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

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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

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.

- 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]));
- 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

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.

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.

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.

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 par-

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.

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.

ticular, 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]

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,

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.

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.

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 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.

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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.

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.

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]

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]

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.

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.

- 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]

  » 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.

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).

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:2016:0330.2.06O464.14.0A paras. 75 et seq and LG Berlin, August 6, 2013 – Case no. 16 O 193/11, ECLI:DE:LGBE:2013:0806.16O193.11KART.0A.

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