

The development and critical junctures of EU Public Procurement Rules vis-à-vis the prevention of bid rigging

Article

Published Version

Giosa, P. ORCID: <https://orcid.org/0000-0001-7509-9605>
(2021) The development and critical junctures of EU Public Procurement Rules vis-à-vis the prevention of bid rigging. *European Procurement & Public Private Partnership Law Review*, 16 (1). pp. 39-51. ISSN 2194-7376 doi: 10.21552/epppl/2021/1/7 Available at <https://centaur.reading.ac.uk/121871/>

It is advisable to refer to the publisher's version if you intend to cite from the work. See [Guidance on citing](#).

Identification Number/DOI: 10.21552/epppl/2021/1/7
<<https://doi.org/10.21552/epppl%2F2021%2F1%2F7>>

Publisher: Lexxion

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the [End User Agreement](#).

www.reading.ac.uk/centaur

CentAUR

Central Archive at the University of Reading

Reading's research outputs online

The Development and Critical Junctures of EU Public Procurement Rules Vis-à-Vis the Prevention of Bid Rigging

Penelope Giosa*

This article argues that the prevention of bid rigging has not been factored into the policy design of the EU Public Procurement Rules in a systematic and consistent way. As it will be shown, the critical junctures of EU Public Procurement Rules did not emerge alongside the anti-cartel legislation in Europe, but entirely independently of the latter. As a result, the current European Public Sector Directive 2014/24/EU is not adequately collusion proof and there is still a long way to go.

Keywords: bid rigging; collusion; EU Procurement Directives; competition; transparency

I. Introduction

Many economic transactions in the interface between public and private sector are governed by public procurement rules. In the European Union, contracting authorities spend every year nearly 14% of GDP on public procurement, ie more than €1.9 trillion.¹ Therefore, in the context of the budgetary constraints that have taken place due to the economic crisis, there is need to ensure that procurement markets are kept open throughout Europe and public funds are used in the most efficient way.² Holding a competition in the public market, in which all interested firms are equally able to take part in the relevant procedure, helps to achieve the best terms and the highest quality at low prices for the procured goods, works and services. Competition enables the award of public contracts to the best tenderer that of-

fers the best value for the procuring entity 'in pursuit of its commercial and horizontal objectives'.³ However, competition for public contracts is continuously falling and partly this is the result of collusion in procurement markets.⁴

This article retraces the development and critical junctures of EU procurement rules. It particularly examines whether they emerged alongside the anti-cartel legislation in Europe or the procurement regimes emerged entirely independently of the latter. Was there any mention of cartels and specifically of bid rigging in the early procurement rules? Was public procurement mentioned in early EU anti-cartel legislation? As it will be shown, the public procurement regime is primarily aimed at regulating the conduct of contracting authorities and not bidders. Hence, very little thought has been given to preventing bid rigging, in the design and development of procure-

DOI: 10.21552/epppl/2021/1/7

* Dr Penelope Giosa, Lecturer in Law at the Portsmouth Law School, University of Portsmouth, United Kingdom. For correspondence: <penny.giosa@port.ac.uk>.

1 European Commission, 'European Semester Thematic Factsheet Public Procurement, 2017' (2017) <https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_public-procurement_en_0.pdf> accessed 12 December 2020.

2 Commission, 'Europe 2020-A Strategy for Smart, Sustainable and Inclusive Growth' (2010) <<https://bit.ly/3vUa3eg>> accessed 12 December 2020;

3 Sue Arrowsmith, 'Understanding the Purpose of the EU's Procurement Directives: The Limited Role of the EU Regime and Some Proposals for Reform' in Konkurrensverket - Swedish Competition Authority (ed) *The Cost of Different Goals of Public Procurement* (Konkurrensverket 2012) www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-cost-of-different-goals-of-public-procurement.pdf accessed 12 December 2020, 72-73. See also Irena Georgieva, *Using Transparency Against Corruption in Public Procurement* (Springer International Publishing AG 2017) 5.

4 Albert Sanchez-Graells, 'Competition and Public Procurement' (2018) 9(8) *Journal of European Competition Law & Practice* 551-559.

ment rules, though Article 101 TFEU is very important for public procurement, as it regulates the behaviour of providers participating in public procurement procedures.⁵ Moreover, it will be proved that the prevention of bid rigging was not factored into the policy design of the current European Directive 2014/24/EU on public sector in a systematic and consistent way.

It is entirely legitimate to examine the extent to which the public procurement regime does or does not facilitate bid rigging. The procurement regime over the years includes many explicit provisions that seek to ensure that public contracts are not structured in a way that inhibits future competition for government requirements.⁶ Moreover, it recognises the undesirability of bid rigging by expressly limiting the length of agreements, by requiring not to act in an anti-competitive manner and by permitting exclusion of firms that have infringed competition law.⁷ It also refers to the need to avoid distortion of competition in a very specific sense of equality of access to public contracts and avoiding narrowing of the market. After all, the wider EU system seeks to protect competition between undertakings⁸, so there is a valuable interest in knowing whether one part of EU law facilitates breach of another by potential bidders. Also, from the taxpayers' point of view it is equally important to examine to which extent the public procurement regime facilitates bid rigging because they can be harmed by having to pay more for products and services of potentially low quality and low-level innovation, without any choice of other by-products of true competition.⁹

In view of the above, the article is structured as follows. Sections II to VI provide a historical as well as critical overview of the European public procurement regime in relation to the overall legislative developments in the EU competition regime. The Procurement Directives under investigation are categorised into five generations, based on their date of enactment and on the evolution stages of the single/internal market in Europe. Hence, Section II examines the first generation of public procurement regime and explains that the first explicit reference to competition law in the field of public contracts was the provision for advertisement of the awarding contracts. Competition was initially seen as a means of ensuring transparency and preventing discrimination, while bid rigging was not considered to be a

major issue, even if the first 'cover bids' had already emerged in public procurement markets. Section III explores the second generation of public procurement regime, focusing on the Cecchini and Atkins reports, which recognized that the opening of public markets to competition would have a major effect on the internal market, as long as competition policy is enforced effectively and anti-competitive devices are eliminated. However, the same section ascertains and criticises the lack of special mention about bid rigging and its anticompetitive outcome in the relevant Public Procurement Directives, though at that time the European Commission was prosecuting a number of major cartels. Sections IV, V and VI explain the ways in which the third, fourth and fifth generation of public procurement regime accordingly made progress towards the development of effective competition and secondarily the protection of undistorted competition in public procurement. As it will be shown, the prevention of collusion was not numbered among the determinants of the relevant legal regimes' policy design. Section VII concludes the article by summarising key issues and findings and by underlining the need for more dialogue between institutional actors at the EU level.

