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PUBLIC AND PRIVATE ENFORCEMENT OF BID-RIGGING CARTELS IN THE EU: DEBARMENT AND COMPENSATION CHALLENGES

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Abstract

Bid-rigging, a form of cartel agreement where competitors collude to manipulate the outcome of tenders, poses significant threats to fair competition and public finances. Despite intensified global and EU-level efforts to combat bid rigging, public procurement remains vulnerable to such practices, underscoring the need for ongoing research and regulatory refinement to address collusion effectively. This paper examines both public and private enforcement mechanisms targeting bid-rigging cartels in the EU, with an emphasis on sanctions - specifically the challenges of debarment mechanisms and compensation for damages arising from these practices. The paper provides an overview of bid-rigging strategies, an analysis of debarment mechanisms (specifically bidder exclusion and director disqualification), and addresses selected private enforcement issues, exploring both the potential victims of bid rigging and the barriers to obtaining compensation. Through this analysis, the paper offers insights into strengthening enforcement measures to promote fair competition and protect public resources.

Key words: *bid rigging, collusion in public procurement, debarment, bidder exclusion, director disqualification, antitrust damages, victims of bid rigging, barriers in pursuing compensation*

1. INTRODUCTION

Bid rigging (or collusive tendering) is an illegal business practice. It is a specific type of cartel agreement in which undertakings that are supposed to compete in a bidding process instead collude to manipulate its outcome. Bid-rigging is present in both private and public tenders. However, certain aspects of the public procurement[1] process - such as the lucrative nature of government projects and the predictability and transparency of regulatory requirements - render it particularly vulnerable to anticompetitive practices.[2] Its impact on competition and public funds is significant.[3] According to data published by the OECD, governments spend approximately 12% of their GDP on public procurement.[4] Eliminating bid rigging could, by some estimates, reduce procurement prices by 20% to 60%[5] which would translate into potential savings amounting to millions or even billions of euros.[6]

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1 Public procurement is of key importance for a Member State's economic development. OECD, *Collusion and Corruption in Public Procurement: Key Findings, Summary and Notes*, OECD Roundtables on Competition Policy Papers, no. 108 (Paris: OECD Publishing, 2010), 10, https://doi.org/10.1787/ef957f70-en.

2 The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly demonstrated in economic literature. See: Albert Sanchez-Graells, "Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement," in *Integrity and Efficiency in Sustainable Public Contracts*, ed. G. Racca and C. Yukins (Brussels: Bruylant, 2014), 3; Public procurement is especially prone to bid-rigging schemes because it makes communication among rivals easier and increases market transparency. Additionally, public procurement often involves large, high-value projects (in sectors such as energy, construction, infrastructure, healthcare and pharmaceuticals, waste management, and environmental services) with a limited number of competitors, while the sheer quantity of contracts creates monitoring difficulties; all of these factors encourage collusive behaviors. OECD, *Collusion and Corruption in Public Procurement,* 10.

3 Collusion damages competition by reducing quality of products and services, waste public funds, impacting infrastructure and services, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. OECD, *Collusion and Corruption in Public Procurement.*10.

4 According to the OECD, public procurement spending as a share of GDP averages around 12% across OECD countries, although recent figures suggest a slightly higher percentage in certain EU nations, particularly due to pandemic recovery funds. Specifically, OECD-EU countries showed public procurement spending increasing from 13.7% of GDP in 2019 to 14.8% by 2021, largely boosted by the EU's Recovery and Resilience Facility aimed at economic recovery and resilience enhancement. OECD, *Government at a Glance 2023* (Paris: OECD Publishing, 2023), 120, https://doi.org/10.1787/3d5c5d31-en.

5 OECD, *Competition Policy in Eastern Europe and Central Asia: Focus on Bid Rigging in Public Procurement*, OECD Newsletter no. 17 (July 2021), 8..; European Commission, *Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Ground*, 2021/C 91/01, C/2021/1631, OJ C 91 (March 18, 2021): 1–28.. point 1.1.; OECD, *Director Disqualification and Bidder Exclusion in Competition Enforcement*, OECD Roundtables on Competition Policy Papers, no. 291 (Paris: OECD Publishing, 2022), 5–6, https://doi.org/10.1787/fe39ea1a-en.

6 European Commission, *Notice on Tools to Fight Collusion in Public Procurement, point. 1.1.*

To minimize damages arising from bid rigging, authorities have intensified their focus on fighting this practice. In the last ten years leading global regulators such as the OECD[7], the World Bank[8], and the EU[9] and governments around the world have delivered a large number of policy and legislative instruments in order to raise awareness of this illegal practice, ease detection, and provide adequate sanctions. Beyond these legislative measures, combating bid rigging has become a central focus of competition authorities. Their efforts in detecting and sanctioning bid rigging are reflected in enforcement statistics, showing a rise in the number of decisions against bid rigging.[10]

In the EU specifically, both public and private enforcement rules have been established to detect, deter, and remedy bid rigging. At the center of the public enforcement mechanism are the principles of integrity, competitiveness, and transparency in public procurement. Additionally, competition law plays a pivotal role in public enforcement, providing a comprehensive framework for prosecuting and

7 OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009), https://legalinstruments.oecd.org/public/doc/284/284.en.pdf; OECD, *Recommendation on Fighting Bid Rigging in Public Procurement* (2012), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396; OECD, *Fighting Bid Rigging in Public Procurement: Report on Implementing the OECD Recommendation* (2016); OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, OECD/LEGAL/0396 (2023), https://legalinstruments.oecd.org/public/doc/284/284.en.pdf; OECD, "Managing Risks in the Public Procurement of Goods, Services and Infrastructure," *OECD Public Governance Policy Papers*, no. 33 (2023), OECD Publishing, Paris, https://doi.org/10.1787/45667d2f-en; OECD, *Integrating Responsible Business Conduct in Public Procurement* (Paris: OECD Publishing, 2020), https://doi.org/10.1787/02682b01-en; OECD, "Professionalising the Public Procurement Workforce: A Review of Current Initiatives and Challenges," *OECD Public Governance Policy Papers*, no. 26 (2023), OECD Publishing, Paris, https://doi.org/10.1787/e2eda150-en.

8 The World Bank Group, *Fraud and Corruption Awareness Handbook*, https://documents1.worldbank.org/curated/en/100851468321288111/pdf/575040WP0Box351Corruption1Awareness.pdf.

9 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 65–242; European Commission, *Notice on Tools to Fight Collusion in Public Procurement;* European Commission, *Communication from the Commission: Guidance on the Participation of Third-Country Bidders and Goods in the EU Procurement Market*, 2019/C 271/02; OLAF (European Anti-Fraud Office), *Fraud in Public Procurement - A Collection of Warning Signs and Best Practices*, manual (2017); OLAF (European Anti-Fraud Office), *Identifying and Reducing Corruption in Public Procurement in the EU*, study (2013).

10 According to the analysis provided in scholarly research, between year 2015 and 2021, competition agencies in 33 European jurisdictions witnessed a 7% increase in decisions against cartels, reaching 184 cases (OECD, 2023). In 2021 alone, 39 of these decisions involved bid rigging. See: Carlotta Carbone, Francesco Calderoni, and Maria Jofre, "Bid-Rigging in Public Procurement: Cartel Strategies and Bidding Patterns," *Crime, Law and Social Change* 82 (2024): 249–281; According to Global antitrust enforcement report, for the third year running, bid rigging was the most commonly enforced type of cartel conduct in 2023. In year 2023, 42% of all cartel decisions related to bid-rigging cartels. A&O Sherman, *Global Antitrust Enforcement Report*, available at: https://www.aoshearman.com/en/insights/global-antitrust-enforcement-report.

sanctioning anti-competitive conduct. Meanwhile, the private enforcement mechanism focuses on redress for victims who have been injured by anti-competitive practices in public procurement procedures.

Bid rigging is regulated *ex-ante* and *ex-post*. *Ex-ante* regulation, grounded in public procurement rules[11], is aimed at preventing bid rigging before it occurs, by introducing requirements of transparency, competition, and equal treatment, all of which make collusion between bidders much more difficult.[12] When collusion is detected during the tendering procedure, a public authority has the possibility of excluding wrongdoers from tender procedures for a certain period of time.[13] This debarment serves as a punishment and a deterrent, as companies are discouraged from engaging in collusive behavior because, as a consequence, they may lose access to high-value public contracts. Many times, however, public authorities fail to recognize the collusion between bidders and tenders were rigged. Where such a situation occurs, the competition rules trigger national or EU-wide *ex-post* enforcement mechanism, as bid rigging is an agreement in violation of Article 101 TFEU. When Article 101 TFEU has been breached, the relevant competition authority (the EU Commission or a competent NCA) may impose severe fines. In addition, national legislation may provide for possible criminal sanctions.[14] As we can see, sanctions for collusion in public procurement vary widely, ranging from fines and imprisonment to more specialized penalties such as debarment from future public procurement procedures.[15] Further, injured parties who suffered harm because tenders are rigged can also seek redress through civil liability, by claiming antitrust damages before national courts.

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC, *Text with EEA Relevance*, OJ L 94 (March 28, 2014): 243–374.

[12] See e.g. recitals 1 and 45 of the Directive 2014/24/EU.

[13] Article 57 (4) (d) Directive 2014/24/EU. For more on debarment see: Erling Hjelmeng and Tina Søreide, "Debarment in Public Procurement: Rationales and Realization," in *Integrity and Efficiency in Sustainable Public Contracts*, ed. G. M. Racca and C. Yukins (Brussels: Bruylant, 2014), University of Oslo Faculty of Law Research Paper No. 2014-32, https://ssrn.com/abstract=2462868. For a critical economic analysis see: Emmanuelle Auriol and Tina Søreide, "An Economic Analysis of Debarment," *International Review of Law and Economics* 50 (2017): 36–49.

[14] For a short multijurisdictional overview on criminal sanctions see: OECD, *Criminalisation of Cartels and Bid Rigging Conspiracies – Summaries of Contributions*, 9 June 2020, DAF/COMP/WP3/WD(2020)22, available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)22/en/pdf#:~:text=Bid%20rigging%20can%20be%20sanctioned,authority%20can%20file%20a%20complaint

[15] OECD, *Collusion and Corruption in Public Procurement,* 13.

Despite awareness of the consequences that colluding companies face, bid rigging persists worldwide, affecting every country and economy. No nation is immune to this global issue, which adapts to local peculiarities and remains a crucial topic of discussion.

