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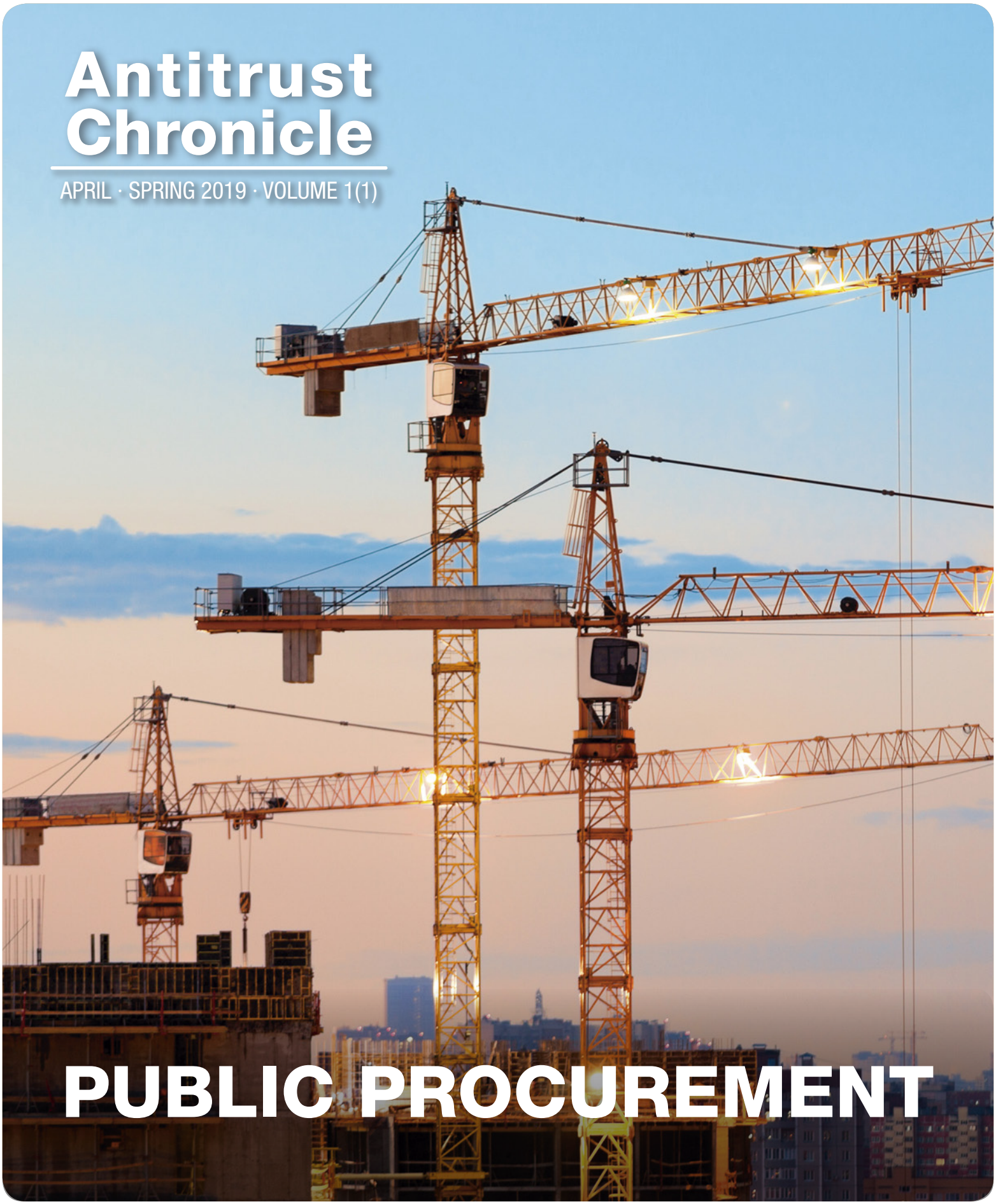

PUBLIC PROCUREMENT

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The interaction between competition law and public procurement has increasingly been in the international spotlight in recent years. Through competitive public procurement and bidding, governments ideally can procure goods and services at market price (saving public funds), encourage small and medium-sized enterprises, and foster innovation, among other policy goals.

As authors in this month's edition of the CPI Chronicle note, "governments around the world spend an estimated $9.5 trillion of public money purchasing vital goods and services each year." Bottom line… its big business.

But the diversity and nature of public procurement regimes in different jurisdictions has the potential to make them prone to distortion through collusion and other wayward conduct. Classic examples of such conduct in the public procurement realm include price fixing, bid rigging (including bid suppression, complementary bidding, bid rotation, subcontracting, etc.), and market allocation schemes. As the OECD notes, "such illegal activity contributes to inflation, destroys public confidence in the country's economy, and undermines our system of free enterprise. In the case of federal procurement, such crimes increase the costs of government, increase taxes and undermine the public's confidence in its government."

This edition of the Chronicle features articles, from the U.S., Canada, Brazil, Mexico, Spain, and the EU, that examine recent antitrust developments in the public procurement sectors of different jurisdictions, loopholes in antitrust enforcement, and potential future policy and strategic changes.

Lastly, we want to alert CPI readers to our upcoming conference on Tuesday, April 30, 2019, Dynamic Competition in Dynamic Markets: A Path Forward, co-organized by CPI and the Competition Law and Economics Network at the Melbourne Law School. The conference will lead off with an opening keynote address by Philip Marsden and will feature a fireside chat with ACCC Chairman Rod Sims and Howard Shelanski. Panels throughout the day will include topics such as: Digital Innovation and Competition Policy; Big Data: Understanding and Analyzing its Competitive Effects; and Designing Antitrust Regulatory Models in a Globalized Silicon Valley Culture.

CPI looks forward to your participation in these timely discussions with leading antitrust academics, enforcers, and private practitioners. Register here.

As always, thank you to our great panel of authors.

Sincerely, **CPI Team**

SUMMARIES

SUMMARIES

WHAT'S NEXT?

For May 2019, we will feature Chronicles focused on issues related to (1) **Common Ownership**; and (2) **Healthcare**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES JUNE 2019

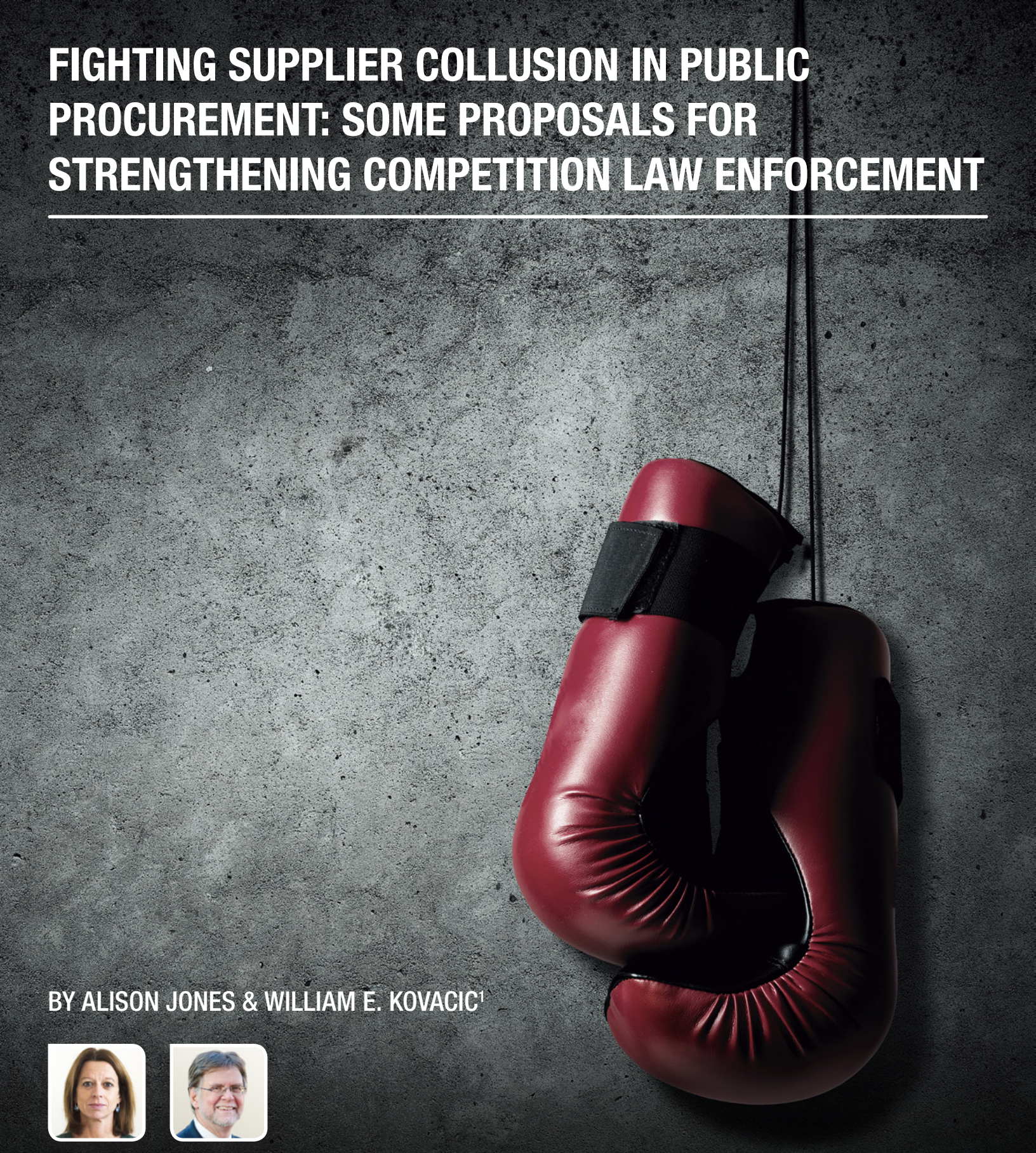
For June 2019, we will feature Chronicles focused on issues related to (1) **A look back at *Amex***; and (2) **Fines & Damages**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

FIGHTING SUPPLIER COLLUSION IN PUBLIC PROCUREMENT: SOME PROPOSALS FOR STRENGTHENING COMPETITION LAW ENFORCEMENT



BY ALISON JONES & WILLIAM E. KOVACIC[1]

1 Alison Jones, Professor of Law, King's College London. William Kovacic is Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London; and Non-Executive Director, United Kingdom Competition and Markets Authority. See further R. D. Anderson, A. Jones & W. E. Kovacic, "Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement," (2019) *George Mason Law Review* forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289170.

I. INTRODUCTION

Governments around the world spend an estimated $9.5 trillion[2] of public money purchasing goods and services each year (public procurement). Not only does this represent a significant proportion of government expenditure (29.1 percent on average in OECD countries[3]) and of total gross domestic product (10-20 percent in many nations[4]), but the goods, services, and infrastructure procured relating, for example, to transport, telecommunications, energy, schools, hospitals, sanitation systems, and health care, are vital to growth, development, and social welfare in a state. Honest and effective government procurement is thus central to a nation's development and prosperity.

A difficulty faced by all governments, however, is that the design of public procurement systems, combined with the value, volume, and frequency of public purchasing activity, render them especially vulnerable to distortion through both corruption and stable supplier collusion.[5] In particular, factors such as those set out below may combine to facilitate coordination of bids by those tendering for public contracts – through bid suppression, cover bidding, market or customer allocation or bid rotation; and to reinforce the internal and external stability of their scheme:

- the constant and predictable nature of government demand;
- procurement design;
- procurement conditions which incorporate restrictive product specifications, involve standardization, limit the pool of competitors, create barriers to entry, and (often) exclude foreign competitors;
- the incorporation of transparency requirements in the procurement process (essential to ensure its integrity) which are overly sweeping and facilitate collusion;
- weak incentives for procurement officers to identify and report cartel activity; and/or
- the presence of corrupt agents, for example, a subcontractor, agent,[6] or government official.

Indeed, despite increased international efforts to halt cartel activity, examples of collusive tendering are still regularly exposed across the globe, e.g.:[7]

- in China (e.g. roro shipping[8]);
- in the EU (at both the EU and national level (e.g. elevators and escalators,[9] combat boots[10] and construction[11]));

2 Presentation of A. Capobianco, "Public Procurement and Competition Policy: Friends or Foes?," LEAR Conference, Rome, July 10, 2017.

3 See e.g. Capobianco *ibid*.

4 See e.g. WTO, "WTO and government procurement," available at https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm and OECD, Policy Roundtables: Collusion and Corruption in Public Procurement DAF/COMP/GF(2010)6.

5 See, generally, R. C. Marshall & L. M. Marx, *The Economics of Collusion: Cartels and Bidding Rings* (MIT Press, 2012) and A. Heimler, "Cartels in Public Procurement," *Journal of Competition Law & Economics*, 11-23 (2012). See also Anderson, Jones & Kovacic, *supra* note 1.

6 See e.g. Case C-542/14, *SIA 'VM Remonts' and Others v. Konkurences padome* [2016] EU:C:2016:578.

7 See e.g.: the World Bank Group ("WBG"), Integrity Vice Presidency, "*Curbing Fraud, Collusion and Corruption in the Road Sector*," (2011): OECD, Collusion and Corruption, *supra* note 4; OECD, Recommendation on Fighting Bid Rigging in Public Procurement (2012); and OECD, Report on Implementing the 2012 Recommendation on Fighting Bid Rigging in Public Procurement (2016).

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

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

10 See e.g. OECD, Collusion and Corruption, *supra* note 4, 195-199.

11 The Guardian, "Court finds Spain's Ruling Party Benefited from Bribery Scheme," May 24, 2018.

- in India (e.g. water purification products[12]);
- in Japan (e.g. construction and engineering services[13]);
- in Singapore (e.g. electrical works contracts, motor trader vehicles, asset tagging services, and electrical services for the Singapore F1[14]);
- in the United States (e.g. public school bus transportation[15]); and
- by integrity units of Multilateral Development Banks ("MDBs").

In some cases, bid rigging may be found to have a vertical element, involving a government insider and the payment of bribes (corruption). For example, *Operation Car Wash*, or "Caso Lava Jato,"[16] the biggest anti-corruption and money laundering investigation in Brazil's history, involved bribery and bid rigging in relation to public works contracts.

Although assessing cartel harm precisely is not easy, it is clear that collusive tendering – as distinct from legitimate joint tendering[17] – is liable to increase the cost of services and infrastructure provided substantially. One paper focusing on bid rigging in Japan suggests that procurers paid 16-33 percent more than they would have paid in a competitive bid process.[18] Further, a report published by the World Bank Group ("WBG") in 2011,[19] investigating misconduct in WBG funded road projects, found that bid rigging in procurement markets led to sharply inflated prices and/or reductions in quality or safety of products and services provided. It documents examples of bid rigging which reportedly increased prices, by up to 60 percent in some cases, in Korea, the Netherlands, the Philippines, Romania, Tanzania, Turkey, and the U.S. More generally, a number of empirical studies suggest that cartels lead to prices in excess of 10 percent, and sometimes in excess of 20 percent, above competitive levels.[20]

Bid rigging also wastes public funds, diminishes public confidence in the competitive process and in government, reduces the quantity and quality of vital goods and services, and creates public safety risks.[21] It seems clear therefore that tackling and countering this conduct should be a high priority. Reducing the amount of bid rigging, even by a small percentage, can yield significant savings to the public purse and ensure better quality work and the provision of more and improved public services. It may also, by increasing the integrity of the procurement system, help build a civic sense that government institutions are dedicated to improving citizens' lives.

12 Lexocology, *India: CCI imposes penalty for Bid Rigging, restricts the scope of single economic entity*, December 7, 2017.

13 See e.g. M. Wakui, "Bid Rigging Initiated by Government Officials: The Conjuncture of Collusion and Corruption in Japan," in T. Cheng, S. Marco Colino & B. Ong (*eds*), *Cartels in Asia: law and practice* (Wolters Kluwer, 2015) and OECD, Collusion and Corruption, *supra* note 4.

14 See e.g. Case CS700/003/15, November 28, 2017.

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

16 Ministerio Público Federal, "Caso Lava Jato," see http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato.

17 Where it allows e.g. two firms to be able to tender at all or tender more efficiently see e.g. C. Ritter, "Joint Tendering under EU Competition Law," May 2017, *Concurrences Review* No. 2-2017, Art. No. 84019, 60 and C. Thomas, "Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting under EU Competition Law," (2015) 6(9) *Journal of European Competition Law & Practice* 629.

18 See J. McMillan, "'*Dango*: Japan's Price Fixing Conspiracies," (1991) *Economics & Politics* 3(3).

19 WBG, *supra* note 7.

20 See e.g. L. M. Froeb, R. A. Koyak & G. J. Werden, "What is the effect of bid rigging on prices," (1993) 42(4) *Economics Letters* 419 and J. M. Connor, *Price-Fixing Overcharges*: Revised 3rd Edition, (2014).

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

II. STRENGTHENING COMPETITION LAW ENFORCEMENT IN THE PUBLIC PROCUREMENT SPHERE

A. Prioritizing Enforcement

Because of the intrinsic vulnerability of public procurement processes to collusion, which frequently works hand and hand with corruption, it seems clear that a multi-pronged approach is required to increase the resistance of public procurement systems to distortion in these ways.[22] One essential component of such a strategy, however, is effective enforcement of national competition laws. Therefore, in addition to having clear rules against bid rigging in place, it seems vital that competition agencies should prioritize enforcement in this area.[23] As deterrence of bid rigging is dependent on there being both a high risk of illegal conduct being uncovered and prohibited,[24] and of effective sanctions being imposed, competition tools in some jurisdictions may need to be strengthened or honed to allow effective enforcement.

B. Detection of Cartels

Companies operating cartels are generally aware of their illegality. Bid rigging tends therefore to operate in secrecy and to be arranged to simulate normal market behavior,[25] creating a challenge for enforcers to adduce sufficient evidence to piece together, and support, a robust and convincing finding of infringement. To uncover such conduct competition authorities must therefore be able to play a number of cards;[26] a successful fight against cartels presupposes not only an effective leniency program, but also other tools capable of exposing them.

1. Leniency, Leniency Plus, and Whistleblowing

Many (more than fifty) competition authorities encourage firms to cooperate with them and to provide direct evidence of cartel activity prior to, or during, an investigation through the operation of "leniency" regimes.[27] Although leniency has undoubtedly proved to be an important tool, successfully exploiting the insecure nature of cartels and creating a race to confess, authorities should not be over-dependent on them. In particular, these programs may be most successful where a cartel is close to being discovered or broken up anyway, and less effective in situations (such as public procurement) where a cartel is profitable and stable;[28] they may be used by some larger firms operating a number of cartels as a technique to prevent cheating and deviant conduct by smaller cartel members;[29] the increasing risk of individual sanctions, criminal prosecution, and/or private damages actions may be making persons more wary of submitting leniency applications; and to be successful there must be a good track record of enforcement following the use of other detection techniques (without which there will, of course, be no incentive to seek amnesty).[30] Thus "theory and practical experience seem to suggest that reliance on amnesty/leniency programmes alone may produce a sub-optimal probability of cartel detection, which in turn may have a negative effect on deterrence."[31]

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22 Including, refinements to the procurement process itself, targeted competition advocacy and steps to counter corruption, see Anderson, Jones & Kovacic, *supra* note 1.

23 Out of 113 cartels uncovered by the European Commission between 2001-2015, only 4 of these related to bid rigging, M. Hellwig & K. Hüschelrath, "Cartel Cases and the Cartel Enforcement Process in the European Union 2001-2015: A Quantitative Assessment," (2017) 62(2) *Antitrust Bulletin* 400. In the U.S., Makan Delrahim, Assistant Attorney General (U.S. Department of Justice) has confirmed the Antitrust Division's commitment to effective antitrust enforcement against bid rigging which cheats the U.S. Government and American taxpayer, November 15, 2018, https://www.justice.gov/opa/speech/assistantattorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

24 See G. Becker, "Crime and Punishment: An Economic Approach," (1968) 76 *Journal of Political Economy* 169.

25 See M. Monti, "Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?," 3rd Nordic Competition Policy Conference, Stockholm, September 11–12, 2000.

26 *Ibid.*

27 See C. Beaton-Wells & C. Tan, *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015). Leniency evidence should however require corroboration, see e.g., Case C-613/13 P, Commission v Keramag Keramische Werke GmbH EU:C:2017:49.

28 See A. Heimler, "Cartels in Public Procurement," (2012) 8(4) *Journal of Competition Law & Economics* 11 and J. E. Harrington, "Detecting Cartels," in P. Buccirossi (*eds*), *Handbook of Antitrust Economics* (MIT Press, 2008).

29 R. C. Marshall, "Unobserved collusion: warning signs and concerns," (2017) 5(3) *Journal of Antitrust Enforcement* 329.

30 D. C. Klawiter, "Enhancing International Cartel Enforcement – Some Modest Suggestions," *Competition Policy International Antitrust Chronicle* September 2011. See also J. Ysewyn and S. Kahmann, "The Decline and Fall of the Leniency Programme in Europe" *Concurrences Review* N° 1-2018, Art. N° 86060.

31 OECD, "Policy Roundtables: Ex Officio Cartel Investigations and the use of screens to detect cartels," 2013.

As a result, it may be important for competition authorities to consider collecting evidence from a broader range of complainants, including competitors, customers, employees, or other whistle-blowers capable of delivering credible evidence on which a convincing finding of infringement can be built. In the EU, for example, the Commission has developed a whistle-blowing tool encouraging any individual to provide the Commission with information about cartel behavior or other anticompetitive business practices.[32] In the United Kingdom, the Competition and Markets Authority offers, in exceptional circumstances, financial rewards of up to £100,000 to those who offer information about cartel activity.[33] More broadly, the U.S. Federal Civil False Claims Act, known as the "qui tam statute," offers monetary rewards for exposure of fraud that impacts on the government.

Leniency Plus programs, where leniency applicants can get additional credit in one cartel investigation for reporting involvement in another, can also be valuable in bid rigging situations, for example, where one incident has been discovered but where participants admit to being involved in other infringements.[34]

In addition, agencies must have the ability to detect and expose illegal conduct themselves. Proactive detection measures produce "positive externalities in terms of improving the efficacy of amnesty/leniency programmes"[35] and allow conduct, which would otherwise remain stable under a stand-alone amnesty/leniency regime, to be revealed.[36]

2. Screening Tools

A burgeoning literature explores how structural and behavioral screens, particularly empirical screens based on economic and statistical analysis of variable data, including quantitative techniques (such as price variance analysis), can be applied to detect initial evidence of possible unlawful cartel behaviors, conspiracies, and manipulations.[37]

Although some have warned that screens are costly and difficult to operate accurately,[38] they have revealed the first evidence of some of the largest conspiracies, manipulations, and frauds uncovered to date, including Bernie Madoff's Ponzi Scheme and the LIBOR conspiracy, and may be well-suited for identification of bid rigging in the public procurement context. Not only do public tender markets facilitate structural assessment, but the data generated by the process facilitates subsequent behavioral assessments,[39] including through the devising and running of electronic tests to screen for "red flags." For example, the Korean Fair Trade Commission ("KFTC") systematically monitors public procurement through a Bid Rigging Indicator Analysis System (BRIAS); Colombia has devised a computer program; Brazil has new technologies and a unit which analyses procurement databases and identifies patterns of suspicious behavior ("Project Brain");[40] and the UK's CMA introduced a new screening tool for procurers which it made available to the general public in July 2017.[41]

BRIAS, for example, automatically analyses online public procurement data (which public procuring authorities are required to submit to it within thirty days of a tender award) and quantifies the likelihood of bid rigging, by assigning a score representing the statistical likelihood of collusion based on factors such as: the tendering method; the number of bidders; successful and failed bids; bid prices above the estimated price; and the price of the winning bid. It enables the KFTC to scrutinize large numbers of tenders each year using search criteria (on average it

32 See European Commission, "Cartels – Overview" (Undated), available at http://ec.europa.eu/competition/cartels/overview/index_en.html.

33 See CMA, "Cartels – Informant Rewards Policy," (2014), available at https://www.gov.uk/government/publications/cartels-informant-rewards-policy. See also W.E. Kovacic, "Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels," (2001) 69 (5/6) *George Washington Law Review* 766.

34 This occurred e.g. in the *Brazilian Car Wash* case.

35 OECD, *supra* note 31.

36 *Ibid.*

37 See e.g. R. M. Abrantes-Metz, "Proactive *vs* Reactive Anti-Cartel Policy: The Role of Empirical Screens," (2013), 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740 (noting that use of screens were successfully used to identify the LIBOR conspiracy and manipulation), K. Hüschelrath, "Economic Approaches to Fight Bid Rigging," (2013) 4(2) *Journal of European Competition Law & Practice* 185, and P. Bajari & G. Summers, "Detecting Collusion in Procurement Auctions," [2002] 70 *Antitrust Law Journal* 143.