5 Sue Arrowsmith, *The Law of Public and Utilities Procurement Volume 1: Regulation in the EU and UK* (Sweet & Maxwell 2014) para 4-117; Office of Fair Trading (OFT) 'Assessing the Impact of Public Sector Procurement on Competition' <https://web.archive.nation-alarchives.gov.uk/20140402182823/http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft742a.pdf> accessed 12 December 2020; Stefan Weishaar, *Cartels, Competition and Public Procurement: Law and Economic Approaches to Bid Rigging* (Edward Elgar 2013); John Temple Lang, 'Subsidiarity and Public Purchasing: Who should apply Competition Law to Collusive Tendering and How Should They Do It?' (1998) 4(1) EPL 55; Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 115–118; Gian Luigi Albano et al, 'Preventing collusion in procurement' in N Dimitri, G Piga and G Spagnolo (eds) *Handbook of Procurement* (CUP, 2006) 347; Robert D Anderson and William Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 PPLR 67.

6 Arrowsmith (n 5) para 4-107.

7 Indicatively see arts 32(2) 33(7) and 55(8) of Directive 2004/18/EC.

8 There are substantive provisions in the Treaty on the Functioning of the European Union (TFEU) that seek to protect competition. Indicatively see arts 101, 102, 103(2) 106, 108, 109 and 119 (1) TFEU.

9 US Department of Justice, 'Antitrust Enforcement and the Consumer' <<https://www.justice.gov/atr/file/800691/download>> accessed 12 December 2020.

II. The Development of Procurement Directives

1. The First Generation of Public Procurement Regime

In 1957 when the Treaty of Rome established the European Community (EC), it was contemplated for the first time that there would be non-discrimination against as well as freedom of movement for any goods and services of the Member States. In this way, trade would be conducted across an internal EC border, as if it were trade within a border.¹⁰ Initially, this goal was achieved by removing visible barriers to trade, such as customs duties in case of manufactured goods, and by introducing a common external tariff.¹¹ The next stage was to remove non-tariff barriers, like buy national public purchasing regimes and technical standards that would favour national products.¹²

Before the aforementioned provisions of the Rome treaty, the official restrictions of governments between the two great wars¹³ that aimed at hindering the trade among the European states, had supplemented several cartel agreements that had already

arisen out of the interchange of manufactured goods among the industrial leaders of Europe, such as France, Germany, Britain and Low Countries.¹⁴ Up to the First World War, cartelisation within Europe was a central feature of German economy and society, mostly because of the fast-moving and intensive industrialisation, the concentration of heavy industry and the unification of the German State.¹⁵ Also, prior to the Second World War, cartelisation was a 'welcomed feature of national industrial policy', as it permitted a 'rationalised' approach to the production of goods in times of economic crisis.¹⁶ The ratification of the Treaty of Rome and of the European Coal and Steel Treaty gave the most important momenta to the 'spread' of antitrust legislation and the generation of an administrative-based anti-cartel regime.¹⁷ Competition policy became 'an integral and crucial aspect' for the accomplishment of the European Common Market and as consequence the regulation of cartels was also to emerge as a central feature of this new corpus of competition policy and law.¹⁸ Hence, Article 85(1) of the Treaty of Rome arose, which prohibited

all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

A practice by bidding participants was thereafter subsumed under Article 85(1) of the Treaty of Rome, as long as it satisfied the legal elements of the provision.

It was against this background that the Council of Ministers in 1962 adopted the General Programme on the abolition of restrictions on freedom of establishment and the General Programme for the abolition of restrictions on freedom to provide services. Yet, in both General Programmes the deterrence of cartel activity in public procurement was not a concern, as no provisions were included regarding this issue. To some extent, this may be explained by the fact that it was not until 1969 that the first cartel decision was adopted in the *Quinine*¹⁹ case. Until then, the European Commission had not prosecuted cartel cases, perhaps giving in this way the wrong message that cartels in public markets were not a particularly damaging form of anticompetitive activity that could increase prices and remove competition.

10 Stephen Martin and Keith Hartley, 'Public Procurement in the European Union: Issues and Policies' (1997) 2 *Public Procurement Law Review* 92.

11 *ibid.*

12 Andrew Cox, *The Single Market Rules and the Enforcement Regime After 1992* (Earlsgate Press 1993) 32.

13 These restrictions used to take the form of tariffs, quotas and licences.

14 Kalypso Nicolaidis and Raymond Vernon, 'Competition Policy and Trade Policy in the European Community' in Edward Graham (ed) *Competition Policy in a Changing World Economy* (Institute for International Economics 1997) 274.

15 Christopher Harding and Julian Joshua, 'A Narrative of Cartel Regulation in Europe, 1970 to the Present Time' in Christopher Harding and Julian Joshua (eds) *Regulating Cartels in Europe* (Oxford University Press 2010) 65-69.

16 Bruce Wardhaugh, *Cartels, Markets and Crime- A Normative Justification for the Criminalisation of Economic Collusion* (CUP 2014) 169. For instance, the International Steel Cartel has been one of the most powerful cartels of pre-war Europe. See Nicolaidis and Vernon (n 14) 275.

17 *ibid.*; Mark Jephcott, *Law of Cartels* (Jordan Publishing 2011, Bristol) 7.

