

Modernisation of Public Procurement

Making the public market more competitive and collusion proof?

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Summary

This thesis has its focus on the interaction between competition law and the public procurement regime. Since the two systems have the same objective of the creation of an internal market it is vital that the two systems reach coherence. Despite this there is now express provision on the importance to fight anti competitive behaviour in the Public Sector Directive 2004/18/EC. On March 28th 2014 the new Public Sector Directive 2014/24/EU were published in the OJ. Prior to the modernised and new Directive the Green Paper emphasized that it is vital to avoid distortion of competition and generate the strongest possible competition on the public procurement market.

The purpose with the thesis is therefore to analyse the new Public Sector Directive 2014/24/EU in order to see how the changes can create effective competition on the public market and how they can affect the tenderers' possibility to create and sustain collusive agreements, which is prohibited under Article 101 TFEU. Competition is of essence in a system of tendering and when the tenderers engage in anti competitive behaviour it undermines the contracting authorities' possibility to reach best value for money.

The public procurement market is a risk zone for collusive agreements (bid rigging) due to various reasons. The risk factors relates to both the market structure and the public procurement process. One of the most important risk factors is that transparency permeates the entire process. Because of this bid rigging on the public market tends to be very stable and due to this the leniency programmes does not reach its full potential on the public procurement market. Therefore the contracting authorities have a decisive role in the prevention and detection of bid rigging. OECD has published guidelines on how such prevention and detection can be done. However, it is questioned whether such guidance is enough or whether there is a need of legislative instruments.

Despite the importance of fighting anti competitive behaviour there is not a lot of the legislative changes in the new Directive that has as its primary purpose to prevent this kind of behaviour. However, the changes are capable of creating a more accessible market for SMEs and the barriers to entry can be lowered. This will result in more participation and the creation of effective competition, which in turn has the effect of decreasing the tenderers' possibility to create and sustain collusive agreements. A few of the changes are minimum requirements and others are discretionary, therefore the outcome and creation of effective competition will be dependent on how the Directive is implemented in the different Member States. One of the conclusions to be drawn is that the legislator could have gone much further in its efforts to create a more pro competitive Directive on public procurement.

Sammanfattning

Denna uppsats belyser ett område där den offentlig upphandling möter konkurrenslagstiftningen. De två lagstiftningarna delar målet att uppnå en inre marknad och det är därför av stor vikt att de två regleringarna samspelar. Trots detta finns det inte någon uttrycklig bestämmelse om att förhindra konkurrensbegränsade samarbete i det nu gällande klassiska direktivet 2004/18/EC om offentlig upphandling. Den 28:e mars publicerades det nya klassiska direktivet 2014/24/EU om offentlig upphandling i EUT. Den Grönbok som publicerades föregående det moderniserade och nya direktivet belyste vikten av att undvika snedvridning av konkurrensen och vikten av att skapa största möjliga konkurrens på den offentliga upphandlingsmarknaden.

Syftet med denna uppsats är således att analysera det nya klassiska direktivet 2014/24/EU för att belysa hur de ändringar som har gjorts har möjlighet att skapa en effektiv konkurrens på den offentliga marknaden och även hur de kan påverka anbudsgivarnas möjlighet att skapa och upprätthålla anbudskarteller, vilket anses konkurrensbegränsande och förbjudet enligt Artikel 101 FEUF. När budgivning ligger till grund för tilldelningen av avtal är konkurrens en avgörande faktor. Om anbudsgivarna sluter konkurrensbegränsande samarbeten motverkas de upphandlande myndigheternas möjlighet att uppnå mesta möjliga valuta för pengarna.

Marknaden för offentlig upphandling är en riskzon för konkurrensbegränsande samarbeten p.g.a. olika faktorer, både relaterade till marknadsstrukturen och den offentliga upphandlingsprocessen. Den öppenhet som genomsyrar hela upphandlingsprocessen är den faktor som har störst påverkan och p.g.a. detta är anbudskarteller generellt väldigt stabila och de eftergiftsprogram som finns tillämpliga når inte sin fulla potential. Till följd av detta har de upphandlande myndigheterna en avgörande roll i det förebyggande och upptäckande arbetet av anbudskarteller. OECD har publicerat riktlinjer för att underlätta sådant arbete. Det ifrågasätts däremot om sådana riktlinjer är tillräckliga för att motverka anbudskarteller eller om det krävs lagstiftande verktyg.

Trots vetskapen om att det är oerhört viktigt att motverka konkurrensbegränsande samarbeten är det inte många ändringar i det nya direktivet som pekar på detta och har det som sitt primära mål. Däremot har en del av de ändringar som gjorts potential att öppna upp marknaden för små och medelstora företag och även sänka inträdesbarriärerna. Detta kan resultera i fler anbudsgivare och en mer effektiv konkurrens. Konsekvensen av det är att anbudsgivarnas möjlighet att skapa och upprätthålla anbudskarteller minskar. Beroende på hur det nya direktivet implementeras i medlemsstaterna kommer det att påverka den effektiva konkurrensen i olika stor utsträckning. En av de slutsatser som görs är att lagstiftaren kunden ha gått längre i ett försök att skapa ett mer konkurrensfrämjande direktiv om offentlig upphandling.

Preface

After five years at Lund University I am now standing at the finish line. I am so proud of what I have accomplished through these years. However, it would not have been possible without the great support that my family been given me all this time. Even if I have not, you have always believed in me and for that you should have huge thanks.

I would also like to thank my supervisor Björn Lundqvist for interesting and valuable discussions along the way.

In i kaklet.

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Abbreviations

Commission	European Commission
ECJ	European Court of Justice
ESPD	European Single Procurement Document
EU	European Union
GDP	Gross Domestic Product
NCA	National Competition Authority
OECD	Organization for Economic and Co-operation and Development
OJ	Official Journal of the European Union
SCA	Swedish Competition Authority
SME	Small and medium-sized enterprise
TEU	Treaty of the European Union
TFEU	Treaty of the functioning of the European Union

1 Introduction

1.1 Background

Within the European Union the total expenditure on the public procurement of good and services is constantly increasing. A recently measured figure is that the public authorities spend around 18 per cent of GDP on procuring works, goods and services. Consequently, public procurement rules play an important role in the Europe 2020 strategy for smart, sustainable and inclusive growth.¹ In the Europe 2020 strategy the Commission emphasis that the public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept EU wide.² Thus, the Commission issued a *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market* in 2011.³ The Green Paper mentions critic that are raised against the current regime and emphasis that there is a need for a simplified legislation and to make the award of contracts more flexible. The Commission are clear about that there is a need to increase the system's efficiency and effectiveness.⁴ One part of the efficiency is to generate best value for money and to be able to achieve that objective the Green Paper states that,

“[...] it is vital to generate the **strongest possible competition** [my emphasis] for public contracts awarded in the internal market. Bidders must be given the opportunity to compete on a level-playing field and **distortion of competition must be avoided** [my emphasis].”⁵

Getting value for money is an important objective, and maybe the most important for most national regimes on public procurement.⁶ The public procurement process is intended to promote fairness and to make sure that the contracting authorities reaches a price as low as possible. The lack of effective competition and competition violation amongst the tenderers is one of the things that counteract the aim to achieve best value for money. The public procurement rules do not expressly address the issue of violations of competition law, even though the violation is far from marginal.⁷ Since procurement facilitate anti competitive behaviour the need to increase attention on competition violation is crucial to achieve efficient spending of public funds.⁸ Competition is a fundamental principle that must be protected

¹ Commission, Green Paper on the modernisation of EU public procurement policy

² Commission, Europe 2020 - A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final, p 26.

³ Hereafter referred to as *the Green Paper*.

⁴ Green Paper, p 3.

⁵ Green Paper, p 4.

⁶ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction* 2010, p 59.

⁷ Green Paper, p 32.

⁸ Ølykke, Grith, “How should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive”, Ølykke, Risvig and Tvarnø (eds), *EU Procurement Directives - modernisation, growth & innovation* 2012, p 59.

and furthered to the maximum possible extent within the field of public procurement.⁹ Most competition violations in relation to public procurement involve bid rigging (cartels) by tenderers.¹⁰ Hardcore cartels are one of the most serious breaches of competition law and it is described as being *the supreme evil of antitrust*. Given this it is apparent that one of the most important objectives of competition law is to prevent and detect the operation of such cartels.¹¹ To get the best value for money in public procurement it is pivotal that competition violation amongst the tenderers is prevented and detected.

It has not been long ago since the current regime was introduced. The current regime consists of two directives, the Utilities Directive 2004/17/EC¹² and the Public Sector Directive 2004/18/EC.¹³ Interesting to note is that the criticism that was raised prior to the current Directive is repeated in the criticism raised in the Green Paper. The 2004 consolidation has not been seen as wholly successful and the reform is therefore very welcomed.¹⁴ Followed by the Green Paper the Commission published a proposal for a Directive.¹⁵ After compromises the new Directives on public procurement were published in the Official Journal of the European Union (OJ) on March 28th. There are both new provisions introduced and a lot of changes made in the new Directives. Thus, some of the changes are going to be described and analysed in order to reach my purpose and answer my research question.

1.2 Purpose and research question

The purpose with the thesis is to determine how the new Public Sector Directive 2014/24/EU and the changes introduced therein are capable of affecting competition on the public market, both in general but also through the fighting of competition violation amongst the tenderers. Consequently, my research questions are as followed,

- ***How is the new Directive on public procurement capable of creating effective competition on the public market?***
- ***How can the changes introduced affect the tenderers' possibility to create and sustain a collusive agreement?***

⁹ Sánchez Graells, Albert, Public procurement and the EU competition rules 2011, p 12.

¹⁰ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 4., Available at, <http://ssrn.com/abstract=2053414>

¹¹ Jones, Alison, EU Competition Law 2014, p 667.

¹² Directive 2004/17/EC for coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

¹³ Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, hereafter referred to as *the current Directive*.

¹⁴ Boyle, Rosemary, EU procurement green paper on the modernisation of EU public procurement policy: a personal response, P.P.L.R. 2011, p 171-174.

¹⁵ Commission, Proposal for a Directive of the European Parliament and the Council on public procurement COM(2011) 896 final, hereafter referred to in the text as *the Proposal*.

1.3 Method and Material

The thesis is based on traditional legal method, which provides for a reconstruction of the legal system and applicable law.¹⁶ The main task of the legal dogmatic is to interpret and systemize applicable law.¹⁷ In order to reach the purpose of the thesis and answer the research question the thesis describes and analyses the recent development within the public procurement regime. The thesis also provides some elements of comparison between public procurement and competition law.

First of all, I am going to make use of EU primary law, the founding treaties in the Lisbon Treaty, TEU and TFEU. In connection to this I am going to take the fundamental principles of EU law into consideration. These are binding sources of law and the fundamental principles, as discussed in chapter 2.1.2, are used by the European Court of Justice (ECJ) to interpret EU law. Secondly, I am going to make use of secondary law and since the public procurement regime is mainly based on directives there will be great emphasis on this source of law.

I will also put a lot of weight into guiding statements, such as guidelines from OECD, the Swedish Competition Authority (SCA) and opinions from Advocate General. Communications, Green Papers, Working Documents and Notices from the Commission are also going to constitute part of the guidance. However it is important to note that these sources only constitutes guidance since they are soft law, which means that they are not binding upon the Member States. Further on, case law is an important factor in the interpretation of the treaties and the directives.¹⁸ The case law is mainly going to consist of EU case law. However, I will make use of national case law where it is appropriate to cover the national dimension and where there is absence of relevant EU case law. I will also make carefully selected references to relevant doctrine and analysis in the field.

1.4 Demarcation

The reader of the thesis is expected to have basic knowledge in public procurement law and the different stages in the procurement process. The basics in public procurement will therefore be excluded with the intention to accommodate for a more thorough analysis of the relevant changes and development made in the new Directive. The new public procurement regime consists of three Directives. However, the thesis will only cover the Public Sector Directive 2014/24/EU. Situation falling above the threshold and within the scope of the directive is going to be covered.

¹⁶ Jareborg, Nils, Rättsdogmatik som vetenskap, p 4. Available at, <http://svjt.se/svjt/2004/1>.

¹⁷ Peczenik, Aleksander, Juridikens teori och metod: en introduktion till allmän rättslära 1995 p 33.

¹⁸ Hettne, Jörgen, EU-rättslig metod: teori och genomslag i svensk rättstillämpning 2011, p 40.

There are two sides of a public procurement transaction and anti competitive behaviour can occur on both sides of this transaction. However, the thesis is only going to cover restraint of competition created by the tenderers and not by the procurers. Through the thesis I am going to presume that the collaborative behaviour is anti competitive and not further develop situation where information exchange, collaboration and joint bidding are permitted.

The thesis accounts for a description of procedural changes in relation to exclusion of companies in the Directive on public procurement. However, other procedural changes such as the introduction of *Innovation Partnership* and *Competitive procedure with negotiation* will be disregarded due to limitations on space and that the changes that are covered are more related to the research question. Further, there will be a demarcation in relation to the objectives with the new directive. The second objective with the new directive is to allow procurers to make better use of public procurement is support of common social and environmental goals. This will not be accounted for in this thesis since it is improbable that it has a direct effect on the problems raised.

Even if collusive agreements (bid rigging) mainly occurs on a national level the thesis will provide for an examination on Article 101 since it has direct effect on the Member States and the corresponding provisions is often to be found in the Member States national legislation. The problem with corruption is clearly linked to the risk of collusion, however this is going to be left out for further examination due to the space given.

1.5 Disposition

The thesis consists of 6 chapters. This first chapter is an introduction to the thesis where the purpose and research question is stated. The chapter also describes the method and material that is used through the thesis.

The second chapter is an examination on the regulatory framework that the public procurement regime is based on. The fundamental principles deriving from the Directive on public procurement and its interaction with competition law are established.

The third chapter is an examination of anti competitive behaviour, such as cartels and bid rigging, which is caught under Article 101 TFEU. The constituent element of the article, the notion of effective competition and the potential of leniency programmes are elaborated. The chapter also contains two examples from case law.

The fourth chapter is a more thorough description of the specific circumstances of bid rigging. The risk factors for why public procurement is a danger zone for collusion and what measures that can be used in order to prevent and detect bid rigging are examined.

The fifth chapter focuses on the new Directive on public procurement. The focus is on the provisions that are likely to create effective competition on the public market and the fighting of anti competitive behaviour. The changes are described one by one and each change is followed by a section of reflections, both from doctrine and by me.

The sixth and final chapter is a final and overall analysis and it accounts for the concluding remarks and reconnects to the introductory research questions. The chapter start with a summary of the previous mentioned legislative changes and reflections and then continues with some overall remarks and conclusions.

Finally the thesis is complemented with a correlation table, which is meant to simplify for the reader when overviewing the different articles and changes.

2 Public Procurement Regime

2.1 The regulatory framework

2.1.1 Primary law

The European Union has its foundation in the Lisbon Treaty, consisting of the Treaty of the European Union (TEU), the Treaty of the functioning of the European Union (TFEU) and its belonging Protocols. TEU, covers the basic provisions on the Union's values and objectives. TFEU is a more detailed normalization of EU policies.¹⁹ The rules in the treaties have direct effect and they are the highest in the hierarchy on norms. The rules on free movement are to be found in the TFEU, consisting of inter alia the free movement of goods (Art 34), freedom of establishment (Art 49) and the freedom to provide services (Art 56). The public procurement rules are in an expression of the fundamental principles of free movement. It is clearly stated in the Directive on public procurement that the Member States and their authorities have to comply with the principles of TFEU and the fundamental principles deriving therefrom.²⁰

2.1.2 Fundamental principles

The fundamental principles of law deriving from TFEU permeate the entire EU law and they are used to apply and interpret both primary and secondary law.²¹ The fundamental principles consist of equal treatment, non-discrimination, transparency, proportionality and mutual recognition.

