of technology that lead to detection and prevention of corruption include the automation of processes that possibly eliminate the need for contracting officials, thus removing corruption opportunities from procurement operations.[198]

---

[191] Hüschelrath, note 171.

[192] See e.g., U.S. submission to OECD Roundtable: Competition in Road Fuel, DAF/COMP/WD(2013)45, available at https://www.oecd.org/competition/CompetitionInRoadFuel.pdf, 329

[193] See e.g., G Ragazzo, 'Screens in the Gas Retail Market: The Brazilian Experience' *Competition Policy International Antitrust Chronicle*, March 2012.

[194] E.g., inadequate advertising of the tender process, not operating an open tender process, the application of unreasonable procedures or tender criteria, M Fazekas, IJ Tóth and LP King, 'An Objective Corruption Risk Index Using Public Procurement Data' (2006) *European Journal on Criminal Policy and Research* 22(3), 369-397.

[195] Ibid

[196] World Economic Forum, '4 technologies helping us to fight corruption'. 18 April 2016. Available at https://www.weforum.org/agenda/2016/04/4-technologies-helping-us-to-fight-corruption/.

[197] OECD, 'OECD Integrity Review of Brazil – Managing Risks for a Cleaner Public Service' (2012), available at http://dx.doi.org/10.1787/9789264119321-en World Economic Forum, '4 technologies helping us to fight corruption'. 18 April 2016. Available at https://www.weforum.org/agenda/2016/04/4-technologies-helping-us-to-fight-corruption/.

[198] Ibid.

3. Advocacy, Training and Educating Business, and the Public

Outreach to the business[199] and wider community is also important to the successful creation of a procompetitive procurement system. Indeed, more could be done to encourage businesses to introduce competition and anti-corruption compliance programs[200] which are backed by audits, monitoring, reviews, and risk assessments to ensure that companies themselves are proactive about preventing and seeking out any illegal conduct (for example, these could be required as a condition for public contracting, see Section III.A). Like competition agencies and procurers, companies themselves can use screens[201] to identify the risk of malfeasance and to allow for targeted audits, more efficient monitoring of their own compliance regimes, and self-reporting of wrongdoing.

Transparency International has also devised an "Integrity Pact" to encourage companies to abstain from bribery, and to tackle the prisoner's dilemma by establishing a level playing field in the contracting process. It involves an agreement between the procurer and bidders that neither will pay, offer, accept, or demand bribes or collude so providing assurance to each bidder that their competitors will refrain from bribery, and that procurers will commit to preventing corruption by their officials. The pact incorporates sanctions for any violation of the agreement including: denial or loss of contract; forfeiture of the bid, performance bond or other security; liability for damages to the principal and the competing bidders; and debarment of the violator by the principal for an appropriate period of time. Integrity Pacts have been implemented in many countries, including India, Korea, Pakistan, Argentina, Mexico, Colombia, Austria, and Germany, and involve more than 300 contracts.[202]

Public education may also facilitate the building of public support for policies towards to counter bid rigging and bribery, and create a wider group of stakeholders vigilant for illegal conduct.[203] Transparency International, for example, stresses the importance of social accountability and the engagement of communities, social groups, and professional associations affected by public contracts. These mechanisms build trust in public procurement processes and ensure that such projects are monitored by those affected and reflect the public interest.[204]

Civil society groups can thus help identify and reduce corruption risks in government procurement by acting as independent monitors. This practice has been implemented in the Philippines and in Mexico, where such monitoring group is known as a "Social Witness." Civil society participation increases transparency by engaging the public more fully in the procurement process, which in turn enhances accountability by identifying corrupt actors and seeking sanctions against them.

4. The Role of Multilateral Development Banks

MDB loans are frequently used to fund public procurement projects. To prevent corruption undermining the realization of their development goals, MDBs have developed legal structures and processes that allow them to fulfill their fiduciary duties and to ensure that loans are used only for the purposes for which they are

[199] See note 185.
[200] See note 262.
[201] See note 171.
[202] See Transparency International, note 98.
[203] See also UNCAC, Art 13.
[204] See its Integrity Pacts Programme, https://www.transparency.org/programmes/overview/integritypacts.

granted. Many institutions now have integrity units ("INTs"), such as the WBG's Integrity Vice Presidency [205] or the European Bank for Reconstruction and Development ("EBRD") Legal Transition Program,[206] that provide advice to borrower countries on procurement reform and corruption prevention, investigate misconduct, and/or operate sanctions systems. This allows them to debar entities found to have engaged in misconduct from bidding on future MDB-financed contracts. Indeed, clauses relating to sanctionable practices and procurement policies now form part of the standard financing and transaction documents executed by MDBs; typically such documents require local procurement offices to include equivalent terms in their procurement documents.[207] MDBs also prepare reports and can provide information to national law enforcement authorities in the country (or countries) where misconduct occurs.

The WBG was one of the first MDBs to take action to counter corruption[208] and it now operates a two tiered administrative system of investigation and decision-taking with an expansive ambit of sanctionable practices and sanctionable entities.[209] Using these powers between 2007 and 2015, 368 entities were debarred or otherwise sanctioned by the WBG, and 359 more faced temporary suspensions.[210] Most MDBs now operate similar systems, with decision-making bodies embedded within the MDBs, decisions based on the preponderance of evidence standard,[211] appeals to an appellate authority, and harmonized sanctioning procedures and policies.[212] In particular, the Uniform Framework for Preventing and Combating Fraud and Corruption[213] sets out common guidelines for the conduct of sanction investigations and establishes a portfolio of sanctions available to MDBs, permanent or conditional

---

[205] INTs are independent units within the Bank which investigate sanctionable practices in relation to Bank financed projects and monitor compliance by sanctioned entities; see The World Bank, 'Integrity Vice Presidency' available at http://www.worldbank.org/en/about/unit/integrity-vice-presidency; and T Dickinson, C Lammers and M Heavener *The Increasing Prominence Of World Bank Sanctions*, www.law360.com.

[206] The EBRD, available at https://www.ebrd.com/cs/Satellite?c=Content&cid=1395238408457&d=Mobile&pagename=EBRD%2FContent%2FContentLayout.

[207] See, e.g. contracts awarded by the IDB, http://www.iadb.org/en/projects/awarded-contracts,8181.html and WBG, 'Guidelines – Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers' (2011), available at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement_GLs_English_Final_Jan2011_revised_July1-2014.pdf.

[208] Committees and investigation units created in 1998 were replaced, in 2001, by the establishment of INT (elevated to vice presidency in 2009) following recommendations of a review panel, see D Thornburgh, RL Gainer and CH Walker, 'Report concerning the Debarment Process of the World Bank' (2002), available at http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf

[209] For a detailed history of the evolution of the Bank's Sanction System, see A-M Leroy and F Fariello, 'The World Bank Sanctions Process and Its Recent Reforms' The World Bank Group, 2012

[210] See, WBG, 'The World Bank Office of Suspension and Debarment Report on Functions, Data and Lessons Learnt', 2007-15, Second Edition, availableavailiable at http://documents.worldbank.org/curated/en/153431468196176596/pdf/104658-WP-PUBLIC-OSD-Report-Second-Edition.pdf, and e.g., its road investigations which revealed evidence of inflated highway construction costs, bribery and siphoning off of funds during contract execution, WBG, note 32.

[211] Typically, once the investigating authority concludes that there is sufficient evidence to show that a sanctionable practice has been committed in the context of a MDB finance project, it presents the case for evaluation at the first tier of the adjudication phase.