38 See C. Mena-Labarthe, "Mexican Experience in Screens for Bid-Rigging," *Competition Policy International Antitrust Chronicle*, March 2012.

39 See OECD Report on implementing the 2012 Recommendation (2016).

40 See CADE's presentation "Screening and data mining tools to detect cartels: Brazilian experience," made during the workshop on "Cartel screening in the digital era," held by the OECD in Paris on January 30, 2018.

41 Published in July 2017, https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool.

flags more than eighty cases per year for investigation)[42] and has increased the number of successful bid rigging prosecutions, including in the construction sector.[43]

Access to procurement data and the use of screens can therefore enable the uncovering of unlawful collusive tendering by competition agencies, procurers, market experts, reporters and academics.

C. Effective Penalties

1. Corporate Fines

International recognition of the harm caused by cartels has led to enhanced sanctions for cartelists. In many jurisdictions, corporate fines, which may be significant, are favored. For example, in *Elevators and Escalators*,[44] the European Commission imposed total fines on the bid riggers of €832,422,250.

A growing concern, however, is that these may not be sufficient to deter cartel behavior, which is easily hidden and reaps significant profits. Not only do they not target the individuals responsible, but they may have spillover effects and, arguably, would need to be impossibly high to outweigh the anticipated gains from cartel activity and so to ensure optimal deterrence.[45]

Some studies reinforce the view that corporate fines are not the highest concern to companies and may not deter recidivism.[46] In the EU, for example, a number of firms operating in chemical and electronics markets have been found to be involved in three or more Commission cartel decisions (and some as many as nine).[47] These cartels seem difficult to explain as the conduct of rogue division managers that operate without the knowledge or help of senior management. Rather, they could suggest that there may be multi-product and multinational firms that embrace, directly or indirectly, explicit collusion as part of their business model and profit-making strategy.[48] Other controls may thus also be required, for example, sanctions for responsible individuals, debarment of corporations, and/or civil actions for antitrust damages.

2. Individual Accountability

In some jurisdictions, cartel activity has been criminalized. It is well known that in the United States, violation of the Sherman Act is a felony and that the DOJ aggressively pursues those involved in cartels in criminal proceedings. Where violations are found, U.S. Courts not only impose fines on the corporations and individuals responsible, but sentence those individuals to prison. U.S. enforcers have not been shy about advocating their view that imprisonment of individuals provides the most effective deterrent to cartel behavior. Although, however, a number of states have introduced criminal cartel offences, or have specific criminal offences against bid rigging, relatively few examples of successful criminalization in this sphere exist outside of the United States. Not only are criminal cartel cases, because of the higher standard of proof, more difficult to make out, but in many countries it has also proved difficult to persuade juries to convict persons, and/or courts to imprison offenders. This suggests that criminalization is unlikely to be fruitful where introduced simply as a mechanism for creating deterrence, and where no pre-existing moral stigma attaches to the conduct and no serious attempt is made to build or shape attitudes against it.[49]

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42 OECD, "Policy Roundtables: Ex Officio Cartel Investigations and the use of screens to detect cartels," 2013.

43 OECD, Collusion and Corruption, *supra* note 4, 236-237.

44 COMP/38.823, *supra* note 9.

45 G. J. Werden, "Sanctioning Cartel Activity: Let the Punishment fit the Crime," [2009] *European Competition Journal* 19, 28.

46 See e.g. OFT, "Drivers of Compliance and Non-compliance with Competition Law – An OFT Report." (May 2010); J. Connor, "Recidivism Revealed: Private International Cartels 1999-2009," (2010) 6(2) *Competition Policy International* 3; but see W. Wils, "Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis," (2012) 35(1) *World Competition* 5.

47 See e.g. Marshall, *supra* note 29.

48 *Ibid*. See W.E. Kovacic, R.C. Marshall, and M.J. Meurer, "Serial collusion by multi-product firms," (2018) 6(3) *Journal of Antitrust Enforcement* 296.

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

In the United States the DOJ generated support for its cartel enforcement program partly by targeting bid rigging cases for prosecution, the subset of cartel activity where, perhaps, a lack of good faith is most evident (especially if involving fraud or certificates of independent bid determinations). Criminal convictions have also ensued in Germany where the criminal charges are reserved exclusively for bid rigging.

Alternatively (or additionally), civil liability might be expanded to ensure accountability of individuals, for example, through civil fines or disqualification orders.

3. Debarment

A number of jurisdictions provide for the possibility of debarring those involved in an infringement of competition law from participating in public tenders.[50] Debarment from bidding on future MDB-financed contracts is also the core sanction used by MDBs where bid rigging in relation to a project they finance is exposed. Nonetheless, one study suggests[51] that debarment rules are not generally enforced in predictable ways, and that corporations are relatively rarely debarred in practice; perhaps partly out of fear of exacerbating procurement difficulties that exist in already concentrated markets.

A greater use of debarment powers by relevant agencies would, in addition to preventing tendering by unsuitable contractors, send a clear signal to the private sector, that access to public procurement markets requires full compliance with the law. Anxieties about debarment being impractical need therefore to be addressed. Such concerns could, for example, be allayed by excluding only ring leaders from contracting, providing for exceptions where debarment would eliminate competition in a highly concentrated market and by operating initiatives, such as self-cleaning, for bringing excluded contractors back into the fold (e.g. where infringers provide compensation to those harmed as a result of the wrong-doing and adopt measures to prevent further future violations).

D. Damages Actions

Many antitrust systems allow civil actions by antitrust victims. Competition damages actions are, however, expensive and complex cases to bring and win, and procurers may have few incentives to seek to recover public money lost in this way and be unwilling to sour relations with contractors they may have to continue to conduct business with.

If routinely brought, however, actions for damages would allow a government both to claw back the taxpayer money lost due to inflated contract prices, and contribute to the deterrence of future violations. There are examples of successful damages actions, for example:

- In Japan, where private litigation has formed "part of the enforcement arsenal from the very beginning of Japanese antitrust law," a preponderance of private lawsuits have been brought against bid riggers, including some by residents on behalf of their local government.[52]

- In the United States, where a sophisticated system of private antitrust enforcement exists, Section 4A Clayton Act specifically allows the government to recover treble damages in cases of collusive bidding. Although it has been argued that more actions need to be brought to ensure taxpayers' money is not left on the table,[53] only three Section 4A cases were filed between 1990 and November 2018, the DOJ has now pledged to revitalize Section 4A's use.[54]

- In the European Union, although private damages actions were initially slow to develop, they are now beginning to play an increasingly important part in the EU enforcement framework and an EU Directive sets out rules designed to facilitate further such claims.[55]

50 See e.g. the U.S. Federal Acquisitions Regulations and the EU's Public Procurement Directive 2014/24/EU, Art 57(4)(d).

51 E. Auriol & T. Søreide, "An Economic Analysis of Debarment," (2017) 50 *International Review of Law and Economics* 36.

52 S. Van de Walle, "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis," (2011) 8 Competition Law Review 8.

53 H. First, "Lost in Conversation: The Compensatory Function of Antitrust Law," April 2010, NYU Law & Economic Research Paper Series Working Paper No 10-14.

54 See speech of Assistant Attorney General Delrahim, *supra* note 23.

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

» Studies published in 2017 and 2019[56] of cartel damages claims in the Member States affirm that private actions are growing, and note that a number of claimants are from the public sector, including local authority or municipality procurers. The latter study finds that in nearly two thirds of the claims analyzed "the allegedly affected purchases resulted from tendering processes" and each provide examples of cases where damages have been awarded to victims of bid rigging.

» The European Commission itself also sought damages against members of the elevators and escalators cartel for losses suffered as a result of the installation of lifts and escalators in Commission buildings. Although the action before the Belgian courts was rejected on the grounds that the Commission had failed to produce sufficient evidence of loss, in the future this type of action might be facilitated by provisions set out in the Damages Directive, especially on disclosure, which have now been implemented within Belgian Law.[57]

» In Germany, damages actions have often been brought by state entities hurt by anticompetitive conduct.[58] For example, Deutsche Bahn, and some cities, relying on competition law infringement findings by the Bunderskartellamt and the Commission (elevators and escalators), have successfully sued cartelists for damages resulting from overpriced products. [59]

III. CONCLUSION

The inherent nature and features of public procurement make it particularly prone to distortion through bid rigging. Despite increasingly vigorous efforts over the past two to three decades to prevent and deter cartels, such conduct continues to plague public procurement systems around the globe.

Given the persistent and enduring problems that exist, it seems clear that mechanisms reaching beyond competition law are required to counter them. Active antitrust enforcement is, however, a crucial and integral part of the struggle against a set of problems that routinely undermines economic development, growth and civic trust by increasing the cost, and reducing the volume and quality, of vital goods, services, and infrastructure relied upon by citizens. This is an area where enhancements in policy and effective enforcement can reap significant rewards, and make dramatic improvements to public procurement which impacts on the day-to-day life of individual citizens and the social and economic well-being of nations.

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

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

58 See e.g. OECD 2015 Antitrust Enforcement Report, Relationship between public and private antitrust enforcement - Germany (2015), DAF/COMP/WP3/WD(2015)21, para. 21.

59 See LG Frankfurt a M, March 30, 2016 – Case no 2-06 O 464/14, ECLI:DE:LGFFM:2016:0330.2.060464.14.0A paras. 75 et seq and LG Berlin, August 6, 2013 – Case no. 16 O 193/11, ECLI:DE:LGBE:2013:0806.160193.11KART.0A.

NEW RESEARCH ON THE EFFECTIVENESS OF BIDDING RINGS: IMPLICATIONS FOR COMPETITION POLICIES

BY JOHN M. CONNOR & DAN P. WERNER[1]

1 John M. Connor, Emeritus Professor, Purdue University; Dan P. Werner, OnPoint Analytics, Inc. Corresponding author. Email: jconnor@purdue.edu. Prepared exclusively for Competition Policy International. An earlier version of this paper was delivered at the conference, "Imperfect Forms of Collusion," Stellenbosch University, Stellenbosch, South Africa, January 12, 2018. We thank Prof. Willem H. Boshoff and other conference participants for many constructive comments on our paper. A more detailed version of the data, literature citations, descriptive analyses, and statistical results mentioned in this paper can be found in Connor, John M. & Dan Werner, Variation in Bid-Rigging Cartels' Overcharges: SSRN Working Paper No. 3273988. (October 27, 2018). [http://ssrn.com/abstract=3273988] (hereinafter "Connor & Werner 2018").

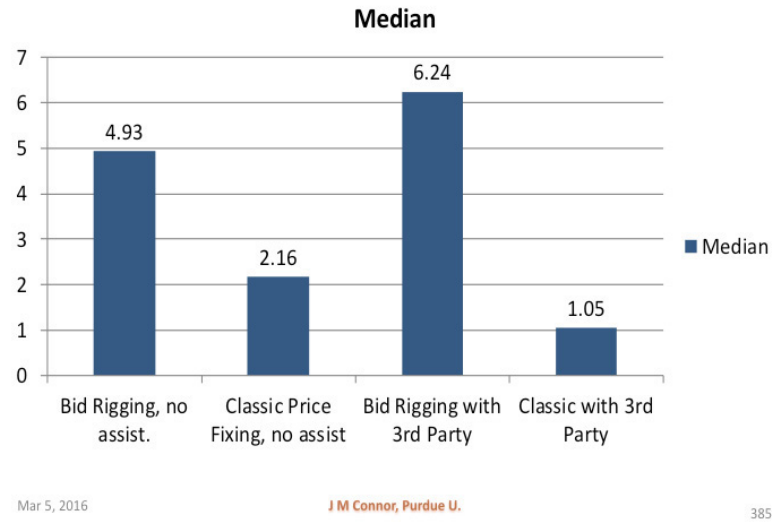
I. INTRODUCTION

Many antitrust authorities' statements imply that bid rigging is patently more harmful and deserving of higher penalties than ordinary price fixing violations. For example, under U.S. federal sentencing guidelines, there is a one-point increase in the culpability score for corporate cartelists that engage in bid rigging.[2] Moreover, individuals convicted in the United States are also sometimes charged with fraud, which can add years to the bid-rigging incarceration penalties imposed. There are also widespread concerns that the rigging of government tenders is related to public corruption, especially in newer democracies (The Economist 2016). In Europe, bid rigging is also treated with greater severity.[3] And multilateral organizations, such as the OECD and the International Competition Network, have given special attention to the problems of enforcement against bidding rings manipulating government tenders.[4]

This antipathy toward bid rigging relative to the more common form of collusive conduct (classic price fixing) is puzzling given that bidding rings achieve *lower* overcharges on average. The median overcharges on modern private international cartels run about 25 percent lower than the median overcharges on price-fixing cartels.[5]

There is empirical evidence that antitrust penalties are more severe for rings than for classic price-fixing cartels. Data on 309 modern private international cartels finds that, when no 3rd-party assistance is implicated, the median severity of penalties on 105 rings is 128 percent higher than for 204 classic cartels; when the cartels have assistance from trade associations, median bid-rigging penalties are six times more severe than price-fixing cartels (Figure 1).[6] That is, relative to the harm generated, bidding rings are in fact fined more harshly than classic price fixing around the world.

Fig. 1. **Median Severity** of Total Penalties by Type of Pricing Conduct



2 A one-point increase in the culpability score for cartelists adds up to 8 percent of affected commerce to the recommended U.S. fine for a similar classic cartel (USSG. *Guidelines Manual 2016*. Washington, DC: United States Sentencing Commission (2016): Chapter 8, Section 2R1.1. [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf]

3 For example, Germany and Italy have laws permitting bid-riggers to be sentenced to prison terms, whereas other price-fixing violations do not (Wagner von Papp, Florian. *Criminal Antitrust Law Enforcement In Germany: "The Whole Point Is Lost If You Keep It A Secret! Why Didn't You Tell The World, Eh?"* (2010). [available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584887]

4 The OECD has more than a dozen publications focused on competition problems surrounding public procurement. For example, (OECD, *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement. (C(2012)115 - C(2012)115/CORR1 - C/M(2012)9).* Paris (17 July 2012). [http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf] and OECD, *Fighting Bid Rigging in Public Procurement: Report on implementing the OECD Recommendation*. Paris (2016). [http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf.

5 Connor, John M. & Robert H. Lande, How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines, *Tulane Law Review* 80 (December 2005): Table 4.

6 Severity is the ratio of monetary penalties to affected commerce of the cartel. Data from Connor, John M., *Price-Fixing Overcharges Master Data Set*. (Spreadsheet dated October 20, 2017), where 3rd-party assistance (trade associations, consultants, etc.) was *not* cited in the case narrative. The mean average severity of penalties was 93 percent higher for rings.

The aggregate data used to construct Figure 1 imply that bid rigging is widely treated as an aggravating factor in setting cartels fines in most jurisdictions, whether there are explicit guidelines for this factor or not. Although suggestive, grouped data may fail to account for variations in bid-rigging overcharges correlated with industry, geographic location, or other underlying explanatory factors. Meanwhile, other empirical research finds no statistically significant impact of bid-rigging on overcharges after several other cartel and market factors are controlled for.[7]

In this paper, we survey the economic literature on collusion, with a special focus on bidding rings, and we draw upon large data sets to empirically examine potential explanatory variables for success among bidding rings. Economic theories of auctions have made many advances, but empirical verification has lagged behind. We then discuss our recent meta-analysis model of overcharges arising from bid rigging, which led us to conclude that the price effects of bidding rings, controlling for industry fixed effects, *are* significantly affected by buyer market concentration, seller industry concentration, and two temporal features. No comparable analysis of the price effects of bidding rings has previously been published in the economic literature. We conclude by discussing the policy implications of these findings.

II. ECONOMIC CONCEPTS OF BID RIGGING

Bid rigging is a form of price fixing with several unique conceptual features. Beginning in the early 1960s, the development of game theory brought about several advances in industrial organization economics. Current economic reasoning tends to relegate bidding rings to collusion within auctions that have few members in the ring.[8]

Bid rigging is in some ways a distinctive form of explicit collusive conduct. Bidding rings are formed with the object of *lowering* the prices of goods sold in an auction below a more competitive but-for price. Products offered in auctions include physical items (antiques, fine art, land, used farm equipment, and the like). Rings are also formed to *raise* the prices of projects or supply contracts for either government-sponsored services (i.e. bidding for tenders), industrial inputs for private buyers (bidding on Requests for Quotes), or sales directly to consumers. Cartels that do not principally engage in the manipulation of bids are called, somewhat confusingly, "price cartels" or "classic cartels."[9]

Price-fixing cartels and bidding rings are similar in that participants agree voluntarily to join a secret association because collusion increases the likelihood of increasing the pool of monopoly profits (collective rationality). Rings pick an auction winner who will bid below the competitive price of an item offered for sale or designate a sealed-bid winner who will bid higher than the competitive price of a tender.[10] Generating profits in bidding rings also requires an agreement about a viable mechanism for sharing the spoils (individual rationality) and a mechanism for punishing deviants from the collusive agreement. McAfee & McMillan demonstrate that pre-auction agreements about side payments can be sufficient to incentivize collusion.[11]

7 For example, Connor, John M. & Yuliya Bolotova, Cartel Overcharges: Survey and Meta-Analysis, *International Journal of Industrial Organization* 24 (Nov. 2006): 1109-1137, available at http://ssrn.com/abstract=788884; Bolotova, Yuliya, John M. Connor & Douglas J. Miller, Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the US Market, *Journal of Competition Law and Economics* Vol. 5, No. 2 (June 2009): 361 - 381.

8 Klemperer, Paul, Auction theory: A guide to the literature, *Journal of Economic Surveys* 13 (1999): 227-286.credits a 1961 article by Vickey with first applying game theory to analyzing equilibrium prices generated by *competitive* auctions. The application of game theory to auctions began in the late 1970s, but theoretical developments on *collusion* in auctions were rather limited up until the late 1990s (Klemperer 1999: 25). More recent advances are discussed Marshall, Robert C. & Leslie M. Marx, Bidder Collusion, *Journal of Economic Theory* 133 (2007): 374-402 and their important book *The Economics of Collusion: Cartels and Bidding Rings*. Cambridge: The MIT Press (2012) ("Marshall & Marx 2012"). A limitation of much of this theoretical auctions-theory literature is that theorists often focus on contrasting first-price with second-price auctions, even though the latter are uncommon in natural markets. Marshall & Marx (2012) generally discuss only two types of rings: open-outcry auctions and sealed-bid tenders.

9 Although rare, some cartels engage in both types of collusive conduct, depending on the customers.

10 Cartels can also implement collusive agreements to reduce output. However, bidding rings do not usually have an output-reducing conduct option, other than boycott of an auction that is delayed as a result. Similarly, rings do not usually have an ability to punish cheaters by increasing the quantity of output that creates nonprofitable price levels.

11 McAfee, R. P. & J. McMillan, Bidding Rings, *American Economic Review* 82 (1992): 579-599. Their model assumes that all bidders are part of the cartel and have private information (differing reservation prices) drawn from the same distribution. Convergence is not guaranteed if bidders are required to pay for the asymmetric information (Matthews, A. A. Information Acquisition in Discriminatory Auctions, in *Bayesian Models in Economic Theory*, Marcel Boyer & R. E. Kihlstrom (editors). New York: North Holland (1984).

The structures of rings can vary widely. An important distinguishing feature of the industries that historically employ open-outcry auctions is that there is heterogeneity in lots or batches available for sale.[12] If information about the quality of items in an auction is not symmetric, part of a bidding-ring agreement usually involves sharing the private information about quality known only to some of the members within the larger group of ring participants. Bidding rings agree to suppress the auction price by permitting only one of its members to make realistic bids against non-members, but they regard the winner as a sort of custodian of the ring's property. A related motive for the formation of bidding rings is the fact that members of the ring can have an asymmetric advantage over the seller (or the auctioneer) in assessing the quality of the products that affect market (resale) values (Marshall & Marx 2012: 57).

In the case of sealed-bid auctions, the tenders issued by buyers contain specifications that can ensure homogeneous quality. However, potential suppliers of the products described in the buyer's Request for Proposal (RFP) may be better informed about costs than procurement managers in private firms or civil servants working in government (Marshall & Marx 2012: 173-180). Members of an auction ring can select the winner through a secret pre-auction knockout auction or a series of post-sale knockout auctions among cartel members, plus a rule for the winner to reward non-winners (i.e. the side payments).[13] Prior agreements also usually require the non-winners to bid and lose in auctions or to submit cover bids in sealed-bid tenders. Alternatively, members of the ring may agree in advance to offer highly profitable bid prices and may agree as to which of its members will offer the lowest, winning bid (which is set well above the costs of supply).[14] Collusive profits can be shared through side payments after each procurement episode or, when tenders are repetitive, ring members can agree to rotate winning bids. In seal-bid auctions, bidding rings can agree on winners based on territorial divisions, customer allocations, time-rotations, or (to fool buyers) a formula that incorporates randomness.

Bidding rings face many of the same managerial challenges in forming and effectuating collusion as do classic price-fixing cartels,[15] but many of the factors are not identical.[16] The principal determinants in common are: high sales concentration within the cartels, small numbers of buyers, and a high cartel share of the market. Other less consistent factors include equal cost conditions across cartelists, low rate of innovation, high barriers to industry entry, inelastic demand, steady or predictable growth in demand, standardized industry contracts, a history of industry collusion, agreements on market quotas or territories, and the use of joint sales agencies. Many of these determinants are difficult to measure.

In general, cartel collusion works best when the participants are few and identical,[17] and bidding rings are more effective if they recruit a high share of all potential bidders and maintain a stable membership from auction to auction.[18] Large numbers of participants make acceptable side agreements more difficult to negotiate. However, a long history of collusion, a homogeneous business culture, or the assistance of a trusted third party can facilitate collusive agreements even with large numbers. Moreover, when a bidding ring faces large numbers of similar tenders over time, then repeated-games strategies can be used as enforcement mechanisms.[19] Thus, frequently repeated auctions tend to be more effective in creating overcharges than one-off events; similarly, frequent communication among ring members aids collusive trust and effective-

12 For example, packaged cigarettes are not auctioned, but bales of cured tobacco leaf are; used farm equipment is auctioned, but not new tractors; houses are not generally auctioned, but bundles of many houses are. Similarly, requests for proposals for large construction projects (e.g. major office towers or public works) or complex tailor-made equipment (power-station turbines and large passenger airplanes) are typically handled by bidding processes.

13 Since the latter 20th century, side-payments are probably not enforceable contracts in most jurisdictions or may be difficult to hide, and agreements on rotating winners may be violated with impunity. An older method of punishment not seen often since the late 20th century is to have participants post bonds and agree to have a secretariat sell those bonds of cheaters to the remaining members of a cartel or ring. However, bond posting, if observed, is a super-plus factor indicating the fact of collusion.

14 Indeed, evidence that the difference between the winning bid and second-best bid has narrowed is a plus factor in identifying seal-bid collusion. Similarly, evidence that items became owned post-auction by non-winners is considered very strong evidence of a knock-out auction and, hence, of collusion.

15 Hendricks, Kenneth & Robert H. Porter, An Empirical Perspective on Auctions, Chapter 32, pp. 2073-2143, in *Handbook of Industrial Organization: Volume 3* (Mark Armstrong & Robert Porter editors). Amsterdam: Elsevier (2007).

16 However, the overlap in facilitating conditions for effective cartels and for rings is not perfect (Marshall & Marx 2012: 248).

17 That is, they employ the same technology of production, operate at similar levels of output and capacity, and the like. Participants with different costs, information sets, or customer bases can frustrate agreement on a collusive price. These differences make cooperation in the terms of a collusive contract difficult and give rise to greater incentives to cheat on the cartel contract.

18 Pure brokers frustrate collusion in auctions. They are rarely if ever invited to join rings. All bidders that buy to own for resale (i.e. non-brokers) have economic incentives to join auction bidding rings if the costs of detection are low enough. Thus, a high member cartel share of industry supply increases the effectiveness of rings because it also implies few brokers are in the fringe. Suborning an auctioneer or bribery to serve a ring is the best solution for collusive effectiveness because it converts an oligopolistic ring into a monopoly.