The principle of *non-discrimination* derives from Article 18 TFEU, and implies that any discrimination based on nationality shall be prohibited. In *Beentjes*²² the ECJ stated that requirements in a procurement procedure which only tenderers in the same Member State are able to fulfil are considered incompatible with the principle of non-discrimination.²³ The principle of *equal treatment* "requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".²⁴ In the field of public procurement the two principles are clearly linked and the principle of non-discrimination based on nationality provides a specific expression of the principle of equal treatment.²⁵

¹⁹ Bernitz, Ulf, *Finna rätt: juristens källmaterial och arbetsmetoder 2010*, p 61.

²⁰ Directive 2004/18/EC, Recital 2, See also Directive 2014/24/EU, Recital 1.

²¹ Sundstrand, Andrea, *Offentlig upphandling: primärrättens reglering av offentliga kontrakt 2012*, p 42.

²² Case C-31/87 *Beentjes* [1988] ECR I-4635.

²³ Case C-31/87 *Beentjes* [1988] ECR I-4635, para 30., Cited in Sundstrand, Andrea, *Offentlig upphandling: primärrättens reglering av offentliga kontrakt 2012*, p 45.

²⁴ Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, para 27.

²⁵ Case C-458/03 *Parking Brixen* [2005] ECR I-08585, para 48., Sundstrand, Andrea, *Offentlig upphandling: primärrättens reglering av offentliga kontrakt 2012*, p 45.

The principle of *transparency* implies that the contracting authorities have to ensure, “for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.²⁶ The principle of transparency is linked to the principle of non-discrimination and argued to be a mechanism to ensure other fundamental principles rather than being an objective in itself.²⁷ The principle of transparency also makes it possible to verify and ensure that the contracting authorities comply with the principle of equal treatment.²⁸

Article 2 in the current Directive on public procurement states that contracting authorities shall treat economic operators with respect to the principle of non-discrimination, transparency and equal treatment. The contracting authorities have to respect the principle of non-discrimination, the principle of equal treatment and the principle of transparency in all steps of the procurement process.²⁹

The principle of *proportionality* means that national measures must be suitable to secure the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it.³⁰ In the field of public procurement the principles means that the contracting authorities are not allowed to set up stricter requirements than necessary. Requirements should be proportionate and linked to the subject matter of the contract.³¹

Finally, the principle of *mutual recognition* emerged from the case *Cassis de Dijon*³² and is intended to avoid dual burden for the supplier of goods or services. The basics with the principle are that the goods and services that are lawfully produced and marketed in one Member State must be recognized and sold in another Member State without further restrictions.³³ In regard to public procurement it is relevant since the principle covers all aspects of trade within the internal market and it also entails a requirement of mutual recognition for e.g. certificates.³⁴

²⁶ Case C-324/98 *Telaustria* [2000] ECR I-10745, para 62., Case C-470/99 *Universale-Bau and others* [2002] ECR I-11617, para 92.

²⁷ Case C-250/07 *Commission v Greece* [2009] ECR I-4369, Opinion of AG Maduro, para 10.

²⁸ Case C-324/98 *Telaustria*, para 61., Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, para 31., For further explanation on the principle of transparency see chapter 4.1.2.

²⁹ Case C-16/98 *Commission v France* [2000] ECR I-8315 para 107., Case C-87/94 *Commission v Belgium, Wallonska Busses* [1996] ECR I-2043, para 54.

³⁰ Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37., Case C-212/97 *Centros* [1999] ECR I-1459, para 34.

³¹ Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, para 69.

³² Case C-120/78 *Rewe Zentral AG* [1979] ECR 649.

³³ Barnard, Catherine, *The substantive law of the EU: the four freedoms 2013*, p 93.

³⁴ Sundstrand, Andrea, *Offentlig upphandling: primärrättens reglering av offentliga kontrakt 2012*, p 47.

2.1.3 Secondary law

The rules on public procurement are mainly based on secondary law, in forms of directives. A directive is binding upon the Member States but the national authorities have the discretion to choose the form and method for implementation as long as the result is achieved.³⁵ Unlike the treaty rules, which has direct effect, the directives has to be implemented by the Member States in the national legislation in order to be invoked by a national court. The Directive on public procurement is a minimum requirement Directive, which means that the Member States are free to implement stricter rules for the contracting authorities. However, in some parts of it the rules are so detailed that it results in full harmonisation and no discretion for the Member States to derogate from the provisions.³⁶

2.2 The interaction with competition law

The Directive on public procurement is in essence an expression on the rules on free movement that are to be found in TFEU. What are also to be found in TFEU are the rules on competition. Article 101 TFEU prohibits agreements between undertakings that have as their object or effect to prevent, restrict or distort competition within the internal market.³⁷ The contracting authorities are not considered to be undertakings and therefore the competition rules do not apply to them.³⁸ However, this does not imply that the competition law is not important in a public procurement context since the competition law regulates the behaviour of the tenderers.³⁹ The rules on procurement regulate the behaviour of the purchaser and the competition rules regulate the behaviour of the supplier.

Since the rules regulated to sides of the same transaction there should not be any conflict or overlap between the two sets of rules and therefore it is vital to reach coherence. Reaching coherence of the outcomes of the rules is important to be able to reach effective competition between the tenderers in the procedure.⁴⁰ To reach effective competition, and also prevent collusion amongst them is one of the challenges to ensure the effective functioning of public procurement and thereby maximizing value for money.⁴¹ The

³⁵ Article 288 TFEU., Craig, Paul & De Búrca, Gráinne, EU law: text, cases, and materials 2011, p 192.

³⁶ Sundstrand, Andrea, Offentlig upphandling: primärrättens reglering av offentliga kontrakt 2012, p 93.

³⁷ For further discussion on Article 101 TFEU see chapter 3.1 and 3.2.

³⁸ Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295, para 26., Case C-113/07 P *Selex Sistemi SpA v Commission* [2009] ECR I-2207, para 102., Referred to in Ølykke, Grith, How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context?, P.P.L.R. 2011, No 6, p 180-181.

³⁹ Ølykke, Grith, P.P.L.R. 2011, p 179.

⁴⁰ Ølykke, Grith, P.P.L.R. 2011, p 181.

⁴¹ Kovacic, William E. and Anderson Robert D, Competition policy and international trade liberalisation: essential complements to ensure good performance in public procurement markets, P.P.L.R. 2009, p 68.

elimination of unnecessary barriers to trade that impede competition is another such challenge.⁴²

The need for coherence becomes even more apparent when looking at the objectives with the two regulatory systems. Competition law is an important part in the foundation of the EU and the regulatory framework. The importance of creating an internal market is established in TEU.⁴³ Therefore one of the objectives with competition law is to facilitate the creation of an internal market.⁴⁴ One important part in that is preventing undertakings from creating barriers to free movement.⁴⁵ To enhance efficiency, maximizing consumer welfare and to protect smaller firms and consumers is also parts of the objectives pursued by the competition rules.⁴⁶

The objectives with public procurement rules are to break down barriers to trade in the public market to achieve the establishment of an internal market.⁴⁷ It is held by ECJ that the purpose with coordinating the award of public contracts is to eliminate barriers to free movement and protect the interest of traders wanting to offer goods across borders.⁴⁸ Further, it is stated in *Assitur*⁴⁹ that the procurement rules,

“were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated”⁵⁰

In *Assitur* the pursuance of competition concerns was clearly recognised by the ECJ.⁵¹ The ECJ held that it is vital to ensure the widest possible participation by tenderers and the highest possible number of potential tenderers.⁵²

To sum up, both the public procurement regime and the competition rules are tools to ensure that the principle of an open market economy with free competition is upheld, as referred to in Article 119 TFEU.⁵³ The two sets of rules are dependent on each other to create an internal market. Ølykke explains it as public procurement and competition law shares a “higher” objective of European integration, but also “lower” objectives such the prevention of protectionism and barriers to free movement and the creation

⁴² Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 68.

⁴³ Article 3 TEU.

⁴⁴ Craig, Paul & De Búrca, Gráinne, EU law: text, cases, and materials 2011, p 959-960.

⁴⁵ Ølykke, Grith, P.P.L.R. 2011, p 181.

⁴⁶ Craig, Paul & De Búrca, Gráinne, EU law: text, cases, and materials 2011, p 959-960.

⁴⁷ Arrowsmith, Sue, Eu Public Procurement Law - An Introduction 2010, p 44.

⁴⁸ Case C-380/98 *University of Cambridge* [2000] ECR I-8035, para 16., Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 32., Case C -507/03, *Commission vs. Ireland* [2007] ECR I-9777, para 27.

⁴⁹ Case C-538/07 *Assitur* [2009] ECR I-4219.

⁵⁰ Case C-538/07 *Assitur* [2009] ECR I-4219, para 25., Case C-412/04 *Commission v Italy* [2008] ECR I-619, para 2., Cited in Ølykke, Grith, P.P.L.R 2011, p 188.

⁵¹ Ølykke, Grith, P.P.L.R. 2011, p 188.

⁵² Case C-538/07 *Assitur* [2009] ECR I-4219, para 26., Ølykke, Grith, P.P.L.R 2011, p 191.

⁵³ Sánchez Graells, Albert, Public procurement and the EU competition rules 2011, p 3.

of effective competition.⁵⁴ Munro explains the objectives to be two sides of the same coin.⁵⁵

As stated, recent cases from the ECJ have shown that they are willing to pursue competition concerns in a public procurement context. However, public procurement law has been relatively disconnected from competition law.⁵⁶ Even if they are linked their relationship are rarely assessed. One reason for that can be that the two systems are enforced through strictly separate systems.⁵⁷ The enforcement of public procurement law is regulated through the Remedies Directive,⁵⁸ and the rules on competition are enforced through Regulation 1/2003.⁵⁹ The fact that the rules are enforced through two different systems makes the achievement of coherence much more difficult.⁶⁰ Also, the public procurement rules are procedural rules whilst the competition law regulates the behaviour of the undertakings on the market, regardless of the existing circumstances.⁶¹

Ølykke however emphasis that even if the competition law has been relatively disconnected from the public procurement rules there might be a legislative solution on its way, considering that the Commission has opened the debate in their Green Paper.⁶² For the first time ever in a public procurement policy document the prevention of anti competitive behaviour is addressed.⁶³ The Commission raises the fact that even if the public procurement rules do not specifically address the issue of competition law violation there is much guidance. Further, they question if the guidance is sufficient to fight collusive behaviour or if there is a need for specific legislative instruments.⁶⁴

⁵⁴ Case C-26/03 Stadt Halle [2005] ECR I-0001, para 44., Referred to in Ølykke, Grith, P.P.L.R. 2011, p 181-182.

⁵⁵ Munro, Catriona, Competition law and public procurement: two sides of the same coin? P.P.L.R. 2006, 6, p 352-361.

⁵⁶ Ølykke, Grith, P.P.L.R. 2011, p 180.

⁵⁷ Ølykke, Grith, P.P.L.R. 2011, p 183.

⁵⁸ Directive 2007/66 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts.

⁵⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty.

⁶⁰ Ølykke, Grith, P.P.L.R. 2011, p 183.

⁶¹ Ølykke, Grith, P.P.L.R. 2011, p 181.

⁶² Ølykke, Grith, P.P.L.R. 2011, fn 12, p 180., Green Paper, paras. 3.2 and 3.3 at p 30 – 33.

⁶³ Ølykke, Grith, “How should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive”, Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 57.

⁶⁴ Green Paper, p 32.

3 Antitrust violation

3.1 Cartels and bid rigging

Competition law applies to the tenderers in the public procurement procedure. In order to ensure effective competition on the internal market all economic operators shall act independently.⁶⁵ Article 101 TFEU is therefore an essential provision under the rules on competition.

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [...]”⁶⁶

Article 101(1) are listing practices that are of special concern, such as directly or indirectly fixing purchase or selling prices and share markets. The prohibition includes collusive behaviour between undertakings such as the creation and operation of cartels for example.⁶⁷ A cartel is a type of horizontal agreement and the Commission defines a cartel as “a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.”⁶⁸ Hardcore cartels are one of the most serious breaches of competition law and it is described as being *the supreme evil of antitrust*.⁶⁹ When collusion occurs in public procurement they are referred to as collusive tendering or bid rigging.

“Bid rigging, or collusive tendering occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process”⁷⁰

Bid rigging is automatically an infringement of Article 101(1).⁷¹ It is stated in *The European Sugar Cartel*⁷² that competition is of essence in a system of tendering. If the tenders submitted are not the result of individual economic calculation by each and every tenderer but with coordination between them competition is prevented or at least distorted and restricted.⁷³

⁶⁵ Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, para 116.

⁶⁶ Article 101(1) TFEU.

⁶⁷ Jones, Alison, EU Competition Law 2014, p 798.

⁶⁸ European Commission, *Overview Competition Cartels*, Available at, http://ec.europa.eu/competition/cartels/overview/index_en.html

⁶⁹ Jones, Alison, EU Competition Law 2014, p 667.

⁷⁰ OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, p 1., Available at <http://www.oecd.org/competition/cartels/42851044.pdf>

⁷¹ Jones, Alison, EU Competition Law 2014, p 689.

⁷² *The European Sugar Cartel* [1973] OJ L140/07.

⁷³ *The European Sugar Cartel* [1973] OJ L140/07, para 42., Jones, Alison, EU Competition Law 2014, p 689.

Bid rigging schemes can be executed in different forms, either through price fixing or market allocation. The most common forms of bid rigging schemes are listed below,

Cover bidding; is used to give appearance of genuine competition. Either the competitors agree that one of them are going to submit a bid higher than the other, or that one of them are going to submit that is known to be too high. Another alternative is that one of them submits a bid with special terms, which they know are unacceptable.

Bid rotation; is often combined with cover bidding. The competitors agree on that they are going to rotate on which one of them that are going to submit the winning tender.

Market allocation; occurs when the competitors carve up the market and agrees not to bid (or cover bid) on each other's markets. This can be done both for certain customers and for certain geographic areas.

Bid suppression; implies that either one of the competitors refrain from bidding or both submit a bid but then one of them withdraws their submitted bid.⁷⁴

Subcontracting; can be used as a compensating mechanism in a bid rigging scheme. When competitors agree not to bid or when they submit a cover bid they do it in exchange of a subcontract with the winning tenderer in whereas they divide the profits derived from the illegally obtained higher price. It is however important to note that subcontracting is not always anti competitive and prohibited.⁷⁵

The common factor of the different forms of bid rigging is that it is an agreement between all or some of the bidders that result in elimination or limitation of competition and it also predetermines who to be awarded the contract.⁷⁶ Bid rigging can occur both through explicit and implicit agreements.⁷⁷

⁷⁴ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 2.

⁷⁵ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 80.

⁷⁶ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 79.

⁷⁷ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 181.

3.2 Case law

3.2.1 Pre Insulated Pipe Cartel

The Pre Insulated Pipe Cartel established in Denmark between four Danish producers of pre insulated pipes and ABB was one of the suppliers. A few years later the cartel extended to Italy and Germany. The cartel consisted of 10 producers in total and the characteristics of the infringement consisted mainly in price fixing, fixing of quotas and market sharing. The conduct affected the whole EU. The companies were also convicted for allocating individual projects to selected producers and manipulating the bidding procedure for those projects in order to ensure that the assigned producer was awarded the contract in question. To be able to protect the cartel from competition from the only non-member of the cartel, Powerpipe, they also took measures to hinder their commercial activity and damage their business and drive it out of the market. The Commission started an investigation after a complaint from Powerpipe. In 1999 the Commission issued a decision against the 10 producers and imposed record fines for European-wide bid rigging. The fine was set at 70 million euro to ABB, however the ECJ reduced it to 65 million euro after appeal.⁷⁸

3.2.2 The Swedish Asphalt Cartel

The Swedish Asphalt Cartel is the greatest cartels of all times in Sweden. In 2009 the Swedish Market Court delivered its judgement against Swedish companies within the production and sales of asphalt. NCC, Skanska, Peab and the Swedish Road Administration was the main suppliers convicted for the cartel and the cartel consisted in both price fixing and market allocation, both on the private and on the public market. The cartel consisted in bid rigging in regard to production, sales and construction works.