[212] E.g., the Joint International Financial Institution Anti-Corruption Task Force focuses on the standardization of sanctions investigation procedures, definition of sanctionable practices, and fostering cooperation. see, IDB, 'Harmonization efforts with other International Financial Institutions', http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/harmonization-efforts-with-other-international-financial-institutions,2708.html

[213] See WBG, 'International Financial Institutions Anti-Corruption Task Force – Uniform Framework for Preventing and Combating Fraud and Corruption' (2006), http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37018601

debarment, reprimand, and/or restitution and other financial remedies, including a requirement that the borrower repay tainted loans.[214] Further, the Agreement for Mutual Enforcement of Debarment Decision ("AMEDD"), concluded by the African Development Bank, the Asian Development Bank, EBRD, the Inter-American Development Bank Group, and WBG in 2010, allows for a sanction imposed by one MDB to be recognized by, and added to the sanctions list of, other MDBs, even if they were not directly affected by the sanctionable practice.[215]

C. Effective Penalties for Both Supplier Collusion and Corrupt Practices

1. General and Corporate Fines

In the competition law sphere, the international fight against cartels has led to "a global trend toward enhanced sanctions combined with common enforcement techniques."[216] In many jurisdictions, significant fines (whether civil or criminal) may be, and are regularly, imposed on firms found to have engaged in cartel activity in violation of antitrust laws. For example in Elevators and Escalators,[217] the European Commission imposed fines totalling €832,422,250 on the bid riggers.

A growing view, however, is that sanctions in many jurisdictions need to be bolstered or rethought as corporate fines may not be sufficient on their own to deter cartel behavior. Not only do they not target responsible individuals, but they may have spill-over effects (penalizing innocent shareholders, employees, and creditors) and, arguably, would need to be impossibly high to ensure optimal deterrence: "To deter cartel activity, the sanctions imposed on cartel participants must produce sufficient disutility to outweigh what the participants expect to gain from the cartel activity. Moreover, the disutility of the sanctions must outweigh the expected gain by enough to account for the fact that the sanctions may not be imposed at all and would be imposed, if at all, after the gains had been reali[z]ed."[218]

Some studies reinforce the view that corporate fines are not the highest concern to companies[219] and may not deter recidivism.[220] In the EU, for example, where corporate fines are the Commission's main weapon against cartels, a number of firms operating in chemical and electronics markets have been found to be involved in three or more Commission cartel decisions (and some as many as nine).[221] These cartels are arguably difficult to explain as the conduct of rogue division managers that are operated without the knowledge or help of senior management. Rather, they could suggest that there may be multi-product and multinational firms which embrace,

---

[214] See 'General Principles and Guidelines for Sanctions', http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/$FILE/Harmonized%20Sanctioning%20Guidelines.pdf

[215] AMEDD, para 4, http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35154738. MDBs may, however, decide not to enforce a sanction imposed by another MDB when such enforcement would be inconsistent with its legal or other institutional considerations, AMEDD, Para. 7.

[216] GC Shaffer and NH Nesbitt, 'Criminalizing Cartels: A Global Trend?', University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No. 11–26 (2011), 3.

[217] COMP/38.823, note 43.

[218] GJ Werden, 'Sanctioning Cartel Activity: Let the Punishment fit the Crime' [2009] *European Competition Journal* 19, 28, C Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence' (2007) 30 *WorldCompetition* 65; and J. Connor, 'Recidivism Revealed: Private International Cartels 1999-2009' (2010) 6(2) *Competition Policy International* 3.

[219] See eg, Office of Fair Trading, 'Drivers of Compliance and Non-compliance with Competition Law – An OFT Report' (May 2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf

[220] See e.g., Connor, note 218; see W Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35(1) *World Competition* 5.

[221] See e.g., *Marshall*, note 84 and Kovacic, Marshall, and Meurer note 84.

directly or indirectly, explicit collusion as part of their business model and profit-making strategy.[222]

This suggests that additional controls may be desirable or required, including: monetary and non-monetary sanctions for individuals that play a role in instigating, or even not preventing, infringements;[223] and non-monetary sanctions for corporations, such as debarment or even, in certain circumstances, structural remedies.[224]

2. Individual Accountability

Evidence implies that a number of personal factors may encourage procurement officials to receive bribes. Further that senior corporate management is frequently aware of, and endorses, bribery by employees,[225] and actors involved may receive high powered incentives for performance enhanced by bribes. It seems crucial therefore that, to counterbalance the effects of these incentives, sanctions[226] for bribery should attach to responsible individuals, providing for fines, prison sentences, and the confiscation of bribes or the proceeds of corruption. Indeed, numerous jurisdictions now provide for criminal sanctions to be imposed on individuals infringing bribery laws (including those offering and receiving bribes and those who have failed to prevent them)[227] and for the confiscation of bribes (or its proceeds).

A number of jurisdictions have also criminalized cartel activity. In the U.S., violation of the Sherman Act is a felony and, for some time, the DOJ has aggressively pursued both corporations and individuals involved in cartels in criminal proceedings. Where violations are found, U.S. courts may impose fines on corporations and individuals responsible, and sentence individuals to prison. U.S. enforcers, working with and through organizations such as the OECD and the ICN, have not been shy about advocating their view that imprisonment of individuals is the most effective deterrent to cartel behavior. However, although more than twenty states have introduced criminal cartel, or bid rigging, offenses significant obstacles to successful criminalization have arisen outside of the U.S. Not only are criminal cartel cases because of the higher standard of proof, more difficult to make out, but in many countries it has proved difficult to persuade juries to convict persons, and/or courts to imprison offenders, in relation to an offense principally introduced to increase deterrence, but to which no preexisting moral stigma attaches.[228] Criminalization is therefore unlikely to be fruitful if simply introduced as a mechanism for creating deterrence without an attempt to build or shape attitudes and an understanding of what is morally reprehensible about the conduct criminalized. In the U.S., the DOJ generated supported for its cartel enforcement program by targeting bid rigging cases

[222] Ibid.

[223] See eg, OFT Report, note 219, and A Hoel, 'Crime Does Not Pay but Hard-Core Cartel Conduct May: Why it Should be Criminalised' (2008) 16 *Trade Practices Law Journal* 102. Individual sanctions do not necessarily have to be criminal in nature, see e.g. A Khan, 'Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?' [2012] 35(1) *World Competition* 77, 82

[224] See DH Ginsburg and JD Wright, 'Antitrust Sanctions' (2010) 6(2) *Competition Policy International* 3 and JE Harrington, 'A Proposal for a Structural Remedy for Illegal Collusion', available at https://joeharrington5201922.github.io/pdf/structural%20remedy.pdf.

[225] OECD, 'Foreign Bribery Report – An Analysis of the Crime of Bribery of Foreign Public Officials' (2014) 22, ('in the majority of cases, corporate management (41%) or even the CEO (12%) was aware of and endorsed the bribery, debunking the 'rogue employee myth …'. … bribery in the financial sector is conducted by high level, managerial staff and, more often than not, by top management and corporate officers.')

[226] In addition to incentives to report or refuse bribes.

[227] See Section II.A.

[228] See e.g., A Jones and R Williams, 'The UK Response to the Global Effort against Cartels: Is criminalization really the solution?' [2014] *Journal of Antitrust Enforcement* 100.

for prosecution, the subset of cartel activity where, perhaps, a lack of good faith is most evident (especially if certification of independent bid determinations ("CIBDs")[229] has been required and signed). Further, many successful criminal convictions have ensued in Germany where the criminal offense is reserved exclusively for bid rigging (and not to other cartels).

Alternatively or additionally to criminal liability, civil liability might be expanded to provide a mechanism for ensuring accountability of individuals and increasing deterrence: for example civil sanctions, such as fines[230] or individual disqualification orders,[231] could be imposed on responsible individuals. Further, as with bribery, the category of actors liable under civil rules could be expanded, to encompass not only individuals directly involved but also others, such as managers, lawyers, underwriters, outside directors, or accountants who have the capacity to influence firm behavior and to ensure compliance with the law.