18 Harding and Joshua (n 15) 110.

19 Case 45/69 *Boehringer Mannheim v Commission (Quinine cartel)* [1970] ECR 769. This cartel was relevant to division of national markets as well as to price-fixing and quotas for the export of quinine and quinidine, which are used particularly in the manufacture of medicines for the treatment of malaria and certain cardiac illnesses.

At the time when General Programmes were adopted in the domain of public procurement, the Regulation 17/62 was also issued in the context of EU competition law. It was the first procedural regulation to implement Articles 85 and 86 of the Treaty of Rome, while competition law was still rather undeveloped.²⁰ The procurement market was not mentioned in this early EU competition law document, showing in this way that Regulation 17/62 emerged entirely independently of the public procurement regimes of that era.

For the purpose of implementation of the General Programmes, the Council of Ministers adopted a number of Liberalisation Directives, such as Directives 64/427/EEC, 64/428/EEC, 64/429/EEC and 70/32/EEC.

2. The Early Directives

The general Liberalisation Directives 64/427/EEC, 64/428/EEC and 64/429/EEC liberalised the market of particular industries by providing in great detail for the abolition of all discriminatory treatment based on grounds of nationality with regard to establishment and provision of services in specific industries.²¹ In line with the General Programmes, the general Liberalisation Directives did not consider particular provisions for the prohibition of cartel agreements in public markets to be necessary for the maintenance of a competitive economy.

After a couple of years, the Commission proceeded to Directive 66/683/EEC which eliminated all differences between the treatment of national products and that of imported products.²² Soon after the enactment of Directive 66/683/EEC, its rules were extended by Directive 70/32/EEC, which prohibited any quantitative restriction on public procurement, reiterating in this way the need for Member States to abolish discriminatory rules in their national procurement systems.²³ This Directive was the first one to regulate the supply of goods and it applied not only to domestic goods of a member state but also to goods coming from a third country, as long as they were imported and freely circulated in the common market.²⁴

Based on the brief presentation of the Liberalisation Directives above, it becomes obvious that the Liberalisation Directives' concept of market access and completion was restricted to the removal of discrimination and barriers to entry into the common

market of the European Community in an overall attempt to move away from national preferential purchasing. Anti-cartel provisions were not seen yet as a means to complete the internal market.

The Liberalisation Directives were succeeded by more far-reaching, secondary legislation, ie the Coordination Directives 71/304/EEC, 71/305/EEC and 77/62/EEC, which unlike the earlier Liberalisation Directives, they aimed at coordinating the procurement award procedures of each member state.²⁵ These Directives contained a *de minimis* rule, meaning that they applied to procurement contracts above a particular financial value.²⁶ The idea of introducing a value threshold was intended to mark out those contracts that were of Community interests. Contracts below the *de minimis* limit were deemed not to have a Community dimension and not to be of relevance to the internal market, as they could not affect trade and competition between the EU Member States. In any other case, the attempt to regulate low-value contracts would have rather negative ramifications, such as transaction costs both on the part of the contracting authority and on the part of tenderers.²⁷ Moreover, a 'too wide ranging obligation to organise competitive public tendering for all sorts of activities which are of minor importance' would not enhance the well-being of the internal market, but it would procrastinate the award of contracts, inhibiting in

20 Matthew Gream, 'An Overview of EC Regulation 1/2003 as the New Implementing Regulation for the Rules on Competition Laid Down in Articles 81 and 82 of the EC Treaty' <http://matthew-gream.net/Professional/IntellectualProperty/overview_ec-reg-1-2003_paper.pdf> accessed 14 December 2020.

21 Directive 64/427/EEC [1964] OJ 117/1863; Directive 64/428/EEC [1964] OJ 117/1871; Directive 64/429/EEC [1964] OJ 117/1880; Peter Trepte, *Public Procurement in the EU-A Practitioner's Guide* (2007) 28-29.

22 Directive 66/683/EEC [1966] OJ 220/3748.

23 Directive 70/32/EEC [1969] OJ L 13/1; M E Comba, 'Variations in the Scope of the New EU Public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role of the Approximation of Laws' in F Lichère, R Caranta and S Treumer (eds) *Modernising Public Procurement: The New Directive* (Djøf Publishing 2014) 32; C Bovis, *EU Public Procurement Law* (Elgar European Law 2007) 18.

24 recital of Directive 70/32/EEC; Bovis (n 23) 18.

25 Directive 71/304/EEC [1971] OJ L 185/1; Directive 71/305/EEC [1971] OJ L 185/5, 682-692; Directive 77/62/EEC [1976] OJ L 13/1.

26 Directive 71/305/EEC, art 7, para 1; Directive 77/62/EEC, art 5, para 1(a).

27 Erik Pijnacker Hordijk and Maarten Meulenbelt, 'A bridge too far: why the European Commission's attempts to construct an obligation to tender outside the scope of the Public Procurement Directives should be dismissed' (2005) 3 PPLR 123-130.

this way the flow of cross-border services.²⁸ Hence, without the *de minimis* limit, the burden of contracting authorities to undergo a competitive procurement process would not always be proportionate to the value and significance of the contract at issue.

At this point, it should be underlined that contracts of low value are still within the remit of European Community law. Thus, although certain contracts are not covered by the Community directives in the field of public procurement, the contracting authorities that conclude them are bound to comply with the fundamental rules of the Treaty and its general principles, such as non-discrimination, equality of treatment, transparency and proportionality.²⁹ In practice, this means that for the benefit of any potential tenderer a degree of advertising must be ensured in order to enable 'the market to be opened up to competition and the impartiality of procurement procedures to be reviewed.'³⁰ The transparency requirements presuppose that the advertising takes place before the public contract is awarded, so as to secure that an undertaking located in the territory of a member state other than that of the Contracting Authority may have access to appropriate information.³¹ The same applies with respect to below-threshold contracts by the Court of Justice of the European Union (CJEU).³²