The cartel was discovered due to the fact that earlier employees of NCC informed the SCA about the on going cartel. Remarkable, the Swedish Road Administration that is state owned was part of the cartel and in the procurement they were both a procuring authority and a supplier of asphalt and the construction work. The cartel resulted in high prices for the contracting authorities and the exposure of the cartel resulted in a price drop between 25-30 per cent.

Except for the fact that the Swedish competition rules were applicable the Swedish Market Court also assessed that the trade criteria was satisfied and therefore Article 101 TFEU also applied. At the time the case was decided it reached the highest fines ever imposed and NCC was fined 200 million SEK.⁷⁹

⁷⁸ Pre Insulated Pipe Cartel, (No IV/35.691/E.4), [1999], OJ L 24., Case T-31/99 ABB Asea Brown Boveri Ltd v Commission [2002] ECR II-01881.

⁷⁹ Judgement from the Swedish Market Court, MD 2009:11.

3.3 Constituent elements of Article 101 TFEU

In order for a conduct to be caught under Article 101 TFEU there are a few constituent elements that has to be fulfilled. First of all there has to exist an agreement, decision or a concerted practice between undertakings. Secondly, the conduct must be considered to have as its object or effect to prevent, restrict or distort competition. Finally, the conduct must be considered to affect trade between Member States.⁸⁰

There is now definition of *undertakings* in TFEU, however it has been defined in the case law from the ECJ. Undertakings are any entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed.⁸¹ Any activity consisting in offering goods and services on a given market is an economic activity.⁸² The activity of giving tender in a public procurement involves an offer of services or goods to the contracting authority.

The notion of *agreement* is interpreted widely under Article 101. Both formal agreements and more informal agreements, “gentlemen’s agreements” is caught under Article 101.⁸³ In other words it covers both written and oral agreements between two undertakings.⁸⁴ The concept of *concerted practice* is intended to cover collusion between undertakings without them having reached the state where a properly agreement has been concluded.⁸⁵ Article 101 is supposed to apply to all types of collusion regardless of what form it takes.⁸⁶ Since bid rigging can take forms in both explicit agreements and tacit collusion it is vital that the prohibition covers both. In complex infringements, such as cartels and bid rigging, the Commission or the party having the burden of proof does not have to show explicitly whether there has been an agreement or a concerted practice.⁸⁷

The conduct must also have as its *object or effect the prevention, restriction or distortion of competition*. It is appropriate to first consider the object of the agreement before considering its effects.⁸⁸ Once it appears that the agreement has as its object to restrict competition it is not necessary to consider its effects.⁸⁹ If an agreement is indisputably intended to restrict competition, for example thorough price fixing or allocation it is unnecessary to show that the competition has in fact been effected. Hardcore restrictions such as cartels are therefore often referred to as being *per se*

⁸⁰ Bellamy & Child, European community law of competition 2008, p 92.

⁸¹ Case C-41/90 Höfner & Elser v Macrotron [1991] ECR I-1979, para 21.

⁸² Case C-35/96 Commission v Italy [1998] ECR I-3851, para 36.

⁸³ Case C-41/69, 44 and 45 ACF Chemiefarma NV v Commission [1970] ECR 661.

⁸⁴ Lidgaard, Hans Henrik, Competition classics 2011, p 56.

⁸⁵ Case C-48/69 ICI v Commission Dyestuffs [1972] ECR 619.

⁸⁶ Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, para 108.

⁸⁷ Bellamy & Child, European community law of competition 2008, p 120., More about the burden of proof in chapter 4.2.2.

⁸⁸ Bellamy & Child, European community law of competition 2008, p 162.

⁸⁹ Case C-56/64 and 58 Consten and Grundig v Commission [1996] ECR 299 at 242.

infringements of Article 101 TFEU.⁹⁰ With background from the reasoning in the *European Sugar Cartel* were they stated that competition is of essence in a system of tendering and if tenders are submitted on the basis of coordination competition is prevented or at least distorted and restricted it can be concluded that bid rigging is a restriction of competition by object.⁹¹

Finally Article 101 only applies to agreements, which *may affect trade between Member States*. The effect does not have to be direct or actual. Indirect and potential effect also falls under the notion of “may affect trade between Member States”. In *Vereeniging van Cementhandeleren*⁹² the ECJ has held that even if a cartel is of domestic nature it can still affect trade between Member States since it has a foreclosure effect on foreign competitors.⁹³ Even if bid rigging in public procurement markets often are of domestic nature they are likely to be caught under Article 101 TFEU. If they are not they are probably going to be caught under respective national legislation. In Sweden for example, anti competitive behaviour is caught by the Swedish Competition Act (Konkurrenslagen) 2:1.⁹⁴

The notion of *may affect trade between Member States* also requires an element of appreciability. An agreement is not caught under Article 101 if it only has an insignificant effect on the market.⁹⁵ This concept is further explained in a Notice from the Commission, *de minimis*.⁹⁶ The exemption also applies to hardcore violations. This means that it is possible that bid rigging does not fall under Article 101. A case-by-case analysis is of essence.⁹⁷

3.4 Effective competition

The achievement of *effective competition* is important for many purposes in the public procurement market and consequently there are several reasons to fight collusive agreements. One of the primary, and most well known reasons is the fact that competition generates lower prices and improves the quality of products and services.⁹⁸ Collusive agreements and the lack of effective competition can however also have other desirable effects such as reducing incentives to innovate⁹⁹, damage the variety on the market¹⁰⁰ and eliminate pressure to achieve cost efficiencies. Consequently, cartels destroy

⁹⁰ Bellamy & Child, European community law of competition 2008, p 163.

⁹¹ For further explanation on the European Sugar Cartel see chapter 3.1.

⁹² Case C-8/72 *Vereeniging van Cementhandeleren* [1972] ECR 977.

⁹³ Lidgaard, Hans Henrik, *Competition classics* 2011, p 105.

⁹⁴ *Konkurrenslag* (2008:579) 2:1.

⁹⁵ Case C-5/69 *Völk v Sprl Ets J. Vervaecke* [1969] ECR 295, 5/7.

⁹⁶ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) EC Treaty (*de minimis*).

⁹⁷ Weishaar, Stefan E., *Cartels, competition and public procurement: law and economics approaches to bid rigging* 2013, p 72.

⁹⁸ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 70.

⁹⁹ Heimler, Alberto, *Cartels in Public Procurement*, *Journal of Competition Law and Economics* 2012, p 2.

¹⁰⁰ Jones, Alison, *EU Competition Law* 2014, p 659.

competition that causes serious harm both on economies and on consumer welfare.¹⁰¹ In a public procurement context it is going to affect the public purchasers possibility to spend public funds efficiently and get the best value for money. It is important to deter competitors to participate in such collusive behaviour since bid rigging is known to raise prices more than ordinary price fixing.¹⁰² In general, collusive behaviour amongst tenderers has shown to raise prices with 20 per cent above competition level.¹⁰³ An example is the exposure of the Swedish Asphalt Cartel that resulted in a price drop between 25 – 30 per cent.¹⁰⁴

The expression of *effective competition* is used both in the legal doctrine but also in the legal framework and case law. There are many apparently reasonable definitions of effective competition. One definition is effective competition as the process of rivalry.¹⁰⁵ Another alternative definition is that there is considered to be effective competition when there is an absence of restraints on a firm's economic activity by another firm. The Commission usually applies this definition when they decide if an agreement is an infringement of Article 101 TFEU.¹⁰⁶

Even if an agreement is considered prohibited under Article 101(1) there is a possibility that it can be exempted under Article 101(3) if it contributes to improvement of production or distribution of goods, promotion of technical or economical progress and at the same time allowing consumers a fair share of the benefits resulting from it. Cartels are however described as being “naked”. It means that they are neither producing efficiencies nor benefits.¹⁰⁷ Compared to other restrictive agreements they restrict competition without producing any countervailing benefits. In cases where there are such benefits the negative and positive effects need to be balanced against each other but with cartels there are no such benefits to balance against.¹⁰⁸ Cartels, which are considered to be hardcore activity are therefore incapable of satisfying the conditions to be exempted under Article 101(3) TFEU.¹⁰⁹

¹⁰¹ Monti, Mario, “Why should we be concerned with cartels and collusive behaviour?” Fighting cartels, why and how?” in Swedish Competition Authority (ed), Fighting cartels – why and how? 2001, p 14.

¹⁰² Jones, Alison, EU Competition Law 2014, p 689.

¹⁰³ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 71.

¹⁰⁴ Albano, Buccirosi, Spagnolo, Zanza, “Preventing collusion in procurement”, in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 348., For further explanation on the Swedish Asphalt Cartel see chapter 3.5.2.

¹⁰⁵ Bishop, Simon, Walker, Mike, Economics of E.C. Competition Law: concepts, application and measurement 2000, p 13.

¹⁰⁶ Bishop, Simon, Walker, Mike, Economics of E.C. Competition Law: concepts, application and measurement 2000, p 15.

¹⁰⁷ Jones, Alison, EU Competition Law 2014, p 691.

¹⁰⁸ Monti, Mario, “Why should we be concerned with cartels and collusive behaviour?” Fighting cartels, why and how?” in Swedish Competition Authority (ed), Fighting cartels – why and how? 2001, p 15.

¹⁰⁹ Jones, Alison, EU Competition Law 2014, p 691.

3.5 Leniency programme

One important tool for the detection and deterrence of cartels is to encourage member of a cartel to come forward with their unlawful behaviour. This is done through so called leniency programmes.¹¹⁰ The first firm who comes forward and reports a cartel to the Competition Authority can get full immunity but it can also provide for lenient treatment to the firms that decide to cooperate when the procedure is already started.¹¹¹ The EU first adopted a leniency programme in 1996. Then it was amended both in 2002 and in 2006. The introduction of a leniency programme has been very successful in the detection of cartels in the private market. Cartels are in general very unstable and if it is likely that the cartel will break up there are also high incentives to ask for leniency.¹¹² A cartel on the private market usually consists in raising prices and restricting output and it can be profitable to cheat on the cartel and start to sell below the agreed price or above the decided quantity. Provided that the other members respect the cartel agreement. This is normally referred to as the *prisoners dilemma*.¹¹³

However, it does not seem like collusion in public procurement markets have been so much affected by leniency programs.¹¹⁴ The discovered cartels through leniency have been very few on the public procurement markets. First of all, a reason for this can be that the bid rigging mainly fall of domestic nature and seldom fall under EU law. However, Member States often have their own leniency programmes. Secondly, the stability of cartels in the public procurement markets is a deterrent factor for leniency. Cartels on the public market are more stable than on the private market and the incentives to cheat are very low due to inter alia the transparency on the market.¹¹⁵ Due to the fact that the cartels on the public market tend to be much more stable than on the private market there is a tendency that the cartels on the public markets have much more members. Discovered cartels in the construction industry have been constituted of around 100 members.¹¹⁶

Because of the low incentives to cheat and the stability in a bid rigging scheme on the public market the leniency programme does not reach its full potential in the public market and therefore the focus needs to be put somewhere else. Therefore the focus is more on the contracting authorities and their possibilities to actually prevent and detect bid rigging.¹¹⁷

¹¹⁰ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 83.

¹¹¹ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 9.

¹¹² Heimler, Alberto, Journal of Competition Law and Economics 2012, p 10.

¹¹³ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 6.

¹¹⁴ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 3.

¹¹⁵ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 10.

¹¹⁶ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 3.

¹¹⁷ The reasoning of why cartels on the public markets tend to be much more stable and why the focus has been put on the contracting authorities are further explained in chapter 4.

4 Bid rigging

4.1 Risk factors

Public procurement is a danger zone for collusive agreements.¹¹⁸ Especially exposed are the markets where the public buyer is the main or sole buyer of special goods or services. Such as roads or other public works, constructions, healthcare markets, education, environmental protection and defence markets.¹¹⁹ There are many different factors affecting the tenderers' possibility to reach collusive agreements. These risk factors can be divided into two different categories. First of all, the issues related to the market structure and secondly, the different features of the public procurement process affecting the possibility to conclude these types of agreements.

4.1.1 Market structure

The public authorities are operating in various different markets and there are a few of them in which they have to take certain precautions on prevention and detection of collusive behaviour amongst the tenderers.¹²⁰ Some of the factors that are affecting this are the number of suppliers on the market, the type of product or service that is going to be purchased and the possibility for a new economic operator to enter the market.¹²¹

The *number of suppliers* on the market can have a significant effect on the tenderers' possibility to collude. The arranging of a bid rigging scheme is easier the less competitors there are on the market and therefore the risk of collusion is higher.¹²² Another aspect of the number of participants is the more competitors you have to agree with the less profit you will get since you will have to share it between several others.¹²³

The second factor having impact on whether the market is more susceptible to bid rigging is what *type of product or service* that are going to be purchased. If the product or service is standardized and simple it is easier to come to a collusive agreement and create and sustain a bid rigging scheme.

¹¹⁸ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel", Report 2013:6, p 138., Available at, http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rapport_2013-6.pdf

¹¹⁹ Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 5.

¹²⁰ OECD, Designing tenders to reduce Bid Rigging, p 7. Available at, <http://www.oecd.org/competition/cartels/42594504.pdf>

¹²¹ OECD, Designing tenders to reduce Bid Rigging, p 7.

¹²² OECD, Designing tenders to reduce Bid Rigging, p 7.

¹²³ Weishaar, Stefan E., Cartels, competition and public procurement: law and economics approaches to bid rigging 2013, p 97.

If the product does not change over time the risk of bid rigging is higher.¹²⁴ Bid rigging schemes are going to be easier to create and sustain if there is a market with little or no degree of innovation or technological change in the product or service.¹²⁵

Thirdly, if there are *high barriers to entry* the risk of new competitors entering the market are low and the risk of collusive behaviour increases. If it is costly, difficult or time consuming to enter a market the already existing firms are protected against potential competition from new entrants. If the competitors know that they can follow through a bid rigging scheme without being interrupted by new entrants the probability that they collude is going to be higher. These barriers also make it easier for the already existing companies to know their competitors in advance and it supports bid rigging efforts.¹²⁶ Public procurement rules are created to break down barriers to trade within the internal market but some certain circumstances creates such barriers anyways.¹²⁷

4.1.2 Procurement process

The predictability, the transparency and the repeated nature of the process are other factors related to the procurement process that facilitate collusive tendering.

The procurement process is in general very predictable since it is very easy for the economic operators to know in advance which economic operators who probably are interested in participating in the tender, due to the limited nature of a procurement situation. The unserious company that wants to reach an agreement with the competitors therefore knows whom to contact.¹²⁸ It is also expected that competitors are more likely to come to a collusive agreement if they expect a higher number of repeated interactions in the future.¹²⁹ The duration of the procured contracts can therefore have significant effect. Deviation from a bid rigging scheme would be more profitable if the duration of the contract are longer. The risk would also be minimized since the prolonged duration complicates the rotation of contracts between tenderers.¹³⁰ Therefore, it would be preferable with longer length of the contract in a market where there is a high risk of collusion.¹³¹

¹²⁴ OECD, Designing tenders to reduce Bid Rigging, p 7.

¹²⁵ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 3.

¹²⁶ OECD, Designing tenders to reduce Bid Rigging, p 7.

¹²⁷ For further discussions on this see chapter 5.

¹²⁸ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6", p 138.