19 Athey, Susan & K. Bagwell, Optimal Collusion with private Information, *RAND Journal of Economics* 32 (2001): 428-465.

ness.[20] The meetings of trade associations, technical-standards committees, or attendance at meetings arranged by a specialized management consultant can facilitate frequent communications.[21]

An inability to adequately monitor quantities or prices among participants, combined with internal enforcement mechanisms that may be costly or weak, can result in defections from a ring's agreement. The ideal situation is complete information *transparency* among cartel or ring members, but complete *secrecy* with non-members. This is why the sharing of sensitive, strategically important confidential data is generally considered a super-plus factor for the evidence of collusion. In ascending-bid (English) auctions, rings are more profitable if the identity of all bidders can be observed (say, through the exclusive use of numbered paddles in one room). Similarly, in sealed-bid auctions profits are generally higher when all information about the bids and bidders are transparent, which is often the case in procurement rules followed by public institutions. The presence of shill bidders is potentially destabilizing to a ring.

Market-share agreements, while not necessary, improve the stability of collusive agreements and resolve the problem of allocation of collusive monopoly profits. These agreements may require periodic (e.g. annual) meetings to compensate participants for unintentional deviations from agreed quotas. For this reason, an increase in interfirm transfers during a collusive period is very strong evidence for the fact of collusion, as is an increase in the stability of market shares.

Auction theory offers a rich set of suggestions for explaining the price effects of bidding rings, useful in understanding the performance of specific, well-documented rings. However, empirical modelling to explain variation in ring overcharges with cross-sectional panels of bidding rings is unlikely to be able to incorporate all of the richness of detail that auction theory proposes. In large samples of modern bid-rigging infringements, many factors are simply unknown or unmeasurable. Details of bid-rigging conduct or auction design simply go unmentioned in most of the posted decisions of antitrust authorities, in the business press, or in follow-up published studies by academics. In order to obtain a sufficiently large data set for statistical analysis, such details may be sacrificed. In other words, in exploratory analyses of the type performed in this paper, the explanatory power of the model may be lower than ideal.

III. ESTIMATING BID-RIGGING OVERCHARGES

Growing out of the general interest of IO economists in market power, the first journal papers empirically analyzing overcharges of bidding rings using formal economic methods started appearing in 1989.[22] Since then empirical studies of overcharges have used data from public tenders for sewer construction; federal-government procurement of frozen fish; state road-building contracts; real estate auctions in Washington, DC; and school milk procurement.[23] Each of these studies found positive overcharges arising during periods of overt collusion.[24]

Developments in auction theory also inspired empirical studies of bid rigging. Most empirical testing of auctions consists of bidding patterns in ostensibly competitive auctions and most study single-product auctions over time.[25] Marshall & Marx (2012: 248-255) present a detailed empirical analysis of 620 sealed-bid auctions held by the Russian Government during 2001-2007 to award petroleum and natural-gas leases.[26] A large plurality of these auctions had only two bidders and ended after one bid was submitted at the Government's minimum permissible price. Only auctions with at least two bidders could result in a lease being awarded. The study finds that at least 13 bidders and as many as 26 companies are shills (necessary to fulfill the two-company required minimum), which made many bids into monopsonies. The authors conclude that if there was a bidding ring, it was not very disciplined.

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20 Frequent meetings permit cartels to make repeated, coordinated price-change announcements (Marshall & Marx 2012: 213-239). Indeed, the frequency of price announcements and the lead times before implementation increase during collusion, but the size of price increases tends to be lower. The proportion of announcement by members with small shares increases during collusion. These patterns make detection more difficult and tend to lower buyer resistance.

21 In a sample of 22 EC-punished cartels, about half of them had third-party assistance mentioned as an aggravating factor in the decisions, and of those cases virtually all of them also had market-share quotas (Marshall & Marx 2012: 125-128).

22 However, Judge Taft seems to be the first to have computed bidding-ring overcharges in his 1898 decision in *Addyston Pipe*.

23 See references in Connor & Werner (2018).

24 These studies were generally made possible by U.S. "freedom-of-information" laws that mandate public access to bids for public project tenders. Although such laws also exist outside the United States, relatively few have been exploited there to obtain data to statistically analyze bid rigging of public tenders.

25 For example, Bajari, Patrick & Ali Hortacsu, *Are Structural Estimates of Auction Models Reasonable? Evidence from Experimental Data: NBER Working Paper No.* (May 25, 2005).

26 It is noteworthy that in their 302-page book, other than occasional references to antitrust decisions about well-known cartels, this is nearly the only empirical work on bid rigging summarized in the text by the authors. Rather, empirical findings are relegated to footnotes in order to illustrate theoretical points.

A third strand of the cartel literature is the statistical analysis of auctions and bid rigging intended to test game-theoretic notions.[27] A good example of an empirical study of imperfect competition in auction markets for stamps.[28] They apply a structural model to comparing the number of bidders and winning bids across two types of auction rules (open auction bidding and sealed bidding) in auctions for timber conducted by the U.S. Forest Service in the western United States. This study finds evidence of mild oligopoly pricing with sealed bids, but no collusion when open-outcry was the rule.

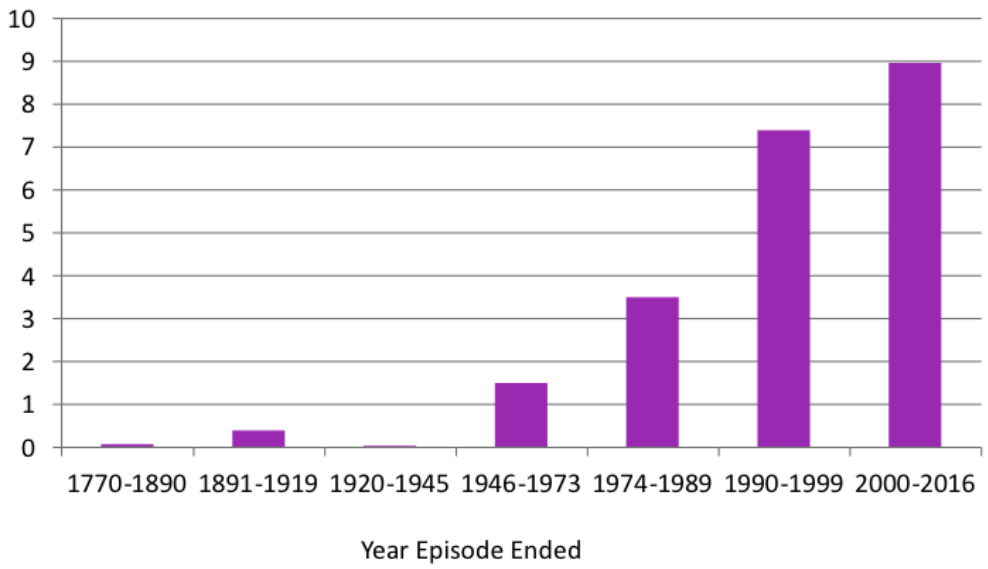
Statistical analyses of data on large samples of bid rigging episodes over time are exceedingly rare. Previous meta-analyses of price-fixing-cartel and bidding-ring overcharge rates have found no significant differences.

IV. EMPIRICAL DATA ON BID-RIGGING

In this section, we show the principal features of the Price-Fixing Overcharges (PFO) data set. This spreadsheet assembles more than 2000 estimated overcharges from all types of cartels that operated over several centuries, but this data set has only limited information on cartel structures, membership, or penalties imposed.[29] Grouped data and simple trend analyses can illustrate patterns that may be analytically significant for statistical testing.[30]

There are roughly four times as many classic price-fixing estimates of overcharges as there are for bid-rigging episodes. For reasons relating to changing priorities in the economic profession and data availability, almost all bid-rigging overcharges appear for rings that ended after the late 1950s (Figure 2).[31] The *Great Electrical Equipment* cartel of 1950-1957, prosecuted in 1958-1961 in the United States, seems to have been a watershed event for antitrust law and for stimulating studies of bidding rings.

Fig. 2. **Number** of Bid-Rigging Overcharges Estimates per Year



27 Hendricks, Kenneth & Robert H. Porter. An Empirical Perspective on Auctions, Chapter 32, pp. 2073-2143, in *Handbook of Industrial Organization: Volume 3* (Mark Armstrong & Robert Porter editors). Amsterdam: Elsevier (2007 provide a survey this economic literature.

28 Athey, Susan & K. Bagwell, Optimal Collusion with private Information, *RAND Journal of Economics* 32 (2001): 428-465.

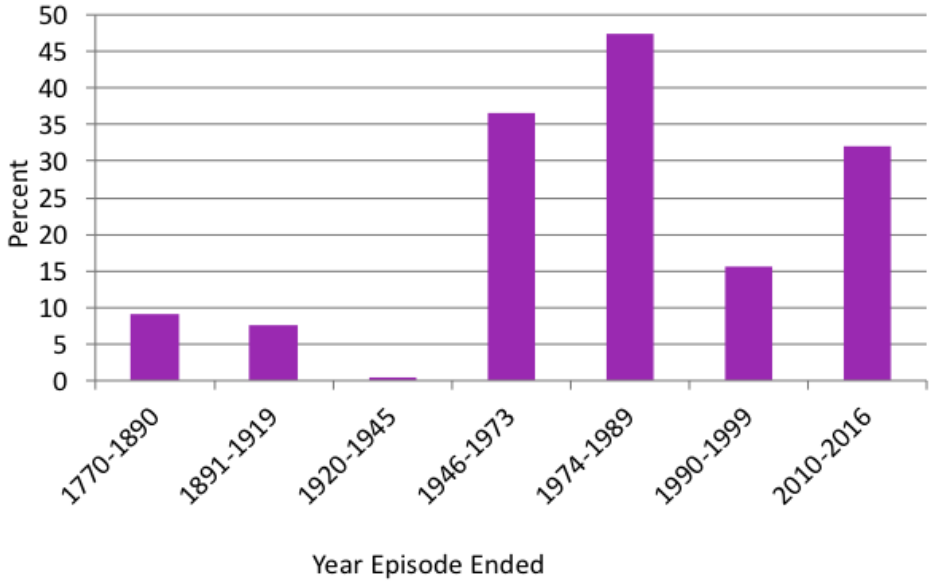
29 See John M. Connor, Cartel Overcharges, pp. 249-387 of *The Law and Economics of Class Actions*, in Vol. 29 of *Research in Law and Economics*, edited by James Langenfeld (March 2014). Bingley, UK: Emerald House Publishing Ltd.

30 Details and additional findings are available in Connor & Werner (2018).

31 Data for figures and statistical facts are from John M. Connor. *Price-Fixing Overcharges Master Data Set*, (Spreadsheet dated October 20, 2017). ("Connor 2017").

Before 1946, bid-rigging episodes accounted for only 4.7 percent of all reported overcharges; during 1946-1989, it rose to 42 percent; but after 1989 it fell to 24 percent (Figure 3). These data seem to indicate a nine-fold increase in the proportion of bid-rigging schemes after World War II compared to 1770-1945. However, we suspect that the change in the mix of cartel pricing conduct in the sample may reflect either the availability of data, changes in the composition of cartelized industries, or the changing preferences of economic researchers, rather than objective market conditions. Thus, rather than reflecting an objective surge in the share of bid rigging in natural markets, more likely explanations may lie in the direction of newly available data sets, enforcement priorities, and keen interest by economists in testing new models of auctions that appeared in the 1980s. It is possible that the increase in bid-rigging cases seen in our sample after 1946 is in part due to the advent of open-records laws.[32] What may seem like a refocusing in research efforts may also be a consequence of greater opportunities to obtain transactions prices. In sum, we believe that the proportion of bid rigging has likely been a more consistent 20 to 30 percent of all cartels across most historical periods.

Fig. 3. Proportion of Overcharges from **Bid-Rigging** Episodes



Studies of bid-rigging cartels in the 1970s and 1980s tended to focus on sub-national cartels in the United States, most of them in local dairy or construction industries. In the 1980s, these localized industries were the preferred targets of the U.S. DOJ's enforcement, which generated follow-on private damages cases.[33] Relatively few *international* cartels rely primarily on rigging auctions or tenders for public projects.[34]

Median overcharges from grouped data are higher for classic price fixing than they are for bid-rigging. On average for the whole time period, cartels engaged in "classic" price-fixing conduct generated six percentage points (32 percent) higher median episodic overcharges than those observed for bid-rigging conduct.

32 U.S. open records laws were instituted in the 1960s and 1970s. The U.S. federal Freedom of Information Act in 1967 and similar national laws elsewhere opened up valuable, large data sets on government tenders, for public works construction, for example. In the 1970s, many U.S. states passed similar laws. Similar laws were passed in Western Europe a bit later.

33 Lanzillotti, Robert F., The Great School Milk Conspiracies of the 1980s, *Review of Industrial Organization* 11 (1996):413-458.

34 The first *known* international bid-rigging cartel with overcharge estimates was the global *Heavy Electric Power Equipment* cartel (1945-1993). One possible earlier international example is the global *Quinine* cartel (1894-1966), which sold its final products through tenders issued by the militaries of many countries; moreover, the use of bid rigging by buyers in this cartel is also possible, because most raw quinine bark was sold to processors at a monthly auction in Amsterdam up to 1914.

Studies of many bidding rings suggest that they were ineffective in controlling market prices. When only *effective* cartel episodes are examined (i.e. those with positive overcharges), classic price-fixing cartels show a remarkable 88 percent higher median overcharge than bid-rigging episodes.[35] Because bid-rigging cartels often are organized to exploit tenders for government public-works projects, some economists have hypothesized that government buyers are less competent in detecting rigged bids than are professional industrial buyers (Cohen & Scheffman 1989:345).[36] Relatively few international cartels engage primarily in bid rigging, so this conduct category may be confounded with geographic extent or industry type (most are found in construction cartels with only a national or regional scope).

Overcharges also vary systematically by the location of the cartels. PFO data show that there are significant differences in median overcharges among cartels that operated in various major regions of the world. Single-nation cartels in Western Europe display distinctly lower median overcharges than those that operated across multiple nations in Western Europe (Connor & Werner 2018: Figure 10). The highest average overcharges are achieved by global cartels, which may be one reason bid-rigging overcharges are relatively low.[37] Cartels confined to one continent hew closely to the median all-cartel average. The few geographic differences we observe may be due to the skills of the cartelists in each region, and to different business cultures, detection preferences, or inherent economic conditions across geographic regions.

Finally, we analyzed overcharges of cartel duration into two conduct categories: with and without third-party assistance.[38] Despite measurement problems, there is an extraordinary difference in the average durations of collusion between classic cartels and rings: rings endure twice as long with third-party help than without (while for cartels duration is shorter with assistance) (Connor & Werner 2018: Figure 12). This pattern suggests, as does the theory, that third-party assistance ought to be a significant factor in explaining price effects *through* its effect on duration. That is, duration and third-party assistance positively interact.

V. STATISTICAL ANALYSIS OF BID-RIGGING PRICE EFFECTS

To further understand the determinants of overcharges by bid-rigging cartels (Connor & Werner 2018) specify a reduced form regression model using a variety of potentially explanatory variables related to market structure, geography, and industry characteristics. The results of this analysis are described in a non-technical fashion in this section.

Our results suggest that, consistent with expectations, buyer and seller concentration have significant effects on the ability of bidding rings to suppress prices. When rings have high shares of their industries and face smaller numbers of buyers, rings are more effective in suppressing prices.[39] Finally, the model results suggest that cartels engaging in bid-rigging against government purchasers do not overcharge said governments more than bidding rings selling to private buyers.

Two temporal factors tend to be highly significant explanatory variables.[40] The price effects of bidding rings are inversely associated with the duration of collusion and are positively related to macroeconomic downturns during the collusive period.[41] Both of these results are, we believe, novel findings in the cartel price-fixing literature.[42]

35 Connor 2017: Table 7.

36 However, the sixty-plus cartels in the *Auto Parts* markets do not support this hypothesis, as the buyers were the world's largest auto makers.

37 Few rings are global in scope (i.e. straddling continents). Dividing cartels into geographic expansiveness categories is in many ways more revealing about the mechanics of price effectiveness. When cartelists organize collusion in a sub-national region – typical of bid rigging – overcharges are lowest. The greater the geographic expanse of collusion, the greater the overcharge rates (Connor & Werner 2018: Figure 11). Two economic features may explain this trend: expansiveness of a collusive territory is positively related to the smallness of production in the fringe and to expanded opportunities for geographic price discrimination.

38 In some cases, assisting entities were fined nominal amounts for their culpability; in other cases, members of the collusive groups simply met at association meetings.

39 Specifically, comparing nearly perfectly competitive market structure to a duopoly structure results in a 23-percentage-point increase in bid-rigging overcharges. Similarly, when there are hundreds of buyers for the cartelized good, typical overcharges drop by 15 percentage points (compared to smaller numbers of buyers).

40 Including annual variables hardly improved the model's goodness of fit. Neither of the supplementary time trend controls is statistically significant.

41 The duration effect is significant but small (two or three percentage points price effect), but the recession effect is large (around 20 percentage points).

42 However, this finding does reinforce the longstanding hypothesis that collusion by any means is able to better survive the turbulence of a recessions (Berle, Adolf A. & Gardiner C. Means. *The Modern Corporation and Private Property*, New York: Macmillan (1933)).

Lastly, the model also investigates a variety of geographic variables to explain bid-rigging overcharges. However, various measures of bidding-ring geography proved to be disappointing explanatory factors, though a few outcomes contained hints that are worthy of additional future research.

VI. ANTITRUST POLICY DISCUSSION

There are two reigning theories on the optimal approach to suppressing the injurious effects of overt collusion. One approach is *deterrence*, which seeks to impose a set of penalties so severe that would-be-cartelists are discouraged entirely from *forming* new cartels – cartel infanticide, if you will. The U.S. Federal Sentencing Guidelines ("USSGs") are founded upon optimal deterrence principles. With no dramatic improvement in detection rates, optimal deterrence would likely require North American and European fines and other penalties to rise dramatically higher than current monetary penalties (Connor & Lande 2007).

Alternatively, a newer school of thought argues that leniency programs, antitrust screening techniques, and other enforcement improvements have raised markedly the rate of detection of clandestine cartels. If so, then proponents say that monetary penalties need not rise dramatically in order to *dissuade or destabilize* existing cartels.[43] This "Dissuasion School" is primarily interested in reducing cartel harms by shortening duration, rather than lowering the overcharge rates of existing effective cartels. Our empirical results on duration do not support the Dissuasion School, because we find that overcharges and duration are inversely related.

Very few formal guidelines for fining cartels mention bid rigging *per se* as an aggravating factor. Those in the United States call for very modest uplifts in fines. In practice, however, most jurisdictions apply more severe fines to rings than they do to classic cartels. Our statistical results give little support for this practice. We tested whether collusion was enhanced when government tenders were the targets of collusion, and found no such effect. This result questions the practice of setting government fines much higher when rings collude against public institutions as opposed to private buyers.[44] Our analysis suggest that antitrust sanctions guidelines should not necessarily treat bid rigging *per se* more harshly than other forms of collusion. Rather, the problem seems to be sub-optimal fines or low detection rates for *all* cartels and, in many jurisdictions, a legal system that is underdeveloped or hostile for private damages actions. Cartel studies contain rich suggestions for improving private rights of action against rings.[45]

Our *statistical* findings suggest that the economic injuries from contemporary bidding rings can be lowered in four ways. First, enforcement resources ought to be deployed in an anti-cyclical fashion. When recessions occur, antitrust authorities should shift resources away from merger and monopoly investigations and increase the sizes of their cartel units; investigators and forensic specialists from police agencies should also be deployed likewise. Second, managers of antitrust authorities should insist on a proper analysis or study of the structure of the purchasing industries. If they are atomistic, then fewer cases in this category should be pursued. Third, when governments are the main or sole buyers, antitrust authorities tend to ramp up resources to extract severe penalties. Our results suggest that this is an unwise redeployment. Rings exploiting private buyers deserve proportionality of enforcement. Fourth, our results also imply that antitrust authorities may have overlooked the efficacy of opening up bidding to larger numbers of better-informed purchasers. There may be a public role for setting up well-designed electronic auctions in industries prone to collusion or to improve reporting suspicions of collusion in auctions to the authorities (e.g. *individual* whistleblower reward policies seem to be working well in the few jurisdictions where they have been tried). Similarly, policies that encourage the entry of new firms in concentrated industries can also pay off. Fifth, it appears that a criminal regime with relatively high fines, an active private damages/class-action legal system, and heavy incarceration for cartel managers is conducive to lower overcharges and marginally better deterrence. Other jurisdictions should adopt similar enforcement methods.

43 The dissuasion approach implications for ideal penalty levels depend on parameters that are difficult to measure. Roughly speaking, doubling present penalties in the U.S. or EU may be sufficient to dissuade. See Harrington, Joseph E. *Are penalties for cartels excessive and, if they are, should we be concerned?* (posted at https://joeharrington5201922.github.io/blog.html, downloaded February 13, 2014)

44 This statistical result reinforces the descriptive data presented above: *median and mean average* bid-rigging overcharges were generally much lower than classic price fixing.

45 Marshall & Marx (2012, 2014) identify "super-plus factors" that are sufficient conditions for the fact of explicit collusion in bidding rings. Many of these factors are observable if preceded by extensive court-mandated, plaintiff-friendly discovery. For ascending-auction bidding rings they propose as plus factors: evidence of fairly rapid inter-bidder product transfers, suppression of prices below the but-for price from a well-formulated econometric model, a pattern of forbearance in bidding against the winner, and ultimate ownership of the goods for sale by non-bidding participants (non-winners) of the public auction (Marshall & Marx 2012: 244-246). For sealed-bid auctions, they propose the following plus factors: evidence of prior overt communications by ring members agreeing on low-priced bids, frequent closeness between the winning bid and the second-lowest bid; and suppression of winning prices below the but-for price from a well-formulated econometric model (Marshall & Marx 2012: 246-248).

However, we recognize that even a strong commitment to severe antitrust enforcement may not translate into effective suppression of bid rigging. For one, the factors that stimulate the formation of new cartels, that stabilize existing cartels, and that contribute to the effectiveness of ongoing cartels are not always congruent. For example, in an empirical study of prosecuted EU cartels, formation was positively related to profit shocks, the entry of new competitors, and the degree of buyer power, whereas theory suggests that these three market factors *destabilize* ongoing cartels.[46] Thus, policies that may improve cartel detection or dissuasion may not be effective in deterrence. Laboratory market experiments also confirm the difficulties of effectively designing anti-cartel policies.[47]

46 Herold, Daniel & Johannes Paha, *Predicting Cartel Formation: SSRN Working Paper No. 2740528* (July 19, 2016), available at https://ssrn.com/abstract=2740528.

47 For example, Hinloopen, Jeroen & Sander Onderstal. Going Once, Going Twice, Reported! Cartel Activity and the Effectiveness of Antitrust Policies in Experimental Auctions. *European Economic Review* 70 (2014): 317-336.) demonstrate that, in the context of two standard types of auctions (the open-outcry English auction and the first-price sealed-bid auction), the widely adopted leniency program has a perverse effect on cartel stability. Antitrust enforcement *without* a leniency program ("detect and punish") had *no* effects on cartel deterrence, stability, or winning bids. Using the size of the winning bids (roughly, the inverse of overcharges), the experiments find that the policy regime does not affect English-auction bid levels. But in first-price auctions, leniency programs *are* effective in reducing bids (raising overcharges) relative to conventional policy regimes (*ibid.* Table 7).

BID RIGGING IN PUBLIC PROCUREMENT

BY ROBERT CLARK[1] & DECIO COVIELLO[2]

1 Department of Economics, Queen's University.

2 Department of Applied Economics, HEC Montreal.

I. INTRODUCTION

Billions of dollars' worth of public contracts are allocated every year through auction-like mechanisms.[3] In theory, with a sufficient number of bidders, auctions represent an efficient way for governments to ensure the provision of goods and services. In practice however, calls for tender often involve only a small number of participants, who may sometimes coordinate their actions to rig the results of the auction and deter the entry of potential competitors. These reductions in competition can result in much higher prices paid by governments.

In this article we summarize findings from our examination of the behavior of participants in procurement auctions in the construction industry in the Canadian province of Quebec that shed light on the impact of bid coordination and entry deterrence.[4] We make use of information uncovered during investigations into allegations of collusion and corruption in the construction industry in Quebec, along with detailed bidding data obtained through access to information requests. The focus is on the municipal procurement of asphalt in Montreal, which was mentioned as a cartelized market during the investigations.

Our analysis leverages the fact that collusion presumably ceased following the investigation. We compare prices and participation levels before and after the investigation in order to learn about the impact of the cartel and about the relative importance of coordination (selection and coordination of profitable collusive pricing strategies and monitoring behavior to prevent defection) and entry deterrence for achieving successful collusion.

