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The Unbalanced Public Contract –
between dumping strategies, simulated
state aid, antitrust effects and criminal
offenses

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To my parents who have
always supported me.

Abstract

The proportion of public procurement is nowadays more than substantial; it amounts to all the goods and services that the State, perceived as both: central and local administrations, demands in order to assure the effective and sustainable functioning of the society. Moreover, as the procurement procedures aim at simultaneously achieving best value for money and high standards in non-financial matters (e.g. environment, social, innovation), efficient operations must be assured. Considering the context, protecting such an economic desirable market from unlawful practices (i.e. dumping strategies, illegal state aid, antitrust or corruption), that can otherwise harm the whole commercial balance, becomes the preoccupation of different areas of law. Furthermore, like privatization processes and public private partnerships, it represents a strategic point on each and every government's agenda, fact that stimulated the research in this area.

Table of Contents

INTRODUCTION	6
1.1 DEFINING THE CONCEPT	6
1.2 QUESTION AND PURPOSE	9
1.3 METHOD AND MATERIALS	9
1.4 DELIMITATION	10
1.5 STRUCTURE OF THE THESIS	11
CHAPTER I: ABNORMALLY LOW TENDERS	12
2.1 DEFINING THE CONCEPT	12
2.2 PREDATORY PRICING – STRATEGY OR ECONOMICAL JUSTIFICATION	15
2.3 DUMPING – <i>STRICTO SENSU</i>	21
2.4 SEEKING RENEGOTIATIONS – ‘HOLD-UPS’ AND THE SUBSEQUENT CONDITIONAL PERFORMANCE	26
CHAPTER II: STATE AID	29
3.1 DEFINING THE CONCEPT	29
3.2 MISUSED AID	33
3.3 ILLEGAL STATE AID	36
3.3.1 MARKET ECONOMY INVESTOR PRINCIPLE	37
3.3.2 MARKET ECONOMY VENDOR PRINCIPLE	40
3.3.3 PRIVATE CREDITOR TEST	42
3.3.4 THE FRAMEWORK FOR FINANCING SGEIS	44
3.3.5 PROCEDURAL SAFEGUARDS	46
CHAPTER III: CARTELS AND CORRUPTION RELATED OFFENCES	48
4.1 DEFINING THE CONCEPT	48
4.2 CARTELS	51
4.3 NE BIS IN IDEM	55
4.4 CORRUPTION IN PUBLIC PROCUREMENT	57
4.5 CORRUPTION IN LIBERALIZED MARKETS	62
CONCLUSION	64
BIBLIOGRAPHY	66

List of abbreviations

CJEU – Court of Justice of the European Union

DG – Directorate General

EU – European Union

GC – General Court

MEAT - Most Economically Advantageous Tender

MEIP - Market Economy Investor Principle

NCA – National Competition Authority

OECD – Organization for Economic Co-operation and Development

OFT - Office of Faire Trade

R&D – Research and Development

SGEI – Service of General Economic Interest

TEU - Treaty of the European Union

TFEU - Treaty of the Functioning of the European Union

UK – United Kingdome

Introduction

1.1 Defining the concept

Since the very beginning of modern legal thinking, contract theories have been drastically influenced by voluntarism theories; the 'core' element of the entire socio-economical system was the contract, perceived as an 'autonomous manifestation of will' with the power to 'bind on goods and conduct' of the parties implicated in transactions. In this respect it should be noted that the post-Cartesian¹ paradigm gathered most of the contractual views around the concept of 'will'.²

Giving primacy to the same current of thought, from the sixteenth century on, the Common law courts had aligned to the idea that the 'adequacy of consideration' was unimportant to a bargain, and that this represented the 'triumph of the free choice ideal' almost a hundred years before even Hobbes developed the principle that 'the value of all things contracted for is measured by the appetite of the contractors'.³

On the other hand, turning to the current legal order, for contracting authorities belonging to the public sector, the rule of freedom to contract has, in a certain way, been 'suspended';⁴ this takes place as, when concluding the agreement, the awarding authority is constrained by the public procurement legislation in force. As a result, the procurement of desired products or services is subject to a competitive, non-discriminatory, transparent, proportionate and based on equal treatment process, aimed at achieving both, financial and non-economical efficiencies.⁵ Having such a premise, the freedom of public authorities' decision-making is substantially narrower than the one exercised by private firms.⁶

This came as a result of the neo-liberal process of market emancipation in Europe that started with the creation of the internal market in the 1992 and the

¹ Current of thought related to René Descartes's opera.

² Horia Ciurtin, *Concept of Price in The New Civil Code: A comparative perspective*, SUBB Jurisprudentia No. 4 (2012) p. 110.

³ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press 1979) p.167.

⁴ Kristian Hartlev, Morten Wahl Liljenbøl, *Changes to Existing Contracts Under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender*, (2013) Public Procurement Law Review No.2, p.52.

⁵ Ruth Nielsen, *Discrimination and equality in public procurement* (2005), pp. 9-10, seen on Stockholm University's webpage on 2014.01.19.

⁶ Dacian Dragos and Roberto Caranta (eds.), *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen, DJØF Publishing 2012) p. 214.

enactment of the Public Procurement Directives.⁷ Ever since, public suppliers have to act under ‘normal’, free market conditions⁸ without the option of developing preferences or protective behavior for certain undertakings. In the same time, liberalization (in the form of privatization) itself is carried out through public contracts and, in certain situations, this fact transforms the process into ‘competition for the market rather than on the market’;⁹ this second process found its roots in the disappearance of the assumption that the provision of public goods and services through monopolies was the most efficient way to deliver them.¹⁰

As a result of the change of economical paradigm in Europe, the national governments must mostly purchase their necessary supplies through public tenders¹¹ (invitations to bid for a certain task, like renovation of a building, or provision of other services¹²) and deal in their endeavor with firms that, in their big majority, belong to the private sphere.

In this matter, the state in its ‘various central, regional and delegated manifestations’ is for sure the leading buyer of supplies, services and works in every sovereign territory;¹³ having this as a premise, the Court of Justice of the European Union (here and after, the CJEU) held that the term ‘state’ – implying public entity, must be interpreted in a functional and broad way, as, otherwise the purpose of the Directives would be jeopardized.¹⁴

Taking a functional view, as part of the act of governance, procurement policy is also essential in solving non-economic problems (i.e. environmental) besides developing the private sector and certain areas of the industry (e.g. small and medium enterprises); moreover, in the European context, an efficient public procurement

⁷ *Older rules / guidelines governing existing contracts*, seen on European Commission’s webpage on 2014.01.22.

⁸ Grit Skovgaard Ølykke, *Abnormally Low Tenders*, (Copenhagen, DJØF Publishing 2010) p. 23.

⁹ *Ibid.*

¹⁰ Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Portland: Hart Publishing 2007) p. 108.

¹¹ Grit Skovgaard Ølykke, *op. cit.*, p. 23.

¹² Neil Andrews, *Contract Law*, (Cambridge, Cambridge University Press 2011) p. 71

¹³ Allan Tyrrell, Becket Bedford (eds.), *Public Procurement in Europe: Enforcement and Remedies*, (Kent, Mackay of Chatham PLC 1997) p.1.

¹⁴ Peter-Armin Trepte, *Public Procurement in the EC*, (Oxfordshire, CCH Editions Limited 1993) p.102.

policy is the fundament of guaranteeing the function of the internal market due to the fact that it provides the Union to collect ‘full return’ from its continuous enlarged.¹⁵

Furthermore, as a novel non-financial tendency, it is currently agreed that where the public authority decides to award a contract to the bidder who submits the most economically advantageous tender (here and after, MEAT), it may use what the doctrine calls ‘strategic procurement’. This comes as support of society objectives, such as ‘fostering innovation, respecting the environment, combating climate change and improving employment, public health and social conditions’,¹⁶ provided that these are connected to ‘the subject matter’ of the agreement, do not confer discretion of choice on the authority and, in the same time, respect the procurement principles.¹⁷

The abovementioned framework is established with the scope of achieving better value for money, guarantee the choice of the most economically advantageous option, assure undistorted competition on the market and foster the functioning of the internal market with the sole scope of increasing the welfare of the final beneficiary that in most of the cases is the European citizen. In this matter, the legal system protecting the process from severe cost unbalances is mostly composed by the public procurement internal rules, competition legislation (*lato sensu*) and criminal law provisions.

When it comes to the synergy between Competition law and public procurement it has been considered that the first has two main protective functions; first, referring to possible cartels, there is the aim for horizontal competition and not cooperation between undertakings; second, there is the purpose of eliminating abuse of dominance in both sides (from and against the awarding authority).¹⁸

On the other hand, the rules of public procurement are aimed to prevent issues that would, in a second phase, engage the effects of Competition law provisions (e.g. the case of direct award of contracts or deliberate overcompensation that would attract the application of State aid rules).¹⁹

¹⁵ Eshien Chong, Carine Staropoli, Anne Yvrande-Billon, *Auction versus Negotiation in Public Procurement: Looking for Empirical Evidence* (2010) p.2, seen on Sciences de l’Homme et de la Société webpage on 2014.01.24.

¹⁶ Jörgen Hettne, *Strategic Use of Public Procurement – Limits and Opportunities*, *Swedish Institute of European Studies*, European Policy Analysis, No. 7, (2013), p. 18.

¹⁷ *Ibid.* p. 9.

¹⁸ Sánchez Graells, *Public Procurement and the EU Competition Law*, (Oxford, Hart Publishingp 2011) p.196.

¹⁹ Grit Skovgaard Ølykke, *op. cit.*, p. 25.

Also, a more severe system aiming at protecting the procurement environment and which sometimes overlaps with competition remedies - especially in the antitrust dimension - is represented by Criminal law. While promoting more transparent procedures by pleading for opened calls for tenders and efficient monitoring mechanisms,²⁰ criminalists require such ideals with the purposes of eliminating the system vulnerabilities to corruption acts.

1.2 Question and purpose

As for many years state expenditure through public procurement procedures has been at the forefront of the economic activities in Member States' markets, this thesis aims at identifying and analyzing market behavior that can hinder the process *per se* and as a consequence affect the market with subsequent implications in the daily life; from a broad perspective, the paper is mostly focusing on areas related to the free movement of services, competition and criminal law. Having this as a premise, its aim is to identify and develop on issues having the effect of unbalancing the consideration regarding contracts in which one of the parties is a public undertaking or the state; however, it will mostly focus on cases in which the state body is the buyer (i.e. public procurement) but will also consider the price criteria in privatization contracts and public private partnerships. Exemplifying, the paper shall emphasize on 'dumping' practices that can lead to 'abnormally low tenders', assess on the ways in which the state itself can affect the market and analyze economical behavior that can engage antitrust or criminal liability.

1.3 Method and materials

In the work, the author has used the traditional (dogmatic) legal method; it is carried out by mostly using qualitative analysis on International Treaties, European Union (here and after, EU) primary legislation (i.e. the Treaty of the European Union, here and after, TEU and the Treaty of the Functioning of the European Union, here and after, TFEU), secondary legislation - *de lege lata* and *de lege ferenda*, case-law

²⁰ M. Gabriel, *Corruption crimes in relation to public procurement* (2012), p. 7, seen on the European Parliament's webpage on 2014.01.28.

(with its role in the EU judicial methodology), opinions of advocates generals, Commission decisions, soft-law (i.e. guidelines), Member States' legislation followed by jurisprudence and also relevant doctrine (emanation of reputed scholars, valuable works of practitioners or working papers from the European bodies). When considering these sources, there will however be a slight usage of quantitative analysis, especially when it comes to statistics.

The juridical analysis can be considered to be an empirical one, based on concrete facts presented to prove a hypothesis. Moreover, in some situations I will make comparison with the United States of America (here and after, USA) legal system. However, having a panoramic view on the paper, it can be said that a conceptual perspective can be identified as well; this happens due to the behavioral and economic theories (e.g. game theory) that come to complete the legal elements of the thesis.

In the same time, the research is an analytical one as I am using facts and information already available and am considering them in order to make a consistent reasoning on different issues and emphasize on possible remedies; however, the outcome will be the result of the complicated interaction of different law branches: civil (*lato sensu*), public procurement, competition and criminal law; in subsidiary, by assessing on the different institutions belonging to these judicial areas the same complex result is reached as, most of the times they intertwine.

1.4 Delimitation

The thesis aims at identifying and developing on the issues presented in the problem statement from a purely EU law perspective. In this resort, even though there shall be decisions cited from national courts' jurisprudence, they will come as result of Union law enforcement or as a consequence of a breach of the EU's exigencies.

When it comes to the civil-contractual law part of the paper, elements related to this area will only be developed to the extent to which it will be necessary to prove the negative effect of the different practices on the public procurement / privatization contract consideration.

In the area of public procurement law, I will just emphasize on the most often breached legal demands and, afterwards, on remedies provided by the resort legislation.

In the competition field, the paper will deal with practices falling under the application of Article 101 TFEU (i.e. cartel practices), Article 102 TFEU (i.e. abuse of dominance in the form of predatory pricing) and Article 107 (i.e. illegal State aid); it must also be emphasized that the privatization legislation shall be mainly analyzed in relation to the last mentioned article.

Finally, the criminal law study will only be of interest in matters of corruption crimes, most 'popular' in the area discussed.

Summing up, it can be interfered that the thesis will focus on unlawful matters that can lead to an unbalanced public (understood as both, public procurement, public private partnership and privatization) contract and will exclude from its area of interest legit legal means that can have the same unbalancing effect (e.g. lawful and legal State aid, legit pricing mechanisms, unforeseeability).

1.5 Structure of the Thesis

The first chapter of the paper will deal with problems like 'hold-ups', predatory pricing, different 'dumping' possibilities and will slightly touch on the State aid issue however, without developing on it at this stage. All of these practices will be placed under the abnormally low tenders 'umbrella'. There will be a permanent interaction between typical law assessments (including study of compared law with the USA) and more abstract economic theories.

The second one shall substantively assess on the way in which State aid can distort competition and affect the consideration in public procurement, public private partnership and privatization processes. In this section I will analyze the state as holding not just the positive obligation of assuring compliance with EU rules but also, its negative obligation to abstain from intervention on the market that can distort competition and as well, affect the procurement market.

The third and last chapter shall consider the link between the competition perspective on antitrust behavior and the criminal remedies for such issues. Moreover, as a link between the two kinds of liability (i.e. administrative and criminal), I shall

also emphasize on the discouraging double punishment that is also validated under the *ne bis in idem* principle.

Chapter I: Abnormally low tenders

2.1 Defining the concept

Nowadays, as result of the economic crisis, firms are willing to submit ‘uneconomic or unsustainable’ tender prices with the sole hope of assuring their survival on the market; as a result, such behavior rises the risk for very poor contractual performance, create problems in the supply chains and, as a result, injure the economic environment.²¹

Moreover, poor markets prove to be good contexts for big companies to eliminate their competitors. Even though, dominance is not *per se* prohibited under EU law,²² financially potent undertakings, within a limited period of time, are sometimes strategically cutting prices to uncompetitive rates in order to eliminate or ‘discipline’ other market players; they afterwards raise long run prices to a supra-competitive level, inflicting a lengthy injury on final consumers’ costs.²³

At the same time, underperforming undertakings can benefit from illegal state incentives or misuse such resources when legitimately received in order to artificially survive or abuse in the competitive environment.

Also, deriving unfair advantages is not always the appanage of governmental intervention in the market; firms can also have their own ‘dumping’ strategies in order to cut expenses and be able to deliver a lower final price.

As it shall be further developed, in situations where a tender appears to be abnormally low, the rules on Public Procurement, Competition and State aid law are currently providing legal basis for the analysis of the tender, each empowered with its own enforcement system.²⁴

²¹ Procurement advice note 3, *Construction Works Procurement* seen on Northern Ireland’s Minister of Finance and Personnel webpage on 2014.01.29.