¹²⁹ Weishaar, Stefan E., Cartels, competition and public procurement: law and economics approaches to bid rigging 2013, p 30.

¹³⁰ Carpineti, Piga, Zanza, "The variety of procurement practice: evidence from public procurement", in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 37.

¹³¹ Albano, Buccirossi, Spagnolo, Zanza, "Preventing collusion in procurement", in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 352.

As stated in chapter 2.1.1, the procurement process is permeated by the principle of transparency. Since the award of a public contracts concerns the spending of public funds it is important that the process are transparent and open to public scrutiny. The contracting authorities have to ensure that the degree of advertisement are sufficient enough to open up the market for competition and allow for objectively review of the procurement procedure.¹³² Hence, the principle of transparency needs to be followed both through the awarding of the contract but also during the selection phase. There is however no express definition of transparency from the ECJ but it is possible to deduce four important dimensions of it, which is publicity of contracts, publicity for the rules of the process, limits in discretion and provision for verification and enforcement.¹³³ Even if early case law established the transparency principle as vital there was no express reference to the principle in the Directive on public procurement at that time.¹³⁴ However the current Directive expressly states that when contracting authorities are awarding contracts they “shall treat economic operators equally and non-discriminatory and shall act in a transparent way.”¹³⁵ These three principles are underlying for the interpretation and the application of the Directive.

Arrowsmith describes the principle of transparency as two folded. Transparency is needed in order to prevent discrimination.¹³⁶ It is also needed to insure that foreign competitors gives tenders on the public market *but* dangerous when it comes to giving out information to competitors since it gives them an opportunity to collude. Absence of transparency might deter foreign participation but it might also decrease collaboration between competitors.¹³⁷ The principle implies that the competitors have full access to get information about the successful tenderer, both the characteristics of the tender such as price and the name of the tenderer.¹³⁸ The transparency in the public market is therefore a factor that increases the risk for collusive behaviour. It is easy for the competitors to get information about any given tender after the contract has been awarded and therefore they can know whether or not the competitor stuck to the agreement or not.¹³⁹ This is what is reflected in the stability of the cartels on the public market and the reason for why there are less incentives to cheat. That is also why the leniency programmes has not reached its full potential in the public market.¹⁴⁰

¹³² Case C-324/98 *Telaustria* [2000] ECR I-10745, para 62., Case C-470/99 *Universale-Bau and others* [2002] ECR I-11617, para 92.

¹³³ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction 2010*, p 131.

¹³⁴ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction 2010*, p 36.

¹³⁵ Directive 2004/18/EC, Article 2.

¹³⁶ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction 2010*, p 60.

¹³⁷ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction 2010*, p 51.

¹³⁸ Directive 2004/18/EC, Article 41.

¹³⁹ Report from the Swedish Competition Authority, ”Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6”, p 138.

¹⁴⁰ Heimler, Alberto, *Journal of Competition Law and Economics* 2012, p 6., See also chapter 3.4.

It is argued that the transparency requirement is a tool to ensure and supervise the competition on the internal market rather than being an objective in itself.¹⁴¹ It is shown through experiences that too much regulation on the transparency rules is as least as harmful as too little regulation. To avoid this it is important that the transparency rules focuses on the aspects that promotes competition rather than deters it.¹⁴² Ølykke emphasis that, due to the transparency and the repeated nature, it is vital that there is an increased attention on ensuring that the competition law is not violated to be able to achieve efficient spending of public funds.¹⁴³

To illustrate both the factors relating to the market structure and the public procurement process is here an example. One market where the risk for collusive tendering is high is the *school milk market*. The only dimension on competition is price, the demand is inelastic, different suppliers face similar production costs and it is a repeated nature of the purchase.¹⁴⁴ The predictability, the repeated nature of public procurement and the high level of transparency are complimentary negative for the risk of collusive behaviour.

4.2 Fighting bid rigging

As stated, leniency has not reached its full potential in the public procurement market and therefore the focus to fight bid rigging must be somewhere else. The closest party able to fight bid rigging is the contracting authority awarding the public contract. In 2009 OECD published guidelines on how to fight bid rigging. It contains in both guidelines on how to prevent bid rigging but also how to detect it when it already occurred. The design of the contract can play an important role in both prevention and detection of bid rigging. Contracting authorities therefore plays an extremely important role in this effort.¹⁴⁵ The tendering procedure can result in a competitive outcome and efficient spending of taxpayer's money if the procurers follow the guidelines from OECD.¹⁴⁶

4.2.1 Prevention and detection

The first guidelines that OECD has given out gives guidance on how the contracting authorities should design their contracts in order to prevent bid rigging.¹⁴⁷ In these guidelines they first of all they raises the fact that it is important to be aware of the types of markets that are more susceptible to

¹⁴¹ Trepte, Peter, "Transparency Requirement" in Nielsen, Treumer (eds), *The new EU Public Procurement Directives 2005*, p 59.

¹⁴² Boyle, Rosemary, *P.P.L.R.* 2011, p 181.

¹⁴³ Ølykke, Grith, "How should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive", Ølykke, Risvig and Tvarnø (eds), *EU Procurement Directives - modernisation, growth & innovation 2012*, p 59.

¹⁴⁴ Jones, Alison, *EU Competition Law 2014*, p 689.

¹⁴⁵ OECD, *Designing tenders to reduce Bid Rigging*, Citation by John Fingleton, p 2.

¹⁴⁶ OECD, *Designing tenders to reduce Bid Rigging*, Citation by Melanie L Aitken, p 4.

¹⁴⁷ OECD, *Designing tenders to reduce Bid Rigging*.

bid rigging.¹⁴⁸ They also highlight the importance of knowing the market well. Knowing the conditions in the specific market and for the specific product that the contracting authority is going to purchase helps them to design an effective process and recognising what is an acceptable price and what is not.¹⁴⁹

Further on, they stress the importance of encourage strong participation by tenderers, because the more tenderers the less risk of bid rigging. One of the reasons why an economic operator is not giving a tender is the high cost of preparing one. If the costs are lowered it will generate in more participation. OECD is proposing that this can be done by only require adequate information in their tender and by using electronic bidding systems if possible.¹⁵⁰ The benefit of having electronically bidding systems is also that it will limit communication between tenderers. Limited communication means fewer opportunities to come to an agreement amongst tenderers.¹⁵¹ If the communications among bidders are limited and if it is difficult for tenderers to identify their competitors it will be more complicated for them to arrange a bid rigging scheme, since it requires communication. OECD therefore recommends that contracting authorities should avoid bringing potential tenderers together in meetings, allow electronically bidding and keep the identity of bidders undisclosed by using number rather than names.¹⁵² The participation can also be reduced if the contracting authorities put up unnecessary restrictions on the tenderers size, composition or nature.¹⁵³

Furthermore they recommend having clear requirements and allowing for unpredictability in the tender process. Having clear requirements can encourage participation since the tenderers knows what is expected from them. Predictability is one of the things that facilitate for the tenderers to reach a collusive agreement, and by vary the scope of contracts by aggregating contracts and not there will be less predictability.¹⁵⁴ OECD also recommends that the public purchaser should evaluate the criteria for awarding contract carefully and provide training to procurement staff about bid rigging.¹⁵⁵

Prevention is the first priority since detection is hard and even if the bid rigging is detected the damage has already occurred.¹⁵⁶ However, an increased risk of being detected can have a deterrent effect on the competitors' choice whether to create a collusive agreement or not.

¹⁴⁸ For further explanation see chapter 4.1.2.

¹⁴⁹ OECD, Designing tenders to reduce Bid Rigging, p 8.

¹⁵⁰ OECD, Designing tenders to reduce Bid Rigging, p 8.

¹⁵¹ OECD, Designing tenders to reduce Bid Rigging, p 9.

¹⁵² OECD, Designing tenders to reduce Bid Rigging, p 9.

¹⁵³ OECD, Designing tenders to reduce Bid Rigging, p 8.

¹⁵⁴ OECD, Designing tenders to reduce Bid Rigging, p 9.

¹⁵⁵ OECD, Designing tenders to reduce Bid Rigging, p 9-10.

¹⁵⁶ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6", p 142.

Since bid rigging agreements is hardcore restrictions they are normally negotiated in secret and therefore they are extremely hard to detect. It is also extremely hard for a contracting authority to know when such behaviour exists and it can be difficult to know what to look for. Therefore OECD has given some guidelines on certain bidding patterns and practices indicating that bid rigging has occurred.¹⁵⁷ There are also a few Member States that have come up with a checklist for the contracting authorities to follow to be more aware and able to detect bid rigging. Sweden is one of those Member States.¹⁵⁸

OECD recommends that you should look for opportunities that the tenderers have to communicate and indications that the tendered have communicated with each other.¹⁵⁹ Contracting authorities should also look for suspicious bidding patterns, unusual behaviour and similarities in the document submitted by different bidders since the bid riggers often have one single person submitting all bids.¹⁶⁰ Most importantly, look for any relationships among the bidders after the successful bid is announced. Such relationships can serve to split the extra profit that is earned through bid rigging. Subcontracts can be such a way to split profits for example.¹⁶¹

4.2.2 Proving an infringement of Article 101 TFEU

The contracting authorities play an important role in the prevention and detection of bid rigging. However, they do not have the burden of proving an infringement of Article 101 TFEU. If a contracting authority suspects that the tenderers in their procurement are collaborating and exert a bid rigging scheme they shall turn to the National Competition Authority (NCA) within their jurisdiction which is responsible for competition enforcement.¹⁶² It is very important that the NCAs have communication channels where the contracting authorities can discuss suspicious bid rigging and where they can report it.¹⁶³ The SCA has a communication channel for the public purchasers for them to talk to someone if suspicious. There are many contracting authorities which do not report such suspicions because they often believes that they have to have full proof on the bid rigging before reporting it, which is not necessary.¹⁶⁴ Important to note is also that there is nothing explicit in the current Directive saying that the contracting authorities are obliged to report a suspicious of competition violation or bid rigging to the NCA.

¹⁵⁷ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 12.

¹⁵⁸ Swedish Competition Authority, Checklist - Twelve ways to detect bid-rigging cartels, Available at, <http://www.kkv.se/upload/Filer/ENG/Publications/Checklist.pdf>

¹⁵⁹ OECD, Detecting Bid Rigging in Public Procurement, p 8., Available at, <http://www.oecd.org/competition/cartels/42594486.pdf>

¹⁶⁰ OECD, Detecting Bid Rigging in Public Procurement, p 9-10.

¹⁶¹ OECD, Detecting Bid Rigging in Public Procurement, p 9.

¹⁶² OECD, Detecting Bid Rigging in Public Procurement, p 11.

¹⁶³ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 13., Carpineti, Piga, Zanza, "The variety of procurement practice: evidence from public procurement", in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 38.

¹⁶⁴ Heimler, Alberto, Journal of Competition Law and Economics 2012, p 13.

The Commission, the National Courts and the NCAs are all empowered to apply Article 101.¹⁶⁵ When the contracting authority has reported the suspicious the responsible competition authority shall investigate it. The burden of proof shall rest on the party or the authority alleging an infringement of Article 101. That party shall prove the existence of an infringement to the required legal standard.¹⁶⁶ The competition authorities are empowered to require that the infringement is brought to an end, order interim measures, accept commitments, imposing fines or other periodic penalty provided for in their national law.¹⁶⁷ Usually a discovered bid rigging end up in fines for the involved but in some countries, for example in Germany, bid rigging is considered to be a criminal offense and the responsible can get imprisonment.¹⁶⁸

As stated the burden of proof rests on the party alleging an infringement and there is a presumption of innocence until the party alleging the infringement fulfilled the standard of proof.¹⁶⁹ If the contracting authorities are aware of the standard of proof they will know what to focus on when preventing and detecting bid rigging and their chances to fight bid rigging and get the highest possible competition on their contracts will increase. When the contracting authority reports the suspicious bid rigging to the NCA it helps if the information gathered could be used as evidence.

In *Seamless steel tubes*¹⁷⁰ the ECJ held that the party having the burden of proof must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place. However, it is not necessary that every single evidence satisfies the criteria listed. It is sufficient that the evidence viewed as a whole meets the criteria.¹⁷¹ The ECJ further held that that statements of a cartel from an employee of one of the members can be used to incriminate other members.¹⁷² However, it can not be regarded as constituting adequate proof if it is not supported by other evidence.¹⁷³

Evidence may be both written and oral and they can also be both direct and indirect. Direct evidence is different forms of documentary evidence.¹⁷⁴ When it comes to direct evidence such as agreements ECJ confirmed earlier case law when they in *Cement* stated that,

¹⁶⁵ Regulation 1/2003, Article 4-6.

¹⁶⁶ Regulation 1/2003, Recital 5 and Article 2.

¹⁶⁷ Regulation 1/2003, Article 5.

¹⁶⁸ Jones, Alison, EU Competition Law 2014, fn 166 p 689.

¹⁶⁹ Jones, Alison, EU Competition Law 2014, p 126.

¹⁷⁰ Case T-67/00 JFE Engineering v Commission [2004] ECR II-2501.

¹⁷¹ Case T 67/00 JFE Engineering v Commission [2004] ECR II-2501 paras 179-180.

¹⁷² Case T 67/00 JFE Engineering v Commission [2004] ECR II-2501 para 192.

¹⁷³ Case T 67/00 JFE Engineering v Commission [2004] ECR II-2501 para 219.

¹⁷⁴ De La Torre, Fernando Castillo, Evidence, Proof and Judicial Review in Cartel Cases, World Competition: Law & Economics Review 2009, Vol 32.4, p 530.

“it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs”¹⁷⁵

When the proof for the alleged infringement is based on direct evidence such as documentary evidence, the burden of proof is shifted to the defendant that has to prove that the evidence is insufficient or that there is another plausible explanation for the conduct.¹⁷⁶ However, direct evidence is not always available in cases of cartels and bid rigging. In the *Cement* case the ECJ emphasis that since it is well known that the participation in anti competitive agreements is prohibited the meeting are often held in secret and the documentation is limit to the minimum extent possible. Even if the Commission find evidence explicitly showing the unlawful contact between tenderers, such as records of meeting, they are often very fragmentary and spare and therefore it is necessary to reconstitute certain details by deduction. To prove the existence of an anti competitive conduct a number of coincidences and indicia must be considered together and if there is lack of another plausible explanation for the conduct it can constitute evidence for the infringement.¹⁷⁷ The ECJ held that the combination of documentary evidence and company statements were *direct documentary evidence* of the alleged infringement of Article 101.¹⁷⁸ The case is confirmed by latter case law, for example in the Swedish Asphalt Cartel earlier mentioned.¹⁷⁹

Parallel behaviour can be such coincidences mentioned and an indication of that anti competitive behaviour exists. When such behaviour is established and contact between the parties can be proved the conduct is likely to be inferred. Exchange of commercially confidential information or other close conduct is examples of such behaviour. The connection of relevant dates, such as price increase by all competitors on identical dates is another such behaviour. If the findings are simply based on such evidence, as parallel behaviour, it is not proof enough unless it is shown that it is the only plausible explanation for the conduct.¹⁸⁰

¹⁷⁵ Bellamy & Child, European community law of competition 2008, p 133., Joined Cases C-204/00 P, C-205/00 P *Irish Cement Ltd – Aalborg Portland v Commission* [2004] ECR I-123, para 81., Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, para 155., Case C-49/92 P *Commission v Anic* [1999] ECR I-4125, para 96.

¹⁷⁶ Case T-67/00 *JFE Engineering v Commission* [2004] ECR II-2501, para 187., Cited in Weishaar, Stefan E., *Cartels, competition and public procurement: law and economics approaches to bid rigging* 2013, p 69.

¹⁷⁷ Joined Cases C-204/00 P, C-205/00 P *Irish Cement Ltd – Aalborg Portland v Commission* [2004] ECR I-123, para 55-57.