II. THE INVESTIGATION

On October 22, 2009 a police task force known as Opération Marteau was charged with investigating allegations of collusion and corruption in Montreal's construction industry. The launching of the task force followed the broadcast earlier that month of an episode of Canadian news television show Enquête detailing allegations of bid rigging, market segmentation, complementary bidding, and bribes to bureaucrats.[5] Later testimony from the *Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry* (commonly referred to as the *Charbonneau Commission*), formed two years later in October 2011 to dig further into the allegations, substantiated the claims of corruption and collusive schemes in various construction-related industries in Montreal and for some provincial contracts.

The collusive arrangement consisted of market segmentation, complementary bidding and payoffs to bureaucrats. Prior to the allocation of contracts by municipalities or the Ministry of Transport, conspiring firms would obtain private information regarding the contracts (location, size, etc.) from municipal or provincial officials.[6] Testimony during the Charbonneau Commission detailed bribes provided to officials.[7] Representatives would then meet to determine which contracts would be assigned to which firms based on the firms' production capacities and plant locations. The agreed-upon winner then organized bidding on that contract (selecting its bid and those of competitors). Prior to the submission closing date, the assigned winner would contact the other participants to provide instructions on complementary bidding.[8] According to statements from dissidents, complementary higher bids were submitted to simulate competition.

3 According to the OECD, member countries in 2018 spent approximately 12 percent of their GDP in public procurement. This percentage can be higher in developing countries. See: http://www.oecd.org/gov/public-procurement/.

4 This article is based on our academic paper: Clark, R., D. Coviello, J.-F. Gauthier & A. Shneyerov (2018), "Bid rigging and entry deterrence in public procurement: Evidence from an investigation into collusion and corruption in Quebec," *The Journal of Law, Economics, and Organization* 34, 301–363.

5 **Legal disclaimer:** This article analyses the alleged cartel case strictly from an economic point of view. We base our understanding of the facts mostly on data obtained from the municipal clerk's office through access to information requests, through transcripts of testimony from the Charbonneau Commission, and the testimony presented in the *Enquête* broadcast. The investigation into, and prosecution of, firms involved in the alleged conspiracy is ongoing. The allegations have not been proven in a court of justice. However, for the purpose of this analysis, we take these facts as established.

6 See paragraphs 684-686 and 724 of Jean Théoret's Testimony from the Charbonneau Commission, November 26, 2012.

7 These included invitations to fishing and yachting trips, wine and hockey tickets, and also political donations. See paragraphs 1226, and 185 to 206 of Gilles Théberge's testimonies from the Charbonneau Commission, May 23-24, 2013.

8 See paragraphs 997-1009 and 1060-1100 of Gilles Théberge's testimony from the Charbonneau Commission, May 23, 2013.

Threats and intimidation were employed to deter competition. When preparing submissions, firms had to request plans from municipal officials. According to testimony, should non-cartel firms have requested the plans, municipal informants would immediately contact cartel members.[9] These non-member potential bidders would be informed that the contract did not belong to them, and that they should either follow cartel assignment rules or withdraw their submission. In the event that they refused, the cartel would harass them unceasingly until the opening date of the submission. If the potential bidder still refused to join the cartel or abstain from bidding, individuals would be sent to deliver a threat in person.[10] If the threats did not achieve their desired impact and a non-member participated in the call for tenders and won the contract, project completion was unlikely. According to testimony, the cartel would tamper with equipment and materials, and would exert physical violence.[11]

III. IMPACT OF THE INVESTIGATION ON PROCUREMENT OUTCOMES

To evaluate the effect that the police investigation, Opération Marteau, had on outcomes we compare prices and participation levels in Montreal after the investigation to prices and participation levels before. Since contracts are negotiated only once a year in the spring, we establish our structural break in 2010, assuming that bidding in Montreal became competitive again from this point. Testimony during the Commission implied that the start of Opération Marteau caused collusion to abate.

This *before* & *after* approach to studying the impact of the cartel on outcomes has the advantage of simplicity. Unfortunately, other factors may have influenced the evolution over time of these two variables, and so it is useful to *control* for changes in the asphalt market by contrasting the behavior of firms in Montreal to the behavior of firms in a benchmark market, that presumably did not react to the police investigation. In our context, we make use contracts in Quebec City as a competitive benchmark. The choice of Quebec City as a competitive benchmark is justified by the fact that, to our knowledge, its asphalt market was never cited during Opération Marteau or the Charbonneau Commission. According to the allegations in the Enquête broadcast, the initial focus of Opération Marteau was on Montreal. Quebec City is located about 250 kms from Montreal, and while one might ideally select a neighboring city to serve as a benchmark, in this case many markets surrounding Montreal have been cited and therefore would not be reliable controls. Most of the suburbs located on the North and South shores of the island of Montreal were mentioned in the investigation. Furthermore, calls for tenders in the Montreal and Quebec City are similar in many ways: (i) the auctions are held during the same period; (ii) the auctions are designed per borough; (iii) the yearly budget for asphalt for the two cities is usually not too different; and (iv) prior to the investigation, bidding patterns were similar in the two markets. Altogether these facts imply that Quebec City represents a suitable control, and therefore, to estimate the effect of the investigation on bidding behavior, we use a *difference-in-difference* approach comparing the difference in contract outcomes in Montreal before and after the investigation to the difference in outcomes in Quebec City before and after.[12]

We collected detailed data for the municipal procurement of asphalt through *Access to Information* requests at the Municipal Clerk's offices for the period 2007 to 2013. The data provide information on all public tenders, and the participating bidders before and after the investigation started. Contracts are at the borough level. In Montreal, calls are for different asphalt types, whereas for Quebec City calls aggregate over asphalt types. As a result, there are many fewer calls in Quebec City each year (one per borough) than in Montreal (up to eleven per borough). We have information on all submitted bids (raw bids and transportation charges), and the identity of the winner.

Table I describes the contracts awarded over the sample period in Montreal and Quebec City respectively. We can also see that, prior to the investigation, raw bids in Montreal were $75 per ton, but only $57 in Quebec City. In the post-announcement sample the differences between Montreal and Quebec were considerably smaller. Note that this is due to changes both in Quebec City and in Montreal following the announcement. Prices increased by $6 in Quebec City and fell by over $8 in Montreal. Therefore, the difference-in-difference effect is $14 (=-$8-$6), suggesting the investigation had a large economic impact on bidding behavior in Montreal's asphalt market.

9 See paragraphs 684-686 and 724 of Jean Théoret's Testimony from the Charbonneau Commission, November 26, 2012.

10 For an example of this behavior, see paragraphs 1102 to 1133 of Piero Di Iorio's testimony at the Charbonneau Commission, November 26, 2012.

11 See paragraphs 839-915 from Jean Théoret's testimony at the Charbonneau Commission, November 26, 2012.

12 This approach has been used to study the impact of alleged price fixing in other markets (see for instance Clark, R. & J.-F. Houde (2014), "The effect of explicit communication on pricing: Evidence from the collapse of a gasoline cartel," *Journal of Industrial Economics* 62, 191–228.).

Table I: Descriptive statistics for Montreal and Quebec City

Year	$ awarded (millions)	Nbr contracts	Nbr bidding boroughs	Avg tons of ashphalt	Nbr bidding firms	Nbr bids per contract	Avg winning bid ($/ton)
Montreal							
	Total		Average				
2007 - 2009	8.1	215	12	491	5.3	2.6	75
2010 - 2013	11	401	17	650	7.8	3.6	67
Quebec City							
	Total		Average				
2007 - 2009	5.9	22	7.3	3,818	6.3	3.7	57
2010 - 2013	10	24	6	5,399	4.8	3.3	63

Figure 1 plots the evolution of raw bids over time in Montreal and Quebec City. Prices were higher in Montreal than in Quebec City prior to the investigation, but the trends in the two cities were common with bids roughly following the price of the main input in the production of asphalt, which we proxy with the price of crude oil (with a lag), until the start of the investigation, at which point prices in Montreal diverged to fall in line with prices in Quebec City.

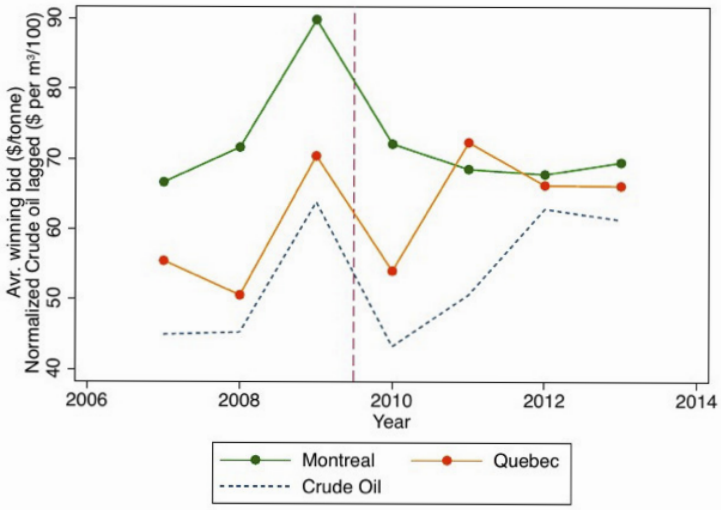


Figure 1: Winning bids before-after the investigation

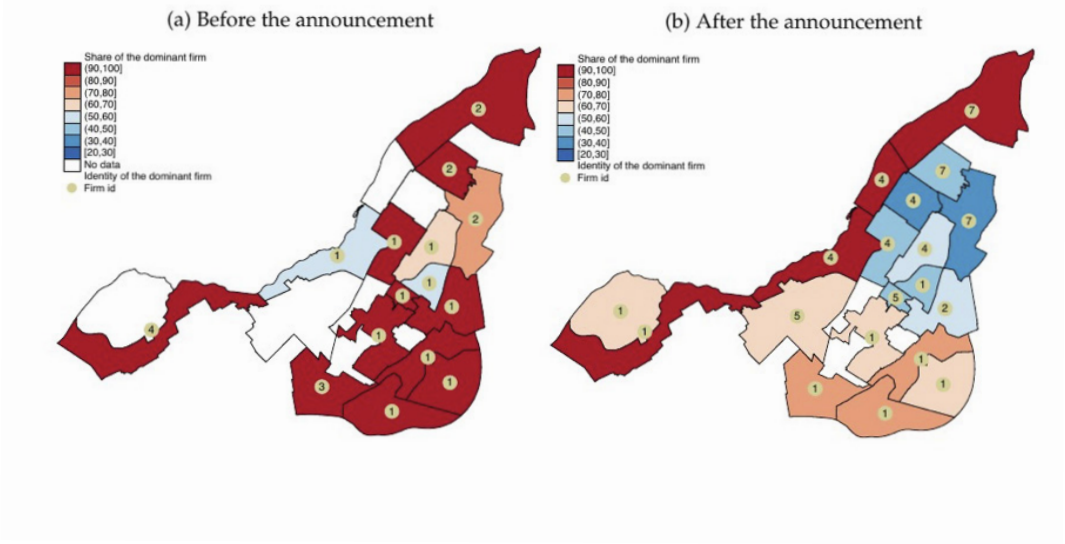
Next, we turn to the effect of the investigation on entry and participation. Prior to the investigation, a total of six firms bid for contracts for the supply of asphalt in Montreal. Three other firms entered subsequently. Two of these placed bids for the first time in 2010, while the other began bidding in 2012. These three entrants had been active in the private sector prior to 2010. Despite the fact that they each had the capacity to supply public contracts, they never placed bids in municipal auctions prior to this date. In Quebec City, no firms enter, and one firm no longer participates in any calls for tender. There were a total of seven firms that bid on tenders for the supply of asphalt in Quebec City in the 2007-2013 period. Two of the firms won large fractions of the contracts in both time periods. As mentioned above, the number of participants per auction actually fell from before the investigation to after.

Looking again at Table 1 we can see that there was a large increase in the number of bids per contract in Montreal post investigation. In the pre-investigation period there were 2.6 bids per contract vs 3.6 afterwards. In contrast, the number of bids fell slightly in Quebec City from 3.7 in the pre-period to 3.3 in the post.[13] Together, these numbers imply that collusion caused the number of bidders per auction to fall by about 1.4 (that is to say, the difference-in-difference estimate is 1.4=1-(-0.4)).

13 The average number of tonnes per contract increases significantly in 2013, but this can largely be explained by one contract. In 2013, the district of Ville-Marie ordered 20 000 tonnes in a single contract. The average without this contract is 736.38 tonnes per contract. Overall, we observe that in 2010 and 2011 districts ordered smaller quantities of all asphalt types while in 2012 and 2013, they switched to fewer asphalt types but ordered in greater quantities.

During the pre-investigation period one incumbent firm had a revenue share greater than half, and three firms dominated the market. After the investigation the market share of two of these firms fell dramatically, but increased for the smallest of the three. Two of the three entrants pick up a little under a third of the market. Figure 2 presents the share of the dominant firm (as measured by total amounts of contracts won) in each borough of Montreal before and after the investigation. The incumbent firms win a smaller share of contracts after the investigation, and in some cases are no longer the dominant firm in the borough afterwards.

Figure 2: Dominance of firms and market-share in Montreal



IV. CARTEL ORGANIZATION: COORDINATION VS ENTRY DETERRENCE

Our analysis thus far reveals that, after the investigation, raw bids decreased in Montreal relative to Quebec City, and that three new players entered the Montreal market, leading to a significant increase in the number of participants per auction. We next investigate the role that entry played in explaining the documented price change in order to learn about cartel organization. Successful collusion requires cartel members to overcome two principal organizational challenges: (i) coordinating an agreement amongst themselves and (ii) deterring the entry of potential competitors.

To quantify the relative importance of these two activities we re-estimate the same difference-in-difference effect as above, but this time restricting our attention to auctions in which there was no entrant present (in Montreal). Although entrants began participating in calls for tender following the investigation it is possible to find a set of auctions in which they did not take part, and to redo our price analysis for this subset of auctions. Our results imply that, even in auctions without entrants, the difference-in-difference estimate is around $12. In other words, even limiting attention to auctions in which there was no entrant present, prices are still found to have fallen significantly in Montreal after the investigation. These findings suggest that the price decrease is mostly due to changes in bidding behavior by incumbent firms, which appears to be more competitive following the investigation.[14]

14 The problem with this approach is that auctions in which entrants participated may be different from those in which they did not and so controlling for entry in our regression analysis might introduce a bias. Moreover, this specification does not allow us to control for the threat of entry, but only the presence of an actual entrant in an auction. To address these issues, and confirm our reduced-form findings in Clark et al. (2018) we follow a quantitative model-based approach.

V. POLICY IMPLICATIONS

Our findings provide insight into the organization of bidding rings in public procurement. While entry deterrence is an element of the cartel mechanism, it is less important than the ability of cartel members to coordinate bids. These results can provide direction to policy makers on how to allocate limited resources when combating collusion and corruption. Emphasis has been on the need to encourage the participation of a large number of bidders in the procurement process by eliminating policies that place restrictions on entry or participation.[15] Our findings imply that more resources should be devoted to eliminating communication and coordination and fewer to designing tender processes that elicit maximum participation.

We have documented that following the investigation prices fell and entry and participation increased. Our results imply that coordinating a profitable and stable agreement was the main function of this particular cartel. The relatively small role of entry deterrence may be at least in part due to the fact that there are six firms in the industry already and so, absent collusion, a fairly competitive outcome can be achieved. However, in other contexts even larger numbers of firms did not guarantee a competitive outcome. For instance, when Austria joined the European Union and Europe-wide competitors were allowed to bid in their treasury auction the number of participants moved from 15 to 25 and bond yields fell.[16]

15 For example, contracts should be well defined in terms of products and delivery times to encourage firms with excess capacity to bid (see for instance Coate, M. B. (1985), "Techniques for protecting against collusion in sealed bid markets," *The Antitrust Bulletin* 30, 897–914), or call for tenders could be advertised on newspapers or the world-wide-web, (see for instance Coviello, D. & M. Mariniello (2014), "Publicity requirements in public procurement," *Journal of Public Economics* 109, 76–100).

16 See Elsinger, H., P. Schmidt-Dengler & C. Zulehner (2019), "Competition in Austrian treasury auctions," *American Economic Journal: Microeconomics* 11, 157–184.

PROHIBITIONS ON CONTRACTING AND THE FUTURE OF PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT IN SPAIN

BY ÁLVARO IZA & LUIS LORAS[1]

1 Lawyers at Freshfields Bruckhaus Deringer LLP. The authors views do not necessarily represent the views of the firm or its clients.

I. INTRODUCTION

The Spanish Competition Authority's ("CNMC") 2016 Annual Plan constituted a landmark for antitrust enforcement in the field of public procurement law in Spain. Together with other measures announced to invigorate antitrust enforcement in Spain, which included the imposition of personal sanctions on directors involved in anticompetitive conduct, the CNMC decided to boost antitrust enforcement by announcing the imposition of prohibitions on contracting, in the context of public procurement, on companies sanctioned as a result of anticompetitive conduct (the *Prohibitions on Contracting*).

Antitrust enforcement in the field of public procurement is already vigorous in Spain. Indeed, up to 18 bid rigging cartels have been sanctioned since the creation of the CNMC in 2013. While some have applauded such vigorous enforcement, others have expressed concerns over the effects of introducing additional regulatory measures, such as the Prohibitions on Contracting, in some markets where there is not a sufficient number of players.

This article analyzes public procurement antitrust enforcement in Spain since the creation of the CNMC, and the absence of Prohibitions on Contracting, with the exception of one precedent dated March 27, 2019, despite their announcement back in 2016. It also seeks to ascertain how enforcement will evolve in the future after the entry into force of the Spanish Public Contracts Law[2] implementing the latest EU Public Procurement Directive[3] (hereinafter referred to as *Spanish Public Contracts Law* and *EU Public Procurement Directive*, respectively).

In addition, this article studies the impact that Prohibitions on Contracting, as implemented under Spanish law, could have on the attractiveness of the CNMC's leniency program. Finally, the article advances the need for the implementation of a comprehensive legal regime that increases antitrust enforcement in the area of public procurement, but not at the expense of the CNMC's leniency program.

II. THE CNMC'S PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT PRIOR TO 2016

Public procurement markets represent approximately 20 percent of Spain's GDP.[4] Hence, it is not surprising that a significant number of antitrust law infringements have been discovered and heavily sanctioned in these markets since the creation of the CNMC in 2013. In total, 9 of the cartels sanctioned by the CNMC prior to 2016 involved some type of bid rigging practice:

Case File	Total Fine
S/0329/11 Cantabria Asphalt	42,800,370 €
S/0316/10 Paper Envelopes	44,581,559 €
S/0341/11 Correos (Postal Services)	3,319,607 €
S/0385/11 Campezo Constructions	133,696 €
S/0423/12 Munters	638,200 €
S/0415/12 ABH-ISMA	3,684,186 €
S/0453/12 Train Bearings	4,000,000 €
S/0429/12 Waste Management	98,200,000 €
S/0481/13 Modular Construction	21,882,843 €

In addition, the CNMC (and its predecessor, the CNC) also enforced Antitrust law in public procurement markets via "soft law." Indeed, among other measures, we would highlight the CNC's 2010 "*Guide to Public Procurement and Competition*" which attracted significant local media and industry attention. This Guide provided contracting authorities with practical guidance to minimize the risk of antitrust infringements, such as the: (i) type of public procurement processes to follow; (ii) access/notice requirements; (iii) award criteria; (iv) contract duration; and (v) prevention and detection of collusion among tenderers.

2 Law 9/2017, of November 8, 2017, on Public Sector Contracts.

3 Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC.

4 See Page 7 of the CNMC's report IPN/CNMC/010/15 on the draft bill on the Public Sector Contracts Law.

Moreover, the CNMC also increased its advocacy activity in relation to public procurement by organizing a series of seminars on "Pro-competitive application of Public Contract Law."[5] In these seminars, the Authority highlighted the importance of competition in public procurement markets, and informed stakeholders of the deficiencies detected in the regime and the measures proposed by the Authority to remedy them. Among other measures, the CNMC announced in these seminars the creation of a "Special Economic Intelligence Unit," which, operating within the CNMC, would supervise the efficient functioning of markets, including public procurement markets, by using advanced software screening tools. According to recent statements by the CNMC, the Special Unit has already discovered the existence of three cartels to date.[6]

2016 was a landmark year in antitrust enforcement in the area of public procurement in Spain. Indeed, this was the year when the CNMC announced in its Annual Plan that, in addition to hefty fines, it would start imposing Prohibitions on Contracting.[7] The CNMC subsequently announced that the first Prohibitions on Contracting would be imposed as early as 2017.[8]

Given the importance of public procurement in several sectors of the Spanish economy, the CNMC's announcement immediately caught media and industry attention but, to date, no economic operator has ever been excluded from a tender process in Spain on Antitrust law grounds.[9] While some applauded the CNMC's plans, others questioned the proportionality and pro-competitive effects of the proposed measure. Indeed, some criticism was raised arguing that the CNMC's announcement was a questionable response from the Authority to the Spanish Supreme Court's Judgment of January 29, 2015. This judgment had annulled the CNMC's Fining Guidelines, triggering the recalculation of dozens of fines and seriously impacting the CNMC's enforcement credibility.

III. THE CNMC'S PUBLIC PROCUREMENT ANTITRUST ENFORCEMENT AFTER 2016

Despite the CNMC's announcement, and the existence of a number of cases in which Prohibitions on Contracting could have been imposed, no economic operator was subjected to such a prohibition by the Authority until March 27, 2019. Indeed, since 2016, among other decisions, the CNMC sanctioned another 8 cartels which involved some type of bid rigging practice.

Case File	Total Fine
S/0504/14 Adult Diapers	128,800,000 €
S/0519/14 Rail Infrastructure	5,584,933 €
S/0544/14 International Removal	4,090,000 €
S/0555/15 Cash Management	46,448,416 €
S/0545/15 Asturias Ready-Mix Concrete	6,120,000 €
S/0512/14 Balearic Ferries	9,170,452 €
S/0584/16 Media Agencies	7,231,890 €
S/0565/15 Software Licencing Procurement	29,900,000 €

The non-imposition of Prohibitions on Contracting contrasted with the enforcement of personal fines for directors involved in anticompetitive conduct. Indeed, both measures were announced at the same time but the CNMC has applied only the latter, never the former.

There were a number of legal and policy reasons which may explain why the CNMC was reluctant to impose Prohibitions on Contracting despite their announcement. Regarding legal reasons, the CNMC may have come up against jurisdictional, limitational and procedural issues. Indeed, it is not clear whether, within its powers, the CNMC has competency to impose Prohibitions on Contracting.[10] In addition, Prohibitions on Contracting came into force in Spain on October 22, 2015.[11] Accordingly, the CNMC may have considered that applying such prohibitions to Antitrust law infringements which occurred prior to that date would effectively run contrary to the principle of non-retroactivity.

5 Among others, the CNMC held a seminar on this topic on March 23, 2017.

6 These statements were made by the CNMC in the Annual Conference of the Spanish Association for the Defense of Competition on November 26, 2018.

7 See Page 20 of the CNMC's 2016 Annual Plan.

8 See Europapress news of March 31, 2017: "*The first sanctions by the CNMC with the prohibition on contracting with the Public Administration will be imposed in 2017.*"

9 Indeed, no records of any such measure currently exist in the Spanish Official Registry of Tenderers and Classified Companies.

10 See Law 15/2007, of July 3, 2007 for the Defence of Competition which does not expressly confer such power on the CNMC.

11 See Law 40/2015, of October 1, 2015, on the Public Sector Legal Regime (which partially implemented the EU Public Procurement Directive in Spain).

Furthermore, under Spanish law Prohibitions on Contracting can only be enforced when sanctioning decisions become final. Accordingly, even if the CNMC could theoretically have imposed them, economic operators could have delayed their effective application by appealing the CNMC's decisions, thereby burdening the authority with further workload.

To steer around the jurisdictional obstacles, the CNMC could have sought the imposition of Prohibitions on Contracting through the Ministry of the Treasury and the Public Sector. According to Spanish law, when an administrative decision on the basis of which an economic operator may be excluded from participating in a tender process has not established the scope and duration of such exclusion, this Ministry, at the request of an interested party, may do so.[12] Nevertheless, the CNMC would have confronted the same non-retroactivity issue as referred to above.

Regarding policy reasons, the CNMC may have considered that the sanctions imposed on economic operators and directors were sufficiently deterrent considering the circumstances of the cases sanctioned since 2016. Indeed, while some commentators expected the amounts of the CNMC's fines to be significantly reduced following the 2015 Supreme Court judgment, they actually did not. In fact, in a recent report published by the CNMC the Authority has concluded that, under the new quantification method, single-product firms will generally face lower sanctions than under the old regime, but multi-product firms will actually face higher amounts.[13]

In addition, the CNMC may have felt that the imposition of such sanctions could compromise the attractiveness of its leniency program. Indeed, at the time Spanish law did not exempt, as it expressly does now to some extent, leniency applicants from Prohibitions on Contracting.