The purpose of this paper is to examine the complexities of public and private enforcement mechanisms related to bid-rigging cartels in the EU, focusing on sanctions for this illegal practice and challenges to achieving effective redress. After this introductory part, which is the first part of the paper, the second part will discuss bid rigging as a specific form of cartel behavior, analyzing the characteristics of bid rigging strategies. The third part of the paper will provide a critical insight into debarment mechanisms, specifically bidder exclusion and director disqualification, as sanctions that can be imposed on undertakings that rigged the bidding process, in addition to fines imposed by competition authorities. The fourth part of the paper will address selected private enforcement issues, with particular attention to identifying potential victims of bid-rigging and exploring the barriers that inhibit public authorities and other parties from pursuing compensation for damages arising from these practices. The fifth part of the paper will conclude.

2. UNDERSTANDING BID-RIGGING CARTELS: KEY CHARACTERISTICS AND COMMON STRATEGIES

According to one of the many definitions[16], bid rigging is a collusive agreement and a serious form of anti-competitive behavior where competing firms illegally conspire to manipulate the outcome of a bidding process, often by deciding in advance which firm will win. This manipulation usually results in higher prices

[16] According to another definition bid rigging belongs to the group of private restriction to competition and is always present when the bidders agree among themselves to offer higher prices or lower quality of goods and services, or to allocate the public procurement among themselves thus preventing, restricting or distorting competition during the awarding process. Sofia Competition Forum, UNCTAD, and CPC, *Guidelines for Fighting Bid Rigging in Public Procurement*, No. 570/2010, 9, https://unctad.org/system/files/non-official-document/ccpb_SCF_Bid-rigging%20Guidelines_en.pdf, 9.; Whish and Bailey describe collusive tendering between actual or potential competitors as: "a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender." Richard Whish and David Bailey, *Competition Law*, 9th ed. (Oxford: Oxford University Press, 2018), 547.; Bid-rigging usually involves competitors collaborating in some way to restrict competition in response to a tender, regardless of whether the tender is issued by a public authority or a private entity. It is universally viewed as one of the most serious cartel-type offences alongside price-fixing, output restrictions and market allocation, and is often a combination of these practices.; See: Fiona Carlin and Joost Haans, "Bid-Rigging Demystified," *In-House Perspective* 2, no. 1 (January 2006): 11–18, 11.; Bid rigging is a collusive agreement among competing firms aimed at artificially distorting a bidding process so that adjudication prices are higher and/or the quality of the product/service supplied is lower.; See: Alberto Heimler, *Cartels in Public Procurement: A Reassessment* (November 20, 2023), 1, https://ssrn.com/abstract=4638354.

or lower quality goods and services, undermining fair competition and impacting public and private procurement.[17]

Most commonly, bid rigging occurs between direct competitors who agree on prices or market share. For that reason, bid rigging is usually classified as a hard-core cartel agreement.[18] However, in practice, bid rigging can also occur between vertically integrated undertakings[19] or in the context of intra-group coordination[20].[21]

Further, although there is no doubt that bid rigging is a type of cartel, there are some differences compared to typical (price-fixing and market-sharing) forms of cartels. First, when it comes to market scope, typical cartels usually affect entire markets or industries, influencing the overall supply, pricing, and availability of goods or services over time (which can make them more difficult to detect as they are spread out), while bid-rigging cartels focus specifically on public procurement, targeting individual bids or tenders rather than broader commercial activities (which can make them easier to detect by examining patterns in specific tenders).[22] Second, typical cartels tend to be unstable, as members have a strong incentive to cheat on agreed prices and quantities, while this is not the case with bid-rigging cartels as collusion occurs in structured, transparent procurement processes, making it more challenging for participants to cheat without detection.[23]

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[17] David Bailey and Laura Elizabeth John, eds., *Bellamy & Child: European Union Law of Competition*, 8th ed. (Oxford: Oxford University Press, 2018), 390.

[18] Carlin and Haans, "Bid-Rigging Demystified," 11.

[19] Which is usually the case in bidding consortia or joint bidding.

[20] For instance, when a corporate group owns multiple competing brands and decides that only one will bid on a tender. If multiple brands from the group do bid, each must act independently; any exchange of information, coordination on pricing or terms would amount to unlawful collusion. Carlin and Haans, "Bid-Rigging Demystified," 12.

[21] E.g. the French NCA imposed fines totaling €4.3 million on subsidiaries of the Air Liquide Group for anticompetitive practices in the hospital medical gas sector. In that case, the NCA found that two subsidiaries of Air Liquide had engaged in market-sharing and price-fixing agreements between 1994 to 1996 while bidding to become suppliers of medical gases to public hospitals and private healthcare establishments. The NCA noted that, while it was not illegal for the subsidiaries of the same group to agree on a sole bidder, it is illegal for the subsidiaries to coordinate the terms and price of their respective offers and present themselves as two independent and competing companies on the market (it made no difference that those who had organised the tenders knew of the corporate links existing between the bidders). Medical gases for use in hospitals: the Conseil de la concurrence sanctions practices by two subsidiaries of the Air Liquide Group; https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/20th-january-2003-medical-gases-use-hospitals-conseil-de-la-concurrence

[22] Typical cartels are often difficult to detect due to their secretive nature and widespread impact across the market, bid-rigging, however, can sometimes be easier to detect because it involves specific, identifiable bid patterns in isolated tenders, allowing authorities to spot signs of collusion through procurement monitoring.

[23] Alberto Heimler, "Cartel Enforcement in Public Procurement," *Journal of Competition Law & Economics* 8, no. 4 (2012): 1–14, https://doi.org/10.1093/joclec/nhs028, 2.

Furthermore, while typical cartels usually involve only a select number of key market players and occur in markets where the product is homogeneous and where there are relatively a small number of market participants, bid-rigging cartels may commonly encompass all market participants within the sector. For example, in the *Ticino* case, all road surfacing companies in the region colluded on tenders to the respective state bodies[24], and in the Netherlands, one of the largest cartels ever prosecuted involved the whole construction industry in the Netherlands.[25].

It is noteworthy to state that bid-rigging is, in some cases, combined with other cartel activities. For instance, in the *Pre-insulated Pipes* cartel case, bid-rigging occurred alongside price-fixing and market-sharing.[26] Similarly, in the *Retail Food Packaging* cartel case, companies restricted competition through price-fixing, customer allocation, market-sharing, the exchange of sensitive price information, and bid-rigging. [27] Additionally, in the *Elevators and Escalators* cartel case, companies not only rigged bids for procurement contracts but also fixed prices, allocated projects, shared markets, and exchanged commercially sensitive and confidential information.[28]

Some of the most common bidding strategies or bidding patterns are:

a. **Cover bidding**. Also known as complementary, courtesy, token, or symbolic bidding, this strategy typically involves competitors who submit bids that are either higher than the designated winner's bid, known to be too high to be accepted, or contain terms unacceptable to the purchaser. [29] When a bidder submits a cover bid rather than declining to submit a bid, it prevents the party seeking tenders from sourcing a competitive alternative. This approach not only restricts genuinely competitive bidders from entering tender procedure but also gives the impression that there is active competition, misleading the party issuing the tender about the true level of market interest and pricing.[30] In the *Car Glass* cartel case, the EU Commission addressed the practice of cover pricing, where cartel members submitted bids that appeared competitive but were deliberately inflated,

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[24] Kai Huschelrath et al., "The Deterrent Effect of Antitrust Sanctions: Evidence from Switzerland," *Antitrust Bulletin* 56, no. 2 (Summer 2011): 427.

[25] Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 7.

[26] Pre-Insulated Pipes (Case AT.37956), European Commission decision of 21 October 1998; Bailey and John, *Bellamy & Child*, 391.

[27] Retail Food Packaging (Case AT.39605), European Commission decision of 24 June 2015; Bailey and John, *Bellamy & Child*, 391.

[28] Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 6.

[29] OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Bailey and John, *Bellamy & Child*, 392.

[30] Bailey and John, *Bellamy & Child*, 392.

ensuring that the designated cartel member secured the contract by setting all other bids higher. [31] Some other notable cases of cover bidding are *Elevators and Escalators* cartel case[32] and *Building and Construction Industry* cartel case in the Netherlands[33]. Cover bidding may be (and usually is) followed by monetary payments among the colluding parties.[34] In the *International Removal Services* cartel case, the EU Commission found that cartel members coordinated by submitting cover quotes and offering financial compensation for unsuccessful bids or for abstaining from bidding entirely.[35]

b. **Bid rotation**. A form of bid rigging where a group of bidders take turns being the winning bidder, ensuring that each participating company wins at least one bid over time. The rotation may be based on different criteria such as size of the project, size of each participant, geographic location of projects, or simply a chronological order and it is often combined with cover bidding.[36] Bid rotation can be difficult to detect, as it creates an impression of dynamic competition between competing firms: bids are often submitted by large number of bidders, who often submit unequal bids. The cases of bid rigging where undertakings involved strategy of bid rotation are e.g. *Italian Raw Tobacco* cartel case[37] and the *French Roadworks* cartel case[38].

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[31] Case COMP/39.125 – Car Glass, Commission Decision of 12 November 2008, OJ 2009 C 173/13; Whish and Bailey, *Competition Law*, 548

[32] In this EU case, major elevator and escalator manufacturers, including Otis, KONE, Schindler, and ThyssenKrupp, coordinated bids in multiple tenders across Belgium, Germany, Luxembourg, and the Netherlands. The companies engaged in cover bidding by submitting artificially high bids to ensure a preselected company won the tender. Case COMP/E-1/38.823 - Elevators and Escalators [2007]

[33] This was one of the largest cartels in the Netherlands, involving many construction companies. These firms engaged in cover bidding by submitting bids that appeared competitive but were actually part of a prearranged agreement on who would win the tenders. Case IV/31.572 and 32.571 - Building and construction industry in the Netherlands, OJ L 92, 04/04/1992, p. 1–55.

[34] OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Bailey and John, *Bellamy & Child*, 392.

[35] Commission Decision of 11 March 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services); Bailey and John, *Bellamy & Child*, 548;

[36] OECD, *Guidelines for Fighting Bid Rigging*, 2009., 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Whish and Bailey, *Competition Law*, 547.