²² Hans Henrik Lidgard, *Competition Classics – Materials & cases on European Competition Law and Practice*, (Lund, Media-Tryck 2010) p. 229.

²³ Einer Elhauge, Damine Geradin, *Global Competition Law and Economics*, (Portland, Hart Publishing 2007) p. 314.

²⁴ Grit Skovgaard Ølykke, *op. cit.*, p. 26.

Having enounced the premises, Article 57 of Directive 2004/17/EC *coordinating the procurement procedures of entities operating in the water, energy, transport and postal services* and Article 55 of Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (here and after, the Procurement Directives) provide with remedies for cases in which ‘abnormally low tenders’ are not either legal or economical justified.

In an early report, the Commission gave general guidelines and stated that a tender is assumed to be abnormally low if ‘is not providing a margin for a normal level of profit’²⁵ and the participant cannot explain his price on the basis of the ‘economy of the construction method, the technical solution chosen, the exceptionally favorable conditions available or the originality of the work proposed’.²⁶ In this matter, awarding authorities are in the position to reject tenders that seem to be abnormally low in relation to any of the relevant elements of the award criteria and not only price, where the award rule is that of the most economically advantageous offer.²⁷

However, if an awarding authority uses the MEAT criteria, this must be clearly stipulated in the tender documentation; in this way specifications must include ‘which criteria it applies to the award and the order of importance for each criterion’.²⁸

Considering the future, the award criteria in the new Directives²⁹ is firstly based on the MEAT standards and as a result, more emphasis is placed on ‘social aspects, innovative characteristics, or environmental considerations’.³⁰ However, it must be said from an early stage that the transposition period for the two new pieces

²⁵ It however does not define what is a normal level of profit but indicates that the European or national competition legislation on pricing must adequately be respected.

²⁶ *Prevention, Detection and Elimination of Abnormally Low Tenders in the European Construction Industry* seen at GCI Union’s webpage on 2014.02.03.

²⁷ Sánchez Graells Albert, *Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions* (2013), European Procurement Law Series, Vol. 6, No. 4, p. 2.

²⁸ Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1, Recital, para. 55.

²⁹ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65 and Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] L 94/243.

³⁰ *New EU-rules on public procurement - ensuring better value for money* seen on the European Parliament’s webpage on 2014.02.03.

of legislation is by April 18th 2016;³¹ until then, the actual provisions can be still relied on.

By giving primacy to such an award system the ‘abnormally low tender’ test will shift from a price oriented assessment to a more complicated analysis of likelihood of performance capacity. In addition, as there are different pieces of legislation addressed to specific sectors of activity and each contracting authority belonging to these sectors might have its own preferences, the concept of ‘abnormally low tenders’ must be assessed for each agreement in accordance with the ‘specific purpose it is intended to fulfill’³² and in relation to the functional requirements mentioned in the tender documentation.³³ Exemplifying, there might be cases where the award criterion will be primarily based on environmental features (e.g. the undertaking that uses the lowest level of emissions for the project), social criterion (e.g. the undertaking that has a performing social corporate responsibilities policy³⁴) or situations in which contracting authorities will still use the lowest price system and evade the MEAT method.

Shifting to the procedural part of the analysis, as already stated in the introductions, Directives are the instruments used to harmonize and regulate this area. Furthermore, as ‘directives are binding to the end to be achieved,’ they leave some choice as to the form and method opened to Member States.³⁵

In this matter, a procedure on which national laws have autonomy to regulate is whether, once the awarding authority has identified an offer to be abnormally low after completing the binding contradictory investigation procedure, there is the express duty to reject it or, if the public entity can allow it on grounds of overriding considerations, which are always subject to a proportionality assessment.³⁶ In this matter, some national setups require the rejection of abnormally low tenders (e.g.

³¹ Directive 2014/25/EU, art. 106.

³² AG Opinion, Joined Cases C-285/99 and C-286/99 *Impresa Lombardini SpA — Impresa Generale di Costruzioni* [2001] I-09233 para. 35.

³³ Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114 art. 23.

³⁴ John Robinson Jr., *Social Public Procurement: Corporate Responsibility without Regulation* (2013), p.3 seen at SSRN’s webpage on 2014.02.06.

³⁵ Paul P. Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 5th Edition (Oxford, Oxford University Press, 2011) p. 106.

³⁶ Sánchez Graells Albert, *Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions*, p. 9.

Germany, Poland) while others leave this to the appreciation of the contracting authority (e.g. Romania, Denmark).³⁷

However, all member states are *expressis verbis* prohibited from introducing rules requiring the ‘automatic exclusion’ from procedures for the award of public contracts of certain tenders calculated on purely mathematical formulas, instead of constraining the awarding authority to apply the *inter partes* examination proceeding.³⁸

Having outlined the general framework of the concept, in the next sections the author shall engage in a more substantive analysis regarding the type of practices having the role of artificially lowering the bids.

2.2 Predatory pricing – strategy or economical justification

Public procurement rules protect competition in an important way, as ‘means to achieve best value for money and to ensure the legitimacy of purchasing decisions’; on the other hand, competition is perceived as an instrument permitting the public authority to gain the benefits of the competitive pressure developed between participating bidders.³⁹

According to the estimates by the European Commission, the expenditure of the public sector amounts up to 19% of the EU gross domestic product;⁴⁰ also, each year, the value of public procurement measures up to about EUR 420 billion.⁴¹ In this regard, having the access to public contracts on the long run makes undertakings consider not only legit market pressure but also uncompetitive tactics to get read of their concurrence.

Game theory is one economical abstraction that explains ‘the roots of such market issues;’ during time, scholars developing on the theory have given many

³⁷ Ibid. p. 10.

³⁸ Joined Cases C-285/99 and C-286/99 *Impresa Lombardini SpA — Impresa Generale di Costruzioni*, [2001] ECR I-09233 para. 45.

³⁹ Sánchez Graells Albert, *Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions*, p. 2.

⁴⁰ The economical value of all the produced goods and services within a country's territory in a specific time period.

⁴¹ *E-invoicing in public procurement: another step towards end-to-end e-procurement* seen on Lithuanian Presidency of the EU's webpage on 2014.01.28.

models related to strategic interaction between undertakings (e.g. raising rival's costs).⁴²

Part of the game theory, strategic theory supporters (mostly developed by Chicago School of economics) consider that a firm with monopoly power may use predatory pricing to eliminate its competitors and implicitly achieve monopoly power.⁴³

On the other hand, the neoclassical price theory offers alternative explanations (e.g. the deep pocket theory),⁴⁴ its supporters are of the view that prices are always correctly established by the market itself and even dominant firms do not have the 'chance to engage in pricing games'.⁴⁵

Having the ideological dispute as a premise, distinction must be drawn between the submission of a tender with an apparently abnormally low price and predatory pricing *per se*, as the public procurement law does not require the price to be predatory in essence in order to be seen as abnormally low.⁴⁶ In consequence, the line between 'vigorous' price competition and unlawful predation may be a thin one.⁴⁷ In this sense, when defending his interests, the claimant in an awarding procedure can either use the abnormally low pricing doctrine or exit the public procurement remedial framework and try proving an abuse of dominance in the matter of the predatory strategy.

In this resort, in the newly Proposed Competition Directive *regarding actions for damages under national law for infringements of the Competition Law provisions*, the Commission aims at ensuring 'the effective exercise of the victims' right to full compensation that will include *damnum emergens* and *lucrum cessans*' (e.g. the loss suffered by rallying with the procurement documentation exigencies and the possible profit that could have been gained as a result of the award).⁴⁸ To this extent, this legal instrument looks like a very discouraging mechanism that will protect the procurement environment; the punitive character of the sanction will make

⁴² Hans Henrik Lidgard, Justin Pierce, Marcus Glader, *Dynamic Competition*, (Lund, Lund University 2013) p. 41.

⁴³ Kenneth G. Elzinga, David E. Mills, *Predatory Pricing and Strategic Theory*, Georgetown Law Journal, Vol. 89, No. 543 (2001) p. 2478.

⁴⁴ *Ibid.* p.3.

⁴⁵ Giuliano Amato, Claus Dieter Ehlermann (eds.), *EC Competition Law*, (Portland, Hart Publishing 2007) p. 250.

⁴⁶ Grit Skovgaard Ølykke, *op. cit.*, p.115.

⁴⁷ Paul P. Craig, Gráinne de Búrca, *op. cit.*, p. 1039.

⁴⁸ COM(2013)0404, Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, para. 1.

undertaking think twice regarding the risks they assume when giving primacy to anticompetitive behavior.

Going further, when assessing on the issue's substance, most predatory pricing theories focus on the idea of cost levels.⁴⁹ However, limiting the assessment to cost-based models in a dynamic environment in which commercial reality 'evolves along strategic lines' would sometimes lead to a rigid analysis.⁵⁰

The CJEU compromised those views in the *Tetra Pak* case where it developed an economic test only to a certain extent; it stated that 'prices below average variable costs⁵¹ must always be considered abusive, as the only economic purpose is the elimination of a competitor'. Secondly, prices 'below average total⁵² costs but above average variable costs are only to be perceived as abusive 'if an intention to eliminate can be shown'.⁵³

When trying to prove intent, the Commission looks for in-house files or business action plans belonging to the dominant undertaking and that can indicate a predatory strategy. For example, a detailed exclusionary economic policy to sacrifice income in order to exclude a competitor (e.g. the plan of bidding 20% below of the average award price in the past two years), to hinder entry or to pre-empt the emergence of a market (e.g. engaging in a 'signaling' practice) can be good proof for the imposition of a fine.⁵⁴ Furthermore, some argue that predatory intent can be deduced from product proliferation, advertising, and other types of non-price behavior.⁵⁵

Comparing, US Courts have detected intent from a showing that the firm 'was neglecting present profits in order to create a market position in which it could charge supernormal ones.'⁵⁶ However, federal judges have recently been moving from the classical cost based analysis to a more structural based test analysis. The 'twin test –

⁴⁹ Alison Jones, Brenda Suffrin, *EU Competition Law*, 5th edition, (Oxford, Oxford University Press 2011) p. 393.

⁵⁰ Giuliano Amato, Claus Dieter Ehlermann, op. cit, p. 294.

⁵¹ Average variable cost is a firm's variable costs (human resources, raw materials, etc.) divided by the quantity of output that it produces.

⁵² Average cost or unit cost is equivalent to total cost divided by the number of goods finally produced.

⁵³ CJEU, Case C-333/94, *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-05951 para. 41.

⁵⁴ *Report on Predatory Pricing*, (2008) p.25 seen on International Competition Network's webpage on 2014.02.12.

⁵⁵ Dermot Nolan, *Predatory Pricing in an Oligopolistic Framework* Royal Holloway, University of London: Discussion Papers in Economics, No. 4 (1998), p.20.

⁵⁶ Charles W. Sherrer, *Predatory Pricing: An Evaluation of Its Potential for Abuse under Government Procurement*, *Journal of Corporation Law*, Vol. 6, No 3 (1981) p. 547.

of sales below cost and of a market structure conducive to predation and recoupment' have made it hard for a plaintiff to succeed in US trials.⁵⁷

With regard to these facts, public tenders are better protected of such practices in the EU than in the USA. First of all, in the test proposed by the CJEU, proof that the undertaking concerned had a 'realistic chance of recouping' their loss is not needed.⁵⁸ In contrast, besides the need to prove recoupment, the USA system also rallies itself with the neoclassical price theory principles when adding the market structure test to an already more exigent analysis.

Furthermore, following this predatory paradigm, attention must be given to prior economical mechanisms that can influence such market behavior. For example, using profits from one market to compensate losses in another market by undertakings active on different fields (e.g. production and supply) can be a good instrument to 'dump' prices.

Predatory and profit aiming cross subsidization is for sure the most alarming for the market. In this case, the main purpose of the company is to 'drive out' competitors and achieve a monopolistic status.⁵⁹ Furthermore, predatory and non-profit aiming is damaging as well; this kind of practice suits most of the government companies as these are presumed to have non-profit purposes.⁶⁰ In those two cases, cross-subsidization involves below-cost pricing and is thus subject to antitrust scrutiny⁶¹ mostly under the principles of 'competition on the merits' and the 'special responsibility of the dominant undertaking'.⁶²

However, when it comes to the sole outcome of below cost selling, member states policies are divided. The practice is banned and markets are 'safe' in Belgium, France, Ireland, Spain, and are restricted in other countries including Austria and Sweden, whereas it is generally allowed in Netherlands and the UK; also, in the US, below cost pricing is illegal when it is done with predatory purpose.⁶³

⁵⁷ Richard Lindberg, *The Ambiguity of Predatory Pricing: Strategy as A Clarifier*, seen on Lund University's webpage on 2014.03.14.

⁵⁸ *Ibid.* p. 44.

⁵⁹ Kenneth Fjell, *A Cross-subsidy Classification Framework* (2000) p. 5, seen on The Norwegian School of Economics and Business Administration's webpage on 2014.02.20.

⁶⁰ *Ibid.* p.6

⁶¹ Zhijun Chen, Patrick Rey *Competitive Cross-Subsidization*, Toulouse School of Economics Working Paper, No. 808 (2013), p.3.

⁶² Damien Geradin, Anne Layne-Farrar, Nicolas Petit, *EU Competition Law and Economics* (Oxford, Oxford University Press 2012) p. 207.

⁶³ *Ibid.*

In this resort, cross subsidization strategies are part of the idea of freedom to conduct business⁶⁴ established by the EU Charter of Fundamental Rights and in most of the times it comes as a legitimate answer to competitive pressure. However, from an antitrust point of view, this freedom should bare exceptions when there can be proven a predatory intent.

An economical test developed to identify such practices (i.e. cross subsidizing) is the *Faulhaber* rule; in this matter, public tenders have to set a price at (or above) the incremental cost⁶⁵, prefiguring that they shall make profits;⁶⁶ also, in multi-product companies, common costs must be distributed in a ‘equitable way’ as no category of consumers is discriminated by paying more.⁶⁷

However, as it will be analyzed in the next chapter, certain activities which, as a rule, fall within the scope of the public power (Services of General Economic Interest, here and after SGEIs), cannot be subject to a criteria of profitability as they are not meant to generate profits.⁶⁸

On the other hand, it is said that prices are the ‘lingua franca of markets’.⁶⁹ From a system perspective, markets fundamentally entail the feedback of information in the form of ‘price signals’.⁷⁰ Embracing this kind of reasoning, scholars belonging to the Economic Theory of Regulation develop on ‘signaling, a sub-category of predatory pricing’. In their view, an apparently abnormally low tender on a newly liberalized market might signal the competitor that they should, in the future, abstain from competing for that particular contract or that a certain pricing threshold should be respected.⁷¹

Besides the already discussed profit sacrificing element, this theory puts more value on the idea of foreclosure as part of the general framework of understanding the exclusionary conduct.⁷²

⁶⁴ Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 art. 16: *Freedom to conduct a business*: ‘The Freedom to conduct a business in accordance with Community law and national laws and practices is recognized.

⁶⁵ Incremental cost is the change that a firm faces when producing one supplementary unit of goods.

⁶⁶ Grit Skovgaard Ølykke, op. cit., p.312

⁶⁷ Ibid. p. 322.

⁶⁸ Christopher H. Bovis, *Public Procurement, State Aid and Services of General Economic Interest*, European Law Journal, Vol. 11, No. 1 (2005) p. 5.

⁶⁹ Giuliano Amato, Claus Dieter Ehlermann, op. cit., p. 250.

⁷⁰ Hideyuki Mizuta, Ken Steiglitz, Erez Lirov, *Effects of price signal choices on market stability*, Journal of Economic Behavior & Organization, Vol. 52, No. 2, (2003) p. 236.

⁷¹ Grit Skovgaard Ølykke, op. cit. p.115.

⁷² COM, DG Competition guidelines on Predatory Pricing, p.2 seen on the International Competition Network’s webpage on 2014.02.17.