¹⁷⁸ Joined Cases C-204/00 P, C-205/00 P *Irish Cement Ltd – Aalborg Portland v Commission* [2004] ECR I-123, para 237.

¹⁷⁹ Judgement from the Swedish Market Court, MD 2009:11.

¹⁸⁰ Bellamy & Child, European community law of competition 2008, p 125.

Something that is going to be interesting to relate to later on in chapter 5 is the fact that in a case from the Hungarian Competition Office, *Baucont/ÉPKER/KÉSZ*,¹⁸¹ the presence of a subcontract agreement between two of the tenderers was evidence enough to prove the existence of competition violation. The agreement entitled the successful party to involve the other one in the execution of the contract as a subcontractor. Even if the tenderers had not agreed on whom to be the winner the risk inherent in taking part in an open competition was reduced and therefore it was liable to distort competition and increase the price.¹⁸²

To sum up, the documentary evidence does facilitate the possibility to prove an infringement. However, it is not required to fulfil the standard of proof. Indirect evidence, such as circumstantial evidence can in combination with the lack of other plausible explanations constitute evidence enough to prove an infringement of Article 101 TFEU.

¹⁸¹ *Baucont/ÉPKER/KÉSZ* Case Vj-28/2003.

¹⁸² Bellamy & Child, *European community law of competition* 2008, p 377.

5 Directive 2014/24/EU

In the Green Paper the Commission emphasis that to be able to achieve efficiency and the best value for money it is vital to generate strongest possible competition and that distortion of competition must be avoided.¹⁸³ Followed by the Green Paper where they also expressed the need for a more simplified and flexible regime they published a proposal for a new Directive in 2011.¹⁸⁴ The Commission emphasis that the modernisation mainly has two complementary objectives and the one relevant to the discussion below is to be read as followed,

“Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a *simplification* and *flexibilisation* of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and *facilitate the participation of SMEs and cross-border bidders.*”¹⁸⁵

On the 28th March 2014 the new Directives on public procurement were published in the OJ, and it entered into force on the twentieth day followed by its publication.¹⁸⁶ The new and revised regime on public procurement consists of a revised Directive on Public Contracts¹⁸⁷ and a revised Directive on the Utilities Sector.¹⁸⁸ It also introduced a totally new Directive on concessions.¹⁸⁹ Nevertheless, the following are only going to cover the former that is the Public Sector Directive 2014/24/EU.¹⁹⁰ The new Directive has an implementation period of 24 months instead of the usual 18 months because the amendments are considered to be very extensive. Accordingly the new Directive is going to repeal Directive 2004/18/EC with effect from the 18th April 2016.¹⁹¹

The changes that are introduced in the new Directive are going to be elaborated below, one by one. It is going to be addressed how the introduced rules and changes are capable to open up the market and create effective competition but also how they are able to affect the tenderers’ possibility to create and sustain collusive agreements, such as bid rigging schemes.

¹⁸³ Green Paper, p 4.

¹⁸⁴ Green Paper, p 3-4.

¹⁸⁵ COM(2011) 896 final, The other objective is to allow procurers to make better use of public procurement in support of common social and environmental goals. The complete objective is to be found in the proposal.

¹⁸⁶ Directive 2014/24/EU, Article 93.

¹⁸⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

¹⁸⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

¹⁸⁹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

¹⁹⁰ Hereafter referred to as *the new Directive*.

¹⁹¹ Directive 2014/24/EU, Article 91.

5.1 Principles of procurement

5.1.1 Legislative change

The contracting authorities have to comply with the fundamental principles of EU law when awarding contracts. This is clear from Article 2 in the current Directive which states that the contracting authority shall treat all economic operators equally, non-discriminatory and that they shall act in a transparent way. This provision is slightly modified in the new Directive and it also adds some other elements in the second subparagraph. The introduced *principles of procurement* is to be found in Article 18 in the new Directive,

“1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

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

5.1.2 Reflections

The Proposal from 2011 contained slightly the same wording of the *principles of procurement* although the final wording in the new Directive also contains a definition of “artificially narrowed competition”.¹⁹² Followed by the Proposal, Graells argued that the new principle and the second subparagraph is a consolidation of the relevance of undistorted competition. He is also of the perception that the development shows that the rules have a clear orientation towards the safeguard of undistorted competition and that it therefore it could be expected that the new Directive contains some tools for the prevention and detection of bid rigging. Further, the inclusion of the principle of procurement shows that the public procurement rules should be interpreted and applied in a pro competitive way.¹⁹³ He welcomes the provision as a positive development in public procurement law since it is a push towards a more competitive oriented system. One of the reasons is because it will raise awareness about competition implications to the contracting authorities.¹⁹⁴

¹⁹² COM(2011) 896 final, p. 47, Article 15.

¹⁹³ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 10.

¹⁹⁴ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 11.

One of the recommendations from OECD is to raise the awareness of the risk of anti competitive behaviour and collusion amongst the public employees.¹⁹⁵ In my view the introduction of *principles of procurement* has the potential to be very important for the increased awareness amongst the public purchasers. Even if this principle is directed to the design of the contract and not the behaviour of the tenderers I am of the perception that it can have effect on both sides of the transaction.

The second subparagraph in Article 18 highlights the importance of not designing the procurement with the intention of unduly favouring or disadvantaging certain economic operators. This emphasis is a great complement and reinforcement of the principle of equal treatment. The importance of not having rules favouring certain economic operators will be apparent in the following section concerning the accessibility for SMEs.

5.2 Facilitate access by SMEs

One of the objectives with the new Directive is to facilitate participation by Small and Medium-Sized enterprises (SMEs).¹⁹⁶ In 2008 the Commission developed a working document, *the Code of Best Practice*, in order to provide guidance to the Member States and their contracting authorities on how to facilitate access by SMEs to public procurement contracts.¹⁹⁷ It might be questioned why this initiative is taken and why it is important to facilitate access by SMEs. The participation of SMEs can have many positive effects and is regarded as an important factor in increasing the competition within the EU. SMEs are often described as being the backbone of European economy.¹⁹⁸ In some Member States they accounts for more than 90 per cent of all companies¹⁹⁹ and they are very important for job creation, growth and innovation.²⁰⁰ It is not unusual that smaller firms are more efficient to provide small parts of bigger contracts since they are specialized.²⁰¹ That is a few of the reasons why it is important to lower the barriers to entry and open up the public market for SMEs.

Important to mention in relation to this is that the procurement rules are only allowed to be SME-fair and not SME-favouring since the principle of equal treatment means that all suppliers should be treated equal regardless of their

¹⁹⁵ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 1.

¹⁹⁶ As defined in the Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, Enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

¹⁹⁷ Commission Staff Working Document – European *Code of Best Practice* Facilitating Access by SMEs to Public Procurement Contracts Brussels, SEC(2008) 2193. Hereafter referred to as the *Code of Best Practice*.

¹⁹⁸ Green Paper, p 27.

¹⁹⁹ Gunasekaren, Angappa et al. Resilience and competitiveness of small and medium size enterprises: An empirical research, International Journal of Production Research, Vol 49, No 18, 2011, p 1.

²⁰⁰ Green Paper, p 27.

²⁰¹ Grimm, Pacini, Spagnolo, Zanza., “Division into lots and competition in procurement” in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 180.

size or form of establishment. There is a lack of guidance and precedents from the EU law on the possibilities to facilitate for SMEs and the award of public contracts, and the balancing and demarcation is extremely complicated.²⁰² Those uncertainties might be eliminated, or at least reduced by the modernised rules on how to facilitate access by SMEs.

Even if the purpose of the public procurement regime is to open up the public market for all economic operators regardless of their size the Commission recognises a need for improvement to create a more accessible market for SMEs and start-ups but also to create a more competitive market in general.²⁰³ To facilitate access for SMEs the procedure has to be more efficient and the new Directive has to be simplified and more flexible. In the Code of Best Practice the Commission have identified a few problems that SMEs are facing in connection to the procurement process and what types of actions that can be taken by the Member States and the contracting authorities to overcome these obstacles. The large size of the contracts and the excessive requirements for financial guarantees are two of the problems that SMEs are facing.²⁰⁴ Below follows a thorough examination on the problematic raised and how they are addressed and introduced in the new Directive.

5.2.1 Division of contracts into lots

One difficulty that SMEs are facing and which also is identified by the Commission in the Code of Best Practice is the overcoming problems in relation to the size of the contracts in public markets. Because of their incapacity in giving tender for such a large contract they are *de facto* excluded from the procurement process.²⁰⁵ However, the contracting authority can either choose to procure the intended goods or services as one single contract or divide it into several smaller lots.²⁰⁶ The latter would be preferable to SMEs. Both quantitatively since the size is better suited to the productive capacity of SMEs and qualitatively because the content of the lots may correspond more closely to the business that the SME operates in.²⁰⁷ As mentioned, it is not unusual that smaller firms are more efficient to provide just a part of a bigger contract since they are specialized.²⁰⁸

²⁰² Sundstrand, Andrea, Offentlig upphandling – primärrättens reglering av offentliga kontrakt 2012, p 45.

²⁰³ Green Paper, p 27.

²⁰⁴ Code of Best Practice, p 5.

²⁰⁵ Code of Best Practice, p 6.

²⁰⁶ Grimm, Pacini, Spagnolo, Zanza., “Division into lots and competition in procurement” in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 168.

²⁰⁷ Code of Best Practice, p 7., Directive 2014/24/EU Recital 78.

²⁰⁸ Grimm, Pacini, Spagnolo, Zanza., “Division into lots and competition in procurement” in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 180., See also above chapter 5.2.

5.2.1.1 Legislative changes

There is no express provision on the division of contracts into lots in the current Directive. However, the current Directive indirect allows contracting authorities to make such division under Art 9(5).²⁰⁹ Other than that references to the division of contracts is only made in relation to the contract notice in Annex VII of the current Directive. The Annex states that if the contracts are divided into lots an indication of the possibility of tendering for one, for several or for all the lots needs to be included in the contract notice.²¹⁰ As it is now, the Member States have a lot of discretion in deciding whether or not to set national procurement rules on the division on contract into lots. In other word they have a lot of discretion on how their procured contracts are going to affect the competition on the market.²¹¹

There have been uncertainties on what is permissible and not when it comes to the division of contract into lots. One example of the use of division of contract into lots prior to the new Directive is the SCAs decision in *Siemens*²¹² in 2008. Siemens questioned the admissibility to divide contract into lots and restrict the tenderers' possibility to give tender in all parts of the contract. The SCA held that such measure is permitted if it complies with the objectives with the Directive and the fundamental principles derived therefrom. To bring the uncertainties to an end, the new Directive introduces, for the first time in a public procurement Directive, a specific provision on division of contracts into lots. Article 46(1) expressly states that,

“Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.”

In the second subparagraph the “*divide or explain*” rule is introduced, which implies that the main rule are the division into lots and if the contracting authority decide to deviate from that they shall provide an indication of the main reasons for their decision not to subdivide into lots.²¹³ If they however decide to divide the contract into lots they have to specify whether the tenders may be submitted only one, several or all lots. The contracting authority does also have the possibility to adopt a maximum number of lots that can be awarded to one tenderer.²¹⁴ Article 46(3) emphasis that Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be

²⁰⁹ Code of Best Practice, p 7., Directive 2004/18/EC, Article 9(5).

²¹⁰ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 12., Directive 2004/18/EC, Annex VII A.

²¹¹ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 12.

²¹² Decision from the Swedish Competition Authority, Dnr 350/2008.

²¹³ Directive 2014/24/EU, Article 46(1) subpara 2.

²¹⁴ Directive 2014/24/EU, Article 46(2) subpara 2.

combined.²¹⁵ The provision on division of contracts into lots also specifies that the Member States can, by specifying the conditions in national legislation and with regard to EU law, make it *obligatory* to award contracts into lots.²¹⁶

5.2.1.2 Reflections

Prior to the new Directive there have been many analysts who have advocated the division of contracts into lots. The reasoning behind that is the knowledge that it can decrease the risk of collusive behaviour among the tenderers. The division of contracts into lots can have influence both on actual and future tendering result.²¹⁷ Through doctrine there is a lot of discussion on the possible effects on the division of contracts into lots. It is possible to influence participation, the participants' behaviour and the final outcome of the award of contracts. It also regulates how easy it is for competitors to split the contract between them and reach and sustain a collusive agreement.²¹⁸

Due to the large impact the division of contract into lots may have on competition there is one crucial decision to be made by the contracting authority, that is the number of lots to divide the contract in. There is a fine balance between dividing the contract into lots, which will foster participation and generate effective competition and the division of contracts into lots, which will facilitate anti competitive behaviour and collusion. Therefore the division of contracts has the potential to have both positive and negative effects, and there are some pitfalls to watch out for. In other words, it can both hinder and promote participation and effective competition.²¹⁹ When deciding the number of lots there are two vital factors deriving from economic analysis. First of all, the number of lots needs to be smaller than the expected number of tenderers and secondly, at least one of the lots should be reserved to new entrants.²²⁰

The reason for dividing the contracts into fewer lots than the expected number of participants is because a bid rigging scheme is dependent on the fact that all competitors can get "a share of the pie" and that is more complicated if the number of lots are smaller than the participants. Therefore the first rule of thumb is very useful, but there are also some limits that need to be recognized. Even if the contract is divided into an optimal number of lots a bid rigging scheme can be implemented through market allocation, bid rotation or subcontracting as a side transfer to share

²¹⁵ Directive 2014/24/EU, Article 46(3).

²¹⁶ Directive 2014/24/EU, Article 46(4).

²¹⁷ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 190.

²¹⁸ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 168.

²¹⁹ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 179.

²²⁰ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 168.

the profits.²²¹ There are also situations and markets where the number of qualified tenderers is limited, and then the increased number of lots above a certain threshold might even facilitate collusion.²²² To sum up, the importance of dividing the contract into fewer lots than the number of participants might aggravate competitors' possibilities to collude but the risk is not totally eliminated.

The second vital factor is to define at least one lot more than the number of incumbents and reserve it to new entrants, such as SMEs. This would be a simple solution to the problem of an inaccessible public procurement market.²²³ Fana et al. argues that some of the public procurement rules are creating unequal treatment of companies since SMEs are facing harder times in the procedure. Consequently, the reserving of lots to SMEs and new entrants might actually reduce the unequal treatment that is already at place.²²⁴ Further, they are of the perception that these kinds of set asides to SMEs can be the most powerful tool in revamping the participation and breaking down barriers to trade by eliminating already existing discrimination.²²⁵ However, the EU does not favour making reservations of lots to specific undertaking. That would be in contradiction with the principle of equal treatment. The Commission rather advocate that the Member States should set up targets on shares of procurement that should be awarded to SMEs, to provide incentives for the contracting authorities to make the utmost of SME friendly procurement.²²⁶

The setting aside to new entrants may also have negative effects on competition. For example, if the contracting authority have one lot reserved to new entrants and the new entrants are too weak the competition would have been better if also stronger operators where able to bid. If lots where to be reserved to new entrants it would reduce the number of lots available for incumbents at that would generate in a risk of incumbents disappearing from the market if they are not able to get a share of sizeable procurement contracts.²²⁷ As stated, the new Directive emphasis that the *contracting authorities may limit the number of lots that may be awarded to one tenderer*.²²⁸ In this part of the development I however think that the Commission has been somewhat contradictory to itself because in the Code

²²¹ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 182.

²²² Albano, Dimitri, Perrigne, Piga., "Fostering participation" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 277.

²²³ Grimm, Pacini, Spagnolo, Zanza., "Division into lots and competition in procurement" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 169.

²²⁴ Fana, Marta, Piga Gustavo, "SME's and Public Contracts – an EU Based Perspective" in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 34.

²²⁵ Fana, Marta, Piga Gustavo, "SME's and Public Contracts – an EU Based Perspective" in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 53.