[37] The Commission found that Italian tobacco processors colluded on allocating contracts for the purchase of raw tobacco through bid rotation and other collusive practices. European Commission Decision of 20 October 2005 relating to a proceeding under Article 81 of the EC Treaty (COMP/C.38.281/B.2 - Raw Tobacco Italy), OJ L 353, 13.12.2005, p. 45–64

[38] Companies involved in roadworks in France allocated projects and used bid rotation to ensure that each participant won specific contracts. French Competition Authority Decision 07-D-15 of 10 May 2007 on practices implemented in the public roadworks sector in Île-de-France

c. **Bid suppression**. A bidding strategy that occurs when one or more bidders agree not to submit a bid or withdraw previously submitted bid or submit bids that are incomplete or deliberately flawed to appear non-competitive.[39] This approach allows the designated winning bidder to offer a price significantly above the market value, avoiding true competition. When bidders withdraw, the tendering process may need to restart, or the buyer may proceed with a higher-priced bid, ultimately inflating costs for goods and services. In *Pre-insulated Pipes* cartel case companies supplying pre-insulated pipes in several EU countries used bid suppression (certain companies refrained from bidding), among other tactics, allowing pre-designated firms to win contracts without competition[40], and in *British Construction* cartel case firms involved in numerous public and private sector contracts were found to refrain from bidding to ensure predetermined winners, which resulted in fines against 103 construction firms for bid-rigging practices[41].

d. **Market allocation**. A bidding strategy in which competitors divide the market by agreeing not to compete for specific customers or within designated geographic areas. They may assign certain clients or customer categories to different firms, ensuring that competitors may not bid or will submit only cover bids for contracts involving those clients.[42] In 2008, the Romanian NCA fined a pharmaceutical producer and three distributors for a market-sharing cartel in which, within an auction within the Diabetic National Program, each distributor offered different products of the same manufacturer, so that they did not compete against each other in the auction.[43]

e. Bidding consortia. Joint bidding is a specific form of bidding agreement that, unlike other bid-rigging strategies, is not necessarily prohibited. Common in practice, many consortia agreements enhance competition by allowing firms to pool their resources and knowledge for a single contract.[44] When assessing whether joint bidding is prohibited, we can consider three elements that are important in this evaluation: whether the undertakings are direct competitors, whether they

[39] OECD, *Guidelines for Fighting Bid Rigging*, 2009, 2.; Carlin and Haans, "Bid-Rigging Demystified," 11.; Whish and Bailey, *Competition Law*, 547.

[40] European Commission Decision of 21 October 1998 (IV/35.691/E-4 – Pre-insulated Pipes), OJ L 24, 30.1.1999, p. 1–23

[41] UK Office of Fair Trading Decision of 2009 (Construction Cartel), Case CE/4327-04

[42] Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 4.

[43] Ibid., 5.; G. Harapcea, "The Romanian Competition Council Fines a Pharmaceutical Producer and Three Distributors for Participation in a Market-Sharing Cartel Active on the Insulin Market (Eli Lilly Export, A&A Medical, Mediplus Exim and Relad Pharma)," *e-Competitions*, 12 March 2008, no. 19850.

[44] Danish Competition Authority, *Joint Bidding Under Competition Law: Guidelines* (2018), https://en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf.

could have bid independently, and whether it was possible to bid for lots of the contracts. First, as long as the participants in bidding process are not competitors as regards the concrete contract, consortium agreement will normally not be problematic under competition rules.[45] Then, practice to bid jointly may be anti-competitive if it restricts competition between parties who could have submitted separate bids, conversely, it generally does not restrict competition when the parties are genuinely unable to tender individually.[46] Consortia or other cooperative arrangements between competitors will usually be unobjectionable where the participants do not have the capacity to execute an order individually or, by combining their resources, are able to make a more competitive offer.[47] In the *Ski Taxi* case, the Norwegian NCA observed that while disclosing the joint nature of the bid to the tendering authority might suggest no intent to collude, such disclosure alone does not rule out bid rigging. A key factor to examine is whether bidders are actual or potential competitors and whether the joint bid lacks a legitimate collaborative purpose.[48] By contrast, in a decision by the French NCA, it was noted that while the lack of economic or technical necessity to bid jointly may give raise to a presumption of anti-competitive intent, it does not constitute proof, of the existence of an anti-competitive agreement.[49] In another case, the French NCA issued a decision regarding the formation of interest groups in tender bid process. The French NCA emphasized that joint bidding can be pro-competitive when members of interest groups complement each other in ways that they cover different specialties, provide access to different technologies, facilitate access to raw materials or the necessary workforce, and even spread costs for equipment rental.[50] Lastly, competition authorities will also assess whether it was possible to bid for lots of the contracts. For example, in the *Skive and Omegns' Transportation Association* case, the Danish NCA found that a consortium's joint bid for municipal snow removal and salting services restricted competition. The Danish NCA

[45] Ibid., 5.

[46] Bailey and John, *Bellamy & Child*, 394.

[47] Collaboration between two or more companies that jointly pursue larger contracts that they might otherwise be unable to compete for. The French Competition Council (Conseil de la Concurrence), for instance, takes the view that the absence of economic and technical necessity for competitors to bid jointly may give rise to a presumption, but does not constitute proof, of the existence of an anti-competitive agreement (Decisions du Conseil de la Concurrence, Nos 04-D-20 and 04-D-50).

[48] Case E-3/16, Ski Taxi SA, Follo Taxi SA, and Ski Follo Taxidrift AS v Norwegian Government, Judgment of 22 December 2016, EFTA Court; Bailey and John, *Bellamy & Child*, 395.

[49] Decisions du Conseil de la Concurrence 04-D-50 of the 03 November 2004 on practices implemented in tenders organised by the Intercommunal Sanitation Union of the Valley of the Lakes Valley (88); Carlin and Haans, "Bid-Rigging Demystified," 12.

[50] Decisions du Conseil de la Concurrence 05-D-21 of the 17 May 2005 on practices in the funeral provision sector; Bailey and John, *Bellamy & Child*, 395.

determined that individual bids for separate routes were feasible, leading to its conclusion that the consortium agreement was anti-competitive.[51] On the other side in *Consortium ERC 900* case, the EU Commission found that, consortium agreement was lawful because it has established that the financial costs and staffing requirements associated to developing and manufacturing of the system were so high that realistically it was not possible to carry out that project individually by parties to the consortium agreement. [52]

As demonstrated by the patterns and strategies described above, bid rigging is a pervasive issue impacting economies worldwide, adapting to local contexts and procurement processes. Detecting and prosecuting these practices poses significant challenges due to complex factual backgrounds, undocumented oral agreements, and often minimal tender documentation.[53] Recognized as one of the 'most serious' infringements under competition law, bid-rigging incurs some of the highest levels of sanctions, designed not only to have a punitive effect but also to serve as a deterrent and safeguard the integrity of public procurement systems.

3. PUBLIC ENFORCEMENT CHALLENGES: DEBARMENT AS A SANCTION IN BID-RIGGING CARTELS

Before examining debarment as a specific sanction for bid-rigging cartels, a brief overview of other types of sanctions will be provided. Various sanctions can be imposed on offenders, with monetary fines being the most common, and representing a key sanction within the framework of competition law enforcement. When calculating fines competition authorities apply the same methodology as in any other cartel case. [54] Fines imposed for bid-rigging cartels are high. For example, in *Optical Disc Drives* cartel case the EU Commission imposed fines totaling 116 million EUR on eight companies involved in bid-rigging[55], in the building and construction industry in the Netherlands the EU Commission imposed 22.5 million EUR fine on the association of trade associations[56], in elevators and es-

[51] Decision of the Competition Council of 30 April 2014, Skive og Omegns Vognmandsforenings tilbudskoordienring (cited from: Danish Competition Authority, *Joint Bidding Under Competition Law*, 2018., 14)

[52] Commission decision of 27 July 1990, Case IV/32.688 – Konsortium ERC 900.

[53] Carlin and Haans, "Bid-Rigging Demystified," 13.

[54] Fines for competition law infringement in EU is up to 10% of annual turnover of each company. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance) OJ C 210, 1.9.2006, p. 2–5.

[55] Optical Disc Drives (Case AT.39639), European Commission decision of 21 October 2015; Bailey, D., & John, L. E. (Eds.). (2018). *Bailey and John, Bellamy & Child,* 391.

[56] Case T-29/92, SPO and Others v Commission [1995] ECR II-289; Whish and Bailey, *Competition Law*, 548.

calators the EU Commission imposed fines of EUR 992 million EUR on four undertakings[57], in *Car Glass* cartel case the EU Commission imposed fines of 1.3 billion EUR, which was at the time the largest set of fines for one decision in the history of Article 101. [58] When it comes to national NCAs, the amount of fines is also significant. French NCA e.g. fined 14 companies with almost 10 million EUR for having shared almost all public markets for the restoration of historic monuments[59], and the UK NCA imposed 129.5 million £ in fines on construction firms engaging in illegal and anti-competitive bid rigging activities on at least 199 tenders. [60] These are just a few examples, illustrating the severity of financial penalties for bid-rigging offenses.

Additionally, to the financial penalties, in many EU countries[61], bid-rigging is a separate criminal offence authorizing the imprisonment of individuals for bid rigging in jail term varying from two to six years. Other criminal laws do not address bid rigging as such but do penalize criminal behavior often associated with bid rigging, such as fraud, bribery or corruption.[62]

Moreover, some authors argue that a comprehensive legal framework should include not only regulatory, civil, and criminal sanctions but also reputational penalties.[63] In this regard, some authorities may compel companies found guilty of anti-competitive conduct to publicly acknowledge their misconduct, which can also be viewed as a type of sanction, adding another layer of deterrence.[64]

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[57] Case COMP/E-1/38.823 – Elevators and Escalators [2007] OJ C75/19; Whish and Bailey, *Competition Law*, 548; Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 6.

[58] Case COMP/39.125 – Car Glass, Commission Decision of 12 November 2008, OJ 2009 C 173/13; Whish and Bailey, *Competition Law*, 548

[59] Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 8.; M. Pujdak and A. Dhaliwal, "The French Competition Authority Fines 14 Companies €9,803,590 for Having Shared Almost All Public Markets for the Restoration of Historic Monuments," *e-Competitions*, 26 January 2011, no. 35150.

[60] Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 7.

[61] Austria, Belgium, Germany, Hungary, Italy, Poland, Spain. Carlin and Haans, "Bid-Rigging Demystified," 15.

[62] Ibid.

[63] „On average, firms lose 2.3% of their market values when an antitrust investigation is exposed." Stijn van den Broek, Ron G. M. Kemp, Willem F. C. Verschoor, and Anne-Claire de Vries, "Reputational Penalties to Firms in Antitrust Investigations," *Journal of Competition Law & Economics* 8, no. 2 (June 2012): 231–258, https://doi.org/10.1093/joclec/nhs008; see also: Franco Mariuzzo, Peter L. Ormosi, and Zherou Majied, "Fines and Reputational Sanctions: The Case of Cartels," *International Journal of Industrial Organization* 69 (2020): 102584, https://doi.org/10.1016/j.ijindorg.2020.102584.