3. Debarment

Debarment for corporations or contractors involved in bid rigging or corrupt conduct may mitigate against the risk of, and deter, future violations[232]; the risk of losing the chance to secure public contracts for a period of time (or possibly permanently) in the future may act as a strong incentive to comply. A number of jurisdictions provide for the possibility of debarring those involved in an infringement of anti-corruption or competition laws from participating in public tenders[233] and debarment is a core sanction used by MDBs against firms engaged in bribery or collusion.[234]

One study notes,[235] however, that although debarment can operate as an effective deterrent, debarment rules are not generally enforced in predictable ways and corporations are relatively rarely debarred in practice; perhaps partly out of fear of exacerbating procurement difficulties that exist in already concentrated markets. Anxieties about debarment being impractical could, however, be allayed by, for example, excluding only ring leaders from contracting, providing for exceptions where debarment would eliminate competition in a highly concentrated market, and operating initiatives, such as self-cleaning for bringing excluded contractors back into the fold (e.g., where infringers provide compensation to those harmed as a result of the wrong-doing and adopt measures to prevent further future violations). Greater use of debarment powers in this way would send a clear signal to the private sector, that access to public procurement market requires full compliance with the law.

---

[229] See note 261.

[230] To be effective, however, personal liability must certainly be un-indemnifiable and un-shiftable and must be sufficient to counter any benefits made from the illegal conduct (such as bonuses received).

[231] See e.g., Khan, note 223. One difficulty is that disqualification orders generally only take effect in the jurisdiction in which they are imposed.

[232] Jones and Williams, note 228.

[233] See note 149 and text See e.g., the U.S. Federal Acquisitions Regulations providing for the suspension and debarment (by a debarment official) of those committing crimes, including violation of federal or state antitrust laws; and the EU's Public Procurement Directive 2014/24/EU providing that contracting authorities may be required by Member states to exclude undertakings from procurement procedures where there are plausible grounds to conclude that they entered into agreements infringing Art 101 (the implementing conditions are to be provided by the Member States) (Art 57(4)(d)) (see also Case C-470/13, *Generali* EU:C:2014:2469 (an undertaking may be excluded by public authorities from tendering for public contracts where it has committed an infringement of competition law, for which it was fined, even if the procurement procedure is not covered by the EU Procurement Directive)).

[234] See note 210 and text also discussion of the AMEDD note 215 and text.

[235] E Auriol and T Søreide, 'An Economic Analysis of Debarment' (2017) 50 *International Review of Law and Economics* 36.

4. Recovery of Bribes and Damages Actions

Asset recovery and damages actions will not only increase deterrence, but will also ensure that wrongdoers do not profit from their wrongs and/or that those that have suffered in consequence are compensated for their loss. It is important therefore that anti-corruption enforcement agencies sanction individuals involved in bribery and corruption and also ensure that illicit bribes (or the proceedings of corruption) are recovered.

Further, many antitrust systems enable victims of antitrust infringements to bring actions for damages.[236] Although this type of civil action by victims can contribute to effective enforcement of the competition law rules, while, at the same, allowing victims of violations to be compensated, there are relatively few jurisdictions in which private actions for damages are frequently lodged against bid riggers. Not only are competition damages actions expensive and complex cases to bring and win, but procurers may have few incentives to seek to recover lost public money and be unwilling to sour relations with contractors they may have to continue to conduct business with. If routinely brought, however, actions for damages would allow a government both to claw back taxpayer money lost due to inflated contract prices and raise the stakes for those breaching competition law. Such claims may be facilitated by, for example, giving standing to public prosecutors (this is the case in Brazil, for example) or other features of the system.

In Japan, where private litigation has formed "part of the enforcement arsenal from the very beginning of Japanese antitrust law," a preponderance of private lawsuits have been brought against bid riggers, including some by residents on behalf of their local government.[237]

In the United States, where a sophisticated system of private antitrust enforcement exists[238], Section 4A Clayton Act specifically allows the government to recover treble damages in cases of collusive bidding,[239] Although has been argued that more needs to be done to ensure taxpayers' money is not left on the table,[240] only three Section 4A cases were filed between 1990 and November 2018, the DOJ has now pledged to revitalize its use. "Going forward, the Division will exercise 4A authority to seek compensation for taxpayers when the government has been the victim of an antitrust violation. We hope that these efforts will also deter future violations."[241]

In the EU, full compensation must, in principle, also be available to victims of antitrust violations.[242] Although private damages actions were initially slow to develop, such actions are now beginning to play an increasingly important part in the

[236] See also the $2.95 billion settlement following a class action securities fraud lawsuit sought brought in the U.S. by investors. The settlement concluded on 3 January 2018 was approved by the New York District Court on June 22 2018, see http://www.petrobrassecuritieslitigation.com/docs/Final_Approval.pdf.

[237] S Vande Walle, 'Private Enforcement of Antitrust Law in Japan : An EmpiricalEmpricial Analysis' (2011) 8 Competition Law Review 8.

[238] See e.g., A Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in M Bergström, M Iacovides, M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing, 2016).

[239] See H First, 'Lost in Conversation: The Compensatory Function of Antitrust Law' April 2010, NYU Law & Economic Research Paper Series Working Paper No 10-14.

[240] Ibid.

[241] See speech of Assistant Attorney General Delrahim, note 150.

[242] See Case C-453/99, *Courage Ltd v Crehan* [2001] EU:C:2001:465 and Cases C-295/04 to 298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] EU:C:2006:461.

EU enforcement framework, and an EU Directive sets out rules designed to facilitate such claims in the national courts.[243] Studies published in 2017 and 2019[244] of cartel damages claims in the Member States indicate that private actions are growing, and notes that some entities bringing damages claims are local authorities or municipality procurers, including some in Hungary, Denmark, and France. The latter study finds that in nearly two thirds of the claims analyzed "the allegedly affected purchases resulted from tendering processes" and each provide examples of cases where damages have been awarded to victims of bid rigging. In one Danish case a municipality was awarded compensation from bid riggers (calculated by reference to the payments made to a losing tenderer by a bid winner as compensation).

The European Commission itself also sought damages against members of the Elevators and Escalators cartel for losses suffered as a result of the installation of elevators and escalators in Commission buildings. Although the action before the Belgian courts was rejected on the grounds that the Commission had failed to produce sufficient evidence of loss, in the future this type of action might be facilitated by provisions set out in the Damages Directive, especially on disclosure, which have now been implemented within Belgian Law.[245]

In Germany, a number of damages actions have also been brought by state authorities hurt by bid rigging or other anticompetitive conduct.[246] For example, the local transportation undertaking of the city of Darmstadt and Deutsche Bahn,[247] relying on a competition law infringement finding by the Bunderskartellamt, successfully sued members of a rail manufacturer cartel (Schienenkartell) for damages[248] resulting from overpriced rails, track switches. In addition Deutsche Bahn[249] and the Cities of Essen, Nürnberg, Dortmund, Bielefeld and Köln, relying on the EU Commission's lifts and escalators cartel decision,[250] successfully sought damages from the cartel members.[251]

In spite of enforcement of competition and anti-corruption laws, it appears, as detailed in Section I, that only a fraction of illegal collusion and corruption that occurs in procurement markets may be being detected and effectively sanctioned. This suggests the need not only to intensify current enforcement efforts, but also to look

---

[243] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, Art 1(1).

[244] J-F Laborde, 'Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges' *Concurrences Review* N° 1-2017, Art. N° 83418, 36 and (2018 ed.) *Concurrences Review* N° 1-2019.

[245] See M Ramos and D Muheme, 'The Brussels Court judgment in Commission v Elevators Manufacturers, or the Story of How the Commission Lost an Action for Damages Based on its Own Infringement Decision' (2015) European Competition Law Review 36(9).

[246] See e.g., OECD 2015 Antitrust Enforcement Report, Relationship between public and private antitrust enforcement - Germany (2015), DAF/COMP/WP3/WD(2015)21, para. 21, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2015/OECD_2015_Antitrust_Enforcement.pdf?__blob=publicationFile&v=2.

[247] OECD 2015 Antitrust Enforcement Report, Relationship between public and private antitrust enforcement - Germany (2015), DAF/COMP/WP3/WD(2015)21, para. 21.

[248] LG Frankfurt a M, 30 March 2016 – Case no 2-06 O 464/14, ECLI:DE:LGFFM:2016:0330.2.06O464.14.0A paras 75 et seq.

[249] LG Berlin, 6 August 2013 – Case no. 16 O 193/11, ECLI:DE:LGBE:2013:0806.16O193.11KART.0A

[250] COMP/38.823, note 43.