²²⁶ Green Paper, p 29.

²²⁷ Albano, Dimitri, Perrigne, Piga., "Fostering participation" in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 287.

²²⁸ Directive 2014/24/EU, Article 46(2) subpara 2.

of Best Practice the Commission argued that there is an advantage of not limiting the number of lots that can be awarded to one tenderer. If the tenderers can be awarded an unlimited number of lots general contractors are not going to be discouraged to participate and the willingness to grow will not be discouraged.²²⁹

Further on, the division of contract into lots might not be efficient under all circumstances. There is a risk that the division of contracts actually generate negative effects on participation and competition. An example of such a situation is when the division of contract into lots not is feasible due to technical or economically factors. Graells emphasis this and states that the rules on division of contracts;

“should allow for *sufficient flexibility* so as not to artificially impose the fractioning of the contractual object where it is *technically or economically unfeasible*, or where it would substantially impair the effectiveness of the procurement process or raise the procurement costs disproportionately.”²³⁰

The second subparagraph makes such “sufficient flexibility” possible but, as I interpret it, Article 46(4) makes it possible to implement national legislation removing this flexibility. From this perspective I am sceptical against the Member States possibility to make it obligatory to subdivide contracts. There might actually be circumstances making it ineffective were the possibility to procure it, as one single contract is vital for effectiveness.

The original proposal from the Commission from 2011 sets out a certain threshold on 500.000 euro in which over that threshold the division of contracts into lots shall be mandatory. Graells emphasis that it is *more* than 50 per cent of all procurement procedures that has an estimated value below this threshold and therefore the removal of this threshold would be preferable since it would generate potential further development. Then the contracting authorities have to conduct a case-by-case analysis of whether it is sufficient or not to split the contract into lots.²³¹ In the final wording in the new Directive this threshold is removed, however there is a provision stating that the Member States have the discretion to make it obligatory. The introduced provision leaves it to the discretion of the Member States to create an effective obligation to divide contracts into lots.²³²

As mentioned above OECD recommends a design of the contracts that is maximising the participation of competing bidders.²³³ One part of this recommendation is the possible to bid on certain lots. They recommend that you should look for specific areas in larger contracts that could be attractive

²²⁹ Code of Best Practice, p 7.

²³⁰ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 13.

²³¹ Sánchez Graells, Albert, “Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market?” in in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 128.

²³² Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 16.

²³³ See chapter 4.2.1.

and appropriate for SMEs.²³⁴ Even if the lots might be divided into different sizes and new entrants and SMEs only are able to procure on the smaller lots it will generate a more competitive market overall. It will raise competition on the lots that new entrants are able to give tender on but it can also have the positive effect of increasing competition among incumbents, since there are fewer contracts to compete for.²³⁵ Except from the fact that the division of contracts into lots can create effective competition it can also have a positive effect on the possibility to create a bid rigging scheme. OECD recommends varying between aggregation of contracts and not since it will result in unpredictability which in turn will make it more difficult to create a collusive agreement for the tenderers.²³⁶

It is not possible to avoid the difficulties in deciding the optimal number of lots and when to divide and not. There needs to be a balance between dividing contracts into lots to the advantageous of SMEs and the aggregation of contracts for the advantageous and retention of bigger firms able to supply bigger parts of the contract. Keeping the bigger firms on the market are vital otherwise they will seek to other contracts generating more profit. The restrictions on how many lots to be divided to every tenderer and whether there should be a maximum or not should therefore be carefully thought through before implemented.

To sum up, the division can have both positive and negative effects and to avoid the negative effects the contracting authorities need to have a lot of knowledge about the market. There are many uncertainties on how the division of contracts into lots should be applied, and to have an effective application of the provision it requires much further guidance for the Member States and most importantly for the contracting authorities. The provision makes the procurement process much more flexible, as required but I am however sceptical against its contribution to a more simplified regime. Overall I think that the development is in the right direction, an express provision about division of contract into lots will raise the awareness of its possibilities and if it is implemented effectively participation will increase and the risk of bid rigging decrease. Graells consider that the provision is in general “well oriented and substantially aligned with economic theory” which will contribute to the prevention of collusive behaviour amongst the tenderers.²³⁷

²³⁴ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 5.

²³⁵ Albano, Dimitri, Perrigne, Piga., “Fostering participation” in Dimitri, Piga, Spagnolo (eds), Handbook of procurement 2006, p 286.

²³⁶ See chapter 4.2.1.

²³⁷ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 16.

5.2.2 Limitation on requirements of participation

Another difficulty that SMEs are facing when trying to access the public market is the excessive requirements for financial guarantees that the contracting authorities set up in their selection criteria.²³⁸ In the current Directive a tenderer can be excluded because they do not live up to the specified “economic and financial standing”. The requirement on “economic and financial standing” in Article 47 are not defined but means that the economic operator has sufficient resources to perform the relevant contract in parallel with their other commitments.²³⁹ A contracting authority must state such minimum annual turnover requirement in their contract notice. However, such requirements must be “related and proportionate to the subject-matter of the contract”.²⁴⁰

5.2.2.1 Legislative change

In the Green Paper the Commission proposes a cap on excessively demanding selection criteria, especially requirements relating to economic and financial standing. The Commission emphasizes that such overly demanding turnover requirements do unavoidably exclude SMEs.²⁴¹ A cap like that would improve the already existing condition on proportionality but the Commission also emphasizes that it might restrict the contracting authorities “freedom to determine which standards they deem necessary to ensure that the contract is implemented properly”.²⁴² Nevertheless, such provision is included in the new Directive that adopts an exhaustive list²⁴³ on qualitative selection criteria. It is held that the selection criteria may relate to economic and financial standing.²⁴⁴ The contracting authorities are allowed to require that the economic operator have a certain minimum annual turnover to ensure that they have the capacity to perform the contract.²⁴⁵ However there are some limitations and exemptions introduced in the new Directive;

“The minimum yearly turnover that economic operators are required to have shall **not exceed two times the estimated contract value**, [my emphasis] except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. [...]”²⁴⁶

²³⁸ Code of Best Practice, p 5., Except from the financial standing the selection criteria can also be connected to the *suitability to pursue the professional activity* and the *technical and/or professional ability* – Directive 2004/18/EC, Article 46, 48 and Directive 2014/24/EC, Article 58.

²³⁹ Arrowsmith, Sue, *Eu Public Procurement Law - An Introduction 2010*, p 142., Directive 2004/18/EC, Article 47.

²⁴⁰ Directive 2004/18/EC, Article 44(2).

²⁴¹ Green Paper, p 28.

²⁴² Green Paper, p 28.

²⁴³ COM(2011) 896 final, p 11.

²⁴⁴ Directive 2014/24/EU, Article 58(1) b).

²⁴⁵ Directive 2014/24/EU, Article 58(3).

²⁴⁶ Directive 2014/24/EU, Article 58(3) subpara 2.

If the contracting authority finds that there is a need to make such an exemption mentioned the main reasons for such a requirement should be states in the procurement documents.²⁴⁷ Such derogation must however still be proportionate and linked to the subject matter of the contract.²⁴⁸ If the contract is divided into lots in accordance with Article 46 in the new Directive the turnover requirements shall apply in relation to each individual lot.²⁴⁹

5.2.2.2 Reflections

Since turnover requirement are a frequently and recognized obstacle to SMEs the introduced changes are going to avoid such unjustified barriers to entry.²⁵⁰ The limitation on turnover requirements is pro competitive since it reduces barriers to entry on the public market without having any detrimental effects from a competition law perspective.²⁵¹ To increase participation and prevent the risk of collusion OECD recommends that the contracting authorities should avoid setting unnecessary restrictions on the tenderers size, since it reduces participation.²⁵² This limitation on requirement is capable to contribute to that. In other words it will facilitate participation by SMEs and create a more effective competition on the public market.

I am of the perception that the turnover cap can be useful, even if it is possible to derogate from it. The proportionality of a turnover requirement is a case-by-case assessment and Article 58(3) contributes to the fact that such an assessment does not have to be done. Consequently, having this provision limited to two times value contracts is a codification of what is proportionate. From my point of view that is a great development since it creates greater legal certainty and uniformity, both for the contracting authorities but also for the tenderers. Consequently, SMEs and other companies will know what least to be expected from them and then it will be easier for them to participate and prepare for a procurement process. Having clear requirements is something that is advocated by OECD in relation to the prevention of bid rigging.²⁵³

Even though the positive effects are apparent there are some criticisms raised toward the introduced turnover cap. Fana et al. emphasis that the limitations will be useful not only to SMEs, but also for bigger firms and even if it might make participation by SMEs more likely it does not reduce

²⁴⁷ Directive 2014/24/EU, Article 58(3) subpara 2.

²⁴⁸ Directive 2014/24/EU, Recital 83.

²⁴⁹ Directive 2014/24/EU, Article 58(3) subpara 4.

²⁵⁰ COM(2011) 896 final, p 11.

²⁵¹ Ølykke, Grith Skovgaard, "How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive?" in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 77.

²⁵² See chapter 4.2.1.

²⁵³ See chapter 4.2.1.

the competitive disadvantage that SMEs have when entering into a tender.²⁵⁴ Further on, one of the issues raised in the Green Paper was that the procurement should be more accessible for start-ups.²⁵⁵ However, I am sceptical against how this turnover requirement is going to help start-ups to get access to the public market since they just started their business and does not have any turnover yet. On the other hand the contracting authorities are spending public funds and their needs to be some security in that the contract is being performed. Further, turnover requirements is not always the optimal way to decide the most suitable tenderer. To exclude unsuitable tenderers and to ensure that suitable ones are not excluded it would be preferable to make an overall discretionary assessment of the tenderers financial situation instead of setting specific minimum requirements. Even if it would not be so transparent it would promote effective competition.²⁵⁶

Overall, the introduction of a turnover cap reflects the principle of proportionality and in my perception very welcomed to ensure legal certainty. Even if the provision and the turnover cap is not mandatory until the Directive enters into force it can have a guiding effect during the implementation period.

5.2.3 Overall reflections on the changes

When the stakeholders²⁵⁷ had the chance to give answers to the Green Paper it was shown that the opinions about the necessity of measures such as turnover caps and mandatory splitting into lots were not very unanimous. The public authorities were in general very sceptical against these types of measures when on the other side of the transaction side, the business' opinions were very divided.²⁵⁸ Of course there is some scepticism against these types of measures from the contracting authorities point of view since the resources required dividing the contracts into lots in an efficient way will be an administrative burden for them and they will take an increased risks when lowering the turnover requirement. However, such administrative burden and risk should be weighted against the benefits derived from effective competition on the procured contracts.

All the elements that are aimed at facilitating participation by SMEs are also going to have an impact on the creation of effective competition on the public market. As one of the risk factors for collusion is the fact there are few suppliers the facilitated access by SMEs are going to obstruct the

²⁵⁴ Fana, Marta, Piga Gustavo, "SME's and Public Contracts – an EU Based Perspective" in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 52.

²⁵⁵ Green Paper, p 27.

²⁵⁶ Arrowsmith, Sue, Eu Public Procurement Law - An Introduction 2010, p 143.

²⁵⁷ Stakeholders are the ones giving replies to the Green Papers consisting of mainly businesses and public authorities but also individual citizens and legal experts. A clear division of the stakeholders is to be found in; Commission, Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, synthesis to reply, p 3.

²⁵⁸ Commission, Green Paper, synthesis to reply, p 14.

tenderers' possibilities to create and sustain collusive agreements. Heimler stresses one important change to be done in order to make collusive behaviour harder, that is that the rules should favour small firms more.²⁵⁹ If the rules are able to open up the market to SMEs the competition will increase not just because it is more participants but also because SMEs are one of the most important sources of innovations. If it is possible to increase their participation in the public market the incumbents will be forced to also invest in innovation. However it is worth noting that bid rigging often occurs in markets without significant innovation.²⁶⁰

My perception is that if the division of contracts into lots are applied efficiently and the limitation on requirements are followed, and not exempted by the contracting authorities, the combination can have a desirable effect on lowering the barriers to entry, enhance competition and prevention of anti competitive behaviour. The turnover requirement is a minimum requirement and need to be implemented by all Member States when on the other hand the division of contract is, to some extent, optional. Consequently, the impact that this will have on competition and the possibility to fight bid rigging depends on how each and every Member States chooses to implement the rules.

5.3 European Single Procurement Document

Another difficulty identified by the Commission in the Code of Best Practice is the excessive administrative burden that SMEs are facing when trying to access the public procurement market.²⁶¹ The burden derives from the need to produce substantial number of certificates or other documents related to exclusion and selection criteria.²⁶² A large amount of paperwork can hinder economic operators' possibility to give tender. The administrative burden can be especially burdensome if the tenderer ends up not being the one that is awarded the contract.

5.3.1 Legislative change

As a solution on the issue of high administrative burden placed on the tenderers the new Directive introduces, for the first time, a European Single Procurement Document (ESPD). It is a standard document and will be provided in all languages and all public authorities will be obliged to share the information on qualified bidders on national databases.²⁶³ The provision on ESPD is to be found in Article 59,

²⁵⁹ Heimler, Alberto, *Journal of Competition Law and Economics* 2012, p 13.

²⁶⁰ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6", p 139.

²⁶¹ Code of Best Practice, p 5.

²⁶² Directive 2014/24/EU, Recital 84.

²⁶³ European Parliament, Press Release - *Procurement package: New deal to ensure more responsible public spending*, 2013, Available at, <http://www.europarl.europa.eu/news/sv/news->

“1. At the time of submission of requests to participate or of tenders, contracting authorities **shall** [my emphasis] accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

- (a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out pursuant to Article 58; [...]²⁶⁴

The system is based on the fact that the contracting authorities shall accept self-declaration instead of requiring complete documentation and certificates. Only when the contracting authority has chosen to whom to award the contract the winning tenderer has to submit the original, up-to-date supporting documentation.²⁶⁵ It is clear from Article 60 that this can be used as means of proof and the contracting authorities may require the ESPD as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.²⁶⁶

The use of ESPD limits the requirements and can reduce the administrative burden and simplify the procedure for contracting authorities, but most important for the economic operators.²⁶⁷ The Commission estimates that the introduction of ESPD can reduce the administrative burden by over 80 per cent.²⁶⁸

The Commission is going to make all language version of the ESPD available through e-Certis, a newly introduced online repository of certificates.²⁶⁹ E-Certis is an “online source of information to help companies and contracting authorities to cope with the different forms of documentary evidence required for cross-border tenders for public contracts.”²⁷⁰ The newly introduced electronic database is a way to create better mutual recognition of certificates.²⁷¹ Better mutual recognition of

[room/content/20130625IPR14411/html/Procurement-package-New-deal-to-ensure-more-responsible-public-spending](http://www.europa.eu/content/20130625IPR14411/html/Procurement-package-New-deal-to-ensure-more-responsible-public-spending)

²⁶⁴ Directive 2014/24/EU, Article 59(1).

²⁶⁵ Directive 2014/24/EU, Article 59(4) subpara 2.

²⁶⁶ Directive 2014/24/EU, Article 60.

²⁶⁷ Directive 2014/24/EU, Recital 84.

²⁶⁸ European Parliament, Press Release - *New EU-procurement rules to ensure better quality and value for money*, 2014, Available at, <http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32386/html/New-EU-procurement-rules-to-ensure-better-quality-and-value-for-money>

²⁶⁹ Directive 2014/24/EU, Article 61.

²⁷⁰ Commission, E-Certis - End User guide 2010, p 3.