Directive 71/305/EEC was the first Directive which explicitly referred to the development of competition

in the field of public contracts by rendering necessary the advertisement of awarding contracts throughout the European Community. In Recital 9, it was contemplated that 'contract notices drawn up by the authorities of Member States awarding contracts should be advertised throughout the Community'.³³ It dealt on the one hand with the co-ordination of legislative and administrative provisions of Member States in the area of free movement of services and on the other hand with the approximation of these legislative and administrative provisions of the Member States.³⁴

The direct reference of Directive 71/305/EEC to competition could be considered as evidence that competition was one of the Directive's purposes. However, the thrust of this Directive was limited, because 'it did not introduce new tendering procedures nor were existing national procedures and practices replaced by a set of Community rules'.³⁵ Moreover, in Recital 3 of the same Directive the European legislator avoided to include the principle of competition in the number of principles that would give rise to the co-ordination of national procedures for the award of public works contracts. In the same vein, there remained a wariness about attacking cartels in public procurement, as bid rigging was not identified as a problem. The European legislator merely provided for the prohibition of technical specifications that had a discriminatory effect, the adequate advertising of contracts, the fixing of objective criteria for participation and the introduction of a procedure of joint supervision to ensure the observation of these principles. The deliberate failure to refer to the principle of competition in order to base the co-ordination of national procedures for the award of public works contracts favours the argument that competition was not still seen as an objective but rather as a means of ensuring the aforementioned principles that governed Directive 71/305/EEC.

Having almost the same provisions as the Works Directive 71/305/EEC, Directive 77/62/EEC came into force in order to regulate the public supplies contracts. Yet, it did not apply to public supplies contracts by public utilities, because of the different legal status they had. Another reason for the non-application of the Directive to the utilities industries was that the rising unemployment marking the 1970s in Europe rendered inappropriate to restructure at that period of time the major employing sectors, such as the utilities industries.³⁶ Competition and cartels

28 *ibid*; David McGowan, 'Clarity at Last? Low Value Contracts and Transparency Obligations' (2007) 4 PPLR 274-283.

29 Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, para 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paras 60-62; Case C-59/00 *Vestergaard* [2001] ECR I-9505, paras 19-20; Case C-264/03 *Commission v French Republic* [2005] ECR I-8831, para 32.

30 Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, para 62; Case C-450/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585, para 49; Case C-410/04 *Anav v Comune di Bari* [2006] ECR I-3303, para 21.

31 Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287, para 21.

32 Case C-6/05 *Medipac-Kazantzidis v Venizeleio-Pananeio* [2007] ECR I-4557; [2007] 3 CMLR 16, para 33; Case C-507/03 *Commission v Ireland* [2007] ECR I-97777; [2008] 1 CMLR 34, paras 30-32; Case C-412/04 *Commission v Italian Republic* [2008] ECR I-619, para 66.

33 Directive 71/305/EEC, recital 9.

34 Treaty Establishing the European Economic Community, arts 57(2) 66 and 100; Comba (n 23) 31.

35 Bovis (n 23) 21.

36 Stephen Martin, Keith Hartley and Andrew Cox, 'Public Procurement Directives in the European Union: A Study of Local Authority Purchasing' (1999) 77(2) Public Administration 393.

in public procurement still were not considered to be major issues, though in the meantime bid rigging practices emerged in public procurement markets, taking the form of ‘cover bids’, submitted by tenderers in order to create the impression of genuine competition among the participants in the procedure.³⁷ Moreover, in April 1972 the European Commission issued its First Report on Competition policy, emphasising in this way that competition policy was an important means for achieving the aims of the Treaties establishing the Communities and that it must be directed towards the creation and proper operation of the common market.³⁸ No special mention was made in this report of the practices that jeopardised competition in public procurement, even if other prohibited horizontal agreements among enterprises, like price-fixing, quota and market-sharing agreements, were thoroughly examined.

The Supplies Directive 77/62/EEC pursued the introduction of equal conditions of competition in order to ensure non-discrimination.³⁹ Specifically, Recital 2 contemplated that equal conditions of competition for public contracts in all the Member States would ensure a degree of transparency which would enable the prohibition of any restrictions on the free movement of goods in respect of public supplies. Non-discrimination could be achieved when the procedures for the award of public contracts were transparent, so that any kind of discriminatory behaviour might be spotted. Hence, like the Works Directive 71/305/EEC, the Supplies Directive 77/62/EEC set common advertising rules for all the Member States in order to achieve transparency and consequently non-discrimination, plus it contemplated the prohibition of technical specifications capable of discrimination.⁴⁰ Similarly to the Works Directive 71/305/EEC, the Supplies Directive 77/62/EEC saw competition as a means of ensuring transparency in order to prevent discriminatory behaviour. Moreover, in both it became illegal to split up contracts into small lots so as to keep public contracts below stated threshold levels.⁴¹

After the European Community’s approval of the World Trade Organisation’s (WTO) General Agreement on Tariffs and Trade (GATT) and the Agreement on Government Procurement (AGP), Directive 77/62/EEC was superseded by Directive 80/767/EEC with the aim that the latter may apply to products coming from outside the European Community. The purpose of Directive 80/767/EEC was ‘to establish an international framework of balanced rights and

obligations with respect to government procurement with a view to achieving liberalisation and expansion of world trade’.⁴² The conditions set by this Directive were deemed to be more liberal than those of Directive 77/62/EEC and some of the procurement framework’s procedural obligations changed in order to make sure that they were equally favourable to tenderers as they were under the GPA.⁴³ An illustrative example of these amendments is the report that Member States had to make each time they decided not to use the open tendering procedure.⁴⁴ Also the minimum time limit for receipt of tenders was increased.⁴⁵ Both amendments were closely relevant to the European Community’s regulatory endeavours to establish a competitive public procurement market.

III. The Second Generation of Public Procurement Regime

1. Political Background - The Thrust of European Efforts

Due to the numerous legal instruments above, a complex body of Community rules was created, which made it difficult for them to get incorporated into the law of the Member States.⁴⁶ Furthermore, statistics demonstrated a ‘minimal application of the Directives’ in the whole of the Community and ‘the tendency of the authorities concerned to keep their purchases and contracts within their own country’.⁴⁷

37 See Commission Decision 73/109/EEC of 2 February 1973 (IV/26 918- European sugar industry) [1973] OJ L140/17.

38 Commission, ‘First Report on Competition Policy- Annexed to the Fifth General Report on the Activities of the Communities’ <<https://publications.europa.eu/en/publication-detail/-/publication/418817dc-c69b-42b1-a787-013fd545017d/language-en>> accessed 14 December 2020.