[251] Manufacturers of fire-fighting vehicles found to have infringed competition law (BKartA), (see Press release: Bundeskartellamt imposes multi-million euro fines against manufacturers of fire-fighting vehicles, 10 February 2011, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/10_02_2011_Feuerwehrfahrzeuge.html?nn=3591568) also indemnified municipalities with EUR 6.74 million through an out of court agreement.

for additional means, beyond those that have been, or are being widely employed. Section III thus sets out some further proposals to supplement these efforts.

III. TOWARDS A MORE COMPREHENSIVE APPROACH: ADDITIONAL TOOLS FOR DETERRING CORRUPTION AND SUPPLIER COLLUSION

A. Ensuring Procompetitive Procurement Design

Although some synergies between national public procurement systems have resulted from international arrangements, bilateral trade agreements, and MDB rules (see Part E *infra*), a variety of approaches continue to exist. In some countries public procurement rules are limited or non-existent. In others, sophisticated systems are in place.[252] An essential starting point to achieving procompetitive procurement is, however, the existence of a good and robust public procurement system, with clearly articulated objectives,[253] which reflect the cultural, administrative, economic, legal, and social traditions of the state in which it is adopted[254] and which is constructed so as to minimize the risk of its objectives being undermined by bid rigging[255] or bribery.

Based on the best available international standards, the following steps and public procurement procedures can be considered in adopting open competitive bidding systems which reduce barriers to entry into the process and render them less susceptible to both collusion *and* corruption:

- The form of procurement model chosen is important. For example, sealed bid tender models may diminish the ability and incentive to collude as compared with dynamic open tender systems where bidders gather in the same place to submit

[252] See ICN, note 32.

[253] One goal of most systems is to maximise efficiency and ensure that contracts concluded represent the best value for money; i.e., to foster and encourage participation in procurement proceedings, promote competition among suppliers, boost production through ensuring efficient spending of public money (cost-quality efficiency of procurement), free and fair competition and the opening up of markets to small and medium sized enterprises (SMEs) as well as cross border trade. Regimes may however be designed to achieve broader goals, including: public or socio-economic policies (ensuring that public money is used to drive other national policies, such as industrial (e.g., growth, employment, innovation and the promotion of SMEs), social, environmental or sustainability objectives); integrity, fairness and public confidence in the process and safeguarding the process against bribery, corruption, incompetence and distortions imposed by attempts to win influence; the facilitation of the free movement of goods and services across borders and between States (e.g., in the EU). Where a multiplicity of objectives isare pursued, guidance as to how competing objectives are to be weighed and balanced should be provided.

[254] Thai, note 132.

[255] Two influential documents widely disseminated and used effectively to fight collusion are the OECD's Guidelines for Fighting Bid Rigging in Public Procurement (1999) and Recommendation on Fighting Bid Rigging in Public Procurement (2012) OECD, Report on Fighting Bid Rigging in Public Procurement, 2012, available at http://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm. The OECD, in the Report on implementing the 2012 Recommendation (2016), note 32, establishes that the recommendations have been widely used and have helped competition authorities both to launch advocacy programs and raise awareness of bid rigging risks and procurement authorities in designing tenders and detecting bid rigging. See also e.g., G Miralles, 'Connecting public procurement and competition policies: the challenge of implementation' Presentation at Lear Conference, Rome July 3 2017. In addition to calling for appropriate law enforcement activities, these instruments rightly emphasize the need for procurers to identify: markets in which bid rigging is more likely to occur; methods that maximise the number of bids; best practices for tender specifications requirements and award criteria; procedures that inhibit communication among bidders; and suspicious pricing patterns, statements, documents and behavior by firms.

bids.[256] Moreover, as pointed out above, individual negotiations can serve as a tool to upset cartel stability[257];

- E-procurement (involving the use of electronic communications), using information and communication technologies, and electronic bidding should be considered where feasible. Although not a panacea, tender systems which are widely advertised (with a legal requirement to publish) by governments through electronic services[258] or e-procurement "can increase transparency, facilitate access to public tenders, reduce direct interaction between procurement officials and companies, increasing outreach and competition, and allow for easier detection of irregularities and corruption, such as bid rigging schemes. The digitali[z]ation of procurement processes strengthens internal anti-corruption controls and detection of integrity breaches, and it provides audit services trails that may facilitate investigation activities. The e-procurement system KONEPS in Korea and Prozorro in Ukraine are examples of integrated online platforms for procurement"[259];
- Offering contracts less frequently and at long, irregular time cycles may reduce bid rigging opportunities[260] and create incentives for bidders to deviate from any collusive scheme;
- Purchasing centrally rather than locally may allow a purchasing agency to exercise countervailing market power against suppliers and place them in a better position to detect patterns of collusion;
- Incorporating anti-collusion tender clauses, for example: requiring bidders to sign a CIBD;[261] requiring bidders to operate audited compliance programs; clarifying that procurement agencies will be vigilant for bid rigging and take action if collusion is detected, setting out penalties that may result and reserving the right not to award contract if suspicion of bid rigging arise; and/or requiring bidders to disclose upfront any subcontracting plans;
- Incorporation of anti-corruption provisions,[262] for example, those incorporated in Transparency International's Integrity Pact;[263]
- Clearly defined, easy, and streamlined requirements for bidders (omitting any unnecessary restrictions) that are likely to maximize participation and open markets to international trade (containing no territorial discrimination or foreign

[256] See e.g., OECD, note 7, and Boehm & Olaya, note**Error! Bookmark not defined.**, Lengwiler and Wolfstetter, note 123, Wang and Chen, note 79 (oral auctions are more vulnerable to collusion than sealed bids, second price sealed-bid auctions are more susceptible than first-price sealed bids and collusion is easier in ascending than in descending auctions).

[257] See note 82 and text.

[258] In one case in Slovakia a €220 million tender was, to ensure that a favoured competitor won, posted only on on a bulletin board in a corridor inside a ministry building, see The Economist, note 5. Allowing bidding by mail, telephone and/or electronically will facilitate bidding by a broader pool of tenderers.

[259] OECD, Preventing Corruption in Procurement (2016), available at http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf, 22.

[260] Wang and Chen, note 79, Larger contracts may however present a greater risk of corruption, see notes 70-71 and text..

[261] See e.g., https://www.oecd.org/governance/procurement/toolbox/search/certificate-independent-bid-determination.pdf and model non-collusion clause published by Hong Kong Competition Commission, https://www.compcomm.hk/en/media/press/files/Model_Non_Collusion_Clauses_and_Non_Collusive_Tendering_Certificate_Eng.pdf.

[262] But see C. Yukins, 'Mandatory Disclosure: A Case Study in How Anti-Corruption Measures Can Affect Competition in Defense Markets' GW Legal Studies Research Paper No. 2015-14.

[263] See note 202 and text.

restrictions). These lower barriers to entry and provide clear, objective, and well-defined guidance (with weightings where appropriate) for the evaluation and award of the tender. If combined with a provision allowing bids on a portion of a tender,[264] the process may increase participation, particularly by local SMEs which account for a significant percentage of all established businesses worldwide[265];

- Defining technical specifications by reference to functional performance, rather than design or descriptive characteristics and streamlining proof of technical expertise processes; basing technical specifications on international standards, where such exist (otherwise, on national technical regulations, recognized national standards or building codes)[266];
- Restricting preferential treatment of domestic suppliers;
- Incorporating an accessible, user-friendly, and rigorously operated complaints and domestic review procedure[267] to facilitate detection of irregularities and to build bidders' confidence in the integrity and fairness of the system.