The CNMC's decision in case S/DC/0598/16 *Rail electrification and electromechanical infrastructure* issued on March 27, 2019 confirms some of these suspicions. The decision imposed fines totaling €118 million on 15 companies and €0.6 million on 14 directors for rigging bids in public procurement processes conducted by ADIF, the Spanish public railway infrastructure company. Regarding Prohibitions on Contracting, the CNMC stated that: (i) the CNMC, itself, was not imposing such sanction but that Prohibitions on Contracting arose automatically by virtue of the law; and (ii) the reason why such sanction was applicable in this case was because the conduct took place before, but also after the entry into force of Prohibitions on Contracting in Spain on October 22, 2015.

That is, the CNMC indirectly recognized that it confronted jurisdictional and limitational issues which had precluded the CNMC from imposing Prohibitions on Contracting in previous decisions. As previously discussed, to overcome the jurisdictional issue, the CNMC decided not to impose the sanction itself, but merely acknowledge its existence and refer the case to the Ministry of the Treasury and the Public Sector to determine its scope and duration.[14]

Having said all the above, the CNMC has a significant number of cases in the pipeline and there are even more pending appeal before administrative courts before becoming final. Hence, while the CNMC has only acknowledged the existence of such measures and referred the case to the competent Ministry in one occasion so far, nobody can rule out what the CNMC may decide to do in the future and if it will only limit itself to acknowledge the existence of such Prohibitions in post-October 22, 2015 infringements. In addition, the absence of the CNMC's enforcement in other decisions does not necessarily mean that economic operators may escape exclusion on Antitrust law grounds from tender proceedings. Indeed, contracting authorities themselves and/or competing tenderers may also be considered interested parties who could seek the exclusion of infringing operators before the Ministry, as set out above.

12 After doing so, the exclusion is then recorded in the Spanish Official Registry of Tenderers and Classified Companies. Generally, the way in which economic operators prove that they are not under a Prohibition on Contracting is by requesting a certificate from this Registry which they subsequently file, together with the rest of the tender documentation, before contracting authorities. See also *supra* note 9.

13 See Document AE-003/18(0704) "*Analysis of the CNMC's recalculation decisions applying the new Supreme Court jurisprudence on Competition law fines*" (analyzing 71 recalculations of fines carried out by the CNMC following the Spanish Supreme Court judgment and finding that, under the new quantification method, 62 percent of the fines were lower than the original but 38 percent would have actually been higher).

14 Please note that the CNMC's decision contains a dissenting opinion issued by one of the members of the CNMC's board who, despite acknowledging that the law does not expressly grant the CNMC the power to impose Prohibitions on Contracting, considers that the CNMC could actually have such power if Prohibitions on Contracting are characterized as negative behavioral remedies, which the CNMC has express powers to adopt.

IV. IMPACT OF THE IMPLEMENTATION OF THE EU PUBLIC PROCUREMENT DIRECTIVE

By April 18, 2016, EU Member States had to implement the EU Public Procurement Directive into national law. However, Spain implemented the EU Procurement Directive two years later through the Spanish Public Contracts Law. This legislation entered into force on March 9, 2018.[15]

Regarding Prohibitions on Contracting, it is important to highlight that the Spanish legislator decided to:

i. implement all grounds for exclusion, including Antitrust law grounds, as mandatory. That is, while the EU Public Procurement Directive provides that contracting authorities *may* exclude economic operators from participating in tender proceedings, the Spanish Public Contracts Law mandates such exclusion.

ii. require that antitrust fines imposed upon economic operators be final before they can be excluded from tender proceedings. That is, while on the basis of the EU Public Procurement Directive contracting authorities may exclude economic operators which have infringed Antitrust law, under the Spanish Public Contracts Law they shall do so, but only after the decision which found that the operator breached Antitrust law has become final.

iii. to a certain extent, exempt leniency applicants from such exclusions. The EU Public Procurement Directive provides that, to be allowed to participate in tender proceedings, economic operators that have infringed Antitrust law may prove to contracting authorities that they have adopted internal measures to prevent future violations, assist authorities in clarifying the facts of the infringement, and pay for the damages caused as a result. The Spanish Public Contracts law, on the other hand, states that economic operators shall not be excluded if they can demonstrate that they have paid the fines or compensations *established in the decision on the basis of which the prohibition to contract was imposed* and have adopted internal measures to prevent future violations, *with such internal measures including applications for leniency*.

It is important to clarify in this respect that, on the basis of the EU Public Procurement Directive, Spain has opted for a centralized system of exclusion assessments.[16] That is, instead of leaving each contracting authority to assess whether an economic operator may be excluded on Antitrust grounds or not, in Spain the CNMC will be the entity responsible for such assessment.[17] This is the case where the CNMC has itself already unveiled and sanctioned the anticompetitive conduct at stake (as it did with the 18 cartels referred to above) or, equally, where the contracting authority expressly requests it in the context of a tender proceeding. Indeed, under the Spanish Public Contracts law, contracting authorities that have reasonable grounds to suspect that their bidders may be colluding shall stay the proceedings and refer the matter to the CNMC so that the authority may issue a decision in this respect following a "expedited" proceeding.

As the foregoing demonstrates, the Spanish legislator has opted not to follow closely the wording of the Directive on Prohibitions on Contracting. Although the direct mention of leniency applications as means to prove that economic operators have adopted internal compliance measures to prevent future violations is welcome, other aspects could cause unintended consequences. Among others:

i. establishing that an Antitrust law infringement triggers mandatory exclusion may result in the exclusion of all potential bidders in certain markets. Indeed, by their very nature, cartels require high combined market shares to be successful. On several occasions, it has been found that the entire market was cartelized. In these instances, if all tenderers must be excluded according to Spanish law, who would be able to bid for the public contract? Alternatively, if most, but not all, tenderers are excluded (e.g. the leniency applicant is allowed to participate) who would prevent non-excluded tenderers from charging supra-competitive prices to contracting authorities?

15 But see *supra* note 11.

16 See recital 102 of the EU Public Procurement Directive: "*[I]t should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.*"

17 This may be the reason why Spanish law has decided not to require economic operators to assist in clarifying the facts and circumstances in which the Antitrust law infringement may have occurred.

ii. requiring antitrust decisions to be final prior to imposing the above-mentioned prohibition may lead economic operators to file unmeritorious, or strategic, appeals to challenge the CNMC's cartel decisions. Indeed, under Spanish law, Prohibitions on Contracting can take up to three years from the date on which an infringing decision becomes final. As a result, if an economic operator knows, or foresees, that major public buyers will be conducting tender proceedings in the short term, they will have a great incentive to file appeals to delay their effective exclusion from those tender proceedings. Conversely, if public buyers have conducted tender proceedings recently, infringers will have a great incentive not to appeal CNMC's decisions with a view to their exclusion immediately beginning to run its course towards the tender's lapse in the future.

Although the questionable effectiveness of adopting Prohibitions on Contracting in terms of a given period of time, as opposed to the prohibition from participating in a given number of future tender processes, is not a Spanish-specific issue (indeed, this is provided by the EU Public Procurement Directive), the Spanish finality requirement in respect of sanctioning decisions potentially exacerbates this issue.

iii. providing that leniency applications are just one potential means of proving the adoption of compliance measures to prevent future violations, but not establishing a *per se* Prohibitions on Contracting exemption, may not be sufficient to preserve the effectiveness of the CNMC's leniency program. Indeed, economic operators confronted with the decision of whether or not to blow the whistle may be discouraged from doing so if faced with any uncertainty concerning the potential imposition of Prohibitions on Contracting.

Nonetheless, the first CNMC's decision that has acknowledged the existence of this sanction has expressly, and almost automatically, declared that the leniency applicants (in the case, SIEMENS and ALSTOM and their respective directors) shall not have Prohibitions on Contracting imposed. However, following the CNMC's own reasoning, if the CNMC has indirectly acknowledged that it lacks powers to impose Prohibitions on Contracting (and determine their scope and duration) it then must follow that the CNMC does not have the power to exempt leniency applicants from such sanctions either. In other words, the Ministry of the Treasury and the Public Sector may well decide to follow the CNMC's proposed exemption, but it is arguable whether the Ministry will in fact be legally bound by it.

iv. centralizing the exclusion assessment with the CNMC may delay tender proceedings. Even if centralization does generally bring greater clarity and uniformity, in this case it could potentially be at the expense of delaying tender proceedings. Although the Spanish Public Contracts Law requires that the CNMC's proceedings must be "expedited," it has completely delegated to secondary legislation how these proceedings should be conducted.[18] Furthermore, sanctioning proceedings before the CNMC generally take 24 months. Hence, even if "expedited," it is likely that the process will potentially delay the award of public contracts, at least for a number of months. Otherwise, it is questionable whether the expedited proceedings would be able to respect the tenderers' rights of defense.

Thus, the EU Public Procurement Directive is likely going to result in greater enforcement of antitrust rules in the field of public procurement and in an even greater involvement of the CNMC in this field. However, the implementation of the Directive has failed to address the jurisdiction, limitation and finality issues referred to above. In addition, it remains to be seen whether any of the unintended consequences anticipated in this article materialize, and what the reaction will be from legislators, regulators, contracting authorities and tenderers in order to overcome the legal and policy difficulties that they may face unless this situation is remedied.

V. CONCLUSION

The CNMC's 2016 Annual Plan constituted an antitrust enforcement landmark in the field of public procurement. However, despite the local media and industry attention awakened by the Prohibitions on Contracting, the CNMC did not adopt, or rather, recognized the existence of, any such measure until March 27, 2019.

18 A delegation which could potentially be contrary to the Spanish Constitution as the CNMC's proceedings would be administrative sanctioning proceedings which could have an effect on economic operators' fundamental rights. Furthermore, after almost a year since the Spanish Public Contracts Law was passed, this secondary legislation has not been enacted yet.

The possibility that the CNMC will not limit itself to acknowledge the existence of such Prohibitions in post-October 22, 2015 infringements and refer the cases to the Ministry of the Treasury and the Public Sector cannot be completely ruled out. In addition, the possibility of alternative ways to publicly (via contracting authorities) or privately (via competing tenders) enforce such prohibitions is still currently alive.

Legal (and potential policy reasons) have discouraged the CNMC from adopting Prohibitions on Contracting until March 27, 2019, despite their announcement in 2016. The implementation of the EU Procurement Directive has not remedied this situation. Quite the contrary, by not closely following the wording of the Procurement Directive, Spanish law could well have created greater uncertainties for the CNMC and other unintended consequences. These consequences could have a negative impact on the attractiveness of the CNMC's leniency program if not remedied.

As for economic operators, the legal uncertainties in relation to all these issues are unfortunate. Indeed, in some sectors of the Spanish economy the submission of tenders in a public procurement context is the means by which economic operators compete in the market (or a large extent of it). Hence, the impossibility of clearly foreseeing any potential antitrust liability, or the after-effects thereof, may not be conducive to promoting competition in this field.

In any case, if economic operators have not done so yet, now is a key time for them to consider getting robust compliance programs in place or updating those already implemented in order to eliminate, or at least minimize, potential fines and Prohibitions on Contracting exposure. In addition, and again if they have not yet done so, it is also a key time for them to seriously consider the business opportunities that lawfully excluding rivals from tender process on Antitrust law grounds may create for them in the future.

THE DEPARTMENT OF DEFENSE'S ROLE IN MERGER REVIEW

BY DAVID A. HIGBEE, DJORDJE PETKOSKI, BEN GRIS & MARK G. WEISS[1]




1 David A. Higbee, Djordje Petkoski, and Ben Gris are partners and Mark G. Weiss is an associate in the antitrust practice of the Washington, D.C. office of Shearman & Sterling LLP.

I. INTRODUCTION

While defense industry mergers are reviewed by the Department of Justice ("DOJ") or the Federal Trade Commission ("FTC" and together the "antitrust agencies"), there is another government agency that can play a key role in the outcome of the merger review process. Within the Department of Defense, ("DoD") the leanly-staffed Office of Industrial Policy's Mergers and Acquisitions Program (the "Office of Industrial Policy", or OIP) reviews deals in or affecting the defense industry. The Office of Industrial Policy is much smaller than the antitrust agencies. Its findings are generally not publicly disclosed, although the Office's website and public statements explain some of its methodology. The Office of Industrial Policy conducts assessments to support the antitrust agencies, coordinates input from across the DoD, and "generally opposes mergers that overly reduce or eliminate competition, limit innovation, raise credible threats to national security, and are not in the [DoD]'s best interests."[2] In conducting these assessments, the Office of Industrial Policy ensures that "[DoD's] interests are protected."[3] The Office of Industrial Policy wields significant influence over the fate of defense deals.[4]

This article provides an overview of the organization and leadership of the Office of Industrial Policy and discusses its involvement in the antitrust review process.

II. CURRENT LEADERSHIP AND RECENT REORGANIZATION

The DoD has used the OIP to review mergers since 1994, but the office was affected by a 2018 DoD reorganization. Previously, the DoD's merger review office was located under the Office of Manufacturing and Industrial Base Policy ("MIBP"), which itself operated under the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics ("AT&L"). The 2018 reorganization renamed the MIBP the Office of the Deputy Assistant Secretary of Defense for Industrial Policy. It also split the AT&L into two offices: The Office of the Undersecretary of Defense for Research and Engineering ("R&E") and the Office for Acquisition and Sustainment ("A&S").

Appointed in 2017, the previous Undersecretary of Defense for AT&L, Ellen Lord, has transitioned to her new role as Undersecretary of Defense for Acquisition and Sustainment. The Office of Industrial Policy acts as the "principal advisor" to the A&S for antitrust reviews of mergers and acquisitions.

The current director of M&A within the Office of Industrial Policy is Jonathan Wright. Wright, who has a business rather than a legal background, holds a BS degree in Finance from Hampton University, and an MBA from the University of Maryland. Prior to his current role Wright worked as an investment banker on Wall Street, had private defense experience from positions at Northrop Grumman and Huntington Ingalls, and served as a business analyst for the Naval Sea Systems Command in the DoD.[5]

III. THE AUTHORITY AND POWER OF THE OFFICE OF INDUSTRIAL POLICY

The Office of Industrial Policy derives its authority to review mergers from DoD Directive 5000.62, which calls for a review of mergers and acquisitions involving major defense suppliers. The Directive calls for consideration of the impact of a defense merger on national security, access to critical inputs, the impact on DoD contracting, technologies, and innovation, as well as more traditional economic analyses of proposed transactions.[6] DoD's involvement in the review process also covers transactions between non-defense suppliers where the DoD is a significant customer.[7]

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2 See Mergers & Acquisitions Website, Industrial Policy, Department of Defense, https://www.businessdefense.gov/Industrial-Assessments/Mergers-and-Acquisitions/.

3 *Id.*

4 Basic information about the Office of Industrial Policy is available on the internet. See *id.*

5 See https://www.businessdefense.gov/Portals/51/Documents/About/Bios/JWright%20bio.pdf?ver=2018-09-18-125032-857.

6 DOD Directive 5000.62, *Review of Mergers, Acquisitions, Joint Ventures, Investments, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interest*, Office of the General Counsel of the Department of Defense (Feb. 27, 2017).

7 U.S. Dept. of Def., Office of the Undersecretary of Defense for Acquisition & Sustainment, Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy, Report to Congress: Fiscal Year 2017 Annual Industrial Capabilities 26 (Mar. 2018), https://www.businessdefense.gov/Portals/51/Documents/Resources/2017%20AIC%20RTC%2005-17-2018%20-%20Public%20Release.pdf?ver=2018-05-17-224631-340 [*hereinafter* the "FY 2017 Annual Industrial Capabilities Report"].

The Directive provides that the Office of Industrial Policy should cooperate with the antitrust agencies in its review of mergers and work alongside attorneys from the general counsel's office for the DoD and the Deputy Assistant Secretary of Defense for Industrial Policy. Said cooperation may include participation in interviews conducted by antitrust enforcers with the merging parties and interested third parties, review of the merging parties' internal documents by the DoD, and coordination between DoD experts and the antitrust agencies.[8] According to Wright, the antitrust agencies "lean on us to make sure they are getting the right information" and "are really helpful and sympathetic to making sure DoD's interests are taken seriously."[9]

Wright's predecessor in his role, Stephen Hull, has also given some insight into the DoD's merger review process. Hull explained in an interview that the antitrust agencies give a lot of weight to complaints from the Pentagon regarding the competitive effects of a deal and, in instances when DoD is the only domestic customer involved, complaints from the Pentagon can carry nearly dispositive weight.[10] The ultimate ability to bring enforcement actions and challenge mergers lies with the antitrust agencies, not the DoD. However, Hull noted that when the Pentagon objects to a deal "[it] gives the DOJ and FTC a good customer who is willing to step forward, provide data and other evidence, and take the witness stand."[11] This gives the DoD the ability to influence the DOJ's and FTC's enforcement decisions in a significant way. Hull added that defense companies often walk away from mergers when his office objects.[12] However, the DoD does not have a blanket policy of preventing potentially problematic deals. As with the antitrust agencies, divestitures and other remedies can often resolve the DoD's competition concerns.

IV. THE OFFICE OF INDUSTRIAL POLICY'S RECENT ANTITRUST REVIEWS

The Office of Industrial Policy reviews "only the transactions with a potential impact to DoD interest[s]."[13] In FY2017, the Office of Industrial Policy reviewed 13 deals ranging from large transactions between prime government contractors to smaller deals where DoD was a significant, but by no means the only, customer invested in the outcome of the transaction. The Office of Industrial Policy's assessment of transactions is not typically publicly reported.

Prime contractor deals reviewed by the Office of Industrial Policy included United Technologies' $30 billion acquisition of Rockwell Collins, Northrop Grumman's $7.8 billion acquisition of Orbital ATK, and Ultra Electronics' acquisition of Sparton Corporation for $235 million.[14] The DOJ required that *United Technologies/Rockwell* divest two businesses involved in aircraft safety, while the FTC required *Northrop Grumman/Orbital ATK* to erect a firewall between its solid rocket motor business and the rest of the merged company and offer those products to competitors on non-discriminatory terms. Each of the remedies was likely identified by the OIP, which can request that the antitrust agencies pursue specific remedies to protect the Pentagon's interests as a customer. Finally, Ultra Electronics and Spartan Corporation walked away from their deal after the DOJ expressed concerns over the loss of competition between the only viable suppliers of sonobuoys – buoys which detect underwater sounds – to the Navy.

As noted above, the Office of Industrial Policy will also review mergers outside of the defense sector where the DoD is a significant customer of the merging parties. For example, in FY2017, the OIP reviewed mergers of cooking oil suppliers with implications for the Department of Defense Commissary Agency, prosthetic limb suppliers impacting Walter Reed and the Defense Health Agency, as well as in industrial machinery suppliers, specialty chemical suppliers, airline passenger safety, and aviation fuel filtration.[15]

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8 Curtis Eichelberger, *DOD's one-man antitrust office focuses on competitive effects in key defense markets, military readiness*, MLex (Sep. 18, 2017), https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/dods-one-man-antitrust-office-focuses-on-competitive-effects-in-key-defense-markets,-military-readiness [*hereinafter* the "Eichelberger Article"].

9 *Id.*

10 But see *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9 (D.D.C. 1992). The Army supported and provided testimony in favor of a merger to monopoly of the only two U.S. manufacturers of 120 millimeter tank ammunition but the FTC successfully sued to enjoin the merger forcing the parties to walk away.

11 *Id.*

12 *Id.*

13 U.S. Dept. of Def., Office of the Undersecretary of Defense for Acquisition & Sustainment, Office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy, Report to Congress: Fiscal Year 2017 Annual Industrial Capabilities 26 (Mar. 2018), https://www.businessdefense.gov/Portals/51/Documents/Resources/2017%20AIC%20RTC%2005-17-2018%20-%20Public%20Release.pdf?ver=2018-05-17-224631-340 [*hereinafter* the "FY 2017 Annual Industrial Capabilities Report"].

14 *Id.*

15 *Id.*

The antitrust agencies challenged no fewer than five of these transactions.[16] Notably, the FTC successfully litigated a preliminary injunction in a specialty chemicals merger, utilizing a witness from Military Sealift Command who testified as to the particular needs of the department.[17] Also of note, two of the transactions reviewed in FY2017 fell below the HSR review threshold. In the first, the Office of Industrial Policy reviewed the acquisition of an airline passenger safety restraint business acquired by TransDigm. After a post-closing review, the DOJ required TransDigm to divest two acquired entities that manufacture these restraint systems, restoring competition in a highly concentrated industry with only two major suppliers. The Office of Industrial Policy also reviewed Otto Bock's recent acquisition of FIH Group Holdings, the prosthetic supplier merger noted above, even though HSR thresholds were not met. The companies are two of the top prosthetics manufacturers in the country. The FTC has challenged the merger and the dispute is ongoing before an administrative law judge.

V. HOW THE REVIEW STANDARD DIFFERS FROM ANTITRUST AGENCIES

The Office of Industrial Policy considers national security and the DoD's specific procurement needs in its antitrust review. These considerations are not equivalent to the traditional consumer welfare standard considered by the antitrust agencies, which can result in disagreements between the OIP and the agencies. Partly for this reason, in late 2015 the DoD announced legislative proposals to grant regulators the ability to block mergers for national security reasons..[18]

The FTC and DOJ subsequently issued a joint statement saying that the antitrust agencies' merger reviews would consider national security interests to the extent that "a transaction threatens to harm innovation, reduce the number of competitive options needed by the DoD, or otherwise lessen competition."[19] Apparently satisfied by the antitrust agencies' response, DoD withdrew those proposals, but the episode illustrates potential tensions that can develop between the antitrust agencies and the DoD in the area of merger review policy.

VI. DOD CONCERNS ABOUT CONSOLIDATION IN THE DEFENSE INDUSTRY

The Office of Industrial Policy's focus on DoD interests and national security needs means that the Office will continue to play an active role in the defense industry going forward, and the Office's scrutiny of defense deals will be particularly focused on mergers between large prime contractors. In recent years, DoD has been increasingly vocal about its concerns over growing consolidation among prime defense contractors. In its 2017 Annual Industrial Capabilities Report, DoD explained that:

> The trend toward fewer and larger prime contractors has the potential to affect innovation; narrow industrial capabilities and technology; limit the supply base; pose entry barriers to small, medium, and large businesses; and ultimately reduce competition that may otherwise not be in the Department's or the public's interests. The Department is mindful of past loss of competition at the prime level, resulting from significant industry consolidations over the past 20-plus years.[20]

16 See *Fed. Trade Comm'n, Statement by FTC Bureau of Competition Acting Deputy Director Haidee L. Schwartz on the U.S. District Court's Grant of a Preliminary Injunction and Announcement from Wilhelmsen Maritime Services that It will Abandon Acquisition of Drew Marine Group* (July 23, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/statement-ftc-bureau-competition-acting-deputy-director-haidee-l; Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.* (Mar. 5, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-challenges-proposed-acquisition-conagras-wesson-cooking-oil; *Fed. Trade Comm'n, In the Matter of Otto Bock HealthCare North America, Inc.*, Docket for FTC Matter No. 171 0231, https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations; *U.S. v. Transdigm Group, Inc.* Proposed Final Judgment, Case No. 1:17-cv-02735 (D.D.C. Dec. 21, 2017), https://www.law360.com/articles/997392/attachments/2 (agreeing to sell the airline passenger safety restraint business purchased from Takata Corp. for $90 million); Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Parker-Hannifin - Divestiture Will Restore Competition in Markets for Aviation Fuel Filtration Products* (Dec. 18, 2017), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin.

17 See *FTC v. WILH. Wilhelmsen Holding ASA*, Civil Action No. 18-cv-00414-TSC (D.D.C. Sept. 28, 2018) (the court in granting the preliminary injunction relied heavily on testimony from a witness from the government's Military Sealift Command named Fry).

18 See Andrea Shalal, *Pentagon eyes proposal for M&A changes in 'weeks'*, Reuters (Dec. 22, 2015), http://www.reuters.com/article/us-usa-military-m-a/pentagon-eyes-proposal-for-ma-changes-in-weeks-idUSKBN0U52H020151223.

19 *Joint Statement of the Department of Justice and the Federal Trade Commission On Preserving Competition in the Defense Industry*, Fed. Trade Comm'n, U.S. Dept. of J. (Apr. 12, 2016), https://www.ftc.gov/public-statements/2016/04/joint-statement-department-justice-federal-trade-commission-preserving.