The threat of future predation may constitute a ‘barrier to entry’ for prospective competitors; for example entry barriers exist when a new market must endure costs that the predator is not bearing, or no longer faces (e.g. the need to hire more employees in order to be in compliance with the contract award demands). The most frequent example is sunk costs—‘fixed cost investment that cannot be withdrawn from the market except at large sacrifice’.⁷³ In this way, signaling can be a useful tool in newly liberalized markets where usually the state company still benefits from a *de facto* monopoly (e.g. the main supplier of energy for the biggest part of the country’s industry) and thus has the power to foreclose it.

There is also the minority part of doctrine considering that ‘the greater the profits now being reaped, the greater the incentives’ for potential new entrants.⁷⁴ However, this might apply on an oligopoly procurement market (e.g. public works) where, there are enough relatively equal players and equilibrium exists even though some investment in market access prevention might be happening.⁷⁵

Summing up, predatory strategies are clear justifications for abnormally low tenders. Even though, on the short run the public authority benefits from a super competitive offer, in perspective, competition on the market can be severely distorted. In certain cases, predation may be committed to facilitate the perpetration of another anticompetitive effect. In this resort, an unsanctioned predation can lead to other abuses, this time exploitative; exemplifying, once in a monopolistic position the firm can limit production on the given market, apply different conditions to transactions of same nature or ‘tie’ the contracting authority.⁷⁶

Moreover, as public authorities can opt for a contract (e.g. supply) with one or more renewal options (e.g. 3+1+1-year contract),⁷⁷ the predator can, in this situation, by renewing, monopolize that service for a longer period of time with the chance of, afterwards, gradually imposing new more favorable conditions by taking into account the alleged ‘changes in quantity or value’ which would had occurred in the past (i.e. 12 months).⁷⁸

⁷³ Patrick Bolton, Joseph F. Brodley and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, Georgetown Law Review, Vol. 88, No. 544 (2000) p. 2273.

⁷⁴ Paul P. Craig, Gráinne de Búrca, op. cit, p. 1040.

⁷⁵ Dermot Nolan, op. cit., p.4.

⁷⁶ Treaty of the Functioning of the European Union [2010] OJ C 83/47, art. 102.

⁷⁷ Kristian Hartlev, Morten Wahl Liljenbøl, op. cit., p. 64.

⁷⁸ Directive 2004/17/EC, art. 17.

2.3 Dumping – *stricto sensu*

First of all it must be emphasized that, in a wide sense, all of the practices presented in this first chapter can be considered to have the effect of dumping (lowering) prices. However, in this section the author's attention shall be focused upon what the doctrine understands as classic examples of dumping.

Starting, the idea of dumping has been mostly defined as 'price discrimination' between domestic markets.⁷⁹

To this point, companies can derive advantages not only from violating the negative obligation of abstinence from uncompetitive behavior. Sometimes they also neglect the positive obligations that they incubate. For example, certain firms avoid paying their taxes, act in breach of worker's rights, ignore environmental standards or try to take advantage of artificially lower priced imported goods. The outcome for these situations is that undertakings in question gain an unjust financial advantage that they can afterwards use when 'playing' on the public procurement market.

While avoiding paying taxes might be more difficult to disguise, as the rule is that contracting authorities require for tax clearance certificates,⁸⁰ fiscal dumping might still occur when member states engage themselves in attracting trade and investment unfairly by practices of 'harmful or predatory, lower taxes'.⁸¹ Moreover, as far as harmful tax measures are 'replicated' in several countries, there is of course the danger of a 'race to the bottom', which will distort mainly competition and in the same time the public procurement market.⁸²

In this matter, 'tax havens' and offshore financial centers give the chance for financial engineering. This happens by artificially lowering tax liabilities in higher tax administrations by 'transferring profits to low or zero tax jurisdictions'.⁸³ For example, within the Union, the British Channel Islands are 'home' places to many financial institutions and undertakings activating in the insurance business due to their low taxes.⁸⁴

⁷⁹ Edwin Vermulst, *EU Anti-Dumping Law and Practice*, 2nd edition, (London, Sweet&Maxwell 2010) p. 1.

⁸⁰ *Public Procurement Guidelines - Competitive Process*, p. 10, seen on Environ's webpage on 2014.02.19.

⁸¹ *Fiscal Dumping* seen at Euro Know's webpage seen on 2014.02.21.

⁸² Wolfgang Schön, *Tax Competition in Europe*, (Amsterdam, IBFD Publications 2003) p. 28.

⁸³ DG Internal Policies, *European Initiatives on eliminating tax havens and offshore financial transactions*, p.34 seen on the European Parliament's webpage on 2014.02.20.

⁸⁴ *The 'who's who' of European tax havens*, seen on Deutsche Welle's webpage on 2014.02.21.

A first and administrative way to defend the domestic tax base is by implementing ‘counter-measures’ to nullify the effects (e.g. when assessing upon the fiscal clearance certificate). Such measures can be ‘the application of tax abuse rules or principles⁸⁵, CFC legislation⁸⁶, rules on residence and immigration, the denial of tax treaty entitlements, the application of transfer pricing rules⁸⁷ or the non-deductibility of certain expenses can be efficient remedies’.⁸⁸

Legal harmonization is a second way to deal with the problem. However, this area of interest is ‘flooded’ with soft law instruments. For example, the *Code of Conduct for Business Taxation* or the *Commission Communication on Preventing and Combating Financial and Corporate Malpractice* clearly do have political force but are non-legally binding instruments.⁸⁹

Summing up, *lato sensu*, fiscal policies remain the attribute of national sovereignties; in consequence, the discussion regarding it remains a political one, which will mainly be related to the sphere of state measures distorting competition.⁹⁰

Seeking the same outcome, companies also engage in social, environmental and trade dumping, with the scope of gaining advantage over other market participants; while the first two notions involve lowering both, levels of remuneration and minimum social demands respectively pollution standards, the third relies on lowering the price of imported (from third countries) goods.⁹¹

According to the new Public Procurement Directives, ‘bidders can be excluded from the procedure, if they infringed Union or national legislation in the field of social, labor or environmental law’. Moreover, contracting authorities will reject tenders if they have established that they are abnormally low because of such violations.⁹²

The new Directives promote the use of public procurement exigencies in order to enforce social, environmental and labor law standards. This way, the Union

⁸⁵ COM(2007)785, Commission communication on the application of anti-abuse measures in the area of direct taxation seen on European Commission’s webpage on 2014.02.21.

⁸⁶ Controlled foreign corporation law functions in parallel to tax treaties and provides the way how taxpayers must declare their foreign earnings.

⁸⁷ Transfer pricing is a ‘profit allocation system’ used to impose a multinational companies’ net profit or loss to countries where it conducts business.

⁸⁸ Wolfgang Schön, *op. cit.*, p. 30.

⁸⁹ *Corporate and financial malpractice*, seen on European Commission’s webpage on 2014.02.25.

⁹⁰ *Harmful tax competition* seen on European Commission’s webpage on 2014.02.23

⁹¹ Magdalena Bernaciak, *Social dumping: political catchphrase or threat to labor standards?*, European Trade Union Institute (Brussels, ETUI Printshop 2012) p. 24.

⁹² Directive 2014/24/EU para. 103.

legislators makes possible to use procurement ‘for the pursuit of such secondary policies’.⁹³

Analyzing the social issues (most present in the working sector), besides wage dumping, companies posting workers or employing migrant labor can gain unfair advantages by lowering other employment standards. Good examples are the facts of forcing their employees to work longer hours in spite of not giving extra compensation, establishing salary deductions for working tools or charging abnormally high fees for accommodation or transport to the place of performance (especially in the public works area).⁹⁴

In consequence, as the degree of ‘deliberate harmonization in the Union legislation aims at combating these specific distortions’ that can injure particular areas of the economy,⁹⁵ the Union bodies enacted the Posted Workers Directive.

The result is a ‘floor of rights’ that puts the posted workers on the same level of protection with the one enjoyed by the worker in the host Member State.⁹⁶ The Directive requires Member States to ensure that posted workers are subject to the host country's laws concerning most importantly ‘maximum work periods and minimum rest periods, minimum rates of pay, including overtime rates, health, safety and hygiene at work or minimum paid annual holidays’.⁹⁷

However, as in the *Laval* case, for countries like Sweden, where the minimum wages in the construction field are usually established after collective negotiations on a case-by-case context, the CJEU considered that a salary rate constructed in this way couldn't be instituted under Directive 96/71/EC.⁹⁸ Following the legislation, the *Directive on third-country seasonal workers* states that this category of individuals has the above mentioned rights as well.⁹⁹ Also, the new *Posted Workers Proposed Directive* provides with compliance monitoring instruments in the matter of national control measures (e.g. inspections), including those that may be applied third-country

⁹³ Albert Sánchez Graells, *Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive*, (2013) p. 4 seen on SSRN's webpage on 2014.03.20.

⁹⁴ Magdalena Bernaciak, op. cit. p.26.

⁹⁵ Paul Davies, Antonie Lyon-Caen, Silvana Sciarra and Spiros Simitis, *European Community Labor Law: Principles and Perspectives*, (Oxford, Clarendon Press 1996) p. 79.

⁹⁶ Philippa Watson, *EU Social and Employment Law*, (Oxford, Oxford University press 2009) p. 336.

⁹⁷ Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services, [2006] OJ L 018, art. 3.

⁹⁸ CJEU Case C-341/05, *Laval un Partneri Ltd v Svenska*, [2007] ECR I-11767, para. 63.

⁹⁹ *Council adopts directive on third-country seasonal workers*, seen on European Union's webpage seen on 2014.02.27.

nationals who are posted within the EU.¹⁰⁰ Also, there exist a double protection regarding the possible dumping from this category of workers as, while being present on the Union territory they must also obtain visas and permits.¹⁰¹

Considering other possible abuses, the new procurement legislation also allows for exclusion in case of practices related to ‘child labor and other forms of trafficking in human beings’ that injures both, the economic environment and social ethics.¹⁰²

It shall however be seen if all this regulatory framework will have a clear administrative transposition and assure compliance from all of the employers; in the author’s view, the big problem is represented by the weak enforcement of the rules as, most of the times, even though in breach of national/Union law, such contractual relationships are seen as ‘win-win’ situations by the two parties.

Going further, firms facing stricter environmental norms are bearing much higher costs.¹⁰³ In order to lower their expenses and have a financial advantage, some undertakings disregard such quality levels.

Dumping can exist in this area as well; for example, environmental dumping is the use of cross border shipment of residual materials from one sovereignty to another with the aim of taking the waste to a country that has not as severe environmental laws or where such laws are not properly enforced.¹⁰⁴

As a remedy for such practice, Regulation 1013/2006 (Basel Regulation) serves to implement not only the EU’s own objective in the waste sector, but also most of its international law obligations. For example specific waste treatment that takes place in low-cost installations and which does not apply the ‘best valuable techniques’ can attract sanctions in the public procurement procedures.¹⁰⁵ It looks that the ‘polluter pays principle’ extends and we are facing a double punishment, one

¹⁰⁰ COM(2012) 131 final Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, para. 23.

¹⁰¹ Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2012] OJ L 343/1, art. 12.

¹⁰² Directive 2014/24/EU, art. 57.

¹⁰³ Hans Veder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?*, (Amsterdam, European Law Publishing 2003) p. 46.

¹⁰⁴ Environmental Dumping, seen at Majmaah University’s webpage on 2014.02.27.

¹⁰⁵ Jan H. Jans, Hans H.B. Vedder, *European Environmental Law*, 3rd edition, (Amsterdam, European Law Publishing 2008) p. 438.

resulting from the Regulation (i.e. severe fines) and one from the Proposed Public Procurement Directive (i.e. exclusion from the procedures).¹⁰⁶

When considering imported goods, the current thinking in international trade provides that it is unfair that a manufacturer who takes advantage from ‘protectionist’ behavior in his domestic market, and therefore can ask for high prices there, subsequently uses such ‘monopoly profits’ in order to subsidize exports at lower prices.¹⁰⁷

With regard to this fact, chances to influence public procurement are lower. The EU deals with such issues through *Regulation 597/2009 on protection against subsidized imports from countries not members of the EU* (e.g. products originating from subsidized industries), *Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community* (e.g. products from non-market economy countries) and *Regulation 260/2009 on the common rules for imports*.¹⁰⁸ As it can be seen, in contrast with, for example, fiscal dumping, the EU has a solid mechanism of protecting its market and implicitly the public procurement field from such practices that can hinder competition.

In this resort, the Union can impose anti-dumping duties, which levels should be either equal with the margin of dumping or subsidy or with the level of injury supported by the Union industry;¹⁰⁹ also, the same countervailing remedy is provided for subsidized imported goods.¹¹⁰

Drawing an analogy with the sphere of Union competences it can be seen that, where it has exclusive (e.g. customs union, common commercial policy)¹¹¹ or shared competences (e.g. environment, social policy for the Treaty aspects)¹¹² the anti-dumping protection is considerably higher than areas where the Union lacks substantive prerogatives (e.g. fiscal area).

¹⁰⁶ Monika Hinteregger, *Environmental Liability and Ecological Damage in the EU*, (Cambridge, Cambridge University Press 2008) p.8.

¹⁰⁷ Edwin Vermulst, *EU Anti-Dumping Law and Practice*, 2nd edition, (London, Sweet&Maxwell 2010) p.1.

¹⁰⁸ Van Bael & Bellis, *EU Anti-Dumping and other Trade Defence Instruments*, 5th edition, (Alphen aan den Rijn, Kluwer Law International 2011) p. 20.

¹⁰⁹ Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-Dumping Law*, 2nd edition, (Oxford, Oxford University Press 2009) p. 600.

¹¹⁰ Konstantinos Adamantopoulos, María J. Pereyra-Friedrichsen, *EU Anti-Subsidy Law & Practice* (Bembridge, Palladian Law Publishing Ltd 2001) p. 190.

¹¹¹ Treaty of the Functioning of the European Union, art. 3.

¹¹² *Ibid.* art. 4.

2.4 Seeking renegotiations – ‘hold-ups’ and the subsequent conditional performance

Hold-up problems take place where the bidder is in the posture to force the contracting public authority to renegotiate the agreement by using the intimidation of not fulfilling the contract else ways.¹¹³ Another example, which verifies, as in the case predatory strategies, the abuse of dominance criteria is the one in which the supplier can ‘hold up’ the public authority if the later does not have the option of receiving the goods or services in question from another firm (e.g. cases of exclusive distributorship). In such scenario the supplier is in the situation to demand excessive prices based on the initiation of the hold up.¹¹⁴

With regard to this fact, when a tendered price is apparently low, the doctrine considers that a ‘undesired risk of opportunistic hold-up’ arises; in this case, the tenderer is able to force a renegotiation at the threat of not diligently achieving his contractual obligations.¹¹⁵

For example, public procurement contracts awarded via competitive tendering are most of the time being renegotiated. This fact generates important post contractual costs and questions the effectiveness of the hall proceedings; in a study of public works procurement contracts in Italy, it was established that, for about a quarter of all works, ‘adaptation costs consecutive to renegotiations’ raised the first price by 10%.¹¹⁶

On the other hand, procurement directives contain no *expressis verbis* statement governing existing contracts, which could give the impression that the procurement rules do not apply to them.¹¹⁷

However, it should be noted that the rules on public procurement do not allow for limitless renegotiation after the contract has been awarded.¹¹⁸ The key concept on which the supranational legislator emphasizes is the fact that the ‘original terms of the contract must not be substantially altered.’¹¹⁹

¹¹³ Grit Skovgaard Ølykke, op. cit., p. 119.

¹¹⁴ Gustavo Piga, Steen Treumer (eds.), *The Applied Law and Economics of Public Procurement*, (New York, Routledge 2013) p.43

¹¹⁵ Grit Skovgaard Ølykke, op. cit., p. 119.

¹¹⁶ Eshien Chong, Carine Staropoli, Anne Yvrande-Billon, op. cit., p. 2.