[64] The French NCA, in addition to imposing fines, required the companies condemning collusion in the public works sector to fund advertisements detailing the decision in two publications given the seriousness of the offences and the need to draw the attention of the relevant public authorities and their electorate to the importance of being vigilant to detect bid-rigging. (Decision No 05-D-26 of 9 June 2005); Alain Ronzano, "Consortium: The French Competition Authority Sanctions a Consortium of

In EU public enforcement, additional sanctions include bidder exclusion and director disqualification. Both sanctions aim at suspending from public procurement procedures, for a set period, either an individual or a company involved in anti-competitive conduct. Director disqualification removes an individual from any managerial role across companies, usually within a particular jurisdiction, while bidder exclusion typically prevents a company from participating in specific bids or markets, often under a particular contracting authority. And while director disqualification is applied mainly to hard-core cartels or abuse of dominance, bidder exclusion is associated with bid rigging in public procurement.[65]

These two types of debarment sanctions have different features and application in different jurisdictions, but they share several aspects of commonalities, such as they are particularly effective in attaining objective of general and specific deterrence[66] and may be valuable as complements to other forms of detection and deterrence[67]. However, although these types of debarment can be highly effective, their application presents several practical challenges, including questions about the objectives pursued, the scope (such as which individuals or companies should be subject to debarment, its duration, and the applicable markets), the required standard of proof, and potential unintended consequences.[68]

3.1. Bidder exclusion

Bidder exclusion is a sanction that enables contracting authorities or other competent bodies to exclude companies engaged in cartel activity from participating in public procurement processes. Besides punishing cartel participants, the purpose of this sanction is to preserve the integrity of the bidding process, particularly in public procurement contracts. The regulatory framework governing bidder exclusion varies across jurisdictions: in some countries, it is established under competition laws, while in others, it is prescribed exclusively under public procurement laws.[69] However, in most jurisdictions, bidder exclusion operates as a sanction un-

Undertakings for Several Anticompetitive Behaviors Such as Market Sharing and Exchanges of Information (Travaux publics dans la Meuse)," *Concurrences* 3, no. 2005 (June 9, 2005): Art. no. 63221.

65 OECD, *Director Disqualification and Bidder Exclusion*, 6.

66 Ibid., 7.

67 Director disqualification can serve as a remedy for anticompetitive conduct, even in cases where the evidence may not meet the strict criteria required in criminal cases. On the other hand, targeted bidder exclusion can effectively maintain the integrity of tenders, helping to restore public trust in fair administration and the responsible use of resources in public procurement. Ibid.

68 Ibid.

69 So for example, in Bulgaria, Croatia, Denmark, Estonia, Finland, Hungary, etc., bidders exclusion is contained in public procurement legislation, while for example, in Germany, Portugal or Czech Republic, this sanction is prescribed in the Competition act. Ibid. 53- 67.

der public procurement laws rather than competition laws and is therefore subject to the competence of different authorities.[70]

At the EU level, bidder exclusion is regulated by public procurement law, as defined in the Public Procurement Directive[71], particularly Article 57, which outlines the criteria for excluding bidders.[72] The recently enacted Notice on tools to fight collusion in public procurement and guidance on exclusion grounds further clarifies the application of this sanction.[73]

The aforementioned article states that contracting authority shall or may exclude from bidding process economic operators that have entered into agreements with other economic operators aimed at distorting competition. Similar provision is incorporated in competition acts or public procurement laws of Member States. However, there are significant differences in the regulation of bidder exclusion in different Member States, those differences exist in relation to rules on mandatory and voluntary exclusion, authorities entitled to exclude economic operator from bidding process, duration of exclusion, and in relation to some other issues that will be elaborated further in the text.

So, regarding the first issue, it should be emphasized that bidder exclusion can be mandatory (or automatic) and voluntary (in which case the decision on the exclusion is on the competent authority). In the EU criteria for exclusion, both mandatory and voluntary exclusion, are listed in article 57 of the Public Procurement Directive. Paragraph 1 of Article 57 precisely defines criteria for mandatory exclusion. It requires contracting authorities to exclude any economic operator convicted by final judgment for serious offenses, including involvement in a criminal organization, corruption, fraud, terrorism-related offenses, money laundering, child labor, or human trafficking. This mandatory exclusion also extends to individuals in decision-making, supervisory, or representative roles within the operator. These

[70] Ibid., 29.

[71] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance *OJ L 94, 28.3.2014, p. 65–242;* The 2004 EU procurement rules (art 45(2)(c) and (d) of Directive 2004/18) already contained provisions that would allow contracting authorities or entities to disqualify infringers of competition law, given that breaches of competition law should always be considered instances of grave professional misbehaviour. Sanchez-Graells, "Prevention and Deterrence of Bid Rigging," 17.

[72] Before the adoption of the 2014 Public Procurement Directives, collusive practices in public procurement were primarily addressed under competition law, with national competition authorities investigating and sanctioning anti-competitive agreements under Article 101 of the TFEU. After 2014, bidder exclusion became explicitly regulated under public procurement law at the EU level, with Article 57 of the Public Procurement Directive establishing clear criteria for exclusion, implemented by contracting authorities. European Commission, *Notice on Tools to Fight Collusion in Public Procurement*

[73] European Commission, *Notice on Tools to Fight Collusion in Public Procurement*

exclusions are compulsory and aim to uphold integrity in procurement by preventing participation from operators involved in serious criminal activities. Voluntary exclusion, on the other hand, is prescribed by Paragraph 1 of Article 57, stating that contracting authorities may exclude economic operators if they demonstrate bankruptcy, insolvency, or other factors that raise concerns about the operator's integrity, such as grave professional misconduct or misleading information provided in the tender process. Furthermore, contracting authorities may also exclude operators suspected of engaging in agreements with competitors aimed at distorting competition. This provision helps prevent collusion by allowing authorities to act on plausible indications of anti-competitive behavior, thereby safeguarding fair competition. Provisions on voluntary exclusion were the subject of preliminary ruling in a recent case *Infraestruturas*.[74] In its judgment, the Court of Justice clarified the scope of discretion conferred by the Public Procurement Directive on contracting authorities regarding facultative grounds for exclusion. The EU legislature intended for contracting authorities alone to assess whether to exclude candidates during the tender selection stage, ensuring that contracting authorities across all Member States have the discretion to exclude operators considered unreliable.[75] The Court emphasized that Member States may either mandate the application of facultative exclusion grounds or allow contracting authorities to choose whether to apply them.[76] The Court further ruled that the exclusion grounds apply not only to the current tender procedure but also to previous conduct in past procedures.[77] The Court concluded that contracting authorities are responsible for assessing operators' integrity and reliability, observing the principle of proportionality, and providing specific justifications for exclusion decisions.[78]

When it comes to the second issue on determining which authority is competent to impose bidder exclusion, practices differ significantly across jurisdictions. Competence depends on the legal basis of the exclusion (public procurement or competition law) and the procedural framework in the country.[79] In most ju-

[74] On 21 December 2023, the Court of Justice delivered its judgment in case Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias (C-66/22). The case originated in a request for a preliminary ruling from the Portuguese Supreme Administrative Court and concerns the interpretation of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU on public procurement and Article 80(1) of Directive 2014/25

[75] Paras 55. – 57. of the judgement in the case C-66/22

[76] Para 58. of the judgement in the case C-66/22

[77] Paras 67. – 69. of the judgement in the case C-66/22

[78] David Drabkin and Christopher Yukins, Debarment: EU-U.S. Comparative Assessment, Stockholm, April 2024: https://publicprocurementinternational.com/wp-content/uploads/2024/04/David-Drabkin-Chris-Yukins-vFinal.pdf , p. 5.

[79] Ibid. 29.

risdictions, bidder exclusion is handled by contracting authorities under public procurement laws. For example, in countries such as Austria, Bulgaria, Denmark, Estonia, Germany, Croatia, and Italy, the contracting authority has the power to impose such sanctions directly.[80] In contrast, some jurisdictions involve competition authorities in the exclusion process when the violation relates to competition law. For instance, in Czech Republic and Portugal, the competition authority can initiate the exclusion process, which is then implemented by the contracting authority.[81] In other jurisdictions, the court plays a central role in issuing debarment orders while the competition authority or the public procurement authority, will monitor its implementation.[82] In Hungary, for example, only a judicial body can impose a bidder exclusion sanction.[83] Same situation is with debarment period (duration of exclusion) which is in most countries between 3 and 5 years (e.g. in Austria, Czech Republic, Denmark, Croatia, Estonia, EU, Finland, Germany, Hungary).[84] In Slovenia and Norway debarment period is not specified[85], while in some countries it is shorter, from one to 3 years (it is the case in Portugal, Turkey, US)[86].

The rule on voluntary exclusion related to infringement of competition rules and encompassed in point (d) of Paragraph 4 of Article 57 of the Public Procurement Directive has identically or similarly been adopted in most Member States.[87] It did not, however, escape criticism for being imprecise and overly vague. The main criticism relates to the fact that legal standard for the exclusion, which is "sufficiently plausible indications" is not precise enough and that it leaves to much discretion to contract authority to decide on exclusion. We must agree that this criticism is justified. But this is not the only flaw related to bidder exclusion, as its application as a sanction for engaging in cartel activity raises numerous concerns. One of the biggest challenges relates to the risks of negative consequences on the market particularly in small countries where there is a small number of competitors. Exclusion from one or more economic operators from the market may lead to decreased competition particularly if the market is oligopolistic. Further, it is worth considering how bidders' exclusion will impact on the incentives of firms

[80] Ibid., 53-67.

[81] Ibid.

[82] Ibid., 29.

[83] Ibid., 53-67.

[84] This is the case for Austria, Czech Republic, Denmark, Croatia, Estonia, EU, Finland, Germany, Hungary etc.

[85] This is the case for Slovenia and Norway

[86] This is the case for Portugal, Turkey, US

[87] OECD, *Director Disqualification and Bidder Exclusion*, 53- 67

or individuals to participate in leniency program.[88] Last, since in large numbers of Member States the decision on the exclusion is on the contracting authority, the question is, are contracting authorities granted with too much power and who is going to control abuse of their powers?

All the above-mentioned challenges have been subject of discussions on the EU and global level. To provide guidance to contracting authorities when and how to apply exclusions some clarifications have been provided in EU and OECD policy papers. So, for example the EU Commission have provided detailed explanation of the notion of "sufficiently plausible indications" as a criterion for bidders exclusion.[89] According to the explanation provided in point 5.4. of the Notice on tools to fight collusion in public procurement and on guidance how to apply to related exclusion ground, sufficiently plausible indication exist when a tenderer has already concluded a subcontracting contract with another tenderer in relation to same public tender, or when a tenderer has pre-ordered the material needed to perform specific contract prior, or when it is established that tenders have been submitted by the same business representative, etc.[90]

The EU Commission and the OECD also invest huge efforts in easing detection of bid rigging cartels and raising awareness about bid-rigging strategies by publishing red-flags guidelines[91], by encouraging reporting of bid rigging suspicion and by supporting development of supplementary sanctions such as for example rules on directors disqualification.

3.2 Director disqualification

Director disqualification as a sanction for competition law infringement has been implemented relatively recently. According to data provided by OECD, 23 jurisdictions worldwide prescribe this sanction for competition law infringement. However, only around 10 jurisdictions provide for it specifically in their competition laws.[92] In those jurisdictions where director disqualification is not prescribed in competition law, it is, as in case of bidder exclusion, prescribed in public procurement laws or companies' acts.