39 Directive 77/62/EEC [1976] OJ L 13/1, recital 2.

40 Directive 77/62/EEC [1976] OJ L 13/1, recital 4 and art 9; Bovis (n 23) 20.

41 Martin, Hartley and Cox (n 36) 394.

42 Directive 80/767/EEC [1980] OJ L 215/1, recital 1.

43 Directive 80/767/EEC, recital 5; Amy Ludlow, *Privatising Public Prisons- Labour Law and the Public Procurement Process* (Hart Publishing 2017) 112.

44 Directive 80/767/EEC, art 5; Ludlow *ibid*.

45 Directive 80/767/EEC, art 6; Ludlow *ibid*.

46 Communication by the Commission to the Council, COM (84) 717, vol 1984/0259, 7.

47 White Paper on Completing the Internal Market, COM (85) 310, 14 June 1985, para 83.

These disappointing conclusions gave rise to serious cause for concern and discussions with Member States in order to 'stimulate a wider opening up of tendering for public contracts' by improving the Directives.⁴⁸ In any other case, European companies would be unable to compete against more efficient market players from the USA and Japan.⁴⁹

In order to deal with this situation, proposals were made to increase the Directives' coverage and to enhance the political commitment to an open procurement market. Indicatively, it was suggested to decrease the financial contractual value threshold below which the Directives do not apply and to extend the scope of Directives to the utilities industries.⁵⁰ The Cecchini report⁵¹ in 1988 and particularly the Atkins report⁵² - 'The Costs of Non-Europe in Public Sector Procurement' - played a key role in this switch. The Cecchini report identified 'healthy competition' as one of the benefits resulting from the completion of the internal market.⁵³ It explained why the gains from the competitive integration of the product markets and the intensified pressures of competition would be great and it ascertained that the opening of public markets to competition would be one of the major effects of the internal market programme.⁵⁴ Government procurement would experience considerable price reductions from the competitive integration of the product markets.⁵⁵ It also underlined the necessity to enforce competition policy effectively to ensure that the barriers which were removed were

not going to be replaced by other anti-competitive devices.⁵⁶

The Atkins report showed that the opening up of public procurement should be a priority together with the liberalisation and integration of financial markets in order to realise a well-functioning internal market in Europe. Cox and Furlong⁵⁷ pointed out that if there were rules governing the demand side of the market so that transparency and liberalisation of the award of public contracts for non-national suppliers may be ensured, three effects would take place in European public and utility supply markets in the short, medium and long terms. Firstly, in the short term the costs of public buyers would decrease, as they would begin to purchase goods, works and/or services from the cheapest supplier rather than from the preferred local or national supplier. This effect was called 'the static price effect'. Secondly, in the medium-term competition would increase, as the low prices from foreign companies would urge preferred and protected national suppliers to increase their productivity, invest in new technology or lower their prices so as not to exit from the market. This effect was called 'the competition effect'. Thirdly, in the long term the increased competition would cause the fundamental restructuring of key industrial sectors dominated by public purchasing, as the least efficient firms would be urged to exit the market and large players would be encouraged to compete and provide significant economies of scale. This effect was called 'the restructuring effect'.⁵⁸

In the same vein, the 1985 White Paper⁵⁹ underlined that the community-wide liberalisation of public procurement was a vital element for the future of the Community economy. For the realisation of this objective, it suggested a number of amendments for the improvement of the Directives, such as review of the present levels of the threshold and that the prime concern should be a system of prior information, the publication of the intention to use single tender procedures as well as the publication of the awards of contracts.⁶⁰

2. Public Supply and Public Works Directives

Despite the White Paper and the changes that took place to the Internal Market provisions of the Treaty introduced by the 1986 Single European Act, a re-

48 *ibid.*, 85.

49 Martin, Hartley and Cox (n 36) 393; Cox (n 12) 6-58.

50 Ludlow (n 43) 113.

51 Commission, 'Europe 1992, The Overall Challenge' (1988) SEC (88)524 final, 4-5.

52 WS Atkins Management Consultants (Epsom), *The Costs of Non-Europe in Public Sector Procurement* (EC 1988).

53 Commission, 'Europe 1992' (n 51) 1.

54 *ibid.*, 4, 5, 6.

55 *ibid.*, 4.

56 *ibid.*, 7.

57 Andrew Cox and Paul Furlong, 'Cross-Border Trade and Contract Awards- The Intellectual Myopia at the Heart of the EU Procurement Rules' (1997) 3(1) *European Journal of Purchasing and Supply Management*.

58 *ibid.*, 10.

59 White Paper from the Commission to the European Council (n 47).

60 Paolo Cecchini, *The European Challenge 1992: The Benefits of a Single Market* (Wildwood House 1988); See also White Paper from the Commission to the European Council (n 47) para 85.

search programme that was launched by the Commission showed that national procurement practices were ‘almost hermetically-sealed’, as only 0.14% of GDP was awarded in public procurement contracts to firms from other Member States of the Community.⁶¹

In view of the shortcomings of the first-generation Directives and as part of the drive towards achieving a single market by 1992, Directive 88/295/EEC was adopted in the sector of public supplies as well as Directive 89/440/EEC in the sector of public works. Both Directives wanted to extend the scope of the first-generation Directives and increase the transparency of procedures and practices for the award of public contracts by setting stricter transparency requirements in combination with creating and developing the conditions of effective Community-wide competition.⁶² Particularly, Directive 88/295/EEC identified the necessity to develop the conditions of effective competition for public supply contracts and the Directive 89/440/EC ascertained that it is necessary to eliminate practices that restrict competition. Nonetheless, no special mention was made of bid rigging and its anticompetitive outcome. To this end, both Directives improved the advertising rules, specifically by means of the Prior Information Notices (PINs) which would make known the contracting authorities’ purchasing programmes for the whole budgetary year.⁶³ Moreover, they contemplated that the conditions under which contracts have been awarded should also be made public by offering debriefing to unsuccessful tenderers and by publishing contract award notices in order to attract the attention of more suppliers in the Community.⁶⁴