¹¹⁷ Kristian Hartlev, Morten Wahl Liljenbøl, op. cit., p. 52.

¹¹⁸ Grit Skovgaard Ølykkeop. cit p. 119.

¹¹⁹ Directive 2004/17/EC, art. 31.

From a broad perspective, ‘substantial alteration’ is a legal term that defines a change that may ‘violate a specific principle of community law, especially the principles of free and undistorted competition, of equality of treatment of the tenderers, and above all the principle of ensuring the effectiveness of the Union Directives’.¹²⁰

Where there has been substantial cost growth during the execution phase of a public contract, it is often proof that the ‘contractor bought its way into the contract’ by intentionally transmitting a bid below his anticipated cost of performance.¹²¹ For example, bearing in mind the abovementioned 10% threshold, in the CJEU’s view is that, by agreeing an increase of the original tender price of up to 10% in connection to the earlier procedures, the piece of legislation implementing the European laws into the Spanish legal system were in breach of the two public procurement Directives, since they allowed a ‘substantial alteration of one of the original conditions of the contract, namely the price’.¹²²

On the other hand, leaving a wider margin for post contract reviews, the new procurement provisions state that the renegotiation frameworks can be ‘10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts’.¹²³

However, in completion, the CJEU does not resume its reasoning only at the price criterion. In the *Nachrichtenagentur* case the Court delivered a test to assess if a change is material. It stated that ‘if there will be conditions introduced which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or accepted’,¹²⁴ the conditions for materiality are met.

Furthermore, if the scope of the contract prolongs its effects to cover services that were not previously covered (e.g. from renovation of a section to renovation of the whole building) or if the economic structure of the agreement is revised in favor

¹²⁰ *Negotiated procedure with publication of a contract notice*, seen on Cyprus Public Procurement Directorate on 2014.02.04.

¹²¹ Charles W. Sherrer, op. cit., p. 546.

¹²² CJEU, Case C-84/03, *Commission of the European Communities v Kingdom of Spain* [2005] ECR I-00139 para. 43.

¹²³ Directive 2014/24/EU art. 89.

¹²⁴ CJEU, Case C-454/06 *Nachrichtenagentur GmbH v Republik Österreich*, [2008] ECR I-04401 para. 35.

of the supplier in a way which was not provided for in the conditions of the first awarding documents the same outcome is reached.¹²⁵

The materiality test is especially useful in the light of the new proposed directive due to the fact that it is very suitable with the MEAT criteria, which, as already stated, is being placed at the forefront of the award criteria.

In consequence, the ‘sanction’ for any substantial modification relating to the actual subject matter of the contract must be considered equivalent to the completion of a new contract that also requires new competition.¹²⁶

For example, changes to the technical specifications, the execution timetable (e.g. deadlines), the conditions for acceptance of the deliverables or the construction techniques, are to be seen as substantial or material alterations to those terms.¹²⁷

In order to bypass such complications, the rejection on grounds of risk of non-performance becomes the primarily reason for which abnormally low tenders are being disregarded.¹²⁸ In this sense, according to the case law, a contracting authority can use ‘predetermined calculation methods for classifying tenderers as abnormally low’¹²⁹ but, as mentioned before, must allow the defendant to present his arguments.

In this matter, the ability to perform the contract must however be assessed in a wide sense, covering, at a first sight, all the tenderer’s ‘activities, obligations liabilities, general financial situations’¹³⁰ and of course, as mentioned above, where the national legislation permits, the overriding reasons.

For example, it is for sure that a tenderer in a critical economic situation will tender more ‘aggressively’ because he has little to loose due to limited liability in the event that it goes bankrupt as a result of the irresponsible bids.¹³¹

On the other hand, the new Directives create another optional exclusion ground that is based on poor previous performance by the bidder, which is meant to punish operators that have abused by such practices in the past.¹³²

¹²⁵ Ibid. para.36-37.

¹²⁶ COM(2004)327 final Green Paper on Public-Private Partnership and Community Law on Public Contracts and Concessions p.16 seen on European Commission’s webpage on 2014.03.03.

¹²⁷ *Guide to the Community Rules on Public Works Contracts*, seen on European Commission’s webpage on 2014.03.03.

¹²⁸ Grit Skovgaard Ølykke, op. cit p. 119.

¹²⁹ Sune Troels Poulsen, Peter Stig Jakobsen, Simon Evers Kalsmose-Hjelmborg, *EU Public Procurement Law*, (Copenhagen, DJØF Publishing 2012) p.507.

¹³⁰ Grit Skovgaard Ølykke, op. cit., p. 232.

¹³¹ Ibid. p. 117.

¹³² Albert Sánchez Graells, Exclusion, *Qualitative Selection and Short-listing in the New Public Sector Procurement Directive*, p. 10.

In the same time, the hold-up problem is an important element of the ‘incomplete contracting approach’, which has become a ‘leading paradigm’ in institutional and organizational economics.¹³³ In contrast with jurists, whom perceive hold-ups as pure effects of bi/multilateral contracts, economists develop a more holistic and dynamic view by trying to answer to this issue while placing it in interconnection with the entire market structure and behavior.

From economists’ perspective, financial renegotiations and the associated hold-up problems may be most probably taking place in longer term projects as, public-private partnerships, when project cost, market demand or other market conditions get ‘significantly unfavorable’ and cause the promoter to renegotiate with the government and ask for rescue (e.g. subsidies).¹³⁴ As it can be seen their approach is closer to the law theory of un-foreseeability and does not necessary share the jurists’ preoccupation for deceptive intent and potential unfair gain.

Deeping the analysis, another and frequently neglected consequence of the parties reviewing existing contracts is the fact that such changes may imply illegal State aid.¹³⁵ In this sense, the procurement Directives provide that ‘where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected’.¹³⁶ As it will be seen in the following chapter of the thesis, this is drastically sanctioned and can lead to further lose for the company in question.

Chapter II: State aid

3.1 Defining the concept

State aid has been defined as ‘assumption by the state of costs which normally fall on undertakings’ or the acceptance by the state of part of the risk which is normally supported by firms and for which the state is not responsible;¹³⁷ as stated in the *Bretagne Angleterre Irlande* case, the CJEU emphasized that State aid rules are to

¹³³ Eva I. Hoppe, Patrick W. Schmitz, *Can Contracts Solve the Hold-Up Problem? Experimental Evidence, Games and Economic Behavior*, Vol. 73, No. 1, (2011) p. 186.

¹³⁴ Piet de Vries, Etienne B. Yehoue, *The Routledge Companion to Public-Private Partnerships*, (New York, Routledge 2013) p. 183.

¹³⁵ Kristian Hartlev, Morten Wahl Liljenbøl op. cit, p.52.

¹³⁶ Directive 2004/18/EC, art. 57.

¹³⁷ Andrew Evans, *European Community Law of State Aid* (Oxford, Clarendon Press 1997) p. 29.

also be applicable to agreements for consideration, established between the government having the role of purchaser and a seller (i.e. private or public firm).¹³⁸

In this resort, in order to be considered as State aid, and in order to fall within the general prohibition and to need prior authorization, four cumulative elements have to be met; the measure must be granted out of State capacities which confer an selective economic advantage to the companies, fact that might affect intra-Union trade.¹³⁹

In the same time, State aid is perceived as a ‘political instrument’ for Member States’ government, who intervene in their countries’ economies with the purpose of helping their own enterprises. This, is however done at the detriment of competitors located in other Member States that, in the context of public tenders, find themselves in a disadvantageous situation.¹⁴⁰ The political nature of State aid is further strengthened by the fact that this instrument may also be used for non-economic purposes, like, for example, the protection of national strategic interests.¹⁴¹

Having this as a premise, in a recent communication, the European Commission (here and after, the Commission) emphasized that State aid control aims at ensuring that the internal market is not distorted by uncompetitive behavior of Member States favoring some particular economical actors.¹⁴² In the absence of such control, the EU would be transformed in the ‘wrestle arena of the Member States’ ministries of finance’, fact that would also have a severe impact on the procurement or privatization markets.¹⁴³

Nowadays State aid control has been divided into different sections. The assessment is being carried on both: ‘horizontal’ (e.g. environmental, R&D) and ‘vertical’ (e.g. sectorial) aid.¹⁴⁴

Considering the selective advantage criteria, in *Belgium v Commission*, the CJEU stated that a measure allowing the creation of working places by decreasing the

¹³⁸ Maria Geilmann, Marta Ottanelli, *The fourth Altmark criterion*, (2012) p. 3, seen on Maastricht University’s webpage on 2014.03.08.

¹³⁹ Albert Sánchez Graells, *Public Procurement and State Aid: Reopening the Debate*, Public Procurement Law Review, Vol. 21, No. 6, (2012) pp. 211-212.

¹⁴⁰ Kelyn Bacon, *European Union Law of State Aid*, 2nd edition, (Oxford, Oxford University Press 2013) p. 9.

¹⁴¹ Leigh Hancher, Tom Ottervanger, Piert Jan Slot, *EU State Aids*, (London, Sweet & Maxwell 2012) p. 33.

¹⁴² COM(2012) 209, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee the Committee of the Regions on EU State Aid Modernisation (SAM), para. 9.

¹⁴³ Kelyn Baconop, op. cit., p. 30.

¹⁴⁴ Andrew Evans, op. cit. p. 47.

social contributions (in some sectors of activity) was to be interpreted as State aid;¹⁴⁵ neither the high total of benefiting firms nor the variety of the areas concerned did not leave to the conclusion that the measure was of general applicability.¹⁴⁶

As it can be seen from this example, from other CJEU decisions¹⁴⁷ and considering the dominant opinion unanimously embraced by the doctrine, the concept of aid covers the granting of an ‘advantage in the broadest sense of the term, in any form whatsoever’ and therefore a broader area than the concept of subsidy.¹⁴⁸ In this matter, tax exemptions, exclusions from para-fiscal charges, preferential interest rates, favorable loan guarantees, the provision of land or buildings on special terms, indemnities of fiscal or social contributions and dividend guarantees or any other advantage can constitute State aid.¹⁴⁹ In a nutshell, State aid is a measure ‘simultaneously entailing benefits for undertakings and burdens for the state’.¹⁵⁰

Exemplifying further, governmental help might be delivered just as much through the administrative methods of the tax authorities whenever a selective advantage can be upheld (e.g. discretionary tax collection).¹⁵¹

The Organization for Economic Co-operation and Development (here and after, OECD) illustrates some of the types of aid that Member States can use in their industrial policies. In their report, elements like ‘government procurements, exemptions from antitrust laws, regulatory barriers to competition, access to credit, arranged mergers and acquisitions, control of acquisitions of national companies by foreign investors, easy access to commodity resources and the products of monopolist companies’ are considered to be incentives equivalent to State aid that can influence final prices.¹⁵²

Going further, when it comes to State aid law as part of Competition Law, the doctrine stated that, in order to distort the competitive environment, it is enough that a

¹⁴⁵ CJEU Case C-75/97, *Kingdom of Belgium v Commission of the European Communities* [1999] ECR I-03671 para. 1.

¹⁴⁶ Conor Quigley, Anthony M. Collins, *EC State Aid and Policy*, (Portland, Hart Publishing 2003) p. 49.

¹⁴⁷ CJEU, Case C-78/76 *Steinike & Weinlig v Federal Republic of Germany* para [1977] ECR 595, para. 8.

¹⁴⁸ Martin Heidenhain, *European State Aid Law Handbook*, (Munchih, C.H. Beck 2010) pp.15-16.

¹⁴⁹ Paul P. Craig, Gráinne de Búrca, op. cit., p. 1088.

¹⁵⁰ Andrew Evans, op. cit. p. 23.

¹⁵¹ *Commission Notice on the application of the State aid rules to measures relating to direct business taxation* para. 10, seen on European Commission’s webpage on 2014.02.14.

¹⁵² Glyn Gaskarth, *Gamekeeper or poacher?*, (2013) p. 11, seen on Civitas’s webpage pn 2014.02.18.

measure somehow rises the market status of the beneficiary by decreasing his expenses.¹⁵³

As it can be interfered, free undistorted competition requires that not only private anti-competitive behavior is banned, but also state intervention in the market must be subject to an effective control mechanism.¹⁵⁴

The general rule state by the CJEU in *Arge* case was that ‘contracting authority allowing bodies receiving subsidies, which enable them to submit lower offers than those of the other, does not constitute covert discrimination’;¹⁵⁵ moreover, this cannot justify the exclusion of entities from a public tendering procedure *a priori* and without further consideration.¹⁵⁶

On the other hand, the exception from this wide principle is found in the Procurement Directives which provide that a tender may be rejected where a public authority considers that a tender is abnormally low because the tenderer has received (or misused) State aid. However, the tender can be excluded only if he is unable to show that the aid in question was received legally.¹⁵⁷

Furthermore, the procedure provides that the Commission must be informed in case of such rejection¹⁵⁸ as it has the exclusive authority to rule on the compatibility or incompatibility of State aid with the single market.¹⁵⁹

To this extent, as the General Court (here and after, the GC) has clarified, the burden of proving that all or parts of the authorized State aid is illegal or has been misused by the beneficiary rests with the Commission.¹⁶⁰ In this matter, ever since the *Sate Aid Action Plan* (2005), the Commission carries out more seriously through economic elements of State Aid (i.e. dynamic approach) and does not resume its analysis to formal assessments.¹⁶¹

On the other hand, giving primacy to this economic path, the doctrine proposes an exception; where the unlawfully granted or misused State aid has zero

¹⁵³ Kelyn Bacon, op. cit., p. 9.

¹⁵⁴ Michael Sánchez Rydelski, *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, (Cambridge, Cambridge University Press 2006) p.11.

¹⁵⁵ CJEU, Case C-94/99 *ARGE Gewässerschutz v Bundesministerium für Land* [2000] ECR I-11037, para. 38.

¹⁵⁶ CJEU, Case C-305/08, *Conorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMA) v Regione Marche*, [2009] ECR I-12129 para 34.

¹⁵⁷ Directive 2004/18/EC, article 57.

¹⁵⁸ Ibid.

¹⁵⁹ Martin Heidenhain, op. cit. 15-16.

¹⁶⁰ Ibid. p. 669.

¹⁶¹ Leigh Hancher, Tom Ottervanger, op. cit., p. 30.

effects on the goods' full costs and no consistent link with the strangely low bid submitted is proven, the tender should still be accepted.¹⁶² However, even though agreeing with this view that the public procurement rules should not sanction such behavior, the State aid remedies must still be enforced as the aid in question might distort other segments of the market.

Summing up, as it can be seen, in many of the situations there is a double punishment, one imposed by the public authority that consists in the rejection from the tenderer and one that will be decided by the Commission and will most probably seek at the recovery of the illegal State aid. In the next sections I shall develop on points in which State aid and public procurement interact and have the potential of distorting contractual considerations.

3.2 Misused aid

The more complicated problem in this area appears when legally granted State aid is being misused; citing Article 1 of the Procedural Regulation, 'misuse of aid' means 'aid put into effect in contravention of Article 107(3) TFEU'; article 108(2) TFEU states that proceedings are applicable in all case typologies: 'notified, unlawful, existing or misuse of aid'. Furthermore, article 20(2) of the Procedural Regulation provides that 'any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid'.¹⁶³

Usually, misused aid involves action by the beneficiary rather than the Member State and comes into action when aid is used by the receiver in breach of the European Commission's imposed conditions.¹⁶⁴

However, the wording 'granted legally' must not be confused with the idea of 'legal state aid'¹⁶⁵ as the latter relates to the assessed compatibility of the aid with the internal market – analysis carried by the Commission after prior notification, the former will not encompass a substantive financial test and will just be a 'bureaucratic' phase carried by the awarding authority.

¹⁶² Martin Heidenhain, *op. cit.*, p. 814.

¹⁶³ DG Competition, State Aid – *Manual of Procedures* seen on the European Commission's webpage on 2014.02.22.