20 FY 2017 Annual Industrial Capabilities Report at 25.

Indeed, DoD has for several years publicly identified defense industry consolidation as a key risk to its operations. DoD has reported that it "relies on robust, credible competition to provide high-quality, affordable, and innovative products. . . . The Department has been concerned about M&A among the top tier of weapons suppliers for some time and does not view consolidation among our top weapon system primes as a favorable development."[21] Consistent with this view, the then-Undersecretary of Defense for AT&L, Ellen Lord, stated at her Senate nomination hearing:

> Although I believe that the Department should not have a blanket policy of discouraging further consolidation or divestiture, or encouraging a specific industry structure, it is difficult to foresee supporting further consolidation of our principal weapons-system prime contractors. It should continue to be the Department's policy to oppose business combinations (mergers, acquisitions, or joint ventures) that are not in its ultimate best interest and represent harm to our Nation's security.[22]

Lord's statements follow a trend set by her predecessors, including the former head of the AT&L, Frank Kendall, who commented in 2015 that, "[t]he trend toward fewer and larger prime contractors has the potential to affect innovation, limit the supply base, pose entry barriers to small, medium and large businesses, and ultimately reduce competition — resulting in higher prices to be paid by the American taxpayer in order to support our warfighters."[23]

These concerns are likely to play a key role in the Office of Industrial Policy's review of defense industry mergers, and keep the office at the center of the antitrust review process.

21 FY 2016 Annual Industrial Capabilities Report at 103.

22 *Advance Policy Questions for Ellen Lord Nominee for Undersecretary of Defense for Acquisition, Technology, and Logistics: Hearing to consider the nomination of Ellen M. Lord Before the S. Comm. On Armed Services*, 115th Cong. 1 (2017) (statement of Ellen M. Lord).

23 Bryan Koenig, *Arms Contractor Mergers Rousing DoD's Unease*, Law360 (Sept. 30, 2015), http://www.law360.com/articles/709451/arms-contractor-mergers-rousing-dod-s-unease.

5 YEARS OF OPERATION *CAR WASH*: REVISITING BID RIGGING AND BRIBERY INVESTIGATIONS

BY DENIS GUIMARÃES[1] & DIAULAS COSTA RIBEIRO[2]

1 Partner at AGPR – Law, Policy & Advocacy. Attorney at the Secretariat of Economic Law (Antitrust Department) of the Ministry of Justice of Brazil – SDE (2003-05). Michigan Grotius Research Scholar (Public Law and Regulatory Policy), Center for International and Comparative Law, University of Michigan; PhD in Economic and Public Finance Law, University of Sao Paulo.

2 Judge of the Court of Justice of the Federal District and the Territories (Court of Appeal of The Brazilian Capital) – TJDFT. Former Counsel of the Superior Council of the Federal District Prosecution Service – MPDFT (2014-16); Former Counsel of the National Council of Prosecution Services – CNMP (2007-09). Visiting Professor, Catholic University of Portugal (Lisbon), Leibniz University of Hanover; Postdoctoral Research, Complutense University of Madrid; PhD in Law, Catholic University of Portugal (Lisbon).

I. INTRODUCTION

The idea that the interface between antitrust, anti-corruption efforts, and criminal leniency agreements has been the hottest topic on Public Procurement & Antitrust in Brazil since at least 2013 would probably be widely accepted.

Since publication of our article on the topic in 2016,[3] there have been no significant changes to the general legal framework of leniency agreements. A lot, however, could be explored - for instance, on administrative regulation and case law studies addressing these agreements between companies and individuals, and the authorities concerned (antitrust watchdog CADE, anti-corruption authority CGU, and the criminal MPF – Federal Public Prosecutor). Unfortunately, this would be a huge task that would not fit into the scope of the present publication.

On the other hand, there are also more recent developments that certainly deserve our attention, especially since significant changes could take place as of this year (2019), as a consequence of Brazil electing a new federal administration, in power since January.

Antitrust and anti-corruption infringements remain unchanged since the enactment of their respective laws, Law 12,529 of 2011 and Law 12,846 of 2013. The same is true regarding penalties applicable to companies and individuals involved in bid rigging and bribery. Here, however, with the development of administrative regulation and Case Law it has become clear that the legal statutes are very far from providing the responses needed by authorities, defendants, and civil society. To explore these shortcomings, we will take a glimpse at what has been done by the authorities to move forward with the investigations derived from "Operation *Car Wash*."[4-5]

II. INFRINGEMENTS

Bid rigging is an antitrust violation that can frequently occur in combination with the payment of bribes to public officials, in exchange for facilitating collusion. Actually, Law 12,846 of 2013 also defines bid rigging as a corruption offense regardless of the presence of bribes, that is, the payment of bribes constitutes a different infringement.

There is a clear overlap regarding what constitutes infringements for antitrust, anti-corruption, and criminal law. Thus, there is no doubt that, in principle, both CADE and the CGU could impose administrative penalties on the same bid rigging practice, leaving aside the criminal penalties that can further be imposed by the Judiciary. In that sense, Article 29 of the anti-corruption law can be understood as a provision designed to avoid double jeopardy/*bis in idem*. Evidently, stating that both CADE and CGU have the power to convict a bid rigging practice implies that the same practice could, in theory, be punished twice by the authorities.

The fact that the anti-corruption law expressly recognizes the power of CADE to investigate and convict an antitrust infringement does not eliminate the possibility of *bis in idem*, but it is reasonable to assume that if both bodies can investigate a given practice *P* (bid rigging), there should be coordination between them in order to mitigate overlaps and increase synergies. This should raise the following considerations:

a. The overlap can be understood as positive, since it theoretically increases the chances that a possible illegal practice is investigated and punished: in practice, one of the two authorities may be willing to investigate while the other may not; and

3 Diaulas Ribeiro, Nefi Cordeiro & Denis Guimaraes, "Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements." *NAFTA: Law and Business Review of the Americas*, vol. 22, 2016, https://ssrn.com/abstract=2710448; see also Denis Guimaraes, "Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements (Short Version)." *Brazilian Antitrust Law (Law # 12,529/11): 5 years*. Sao Paulo: IBRAC, 2017, https://ssrn.com/abstract=2992175.

4 The so-called Operation *Car Wash* can be defined as the task force led by the Federal Public Prosecution Office and the Federal Police to dismantle Brazilian corruption scandals. Started in March 2014, it used to focus on public procurement promoted by the state-controlled oil company Petrobras (and its supplying construction companies), and the accusations alleged the existence of bid rigging and bribery. *Car Wash* investigations are significant due to its economic importance and the fact that they involve several important Brazilian politicians. Adapted from Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 141.

5 Operation *Car Wash* ("Operação Lava Jato") was the name adopted by the Federal Police to baptize that investigation. In Brazil, "Lava Jato" is a *"fast wash service"* for cleaning cars, normally within the area of gas stations. In the center of Brasilia, within a gas station, worked a disguised exchange broker office (*doleiro*: black market money dealer), used for money laundering. Ironically, within that gas station area didn't work - and it doesn't work until today -, a cleaning car service. The name "Lava Jato" isn't, literally, *Car wash*. That's a quibble. When the police realized they were on to something bigger when they discovered that the *doleiros* were working on behalf of an executive at Petrobras the conclusion was: there is enough money laundered to pay a jet (*Rectius*: more than 50 Airbus A-380), not just (to pay) a car. Consequently: *Jet Wash/Lava Jato*.

b. The overlap exists and, if both authorities are willing to investigate the practice, they should coordinate to carry out possible simultaneous investigations efficiently and exploiting synergies. This would involve information sharing, including of evidence gathered in the files. Thus, it would be possible to reach the same fact-finding conclusions at the end of the investigation, which could allow both bodies to issue separate decisions without *bis in idem*. There could still be two convictions, but the penalties imposed should be agreed between CADE and CGU so that the sum of the penalties will be equal to the maximum penalty to be issued according to one of the laws – whether the antitrust or the anticorruption one.

It should be noted that this possibility, which would require information sharing from the investigation files, is not currently stated in the laws, but is included in the CADE/CGU cooperation agreement n. 02/2014.

In addition, it should be noted that the issuance of two convictions – one by CADE and another by CGU – with the sum of penalties not exceeding the maximum penalty established by one of the laws would be a very complex task. As will be shown in the next section, the penalties are somewhat similar but there are differences in the details, and this would matter when the authorities come to set the fines and decide on the enforcement of other kinds of penalties.

III. PENALTIES

A. Administrative Fines on Companies with Sales

Article 37(I)[6] of the antitrust law and Article 6(I)[7] of the anti-corruption law set the range of administrative fines that can be imposed in case there is conviction of a company. Both penalties range from 0.1 to 20 percent of the gross sales of the offender (excluding taxes) in the last fiscal year before the launching of the administrative proceeding, provided that the fine does not end up being lower than the advantage obtained, whenever such estimate is possible.[8]

There are some significant differences, though. In the antitrust law, the fine imposed on the offender can concern only one company that is being investigated in the administrative proceeding, or it can refer to the gross sales of the whole group or conglomerate. In the anti-corruption law, there is no definition on whether the fine can refer to a single company or the whole group. Our understanding is that the Article 6(I) should be interpreted as if it had the same wording as Article 37(I) of the antitrust law (company, or group or conglomerate), for two main reasons:

a. Article 4, §2, of the anti-corruption law states that: "The parent companies, subsidiaries, affiliates or co-members of a consortium, within the scope of the respective contract, will be jointly and severally liable for the practice of the acts described in this Act, being such liability limited to the payment of penalty fines and full compensation of the damages caused"; and

b. Article 16, §5, of the anti-corruption law states that: "The effects of the leniency agreements shall be extended to the legal entities of the same economic group, in fact and in law, subject to such legal entities also signing the agreement, becoming bound by the conditions set forth therein."

The above-mentioned provisions reflect an economic rationality intended to punish or benefit economically related entities linked to the practices, and not a formalistic *ratio* designed to focus on a particular legal entity.

6 "[I]n the case of a company, a fine of one tenth (0.1%) to twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof," http://www.cade.gov.br/assuntos/internacional/legislacao/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

7 "[A] fine in the amount of 0.1% (zero point one percent) to 20% (twenty percent) of the gross revenues earned during the fiscal year prior to the filing of administrative proceedings, excluding taxes, which shall never be lower than the obtained advantage, when it is possible to estimate it," http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1.

8 Daniel Andreoli & Denis Guimaraes, "Comentários ao artigo 37 (multas administrativas)," *Comentários à Nova Lei de Defesa da Concorrência*. Rio de Janeiro: Forense; São Paulo: Método, 2012, p. 151.

There is another difference concerning the concept of gross sales. As antitrust practitioners with knowledge of Brazilian law are aware, the "field of business activity in which the violation occurred" (Article 37(I)) is a Brazilian alternative formula ultimately approved by Congress in substitution of the traditional criterion of relevant markets[9]. Regarding the interface between antitrust and anti-corruption laws, what is important to have in mind is that, in the antitrust law, the fines will generally be applied over a specific portion of the gross sales of the company/group/conglomerate, and not over the total gross sales of the entity(ies). *This is not applicable to the anti-corruption law*, as there is no antitrust/relevant market discussion in anti-corruption cases.

B. Administrative Fines on Entities without Sales and Employees of the Companies or Entities. Administrative Fines on Administrators or Managers of Companies.

Article 37, II, of the antitrust law and Article 6, Section 4, of the anti-corruption law set the range of administrative fines that can be imposed in case there is a conviction of an entity that does not perform business activities and, consequently, does not make sales (the concept of *gross sales* is inapplicable). In the antitrust law, fines applied to these entities range from BRL 50,000 to BRL 2,000,000,000, while in the anti-corruption law they range from BRL 6,000 to BRL 60,000,000. The reason for the difference is a matter of legislative drafting[10] that cannot be addressed within the scope of this publication.

Article 37, II, of the antitrust law, is also applicable to the *individuals* that are employees of companies undertaking sales, and employees of any kind of entities not undertaking sales. Therefore, under the antitrust law, mere employees without the power to make decisions but able to concur with an anticompetitive practice are punishable, and their fines have the same range as the ones of entities that do not perform sales.

Conversely, Article 37, III, of the antitrust law targets administrators or managers directly or indirectly responsible for the infringement whenever negligence or willful misconduct is proven. The fines range from 1 to 20 percent of the fine applied to the company (Article 37(I) – in the presence of sales) or entity (Article 37(II) – in the absence of sales).

Finally, in regard to penalties applicable to individuals, there is a major difference between the antitrust and anti-corruption laws: while the former establishes fines applicable to administrators/managers and mere employees, the latter does not set any fines applicable to individuals. It is understood that the anti-corruption law "establishes the rules that discipline the civil and administrative *liability of legal entities* that carry out acts against national or foreign governments,"[11] but it is undeniable that at least one individual must act so that a company can infringe the law.

C. Other Penalties: Administrative Antitrust and Judicial Anti-corruption. Judiciary Antitrust Enforcement. Public Prosecution Office's Oversight of Administrative Anti-corruption Enforcement.

The comparison between Article 38 of the antitrust law and Article 19 of the anti-corruption law is justifiable since the former establishes penalties other than fines – all of them administrative – while the latter establishes judicial penalties. Indeed, all penalties established by the antitrust law are administrative and may be applied by CADE, while the anti-corruption law sets administrative penalties applicable by federal (CGU having a concurrent power in this case), state and local authorities (that may have suffered injuries through practices forbidden by the law's Article 5) as well as judicial penalties applicable upon request by the Federal Government, the States, the Federal District, the Municipalities (also because of possible injuries suffered as a result of practices forbidden by Article 5) and the Public Prosecution Offices, whether Federal or the State ones. These can prosecute offenders who may have caused injury to the public administration, each within their own jurisdiction.

Indeed, the summary below shows that antitrust administrative penalties applicable by CADE (Article 38) are similar to anti-corruption judicial penalties (Article 19, etc.). That is the case for:

a. items II and IV, b (38, antitrust) *vis-a-vis* item IV (19, anti-corruption) and items II and III (88, public procurement law – the anti-corruption law makes reference to it) – all of them concerning penalties such as suspension of the right to participate in bids and denial of access to *i)* credit from public financial institutions and agencies and *ii)* public incentives and subsidies;

9 *Id.* at 153.

10 Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 129.

11 http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles-1.

b. item V (38, antitrust) *vis-a-vis* item II (19, anti-corruption) – concerning penalties such as partial suspension of activities or transference of corporate control, and;

c. item VI (38, antitrust) *vis-a-vis* item III (19, anti-corruption) – concerning penalties such as full termination of activities.

It is important to clarify that the Judiciary is not excluded from enforcement of antitrust law. Its participation can happen given the following cases:

a. Injured parties can request a judicial order to (i) cease respective anticompetitive practices; and to (ii) obtain compensation for the damages – all this according to Article 47 of the antitrust law. Although the possibility of judicial action before CADE's decisions is explicitly provided by the law, it is not common – judges prefer to have access to the decision of the specialized administrative tribunal;

b. A party in an administrative proceeding before CADE can appeal to the Judiciary in regard to any CADE decisions.

In both cases a) and b), it should be noted that antitrust matters before the Judiciary are initially dealt by generalist single judges. Courts only decide such cases in the scope of appeals – either State Courts, Federal Courts, and The Superior Court of Justice ("STJ"). The Supreme Court of Justice ("STF") only deals with constitutional matters.

Finally, another provision of the anti-corruption law that may end up having significant importance should be addressed. Article 20 establishes that the Public Prosecutor's Office, *in addition* to the power of requesting enforcement of judicial penalties, can also request before the Judiciary the enforcement of administrative penalties set out in Article 6 of the Law, *provided that the administrative authorities fail to enforce them*.

A judicial decision over such failure or omission does not seem simple, that is, the Law seems to explicitly attribute to the Public Prosecutor's Office huge powers to oversee the administrative enforcement of the anti-corruption law, and the Judiciary will have the discretion to decide whether there has been a failure/omission. One the one hand, this power attributed to the Public Prosecutor's Office can increase the chances for effective enforcement of the anti-corruption law; on the other, it may also open the door for excessive oversight and intrusion through the powers of the federal, state and local governments to enforce the Law.

D. From the Broad Parameters set by the Legal Provisions to the Specifics of Administrative Regulation, Soft and Case Law: CADE Settlement Guidelines v. Advantage Obtained

Article 45 of the antitrust law and Article 7 of the anti-corruption law establish the parameters under which authorities should set the actual fines, within the broad ranges provided by those laws.

While these articles are quite similar, it is interesting to observe that, in this particularly, the anti-corruption law, through the issuance of its regulating Presidential Decree 8,420 of 2015, went far beyond antitrust regulation in terms of fines – what used to be done only through Law. There had been no regulation by CADE regarding the criteria for setting the fines as late as May 2016: parties had to rely exclusively on case law.

With the release of CADE's Settlement Guidelines (updated in September 2017[12]), the Council clarified[13] that the criteria used to set pecuniary contributions in cases of settlement agreements were basically the same that should be used (the Guidelines are not mandatory for CADE) by the authority to set fines in cases of full investigation and conviction.

Therefore, in very simple terms, the following steps were ultimately established for fines (convictions) and pecuniary contributions (settlements):

12 English version published in December 2016 and not yet updated, http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf.

13 This could already be inferred from early documents with the participation of the Brazilian antitrust authorities, such as: OECD Policy Roundtables. *Experience with Direct Settlements in Cartel Cases 2008*. October 1, 2009, p. 89, https://www.oecd.org/daf/competition/cartels/44178372.pdf. Note that settlements in cartel cases were only allowed in Brazil as of 2007.

Calculation basis for fines

As already seen, this would primarily be the gross sales in Brazil, in the last fiscal year before launching the administrative proceeding, in the field of the business activity in which the violation occurred. The Guidelines also elaborate on the exceptions, that is, other calculation bases that may be used when such sales did not take place.

Percentage of the expected fine

As already seen, the percentage ranges between 20 percent and 0.1 percent. The Guidelines expressly mention that, generally, in hard-core cartels (which include bid rigging), 15 percent is applied in line with most case law. The expected fine equals the calculation basis multiplied by the percentage.

Discount for the purposes of settlement agreements

In the case of multiple[14] settlements with regressive discounts in the same administrative proceeding, the following discounts apply:
First applicant: 50 to 30 percent of the expected fine
Second applicant: 40 to 25 percent
Third and further applicants: up to 25 percent

* Calculation of the pecuniary contribution for individuals

Administrators: generally, 1 percent of the pecuniary contribution charged from their companies, but not less than BRL 50,000. Aggravating circumstances may apply.

Other individuals: generally, BRL 50,000. Aggravating circumstances may apply.

It is very important to mention here not only the fines (convictions), but also the pecuniary contributions (settlements), due to the fact that since 2013 the number of settlement agreements executed by CADE has grown remarkably. That happened because the Council issued Resolution n. 5/2013 – regulating the aforementioned multiple settlements with regressive discounts in the same administrative proceeding – in order to simultaneously incentivize (i) collection of evidence; (ii) faster resolution of the proceedings (reducing procedural costs); and (iii) collection of part of the amount that would be due (fines) in case of conviction at the end of the investigations.

The above points (i), (ii), and (iii) could have led virtually any analyst to state that, with CADE's Resolution n. 5/2013 – and in addition to earlier developments[15] such as dawn raids and leniency agreements – the Brazilian anti-cartel policy had finally reached maturity,[16] perhaps at a similar stage of development as the most prestigious policies implemented by a few of the authorities from OECD[17] countries. However, more developments have since taken place.

As of 2016, two economist members of CADE's Tribunal (out of a total 7 members: 6 Commissioners and the President) started to argue that the pecuniary contributions (the majority of cases as of 2013) and fines were not being set according to the provisions of Brazilian antitrust law. Basically, they argued that pecuniary contributions/fines set according to the percentage range provided by Article 37(I) of the Law, and especially given the different calculation bases accepted by most Commissioners in several cases, ended up being set below the aforementioned requisite amount (item 3.1) established in the same legal prevision. In other words, that the fine cannot be lower than the advantage obtained by the defendant through said anticompetitive practice, provided that it is possible to estimate such advantage.

14 For a critique of this regulation, see Roberto Taufick, "Suboptimal liability in cooperative supergames and resilient official cartels in Brazil," *Revista de Derecho Aplicado LLM UC* 2 (2018), p. 18, https://ssrn.com/abstract=3314907.

15 Marcelo Calliari & Denis Guimaraes, "Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation," *Antitrust Magazine*, Vol. 25, No. 3, 2011, p. 68, https://ssrn.com/abstract=2710408.

16 Marcelo Calliari & Denis Guimaraes, "Brazil: Toward a Mature Cartel Enforcement Jurisdiction?"; Adrian Emch, Jose Regazzini & Vassily Rudomino (eds.), *Competition Law in the BRICS Countries*. International Bar Association Series, Kluwer Law International, 2012, pp. 13-25, https://ssrn.com/abstract=2710434.

17 OECD's current assessment is that "CADE relies extensively on settlements (…) to resolve its investigations" (OECD Report by the Secretariat. *Competition Law and Policy in Brazil – A Peer Review*. 18 January 2019, p. 99).

In addition, it should be mentioned that the Ministry of Finance (boosted into the Ministry of the Economy in January 2019) has a body devoted to competition advocacy, which in March 2018 issued a *Technical Note*[18] addressing the matter of the advantage obtained, in line with the work carried out by the two aforementioned CADE Commissioners since 2016[19].

1. CADE Settlements in investigations derived from the Operation *Car Wash* and the debate on pecuniary contributions/fines

The dissent between these two economists and the other 5 members of CADE's Tribunal (including its President) is reflected in the decision from November 21, 2018, that approved 16 settlements in the scope of 6 bid rigging investigations derived from the "Operation *Car Wash*" scandal.

The chart below illustrates how significant the difference can be between pecuniary contributions/fines set according to (i) the CADE Settlement Guideline; or (ii) more elaborated quantifications carried out with the purpose of estimating the advantage obtained through said anticompetitive practices.

Details regarding pecuniary contributions discussed by CADE's Tribunal									
Investigation	**Settlement**	**Defendant**	**Calculation basis**	**Percentage***	**Deterrent factor****	**Discount**	**Commissioner's dissenting vote*** (BRL)**	**CADE's decision**** (BRL)**	**Difference**
Onshore refineries (Petrobras)	1 2 3	OAS Carioca Odebrecht	Confidential	Confidential	40%	19% 14% 12%	917,591,042 190,081,572 1,949,250,962	116,220,578 49,356,180 300,651,617	690% 285% 548%
Nuclear plant (Angra III)	4	Odebrecht	Confidential	Confidential	40%	22%	37,346,147	13,349,110	180%
Shanty town urbanization (PAC Favelas)	5 6 7	OAS Carioca Odebrecht	Confidential	Confidential	40%	41% 32% 16.5%	54,019,075 30,406,752 152,862,155	12,967,312 6,914,016 28,088,245	317% 340% 444%
Arenas World Cup 2014	8 9	Carioca Odebrecht	Confidential	Confidential	40%	30.5% 48%	35,142,178 200,541,966	4,619,100 90,740,615	661% 121%
Petrobras's special buildings (Cenpes)	10 11 12	OAS Odebrecht Andrade Gutierrez*****	Confidential	Confidential	40%	46% 29% 19%	51,584,171 70,155,662 62,490,046	31,641,977 40,479,654 38,070,391	63% 73% 64%
Railways	13 14 15 16	OAS Odebrecht Carioca Andrade Gutierrez	Confidential	Confidential	40%	30% 16.9% 16.7% 50%	5,799,618 182,016,338 5,037,572 185,468,779	3,716,640 46,090,624 2,606,249 31,649,620	56% 295% 93% 486%
Total							4,129,794,035	817,161,929	405%

Adapted from CADEa. *Dissenting vote of Commissioner Schmidt – Table 1*. Brasilia: November 21, 2018, p. 4. * In all cases (except one), higher than 17%.
** The *deterrent factor* is not mentioned in the CADE Settlement Guideline. According to both dissenting Commissioners, in order to comply with the legal provision, the fines/pecuniary contributions must actually exceed the *advantage obtained*. Otherwise, defendants would be incentivized to engage in anticompetitive practices again. While in general Commissioner Schmidt sets the deterrent factor as a 20% increase over the amount defined under the preceding column, for the Car Wash settlements, she claimed it was necessary to set it as a 40% increase, alleging that it is more difficult to uncover bid rigging cases (p. 4, paragraph 43).
*** Pecuniary contributions that should be charged to comply with the *advantage obtained* requirement of the law, according to the more severe dissenting vote (there were two dissenting votes pro *advantage obtained*).
**** Pecuniary contributions negotiated between defendants and CADE's General Superintendence (*SG*), the investigative branch. The majority of the Commissioners of CADE's Tribunal approved these amounts.
***** Odebrecht, OAS, and Andrade Gutierrez, jointly with Camargo Correa and UTC (the last two had already executed settlement agreements before CADE in the scope of investigations derived from the Operation Car Wash), are considered by the investigators the leaders of the cartel (CADEb. Dissenting vote of Commissioner Resende. Brasilia: November 21, 2018, p. 3, paragraph 11, endnote 2).