²⁷¹ Commission, Green Paper, synthesis to reply, p 14.

certificates has the potential to increase cross border trade, which is important to achieve fair and effective competition on the public market.²⁷²

E-Certis can be useful both from a national and from a cross-border perspective. Within the Member States it is useful for first time bidders, since they in an easy way can get information about what types of documents usually required. The online source is also going to contribute to the increased participation by cross border bidders. Costs and uncertainties deriving from having to submit certificates in another format than they are used to are one of the things that can deter them from bidding. The online source can to some extent eliminate that obstacle. It is necessary to point out that the e-Certis does not cover all potential documents that can be required but only the most frequently requested documents.²⁷³

5.3.2 Reflections

As mentioned the introduction of ESPD and the easy accessibility through e-Certis are going to reduce the administrative burden. The modernisation reflects the principle of mutual recognition. Consequently, it has the possibility to both facilitate access by SMEs and increase cross border participation. The Green Paper held that the cross border participation in public procurement remains low. Recent studies show that only 1,6 per cent of the public contracts is awarded to a tender from another Member State.²⁷⁴ If the public market is more opened up to foreign competition the risk of collusion will decrease. The reason for that can be due to various factors. Mainly because it raises overall participation and competition in a tendering procedure and as stated above that complicates the possibilities to implement a bid rigging scheme. It can also depend on the fact that foreign competitors might come from a different business culture and it can also just be that simple that contacts between foreign and domestic competitors are more unusual than contact between two domestic competitors.²⁷⁵

There is however some scepticism against the introduced system of ESPD. With the same reasoning as regarding the limitation on turnover requirements Fana et al. emphasis that this change are going to apply to all economic operators, regardless of their size, which means that it is only reducing moderately the competitive advantage that information obligations in general give to large firms compared to small ones.²⁷⁶ Graells is of the opinion that the provision generates higher risks and difficulties than benefits. He is sceptical to the provision because he is concerned about the time limits. He thinks that it is necessary to set up “speedy but reasonable” time limits to produce the requested documents and to strengthen the

²⁷² Green Paper, p 30-31.

²⁷³ Commission, E-Certis - End User guide 2010, p 3.

²⁷⁴ Green Paper, fn 9. p 4.

²⁷⁵ Kovacic, William E. and Anderson Robert D, P.P.L.R. 2009, p 82.

²⁷⁶ Fana, Marta, Piga Gustavo, “SME’s and Public Contracts – an EU Based Perspective” in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 51.

consequences of failing to produce supporting evidence for self - declaration.²⁷⁷

Nonetheless, I am of the perception that it will have another important and positive function than just reducing the red tape and facilitate access to SMEs. The self-declaration shall include the assurance of that the economic operators have not engaged in any of the activities which forms the basis of exclusion under Article 57. One of the activities referred to is the entering into agreements with other economic operators aimed at distorting competition.²⁷⁸ OECD highlights that this type of self-declaration will help to remind the tenderers of their obligation to bid independently and not collude, and also emphasizes the penalties that can follow from collusion.²⁷⁹

The ESPD can be equated with a system that is already advocated by the OECD and used by a few countries, for example Sweden and Germany. The OECD has referred to it as the Certificate of Independent Bidding and it requires bidders to disclose all material facts about any communication that they have had with competitors in relation to the invitation to tender.²⁸⁰ OECD recommends it when designing a tender process since it effectively reduces communication among tenderers.²⁸¹

One of the reasons and benefits with having the Certificate of Independent Bidding is because it is much easier to prove that competitors have communicated with each other than proving the existence of a cartel.²⁸² As said, it already is in use in some Member States but now it has been codified in the new Directive and this introduction of an ESPD in the Directive is going to create harmonisation and legal certainty within the EU. Hopefully this will have a deterrent effect on the creation of collusive agreements, but also the possibility use it as documentary evidence when trying to reveal and prove a bid rigging scheme.

5.4 Exclusion of tenderers

As elaborated in chapter 4 there is a lot of guidance on how to prevent and detect bid rigging. The Green Paper however questions whether such guidance is enough to fight collusion efficiently or whether there is a need for specific legislative instrument. Such an instrument could be a stricter debarment in case of bid rigging for example.²⁸³ To be able to ensure fair and effective competition and prevent anti competitive behaviour it is important that there is a possibility for the contracting authorities to exclude

²⁷⁷ Sánchez Graells, Albert, "Are the Procurement Rules a Barrier for Cross-border Trade within the European Market" in Graells., Ølykke, Grith, EU Procurement Directives - modernisation, growth & innovation 2012, p 121.

²⁷⁸ For further explanation see chapter 5.4.

²⁷⁹ OECD, Designing tenders to reduce Bid Rigging, p 10.

²⁸⁰ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 8.

²⁸¹ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, p 8.

²⁸² Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6", p 147.

²⁸³ Green Paper, p 32.

such tenderers engaging in anti competitive behaviour from the procurement procedure. The following are therefore going to examine the changes made in the new Directive in relation to debarment of competition law infringers, or as referred to in the Directive, *exclusion of tenderers*.

5.4.1 Legislative change

In the current Directive the grounds for exclusion are listed in inter alia Article 45. In *La Cascina*²⁸⁴ the ECJ held that the grounds for exclusion has to be set out in advance by the contracting authority and they are only allowed to use exclude grounds that are listed. This ruling is in compliance with the general principles of transparency and equal treatment.²⁸⁵ Article 45(2) states that a contracting authority can exclude a tenderer that has been *convicted of any offence concerning his professional misconduct* or *guilty of grave professional misconduct proven by the contracting authority*.²⁸⁶ There is some ambiguity on whether “professional misconduct” can be used in order to exclude economic operators engaging in collusive agreements. There is however a clear indication that there is room for the inclusion of competition law breaches within the relevant concept of professional misconduct.²⁸⁷ Bovis stress that violations of competition law should always be considered instances of grave professional misconduct and consequently should qualify indistinctly under both paragraph c) and d) of Article 45(2) in the current Directive.²⁸⁸ Graells further emphasis that all kinds of anti competitive behaviour should be caught by the concept of *offence concerning professional conduct* or *professional misconduct*.²⁸⁹ Followed by the new Directive this seems clearly established.²⁹⁰ Recital 101 in the new Directive establishes that the *professional misconduct* is supposed to include violations of competition rules. However, the exclusion grounds that are found in the current Directive under Article 45(2) c) which is the exclusion of economic operators who has been *convicted of any offence concerning his professional misconduct* has been deleted in the new Directive. It was probably deleted because of the wide interpretation of the existing ground relating to the *grave professional misconduct*, which is now to be found in the new Directive in Article 57(4) c).²⁹¹

Except from the fact that violations of competition law are included in the term *professional misconduct* in recital 101 in the new Directive, the exclusion of competition law infringer becomes codified in the new Directive. The new provision of grounds for exclusion is to be found in Article 57 and it sets out both mandatory and discretionary grounds for

²⁸⁴ Case C-226/04 - La Cascina and Other [2006] ECR I-1347.

²⁸⁵ Case C-226/04 - La Cascina and Other, paras 21-22.

²⁸⁶ Directive 2014/24/EC, Article 45 c), d).

²⁸⁷ Sánchez Graells, Albert, Public procurement and the EU competition rules 2011, p 254.

²⁸⁸ Bovis, Christopher, *EC public procurement: case law and regulation* 2006, p 16.

²⁸⁹ Sánchez Graells, Albert, Public procurement and the EU competition rules 2011, p 255.

²⁹⁰ Sánchez Graells, Albert, Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement 2014, p 17.

²⁹¹ Priess, Hans-Joachim, The rules on exclusion and self-cleaning, P.P.L.R. 2014, p 117.

exclusion. The exclusion grounds set out in Article 57(4) are discretionary which means that the,

“Contracting authorities may exclude or may be required by Member States to exclude from participation in an procurement procedure any economic operator in any of the following situations”²⁹²

And the exclusion of competition law infringers is to be found in Article 57(4) d),

“Where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into **agreements** [my emphasis] with other economic operators **aimed at distorting competition** [my emphasis]”²⁹³

Article 57(5) further holds that the grounds for exclusion can be applied at all times during the procurement procedure, it can be used both before and during the procedure.²⁹⁴ This is an important clarification from the current Directive and Article 45 that does not define the time period during which an economic operator can be excluded.²⁹⁵

If an economic operator is in the situation referred to in Article 57(4) d) they should be able to set things right and be a part of the procurement anyway. The new Directive therefore identifies the possibility of self-cleaning measures. The purpose is that the economic operators shall be able to regain its eligibility to be part of a public procurement procedure.²⁹⁶ The possibility of self-cleaning is to be found in Article 57(6),

“Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure [...]”²⁹⁷

The possibility for self-cleaning requires that the tenderer can prove that they have compensated any damages caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct.²⁹⁸ The possibility to self-cleaning reflects the principle of proportionality.²⁹⁹

²⁹² Directive 2014/24/EU, Article 57 (4).

²⁹³ Directive 2014/24/EU, Article 57 (4) d).

²⁹⁴ Directive 2014/24/EU, Article 57 (5).

²⁹⁵ Priess, Hans-Joachim, P.P.L.R. 2014, p 113.

²⁹⁶ Priess, Hans-Joachim, P.P.L.R. 2014, p 121.

²⁹⁷ Directive 2014/24/EU, Article 57(6).

²⁹⁸ Directive 2014/24/EU, Article 57(6) subpara 2.

²⁹⁹ Priess, Hans-Joachim, P.P.L.R. 2014, p 113.

Further on, the Article provides a requirement on the Member States to specify the implementing conditions of the Article and determine the maximum period of exclusion. In regard to discretionary exclusion based on distortion of competition the maximum period of exclusion is three years from the date of the relevant event.³⁰⁰

5.4.2 Reflections

Worth mentioning is that the wording in Article 57(4) d), in relation to exclusion based on distortion of competition, is clearly different from the wording in Article 101 TFEU. First of all, the wording in Article 57(4) d) only extends to the ground for exclusion to *agreements*, and not to *decisions or concerted practices* as under Article 101. Secondly, the agreement must have as its aim to distort competition. When on the other hand Article 101 covers both practices that have as their object *and* effect the prevention, restriction or distortion of competition.³⁰¹ To reach coherence between the two systems and efficiently prevent all types of anti competitive behaviour I am of the perception that it would be preferable to use the same wording under both Article 57(4) d) and Article 101.

Even if bid rigging schemes are always aimed at distorting competition it does not always take expression in an agreement. As elaborated above in chapter 4.2.3 the positive thing stemming from case law when it comes to prove an anti competitive behaviour is that in cases of complex infringements there is no need to prove if there has been an agreement or a concerted practice. However, a narrow interpretation of this provision would require such specification, which would result in a more complex assessment of evidence. With regard to the earlier case law in *La Cascina* where it is clear that the list of exclusion grounds is exhaustive there is an indication that there will be a narrow scope of the article, which means that the grounds for exclusion will not cover anti competitive behaviour to the same extent as under Article 101.³⁰² Due to the indication of a narrow scope there is a risk that it is not always going to be possible to prove and exclude tenderers engaging in anti competitive behaviour, such as bid rigging.

In relation to this it is also worth mentioning that even if there is now possibility to exclude tenderers based on the exclusion grounds due to the difficulties of proving an agreement or the aim there is another chance to end the procedures when there is a suspicious of bid rigging for example. The consequence of a bid rigging scheme can often be that there is only one suitable tender left and in *Metalmeccanica*³⁰³ ECJ held that the contracting authority is not required to award the contract to the only suitable tender. In the case there was 4 tenderers submitting a bid in the open procedure arranged by the contracting authority, but after evaluation there was only one suitable tender left and the contracting authority decided to terminate

³⁰⁰ Directive 2014/24/EU, Article 57(7).

³⁰¹ Priess, Hans-Joachim, P.P.L.R. 2014, p 119.

³⁰² Priess, Hans-Joachim, P.P.L.R. 2014, p 119.

³⁰³ Case C-27/98 *Metalmeccanica Fracasso SpA* [1999] ECR I-5697.

the tender procedure, which was also held to be perfectly permitted. The interesting part in the judgement from this thesis point of view is that the judgement was based on the objectives of public procurement to develop effective competition.³⁰⁴ The contracting authorities should be aware of the fact that they can do this even if it is not stated in neither in the current nor in the new Directive.

Graells wish for further clarification and streamlining of the disqualification procedure.³⁰⁵ He is of the perception that there is still a need for the suspension and exclusion system in the public procurement rules to be further developed. Further he mentions that such optimal terms that stems from the provisions can give rise to different regimes in different Member States and as a consequent facilitate strategic behaviour by economic operators. To strengthen the pro competitive orientation of the public procurement and to decrease the distortion of competition created by economic operators, Graells is in favour of a more strict and uniform system of the exclusion of competition law infringers.³⁰⁶

In regard to the possibility of self-cleaning I am of the perception that it will definitely be positive for the creation of effective competition. Priess emphasis that it reflects the principle of proportionality and he is of the opinion that allowing economic operators to rehabilitate themselves, under strict conditions, could enhance competition and therefore it is a positive aspect of the modernised Directive.³⁰⁷ Even if Article 57 leaves a lot of questions unanswered it is a step towards a greater harmonisation of the public procurement law in the EU, especially the introduction of self-cleaning and maximum time limits.³⁰⁸

I am about to agree with both Graells and Priess, the development is welcomed but it needs much more. The measures are adopted on a voluntary basis by both the contracting authorities and the Member States and it is up to them that the Article reaches its full potential. However, the potential is limited due to its narrow scope. The clarified and amended exclusion grounds are going to provide legal certainty and in combination with the introduced ESPD it can be helpful for the fighting of collusive agreements. The legislator should however review its limits and revise the provision to get a wider scope.

It is undeniable other interesting amendments on exclusion grounds which would be interesting to analyse. However the introduced and elaborated exclusion grounds of distortion of competition is the most and direct interesting in this regard.

³⁰⁴ Case C-27/98 *Metalmeccanica Fracasso SpA* [1999] ECR I-5697, para 26.

³⁰⁵ Sánchez Graells, Albert, *Prevention and Deterrence of Bid Rigging; A look from the new EU Directive on Public Procurement 2014*, p 17.

³⁰⁶ Sánchez Graells, Albert, *Prevention and Deterrence of Bid Rigging; A look from the new EU Directive on Public Procurement 2014*, p 19.

³⁰⁷ Priess, Hans-Joachim, *P.P.L.R. 2014*, p 121.

³⁰⁸ Priess, Hans-Joachim, *P.P.L.R. 2014*, p 123.

5.5 Subcontracting

The optimal situation for an economic operator is to win contracts themselves because subcontracting usually tends to lower profits. Since public contracts usually are of very large size it is very likely that SMEs are not able to be the main contractor and therefore it is very likely that subcontracts are taken by SMEs.³⁰⁹ However, this is not always trouble free for SMEs. Long delays in payments are one of many problems that SMEs are facing. Even if they are assigned the works and completes it there is a risk that they are driven out from the market due to slow payment from the main contractor.³¹⁰ The stricter rules on subcontracting are mainly introduced to prevent social dumping but also with the purpose of facilitate access by SMEs. Nevertheless, the following are also going to highlight the changes and its chance to create effective competition and the possibility to fight collusive agreements.

5.5.1 Legislative change

There are very limited rules on subcontracting in the current Directive.³¹¹ However, with the objective of encouraging the involvement of SMEs in the public procurement market the current Directive advocate that provisions on subcontracting should be included.³¹² In respect to this, Article 25 is the only provision relating to public contracts and subcontracting in the current Directive and it is read as follows,

“In the contract document, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors”.³¹³

As it looks today there is only a small possibility for the contracting authority to monitor and control subcontracting. The only possibility for a contracting authority to restrict subcontracting is when they are unable to verify the capacity of the subcontractor.³¹⁴ The new Directive provides for a more extensive and tougher provision on subcontracting. The rules on subcontracting are to be found in Article 71 in the new Directive.

First of all, Article 71 includes the wording of Article 25 from the current Directive. Although the wording is slightly modified the changes are not

³⁰⁹ Code of Best Practice, p 10.