¹⁶⁴ Conor Quigley, Anthony M. Collins, *op. cit.*, p. 294.

¹⁶⁵ Kelyn Bacon, *op. cit.*, p. 101.

As it can be deduced, this will not be a suitability analysis but rather one in which the contracting authority will look to see if the aid was notified and approved by the Commission or whether it falls within the scope of a block exemption provision.

It can be inferred that the ‘monopolistic’ competence of the European Commission when applying the relevant legislation maintains the analysis that public bodies can use to abnormally low tenders tainted by State aid ‘limited to the legality of its being granted and not of its use’.¹⁶⁶ Moreover, the wording in the new legislation: ‘compatible with the internal market within the meaning of Article 107 TFEU’ comes to strengthen even more this type of logic.¹⁶⁷

Going further, like the case of predatory pricing, the misuse of State aid can take the form of internal cross-subsidization and, as a consequence of this practice, it can unbalance the market by delivering artificially low prices.

For example, as already stated in the First Chapter, a price scheme is said to have cross subsidies if earnings from a client are lower than the incremental cost of providing services in return or if ‘some consumer prices are below average costs¹⁶⁸ and others are above’.¹⁶⁹

The CJEU, in *SFEI v La Poste* case, ruled that the provision of logistical and commercial assistance by a public entity to its subsidiaries, which are regulated by private law and carry on an activity opened to free competition, can be seen as State aid if the remuneration received is lower than the one which would have been claimed under regular market circumstances.¹⁷⁰

Trough analogy, the same problem arises when a private undertaking uses legally allocated State aid in other sectors of its activity than the one for which the aid was awarded. The effect is as harmful and the only difference is the legal qualification that, in this example, is misused and not illegal aid.

The substantive test in this case coincides with the one that can be used in the case of predatory subsidization. As already mentioned in the last chapter, the *Faulhaber* test comes as a useful tool in combating such practices.

¹⁶⁶ Sánchez Graells Albert, *Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions*, p. 6.

¹⁶⁷ Directive 2014/25/EU, art. 84.

¹⁶⁸ Also presented as ‘unit cost’, represents the total cost divided by the amount of items produced.

¹⁶⁹ Paulina Beato, Jean-Jacques Laffont (eds), *Competition Policy in Regulated Industries: Approaches for Emerging Economies*, (Washington: IBD Publications Section 2002) p.203.

¹⁷⁰ Leigh Hancher, op. cit., p. 284.

Exemplifying, in a case regarding the anthracite market (good used in electricity, iron and steel industry public procurement and also domestic use), under a law regulating coal used in the electricity industry, two German companies received subsidies from their domestic government.¹⁷¹

The Commission stated that the separation made by the Member State between subsidized and non-subsidized production on the basis of the product market was to be considered ‘artificial and unfounded’. This was because, both the domestic and industrial market were receiving the aid-supported products. Furthermore, the Union judicature assessed the State aid received helped pricing policies which did not justify production costs. Concluding, the Brussels technocrats emphasized on the fact that, *ex nunc*, goods intended for industrial and domestic usage will have to be commercialized at prices fitting the production expenses.¹⁷²

To this extent, the Commission was and will be able to take a decision ordering the Member State to suspend the aid until it assesses upon its compatibility with the internal market; where it finds out that the aid has been misused it demands for its recovery.¹⁷³ Moreover, after the recently recast of the Procedural Regulation, the Commission has powers to request data from sources other than Member States (e.g. beneficiaries) and is also attributed with the coercion mechanism of imposing fines in case of lack of compliance.¹⁷⁴ Moreover, the cooperation with the National Competition Authorities (here and after, NCAs) is another tool that the Commission can use in order to relieve itself from administrative matters.

In this sense, a NCA receives information and documents from beneficiaries of State aid, draws up their inventory, informs the Government on issues identified proposes remedies and, when the case, sends answers, explanations, documents and any other information requested by the Community procedures.¹⁷⁵

Summing up, national awarding authorities have no prerogatives when it comes to the substantive assessment on either misused or illegal State aid; they need

¹⁷¹ Commission Decision 1999/184/ESCS, *Sophia Jacoba GmbH and Preussag Anthrazit GmbH*, [1999] OJ 1999 L60/74.

¹⁷² Ibid.

¹⁷³ Phedon Nicolaides, Mihalis Kekelekis, Philip Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners*, (Hague, Kluwer Law International 2005) p. 75.

¹⁷⁴ Council Regulation (EU) No 734/2013 of 22 July 2013, laying down detailed rules for the application of Article 93 of the EC Treaty, [2013] OJ L 204/15.

¹⁷⁵ *Romanian Regulation of Procedures for Monitoring State aid*, art. 3 seen on the Romanian National Network for State Aid’s webpage on 2014.02.23

to stick to a rigid formal analysis and, in situations of doubt, can receive help from competent authorities (primarily, the Commission and the NCAs).

As it will be seen in the next chapter, besides the *Faulhaber* test (typical for misused aid and predatory pricing), practitioners have also developed substantive ‘filters’ in order to detect illegal state aid. Furthermore, the tests fit on both situations, when State aid is received through public tenders (e.g. privatization, establishment of Services of General Economic Interest, here and after, SGEIs) and also, when government incentives can distort competition and efficient public procurement (e.g. capital ‘injections’, non-diligent debt management).

All this preoccupation comes as a legit remedy mechanism due to the fact that once ‘injected’, public aid can have major implication when it comes to competition on the market and as a consequence, on the final contractual price.

3.3 Illegal State Aid

Article 107 TFEU provides that public aid granted ‘in any form whatsoever’ ‘which distorts or threatens to distort competition’ on the internal market by giving an advantage to certain companies shall be treated as illegal.¹⁷⁶ To this extent, favoring the production of certain goods that afterwards are to be sold in public tenders can be seen as distorting competition.

According to a working framework developed by Directorate General for Competition (here and after DG Competition), central in the State aid assessment is the principle of the ‘Market Economy Operator Principle’. In this matter, the main idea is to compare the state’s behavior with that of a comparable private player whom finds itself in the same situation and acts under normal market conditions. Depending on the context, the principle can have three variations: the ‘Market Economy Investor Principle’ (here and after, MEIP) – which is based on the idea of profit, the ‘Market Economy Creditor Principle’ – fundamental on the idea of repayment and the ‘Market Economy Vendor Principle’ – constructed on the aim of receiving the highest price.¹⁷⁷ Based on these principles, the Union Courts and Commission have developed tests that are used when assessing on public aid.

¹⁷⁶ TFEU [2010] OJ C 83/47 article 107.

¹⁷⁷ Adinda Sinnaeve, *Applying the concept of 'economic activity' and the 'market economy investor' test* (2012) p.10 seen on the European Commission’s webpage on 2014.02.26.

3.3.1 Market Economy Investor Principle

The Union judicature makes use of the Market Economy Investor Principle when it assesses on the capital investment that a Public body makes in private or public undertaking. The conclusion will be that there exists State aid if the investment (i.e. direct or indirect) would not be suitable from the point of view of a diligent private investor whom finds himself in a similar business context.¹⁷⁸

The policy making character of the MEIP is to make sure that there will not be intervention on the market that would otherwise help underperforming undertakings at the cost of keeping artificial prices on the market. In the same time, this particular ‘filter’ is a consistent principle that needs to be respected. It is based on the idea that the Union legislation does not aim at discriminatory treatment between public and private ownership.¹⁷⁹

However, even though embracing such logic, there are consistent elements that separate private from public undertakings. Figures like position on the market, structure, demand criteria, the way of understanding efficiency, supply conditions, the manufacturing procedures, pricing policies and the risk management can be perceived in fundamental different ways in the two sectors.¹⁸⁰

Having regard to such particularities, it has been argued that allowing national bodies to use their powers as public authorities for the interest of their investments in undertakings operating in markets that are under Competition law scrutiny would injure the Union rules in State aid and make them powerless.¹⁸¹

In this resort, the doctrine has concluded that, in applying this test, the state must be perceived as owner (i.e. concentrating on the value of the assets) and not as public authority (e.g. seeking short run results for the upcoming elections).¹⁸²

Exemplifying, when a company receives ‘fresh capital’ under circumstances that would not have been viable for a private investor operating ‘under normal market economy conditions’, a firm belief of State aid occurs.¹⁸³

¹⁷⁸ Peter L. Vesterdorf, Mogens Uhd Nielsen, *State Aid Law of the European Union*, (Sweet & Maxwell, London 2008) p. 307.

¹⁷⁹ Ben Slocock, *The Market Economy Investor*, Competition policy newsletter, No. 2, (2002) p. 23.

¹⁸⁰ Christopher H. Bovis, *op. cit.*, p.2.

¹⁸¹ GC, Case T-156/04 *EDF v Commission* [2009] ECR II-4503 para. 97.

¹⁸² Peter L. Vesterdorf, Mogens Uhd Nielsen, *op. cit.* p. 2.

¹⁸³ M. Heidenhain, *op. cit.*, p. 74.

The Private Investor Test represents the central method of assessment in this resort. Moreover, the key element on which the test is based is the ‘appropriate rate of return’ - seen as reasonable profit - that stays as a barometer for evaluating the different transactions taking place on the market.¹⁸⁴

The CJEU concluded that it is essential to provide with evidence showing that the aid is given on the basis of economic calculations similar to the ones which a ‘rational private investor’ in a comparable context would have engaged in;¹⁸⁵ moreover, the profitability assessment must be done before (and not after) proceeding to the actual investment.¹⁸⁶

More precise, the realized investment will be perceived as State aid if the financial return that the public body receives (e.g. from rent, operating taxes, publicity) is lower than what a private investor would have expected in an analogous context.¹⁸⁷ In the same time, by taking into consideration their specificities, the test developed in particular features for each and every industry (e.g. airlines, cars).¹⁸⁸

When considering the nature of the incentives, this ‘filter’ can also be used where the state is using measures that are not in the private investor’s portfolio (e.g. fiscal), if they have the objective of stimulating an economic activity.¹⁸⁹

For example, in the *EDF* case, it did not matter for the Union judiciary that the incentives delivered were ‘instruments of state power’ (i.e. tax nature - deductions) and concluded that the public body in question offered that discriminatory advantage in his posture of shareholder of the company it owned;¹⁹⁰ this way, the Court widened the area for this test in order to secure and undistorted competitive environment.

A variation of the MEIP test, with regard to the capital market is being developed by the CJEU in *Belgium v Commission* with the aim to determine whether the decision of a government (shareholder) to ‘inject’ capital, in a company facing financial problems incubates State aid; the essential criterion to determine this fact

¹⁸⁴ *Competition Competence Report, State aid & The More Economics Based Approach* (2005) p. 1 seen on European Economic & Marketing Consultants’s webpage on 2014.03.11.

¹⁸⁵ CJEU Case C-124/10 *Commission v EDF* [2012] ECR II-4503, para. 84.

¹⁸⁶ *Ibid.*, para. 85.

¹⁸⁷ Hans w. Friederiszick and Michael Toge, *Applying the Market Economy Investor Principle to State Owned Companies — Lessons Learned from the German Landesbanken*, Competition Policy Newsletter, DG Competition, No. 1, (2006) p. 105.

¹⁸⁸ Laura Elizabeth John, *State aids and publicly owned airports: the application of the private investor principle to the aviation sector* (2008) p. 3 seen on Monekton Chambers webpage on 2014.03.01.

¹⁸⁹ Magnus Schmauch, *EU Law on State Aid to Airlines: Law, Economics and Policy* (Berlin, Lexxion Publisher 2012) pp. 102-103.

¹⁹⁰ GC, Case T-156/04 *EDF v Commission* [2009] ECR II-4503 para. 92.

was whether the company had the chance (i.e. was ‘desirable’ enough) to receive the same amount on the capital market.¹⁹¹ This test is constructed on the idea of efficient State aid and aims to make sure that the national government acts in a proportionate way (as a regular shareholder) and does not confer incentives that a private associate would not have invested.

Other extensions of this principle can be transposed in areas like loans (i.e. ‘a loan does not involve state aid if it is approved under the same conditions that a commercial lender would accept’) or guarantees (‘guarantees are not perceived as State aid if they are adequately remunerated’).¹⁹²

Slightly moving to the liberalization process, when analyzing restructuring aid’s role in the privatization procedures, the Commission had the chance to deliver its opinion in three major cases related to the automobile industry (i.e. ENASA, Renault and Rover). In these situations aid in the form of ‘capital injection, debt relief and loss compensation’ was delivered in order to prepare the non-competitive undertakings for privatization. However, the measures were validated only in part by the Commission and resumed only to the restructuring plan priorities (i.e. the closure of capacities) while excluding any other excessive, above market rates, support.¹⁹³ The overcompensation was perceived as unnecessary incentive under the MEIP; moreover the sole aim was to make the undertakings competitive enough for privatization and not to give a substantive advantage to the further buyer of the asset.

Concluding, nowadays, in its recent casuistic, the CJEU has made a transition from a criteria based on the ‘normal investor’ (i.e. aiming at short term profit) to one based on a ‘reasonable investor’ (i.e. aiming at longer term profitability) and who also ‘pursues goals derived from broader economic policy with his investments’.¹⁹⁴ In this way, the analysis became less rigid and more dynamic when assessing on the current economic realities.

However, the idea of ‘broader economical policy’ should be limited within the frames of the private sector dimension definitions. If this way of reasoning extends as well to the public sector, economical policy may incubate strategic or social aspects

¹⁹¹ CJEU, Case C-142/87 *Belgium v Commission* [1990] ECR I-959 para. 26.

¹⁹² Ben Slocock, op. cit., p. 25.

¹⁹³ Geert Dancet, Manfred Rosenstock, *State aid control by the European Commission: The case of the automobile sector* (1995), seen on European Commission’s webpage on 2014.03.10.

¹⁹⁴ M. Heidenhain, op. cit., p. 76.

(e.g. development of a region, electoral matters) that, at the end of the day, would allow the State to behave as public authority and not just as private investor.

3.3.2 Market Economy Vendor Principle

As it has been mentioned before, the Market Economy Vendor Principle has as core the idea of obtaining maximum price from transactions. As it will be seen in this section, the price is sometimes unbalanced as the state gives primacy to a public authority way of reasoning instead of embracing a normal market conduct.

Furthermore, when it comes to the actual privatization, scholars have developed what is called to be the Public Vendor Test. The main question that needs to be answered is ‘did the state act in the same way as a private vendor would act in order to get the highest price?’.¹⁹⁵

In connection with privatization and public procurement procedures, deriving from applied economics, practitioners have developed the Auction theory.¹⁹⁶ Linking it with the already discussed game theory, it can be said that auctions are ‘bayesian’¹⁹⁷ games’; also, in connection with the contract design theory, auctions are seen as ‘allocation mechanisms’ that afterwards become models of price information.¹⁹⁸ Even though auctions *per se* aim at assuring the best price, Member States can sometimes ‘sabotage’ this objective by implementing specific protectionist demands in the tender documentation.

Even though *prima facie* it may look that Member States chose to privatize state companies for policy based reasons, in most of the situations liberalization occurs as the undertakings in question become strong financial burdens that the national governments can no longer sustain.¹⁹⁹

In the *Bank Burgenland* case, by following a public tender procedure, the undertaking was sold to a company offering about 30% less than the other competitor. The Commission took the view that, in such a case, a public vendor needs to disregard its status function of public authority who had granted (conditional on privatization) State aid in the form of a guarantee to Bank Burgenland and adopt a behavior closer

¹⁹⁵ Erika Szyszczak, *op. cit.*, p. 191.

¹⁹⁶ Lawrence M. Ausubel, *Auctions: Theory* (2007) p. 2, seen on University of Maryland’s webpage on 2014.03.18.

¹⁹⁷ The data about characteristics of the other actors is incomplete.

¹⁹⁸ M Harris, A Raviv, *Allocation Mechanisms and the Design of Auctions*, *Econometrics*, Vol. 49, No. 6, (1981) p. 1478.