A negotiated procedure with prior publication of the tender notice for certain contracts previously exempt altogether and in exceptional cases was also adopted by both Directives in order to ‘limit the use of the single-tender procedure’⁶⁵ Certainly, this was a step in the right direction, as this new procedure improved the access of contractors to procedures for the award of public contracts. Under normal circumstances, Directive 89/440 identified that open or restricted procedures should be the rule, while Directive 88/295 differentiated itself as far as restricted procedures were concerned. Specifically, it instated a more open default tendering process and it contemplated that contracting authorities might use the restricted procedure only in justified cases, such as when there was a need to maintain a balance between contract value and procedural costs or when the spe-

cific nature of the products to be procured required the restricted procedure.⁶⁶

All the aforementioned amendments were made not only to align the European public procurement regime with the GATT AGP but also to make possible stricter enforcement of the prohibition of restrictions on the free movement of goods, which constituted the basis of these Directives, according to the pre-ambles of Directive 88/295/EEC.⁶⁷ Therefore, the key purpose of these Directives was the implementation of transparency to support free movement and to monitor compliance with the prohibition of restrictions on freedom of establishment and freedom to provide services more closely, while competition was nothing more than a means to achieve this goal. Regarding collusion in public tendering, there were still no specific provisions that would enable its detection and/or deterrence nor any implications that the aforementioned amendments aimed at its handling. Quite the contrary, the fact that both Directives had transparency as a top priority increases the risks of distortions and restrictions of competition.⁶⁸ Such an omission demonstrates that the European legislator was underestimating the risk of collusion in public procurement markets and his attitude towards it was rather tolerant. This becomes obvious if we also bear in my mind that during the decade between the middle of the 1970s and that of the 1980s, the European Commission was continuously and vigorously prosecuting a number of major cartels.⁶⁹

61 Ludlow (n 43) 113.

62 Directive 88/295/EEC [1988] OJ L 127/1, recitals 5 and 7; Directive 89/440/EEC [1989] OJ L 210, recitals 6 and 14.

63 Directive 88/295/EEC, recital 15; Directive 89/440/EEC, recital 19.

64 Directive 88/295/EEC, recital 5; Directive 89/440/EEC, recital 19.

65 Directive 88/295/EEC, recital 12; Directive 89/440/EEC, recital 15.

66 Directive 88/295/EEC, art 7.

67 Directive 88/295/EEC, recital 5.

68 Catriona Munro, ‘Competition law and public procurement: two sides of the same coin?’ (2006) 15(6) *Public Procurement Law Review* 352-361; Robert D Anderson, William E Kovacic and Anna Caroline Müller, ‘Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation’ (E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016) <<http://e15initiative.org/wp-content/uploads/2015/09/E15-CompetitionAnderson-Kovacic-Muller-Final.pdf>> accessed 20 December 2020. See also Albert Sanchez-Graells, ‘Transparency and Competition in Public Procurement: A Comparative View on their Difficult Balance’ in Kirsi-Maria Halonen, Roberto Caranta and Albert Sanchez-Graells (eds), *Transparency in EU Procurements* (Edward Elgar Publishing 2019) 33-56.

69 Harding and Joshua (n 15) 130-131.

IV. The Third Generation of Public Procurement Regime

1. Public Services Directives

For the first time in the legal history of Europe, services in public markets were open to intra-community competition and liberalisation, with the enactment of the first directive on services, ie Directive 92/50/EEC which undertook the coordination of procedures for the award of public services contracts. In its preamble, it is contemplated that one of the Directive's objectives is to develop effective competition by eliminating practices that restrict competition in general and participating in contracts by other Member States' nationals in particular.⁷⁰ Having the same principles as the other Directives, such as advertising rules for public contracts and prohibition of any discrimination that may arise due to technical specifications, Directive 92/50/EEC had still some differences. The most indicative of these differences was that it introduced a new award procedure, the design contest. It is worth mentioning that the European legislator showed regard for the number of candidates invited to participate in this new award procedure, which had to be sufficient to ensure genuine competition and, by extension, prevention of collusive practises among them.⁷¹

2. Public Supply and Public Works Directives

Trying to achieve the consolidation of the numerous Directives on public procurement so as to bring homogeneity into the relevant regulatory landscape, Directives 93/36/EEC and 93/37/EEC were enacted. Directive 93/36/EEC coordinated procedures for the

award of public supply contracts while Directive 93/37/EEC coordinated procedures for the award of public works contracts. Both Directives underlined that in any event, the number of candidates invited to tender in a restricted procedure shall be sufficient to ensure genuine competition.⁷² It could be argued that indirectly the European legislator recognised in this way that a small number of tenderers is an essential precondition of collusive behaviour to be sustainable in public procurement and so he tried to avoid this. In other respects, their provisions were in the same vein as those of the previous Directives. This is why there is an impression that most of the amended provisions were not a big surprise, but they were based on common sense in order to ensure compliance with their sister directives.⁷³ Also, transparency continued to have a central role as a monitoring tool, while 'effective competition' was directly mentioned as a reason only for provisions on the advertisement of contract notices.⁷⁴

V. The Fourth Generation of Public Procurement Regime

2. Public Services, Supplies and Works Directive

Ten years after the enactment of the 1993 Directives, the European Union introduced a new set of rules in order to coordinate the procedures for the award of public works contracts, public supply contracts and public service contracts. Apart from the classical objectives dated back to 1970s (ie freedom of movement of goods, of establishment as well as freedom to provide services), the new Directive 2004/18/EC pursued the simplification, clarification and modernisation of the existing Directives.⁷⁵ Directive 2004/18/EC also referred to the opening-up of public procurement to competition as one of its objectives and clearly stated that its coordinating provisions should be interpreted in accordance with this rule as well as with the freedom of movement of goods, freedom of establishment, freedom to provide services and the principles of equal treatment, non-discrimination and transparency.⁷⁶ The contracts had to be awarded on the basis of objective criteria which ensured compliance with the above principles that guaranteed the assessment of tenders in conditions of effective competition.⁷⁷