[88] Ibid., 35.

[89] European Commission, *Notice on Tools to Fight Collusion in Public Procurement, point* 5.4.

[90] Ibid.

[91] See for example: European Commission, OLAF, *Fraud in Public Procurement: A Collection of Red Flags and Best Practices*, 2021, https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021_en.pdf; OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, 2016.

[92] OECD, *Director Disqualification and Bidder Exclusion*, 9.

Director disqualification enables competition authority, court or other competent authority to bring an order by which companies' director, former director, shadow director or any other individual who is exercising analogous functions in practice is requested not to act as a director.[93] This sanction is generally considered to be a very effective one because it is targeted directly against natural person who is responsible for the infringement. It prevents directors to shield behind a company and it results in personal liability of those responsible for companies' decisions and for wrongdoings. The effectiveness of this sanction rests on the fact that director disqualification hits an individual's reputation, career, and deprives individuals of their livelihood.[94]

Although director disqualification is generally regarded as an effective sanction for competition law infringements, it raises several issues worth discussing, such as which authority should impose the sanction, the appropriate duration of the disqualification, the criteria for disqualification, the standard and burden of proof required, and the specific challenges to consider when implementing this sanction.

In relation to the issue of competent authority for imposing sanctions and disqualification period, it is noticeable that different countries have adopted different solutions. In some jurisdictions, such as Australia, Hungary, and Israel, the decision to impose this sanction is on court or other judicial body. On the other side, in Poland, Japan, the UK or the US, competition authority is entitled to bring the decision on director disqualification.

When it comes to the disqualification period, in many countries' disqualification can be imposed for a period not longer than five years. So, for example, disqualification period in Germany is three years, in Ireland is up to five years, in Norway is up to five years, and in Sweden is from three to 10 years[95]. However, there are some jurisdictions where the disqualification period is much longer. This is the case for the UK where disqualification period is up to 15 years, or in US where disqualification period can be imposed for unlimited time[96].

Since elaborated sanction can evidently have serious consequences for sanctioned individuals, it is important that criteria for disqualification are clear and precise.

Further, because many cartels are global cartels involving multinational corporations it is important that those criteria are globally standardized and universally

[93] By shadow director, it is normally meant any individual who is taking strategic decisions at the firm, even if she does not hold the relevant function title. OECD, *Director Disqualification and Bidder Exclusion*, 15.

[94] Ibid., 9.

[95] Ibid., 45- 52.

[96] Ibid., 51.

recognized. However, the research conducted showed that this is not the case. For example, EU Commission as well as large number of EU countries neither impose nor acknowledge director disqualification as a sanction for the infringement of competition rules. Such situation diminishes overall importance and the effect of this sanction as an effective tool to fight large multinational bid-rigging cartels. On the other side, some countries, such as the UK or the US, use this sanction frequently and have elaborated rules on criteria for disqualification. An example of a jurisdiction where criteria for disqualification are clear and precise is UK.

In the UK Guidance on Competition Disqualification Orders[97] it is said that director disqualification is a mandatory sanction for breach of the competition rules. So according to the Guidance, the UK's Competition and Market Authority must request from the court directors disqualification when a company is engaged in competition law infringement and when the director is "*unfit to be concerned in the management of a company*"[98]. Under Article 2.10 of the Guidance, director's conduct can render them unfit for company management if they contributed to the competition law breach, had reasonable grounds to suspect a breach was occurring and took no steps to prevent it, or were unaware of the breach but ought to have known about it.[99] From above it is obvious that the decision of the court as to whether the director should be disqualified or not is assessed in light of all fact of each case. The UK's Authority has been rather strict in applying this sanction. Since its introduction, the UK's Authority has expanded the scope for director disqualification orders to cover all competition law infringements, prohibited agreements and abuses of dominance, although these sanctions have primarily targeted severe cartel cases. Between 2016 and 2022, the CMA issued 25 notable disqualification decisions, including the first order in December 2016 against Mr. Daniel Aston, a director involved in price-fixing for online posters (5 years). In 2020, further disqualifications were imposed on Mr. Amit Patel for arrangements in the nortriptyline supply (5 years) and on directors involved in price-fixing in Berkshire's real estate sector (up to 6.5 years). In 2021, the CMA secured disqualification undertakings against former directors of FP McCann Ltd. for participation in a pre-cast concrete cartel, with disqualification terms ranging from 11 to 12 years.[100] Furthermore, research conducted by professor Whelan, focused on *ex-*

97 UK Competition and Market Authority, *Guidance on Competition Disqualification Orders*, February 6, 2019, https://assets.publishing.service.gov.uk/media/5f3d3ca9d3bf7f1b164fe1a4/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf

98 Ibid.

99 Ibid. Article 2.10.

100 Competition and Markets Authority (CMA), *Annual Report and Accounts 2021/22*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097032/Annual_Report_CE.pdf; OECD, *Director Disqualification and Bidder Exclusion*, 14.

post analysis of the impact of directors disqualification in the UK, showed that it is an effective deterrent measure.[101] Therefore, it seems that this sanction is worth considering as one of the sanctions for the competition law infringement in those countries, which so far did not regulated it in national jurisdictions. UK model of regulation can serve as good example of regulation.

In close relation to addressed issue of criteria for director disqualification are the issues of burden of proof and standard of proof. When it comes to burden of proof, it is normally the duty of the competition authority or other competent authority to prove the liability of directors involved in anti-competitive conduct. On the other hand, in the court case the burden of proof is on the director who must show (or prove) that criterion for disqualification is not met. A more complex question is the question of standard proof. The main dilemma is should director's liability be proved "beyond any reasonable doubt" or the standard of proof should be "balance of probabilities".[102] With regarding to that, we can find opposing opinions of legal scholars. While some argue that director's liability should be established "beyond any reasonable doubt", the others argue that such standard would make director disqualification less attractive as a sanction since director's liability will be difficult to prove.[103]

Lastly, to provide an objective insight in analyzed sanction, it remains to reflect on challenges of director disqualification order. It should be said that director disqualification is not a miracle sanction. It should be viewed as a necessary regulatory measure aimed at suppressing cartel activity but also as a measure that would increase the accountability of companies' directors. In that sense, as with some of the downsides of these sanctions we should mention following. First, it may have no effect outside the jurisdiction in which it was imposed. Second, proving individual liability may be costly and burdensome and it may jeopardize investigation against company, if the investigation against a company and individual is conducted in parallel[104], as this could dissuade individuals from coming forward with information and evidence. Last, it is questionable whether and how it will be enforced against individuals who have retired or who resigned their position in the company and moved to some other company.

[101] Ibid., 27.

[102] OECD, *Director Disqualification and Bidder Exclusion*, 17.

[103] See on that: A. Khan, "Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?" *World Competition* 35, no. 1 (2012): 77–122.; see also: OECD, *Director Disqualification and Bidder Exclusion*, 17.

[104] OECD, *Director Disqualification and Bidder Exclusion*, 23

4. PRIVATE ENFORCEMENT CHALLENGES: POTENTIAL VICTIMS AND BARRIERS TO INITIATING DAMAGES CLAIMS

While aforementioned sanctions in the event of an infringement may "punish" the wrongdoers, they do not address the harm caused by such practices. Bid rigging practices cause harm to public authorities, individuals and the society as a whole. To address these concerns, injured parties must seek redress through civil liability, by claiming antitrust damages before the competent national courts.

The importance of private enforcement should not be underestimated. Recent OECD studies have shown that bid-rigging cartels achieve higher levels of overcharging than non-bid-rigging cartels.[105] It leads to significant price increases for public purchasers compared to normal market conditions.[106] This overcharging of rigged goods and services is a direct loss of taxpayers' money and a blow to public resources that could have been more wisely and efficiently allocated. It goes without saying that the more public financial resources are overspent on rigged public tenders, less there is for any other government activity including its core functions. In addition, this leads to larger budget deficits and greater reliance on borrowing by governments that might negatively influence their financial stability.[107] By claiming damages, public authorities can effectively recover the overcharges, thereby restoring taxpayer funds and deterring future bid-rigging.[108]

The legal basis for antitrust damages claims is provided by national laws of Member States transposing into their national legislation the Antitrust Damages Directive.[109] The Antitrust Damages Directive grants the right to compensation to any person who has suffered damage caused by the anticompetitive practices including public authorities, regardless of whether or not there has been a prior finding of an infringement by a competition authority.[110]

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105 More on the topic see Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, Discussion Paper no. 12-050 (ZEW, 2012), 12, http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf.

106 European Commission, *Notice on Tools to Fight Collusion in Public Procurement*, point 1.1.

107 Loc.cit.

108 Penelope Giosa, "The Case for Reforming the Rules on Contracting Authority Damages Claims for Bid Rigging in the EU," *Public Procurement Law Review* 27, no. 6 (December 2018): 235–250, https://ssrn.com/abstract=3576966.

109 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 Text with EEA relevance, OJ L 349, 5.12.2014, p. 1–19.

110 See recital 13 of the Directive 2014/104/EU.

The Antitrust Damages Directive and consequently national legislation as well, brings forward a set of tailor-made rules for antitrust damages redress, facilitating the role of the claimant in the proceeding while maintaining the integrity of public enforcement mechanism. Regardless of the existence of these rules, it appears that in some jurisdictions, bid rigging victims do not use this right as often as they could and should.[111]

Laborde's study on cartel damages in Europe from 2021 shows that claimants from public sector cumulatively initiated a total of 42% of the cartel related damages claims across Member States.[112] However, the majority of this cases was based of only a few cartel decisions and was limited to just a few jurisdictions. Most cases were initiated in Germany and France following the rail[113], truck[114] and road signalization cartels[115]. On the other side of the spectrum are states such as Croatia with no reported antitrust damages cases following bid rigging.[116] At the same time, it is undisputed that there is a clear moral imperative to ensure that public money is spent as efficiently and effectively as possible. For that to happen, public finance management systems must ensure transparency and accountability.[117] In terms of the latter, it can be argued that claiming damages suffered through bid

[111] It should be noted that there is no comprehensive study on private enforcement efforts stemming from bid rigging. Some countries report the existence of such cases, Catalonia observes the lack of such cases in their jurisdiction. See, Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations Due to Anti-Competitive Practices*, February 2023, ES 22/2019, 4–6, https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20230208_es_22_2019_reclamacio_danys_eng.pdf.

[112] Publicly owned companies (20% of the cases), local authorities (19%), and central governments (3%), See Jean-François Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.), Concurrences N°3-2021, para 22.

[113] Annual Report On Competition Policy Developments In Germany 2013, prepared for OECD, DAF/COMP/AR(2014)25, p. 6.