Once tenders have been received they should be evaluated according to established criteria by a skilled team (see relevant discussions in Part C *infra*). Procurers should discuss bids individually with tenderers rather than jointly, avoid splitting contracts between suppliers with identical bids, and be cautious about joint bids or bids made with the use of industry consultants. Even if the outcome of the process is transparent and/or there is a public bid opening, procurers should keep the terms and conditions of each firm's bid confidential. Records of the design process, decision process, and how it is implemented should be taken and monitored to ensure processes are carried out according to their letter, bids are allocated fairly and contracts are not unduly changed or extended during the implementation stage.[268]

B. Careful Market Research and More Advanced and Targeted Competition Advocacy

Careful preparation and market research at the outset of a tender process can contribute to the tender's effectiveness. With modern electronic search tools and increased transparency, procurement officials can familiarize themselves with the goods and services that are potentially available, possible tenderers and, in many cases, with the prices that have been paid in their own and in adjoining jurisdictions in similar procurements. Such a survey can also be useful in determining whether the market is likely to support collusion,[269] the potential bidders (their costs, prices, and previous tender history), and how the possibilities for soliciting innovative, competitive solutions can be maximized.

In markets where there is a high risk of collusion, this information can aid the construction of processes that will not enhance, but rather will offset, the risk

[264] See Sanchez Graells, note 68.
[265] See OECD, Preventing Corruption in Public Procurement, note 7.
[266] See requirements established under the GPA (Article X), note 302.
[267] The GPA established minimum standards with regard to domestic review procedures in Article XVIII, see note 302.
[268] See e.g., The Economist, note 5, reporting on a case where the British Nuclear Decommissioning Authority was found by the High Court to have been fudging the evaluation of tender criteria to favour a particular bidder and conducting poor record keeping, *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC); on appeal [2015] EWCA Civ 1262, [2017] UKSC 34.
[269] See sections I. B.

especially by considering how to: draw up appropriate pre-qualification criteria; reduce barriers to entry and to structure the auction and tender specifications and process to allow for the maximum number of qualified bidders and the offering of a spectrum or variety of goods and services; reduce opportunities for bidders to meet or coordinate conduct during the tender process (for example avoiding the organization of pre-bid meetings or site visits where possible, and managing any meetings carefully, making procurement patterns less predictable, and by avoiding presenting similar size contracts regularly); and design the process so as to ensure reduced communication and flow of competitively sensitive information among the bidders and between them and the tendering authorities. It can also help procurers to react quickly when, for example, likely bidders do not participate or where bids seem to exceed anticipated pricing levels.

The market must be approached in a way that ensures compliance with the principles of transparency and equal treatment and avoids disclosing privileged information or privileged market positions. A measure to ensure fair competition and avoid excluding a more advantaged tenderer is to announce openly the preliminary market consultation, for instance by publishing a prior information notice in national procurement portals.[270]

More advanced and sophisticated approaches to competition advocacy are also needed. Issues to be addressed will include continued operation of tender processes which do not comply with the best practices outlined in Part A *supra* perhaps because they unnecessarily limit bidders' participation (such as provisions which restrict participation to domestic bidders only) raising barriers to entry, reducing the number of potential bidders, and allowing easier coordination among the fewer remaining bidders. For example, national regulatory rules may make it difficult for foreign companies to qualify to bid. Further, the imposition of domestic or local content rules frequently excludes potential bidders. In the U.S., for example, foreign suppliers are effectively precluded from bidding on most federal government contracts unless they are: (i) based in a country that is a party to the Agreement on Government Procurement ("GPA"); (ii) covered by provisions on government procurement in a preferential trade agreement between the U.S. and another country; or (iii) based in a Least-Developed Country.[271] Many other countries also have policies that favor domestic suppliers in at least some aspects of their public procurement process.[272] Entry may also be deterred by procedures that aim to increase the integrity of the procurement system[273]; civil and criminal strictures against fraud in public

[270] European Commission, Public Procurement Guidance For Practitioners, February 2018, available at http://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf.

[271] The U.S. approach has been defended on the basis that it provides an essential inducement for countries to seek accession to the GPA or other arrangement providing access to the U.S. market, see CR. Yukins and SL Schooner, 'Incrementalism: Eroding the Impediments to a Global Public Procurement Market,' *Georgetown Journal of International Law*, Vol. 38, No. 529, Spring 2007. These authors refer to the U.S. market as a 'walled garden'. See also L Weiss and E Thurbon, 'The business of buying American: Public procurement as trade strategy in the USA' (2006) 13(5) *Review of International Political Economy* 701.

[272] An encyclopaedic description of domestic preferences programs in regard to public procurement in OECD and non-OECD is provided in C McCrudden, *Buying Social Justice: Equality, Government Procurement and Social Change* (Oxford: Oxford University Press, 2007). The GPA prohibits discrimination only in regard to 'covered' procurement (parties are free to discriminate in regard to 'non-covered' procurement).

[273] See, generally, OECD, *Competition Policy and Procurement Markets* (Paris: DAFFE/CLP/(99)3FINAL, 1999).

procurement markets that create asymmetries between public and private contracting can discourage firms from serving public purchasers[274].

Competition agencies can also warn procurers when processes are not drawn up to minimise the risk of collusion, for example, where they are presented too regularly or incorporate inappropriately tailored transparency requirements.[275] Appropriately constructed transparency provisions can, however, facilitate participation by new participants (including those "outside the club")[276] through the open provision of information on how to participate in the procurement process.

C. Professionalization of the Procurement Workforce

1. Generally

Investment in human resources is vital to yield good results out of any procurement system. Indeed, experience suggests that appropriate investments in the procurement workforce may partially alleviate the need for costly ex post control systems and deliver better overall value for taxpayers. As suggested by Schooner and Yukins:

> States must promptly, dramatically, and aggressively invest in their acquisition of workforces. … provide these business professionals with the most current, realistic and skilled-based training available. … Then, governments should deploy these talented, skilled, incentivized procurement professionals to get the taxpayers the most for their money. No nation can reasonably conclude that additional investments in personnel to improve its performance in any of these disciplines would not pay significant dividends. Rather, most would enjoy dramatically increased return on their procurement investments by strengthening their capacity in each of these critical areas.[277]

As part of this professionalization effort, public procurement agencies and officials should understand the objectives of the procurement system and the importance of it not being undermined either by tenderers' actions or their own conduct. Appropriate remuneration is also important since an underpaid procurement workforce increases the risk of corrupt practices.[278]

2. Increasing procurement officials' ability and incentives to identify and report collusion and to comply with anti-corruption laws

Given their knowledge of the market, their capacity to observe patterns in bidding process, to interact with bidders, to observe behavior, and to intercept documents, public officials are well situated to detect bid rigging arrangements when they do take place. Public officials should therefore receive competition law training which enables them to understand when markets are prone to collusion and how the procurement process might facilitate or encourage it and the usefulness of more open-ended approaches to procurement design. This will also ensure that: they are aware of

[274] WE Kovacic, 'The Civil False Claims Act as a Deterrent to Participation in Public Procurement Markets' (1998) 6 *Supreme Court Economic Law Review* 201.
[275] See note 78-80 and text.
[276] See Anderson, Müller and Kovacic, note 18.
[277] SL Schooner, and CR Yukins, 'Public procurement: focus on people, value for money and systemic integrity, not protectionism,' in R Baldwin and SJ Evenett (eds), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (A Vox e-book, 2009).
[278] See note 284.

the risks that arise if bidders communicate with each other, submit joint bidding, or subcontract; they are alert and screen for warning signs or indicators of possible collusion; and they will be more likely to report suspicions to, and exchange information with, competition enforcers. Competition agencies thus routinely engage in advocacy, training, and outreach programs aimed at raising procurers' awareness of the rules against bid rigging and produce guidelines and handbooks urging public procurement officials to be vigilant for cartels, to act as a complainant where they suspect breaches, and to collect and to use or pass-on key data for screening and monitoring compliance with the competition law rules.[279]

As procurers may be unwilling to derail or delay procurement they are employed to achieve (especially if their performance is evaluated not on how many cartels they discover but on the basis of their ability successfully to set up and complete the procurement process and to conclude contracts[280]), it is important that procurers should be provided with incentives to monitor for, and report, any suspected bid rigging. For example, the money saved from a cartel that an administration helped discover could, in part at least, remain with the administration, and the official who helped discover a cartel could gain a career benefit.[281] Commending letters for uncovering collusion could also be considered along with the introduction of negative repercussions for not following relevant monitoring and/or reporting laws or guidelines.