70 Directive 92/50/EEC [1992] OJ L 209/1, recital 20.

71 Directive 92/50/EEC, art 15, para 5.

72 Directive 93/36/EEC [1993] OJ L199/1, art 19, para 2; Directive 93/37/EEC [1993] OJ L199/55, art 22, para 2.

73 Christian Servenay, 'The New Provisions of Supplies Directive 93/36' (1994) 5 PPLR 169.

74 Directive 93/36/EEC, recital 14; Directive 93/37/EEC, recital 10.

75 Rhodri Williams, 'The New Procurement Directives of the European Union' (2004) 4 PPLR 153.

76 Directive 2004/18/EC [2004] OJ L 134, recital 2.

77 Directive 2004/18/EC, recital 46.

What is more, for the first time in the history of public procurement directives there was direct reference to the distortion of competition in relation to public entities. Specifically, in its preamble, the new Directive made it clear that ‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers’⁷⁸. The introduction of competitive dialogue⁷⁹ as a new procurement procedure was also accompanied with a provision that

the procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous⁸⁰.

The same applied to the new procurement techniques, like framework agreements,⁸¹ dynamic purchasing systems⁸² and electronic auctions⁸³, which should not be used by contracting authorities in such a way as to hinder, limit or distort competition. The Public Sector Directive also included express requirement to limit the duration of framework agreements to four years,⁸⁴ in an attempt to avoid the reduction of the number of players in the market, which would favour collusion in the long run. This was the first kind of constraint in the design and implementation of procurement procedures and techniques with a view to secure undistorted competition, away from collusive behaviour and practices. In the same direction, Article 45 of Directive 2004/18/EC contemplated in its paragraph 2 that any economic operator may be excluded from participation in a contract where he has been convicted of an offence concerning his professional conduct or has been guilty of grave professional misconduct proven by any means. Therefore, collusion could constitute a reason of exclusion, depending on how Member States defined ‘offence concerning his professional conduct’ and ‘grave professional misconduct’ in their implementation of this Article.⁸⁵

However, in the Directive there was no specific reference to the distortion of competition in relation to private tenderers, nor sufficient safeguards against anti-competitive behaviours in tender procedures. In the absence of specific legislative instruments that

would encourage pro-competitive procurement strategies and address the issue of bid rigging, it gets clear that the fourth generation of the public procurement regime was not particularly ‘collusion-proof’. This is also due to the fact that the European legislator did not accommodate certain instruments with a particular risk of being misused for collusion, such as subcontracting, whilst this new set of rules was a golden opportunity for additional and stronger safeguards against bidders’ collusive conduct.

VI. The Fifth Generation of Public Procurement Regime

In March 2010, the European Commission launched ‘Europe 2020 - A strategy for smart, sustainable and inclusive growth’⁸⁶, with the aim of boosting the economy of the Member States in a post-crisis scenario. In this policy paper the European Commission clearly stated that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU-wide. After almost a year, the Green Paper on the modernisation of EU public procurement policy – ‘Towards a more efficient European Procurement Market’⁸⁷ - was published, which repeated the objective of the Europe 2020 Strategy. In this context, three Directive proposals were presented by the European Commission on 20 December 2011.⁸⁸ They were approved in the first reading by the European Parliament as well as by the Council and the Directives were eventually published on 28 March 2014.

78 Directive 2004/18/EC, recital 4.

79 Directive 2004/18/EC, art 29, para 6.

80 Directive 2004/18/EC, recital 31; See also art 29, paras 6 and 7.

81 Directive 2004/18/EC, art 32, para 2.

82 Directive 2004/18/EC, art 33, para 7.

83 Directive 2004/18/EC, art 55, para 8.

84 Directive 2004/18/EC, art 32, para 2.

85 OECD, ‘Collusion and Corruption in Public Procurement’ (Contribution from the Internal Market and Services Directorate General of the European Commission, 22 January 2010) <<https://bit.ly/3cf6jMp>> accessed 20 December 2020.

86 COM (2010) 2020 final <<https://bit.ly/3IOLqLs>> accessed 20 December 2020.

87 COM (2011) 15 final <<https://bit.ly/3sukNxy>> accessed 20 December 2020.

88 COM (2011) 895 final; COM (2011) 896 final; COM (2011) 897 final.

In general, it is said that the new package of the EU Directives on Public Procurement is 'within a logic of continuity with the Directives 2004/17/EC and 2004/18/EC'⁸⁹ and for the first time the European legislator took a step forward and consolidated in Article 18(1) of Directive 2014/24/EU the significant role of competition to the EU procurement regime.⁹⁰ Specifically, Article 18(1) of Directive 2014/24/EU contemplates that:

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

The explicit contemplation of competition as an objective and as 'a manifestation of the equal treatment principle'⁹¹ shows that Directive 2014/24/EU has recognised an increased role for competition in public procurement. In the same vein, the European legislator included some new provisions that better allow Member States to consider the need to preserve competition in the public market and promote the prevention of distortions in the dynamic competitive processes.⁹² Hence, the new Directive made some headway in its attempts to fight collusion in the public procurement setting. Yet, most of the additions made by the European legislator do not have the detection and/or deterrence of bid rigging as their priority. This matter is handled indirectly and in a minor way, only in the context of an attempt to create effective competition in public procurement. Without having the luxury to conduct a comprehensive analysis of the issue at this point of the article, let us

indicatively mention the two provisions of the current Directive that have a direct effect on the combat of collusion in public procurement. The first one is Article 58, paragraph 4 of Directive 2014/24/EU, which contemplates that:

A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In virtue of Article 58, paragraph 4 of the current Directive, contracting authorities may turn down the tender of an economic operator, if this economic operator has obtained various conflicting roles during the market dialogue phase, which may have given it a competitive advantage over the other bidders at the later stage of procurement process, or may have distorted the economic operator's advice to the relevant contracting authority. Such a measure calls a halt to economic operators' bid rigging activities which can be sustained and facilitated by their undue involvement in preparing the procurement procedure.