It should be stressed that the significant difference between the amounts settled by CADE based on the Guidelines and the more rigorous amounts advocated by the dissenting Commissioners quoted above are due to the use of (i) different calculation bases; and (ii) the deterrent factor (used by both dissenting Commissioners).

18 SEPRAC – Secretaria de Promoção da Produtividade e Advocacia da Concorrência. "Poder dissuasório das multas aplicadas pelo Cade: relação entre o valor da multa e a vantagem auferida pelo infrator," *Nota Técnica SEI nº 1/2018/ASSEC/SEPRAC-MF*. Brasília: 1º de março de 2018, esp. p. 3, parágrafo 15.

19 The OECD, on the other hand, criticizes the "uncertainty about whether and how to calculate the benefit derived from the infringement" (*supra* note 17, 102).

2. Fines and penalties set by CGU in investigations derived from Operation *Car Wash*

In parallel to CADE's efforts to move forward with the investigations derived from Operation *Car Wash*, CGU has of course been doing the same. In 2017-18, the anti-corruption agency was able to issue its first fines, as shown in the chart below.

Details regarding fines (etc.) imposed by CGU/AGU[20]					
Leniency*	**Defendant**	**Injured party**	**Calculation basis**	**Percentage**	**CGU/AGU decision (BRL – approx.)**
1 07/2017	UTC Engenharia	Federal Government, Petrobras, others	Confidential	Confidential	**Subtotal 574,000,000** Specification between fine and indemnification** not available
2 04/2018	MullenLowe and FCB Brasil	Federal Government, public bank (CEF), others	Confidential	Confidential	*** **Subtotal 53,100,000** Fine - 8,000,000 Indemnification: Damages - 3,500,000 Profit - 38,500,000
3 07/2018	Odebrecht	Federal Government, Petrobras, others	Confidential	Confidential	**** **Subtotal 2,720,000,000** Fine - 442,000,000 Indemnification: Bribes - 900,000,000 Profit - 1,300,000,000
4 07/2018	SBM Offshore	Petrobras	Confidential	Confidential	***** **Subtotal 1,220,000,000** Fine - 264,000,000 Indemnification: Damages - 285,000,000 Not clear - 667,000,000
5 12/2018	Andrade Gutierrez	Petrobras, Federal Government, others	Confidential	Confidential	****** **Subtotal 1,490,000,000** Fine - 286,000,000 Indemnification: Bribes - 328,000,000 Profit - 875,000,000
Total					**6,050,200,000**

Self-elaboration, based on http://www.cgu.gov.br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia, accessed on 02/21/2019.
* The fines are imposed in the scope of leniency agreements because the anti-corruption law does not allow full immunity.
** Indemnification:
According to the Regulation (Normative Instruction CGU/AGU n. 2/2018 – Annex I, I – Introduction, 3, i and ii), the penalties are of two kinds:
- Administrative fine; and,
- Indemnification, understood as the undue advantage obtained or sought, which subdivides into three different categories:
    - Damages (uncontroversial);
    - Bribes;
    - Profit (undue – that is, that is obtained as a result of the corrupt practice).

*** MullenLowe and FCB Brasil:
This CGU/AGU leniency agreement has been also signed by the Federal Public Prosecution Office – MPF.
**** Odebrecht:
This amount will be subtracted from the USD 2.6 billion agreement between Odebrecht, MPF, the U.S. Department of Justice and the Office of the Attorney General of Switzerland (https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve).
***** SBM Offshore:
Note that in addition to this amount, Petrobras had already received BRL 1,475,000,000 as indemnification in the scope of criminal leniency agreements executed before the MPF.
****** Andrade Gutierrez:
From this amount it will be subtracted the BRL 1,000,000,000 leniency agreement executed between Andrade Gutierrez and MPF in 2016. The powers of the Federal Court of Auditors – TCU remain fully valid, in case the need of further indemnification rests evidenced in the future.

20 The Inter-Ministerial Ordinance 2,278/16 was issued jointly by CGU and AGU – the latter being the "Advocacy-General of the Union," (Brazilian Constitution, p. 58, Section II – The Public Advocacy).

In addition to the interesting opportunity of observing the cases, parties involved, steps for the definition of pecuniary contributions and fines, etc., and the amounts collected from the defendants (settlement or leniency applicants), more can be inferred from the charts and their notes.

3. Further comments on the interface between the *Car Wash* antitrust and anti-corruption investigations

The concept of *advantage obtained* is already part of the practice of both CADE and CGU,[21] even though its use by CADE is still advocated by a minority of the Tribunal.

The Federal Public Prosecution Office – MPF has already executed a leniency agreement jointly with CGU/AGU, which is necessary to grant criminal immunity for individuals[22] involved in corrupt practices.

CGU/AGU, MPF, and TCU have been working together to avoid double jeopardy/*bis in idem*, or, more importantly, excessive punishment that could unreasonably affect the activities of the companies and the Brazilian economy. CADE is also involved in these *complementary investigations*,[23] as stated by its President during the Session in which the *Car Wash* settlements were approved.

On the other hand, there is evidence that the desired coordination between simultaneous investigations – with the aim of mitigating overlaps, increasing synergies, and efficiently sharing information – still has room to evolve. For instance, CADE's dissenting Commissioners claim that it was not possible to obtain detailed information in respect to CGU/AGU and MPF leniency agreements to check whether the amounts charged by these authorities would also refer to the same contracts under analysis by CADE.[24]

IV. CONCLUSION

As we mentioned in the introduction, since January 2019 Brazil has a new federal administration. Even in countries with mature bureaucracies, government changes increase the possibility of policy shifts.

In the case of CADE, it is fair to say that its practice of publishing Guidelines addressed to market players and even the civil society has been a great success. On the other hand, that does not mean that improvements are not possible. There is indeed the possibility of policy changes.

Two Ministers, those in charge of Justice and the Economy, may be responsible for appointing 5 new leaders at CADE: The General Superintendent (head of investigations, who can be appointed to a second 2-year term) and 4 Commissioners (to be appointed to 4-year single terms). This means, for instance, that the current dissent around *CADE Settlement Guideline vs advantage obtained* can be changed. Nevertheless, we hope to have demonstrated in this article that such dissent does not seem to be too important, since all the aforementioned authorities involved in the fight against bid rigging and bribery (in addition to CADE: CGU/AGU, MPF, and TCU) have been working on defining criteria to set monetary penalties on players that are found liable for such antitrust and/or corrupt practices.

It is important that both the remaining and incoming policymakers make a collective decision in the sense of improving the *complementary investigations* that have already been conducted by the authorities.

21 Actually, not only just CADE and CGU, but also TCU and MPF, at least to some extent: CADEb, 2018: 7.

22 Ribeiro, Cordeiro & Guimaraes, *supra* note 3, 170.

23 http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato.

24 CADEa, 2018: 6; also CADEb, 2018: 12.

SHIELDING PUBLIC PROCUREMENT IN MEXICO: A LONG WAY THROUGH COMPETITION

BY FERNADO CARREÑO[1]

1 Partner of the Competition & Antitrust Practice and the Corporate and Mergers & Acquisitions, Joint Ventures Practices of Von Wobeser y Sierra.

I. INTRODUCTION

Ever since the concept of "Economic Welfare" appeared competition policies have focused on increasing the welfare of both consumers and undertakings.[2] Protecting the competitive process in markets has become the primary task for authorities in different jurisdictions around the world, seeking to obtain more accessible prices for consumers and increase economic efficiencies.

What, then, is the relationship between competition and public procurement? It has been shown that competition in public contracting processes is an essential tool for fighting corruption and ensuring their efficient development. The benefits of competition can be transferred to the process of public procurement, generating more competition among participants and much more aggressive proposals, with better prices, conditions and quality in the products.[3] This translates into achievement of public objectives with a maximization of resources and guarantees the provision of goods and services of the highest possible quality.

For this reason, it is said that the design of each public bidding procedure should be oriented not only towards attracting the largest number of participants, but also generating intense competition among them, and reducing the spaces or incentives for the existence of collusive agreements and corruption. The existence of competition in a public bidding procedure depends mainly on two factors: (i) the design of the calls and procedures; and (ii) the establishment of institutional incentives for a correct application of the legislation.[4]

II. PUBLIC PROCUREMENT IN MEXICO

In Mexico, the Law of Acquisitions, Leases and Services of the Public Sector ("LAASSP", its acronym in Spanish), establishes that public entities and agencies may choose among the following procedures for public procurement: (i) public bidding; (ii) invitation to at least three entities; and (iii) direct award. According to this legislation, as a general rule all public procurement should be carried out through the public bidding process. However, public entities have the opportunity to choose (under their own responsibility) any of the other two processes, so long as they fall into the exceptional cases provided by the Law.

Exceptions to the public bidding process, provided by law, give government dependencies or public entities a wide margin for deciding the kind of process to be implemented in public procurement. Although the authorities must explain and justify their decisions, in practice they can avoid implementation of a public bidding process so long as the project's operation or contract does not exceed the maximum amounts established for each of the awarding options in the annual Federal Budget of Expenditures.

On July 2018, the Mexican Antitrust Authority ("COFECE"), issued a formal document containing its analysis and recommendations for a better execution of public procurement processes in Mexico. COFECE found some inefficiencies in these processes, derived from (i) using alternate bidding methods through ambiguous or subjective justifications; (ii) restrict participation through unnecessary requirements; (iii) granting advantages to specific agents with certain technical specifications or other criteria; and (iv) facilitating coordination between bidders.[5]
According to data compiled by COFECE, in Mexico, in 2017, more than 228 thousand public contracts were awarded, with a combined value greater than $585 billion pesos (US$30bn). 78 percent of these contracts were granted through a direct award, 10 percent through an invitation to at least three people, and only 12 percent through public bidding.[6]

This implies that, of all contracts exceeding one million pesos, only a small proportion were awarded through public bidding mechanisms. This situation should be closely observed, since the greater the amount of a contract the more important it is that it be awarded through public bidding, as it is the only method that maximizes competition.

2 Massimo Motta, *Política de Competencia*, (Ciudad de México: Fondo de Cultura Económica, 2018), p 45-50.

3 Comisión Federal de Competencia Económica (2018). *Agenda de Competencia para un ejercicio íntegro en las Contrataciones Públicas,* p. 9 (https://www.cofece.mx/wp-content/uploads/2018/07/CPC-ContratacionesPublicas.pdf).

4 *Ibid.* 9.

5 *Ibid.* 9.

6 *Ibid.* 8.

Why is competition so important in bidding processes? Well, the lack of competition in public procurement procedures is associated with an inefficient use of public resources since, without competition, these procedures could result in the acquisition of more expensive products or services, and of lower quality, than could be obtained in competition.[7]

Likewise, competition can help fight corruption, undue favoritism, or advantages for certain participants in a public procurement process. Lack of competition can have serious repercussions for public procurement, as it leads to the inefficient allocation of resources throughout society.[8]

According to the latest Global Corruption Barometer survey, corruption is a scourge that hurts ordinary people every day across the Americas, and when they speak out about it, far too often they face retaliation.[9]

Almost two thirds (62 percent) of people surveyed for the latest Global Corruption Barometer, People and Corruption: Latin America and the Caribbean, said that corruption had risen in the 12 months prior to their participation in the survey.[10]

More than half (53 percent) said their government is failing to address corruption. And one in three people (29 percent) who had used a public service in the last 12 months said they had to pay a bribe.[11]

Bribery was found to be most common in Mexico and the Dominican Republic, where 51 percent and 46 percent of those surveyed said they'd had to pay a bribe to access public services. Police and politicians are perceived to be the most corrupt institutions in the region, with almost half of citizens saying that most or all the people in these institutions are corrupt. This demonstrates a worrying lack of trust in these vital public sector groups.[12]

Corruption problems can be transferred to public procurement processes, preventing the efficient fulfillment of public objectives. For example, when a public servant favors certain participants, or gives them undue advantages through the use of privileged information in exchange for bribery, it generates extra-normal profits for the economic agent who is awarded the contract at artificially high prices. This in turn facilitates the payment of more bribes in exchange for continuing favors in future adjudication processes, generating a vicious cycle between corruption and lack of competition in which the public official can direct decisions to give victory to certain agents and facilitate collusive agreements violating the Federal Competition Act ("FCA"). Thus, corruption may in turn limit competition and exacerbate the lack thereof.[13]

That said, preventing corruption is not a task that can be completed through competition alone. Nonetheless, there are certain actions and strategies that can help protect public procurement processes and need to be considered by legislators and public entities.

III. SHIELD PUBLIC PROCUREMENT

So, the question is, in the presence of corruption problems and regulation that facilitates inefficiencies in public procurement, how can these processes be improved in order to efficiently achieve the state's objectives?

As has been said before, the main reason for the existence of public procurement, from small purchases to big infrastructure projects, is to provide the State with the best consumables for the development of its constitutional and legal functions. They are a powerful tool for the achievement of public goals, so long as public funds are maximized and the provision of the best possible quality goods and public services is assured.[14] The regulation of public procurement must therefore lay the foundations to achieve the best conditions for the State in its acquisition

7 *Ibid.* 8.

8 OCDE. (2010). *Roundtable on collusion and corruption in public procurement.* p. 205. OCDE. (https://www.oecd.org/competition/cartels/46235884.pdf).

9 Please see Global Corruption Barometer, People and Corruption: Latin America and the Caribbean.

10 *Id.*

11 *Id.*

12 *Id.*

13 Comisión Federal de Competencia Económica (2018). *Agenda de Competencia para un ejercicio íntegro en las Contrataciones Públicas* (https://www.cofece.mx/wp-content/uploads/2018/07/CPC-ContratacionesPublicas.pdf).

14 *Ibid.* 7.

of goods and services and contracting for public works.

The lack of competition in public procurement procedures is associated with inefficient use of public funds, since it may result in the acquisition of pricey goods and services, technical specifications that are superfluous or excessive or, on the opposite end, of a lower quality than required, concealing defects and/or useless. These inefficiencies driven by the lack of competition in public biddings may occur because of:

- Using methods other than the bidding process, with ambiguous or subjective justifications.
- Restricting participation through unnecessary requirements.
- Granting advantages to specific agents with certain technical specification or other criteria.
- Facilitating the coordination of positions among bidders.[15]

Therefore, as said before, the existence of competition in public procurement would depend, mainly, on two factors: (i) the design of public calls and procedures, which depend on the regulatory framework; and (ii) the institutional incentives for the correct application of legislation.[16]

Public procurement regulation must lay the foundations to achieve the best conditions for the State in the acquisition of goods and services and contracting for public works. Competition in public procurement procedures is an ally for achieving the best possible procurement conditions.[17]

In order to shield the public procurement in México, the design of the procedures should be orientated towards:

- Obtaining the highest possible participation, that is, avoid placing artificial limitations regarding the number of bidders through unnecessary technical requirements, using methods other than public biddings, or limiting participation to certain companies.
- Creating intense competition between participants, that is, favor tender offers with aggressive prices and avoid establishing rules that favor some of the participants; and
- Reducing spaces for the formation and sustenance of collusive agreements and corruption. Likewise, administrative efficiency must be prioritized in the implementation and follow up of public procurement procedures.[18]

IV. RECOMMENDATIONS TO PROTECT THE EFFICIENCIES ON PUBLIC PROCUREMENT

A. Obtain the Highest Possible Participation

To obtain the highest possible participation, it is recommended that public entities (i) make transparent and publicize market research for all procurements; (ii) improve the terms and conditions of the bidding rules; (iii) limit the exceptions to public biddings; and (iv) impede the negative effects of subcontracting and joint offers, through their correct identification.

Regarding the first recommendation, it should be considered that public procurement procedures are made up of different stages: planification, programing, and budgeting; the design of requirements and rules of participation; development of the contest; and the post-bidding stage, which includes formalization of the agreement, follow up, and in some cases, amendments and extensions. Aspects that favor or limit competition may exist in each of these stages.

Within the planification process, market research plays a crucial role. Through it, the organizing entity acquires the necessary information regarding market structure to make better decisions regarding the procedure to choose, the requirements and technical characteristics of the

15 *Ibid.* 9.

16 *Ibid.* 9.

17 *Ibid.* 8.

18 *Ibid.* 7.

goods and services to be acquired, as well as estimated prices based on the information gathered, among other relevant data. Therefore, it is important that market investigations are carried out in an comprehensive, reliable and solid manner.[19]

In that regard it is important to bear in mind that certain companies may manipulate budgets presented during the market research stage in order to achieve subsequent awards on higher prices than those that would prevail given a competitive environment. Here, companies may collude to fix, elevate, arrange, or manipulate the prices they offer at the market research stage in order to artificially fix a high maximum reference price. This could even result in a reduction of participation due to disqualification of certain participants for offering "abnormally low prices." In addition, they may coordinate to make it more difficult for a larger number of companies to participate through the imposition of technical barriers or other restrictions, and this way guarantee the allocation of contracts to specific agents. The aforementioned can be made that much easier by acts of corruption.[20]

As for the second recommendation, the design of the procedures should, at least, consider the following: (i) establishing only those requirements that are strictly necessary and that are transparent, objective and nondiscriminatory; (ii) spreading promptly and within a reasonable time period the relevant information in order for participants to prepare their proposals, but avoiding the release of information that may facilitate the formation of collusive agreements; (iii) using objective criteria to qualify the technical and economic solvency of the proposal and to allocate the agreements. Overall, it is essential to reduce the scope of discretion and uncertainty through the procedure so that the economic agents can elaborate their proposals based on the characteristics of the goods/services they offer, and not strategically anticipating the possible behavior of the public officer in charge of the bidding.[21]

As for the third recommendation, it must be considered that there are alternative methods to public bidding for the allocation of public contracts: invitation to at least three agents, and direct allocation. The regulation establishes that these methods may only be used in exceptional cases and scenarios provided by the law. Likewise, the legislation establishes limits regarding the amounts involved in contracts that may be allocated with a procedure other than public bidding.[22]

The use of these exceptions may answer to valid reasons, like the purchase of goods with patent protection, or an administrative efficiency criterion regarding minor purchases. Nonetheless, given the generic nature of these scenarios, an excessive use of the exceptions may arise, making it necessary to restrain their use as much as possible. A clear example of wrong use of such exceptions was the direct purchase of boots for the uniforms of traffic police officers, claiming it as an issue of national security.[23]

Finally, regarding the fourth recommendation, it would be beneficial to implement the following: (i) require bidders to reveal in advance who they plan to subcontract, for what purposes, and why; (ii) prevent the subcontracting of persons or companies that have participated in the bid through which the contract was awarded; and (iii) when the presentation of joint offers is permitted, not allow participation by the same bidder individually and as part of a joint offer in the same contracting procedure.[24]

Implementation of these recommendations will allow for the largest possible concurrence, since they will contribute towards avoiding artificial limitations on the number of bidders through unnecessary technical requirements, alternatives to public biddings, or having participation limited to certain selected companies.

B. Create Intense Competition Between Participants

In order to create intense competition between participants, it is recommended to (i) create a virtual market for small purchases of homogenous goods for government agencies; and (ii) prohibit simultaneous participation by entities of the same group.

19 *Ibid.* 15.

20 *Ibid.* 15.

21 *Ibid.* 16.

22 *Ibid.* 23.

23 *Ibid.* 24.

24 *Ibid.* 47.

Virtual markets for public purchases are electronic platforms that allow for interaction between suppliers and public officials responsible for contracting in a dynamic and competitive environment. The use of a virtual market promotes competition since, among other things, it facilitates the participation of small and mid-sized companies in public tenders.[25]

In virtual markets, the public officials introduce purchase requests specifying their needs, while the suppliers (previously authorized) publish their products in an electronic catalog (including quantities available, unit price, and delivery times, among other information). When a particular good or service satisfies the needs of the authority, the official determines the quantity and method of delivery. Subsequently, the supplier receives a purchase order through the virtual market's webpage that specifies the quantities to be supplied. If it has the capacity, the purchase becomes official. The virtual market focuses on purchases of relatively small amounts and homogenous goods. In practice, a maximum amount is often established above which it is not possible to use this platform (and therefore the traditional methods must be used). As for the type of goods and services, it is often the least complex (more standardized) that incorporated into the virtual market.

It is similarly important to ban simultaneous participation by entities belonging to the same economic group, since presentation of multiple offers by one interest group may have anticompetitive effects when they do not allow free competition in public biddings, unfairly displace competitors, or allow the renegotiation of bids in favor of companies within the same economic interest group.[26]

First, it may limit the participation of other agents when, in a market study for example, it is considered (artificially) that enough participants exist, but they are within a same economic interest group.[27] Second, an economic interest group may displace competitors in public procurement procedures that allow simultaneous supply. For instance, if the organizing entity decides to carry on a procedure that considers allocating 80 percent of the contract to the first-place winner and 20 percent to the second place, the economic interest group may establish two different proposals through its affiliates and obtain, jointly, 100 percent of the contract. The above may have the intention or effect of displacing competitors from the market and reduce competition in the long term.[28]

The creation of a virtual market for small purchases and a prohibition on simultaneous participation by entities belonging to the same group would favor tender offers with aggressive pricing and avoid establishing rules that favor only some of the participants, ensuring intense competition between participants.

C. Reduce Spaces for the Formation and Sustenance of Collusive Agreements and Corruption

Finally, to reduce the spaces available for collusive agreements and corruption to grow, it is necessary to (i) require the participation of the competition authority in relevant public biddings; and (ii) enforce the prohibition on economic agents sanctioned for collusion from participating in subsequent public contests.

In this regard, Competition Authorities would be able to: (i) identify technical requirements that could reduce the number of participants and favor certain entities within the bidding rules; (ii) suggest competition principles within the bidding rules; (iii) in applicable cases, provide a competition assessment on the bidders and corresponding markets. A monetary threshold could be considered in order to determine which procedures the authority should participate in.[29]

On the other hand, regarding the ban on economic agents sanctioned for collusion from participating in a subsequent public bid, the Law on Administrative Liabilities in Mexico (by its acronym in Spanish "LGRA") contemplates such a prohibition on participation for collusion, when the private parties collude for the purpose of: (i) obtaining any improper benefit or advantage in public contracting; or (ii) cause damages to Public Finances or the wealth of Public Entities.[30]

25 *Ibid.* 47.

26 *Ibid.* 20.

27 *Ibid.* 30.

28 *Ibid.* 30.

29 *Ibid.* 38.

30 *Ibid.* 39.

In this respect, it is also necessary to fully enforce the prohibition on economic agents sanctioned for collusion from participating in subsequent public bids, established in the LGRA for economic agents that have been sanctioned due to collusion by the COFECE under Article 53, Section IV, of the FCA, with exceptions available for agents that have been granted immunity and a reduction of sanctions under the Leniency Program contemplated in the LFCE. Additionally, criteria for exceptions may be considered, and possibly regulated, when such a prohibition could cause a lack of supply.[31]

These measures will contribute to prioritizing administrative efficiency towards the implementation and follow up of public procurement procedures, reducing opportunities for collusive agreements and corruption.

V. CONCLUSIONS

The processes of public procurement in Mexico are affected by the extent of discretion that the regulation grants to public agencies and entities. This broad discretion decreases the efficiency of these processes and hinders the attainment of public objectives such as the maximization of resources and the assured provision of goods and services of the highest possible quality.

One way to combat this situation would be to seek and ensure competition in these processes. There being competition will depend on two main factors: (i) the design of the calls and procedures; and (ii) the institutional incentives for a correct application of regulations.

Therefore, we make the following recommendations: (i) obtain the highest possible participation; (ii) create intense competition between participants; and (iii) reduce spaces for the formation and sustenance of collusive agreements and corruption.

Competition is of great importance in public procurement processes, because when a bid is designed with competition in mind overpricing is restricted, along with the space for favoritism and undue influence, impeding the formation of collusive agreements that harm the public budget and the welfare of the entire society.[32] Thus, competition leads to welfare through the maximization of public resources.

31 *Ibid.* 49.

32 *Ibid.* 11.