[114] EU Commission Decision in Case AT.39824 — Trucks.

[115] Nathalie Jalabert-Doury, Public tender - Fines: The French Competition Authority fines a cartel in the road signs sector (Road signs cartel), 22 December 2010, Concurrences N° 1-2011, Art. N° 34026, pp. 86-87.

[116] For instance, Croatia does not have a single bid rigging damages claim before its courts. The reason is likely linked to public competition law underenforcement in relation to bid rigging. In Croatia to date there is only one bid rigging infringement decision by the Croatian Competition Agency in case *CCA vs. Agro-Vir d.o.o. et al*, Class: UP/I 034-03/17-01/021. Reg.no. 580-09/84-2022-082 of 28 April 2022. Similarly, the autonomous region of Catalonia observes the lack of such cases in their jurisdiction. See, Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 4-6.

[117] How to ensure efficient and effective public spending, by OMFIF editors / 5 December 2023, available at https://www.omfif.org/2023/12/how-to-ensure-efficient-and-effective-public-spending/ (accessed 24/09/2024).

rigging is not only a right of the state but rather an obligation stemming from good administration principle.[118]

The vital importance of pursuing damages from bid rigging has been recently recognised by the Catalan Competition Authority who in 2023 issued an invitation to public administration bodies to engage in claims for damage caused by bid rigging and offered a set of recommendations that might facilitate this activity.[119]

While issues pertaining to the relatively low involvement of the state may be many, and will be addressed later, it is certainly worth mentioning that, unlike other types of anticompetitive behavior, damages claim from bid rigging are unlikely to be pursued in a stand-alone setting, although this is not excluded as a possibility. We believe it is unlikely for the state body to initiate a stand-alone procedure because of the heavy legal and evidentiary burden in the absence of an infringement decision by the NCA. In addition, it is possible that state body even if suspicious of bid rigging, is not sure that collusion between bidders took place and let alone that it had been directly harmed by it. Therefore, it is more likely for sate bodies to initiate proceedings for damages only once the relevant competition authority reaches an infringement decision, by which the state body itself becomes aware of the infringement and the damage it had suffered as a result. Certainly, this indicates the existence of a link between public and private enforcement of bid rigging practices. The increase of bid rigging decisions by competition authorities across jurisdictions thus might have a beneficial impact on private enforcement against these practices. The good news is that a recent study shows that in 2023 for the third consecutive year, bid-rigging was the most frequently enforced type of cartel behavior by national competition agencies.[120]

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118 „Public entities have several important reasons to pursue damages claims against cartels, including redressing harm to taxpayers, restoring public resources, deterring future anticompetitive practices, and promoting long-term benefits like more competitive tenders, lower prices, and higher quality services, all of which enhance social welfare." Carmen Garcia, Juan Luis Jiménez, and José Manuel Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages: Challenges and Obstacles," in *Competition Policy in Eastern Europe and Central Asia: Advocacy of Competition*, OECD-GVH Regional Centre for Competition in Budapest (Hungary), Review no. 23 (January 2023), 44.; Assimakis Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Oxford: Hart Publishing, 2008), 19.
On different aspects of good administration see: *Good Administration in European Countries*, OM OFFENTLIG SEKTOR, 2023, https://www.eupan.eu/wp-content/uploads/2023/04/Annex-1.-Good-administration-in-European-countries.pdf

119 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 4-6

120 Significant fines were issued in the UK, Germany, Austria and France. See: A&O Sherman, *Global Antitrust Enforcement Report*

Even though there is a beneficial correlation between public enforcement and subsequent private actions for damages, it is not the primary driving force behind such claims, nor is it the sole factor determining their success. In the following paragraphs, we first present the list of possible victims of bid rigging cartels to emphasize the magnitude of damage and present the main challenges each category of victims faces. We then proceed with identifying possible deterring reasons on the part of the state for initiating damages actions and put forward some recommendations.

4.1. Identifying Victims of Bid Rigging

The *direct victim* of bid rigging is obviously the state in any of its organizational units (i.e. any public authority, body or organization tendering the rigged public procurement). The state may suffer overcharges, reduced quality of goods or services, and possibly supply chain disruptions.[121] Out of all the presented damage, the overcharge is the likeliest damage to be claimed by the state, as the reduction of quality and disruption of supply chain is very difficult to prove and quantify. In addition, state bodies might suffer loss of profit from the decrease of sales, because the actual damage from overcharge has been passed on purchasers increasing the price of rigged goods or services.[122]

The state as a claimant who is the direct victim of bid rigging faces the same challenges as any other direct victim of anticompetitive behavior. Therefore, the determination of damage, its quantification and to a lesser degree the causation between the damage and the harm suffered, may be the most challenging issues to prove before the national courts.

An illustrative example is a Belgium case in which, albeit by application of general tort rules, the Commercial Court in Brussels dismissed the claim by the EU Commission[123] against the members of the escalator cartel. The EU Commission itself found that the members of the cartel divided the market by allocating tenders and maintenance contracts [124] and initiated proceedings for damages following its own infringement decision. The Commercial Court in Brussels found that the EU Commission insufficiently proved damage and the causal link. Even though this is

121 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 13.

122 Loc.cit.

123 Europese Commissie/Otis e.a. (A.R. A/08/06816) (24-11-2024) reported in 2021 ICC Compendium on Antitrust damages, p. 113-114.

124 European Commission decision of 21 February 2007 in Case COMP/E-138.823 PO/Elevators and Escalators.

not the final say because the appeal is still pending[125], it is interesting to consider the arguments of the Commercial Court. When it comes to causation the Court emphasized "it is in principle sufficient that there is a condition *sine qua non* link between the ground for liability and the damages".[126] However, the EU Commission's infringement decision that was relied upon did not prove that the cartel caused the overcharge. It was merely established this was the aim of the cartel, but failed to prove this aim was actually achieved. The Commercial court concluded that when it comes to bid rigging, under normal circumstances, an effect on price cannot be assumed.[127]

As mentioned, the case was decided by application of general tort rules, as the time of procedure precedes the application of the national legislation implementing the Antitrust Damages Directive. However, this is not decisive for the outcome reached, as causation is not harmonized by the Antitrust Damages Directive but rather it is left to the competence of the Member States [128] with a very limited interpretative scope so far offered by the CJEU.[129] The Belgian example is thus only one of possible interpretations and application of a causation standard across Member States.

On the other side, the state as a direct victim is in a better position to prove damages than other cartel victims, because the asymmetry of information generally characterizing cartel damages, are not as strong in these cases. Namely, the public authority who suffered damages as a result of a rigged public tender is in possession of all the bids placed by the participants of the rigged public procurement which subsequently may be used as evidence in antitrust damages proceedings. In addition, it has been observed that members of a bid rigging cartel are less likely to make use of the leniency program[130] due to its interaction with anticorruption rules. As long as leniency immunity does not cover the corruption offence it is less likely that members of a bid rigging cartels will make a leniency application.[131] While this negatively influences the number of infringement decisions,

[125] Lewis Crofts and Niki Boussemaere, "EU Institutions' Elevator – Cartel Damages Resumes in Belgian Appeal Court," *mLex*, March 4, 2024, https://interleges.com/wp-content/uploads/2024/03/MLex_EU-institutions-elevator-cartel-damages-battle-resumes-in-Belgian-appeal-court.pdf

[126] 2021 ICC Compendium, op.cit. p. 114.

[127] Loc.cit.

[128] See recital 11 of the Directive 2014/104/EU,

[129] Fora a detailed account on causation in antitrust damages claims see: Claudio Lombardi, *Causation in Competition Law Damages Actions* (Global Competition Law and Economics Policy) (Cambridge: Cambridge University Press, 2020).

[130] Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 43

[131] Juan Luis Jiménez, Manuel Ojeda-Cabral, and José Manuel Ordoñez de Haro, "Who Blows the Whistle on Cartels? Finding the Leniency Applicant at the European Commission," *Review of Industrial*

where such decisions are reached in the ordinary procedure, it is much easier for the victims to obtain evidence by application of general disclosure rules provided by the Antitrust Damages Directive (as opposed to leniency statements which are blacklisted for disclosure).[132]

Besides the state as a direct victim of bid rigging, there are even more *indirect* victims of bid rigging. These are all the people to whom the overcharge or decreased quality has been passed on by the state. An illustrative factual example of the magnitude of possible indirect victims of a bid rigging cartel is the recent CJEU case *Kilpailuja kuluttajavirasto*.[133] The case involved a rigged public tender for the award of a contract for the construction of a high-voltage transmission line in Finland. In this case it was observed that cartel could have "harmful economic repercussions downstream, in particular in the form of higher electricity distribution tariffs".[134] In other words, indirect victims are all the costumers of the members of the cartel that had to pay higher prices for electricity due to the cartel.[135] For indirect victims it is even more difficult to prove causation. In fact, the more distant the victim is to the infringer, the more difficult it is to prove causation, particularly when an unbroken chain of events leading to the damage is required. In addition, indirect victims have the burden of calculating the amount of damage passed-on to them by the state which is never a straightforward calculation.

In addition to direct and indirect victims of bid rigging, the CJEU recognised other, even more remote categories of victims. The first one relates to *umbrella victims*, i.e. victims of umbrella pricing. This situation occurs where undertakings

Organization (October 2022): 17, https://ssrn.com/abstract=4503090.