In addition, because bid riggers may offer procurement officials bribes and other kickbacks specifically designed to prevent them from reporting their wrong-doing, procurers should be informed of their duties to conduct procurement procedures in a fair, ethical and impartial way— in accordance with anti-corruption laws—and measures put in place to prevent such misconduct. Procurers should therefore also receive training in anti-corruption laws and be subject to civil service regulation or codes of conduct which outline relevant laws, standards, and expectations of good conduct and consequences of infringement. These should aim to ensure that officials' private interests do not improperly influence performance of their public duties and/or that public officials are obliged to disclose information or make asset declarations that may reveal conflicts of interest. Examples of procurement Codes of Conduct and training exist in Canada, Austria, and France.[282] To be effective, compliance with integrity standards, and ethical codes, throughout the procurement cycle must be overseen by a dedicated entity or government department.[283] Rewards for not accepting bribes (and turning in those that offer them), rotation of civil servants (to prevent them creating strong ties with industries with which they routinely work), and/or the increase of public sector wages may also constitute mechanisms for tackling the supply of corruption.[284] In addition to increasing the integrity of the

[279] See ICN, note 32, especially Annex A and discussion of activities in Australia, Botswana, Canada, Colombia, Cyprus, the EU and Finland. In the U.S., the DOJ routinely engages in training of procurement officials, aiming to teach them how to evaluate bids like an antitrust expert prosecutor. The ICN-WBG Competition Policy Advocacy Awards has revealed a number of examples of successful collaboration between procurers and competition agencies, which have led to significant savings in public money.

[280] See note 76.

[281] Heimler, note 69, 862

[282] See e.g., Public Services and Procurement Canada (2016), available at www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html, and OECD, 'Preventing Corruption in Public Procurement' (2016), available at http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf

[283] In Brazil the Public Spending Observatory scrutinizes procurement expenditure. See also e.g., OECD, 'Principles for Integrity in Public Procurement' (2009), available at http://www.oecd.org/gov/ethics/48994520.pdf; Wakui, note 46.

[284] See e.g., Tanzi, note 122 (discussing literature on the link between wages and corruption).

procurement process, ethical codes promote good governance and build trust in public institutions.

D. The Interaction Between Anti-corruption and Pro-competition Measures

This Paper has flagged the distinct but complementary nature of bid rigging and bribery in public procurement and stressed that a more "joined up" approach to these problems is required.[285] It is difficult to fight bid rigging effectively in public procurement markets without tackling corruption, and vice versa.

It is crucial, therefore, that, beyond advocacy and training, procurement, competition, and anti-corruption agencies work closely together. Not only can this facilitate prevention and ensure the promotion and understanding of each other's remit, powers and procedures, but cooperation in monitoring for, detecting and prosecuting violations is likely to contribute to effective enforcement of, and the deterrent effect of, each set of laws. Indeed, indicators of collusion and/or corruption may emerge during a public procurement process, evidence of corruption may be uncovered in a bid rigging investigation, and evidence of bid rigging may emerge in corruption probes. Consequently, it is vital that the complementarities between competition and anti-corruption remits, which fight two sides of the same coin,[286] are recognized; careful consideration of institutional design, strong working relationships, dialogue, interagency cooperation, and joint enforcement in these spheres[287] will help to unravel synergies. Although coordination presents huge challenges, both formal and informal means may help to overcome these.

Cooperation can be internalized by entrusting the same agency with procurement, competition, and/or corruption remits. For example, in Germany, Sweden, and Russia competition authorities have the power to supervise or oversee public procurement processes. In Germany, the competition authority has chambers that act as a public procurement review body, assessing whether procurers have met their obligations. In the U.S., the DOJ, the main law enforcement agency and part of the executive branch, can use its full powers to prosecute violations of criminal law, including fraud, corruption, and the antitrust laws.

Where agencies are distinct, mutual assistance can be achieved not only through advocacy, training, and outreach, but also through placement and exchange of staff, cooperation, and knowledge sharing systems, which allow information uncovered or gathered by one authority to be shared or brought to the attention of the appropriate enforcement body, inter-agency agreements, or task forces as well as oversight agencies. In some jurisdictions interagency task forces have been established (e.g., in Chile) [288] and many competition authorities now work closely with public procurement bodies[289] and routinely and carefully monitor public procurement.[290]

Relatively few jurisdictions, however, explicitly acknowledge the interaction between corruption and bid rigging or have mechanisms for competition and anti-corruption agency cooperation or indeed for firms to cooperate with different agencies

[285] See Part V.
[286] IDB secretariat, note 57.
[287] Alford, note 119. ('For example, the records of communications and the trail of unlawful payments may surface in the same file').
[288] See also the creation of the Ministerial Task Team in South Africa.
[289] See note 279.
[290] See nn 180-186 and text.

dealing with antitrust, anti-corruption, and/or criminal enforcement.[291] Arguably, therefore, more could be done to ensure that enforcers probe both horizontal and vertical elements of bid rigging and to encourage evidence sharing, where compatible with national evidentiary rules, between anti-corruption and competition agencies.[292] Analytical synergies may result from grouping these kinds of conduct together, and investigations in one sphere may helpfully lead to operational intelligence in the other.[293] The introduction of a formal cooperation policy could therefore significantly improve the chance of misconduct in public procurement is uncovered and prosecuted.[294]

In some jurisdictions, it is theoretically possible for competition agencies that uncover bid rigging involving procurement officials to find the procurer or procurement agency to have infringed competition laws by acting as a facilitator to the cartel.[295] In most cases, however, competition agencies focus only on the horizontal element of the cartel and do not have power, or the incentive, to tackle corruption. Similarly, relatively few enforcers of anti-corruption laws can proceed against bid rigging unless it involves fraud or a criminal cartel offense. MDBs adopt a more holistic approach to bid rigging, inquiring into both vertical and horizontal elements and sanctioning both, but they lack the investigative powers and techniques of competition and anti-corruption agencies. Even if, therefore, MDBs were more willing to impose sanctions against both corruption and collusion, they are less able to expose it.

An example of how effective formally recognizing the link between bid rigging and corruption can be is seen in Japan where "dango," or bid rigging in public tendering, has for a long time been a core focus of criminal competition law enforcement.[296] Nonetheless, concern grew that the laws did not reach facilitators or procurement officials found to have been involved in such arrangements. In 2000, for example, government officials were found to have played a central role in bid rigging in construction contracts procured by the Hokkaido prefecture government, but the JFTC was powerless to sanction their conduct. In recognition of this lacuna, and the especially strong temptation that exists in Japan for procurement officials to become involved in bid rigging, legislation was adopted in 2002[297] specifically outlawing conduct which promotes and aides bid rigging (e.g., through determining the winner, disclosing information or taking other measures to facilitate it). This legislation is enforced by the JFTC, which has the power to demand procuring departments to investigate the issue, publish the outcome of its investigation and take action against officials found guilty (for example, through claims for damages or disciplinary action).[298] Where involvement by officials is found, procuring departments must also

[291] See e.g., OECD, Collusion and Corruption, note 7 and joint meeting on Co-opoeration between anti-corruption and competition authorities, OECD Working Group on Bribery and the OECD Competition Committee, 2016 (see e.g. http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04114.html). In Singapore, the CCS maintains a close relationship with the Corrupt Practices Investigation Bureau.

[292] E.g., to assist competition agencies which may not have access to the information to trigger an initial investigation and are liable to have more limited evidence-gathering powers than criminal justice agencies.

[293] Alford, note 119.

[294] OECD, Collusion and Corruption, note 7.

[295] See e.g., in the EU Case C-194/14 P, *AC-Treuhand*, note **Error! Bookmark not defined.**, but in the EU the procurer will only be caught by the competition law rules if it is an 'undertaking', an entity engaged in economic activity, see Case C-205/03 P, *FENIN v Commission* EU:C:2006:453.