The second example regards the introduction of the debarment mechanism, according to which contracting authorities are able to exclude firms that have infringed competition law.⁹³ This provision refers directly to bid rigging cartels and sends a signal to the private sector that there will be no tolerance to collusion in the public market. As explained in the previous section of this article, prior to the enactment of Directive 2014/24/EU on public sector, it was still prohibited to commit competition law infringements, but this fell under the more generic heading of 'grave professional misconduct'.

VII. Concluding Remarks

This article set out the legislative background to the current European procurement regime, retraced the critical junctures of EU procurement rules and examined whether they emerged alongside the anti-cartel legislation in Europe or entirely independently of it. The analysis has shown that the public procurement regime is primarily aimed at regulating the conduct of contracting authorities and not bidders. Therefore, very little thought has been given to preventing bid rigging, in the design and development of procure-

89 Rui Medeiros, 'The New Directive 2014/24/EU on Public Procurement: A First Overview' <<https://www.servulo.com/pt/investigacao-e-conhecimento/The-new-directive-201424EU-on-Public-Procurement-A-First-Overview/3531/>> accessed 20 December 2020.

90 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 [2014] OJ L 94/65.

91 Arrowsmith (n 5) para 7.28.

92 *ibid*, para 4.107; recitals (31) (49) (61) and (96). See also art 24 about conflicts of interest, art 30 about the competitive dialogue, art 40 about the preliminary market consultations, art 41 about the prior involvement of candidates or tenderers and art 57 about the exclusion grounds.

93 Directive 2014/24/EU, art 57, para 4(d).

ment rules, though Article 101 TFEU is very important for public procurement, as it may affect public contracts by rendering them unlawful due to anti-competitive agreements between providers. Also, founding fathers of the European public procurement regime were not really seeing competition as an objective *per se* of the Directives but rather as a means of ensuring the principle of non-discrimination and transparency in order to prohibit any restrictions on the free movement of goods. However, things have gradually changed since the Cecchini report in 1988, which recognised the necessity to enforce competition policy effectively in government procurement.

The big changes came with the enactment of Directive 2004/18/EC, where for the first time in the history of Public Procurement Directives, there were many provisions with direct reference to the distortion of competition in relation to private tenderers. These provisions sought to ensure that public contracts are not structured in a way that inhibits future competition for government requirements. In particular, the new procurement procedures, like the competitive dialogue, as well as the new procurement techniques that this Directive introduced, like framework agreements, dynamic purchasing systems and electronic auctions, should not prevent, restrict or distort competition. The Public Sector Directive also wanted to limit the duration of framework agreements to four years, trying to avoid the reduction of market players, which would favour collusion among them in the long run. This was the first kind of constraint in the design and implementation of procurement procedures and techniques with a view to secure undistorted competition, away from collusive behaviour and practices. By the same rationale, the European legislator took a step forward and consolidated in Article 18(1) of the subsequent Directive 2014/24/EU the role of competition in the EU public procurement. In the same vein, he recognised the need for fair and effective competition in the public market by adopting several provisions that are capable of preserving and enhancing competition. He also recognized the undesirability of bid rigging, but only on a theoretical level and to a limited extent, as the new provisions directly and clearly promoting the detection and/or prevention of distortions in the dynamic competitive processes are few. These are the exclusion of firms that have infringed competition law and the ability of contracting authorities to turn

down the tender of an economic operator, if this economic operator has obtained various conflicting roles during the market dialogue phase. Hence, it gets obvious that prevention of bid rigging was not factored into the policy design of the current EU Public Procurement Directives in a systematic and consistent way. Additionally, EU procurement rules ignored the EU anti-cartel legislation and vice versa. Consequently, it is argued that the current public procurement rules are not particularly concerned with anti-competitive practices such as bid rigging, despite their damaging consequences for public spending. Though the current Directive 2014/24/EU consolidated the role of competition and identified bid rigging as a significant problem, it has been shown that it did not proceed further insofar that public procurement rules should be designed and implemented in a way that they do not distort competition.

Based on the finding above, it is apparent that there is need for more dialogue between institutional actors at the EU level. However, the fact that public procurement and competition belong to different policy departments tends to inhibit the achievement of this goal. Public procurement falls within the portfolio of the Directorate-General (DG) for Internal Market, Industry, Entrepreneurship and SMEs, whereas competition falls within the portfolio of the DG for Competition. By that very fact, this means that the policy spheres are distinct; therefore, the institutional priorities of these DGs may not always converge, especially in light of the different interests and values of the officials working for each of them. The variety of Commission activities and policy spheres do not guarantee neat dovetailing and cohesion between the DGs.⁹⁴ Taking this weakness into account, the European Commission pursued cooperation with the national competition agencies of the EU Member States through the European Competition Network (ECN).⁹⁵ In this way, a consistent and

94 Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law - Text and Materials* (Cambridge University Press 2019) 66. See also Laura Cram, 'The European Commission as a Multi-Organization: Social Policy and IT Policy in the EU' (1994) 1(2) *Journal of European Public Policy* 195; Hussein Kassim et al, *The European Commission of the Twenty First Century* (Oxford University Press 2013) 115-118.

95 International Competition Network, 'Anti-Cartel Enforcement Manual April 2015- Chapter on Relationships between Competition Agencies and Public Procurement Bodies' <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMPUBLICPROCUREMENT.pdf> accessed 22 December 2020.

uniform application of EU competition legislation and case law across the EU Member States is guar-

96 *ibid* 26.

anteed, while the European Commission, through the ECN, can more easily reach the national procurement bodies and make them aware of its competition decisions and interpretation of EU competition legislation.⁹⁶