132 Article (6) of the Directive 2014/104/EU.

133 Case C-450/19 - *Kilpailu- ja kuluttajavirasto*, Judgement of of 14 January 2021, EU:C:2021:10.

134 Ibid., para 36.

135 Far from being just a factual illustration of the spillover effect of a rigged public tender, the ruling in the *Kilpailuja kuluttajavirasto* case is relevant as it gives an interpretation on the moment when a bid rigging cartel ends. The court specified that in cases of a single bidding collusion, the violation ends with the conclusion of the contract, i.e., determination of the essential details of the contract such as price. According to the CJEU it is up to the national court to determine when these essential details were finalized. While this moment is crucial for public enforcement as this is the moment when time limits tarts to run, it is not affecting directly time limits in private enforcement, as they are safeguarded by the Article 10 of the Directive 2014/104/EU according to which the limitation periods starts to run cumulatively when the infringement of competition law has ceased (*Kilapailuja kuluttajavirasto* judgement) and the claimant knows, or can reasonably be expected to know the about the infringement of competition law; the existence of harm to it; and the identity of the infringer. Usually this is the moment when the final infringement decision is made. For a short comment of the case see: Patrik Albrecht, "When Is Participation in a Bid-Rigging Cartel Deemed to Have Ceased to Exist?" *Kluwer Competition Law Blog*, February 26, 2021, https://competitionlawblog.kluwercompetitionlaw.com/2021/02/26/when-is-participation-in-a-bid-rigging-cartel-deemed-to-have-ceased-to-exist/

that are not members of a cartel raise their prices to align them with the inflated prices set by the cartel.[136] As a consequence even their customers pay a price that is higher than it would have been in the absence of a cartel. The right of umbrella victims to claim antitrust damages against the members of the cartel dates back to the *Kone* case[137] in which the CJEU essentially concluded that national legislation, which categorically excludes any civil liability of cartel members for damages resulting from umbrella pricing, is incompatible with EU law.[138] In the context of bid rigging, a recent study shows that umbrella damage is not negligible as "structural estimation reveals that, per contract, damages due to non-cartel firms bidding higher are at least 35 percent of damages caused by the cartel".[139] However, these claimants face a very heavy evidentiary burden in relation to the existence of damage and causation as demonstrated by the 2024 judgement of Court of Appeal of the Hague in relation to umbrella claims against Kone.[140] Court of Appeal of the Hague recognised that umbrella damages might not be *a priori* excluded, however in order to hold Kone liable for damages, the umbrella claimant must as a minimum provide concrete indications of umbrella pricing such as "examples where the assignors changed supplier after price increases by the addressees or demonstrate that price trends of parties that were not addressed in the decision, where related to price increases by the addressees. General economic theory without concrete indicia is, however, insufficient according to the Court".[141]

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136 In the context of competition law, it is widely accepted that umbrella pricing represents a legitimate business strategy as market participants are entitled to adapt intelligently to the prevailing market conditions (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-*73 Coöperatieve Vereniging 'Suiker Unie' UA and others v. Commission* ECLI:EU:C:1975:174.) In consequence, the adoption of such a pricing policy by undertakings not party to a cartel does not constitute a violation of EU competition rules and, therefore, no liability for compensation for the resulting loss may be imposed upon them. In such a case, compensation may only be required from cartel members, as it is the cartel activity that enables third parties to impose higher prices.

137 Case C-557/12 *Kone AG and others v. ÖBB- Infrastruktur* AG, EU:C:2014:1317.

138 For a detailed analysis of Kone case, see Vlatka Butorac Malnar, "The Kone Case: A Missed Opportunity to Put the Standard of Causation Under the Umbrella of the EU," in *EU Competition and State Aid Rules: Public and Private Enforcement*, edited by Vesna Tomljenović et al., Series Europeisation and Globalisation (3) (Berlin Heidelberg: Springer Verlag, 2017), 175–195.

139 El Hadi Caoui, The Journal of Law and Economics Volume 65, Number 2, May 2022., 239. See also: John Asker, El Hadi Caoui, Vikram Kumar, and Enrico De Magistris, "Bid Rigging and Umbrella Damages," *Competition Policy International's Antitrust Chronicle* (October 2023), 6.

140 Judgement of the Court of Appeal of the Hague from 23 January 2024, case no. 200.304.621 and 200.304.673.

141 Jeroen Kortmann, Nima Lorje, and Frederike de Meulemeester, "Court of Appeal of The Hague Rules on Liability for Antitrust Follow-On Damages Claims in the Elevator Sector," *Stibbe*, February 29, 2024, https://www.stibbe.com/publications-and-insights/court-of-appeal-of-the-hague-rules-on-liability-for-antitrust-follow-on

Another interesting category of victims related to a bid rigging cartel, originates from the 2019 judgement of the CJEU in the case *Otis II*.[142] In that case the court recognized the right to compensation to the Province of Upper Austria for damages suffered in its capacity of a public subsidies' provider. The victim was again the state, however this time, relationship of the state to the cartelists was neither direct or indirect. Action for damages was initiated by the Province of Upper Austria claiming that it suffered harm caused by the escalator cartel, in the context of its budget allocations. Province of Upper Austria was giving out promotional loans for financing building projects. It claimed that the installation costs of lifts paid by beneficiaries of those loans that were included in the overall building costs increased due to the escalator cartel. As a result, the Province of Upper Austria had to provide larger loans. It claimed that in the absence of a cartel, it would have provided smaller loans. The difference between the two could have been invested more profitably. However, under Austrian law, such a loss does not present a sufficient connection with the purpose of the legal rule prohibiting cartel agreements and the objective pursued by Article 101 TFEU and as a consequence, it could not give rise to compensation.[143] The CJEU disagreed with such an interpretation and building on its previous case law and full effectiveness of Article 101 TFEU, confirmed that compensation for losses may also be claimed under these circumstances.[144] However, yet again, the CJEU extended the right to compensation, while falling short of specifying elements that must be met in order to establish causation and other requirements for compensation before national courts. Although it is an expected ruling, it might lead to divergent application of EU competition law by Member States.[145]

Finally, among the bid rigging victims are the unsuccessful bidders as well. These are the undertakings that did not win the public contracts because the public tenders were rigged. The challenge for this category of victims is how to prove that they would have won the contract without the cartel. Particularly challenging is proving counterfactual, especially as there may be other criteria besides the cost (such as social, environmental, quality and other tendering criteria), influencing the outcome of a public procurement procedure. It has been observed in the literature that such a victim could be successful in proving damage only if in the

142 Case C-435/18, *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others*, Judgment of the Court of 12 December 2019, EU:C:2019:1069.

143 Ibid. para 14-15.

144 Ibid, para 35.

145 Sílvia Bessa Venda, "Otis II: Light at the End of the Tunnel for Damages Indirectly Caused by Competition Law Infringements," *UPL Law Review: Revista de Direito da ULP* 13, no. 1: 161.

absence of cartelists' bids, his bid would have remained the only valid bid in the tender.[146]

4.2. Barriers Inhibiting the State in Pursuing Damages in Bid-Rigging Cases

Despite recent positive trends in enforcement statistics, reflecting an increase in decisions against bid-rigging practices, private enforcement in the domain of public procurement in the EU operates at a slow pace.[147] Research has identified numerous reasons why private enforcement by procurement entities is underutilized.

Since 2004, the EU Commission has invested in promoting private enforcement of competition law in order to increase incentives for seeking compensations.[148] Prior to the adoption of the Antitrust Damages Directive, the EU Commission conducted Impact Assessment[149] and issued Green and White Paper[150] in which it identified common difficulties victims of competition law infringements face when seeking compensation.[151] While the Antitrust Damages Directive introduced measures to address these issues and increase civil antitrust claims, some argue that the Antitrust Damages Directive does not provide an adequate framework for encouraging public authorities to pursue private enforcement. A key criticism is that it offers no significant advantages over existing national tort laws

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146 Marsela Maci, "Private Enforcement in Bid-Rigging Cases in the European Union," *European Competition Journal* 8 (2012): 211, 219–220.

147 In some countries however, the deterrent effect of private enforcement is significant. E.g. „In Japan, many private antitrust lawsuits have actually been brought by public entities, such as local governments and government agencies, who frequently seek to recover damages suffered from bid-rigging cartels." OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Relationship Between Public and Private Antitrust Enforcement*, Working Party No. 3 on Co-operation and Enforcement, June 2015, DAF/COMP/WP3(2015)14, 9–10.; "It's not widely recognized that the public sector has consistently sought damages for losses caused by cartels, which raises concerns because any financial damage or dysfunction within the public sector inevitably impacts the broader well-being of society." Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages" 43.

148 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 6.

149 Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013)

150 Commission, Green Paper - Damages Actions for Breach of the EC antitrust rules, COM (2005)672 final; Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008)165 fina

151 These include, among others, difficulty of accessing the evidence, unclear rules on the passing-on defence, calculating damages and the rules concerning the costs of actions. Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), 15; Commission, White Paper on Damages Actions for Breach of the EC antitrust rules (2008), para. 2.

or competition law for public authorities, thus limiting its practical relevance in public procurement.[152]

Private enforcement actions involving bid-rigging cartels are less common than those targeting other hard-core cartels, such as price-fixing and market-sharing.[153] This section will provide for a bid-rigging-specific reasons why private enforcement by procurement entities is underutilized. It will also offer suggestions for addressing these issues.

a. **Establishing harm.** Although the Antitrust Damages Directive established the right to 'full compensation' for harm caused by EU competition law violations and introduced a rebuttable presumption that cartels cause harm, plaintiffs still encounter significant challenges in proving and quantifying damages in bid-rigging cases, as discussed in detail in the previous section.[154] The contracting authorities' difficulty in specifying and quantifying the financial harm is one of the reasons why private enforcement is limited in bid-rigging cases.[155] Determining damages is one of the highly complex, yet crucial aspect of the process, as bid riggers carefully conceal their actions, making it difficult to establish a clear causal link between bid rigging and financial loss and quantifying the overcharge or loss of quality resulting from anti-competitive practices.[156]

To address the challenge of specifying and quantifying financial harm, several potential solutions can be considered. Contracting authorities could opt for statutory or pre-established damages instead of actual damages. This simplifies the process by providing a predefined amount of compensation without requiring a detailed calculation of losses.[157] Another solution is the use of liquidated damages clauses in public contracts. These clauses allow for a pre-agreed lump sum to be paid in the event of a breach, relieving public bodies of the burden of proving their loss.[158]

152 Enhancing contracting authorities' ability to seek damages was not among the Directive's objectives. On shortcomings and challenges arising under the Directive see: Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

153 Maci, "Private Enforcement in Bid-Rigging Cases," 212.

154 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 7.

155 Penelope Giosa, "Damages Claims for Bid Rigging: How to Make Them More Popular in the EU," *CCP Research Bulletin* 37 (2019): 4–6, 6.

156 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

157 Such a solution already applies in the domain of intellectual property, where judicial authorities are enabled in certain cases, award damages as a lump sum. This is typically based on factors like the amount of royalties or fees that would have been due if the infringer had obtained authorization to use the intellectual property right in question. Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

158 This practice is particularly common in Germany, where courts have upheld the legality of these clauses, awarding public bodies damages based on pre-agreed amounts. See more in: Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

The amount of damages can also be introduced to the tendering procedure documentation.[159] Furthermore, some jurisdictions went so far as to expand the courts' powers to allow them to estimate the amount of damages, following the principle that judicial actions must remain effective. This principle ensures that seeking damages should not be made practically impossible or excessively difficult. Consequently, a court cannot refuse to award some form of damages solely because the claimant is unable to precisely quantify the actual harm suffered.[160] Finally, national courts may request the competition authority to assist in the proceedings.[161] Involvement of national competition agencies in the proceedings might be very beneficial. They can play a significant role by acting as *amicus curiae* and provide the guidance to the courts in the quantification of damages, or by determining the damage suffered by the public administration body already at the stage of public enforcement.[162] Regarding the latter, most antitrust damages claims, as has been previously stated, are follow-on actions, so it is clear that these decisions play a significant role in the outcome of such claims. Therefore, it could also prove useful that competition authorities' decisions support the compensation process by including at least relevant data and information about the infringement and the affected parties, which would provide potential claimants with valuable insights into damages that could support their legal actions.[163]

b. **Costs of litigation.** Legal costs and cost shifting (loser pays principle embedded in the Antitrust Damages Directive and embraced in almost all Member States as a general rule[164]) are determinant factors of whether harmed contracting authorities will

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159 It is interesting in Korea; in order to discourage cartel conduct, procurement agencies require bidders to submit a statement signed by each bidder that they have not and will not engage in any communication with other bidders including a warning of the possibility of sanctions and of related damage claims for bid rigging. The statement also includes a predetermined amount of damages, which generally says that "once bid-rigging among bidders is established, a bidder agrees to compensate 10% of the amount of the contract for damages caused by bid-rigging to the procurement agency unless a specific and fixed amount of damages is proved and verified." OECD, *Relationship Between Public and Private Antitrust Enforcement*, 17.