[296] Wakui, note 46 (almost half of the JFTC's 134 cases in the fiscal years 2006-2012 related to bid rigging in public procurement)

[297] Act No. 101 of 2002, available at http://www.jftc.go.jp/en/legislation_gls/aepibr.files/aepibr.pdf

[298] Wakui, note 46, para. 2-022.

implement improvement measures that will eliminate the illegal activity. The law has thus established a "unique system under which the government procuring offices introduce measures to make public tendering systems more competitive under the scrutiny of the [J]FTC."[299] Indeed, the 2002 Act has now been enforced in a number of cases in the construction and engineering industries. In these cases bidders and public officials have been found to have worked closely together and to have interacted frequently, especially in tight-knit local communities or in cases where ex-officials moved to work for bidding companies.

In addition, procurement, competition, and anti-corruption agencies need to cooperate not only on a national basis, but also internationally. Indeed, UNCAC, recognizing the strictly territorial nature of law enforcement, sets out extensive and detailed provisions relating to international cooperation in criminal matters and requires states to combat convention offenses through mutual legal assistance in investigations, prosecutions, and judicial proceedings. Competition authorities also habitually work together, particularly through the ICN but also through other formal and informal bilateral and multilateral arrangements, to combat cartels and to coordinate searches and investigations across jurisdictions.

E. The Contribution of Trade Liberalization to Strengthening Competition and Deterring Corruption in Public Procurement[300]

Another policy tool that can contribute powerfully to the fight against corruption and the strengthening of competition in government procurement markets is to open acess to procurement markets to tenderers from outside the tendering state. Not only does trade liberalization enhance competition in the home market, but it provides the opportunity for specialization, exchange, and access to technology that is not available in that home market.[301]

The liberalization of trade in relation to government procurement markets can, in principle, be undertaken unilaterally. In practice, however, it almost always occurs through participation in the WTO plurilateral GPA,[302] or in bilateral agreements embodying rules and commitments similar to those of the GPA.[303] MDBs also impose procurement (and anti-corruption) requirements and regimes, which are similar to standards established under the GPA, on the borrowers responsible for the projects they fund.

The GPA's provisions promote an open approach to procurement in a number of ways. For example, the Agreement incorporates:

- Requirements for procurement to be conducted in a transparent and impartial manner. This provision encourages a wider pool of participants by ensuring wide

[299] *Ibid*, para 2-010.

[300] This section draws on material in Anderson, Müller and Kovacic, note 19, and in R Anderson and A Müller, 'The revised WTO Agreement on Government Procurement (GPA): key design features and significance for global trade and development' (2017) *Georgetown Journal of International Law* 48(4), 949-1008. Available at https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-4-The-Revised-WTO-Agreement-on-Government-Procurement-GPA.pdf.

[301] See note 302, and Anderson, Kovacic and Müller, note 19.

[302] The GPA consists of 19 parties covering 47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party). Another 32 WTO members/observers and four international organizations participate in the GPA Committee as observers. 10 of these members with observer status are in the process of acceding to the Agreement.

[303] For further analysis, see RD Anderson, AC Müller and P Pelletier, 'Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?', in A Georgopoulos, B Hoekman and PC Mavroidis (eds.), *The Internationalization of Government Procurement Regulation* (Oxford University Press, 2017).

dissemination of information necessary to participate in and to prepare tenders is shared beyond 'the usual suspects' (a procuring entity's preferred suppliers).

- Market access or coverage commitments which make it more difficult for parties to design procurement rules to favor national suppliers through technical specifications. Procurement covered in this way is subject to rules requiring non-discriminatory treatment ('national treatment') of other GPA parties' goods, services, and suppliers. Suppliers from other GPA parties cannot be arbitrarily excluded. This increases the pool of competitors, thereby making collusion more difficult.

- Provisions that discourage practices such as the "wiring" of technical specifications to favor particular brands or suppliers.[304] For example, the GPA articulates a clear preference for technical specifications that are framed in terms of performance and functional requirements, rather than design or descriptive characteristics. Government procuring entities are specifically prohibited from prescribing technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as "or equivalent" in the tender documentation.[305]

- An explicit stipulation that GPA parties' procuring entities may not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement. In all of these ways, the Agreement serves as a guide for procompetitive policy reforms and reinforces the effects of domestic legislation aimed at ensuring open and procompetitive procurement design.[306]

- Recourse to the WTO Dispute Settlement Understanding ("DSU") in circumstances where parties believe that international competition has been suppressed through measures taken in breach of their GPA commitments. Although recourse to the DSU has not frequently been used to challenge government procurement processes, its applicability is essential to ensure that participating governments honor their commitments and do not arbitrarily exclude potential competitors from the other GPA parties.[307]

Evidence suggests that the entry into trade agreements can, in appropriate circumstances, help to change perspectives, engage a different set of players, and signal parties' commitment to combat collusion and corruption. In this context, the GPA:

- Requires all participating countries to establish national bid protest or remedy systems (domestic review procedures), through which suppliers can challenge questionable contract awards or other decisions by national procurement authorities before impartial bodies. When fairly administered, these systems

[304] Recall the discussion in section III.A.
[305] In this and multiple other respects, the GPA aims simply codify and enforce good procurement practice as it is understood by the 47 Parties to the Agreement.
[306] See this paper, IV(1).
[307] Anderson and Kovacic, note 73, Anderson, Kovacic, and Müller, note 19; see also OECD, Transparency in Government Procurement: The Benefits of Efficient Governance (TD/TC/WP/(2002)31/Rev2/14 April) (2003).

enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism—thereby encouraging participation from a broader range of potential suppliers. Further, foreign participants are likely to have stronger incentives and fewer inhibitions to report collusion and/or corruption than domestic players, as they are less subject to ongoing scrutiny and social pressures.[308]

- Explicitly requires procurement to be conducted in a transparent and impartial manner that avoids conflicts of interest and prevents corrupt practices (see Article V:4 GPA).[309] Although such a provision cannot, by itself, ensure full integrity in all subscribing procurement systems, the provision is an important lever that can help to promote compliance and galvanize related institutional efforts, providing an important "hook" for efforts to eradicate corruption on the part of both governmental and non-governmental authorities.[310]
- Provides for external oversight of national procurement systems by the WTO Committee on Government Procurement, also potentially helping to break vicious cycles.

Participation in the GPA may thus signal to both domestic suppliers and the outside world that an acceding country is intent on conforming to international best practices, so challenging entrenched expectations with regard to collusion and corruption.[311]

The potential contribution of trade liberalization to the control of collusion and corruption is illustrated by some recent reports. For example, an empirical analysis conducted in 2018 using new data sources and sophisticated econometric techniques affirms that GPA participation strengthens competition in at least three measurable ways: (i) it increases the number and diversity of firms bidding for particular procurements, including by allowing foreign firms to bid; (ii) it decreases the number of contracts with single bidders; and (iii) it decreases the total number of contracts awarded to individual firms.[312] The assessment also finds that, in doing so, the GPA fosters cost-effective public procurement by lowering the probability that the procurement price is higher than estimated cost.[313] These findings build upon important new data sources that are expected eventually to yield even better understanding of the costs of protectionism and the benefits of liberalization in the public procurement sector.[314] Further a report for the European Parliament by Mungiu-Pippidi and her colleagues employs advanced statistical methods to test the major hypotheses arising from the modern literature on the causality of corruption, using time-series data covering a sample of 113 countries. In their words:

> The results show that power discretion and dependency on fuel-export determine poor control of corruption. By contrast, economic openness,

[308] See Anderson, Kovacic and Müller, note 19.
[309] The intention that the provision should ensure accord with international instruments and the view 'that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources [and] the performance of the Parties' economies' is spelt out clearly in the preamble and recitals, *Ibid*.
[310] See the experiences of Moldova and Ukraine, cited in Anderson, Müller and Kovacic, note 19.
[311] Anderson, Kovacic and Müller, note 73, 14.
[312] See B Kamil Onur Taş Kamala Dawar, P Holmes and S Togan, "Does the WTO Government Procurement Agreement Deliver What It Promises?" *World Trade Review*, 2018.
[313] Onur Taş et al, ibid.
[314] See Z Kutlina-Dimitrova, Government Procurement: Data, Trends and Protectionist Tendencies, in European Commission, DG Trade, Chief Economist Note, Issue 3, September 2018.

consisting in lower trade and financial barriers, and social openness as well as press freedom positively influence control of corruption.[315]

It is true that trade liberalization entails its own set of political and other challenges, and many jurisdictions have been or are reluctant to embrace market opening in the procurement sector and may favor public procurement as a means of nurturing domestic businesses. The Authors do not expect that liberalization will now be universally embraced, or will serve as a panacea. Still, the benefits described *supra* are well documented in relevant literature.[316] As such, trade liberalization needs to be seen as an important complementary tool in the never-ending struggle to improve public procurement processes and to protect them from being undermined by bid rigging and bribery.