³¹⁰ Fana, Marta, Piga Gustavo, “SME’s and Public Contracts – an EU Based Perspective” in Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 35.

³¹¹ Green Paper, p 26.

³¹² Directive 2004/18/EC, Recital 32.

³¹³ Directive 2014/24/EU, Article 25.

³¹⁴ Weishaar, Stefan E., Cartels, competition and public procurement: law and economics approaches to bid rigging 2013, p 94., Case C-314/01 Siemens, ARGE [2004] ECR I-2549, para 47.

going to affect the meaning of it.³¹⁵ Secondly, the new Directive and Article 71 introduces an added provision on direct payment to subcontractors,

3. Member States may provide that **at the request of the subcontractor** [my emphasis] and where the nature of the contract so allows, the contracting authority shall **transfer due payments directly to the subcontractor** [my emphasis] for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.³¹⁶

In relation to the direct payment to subcontractors the article further specifies that the Member States may provide more stringent liability rules under national law on direct payments to subcontractors. For instance by providing direct payment without it being necessary for the subcontractor to request such direct payment.³¹⁷

Finally, the amended article on subcontracting adds an extended possibility for the contracting authority to require information about the subcontractor. It is clear in the first subparagraph of Article 71(5) that,

“In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority **the name, contact details and legal representatives of its subcontractors**, [my emphasis] involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.”³¹⁸

The first subparagraph in Article 71(5) does not apply to suppliers but contracting authorities may extend or may be required by the Member State to extend the obligation to for instance “supply contracts, to service contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to supplier involved in works or services contract”.³¹⁹

³¹⁵ Directive 2014/24/EU, Article 71(2).

³¹⁶ Directive 2014/24/EU, Article 71(3).

³¹⁷ Directive 2014/24/EU, Article 71(7).

³¹⁸ Directive 2014/24/EU, Article 71(5).

³¹⁹ Directive 2014/24/EU, Article 71(5) subpara 4-5.

5.5.2 Reflections

The direct payment to subcontractors can be a tool to avoid the burden of long delays in payment and facilitate the involvement of SMEs.³²⁰ If the risk of delays in payment are lowered, as it should be since the public purchaser are more liable, there is a greater chance that SMEs are not driven out from the public procurement market. Even if the direct payment to subcontractors is useful it is not directly meant to support SMEs, when talking about support to SMEs it is often meant to support them as the main contractor.³²¹ The amended article on subcontracting does not increase participation by SMEs as main contractors. Therefore, it cannot be argued to create effective competition and aggravate the tenderers' possibility to create and sustain collusive agreements because of increased participation, as argued for above changes.

The stricter rules and the increased possibility to monitor subcontracting and require information about the subcontractor can have other important ways to affect competition. Especially since subcontracting can be used as a compensating mechanism within a bid rigging scheme.³²² The competitors can have an agreement were they decide that the winner company are going to compensate its competitor by engaging them as subcontractors.³²³ A Swedish example of this is a procurement regarding power poles. The companies agreed on that the one who won the contract had to buy half of their need from the other one.³²⁴ OECD suggests that the contracting authorities should pay extra attention to certain bidding patterns, such as that the winning tenderer repeatedly subcontract works to unsuccessful tenderers. The most common scenario is that the unsuccessful tenderer is rejected to due a higher price or unacceptable requirements.³²⁵ The problematic with the current rules on subcontracting is that the contracting authorities may require the information on the share and amount that is going to be subcontracted but they are not entitled to know to whom it is to be subcontracted. Cartel formation is facilitated when it is possible to make transactions within the bid rigging scheme without having the contracting authority monitoring everything.³²⁶ The contracting authorities' possibility to require information is therefore going to create a better chance for them to monitor subcontracts and detect suspicious bidding patterns. Accordingly, it is going to be harder for the tenderers to create and sustain a bid rigging scheme. If the Member States take the opportunity to implement even stricter rules on subcontracting the chance will increase even more.

³²⁰ Directive 2014/24/EU, Recital 78.

³²¹ Fana, Marta, Piga Gustavo, "SME's and Public Contracts – an EU Based Perspective" in Ølykke, Risvig and Tvarnø (eds), *EU Procurement Directives - modernisation, growth & innovation 2012*, p 53.

³²² See chapter 3.1.

³²³ Swedish Competition Authority, Checklist - Twelve ways to detect bid-rigging cartels.

³²⁴ Report from the Swedish Competition Authority, "Osund konkurrens i offentlig upphandling - Om lagöverträdelser som konkurrensmedel, 2013:6" p 151., Decision from the Swedish Competition Authority, Dnr 237/2007.

³²⁵ OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, p 12.

³²⁶ Weishaar, Stefan E., *Cartels, competition and public procurement: law and economics approaches to bid rigging 2013*, p 94.

The Green Paper highlights that experiences also suggests that it might be useful to make certain instruments which present a particular risk of being misused for collusion more "collusion-proof". Subcontracting can be such an instrument, since it a popular way for the winning bidder to reward cartel members for abiding by the cartel agreement. One possible way to address this problem could be to forbid, under certain conditions, subcontracting to undertakings which participated themselves in the tender procedure.³²⁷ The stakeholders in the response to the Green Paper raise another suggestion for instruments to ensure fair competition and encourage pro-competitive procurement strategies. They suggest that the contracting authorities should have the possibility to restrict subcontracting if there are indications of anti competitive behaviour.³²⁸ However, the new Directive does not say anything explicit about neither the prohibiting subcontracting to avoid anti competitive behaviour or a prohibition on subcontracting to unsuccessful tenderers. Further, the Green Paper highlights that the advantages derived from such additional guarantees against anti competitive behaviour must be weighted against the additional administrative burden that is put on the procurers and the undertakings.³²⁹

I would say that a provision restricting subcontracting to unsuccessful tenderer and when there is indication of anti-competitive behaviour does not reflect the principle of proportionality. It would not be proportionate to have such restrictions without having provisions similar to the once in Article 57 on self-cleaning and time limits.

An interesting reflection is whether the fact that the winning tenderer subcontracts parts of the agreement to an unsuccessful tenderer could be regarded as enough evidence to prove a bid rigging scheme and an infringement of Article 101. If the main contractor subcontracts parts of the agreement to an unsuccessful tenderer it should be an indication of bid rigging scheme in my view. It is clear from the case from the Hungarian Competition Office, as elaborated in chapter 4.2.2, that the existence of a subcontract can be evidence enough. The stricter rules on subcontracting can therefore be helpful for the burden of proof.

I am of the perception that the development of the possibilities to control and monitor subcontracting is consistent with the principle of transparency. If the contracting authorities are required to have an open and transparent procedure the same should apply towards all steps of the transaction. Even if the improved rules on subcontracting might develop the integration of the public procurement market I however think that the legislator could have gone even further on its path towards harmonisation. They could have introduced a provision that allows the contracting authorities to restrict whether a tenderer engaging in anti competitive behaviour or an unsuccessful tenderer can be a subcontractor or not. However it should be on the conditions that they also implement rules on self-cleaning and time limits.

³²⁷ Green Paper, p 32.

³²⁸ Commission, Green Paper, synthesis to reply, p 14.

³²⁹ Green Paper, p 32.

6 Analysis and conclusion

To begin with, I would like to summarize the above-mentioned changes and briefly explain their capacity to create effective competition and chance to affect the tenderers' possibility to create and sustain a collusive agreement.

First of all, the second subparagraph in the *principles of procurement*³³⁰ is going to have the effect of raising the contracting authorities awareness of the risk of anti competitive behaviour. The introduced principles are a push towards a more competitive oriented system. Secondly, the flexibility of applying *the division of contract into lots*³³¹ has the potential to create a more unpredictable public procurement process. It also has the potential, if applied effectively, to increase participation among suppliers. However, it can be questioned if the complexity in the possibility to divide contract into lots makes the Directive more simplified, as wanted. Thirdly, the introduced *limitations on requirements*³³² and the turnover cap are a codification of what is proportionate and it is going to make it easier for the economic operators to know what is expected from them. Due to the cap it is going to be easier for SMEs to give a tender. The division into lots and the limitations on requirements are going to enhance participation and create effective competition and in extension that it is going to obstruct the tenderers' possibility to create and sustain a collusive agreements.

Fourthly, the introduction of *ESPD*³³³ is going to lower the barriers to entry and hopefully generate in more participation. Further on it is possible that it can contribute to the detection and proving of the existence of anti competitive behaviour. Fifthly, the introduction of clarified rules on the *exclusion of tenderers*³³⁴ are going to provide legal certainty since it is codified that there is room for exclusion if the tenderers engaged in anti competitive behaviour. However, it is important to note that the limited scope of the provision prevents the possibility to reach full coherence with Article 101 TFEU. The introduction of ESPD and the amended clearer rules on exclusion of tenderers are also going to raise the awareness of competition law concerns amongst the contracting authorities.

Finally, the extended rules on *subcontracting*³³⁵ are going to improve the contracting authorities' possibility to monitor subcontracting and because of that it is going to be easier to detect bid rigging. Both the ESPD, the exclusion grounds and the extended rules on subcontracting has the possibility to create a higher risk of being detected, which in turn can have a deterrent effect for the creation of collusive agreements. Consequently, it will undermine the tenderers' possibility to sustain such an agreement.

³³⁰ For more detailed reflections see chapter 5.1.

³³¹ See chapter 5.2.1.

³³² See chapter 5.2.2.

³³³ See chapter 5.3.

³³⁴ See chapter 5.4.

³³⁵ See chapter 5.5.

It is important to note that the effects of the changes are dependent on the political will in each and every Member State and by the contracting authorities. Since the Directive on public procurement is a minimum requirement Directive there is a lot of discretion left to the Member States when implementing the Directive in national legislation. Which has to be done no later than 2016. Some of the provisions are mandatory, as for example the limitations on turnover requirement when on the other hand there is a lot of the changes that are discretionary and optional for the contracting authorities or/and the Member States to apply. Therefore it is going to be interesting to see how the new Directive is implemented, and depending on how it is implemented there will be different outcomes and various effects on competition. Additionally, it is going to be interesting to see whether ECJ are going to interpret the Directive in a more pro competitive way or not.

As stated in the beginning the Green Paper emphasis the importance of creating the *strongest possible competition* and that *distortion of competition must be avoided*. A lot of the changes introduced in the Directive are capable of creating effective competition on the public market. Remarkably, the effort to avoid distortion of competition is not very apparent. The indirect effect of a few of the changes might be less distortion of competition but it does not seem to be the primary purpose. I am of the perception that the only change that is clearly introduced to fight anti competitive behaviour is the criteria for exclusion of tenderers in Article 57 and the introduction of ESPD. There are a lot of other things that could have been implemented and productive on the path to eliminate, or at least reduce the risk of distortion of competition. In my view the legislator missed the chance to make such effort. One of the things that they could have implemented in the Directive is an obligation for the contracting authorities to report suspicions of bid rigging to their responsible National Competition Authority.³³⁶ A few Member States have discussed such mandatory provision³³⁷ and it is something that the Member States has discretion to implement in their national legislation. However, a mandatory provision on the reporting of suspicious bid rigging in the Directive could create harmonisation and enhance the enforcement of competition law. As part of the state the contracting authority should have a responsibility to report it since they are spending public funds. As mentioned, the leniency programmes has not reached its full potential on the public market and

³³⁶ Along the same line see, Ølykke, Grith, "How should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive", Ølykke, Risvig and Tvarnø (eds), EU Procurement Directives - modernisation, growth & innovation 2012, p 78., Graells, Public procurement and the EU competition rules 2011, p 380., and Spagnolo, Giancarlo, On behalf of the Swedish Competition Authority, "Open Issues in Public Procurement", Report, 2009:7, p 16., Available at, http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/uppdraagsforskning/forsk_rap_2009-7_Issues_Procurement.pdf

³³⁷ Swedish Competition Authority, "Konkurrensen i Sverige 2007", Report 2009:7, p 225., Available at http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/rap_2007-4.pdf

therefore the focus and responsibility has been put on the contracting authorities instead.

Even if the rules on public procurement are suppose to protect the suppliers they cannot be unreasonable since it is public funds being spent, there needs to be a balance. Reporting and revealing bid rigging is something that will be positive for competing suppliers not engaging in anti competitive behaviour.

The reason for why there should be an obligation for the contracting authorities to report if they have suspicions is because of the lack of incentives. Even if there is a moral obligation to do it there are some uncertainties from my point of view that might stop them.³³⁸ One reason could be that it might cost the contracting authorities more to wait for an investigation and to start all over with the procurement process instead of just looking through the fingers and accepting the high price and live with the fact that they did not get the best value for money. I am of the perception that there needs to be more focus on creating incentives for the contracting authority to unravel a bid rigging scheme.

As mentioned, the Green Paper also raises the question on whether guidance is enough to combat anti competitive behaviour or if there is need for legislative instruments, such as the mandatory reporting of suspicious bid rigging. I am of the perception that guidelines are very helpful, however it is not certain that everyone cares about them. The contracting authorities can have other interests than fighting anti competitive behaviour. Even if bid rigging counteracts the aim to achieve best value for money they do not have the resources, or they do not priorities their resources to detect bid rigging. Therefore I am of the view that legislative instruments are needed. Since the contracting authorities might be in conflict of interests, I am of the perception that the Directive could have been even more tightened and not allow as much discretion to the contracting authorities as in the new Directive. In such situations it would be preferable with fully harmonised rules.

One of the risk factors for collusion, in relation to the market structure is the fact that there are few suppliers on the market. Even if the fact that there are few suppliers on the market is something that facilitates collusive agreement I do not think that the increased participation in itself are going to create effective competition. Of course it will generate in more competitors competing for each and every public contract but since experiences show that bid rigging schemes have been created and sustained for a long time with 100 members the high degree of participation is not going to be vital. I am of the perception that it is the lowered barriers to entry, which is also a factor affecting the possibility to collude, that will have an impact on the

³³⁸ Along the same line see, Spagnolo, Giancarlo, On behalf of the Swedish Competition Authority, "Open Issues in Public Procurement", Report, 2009:7, p 16., Available at, http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/uppdragforskning/forsk_rap_2009-7_Issues_Procurement.pdf

effective competition and the possibility to create and sustain a collusive agreement. If the barriers to entry are lowered and it is unproblematic to enter the market new competitors can enter and interrupt an already existing bid rigging scheme. Nor will it be as tempting to create a collusive agreement if there is a risk of new competitors entering the market competing with a lower price. The third risk factor in relation to the market structure is if there is a standardized product that is going to be purchased. However, this is something that is hard to affect.³³⁹

To sum up, both the public procurement rules and the competition rules are essential for the creation of an internal market and anti competitive behaviour between the tenderers counteracts the goal of effective competition and best value for money. Therefore it is extremely important that the risk of collusion is eliminated to the extent possible. That is why it is important that the two systems reach coherence. However, most of the changes do not have as its primary purpose to fight distortion of competition, yet that is capable of being the indirect effect of most of the changes. Unfortunately there are not much in the legislation pointing direct toward the fighting of collusive agreements. The modernised rules on public procurement are a push towards a more competitive conscious system put there is still a long way to go. I am therefore of the perception that there is potential in the new Directive to create more effective competition on the public market, but it will definitely not be collusion proof.

³³⁹ See chapter 4.1.1.

Annex A - Correlation Table

2014/24/EU	2004/18/EC	
Art 18 para 1	Art 2	Principles of procurement
Art 18 para 2	-	Principles of procurement
Art 46	(Art 9)	Division of contracts into lots
Art 58	Art 47 (Art 44)	Selection criteria - turnover cap
Art 57	Art 45	Exclusion grounds
Art 59	-	European Single Procurement Document
Art 61	-	E-Certis
Art 71	Art 25	Subcontracting

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