160 Ibid.

161 Ibid. The Damages Directive allows national competition authorities, if deemed appropriate, to assist in determining the amount of damages when requested by a national court.

162 Claim for damages caused…, op.cit. p. 47-48.

163 Furthermore, when competition authorities determine that a public administration has been harmed by a sanctioned behavior, they could notify the administration of the infringement decision, encouraging that way the affected administration to seek damages. Susanna Grau and Pau Mirapleix, "Boosting Antitrust Damage Claims by Catalan Public Administration," in *Competition Policy in Eastern Europe and Central Asia: Advocacy of Competition*, OECD-GVH Regional Centre for Competition in Budapest (Hungary), Review no. 23 (January 2024): 38.

164 In all Member States "loser pays" is the general rule, except in Lithuania where each party undertakes its own costs. C. Hodges, S. Vogenauer, and M. Tulibacka, "The Oxford Study on Costs and Funding

pursue legal action.[165] High litigation costs, uncertainty around the outcome, and the time-consuming nature of legal proceedings can discourage them from taking action, especially since these costs and resources are ultimately borne by the public budget and taxpayers. [166] This burden is particularly heavy for Member States with smaller procurement agencies, which often lack the necessary enforcement resources.

To address this obstacle, it has been suggested that a competition damages litigation fund be established, funded by contributions from contracting authorities and supervised by a government body responsible for auditing public sector accounts (e.g., the Auditor General).[167] Such a fund would cover litigation costs, helping to alleviate the financial pressure on public entities. Procedural costs can often cause public entities to withdraw from or avoid initiating claims due to concerns over high expenses or low success rates. In cases where success is more likely, providing public financial support would enable these entities to pursue claims more effectively. [168]

c. **Public officials and their role in the process.** When it comes to procurement public officials there are several challenges that can be associated with their roles. First, as identified, procurement officials often lack the "industry-specific knowledge" needed to monitor and detect anti-competitive behavior, which results in difficulty in assessing whether a tender requires formal antitrust investigation.[169] In addition, the public bodies who initiate proceedings do not benefit from the recovered damages, nor do the reporting officials receive career benefits.[170] Quite to the contrary, public officers are generally evaluated on the ground of successful bidding process and not the number of identified bidding rings.[171]

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of Civil Litigation - Introduction," in *The Costs and Funding of Civil Litigation: A Comparative Perspective*, ed. C. Hodges, S. Vogenauer, and M. Tulibacka (London: Bloomsbury Publishing, 2010), 17.

165 M. De Sousa e Alvim, "The New Directive on Antitrust Damages - A Giant Step Forward?" *European Competition Law Review* 36 (2015): 247.

166 Hodges, Vogenauer, and Tulibacka, "The Oxford Study on Costs and Funding," 4.; Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; It is interesting that some are of the opinion that "the state is in a favourable position as a litigant in damages actions, (op.a. especially due to the fact that) the costs are borne by the public budget". Maci, "Private Enforcement in Bid-Rigging Cases," 225.

167 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

168 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

169 There are several reasons why authorities encounter increasing challenges in uncovering bid-rigging in public tenders. Bid-riggers use more sophisticated methods to hide their activities, and effective detection depends on close cooperation between procurement bodies and competition authorities, alongside proper training for officials. Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 43. – 44; Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; International Competition Network, *Anti-Cartel Enforcement Manual: Chapter on Relationships Between Competition Agencies and Public Procurement Bodies*, April 2015, 15.

170 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

171 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

To overcome these challenges, proposed solutions are directed to strengthen the capacity of procurement officials. First, enhanced detection techniques, such as advanced data analytics and cross-border cooperation between competition authorities, could facilitate earlier identification of bid-rigging schemes.[172] Given that procurement officials often lack expertise in various specific industries needed to prepare high-quality tender specifications or evaluate offers, it is crucial to involve external experts at key stages of the procurement process. [173] Another key solution is to create appropriate incentives for public officials to pursue damages claims, such as shielding officials from reputational risks or political repercussions. To further support public bodies in pursuing damages claims, it is essential to strengthen guidance from competition authorities or establish specialized public consultancies to assist in preparing claims. Public bodies, unlike other victims of cartels, are well-positioned to quantify the economic harm caused by bid-rigging, as they hold key documents such as cost estimates and contract values, which are critical in calculating overcharges.[174] Public officials should be provided with clearer incentives, ensuring that their efforts in identifying and reporting bid-rigging are recognized and rewarded. Aligning these incentives would also help address the principal-agent problem, giving officials a direct stake in the successful recovery of damages, similar to the interest seen in private companies.[175]

d. **Damaging relationships with tenderers.** Another detected reason why contracting authorities are reluctant to pursue an action against businesses engaged in bid-rigging practices is the concern that the initiation of litigation against colluding economic operators may spoil their cooperative relationship with bidding companies. This issue is particularly pronounced in smaller markets, where only a few operators often meet the tender requirements. If these economic operators are excluded, there is a risk that no bidders will remain, creating challenges for the state, which still relies on these operators to provide procured services. It can eventually lead the state to accept partial compensation through settlements rather

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172 OECD. *Algorithms and Collusion - Background Note by the Secretariat*. DAF/COMP(2017)4. https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf; OECD. *The Role of Competition Authorities in Promoting Competition*. DAF/COMP(2007)34. https://www.oecd-ilibrary.org/docserver/8ed0c7ba-en.pdf?expires=1730575201&id=id&accname=guest&checksum=99230BA35DFA7A71C1BCB9E38CA8D267

173 However, this should be done with caution, as the inclusion of external advisors can introduce risks, such as conflicts of interest, competition law violations, or breaches of public procurement law through discriminatory requirements; OLAF, *Fraud in Public Procurement - A Collection of Red Flags and Best Practices* (November 2017), 11.

174 Garcia, Jiménez, and Ordoñez-de-Haro, "Calling on Public Entities to Claim Cartel Damages," 44.

175 Ibid., 44.

than pursuing full damages.[176] Furthermore, for the same reason, there may be limited political interest in pursuing such claims.[177]

A potential solution is the assignment of claims to third parties with both an interest in pursuing legal action or the expertise to handle cases more efficiently than public procurement bodies. These could include special courts, institutions like audit or procurement oversight agencies, private agents such as law firms or taxpayer associations, and even competitors who lost bids due to bid manipulation. This practice is already in place in Germany, where claims can be assigned to third-party funders or special purpose vehicles (SPVs)."[178]

e. **Limited availability of collective redress mechanism.** Limited availability of collective redress mechanisms, which in many Member States, are primarily available only to consumers, is also seen as an obstacle to the effective damages claim system. According to the OECD, when it comes to cartels, collective actions or other mechanisms allowing multiple small claims to be aggregated can be an important element in seeking cartel induced damages.[179] The damage caused by competition law infringements is often dispersed among many potential claimants. In these cases, the individual damage suffered by each claimant may be too small to justify the cost of a lawsuit, leaving many smaller claims unaddressed. Without such mechanisms, recovery of damages is often limited to plaintiffs with substantial claims or the financial means to pursue lengthy litigation.[180]

While collective redress mechanisms exist in some Member States, the EU Directive on representative actions[181] is limited to consumers and does not extend to public procurement or competition law cases where victims are public entities, other undertakings, or non-consumer victims. Expanding the scope of such mechanisms to cover public procurement entities and antitrust violations could facilitate access to justice for these claimants, including smaller entities.

f. **Prevalence of settlements.** Another significant reason (while minding that this aspect is not viewed negatively) for the underutilization of damages claims in bid-rigging cases is the prevalence of settlements. Settlements are common across

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176 Giosa, "Damages Claims for Bid Rigging," 6.

177 Autoritat Catalana de la Competència, *Claim for Damages Caused to Public Administrations*, 7; Penelope-Alexia Giosa, op.cit.

178 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

179 OECD, *Relationship Between Public and Private Antitrust Enforcement*, 19.

180 Ibid.

181 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on Representative Actions for the Protection of the Collective Interests of Consumers, OJ L 409 (December 4, 2020): 1–27.

the Member States as a response to antitrust infringements and are particularly favored in public procurement.[182] Public authorities often encourage bidders to settle claims rather than pursue litigation, knowing that these companies will bid for future public contracts. This preference for settlements is also reinforced by the Antitrust Damages Directive, which promotes out-of-court resolutions, including mediation, arbitration, and conciliation, as efficient methods for compensating victims of competition law violations. [183]

5. CONCLUSION

Bid-rigging in public procurement causes substantial financial losses for the public sector, undermining the integrity and competitiveness of public procurement processes. Public and private enforcement mechanisms in competition law serve as two primary avenues in addressing this issue. Public enforcement plays a crucial punitive role by imposing sanctions in line with the severity of infringements, complemented by debarment mechanisms like bidder exclusion and director disqualification. These measures aim not only to punish anti-competitive behavior but also to maintain the integrity of future procurement processes by restricting access to high-value contracts for wrongdoers. Private enforcement, meanwhile, is essential in compensating public entities for the harm caused by collusive practices, thereby restoring essential funds to public budgets and reinforcing the punitive and deterrent effects of fines on cartels. However, despite the encompassing framework, private enforcement remains underutilized across many EU jurisdictions. Barriers specific to bid-rigging cases limit its full impact. Yet, when effectively pursued, private enforcement provides valuable compensation and can amplify the overall deterrent effect of competition law enforcement. Encouraging private damages claims by public entities requires more than regulatory incentives, it necessitates a coordinated effort among stakeholders dedicated to safeguarding competitive markets. Addressing procedural and evidentiary obstacles, ensuring adequate resources and guidance, and leveraging debarment alongside traditional sanctions are vital to building a comprehensive enforcement strategy. Through such a committed, collaborative approach, enforcement of competition law in bid-rigging cases can better achieve its goals of punishment, deterrence and compensation, ultimately strengthening public procurement systems and contributing to overall social welfare.

182 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"

183 Giosa, "Reforming the Rules on Contracting Authority Damages Claims"; OECD, *Relationship Between Public and Private Antitrust Enforcement*, 32. – 33.

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