F. Incremental Versus Systemic Reforms: The Importance of Context

The entrenched nature of corruption and supplier collusion in public procurement markets referred to in the sections above, underscores the difficulties involved in provoking a break from these practices. Indeed, the reform of public financial management processes, especially public procurement, is a perilous process, fraught with possibilities for failure. It is not surprising, therefore to find evidence indicating that, even when based on international best practices, it is difficult to make reforms "take root" and achieve real change.[317] To be successful, measures must be accompanied by a sustained effort to engage stakeholders in addressing the problems that are most critical to them. Incremental (rather than systemic) steps, in which reforms are introduced, tested, and become part of the civic culture progressively over time, may have important advantages in some contexts.[318]

At the same time, other research suggests that progress in this sphere is likely to be possible only with sweeping, systematic reforms that fundamentally alter incentives and expectations. For example, in some countries corruption appears to be institutionalized, not just a sum of individual corrupt acts.[319] This indicates that, in countries where corruption is endemic, although relevant actors may understand that they would stand to gain from eradicating corruption, they cannot be confident that most other actors will refrain from corrupt practices, and thus, they may have little reason to refrain from paying or demanding bribes.[320]

> As a consequence of such unaddressed collective action problems, societies may face a vicious circle of corruption that nobody alone can break. For progress to occur, something more than the formal monitoring and sanctioning mechanisms described above is needed:

[315] See A Mungiu-Pippidi, 'Fostering good governance through trade agreements: an evidence-based review,' in Policy Department for External Relations Directorate General for External Policies of the Union Anti-corruption provisions in EU free trade agreements: Delivering on clean trade (European Parliament: April 2018). See also A Mungiu-Pippidi and M Johnston, *Transitions to Good Governance*, (Edward Elgar Publishing, 2017).

[316] See, for a recent and path breaking econometric assessment, Z Kutlina-Dimitrova, above note 317 .Government Procurement: Data, Trends and Protectionist Tendencies (European Union, DG Trade, Chief Economist Note, September 2018), available here: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157319.pdf. See also Anderson and Kovacic, note 73; Schooner and Yukins, note 277; and RD Anderson, P Pelletier, K Osei-Lah, and AC Müller, 'Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement: Some New Data Sources, Provisional Estimates and an Evaluative Framework for Individual WTO Members Considering Accession', WTO Staff Working Paper ERSD-2011-15 (2011).

[317] See generally Dædalus, (2018) Summer, *Anticorruption: How to Beat Back Political & Corporate Graft*.

[318] The seminal contribution here is M Andrews, *The limits of institutional reform in development: changing rules for realistic solutions* (Cambridge University Press, 2013).

[319] See e.g., A Mungiu-Pippidi, 'Seven Steps to Control of Corruption: The Road Map' in Dædalus, note 317.

[320] See Persson et al, note 16. This is, of course, a version of a prisoners' dilemma game.

> what is required is a 'revolutionary change in institutions' or a perceived 'new game in town,' leading to fundamental changes in the shared expectations of citizens.[321]

In some jurisdictions this may necessitate dramatic change, requiring efforts to build corruption control from the ground up, increase engagement by citizens and the freedom of the press, and even the introduction of political reform.[322] One tool which may play a role in the creation of such systemic change could be the entry by countries into binding, legally enforceable agreements such as the GPA. Experience suggests that some countries with well-documented problems in this area have used the Agreement precisely for this purpose.[323]

It is clear, therefore, that the requisite solutions are likely to differ substantially from country to country and to require careful diagnosis of the roots of the problems in procurement; those that are potentially workable in some contexts may be problematic in others. For example, in jurisdictions where outright corruption problems are believed to be minimal, some lessening of transparency measures might be considered, for the sake of preventing collusion. On the other hand, in economies where bribery and other 'traditional' forms of corruption due to principal-agent problems are rampant, any lessening of transparency measures is likely to be a recipe for disaster.[324] International donors may arguably be well placed to play an important role in diagnosis, coordinating efforts to tackle corruption and collusion in public procurement and making compliance with anti-corruption requirements a condition for the receipt of aid.[325]

CONCLUSION

Corruption and supplier collusion in public procurement markets impact negatively on consumer welfare, economic growth, and the provision of vital infrastructure relied on by citizens. The inherent nature and features of public procurement, however, make procurement particularly prone to distortion through bribery and bid rigging. Despite increasingly vigorous efforts over the past two to three decades to fight these practices, such conduct continues to plague public procurement systems around the globe.

This Paper argues that, given the persistent and enduring problems which exist, the traditional tools applied to the problems of corruption and supplier collusion in public procurement markets, focusing on transparency and effective enforcement of anti-corruption and competition laws, require enhancement and supplementing, whether through incremental or (where necessary) systemic change.

Fundamental to any reform, is a political commitment to ensuring that appropriate foundations are laid and appropriate systems are put in place to strengthen procurement, competition and related anti-corruption laws and systems. This in turn depends upon a recognition that: (a) these provisions are central to the welfare of citizens and to the effectiveness and credibility of states; (b) there is an extremely close connection between the three spheres of law and that none of the individual sets of rules is likely to achieve its full objectives in the absence of the other; and (c) a

---

[321] Anderson et al, note 19.
[322] See e.g., S Rose-Ackerman and BJ Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2016, Cambridge University Press, 2nd ed).
[323] Ibid.
[324] Ibid.
[325] Mungiu-Pippidi, note 319.

joined-up approach and dialogue between enforcers is required, both at the national and international level, as well as between enforcers and MDBs.

The proffered changes are likely, in many jurisdictions, to require modifications to laws, enforcement techniques, sanctioning practices, the design of procurement systems, and/or the working practices of procurement staff. In addition, a shift in the incentives affecting, and a change in the mindsets of, procurers, enforcers, businesses, and the public is required. If each of these stakeholder categories fully understands the overall benefits of procompetitive procurement and that significant consequences follow from transgression of the rules governing it, changes may materialize through, in particular: a greater ability and willingness of procurers to develop procurement processes that are less susceptible to distortion, to identify and report suspected bid rigging, to comply with ethical codes, and to encourage the bringing of damages actions where public money is lost as a result of unlawful collusion; encouraging firms to comply with anti-corruption and competition laws and to monitor for, and self-report, transgressions; enhancing the ability of enforcers to detect, act against, and sanction unlawful bid rigging and bribery; building public support for procurement; and allowing the public to play a greater role in monitoring compliance with the law.

This Paper has argued that trade liberalization can play a significant role in helping to address corruption and competition concerns in public procurement markets. The GPA is the world's primary tool for facilitating progressive market opening and limiting the scope for protectionism in the public procurement sector. Participation in the Agreement, as such, enhances possibilities for healthy competition in relevant markets, through participation by foreign-based or affiliated contractors. The GPA also guarantees adherence to minimum standards of transparency and commits its parties to the implementation of measures to prevent corruption and avoid conflicts of interest in their procurement systems.

In calling for these changes and enhanced cooperation to address corruption and supplier collusion problems in public procurement, this Paper does not propose something that is entirely new. However, it argues that there is a need for cooperation and other mechanisms and steps which go beyond those currently engaged by the specialized disciplines of competition law enforcement, anti-corruption work, and procurement policy in their respective spheres of activity. It is only through a more integrated approach that the world will come to grips with a set of problems that routinely undermines economic development, penalizes our most vulnerable citizens, and erodes the very foundations of states themselves.