¹⁹⁹ Mario Siragusa, *op. cit.*, p. 1094.

to the one of a ‘seller of an asset on an open market’; it concluded that a private seller would have preferred a higher price instead of ‘assuring’ the existing guarantee liabilities.²⁰⁰

Moreover, in a Competition Policy Report, the Brussels technocrats considered that there is a presumption of respect of normal market conditions and of conformity with the State aid rules when the privatization is realized by the sale of shares on the stock market.²⁰¹

However, if the undertaking is being privatized by regular trade sale, the presumption is not effective anymore; Commission guidelines provide with the need to sell the company to the highest bidder and to assure a competitive tender which is ‘not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain business’.²⁰²

For example, in the *Automobile Craiova* case, the Commission assessed that the privatization conditions encompassed certain demands with direct effect on minimum production, employment and investment levels. To that extent, the scoring grid revealed that the price offered meant just 35 % of the total score; the rest was composed by the aggregate investments (i.e. 25 %), the achievement of a production integration level of 60% after four years (i.e. 20 %) and the obligation achieve a production level of 200000 during the fifth year (i.e. 20 %).²⁰³ As a result, the Commission decided that the indirect reduction in the final sales price (amounting at about approximate 70 %) conferred an advantage on the privatized economic entity and was to be seen as State aid.²⁰⁴

Departing from the privatization discussion, practitioners have also developed a test for the regular trade agreements as well. In this matter, the Private Purchaser Test has the purpose of assessing if the contract represents a ‘regular trade agreement’.²⁰⁵

In the case in which a public body purchases goods and services when it does not have ‘an actual need for them’, the Union judicature has concluded that this is not

²⁰⁰ Press release: *State aid: Commission requests Austria to recover around €55 million from buyer of Bank Burgenland* (2007) seen on European Commission’s webpage on 2014.03.12.

²⁰¹ European Commission, Xxlld Report on Competition Policy (1993) para. 403 seen on Bookshop Europa’s webpage seen on 2014.03.23.

²⁰² Ibid.

²⁰³ Commission Decision C-46/07, *Automobile Craiova* [2008], OJ 2008 para.17.

²⁰⁴ Ibid. para. 82.

²⁰⁵ Erika Szyszczak, op. cit., p.191.

a normal market transaction and involves state aid.²⁰⁶ This was the situation in joined cases *P & O European Ferries* where the purchase (by a public body) of a predetermined number of travel vouchers that were more expensive than the normal commercial estimate and that were paid for even in respect of journeys which were not made.²⁰⁷

As it can be deduced from the two, Private Vendor and Purchaser, tests, they are mostly based on the idea of financial efficiency. However, it must be emphasized that like in the case of public procurement, privatization can also take into consideration non-economic criteria. For example, environmental policies can be implemented during the privatization procedures. To this extent, considering a lower bid in the detriment of a non-ecological option looks a legitimate exception²⁰⁸ due to the fact that environmental policies are a growing Union interest.²⁰⁹

3.3.3 Market Economy Creditor Principle

A private creditor is to be perceived as a public entity to which, even before facing financial issues, the company having problems was owing money. This type of claim is usually the result of repetitive and consolidated non-payment of taxes or social security contributions.²¹⁰

Exemplifying, in *Spain v Commission*, a case regarding indirect taxation, the CJEU had stated that the fact of ‘constant non-payment of taxes and social security contributions’ of the undertaking in question followed by the lack of diligence from the State in recovering at least a small amount, was to be considered an attitude contrary to what a private creditor would usually do.²¹¹

In *Tubacex* case the CJEU had been demanded and answer regarding the interest rates that must be charged by a public creditor who re-scheduled debts; starting from the premises that the interest’s purpose is to make good the loss, the

²⁰⁶ Ibid.

²⁰⁷ ECJ, Joined cases C-442/03 P and C-471/03 P, *P & O European Ferries (Vizcaya) SA v Commission*, [2006] ECR I-04845, para. 4.

²⁰⁸ Mark Kristiansen, *Incorporating Environmental Law in the Context of Privatization Transactions in Hungary, Poland and Russia*, Administrative Law Review, Vol. 48, No. 4, (1996) p. 627.

²⁰⁹ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’ Text with EEA relevance [2013] OJ L 354

²¹⁰ Michael Sánchez Rydelski, op. cit., p. 197

²¹¹ Case C-276/02 *Spain v Commission (GEA)* [2004] ECR I-8091 para. 36-37.

Court stated that ‘if the rate of default interest applied to the debts of a public creditor is not the same as the rates charged for the debts owed to a private creditor, it is the latter rate which ought to be charged if it is higher than the former’.²¹²

In the matter of direct taxation, the Union judicature established that the failure to pay VAT was not enough to raise a presumption that a company has enjoyed an advantage within the meaning of State aid rules. It completed its reasoning by stating that is the Commission’s responsibility to search whether that lack of payment provides with a cash-flow gain on the undertaking in question (e.g. moving the money inside a public auction).²¹³

Drawing connection with the already discussed privatization process, a company’s debt resulting, this time, from indirect taxes, may be ‘written off or reduced’ before privatization as far as the ‘income is above the reduction in debt’. This was the case in *Germany v Commission*, where, in order to analyze whether capital contribution related to the sale of a public company raised problems of State aid, the CJEU considered that it was necessary to assess whether ‘a market economy investor’ would have decided to ‘write up the firm’ instead of ‘injecting’ additional capital.²¹⁴

Continuing with the reasoning, this principle also finds its applicability where a creditor would seek to secure a payment in the case scenario according to which the debtor finds himself in severe financial difficulties.²¹⁵ In this resort, a public creditor might also be tempted to accept a financial restructuring plan of the firm ‘if it promises a better return than liquidation’.²¹⁶ This was the case in *PZL Hydral* case where a settlement regarding the historical debts by State creditors was preferred to bankruptcy.²¹⁷

Developing on this kind of practice, in the *Vitesse* case, Commission appreciated that the municipality acted like a hypothetical private creditor within the options that the Dutch law provided with. In this case, the soccer club was, at its request, allowed to suspend payments with the scope of restructuring the balance

²¹² Erika Szyszczak, op. cit., p. 190.

²¹³ CJEU, Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission of the European Communities* [2007] ECR II-02911 para. 10

²¹⁴ Heidenhain, op. cit., pp. 474-475.

²¹⁵ Adinda Sinnaeve, op. cit., p. 15.

²¹⁶ Erika Szyszczak, op. cit., 197

²¹⁷ Adinda Sinnaeve, op. cit., p. 15.

sheet and be able to pay its creditors afterwards.²¹⁸ Supporting the club's financial recovery and defending its own financial interest, the municipality of Arnhem, acting in accordance with the market economy creditor principle, agreed with a settlement regarding damages resulting from a penalty clause in order to avoid a situation of bankruptcy for the debtor; in this resort, it hoped for a gradually recoupment *ex nunc*.²¹⁹

In the matter of recovery of investment previously made it can be observed that the creditor's initial priority focuses less on the complete return and more on the 'increase of the possibility of recovering' the values he has already provided with.²²⁰

Concluding, the CJEU has decided that the Commission's use of the private creditor and investor tests 'involves complex economic appraisals'. Having this as a premise, it established that when facing such cases, the European Courts must 'resume their analysis to see if the Commission respected the formal procedural rules and if there appeared 'any manifest error of assessment or a misuse of powers'.²²¹ The sole outcome of such a judicial policy is that the Commission is basically the only one to decide on substantive aid matters while the Courts are more or less dealing with formal issues which do not allow them to develop a real intimate assessment.

3.3.4 The framework for financing SGEIs

In a standard definition, the Commission sees SGEIs to be activities that are economical in nature and to which public authorities give high importance by considering them of fundamental social need (e.g. postal services, transportation).²²² The fact that there is not enough or not at all offer for such services makes the state intervene and become itself, direct or indirect, a provider.²²³

²¹⁸ C(2013)1152 final State aid SA.33584 (2013/C) (ex 2011/NN) – The Netherlands Alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011, para. 21.

²¹⁹ Ibid.

²²⁰ *Competition Competence Report, State Aid & the more economically based approach* (2005) pp. 2-3 seen on European E&M consultants' webpage on 2014.03.17.

²²¹ Case T-36/99 *Lenzing AG v Commission* [2004] ECR II-3597, para. 150.

²²² *Services of general Economic Interest*, seen on European Commission's webpage on 2014.03.28.

²²³ Sybe A. de Vries, *Services of General Economic Interest in the Interplay Between Public and Private in Europe After Lisbon: The Search for More Coherence* seen on Lund University's webpage (2010) pp. 663-664 on 2014.03.20.

In this matter, their activity cannot be equated to the main characteristics of private sector entrepreneurship due to the fact that the purpose of the public sector is ‘not to maximize gains but to assure satisfying public services’; to this extent, the social interest takes over profit maximization and makes the abovementioned tests unsuitable.²²⁴

Before the *Altmark* case, any subsidy given to a company (private or public) for the realization of SGEIs was seen as State aid. However, the aid in question could have been approved if it fitted the conditions under Article 106(2) TFEU and it was previously notified to the Commission.²²⁵

However, after the CJEU had delivered its reasoning on the *Altmark* case, the compensation for discharging public service does not constitute State aid, as far as a number of conditions are fulfilled.²²⁶

The test in this case is that the recipient undertaking is demanded to provide public service (with clear defined tasks), the compensation must be calculated beforehand in an objective way and must not go beyond what is necessary to cover the incurred expenses.²²⁷

However, where the firm carrying public service obligations is not picked in a public procurement procedure, the level of compensation needs to be figured out ‘on the basis of an analysis of the costs which a typical undertaking, well run’ would incur.²²⁸

When it comes to price influencing, a measure meant to protect from cross subsidization in such situations is found in *Directive 2005/81/EC*, which modifies *Directive 80/723/EEC*. This piece of legislation requests any company receiving public compensation to separate the accounts used in the matter of duties for which it receives public compensation from the other ones used in other domains of activity;²²⁹ if however companies do not comply with such request they can be excluded from the public procurement procedures on the basis of misusing State aid.

²²⁴ Christopher H. Bovis, op. cit., p. 2.

²²⁵ Vassilis Hatzopoulos, *Public procurement and state aid in national health care systems* (2011) p. 384, seen on G&H Law Chamber webpagepdf on 2014.04.03.

²²⁶ Vesterdorf, op. cit., p. 274.

²²⁷ CEJU, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I – 7810 para. 110.

²²⁸ Ibid.

²²⁹ Vassilis Hatzopoulos, op. cit., p. 386.

3.3.5 Procedural safeguards

A last ‘filter’, more procedural this time and having the same purpose of assuring the best consideration in public contracts is the one focusing on the idea of a transparent and non-discriminatory tender. In the case of what can be perceived as a ‘Procedural’ Test, the Court does not look at analogous market behavior or economical calculations but analyzes the procurement process *per se*.

Basing its analysis frameworks for CJEU’s case law, the European Commission has created a presumption that no State aid incompatible with the law is present where the contract award represents a veridical procurement transaction and where the procurement procedure is in compliance with the EU Public Procurement Directives (e.g. MEAT criteria), to the extent that no economic advantage, which exceeds normal market conditions, is being given.²³⁰

However, exceptions from this general rule may be found. For example, in the *Clonee/Kells Motorway* case, even though the winning company in a public private construction partnership was chosen through a public procurement procedure (i.e. negotiated proceedings) this was not sufficient. As the economical outcome of that complex procedure was not totally predicted to that extent, the Commission stated that it cannot omit that the ‘financing measures proposed by authorities may confer an economic advantage’, and thereafter the financial scheme had to be notified.²³¹

The same conclusion had been reached in the *Cumbria Broadband* case. The fact that the service provider was to be appointed after a tendering procedure was not sufficient as the United Kingdom (here and after, the UK) authorities aimed at using a negotiated procedure. In the Commission’s view such procedures do not allow the calculation for the compensation beforehand and in an objective and transparent way.²³²

It can be interfered from the two-abovementioned examples that the Commission has a cautious view when the procedure involves a direct award of a contract that can experience major financial fluctuations as a result of the negotiations carried between the parties and of the changes in the project.²³³

²³⁰ Albert Sánchez Graells, *Public Procurement and State Aid: Reopening the Debate* (2012) p.8.

²³¹ C (2006) 1840 final State aid No N 149/2006 Traffic guarantee for M3 Clonee to North of Kells and N7 Limerick Southern Ring Road Phase II para. 35.

²³² C(2003)4480final State Aid N 282/2003 ‘Cumbria Broadband – Project Access – Advancing Communication for Cumbria and Enabling Sustainable Services’ section 3.2.

²³³ *Competitive negotiated procedure*, seen on European Commission’s webpage on 2014.04.04.

Going further, in *Parking Brixen* case the CJEU, even though not analyzing the State aid issue, considered that the award of a public service concession without an awarding competition offered a discriminatory advantage to the receiving undertaking. Even though the procurement directives do not include public service concession contracts, the bodies awarding them are bound by the general principles (e.g. transparency).²³⁴ Furthermore, in order to avoid further issues, a new Concessions Directive has been adopted very recently.²³⁵

Moving to the real estate sector, the Commission has created guidelines regarding the problem of State aid through sales of land and buildings by public authorities. In this sense, the standard procedure requires the sale to be carried ‘through an unconditional bidding procedure’ which is enough well publicized and that can be compared to an auction; otherwise an independent expert evaluation would be needed. Moreover, in case of failure to sale, a decrease in price is allowed only to the extent of a 5% threshold.²³⁶

However, extrapolating and drawing an analogy with the MEIP, when it comes to real estate, not only pricing can result in State aid. The fact that a public entity would buy a land plot and adapt it for industrial usage and after promise to purchase from the private company, that would subsequently locate there, a certain number of products manufactured in that area, made the Commission consider that the private undertaking had an advantage that it not had obtained otherwise on the market.²³⁷

As it can be seen, this last ‘filter’ does not encompass too much economic analysis that widens the Court’s prerogatives when judging on the facts. Moreover, even though this last test looks quite rudimentary when compared with the other more sophisticated economical assessments, it is of special importance in cases where State aid comes as a result of corruption practices affecting transparency (e.g. award preceded by bribery).

²³⁴ ECJ, Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen* [2005] ECR I-08585, para. 46.

²³⁵ Directive 2014/23/EU of the European Parliament and of the Council [2014] on the award of concession contracts [2014] L 94/1.

²³⁶ *Commission Communication on State aid elements in sales of land and buildings by public authorities* [1997] OJ C 209 1997/3

²³⁷ Commission Decision C(2012) 4194 on the State aid SA.28356 (C 37/09, ex N 226/09) — Habidite Alonsotegi, [2012] OJ L 119/9.

As it will be seen in the last and final chapter, there are a wide variety of practices that can be categorized into both, corruption and antitrust behavior and that have considerable effects in distorting the compensation in public contracts.

Chapter III: Cartels and corruption related offences

4.1 Defining the concept

The scope of this final chapter is to develop on practices that evade the more complex economic sphere of, for example, dumping strategies, predation and State aid; the behavior analyzed in this chapter happen in the ‘backstage’ and has the scope of unlawfully affecting public tenders, privatization processes or generally, fair trade, by promoting uncompetitive or penal conduct.

As a premise, competition can be understood as market situation in which the individual vendor or purchaser does not impact on the price by his acquisitions or sales. In other words, ‘the elasticity of supply facing any buyer is infinite, and the elasticity of demand facing any seller is infinite’;²³⁸ in this resort, high elasticity assures that supply is not ‘neutral’ to price changes and that potential clients can always shift to other sellers;²³⁹ this context is defined by economists as perfect competition as there is no market player strong enough to establish the compensation in a certain area of activity.²⁴⁰

In this matter, the main antitrust laws (i.e. European and Nord American) may be paraphrased together as materializations of the principle that any ‘agreement, cooperative effort or intent’ developed by two or more entities that has the effect or is likely to affect or restrain their competitors is illegal.²⁴¹

The ‘hallmark’ of competition violations in both, USA and European jurisprudence is composed by practices such as: price-fixing among competitors and resale price fixing with distributors, division of market territories or group boycotts.²⁴²

²³⁸ Eugène Buttigieg, *Competition Law: Safeguarding the Consumer Interest*, (AH Alpena an den Rijn, Kluwer Law International 2009) p. 5.