ANTITRUST LIABILITY OF PUBLIC ENTITIES ACTING AS AWARDING POWERS IN PUBLIC PROCUREMENT…THE HESITANT SPANISH CASE

BY ANTONIO MIÑO LÓPEZ[1]

1 Lawyer at the Xunta of Galicia (Regional Administration of Galicia, Spain) and bachelor by contract at the University of Vigo. Phd. in Law, (University of A Coruña), Master in EU Consultancy Projects (Université Libre de Bruxelles) and Postgraduate in Intellectual Property and Competition Law (University of Santiago de Compostela).

I. INTRODUCTION

In Spain, as in other continental systems, the rules for attributing antitrust liability are conditioned by the imperfect relationship between Competition, Administrative, and Criminal Law. On one hand Competition is, regarding infringements and sanctions, a (not far from the trunk) branch of Administrative law, whereby both disciplines share general principles and boundaries. On the other hand, administrative rules on penalties are built upon Criminal law's fundamental principles and guarantees - as are the rules for setting liability. However, the abovementioned links are not comprehensive in either case. Administrative law is less stringent than Criminal law, and lacks its degree of accuracy in setting out categories of lawbreakers and penalties. Currently, Articles 27 and 28 of the Criminal Code distinguish between authors (perpetrator, inductor, necessary collaborator) and accomplices. In contrast, Article 64 of Law 39/2015 of the Common Administrative Procedure, uses an imprecise clause: "person or persons allegedly liable."

The genus-species link between Administrative and Antitrust Law causes the imprecision of the first to affect the second. The traditionally unquestioned theory of antitrust liability points only to the author, tantamount to the actual perpetrator of the anticompetitive behavior. Therefore, Article 101 TFEU and Article 1 of the Spanish Competition Law apply to undertakings engaging in cartels or in horizontal or vertical restrictions. Article 102 TFEU and Article 2 of the Spanish Competition Law address dominant operators abusing their market power in the ways described by those articles.

This position renders useless any discussion on the antitrust liability of the awarding powers. Notwithstanding, two doctrines drawn by the EU Courts, and one from the Spanish Supreme Court, make the issue far from being crystal-clear. First, the attribution of liability for collusive conduct to a cartel's consultant and auxiliary operators is several decades old, and has received full support from the European Courts since 2004 (*Treuhand* doctrine). This would have looked like a rising chance to go after contracting authorities. However, that window seems to have closed when the *Fenin* doctrine took the stage, for it exempts from Competition Law enforcement those buying entities who do not allocate their purchased goods or services to the market. Finally, following a fast-evolutionary process, the Spanish Competition Authority and the Supreme Court severed the connection between antitrust liability and economic activity, which entitles them to sanction on the basis of a (public) entity's mere participation in the infringement, irrespective of whether they have acted as economic operators or as regulatory bodies.

II. TARGETING CONSULTANTS AND COLLABORATORS: *TREUHAND*

At the EU level, the persecution of cartel facilitators goes back to the beginning of 1980. In *Italian Flat Glass*, the European Commission blamed some manufacturers involved in the illegal conduct, but also a consultant who had actively facilitated it on which, however, it did not impose a fine.[2] The Commission's decision on the *Polypropylene* cartel concluded that Fides Trust (a consultancy firm) was essential to the success and duration of the cartel, managing the complex exchange of information between the cartelized companies. However, only the cartelized firms were fined, not the consultant.[3] Therefore, by the end of the 1980s the Commission was already arguing that facilitating the cartel was contrary to Article 81 ECT, yet exempted the facilitators from fines.

This position changed significantly, however, with the decision adopted in the organic peroxides cartel and the confirmatory judgment of the CFI in 2008 – *Treuhand I* – followed by *Treuhand II* in 2015.[4] Both cases dealt with the participation in a cartel of a consultancy firm whose role was auxiliary (summarizing, organizing meetings for the cartel participants (which it attended and in which it would actively participate), collecting and supplying data to the participants on sales for the relevant markets, offering to act as a moderator in case of tensions between the undertakings concerned, and encouraging the parties to find compromises, for which it received remuneration).

In *Treuhand I*, the complainant held the traditional theory according to which EU law only allows sanctions against the perpetrators of an infringement, understood as (1) companies belonging to the categories set out in Article 81 TEC (101 TFEU) which (2) are parties to the restrictive agreement and (3) operate in the market affected by the infringement, (4) given that the agreement can only be concluded between companies that have the status of competitors, suppliers, or plaintiffs in the affected market. Since EU Law does not contain penalty provisions for accomplices or inducers, sanctioning them would violate the principles of legality of penalties and certainty of criminal law. However, the Court of First Instance adopted a test to assess the antitrust liability of a facilitating company based on two concurrent elements: (1) the market in which the

2 Commission Decision 81/881/EEC of September 28, 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV.29.988 - *Italian Flat Glass*), OJ L 326, 13.11.1981, at pages 32-43.

3 Commission Decision 86/398/EEC of April 23, 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV.31.149 - *Polypropylene*), OJ L 230, 18.08.1986, at pages 1-66.

4 Judgment of the Court of First Instance, of July 8, 2008, T-99/04, *AC-Treuhand*, Judgement of the European Court of Justice of October 22, 2015, C-194/14 P, *AC-Treuhand*.

facilitator operates and (2) the circumstances of its participation. Regarding the first point, the CFI goes far beyond the traditional view by including among the restrictions of competition those created in the market affected by the cartel (intra-cartel agreements, other horizontal or vertical agreements) as well as in related or emerging markets (cartel-facilitator agreement). Regarding the second, for the facilitating practice to be punishable the auxiliary intervention must be active, deliberate, committed to the organization and implementation of the cartel, and profitable for the accomplice.

Treuhand II strengthened both arguments. As to the market, Article 101.1 TFEU covers all agreements and concerted practices adopted in horizontal or vertical relations, regardless of the market in which the parties operate. Regarding participation, the facilitator must make an active contribution to the cartel, for which it played an essential role. It must also be deliberate, so that its behavior falls directly under the activity of the cartelized companies, and its goal is the realization, with full knowledge of cause, of the anti-competitive objectives pursued by the group. It is not necessary, then, that the facilitator pursues its own commercial objectives; it is enough for them to obtain a profit from their performance, e.g. in the form of retribution.[5]

By expanding the scope of markets and activities, *Treuhand* widened the reach of antitrust liability by adding to the author a second subjective term of imputation: the facilitator (accomplice). And by enlarging the categories of infringers European jurisprudence brought Competition closer in line to Criminal codes, bypassing Administrative Law. It would seem that the doctrine is enough to prosecute contracting authorities facilitating bid rigging in public procurement. But blind adoption of this finding would be wrong, since *Treuhand* makes antitrust liability dependent on carrying out economic activities as a market operator. It is a different case, *Fenin*, which sets out whether and how a public contracting authority meets the economic activity test, and whether they must be included or excluded from the scope of Competition Law.

III. RE-ENTRY INTO THE MARKET AS A PRE-CONDITION OF PROSECUTION: *FENIN*

FENIN is the principal association of businesses which deal in medical goods and equipment, particularly medical instruments, used in Spanish hospitals. In 1997 FENIN submitted a complaint for abuse of dominant position to the Commission, alleging systematic delays in payment by the SNS management bodies. Since these are by far the main purchasers, the members of FENIN cannot exert any commercial pressure on them. The CFI/CJ dismissed the plea, holding that the SNS management bodies do not act as businesses when purchasing from the members of FENIN for two reasons.[6] First, because the SNS operates according to the principle of solidarity, is funded by social security contributions and other State funding, and provides services free of charge on the basis of universal coverage. Second, and more interestingly, in order to determine whether the purchaser is an economic operator, it would be incorrect to dissociate the purchasing activity from the products' subsequent use. The economic nature of the purchase depends on whether the subsequent use of purchased goods amounts to an economic activity (offering goods and services in the market). Otherwise, even massive acquisitions by a "monopsonistic" entity are not economic activities, whereby they would remain outside the scope of Competition Law.

As in *Treuhand*, The ECJ adopts the economic activity test in *Fenin* to determine whether a body is subjected or exempted of Competition Law. According to the literal terms of the CFI and ECJ judgements, no contracting authority can be fined for facilitating or engaging in anticompetitive practices during the tender or implementation of the contract, since it uses the goods or services purchased internally for carrying out its own tasks. However, this finding is less indisputable than the judgements suggest, for it depends on the type of public contract. It is a correct assumption for public works, public supply and public service contracts. But not so for public works and public service concessions where third parties to the contracting authority and to the contractor ("users") employ the goods and services purchased and pay the concessionaire for the use. This is quite obvious when the concessions have counterparts in the private sector and there are (scarce) conditions for competition (e.g. hospitals, gyms).

IV. MEDDLING WITH PUBLIC ENTITIES: AN OVERVIEW

The Spanish national and regional competition authorities rarely enforce antitrust liability against contracting authorities. A great deal of cases has investigated abuses of dominant position in public service concessions. In sum, three positions are sustained, often overlapped: (1) appealing to constitutional grounds; (2) sanctioning the concessionaire; (3) distinguishing between the contracting authority and its parent administration.

5 Judgment of the General Court of November 10, 2017, T-180/15, *Icap plc and others v. European Commission*. Appeal case before the Court of Justice, C-39/18 P.

6 Judgment of the Court of July 11, 2006, C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities*. Precedente case before the General Court, T-319/99.

A first type covers accusations of predatory prices and unfair competition in the management of gyms and sports facilities. The handling of these centers is managed by local authorities or outsourced to public service concessionaries. In both cases user fees are usually far lower than those set by private competitors, even close to zero. Competition authorities hold that several constitutional articles imposing on public authorities the duty to protect public health and promote sports provide sufficient coverage to apply the exemption set out in Article 4.1 SCL and make Competition law inapplicable. Second, the role of the contracting authority in the contractor/concessionary abusive behavior is played down on the grounds that the latter, as the dominant operator in the market, has a special responsibility to ensure the competitive implementation of the contract or concession. The contractor enjoys a great deal of autonomy to implement the contract, so that it can check and fix any anticompetitive practices and promote pro-competitive management of the service. Third, the refusal to fine the contracting authority disappears for tenders not put forward by public administrations but by state-owned companies. The finding shows that public powers setting up private entities to manage public services have to accept that the former share the same properties and requirements as private companies, and must therefore abide by Competition law.

Underlying the first two positions is the seminal idea that Competition law only applies to economic operators. EU and Spanish public procurement law deem that contracting authorities are regulatory bodies and customers. Because of the first role they set up the framework and set out the rules for the tender to take place and the contract to be implemented. As customers, they take advantage of the acquisitions but do not carry out economic activities. The third position sets an "artificial" difference between contracting authorities – administrations and state-owned firms – regardless of whether they commit the same misbehaviors. It appears as a formal argument lacking substantial foundations.

The evolution towards a more open point of view did not follow a strictly linear progression. The conceptions summarized above coexisted with decisions that proposed piercing the veil and clarifying whether, under the appearance of unilateral administrative roles, the contracting authority acts as a company.[7] Some regional competition authorities have also fined public administrations or submitted to settlement without even mentioning *FENIN*. In any case, the first landmark we have is *SESCAM*.[8] With this decision the Spanish Competition Authority started down a line of thought that blames public administrations for achieving market shares above contract law and for price fixing agreements with industry associations. The Decision established that a regional Health Service which agreed to distribute the provision of medication to health centers from, among a large group of pharmacists did not act as a regulatory body, but as an economic operator that reached a collusive agreement on market shares with the regional pharmacist association. The decision annulled the agreement but did not fine the parties. However, the authority pointed out that the same outcome attained according to the public contracts law, "in theory should exclude the application of antitrust legislation."

A second decision in that direction was *Uva de Jerez*.[9] The Spanish Competition Authority sanctioned the Junta of Andalucía for having facilitated and signed the Strategic Plan for Sherry wine, which incorporated a price fixing agreement between the companies involved. The decision offers three innovations regarding *SESCAM*. First and foremost, an entity does not need to qualify as an economic operator to be prosecuted and sanctioned: for the first time a decision attributed antitrust liability to a public administration acting as a regulator. Second, the decision imposed an actual fine on a public administration. Third, one of the arguments for intervention by the Competition Authority was the inexistence of a channel to appeal to a Court against material activities undertaken by public entities, such as organizing or participating in meetings with the cartel members.

Finally, we look at the Decision issued by the Spanish Competition Authority in *Port of Valencia*.[10] The Port Authority of Valencia participated in the signing of the first agreements between the port's transport operators, in the creation of a registry of heavy vehicles, and in the meetings for the creation and monitoring of Transport Tables. The Government of the *Comunidad Valenciana* mediated and sought an agreement between them. Although the actions taken by the public entities were of a material, non-legal nature, the Decision supported that, when the facilitating public entity combines resolutions or administrative acts with factual conduct, it is up to the contentious-administrative jurisdiction to review the adherence of the former with administrative law, and that the competition authorities sanction the contradiction with Articles 1 and 2 of the Spanish Competition Law ("SCL") on conduct executed in the pursuit of provisions, resolutions, or administrative acts.

7 Decision of the Spanish Court of Defence of Competition, of March 9, 2006, R-499/01, *TKI*.

8 Judgement of the Spanish Supreme Court of March 9, 2015, *SESCAM*.

9 Judgement of the Spanish Supreme Court of July 18, 2016, *Uva y vino de Jerez*.

10 Decision of the Spanish Court of Defence of Competition September 26, 2013, S/314/10, *Puerto de Valencia*.

The National Audience rulings on appeals to these cases rejected the Spanish Competition Authority's twice-repeated opinion in favor of sanctioning public entities acting as regulators. The court used the traditional argument that Competition Law only applies to economic operators. Hence, it would be the Supreme Court who would decide between custom and novelty. Its position was ultimately ground-breaking since it linked antitrust liability solely to the ability of the conduct to restrict competition, irrespective of the (public/private, economic operator/regulatory body) nature of the perpetrator:

> In the field of competition law there operates a broad and functional business concept; so that what is relevant is not the economic legal status of the subject who perpetrates the conduct, but that its behavior caused or is able to cause an economically harmful or restrictive outcome for competition in the market.

This clause suggests several interpretations. Regarding the topic of this paper, the Supreme Court comes to quote and then accept the *Treuhand* facilitators theory for the "participation" of public entities in the adoption and implementation of restrictive agreements. Neither the *Treuhand* nor the *Uva de Jerez* doctrines have been adopted in public procurement cases, but they can be adapted to this scenario, as we will show next.

V. SUITABLE FOUNDATIONS FOR THE LIABILITY OF THE CONTRACTING AUTHORITIES

This section will assess how an appropriate interpretation of all the doctrines exposed in the above chapters would lay the foundation for attributing antitrust liability to contracting authorities for behavior supportive of collusion in public procurement. It will also show how this opportunity is endangered by the very same Spanish Competition Authority who paved the way for it.

On the one hand, *Treuhand* opened the gates for expanding the targets of antitrust procedures in three directions: (1) auxiliary and instrumental conducts distinct from principal anticompetitive practices; (2) accomplices or facilitators belonging to cartels or to horizontally/vertically restrictive groups; (3) other markets separate from the one where the main restrictive behaviors operate. On the other hand, the Spanish Supreme Court in *Uva de Jerez* goes well beyond *Treuhand*, to which it adds our fourth and fifth findings: (4) it allows competition authorities to prosecute and fine not only economic operators but also public entities acting as regulatory bodies; (5) the profit or retribution is not taken in consideration when becoming a facilitator. Moreover, it bypasses *FENIN*, (5) since the fate of the purchases is no longer a relevant factor for the application of Competition Law against the buyers. As was stated before, competition authorities and courts must only consider the ability of the defendant's conduct to restrict competition.

That was the state of affairs in 2018 when the Spanish Competition Authority issued the Decision on Licitaciones de aplicaciones informáticas. The Authority fined eleven companies for creating a cartel for the provision of computer services and data processing to public administrations throughout the country. The cartel shared data on customers, agreed on prices and commercial conditions, and exchanged sensitive commercial information, in order to make public procurement more expensive. Specifically, the cartel: (1) set up instrumental temporary joint ventures; (2) granted preferential subcontracting to certain companies in exchange for not participating in the tender; (3) submitted cover offers; and (4) agreed with some firms that the latter would not bid in certain tenders in exchange for other kinds of favors. All these practices reduced the competition in the tenders.[11]

In her Dissenting Vote ("DV"), one of the members of the Authority disagreed with the majority position on understanding that the Decision had chosen not to fine the contracting authorities despite evidence that they had participated as facilitators in the commission of the collusive conduct. The DV cited multiple conducts attributed to the contracting entities in the proven facts. Among them, collaboration with the cartel for the elaboration of the bidding documents; its referral to cartel members prior to publication of the contract notice; suggesting the setting-up of a temporary association among potential bidders; preparing the contest in favor of the winning temporary association or wishing that they take part in the tender, etc.

The Decision did not explain the reasons for acquitting the contracting entities. It simply ignored the question. But it seems clear that they intended for the bidders to set up a successful cartel. Their behavior also met the requirements demanded by the Supreme Court in *Uva de Jerez* for regulators to be considered as facilitators of collusive practices. In fact, the practices imputed to the contracting authorities in this case were equally or more effective in achieving the anticompetitive goals than the practices carried out by the public entities in *SESCAM* or *Uva de Jerez*.

11 Decision of the Spanish Competition Authority of July 26, 2018, S/DC/565/15, *Licitaciones de aplicaciones informáticas*.

In its most recent decision – *Rutas Navidad Autobuses Madrid* — the CNMC set a solo requirement to start a sanctioning procedure against public sector entities: "it is in any case necessary to subsume its action in any of the offenses defined in the Spanish Competition Act." Otherwise, the issue has to be handled via an administrative tribunal.[12] Despite the apparent crystal-clearness of the expression in italics, its meaning deserves to be elaborated on in future decisions. It could be understood as a step back towards the pre-*Treuhand* position. The *Treuhand* doctrine principal novelty – adopted by *Uva de Jerez* — was to include among the punishable entities those which neither performed nor took part in the anticompetitive behavior, nor were members of the collusive relationship or even operated in the market concerned by the infraction. Literally understood, the Decision comes to hold that public entities are only liable when performing the practices quoted in Articles 101 and 102 TFEU (Articles 1 and 2 SCL), but not when their role is that of facilitator and even less when it is that of a regulatory body.

Should the latter interpretation be correct, it looks like a blatant regression regarding *SESCAM* and (mainly) *Uva de Jerez*. However, it is likely that the finding was conditioned by the case facts. First at all, it is not a public procurement scenario, but a sheer normative intervention of a public power, using its *imperium* to protect the environment (adoption of a Decree by the Madrid City Council that establishes limits on traffic circulation that unequally affect the tourist transport companies). Unlike all the aforementioned decisions and judgements, the analysis here does not focus on a public entity assisting in the formation of a cartel (Articles 101 TFEU/1 SCL,) but deals with Article 102TFEU/2 SCL. The Decision is based on the inexistence of a market where the presumed abuse has taken place. This argument amounts to rejecting the Supreme Court position in *Uva de Jerez*, for it is obvious that a public entity will only be present in a market as an economic operator (*Treuhand*), not as a regulator (*Uva de Jerez*). A more accurate answer would have remarked that the Decree appealed to an overriding reason relating to the public interest (protection of the environment) to restrict the freedom to provide services in a particular market. And this restriction is allowed by the Services Directive 2006/123/EC and the transposing Spanish law.

However, the Competition Authority should have explained the close-the-file Decision from the *Treuhand/Uva de Jerez* facilitator doctrines. It should have been assessed whether (1) the group of transport companies not affected by the banning Decree enjoyed a dominant position on the market and abused or planned to abuse of it; and (2) whether the Decree involved an active and deliberate collaboration in the abusive strategy. It is essential to remark that the presumed abuse would have not been committed by the Council, but by the transport operators. The City Council would be fined in concept of facilitator or accomplice of those practices.

VI. CONCLUSION

The demand of antitrust liability for (contracting) public entities does not have legal backing in Spain. Competition authorities and courts keep a reluctant and case-by-case position under the economic operator paradigm. The *Treuhand* facilitator's doctrine was assumed in the *SESCAM* case for public economic operators carrying out economic activities. The Supreme Court applied it to regulatory bodies in *Uva de Jerez*. However, the Spanish Competition Authority did not even mention the aforementioned doctrine in the last exempting decisions.

However, all the conditions that the EU and internal jurisprudences have set out to fine the contracting authorities engaging in active and deliberate collaboration in anti-competitive behaviors remain in force. Imposing antitrust liability on contracting authorities is a measure directly addressed to (public) customers, beneficial for Competition law enforcement in two ways: (1) a preventive effect before and during the tender, by prompting the contracting authority to use all the legislative remedies to impede the bidders from setting up collusive rings; (2) a side effect during the investigation procedure undertaken by the Competition agency, which will be helped by the contracting authority to fight bid rigging.

12 Decision of the Spanish Competition Authority of August 30, 2018, SAMAD/08/16, *Rutas Navidad Autobuses Madrid*.

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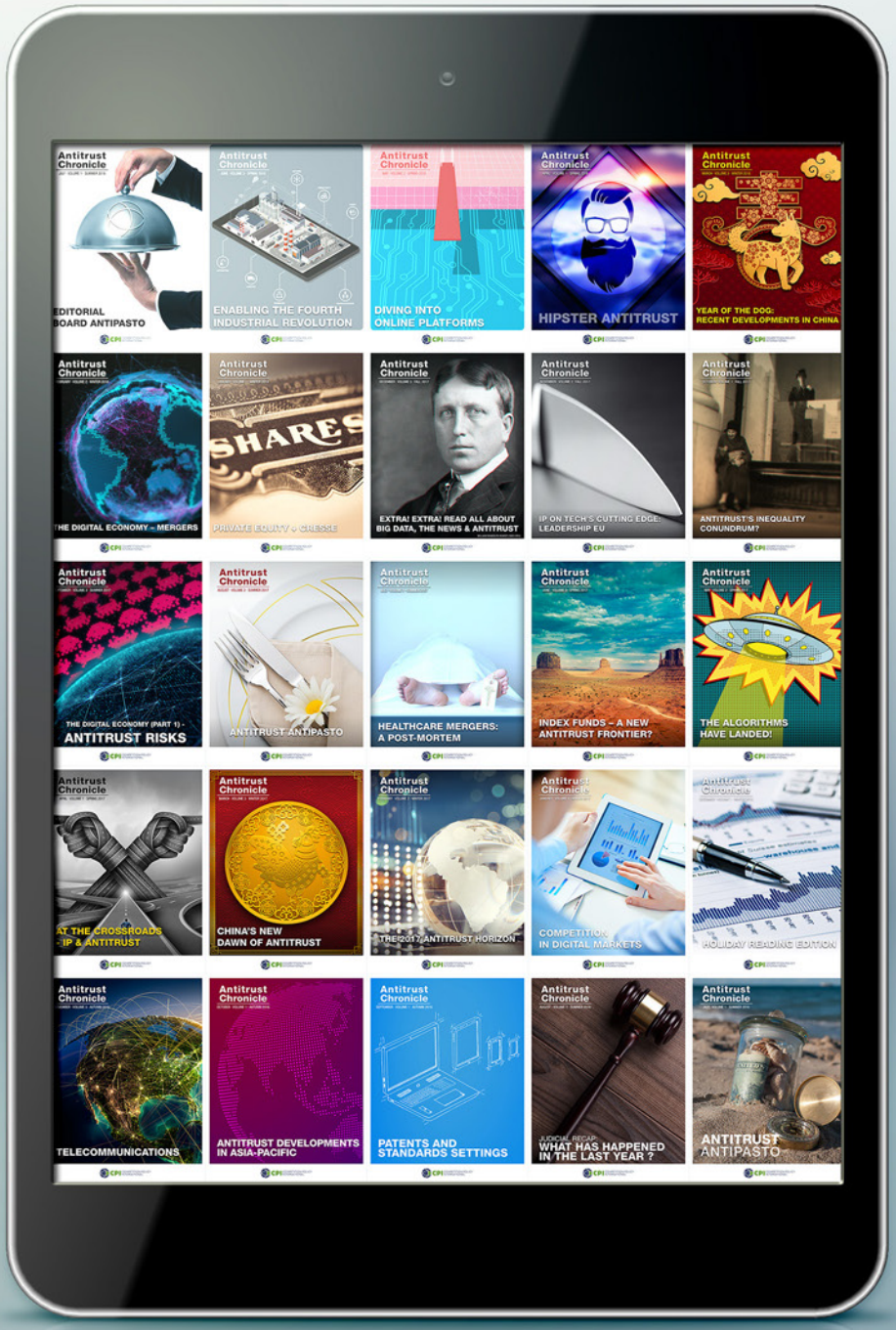

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