²³⁹ Hans Henrik Lidgard, *Competition Classics – Materials & cases on European Competition Law and Practice*, p. 14.

²⁴⁰ Ibid.

²⁴¹ Alfred F. Crotti, *Trading Under US and EEC Antitrust Laws*, (London, Butterworth & Co Publishers 1977) p. 7.

²⁴² Ibid. p. 103.

Moreover, narrowing the discussion, EU Courts have deliberately refrained from interpreting the terms agreement and concerned practice in a formal or static way.²⁴³ By giving primacy to a dynamic, invasive and effect-based approach, any contact between undertakings that is outside the fair trade principle can be punished.

Narrowing the analysis, in relation to public procurement, engaging into cartel practices in order to avoid the competition exigencies can result in the creation of ‘artificial, uneconomic and unstable industry structures, threaten sustainable employment, lower productivity gains and technological improvements’,²⁴⁴ all of the detriment of taxpayers and of the society as a whole.

However, in order to promote their own private interests, undertakings do associate in cartels that are essentially agreements between competitors with the purpose to coordinate their behavior on a certain market.²⁴⁵ These affiliations have direct impact on consumer’s interests as they lead to price fixing. Also, when this behavior concerns products that are bought by public authorities they may also affect taxpayers.²⁴⁶

In this matter, collusion can be achieved if firms exchange data regarding the most important competition variables; shared information regarding the market structure, participants’ costs or different market strategies can lead to a harmful and anticompetitive transparency.²⁴⁷

Besides this first way of influencing free trade, companies (through their representatives or stakeholders) might try to receive unlawful advantages by promoting a corrupt attitude towards the public decision-making actors.

From a principal-agent theory perspective, such corruption is primarily referring to the use of government positions in order to achieve individual gains; where the agent (e.g. public servant or dignitary) empowered with the prerogatives of carrying out public duties by the principal (e.g. government and implicitly taxpayers)

²⁴³ Andreas Scordamaglia-Tousis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental Rights*, (Alphen aan den Rijn, Wolters Kluwer 2013) p. 210.

²⁴⁴ COM, SEC/2003/0467, Report from the Commission - Part One - XXXIInd Report on Competition Policy [2002] para. 26.

²⁴⁵ Andreas Scordamaglia-Tousis, op. cit., p. 4.

²⁴⁶ Eugène Buttigieg, *Competition Law: Safeguarding the Consumer Interest*, (AH Alpena an den Rijn, Kluwer Law International 2009) pp. 119-120.

²⁴⁷ Giuliano Amato, Claus-Dieter Ehlermann, op. cit., p. 30.

gives primacy to his own, *lato sensu*, interests instead of assuring the common good, he engages into corruption practices.²⁴⁸

From a public procurement perspective distinction must be made between political (high level) and administrative (bureaucratic) corruption. In an example, illegal behavior occurring while the resort budgeted is being elaborated reflects the political type of corruption while corrupt attitude embraced during the budgetary execution timetable (e.g. the way resources are spent) is perceived as being bureaucratic corruption.²⁴⁹

Related to the public tenders, such behavior (occurring most of the time in the second stage) can cause inefficiencies that hinder competition; limiting the number of participants and, on the other hand, favoring the ones ‘with inside connections’ at the costs of neglecting the other efficient offers is proven to be damaging for the economic environment.²⁵⁰

Moreover, corruption lowers private investment and, as a consequence, it reduces the economic growth even in states with a high grade of bureaucracy and control (e.g. EU Member States)²⁵¹. The Commission estimates that, within the Union, this phenomenon amounts at approximately EUR 120 billion per year.²⁵² This is for sure in severe contradiction with the idea of ‘best value for money’ and injures consumer welfare proportional with the huge amount lost. Besides the economic impact, corruption in public tenders can also engage bad solutions like approving projects that have negative environmental effects, reduce the incentives for innovation or neglect the social needs.²⁵³

However, as a matter of economic reality, the most desired business position is to have a protected exclusive market. In such a context, the undertaking is the principal supplier in a certain territory and as a consequence ‘enjoys the bliss of non-competitive pricing’.²⁵⁴

²⁴⁸ Arnold J. Heidenheimer, Michael Johnston, *Political Corruption a Handbook*, (New Jersey, Transaction Publishers 2009) p. 322.

²⁴⁹ Tina Søreide, *Corruption in public Procurement Causes, consequences and cures* (Bergen, Chr. Michelsen Intitute, 2002) p.7.

²⁵⁰ Ibid, p.8.

²⁵¹ Paolo Maduro, *Corruption in Public Procurement*, Quarterly Journal of Economics. Vol. 110, No.3, (2005) p. 683.

²⁵² Corruption, seen on European Commission’s webpage on 2014.04.09.

²⁵³ Kenneth Kostyo (ed.), *Curbing Corruption in Public Procurement - Handbook*, (Berlin, Transparency International 2006), p. 30.

²⁵⁴ Alfred F. Crotti, op. cit., p. 128.

Having this as a premise, a company can assure market comfort by abusing its dominance (e.g. predatory pricing as already discussed) or can also proceed to other strategies in order to achieve the abovementioned aim. In this matter, having the possibility of accessing such a consistent market, there are sufficiently enough reasons for which an undertaking would bribe public officials when involved in a public tender.

For example, by offering illegal incentives, a firm representative can determine the public servant to include the company in the short list of undertakings qualified to participate, give him confidential information, customize the tender documentation in relation to the company's offer or tolerate implementation irregularities.²⁵⁵

On the other hand, the increasing dimension of corporate governance worldwide is determining undertakings to focus on anti-corruption policies as part of their functioning, with the scope of taking care of their reputation and also for aligning the interests of management and shareholders.²⁵⁶ Furthermore, as the sanctions in such cases (i.e. antitrust and criminal) are more severe (e.g. fines that can amount to 10% of the company's total turnover in the preceding business year²⁵⁷ or imprisonment for the offender) and can also be cumulated without breaching the *ne bis in idem* principle²⁵⁸, undertakings and private entrepreneurs are facing the most punitive liability framework discussed so far in this paper.

4.2 Cartels

Cartels can be defined as secret agreements that are established between potential market rivals with the sole scope of not competing between each other.²⁵⁹ Generally, cartels are active in markets where 'the product is homogenous and the number of industry participants is limited'.²⁶⁰

²⁵⁵ Amjad Toukan, *Corruption in Public Procurement and Social Welfare* (2014) p. 2 seen on PCS webpage on 2014.03.29.

²⁵⁶ Anti-Corruption, seen on United Nation's webpage on 2014.03.25.

²⁵⁷ 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 2003 OJ L 1/16, art. 23.

²⁵⁸ Amjad Toukan, *op. cit.* p. 2.

²⁵⁹ Alberto Heimler, *Cartels in Public Procurement*, *Journal of Competition Law & Economics*, Vol. 8, No. 4 (2012), p. 849.

²⁶⁰ Alberto Heimler, *op. cit.*, p. 850

Applying this typology to the procurement area, bidders are often gathering themselves into cartels and try to influence the award decision in the interest of one of the participants; this happens without however involving any public servant in the equation.²⁶¹ In consequence, cross borders cartels ‘harmonize the conditions of competitions’ and have negative effects on the interpenetration of trade by ‘cementing’ just one artificial trade pattern.²⁶²

An agreement can be sanctioned if there is consensus on a plan that can limit commercial freedom.²⁶³ In its casuistic, the Commission has developed the idea that a company’s attendance in meeting at which anti-competitive agreements were concluded gives rise to a presumption of engagement in such practice and is for the defendants to prove the opposite.²⁶⁴

The general rule is that where the aim of hindering normal competition can be interfered, that is enough proof for revealing ‘violence’; moreover, where the business strategy is such that it should illegal impact on prices that is also enough. Furthermore, where not sure about the legality of the conduct, the actual effect is the one prevailing in the analysis.²⁶⁵

Narrowing the assessment, bid rigging is placed at the forefront of the cartel practices. Even though other strategies such as price fixing, territory or consumer allocation or product output have a severe impact on the public procurement market, bid rigging is intrinsically linked with the tender procedures and represents the standard way of antitrust fraud in this resort. Furthermore, as it shall be seen, in some cases, bid rigging comes as an instrument of implementing such fraudulent strategies.

For example, in an auction regarding a national health programme, the fact that three distributors from the same pharmaceutical manufacturer did not compete, as each participant offered a different product from the same supplier (i.e. no interchangeability between them) was considered to fit the test for market-sharing cartels.²⁶⁶

²⁶¹ Kenneth Kostyo (ed.), op. cit., p. 16.

²⁶² Herausgegeben von Hans-Georg Kamann, Marting Selmayr, *European Competition Law*, (Munchen, C.H. Beck 2010) p. 201.

²⁶³ Stefan E. Weishaar, *Cartels, Competition and Public Procurement*, (Cheltenham, Edward Elgar Publishing 2013) p. 68.

²⁶⁴ Giuliano Amato, Claus-Dieter Ehlermann, op. cit., p.38.

²⁶⁵ Alfred F. Crotti, op. cit., p. 111.

²⁶⁶ Albert Sánchez Graells, *Public Procurement: An Overview of EU and National Case Law*, (2011) p. 3 seen on SSRN’s webpage on 2014.04.10

Having regard to structural characteristics, bid-rigging cartels are substantially more stable. This happens due to the fact that in regular markets, both, quotas and prices need to be agreed on while in bidding markets the volume is established by the awarding authority and participants know that, in most of the cases, by decreasing prices they just increase their profit once (fact that does not have effect on the quantities they intend to sell in the future).²⁶⁷

Going deeper in the analysis, one of their preferred practices is ‘cover pricing’; this represents the case where one company which is not willing to win the contract helps a rival by submitting an economically viable but unsuccessful bid. Cover pricing has the purpose of misleading public authorities to consider that they face higher competitive bidding than they actually do.²⁶⁸

Furthermore, other unlawful practices can take the form of ‘bid suppression’, when competitor agree not to participate or withdrawn their offer in favor of one bidder, ‘bid rotation’ when each member is waiting his turn to ‘win’ a contract or ‘market allocation’ where bidders agree not to compete in particular markets.²⁶⁹

Exemplifying, while proving such fraudulent behavior, the UK Office of Fair Trade (here and after, OFT) fined more than one hundred construction firms in England with the total sum of approximately £130 million. The investigation revealed about two hundred compromised tenders in a period of about six years; the inspectors also found particular cases in which the winners paid an *a priori* compensation to the losing bidder. As a consequence, this generalized practice affected building projects estimated at approximately £200 million (i.e. public schools, universities, hospitals).²⁷⁰

In another cartel case from the Czech Republic, the NCA fined several companies for arranging a service tender organized by the Defense Ministry. The facts were that one of the cartel members (i.e. cartel leader) gave the other firms forms that were indicating the prices that they to offer and which were actually submitted.²⁷¹

²⁶⁷ Alberto Heimler, op. cit., p. 855

²⁶⁸ Andreas Stephan, ‘Cover Pricing’: *Object or Effect?*, (2011) seen on University of East Anglia’s page on 2014.04.10

²⁶⁹ *Bid rigging in the construction industry in England* (2011) seen on Office of Fair Trading’s webpage on 2014.04.11.

²⁷⁰ Ibid.

²⁷¹ Kristyna Oberfalcerova, Bid Rigging of Cartel Agreements of Tenderers seen on Legal500’s webpage on 2014.04.14.

A similar case can be found in the Romanian jurisprudence; in a tender concerning the ‘construction, repair and maintenance of natural gas pipelines’ the Romanian Competition Authority, while applying article 101 TFEU in parallel with the national provisions, fined with €5,6 million four companies that participated in two public procurement procedures (i.e. organized by the state owned operator on gas). After obtaining data from the prosecutor’s office, the NCA initiated investigations (i.e. searching emails²⁷²) and discovered that the horizontal cartel distorted competition by object as the parties exchanged sensitive information (i.e. the financial offers) and afterwards coordinated their market conduct.²⁷³

Going further with the examples, in Italy, a Local Health Authority notified the NCA that there was a suspicious similarity of the prices asked by the undertakings participating in a tender regarding ‘non-ionic radiopaque agents for radiological use’. After carrying investigations, the NCA revealed a framework of common pricing that *inter alia* included the coordination of some of their product promotions, the exchange of information on the quotas sold and also bid rotation. In proving such collusive behavior, the NCA relied on the ‘vertical correspondence’ that the firms had with the local agents and also, on the data exchanged by the two parties regarding the market information. It concluded that there was ‘price parallelism’ and in certain cases ‘exclusive tendering’ fact that made the NCA impose a fine amounting at 5,5% of the undertakings’ turnover on the relevant pharmaceutical market.²⁷⁴

Furthermore, practitioners have decided that where are suspiciously high prices, big differences or too much similarity between the tenders, constant winning firms, questionable subcontract practices or suspect joint tenders, public authorities might be facing bid rigging practices.²⁷⁵

When looking at the statistics, a study made in France years ago shows that at a number of about 170000 public tenders there were only 15 prosecutions against cartels; the low level of enforcement is based on the difficulty of proving such illegal practices and on the structural stability of the cartels. In such situation, giving cartels

²⁷² Romanian Competition Authority Decision no. 72 from 14.11.2012 p. 15 seen on Romanian Competition Authority’s webpage on 2014.04.04.

²⁷³ Romania: *Fines imposed on Bid Rigging Cartel in Natural Gas Pipelines Sector*, seen on the European Commission’s webpage on 2014.04.05.

²⁷⁴ Nicola Dimitry, Gustavo Piga, Giancarlo Spagnolo, *Handbook of Procurement*, (New York, Cambridge University Press 2006) p. 369.

²⁷⁵ Swedish Competition Authority, *Twelve ways to detect bid-rigging cartels*, seen on Konkurrensverket’s webpage on 2014.04.06.

members' incentives to denounce the cartel becomes essential.²⁷⁶ Leniency programs have the effect of exonerating or reducing the fines for the cartel participants that bring evidence against the unlawful practices.²⁷⁷ However, as leniency applications are more usual when a cartel lacks stability, leniency is not that popular in the bid rigging area.²⁷⁸

The situation becomes even more difficult where companies collude by avoiding direct communication and cooperate without complete mutual understanding. Moreover, as explicit collusion (i.e. cartel) is unlawful and tacit collusion (i.e. collective dominance) is usually hard to prove (e.g. price leadership), undertakings in oligopolistic markets realize that it is within the benefit of all the undertakings to preserve a high price or to hinder vigorous price competition.²⁷⁹

The cartel secrecy is meant to protect the firms from severe punishment that, as seen before, can amount to millions of Euros. In the same time, as it will be developed further, the fines coming as a result of breaching the competition rules can be cumulated with sanctions of criminal nature, developing the most punitive liability framework analyzed so far in this paper. Moreover, the new procurement legislation provides that 'where the contracting authority has sufficiently plausible indications (i.e. from NCA or Commission) to conclude that the economic operators have entered into agreements²⁸⁰ aimed at distorting competition', it may exclude them from the tender.²⁸¹

4.3 Ne bis in idem

Starting, it has been established that parallel or consecutive proceedings (i.e. from NCAs and Commission as members of the European Competition Network) carried in the same case are possible and sometimes suggested by the Competition

²⁷⁶ Karine Brisset, Lionel Thomas, *Leniency Program: A New Tool In Competition Policy to Deter Cartel Activity in Procurement Auctions*, European Journal of Law and Economics, Vol. 17, No. 5 (2004) p. 5.

²⁷⁷ Cécile Aubert, Patrick Rey, William E. Kovacic, *The impact of leniency and whistle-blowing programs on cartels*, International Journal of Industrial Organization Vol. 24, No.6, (2006), p.1241.

²⁷⁸ Alberto Heimler, op. cit., p. 862.

²⁷⁹ Joseph E. Harrington, Jr, *A Theory of Tacit Collusion* (2012) p.3 seen on John Hopkins University's webpage 2014.04.15.

²⁸⁰ In my view, before doing so, the public authorities will need an authorized point of view from a competition authority due to the complexity of such analysis.

²⁸¹ Directive 2014/24/EU.

law provisions enacted in Regulation 1/2003 and by the subsequent case law.²⁸² This means that each and every investigation ends up with its own sanction, proportionate to the geographical market and the period of time in which the anticompetitive behavior incurred.²⁸³

Article 23(5) of Regulation 1 from 2003 stipulates that decisions that impose sanctions for infringements ‘shall not be of criminal law nature’. *Per a contrario*, this textual reading, embraced by the CJEU as well²⁸⁴, suggests that the fines and the subsequent procedure are administrative in nature.²⁸⁵

However, recently, in the *Menarini* case, the European Court of Human Right, confirmed the application of Article 6(1) of the ECHR, regarding the ‘right to a fair trial in criminal cases’ to competition law procedures.²⁸⁶ However, the decision demonstrates the ‘immediate relevance of fundamental rights’ to EU competition law enforcement²⁸⁷ and is meant to influence the Union judiciary’s review of the Commission’s decisions.²⁸⁸

As it can be seen, the decision comes mainly as a procedural remedy and is not affecting the possibility of cumulating the Competition law liability with further criminal sanctions. In this matter, for cases like bid rigging that can fall under both, criminal and administrative liability, a company involved in such practice can end up by being sanctioned by his NCA (where this is a non-penal body) and Commission (i.e. antitrust) while its representatives can be subject in a criminal trial under the penal legislation (e.g. machinations in public tenders).

Moreover, nowadays, when it comes to the nature of the punishment, there is a growing tendency for Union NCAs to promote individual liability. In Belgium, starting with this year, the NCA will be able to fine individuals up to €10,000 for

²⁸² Carl Lundeholm, *The Principle of Ne Bis In Idem: Human Rights and the Enforcement of European Union Competition Law* (2011) p. 52 seen on 2014.04.07.

²⁸³ However, in case of identity of time and geographical market, the principle applies.

²⁸⁴ Andreas Scordamaglia-Tousis, op. cit., p. 35.

²⁸⁵ Ibid. p. 33.

²⁸⁶ Eduardo Maia Cadete, *European Union: European Court Of Human Rights Confirms That Antitrust Procedures Have A Criminal Nature For The Purpose Of Article 6 Of The European Convention Of Human Rights Regarding The Right To A Fair Trial* (2012) seen on Mandaq’s webpage on 2014.04.08.

²⁸⁷ Bronckers, Marco and Vallery, Anne, *EU Competition Law After The Menarini Case*, MLex Magazine, Vol. 3, No. 1, (2012) pp. 44-47.

²⁸⁸ Eric Barbier de la Serre, Jones Day, *A lesson on judicial review from the other European Court in Luxembourg*, (2012) seen on Wolters Kluwer Law & Business on 2014.04.10.

taking part in ‘hard core’ infringements while in Poland the fine threshold for cartel involvement is planned to be €500,000.²⁸⁹

Furthermore, considering cartels just ‘another form of theft’, some Member States criminalized the competition law enforcement (e.g. Estonia, UK, and Germany), fact that assures a more efficient general prevention and discourages such acts.²⁹⁰

For example, in *ABB Asea Brown Boveri Ltd v Commission* the CJEU, when assessed on the company’s behavior of price fixing, of allocating individual projects to pre-established producers and manipulating the awarding procedure, concluded that it was dealing with a cartel within the meaning of article 101 TFEU.²⁹¹ Furthermore, besides the punitive fines imposed by the Commission²⁹² for running a cartel, judicial authorities from Germany imposed a final prison sentence of about three years and an additional fine of €100,000 for the main defendant, fact that was meant to fully compensate with the market harm caused.²⁹³

4.4 Corruption in Public Procurement

Besides the severe economic effects developed, corruption has also implications when it comes to the public opinion. Citing from a recent study, 56 % of the Member States’ population interviewed in the 2013 *Eurobarometer* survey say that the ‘only way to succeed in business is through political connections’.²⁹⁴

Even though more than half of the Europeans have this negative view, corruption has been on the Union’s agenda ever since 1997; however, the 2003 and 2011 *Commission Communication* (i.e. soft law) *on a comprehensive anti-corruption*

²⁸⁹ Marco Slotboom, *Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield* (2013) seen on Wolters Kluwer Law&Business webpage on 2014.04.12.

²⁹⁰ Katalin J. Cseres, Maarten Pieter Schinkel, Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement*, (Cheltenham, Edward Elgar Publishing Limited, 2006) p.331

²⁹¹ CJEU, Case C-31/99 *ABB Asea Brown Boveri Ltd v Commission of the European Communities* [2002], ECR II-01881, para. 15.

²⁹² COM press release - IP/98/917, Brussels, 21st October 1998, seen on European Commission’s webpage on 25th of October 2013.

²⁹³ Florian Wagner-von Papp, *Criminal antitrust law enforcement in Germany: The whole point is lost if you keep it a secret! Why didn’t you tell the world, eh?* (2010) p. 9, seen at Social Science Research Network’s webpage on 2014.03.20,

policy have been more of political instruments with disappointing results when it comes to the actual implementation.²⁹⁵

Facing lack of efficiency, the Commission tries to enforce anti-corruption policies by incorporating them in its proposed sectorial legislation. For example, in line with the already implemented Directives, the new legislation preserves grounds for mandatory exclusion such as: ‘participation in a criminal organization, corruption, fraud, and money laundering’.²⁹⁶

Having a teleological analysis, in most of the cases a participant offer bribes in order to receive a contract. In this matter, bribes are identified as consistent amounts of money given to the public servants with the hope of receiving a favorable decision where there is no fundament for such outcome.²⁹⁷ Also, bribes are most of the times calculated in terms of percentages of the final contract (i.e. kickbacks).²⁹⁸

The mechanisms of giving bribes is a ‘generous’ one; first, money can be transferred to accounts located in places with high secrecy (e.g. Switzerland) or can follow a ‘laundering’ circuit. For example, the giver might have to buy overestimated goods or assets from the receiver’s entourage (e.g. land) or might have to fictitiously subcontract works to companies indirectly controlled by the corrupt official. However, when it comes to this last practice, the new legislation provides for the tenderer ‘to indicate in its tender any proposed subcontractors’, fact that would at least signal the beginning of a fraudulent intent.²⁹⁹

However, when analyzing more complex markets (e.g. infrastructure, construction) where the preparation period is more lengthy, such illegal incentives may be paid gradually at particular stages of the process; exemplifying, their purpose might be to impact on the tendering process at an early time and ‘manipulate’ the design of the documentation or receive information already decide upon.³⁰⁰ Moreover,

²⁹⁵ Ognian Shentov, Boyko Todorov, Maria Yordanova (eds), *Anti-Corruption in Public Procurement – Balancing the policies*, (Brussels, Center of the Study of Democracy 2011) p. 11.

²⁹⁶ Albert Sánchez Graells, Exclusion, *Qualitative Selection and Short-listing in the New Public Sector Procurement Directive*, p. 7.

²⁹⁷ Kenneth Kostyo op. cit., p. 16.

²⁹⁸ Tina Søreide, *Corruption in public Procurement Causes, consequences and cures* (Bergen, Chr. Michelsen Intitute 2002) p.12.

²⁹⁹ Directive 2014/24/EU art. 71(2)

³⁰⁰ Ognian Shentov, Boyko Todorov, Maria Yordanova (eds), op. cit., p. 8.

the practice of, at a future stage, receiving data about other competitors' submitted tenders have developed 'well-remunerated information networks'.³⁰¹

As a useful remedy, the new legislation provides that 'where the economic operator has undertaken to influence the awarding authority in order to obtain confidential information that may confer an undue advantages', he can also be excluded.³⁰²

On the other hand, not only information is desirable in such context; carrying the tender during regular vacation, fact preceded by a very short deadline for offer submission can be seen as a form of deliberate advantage.³⁰³ Also, in opposition to experience and efficiency, the admittance on a contract shortlist (i.e. prequalification) can also be conditional on a bribe.³⁰⁴ In a Commission report it has been stated that 'insufficient transparency at all stages, excessively short deadlines, changes to the initial information of the tender procedure that are published only at national level, excessively strict selection criteria and artificial algorithms for evaluation of tenders' are all perceived as high risk corruption indicators.³⁰⁵ With regard to these facts and in order to increase efficiency and transparency, the European Commission released a communication providing with a strategy to make e-procurement (i.e. electronic procurement) the rule in the Union by the middle of 2016.³⁰⁶

Exemplifying on the case law, in Norway, an engineer working for the national petroleum company and organizing procurement for coating services received bribes in the equivalent of EUR 50.000 from two private CEOs for the scope of influencing the tender procedure. In consequence, all three of them were sentenced to about one year in jail.³⁰⁷ This case is the perfect example for administrative corruption; on the other hand, high-level political corruption is also identifiable in public procurement.

In this matter, the former Slovenian prime minister has been sentenced to two years in jail for receiving about EUR 2 million from a Finish (state owned) arm dealer. The public contract referred to 135 armored personnel carriers worth about

³⁰¹ *Bribery in Public Procurement, Methods, Actors and Counter Measures* (2007) p. 46 seen on OECD's webpage on 2014.04.22.

³⁰² Directive 2014/24/EU art. 57.

³⁰³ Tina Søreide, op. cit., p. 14.

³⁰⁴ Ibid.

³⁰⁵ COM(2014) 38 final, EU Anti-Corruption Report – ROMANIA (2014) p. 10, seen on European Commission's webpage on 2014.04.05.

³⁰⁶ E-procurement, seen on European Commission's webpage on 2014.05.22.

³⁰⁷ Ognian Shentov, Boyko Todorov, Maria Yordanova (eds), op. cit., p. 50.

EUR 280 million. Adding, the contract was cancelled after the lack of compliance with *Directive 2009/81/EC on defense and sensitive security procurement had been revealed*.³⁰⁸

Going further in the analysis of political corruption, last year, the Romanian Constitutional Court declared certain amendments imposed by the Parliament to the penal code to be unconstitutional; these modifications, meant to ‘immunize’ political actors, eliminated parliamentarians from the scope of the status of ‘public officials’ with the effect that they would no longer be prosecuted for corruption in the public sector.³⁰⁹

Turning back and analyzing the final stage of the contract negotiations, in case where the briber outbids in order to receive the award, there are instruments (i.e. additional acts) to reestablish the fraudulent *ex ante*-negotiated conditions. In some cases, even though satisfied with the agreement *status quo*, the contractor might however try to manipulate decisions regarding modifications to the original project as in case of success he will increase the enterprise profits (e.g. incorporation of new works).³¹⁰

In this resort, the CJEU in *Nachrichtenagentur* case states that amendments to the already signed agreement must be ‘that materially different in character from the original contract’ such as to show the intention of the contracting parties to proceed to renegotiations regarding the essential terms of the agreement’.³¹¹

Exemplifying, statistics made in Romania show that between 2010 and 2011 for 96 works contracts were concluded 203 addendums of which 23 were aimed at changing the contract value (e.g. increasing it with 50%).³¹² As discussed in the First Chapter, such renegotiations can be perceived as ‘new contracts’ or as simulate state aid, both followed by administrative remedies; however, if fraudulent intent is proven, criminal liability can also be engaged.

There are circumstances in which, in order to reduce costs without renegotiations and in complicity with the awarding authority (who makes the quality

³⁰⁸ Slovenian ex-PM Jailed on Corruption (2013) Charges, seen on Novinite’s webpage on 2014.04.25.

³⁰⁹ COM(2014) 38 final, EU Anti-Corruption Report – ROMANIA (2014) pp. 8-9.

³¹⁰ Tina Søreide, *Corruption in public Procurement Causes*, consequences and cures op. cit., p.16.

³¹¹ CJEU Case C-454/06 *Nachrichtenagentur GmbH v Republik Österreich (Bund)* [2008] ECR I-04401 para. 34.

³¹² *Sector inquiry on Market Works Construction of roads and highways* (2013) p. 172 seen on Romanian Competition Authority’s webpage on 2014.04.25.

checks before taking over) the winning company might decrease the standard of the services or works agreed upon (i.e. proportional with the amount offered as bribe) and be tolerated by the work auditor in its unlawful endeavor.³¹³

Going further, corrupt authorities can take advantage of emergency procurement (e.g. flood, earthquake, snow storm) as this situation involves fast transfer of funds, permitted lack of compliance with the standard procurement procedures and a lot public emotion that shifts the attention.³¹⁴ In certain cases, public authorities exaggerate the emergency just to create the legal framework in order to foster their corrupt plans. By using motives like ‘the continued threat to human life’ they can take advantage of ‘fast-track’ emergency procedures and give preference to their own ‘clientele’ (e.g. mostly supply contracts).³¹⁵

Continuing with the analysis, besides the classical public servant – entrepreneur agreements, smaller towns from eastern Europe face issues as organized crime infiltration which are synonym to ‘violence, threats and collusion with local authorities’, all of them injuring impartial and transparent procurement procedures by keeping the potential candidates away from the actual tenders.³¹⁶

Extrapolating, corruption can also appear during the process of preparation (i.e. Commission), debate (e.g. Parliament) or implementation (i.e. national level) of a piece of legislation (e.g. Directive). In this matter, as in the above-mentioned case, the corruption manifests itself at a pure political level and has as scope the enactment of a ‘weak’ piece of legislation (e.g. leaving a wide margin of discretion to the awarding authorities). For example, in 2011 a member of the Social Democrats political group (European Parliament) accepted the idea of receiving €100,000 each year for the scope of proposing certain amendments and voting against other in accordance with the interest of a certain firm.³¹⁷

Moreover, having a look over the new legislation firms can be excluded from tenders for ‘grave professional misconduct’, rendering their integrity (e.g. breach of intellectual property rights), conflict of interest (i.e. ‘financial, economic or other

³¹³ *Case of bribery: Company planning poor works to maximize profit* (2014) seen on Mediafax’s webpage on 2014.04.21.

³¹⁴ OECD, *Integrity in Public procurement*, seen on OECD’s webpage, p. 49.

³¹⁵ Jessica Schultz, *Tina Søreide, Corruption in emergency procurement*, *Disasters*, Vol. 32, No. 4, (2008) p. 523.

³¹⁶ COM(2014) 38 final, EU Anti-Corruption Report – BULGARIA (2014) p. 11 seen on European Commission’s webpage on 2014.04.26.

³¹⁷ *Romanian MEP faces corruption trial in cash-for-influence scandal*, seen on Euractiv’s webpage (2013) on 2014.04.29.

personal interest'), and deceptive attitude in presenting justifying documentation (e.g. false portfolio).³¹⁸ Having these new provisions incorporated in the new Directives' text, it can be said that the Union legislator perceives it as serious danger. However, as in the case of bid rigging cartels, corruption in public procurement is difficult to monitor. In this matter, it can be assumed that the illegal incentives received by the functionaries, dignitaries or politicians are only the 'tip of the iceberg'.³¹⁹

4.5 Corruption in liberalized markets

Evers since the liberalization of Romanian rail freight that started in 2001, the private investors entering the market decreased the state company's market shares from 100% in 2001 to 49,9 years later.³²⁰

Considering those facts it can be said that, *prima facie*, private firms activating in this resort put significant competitive pressure on the former monopolist undertaking fact that is in complete accordance with the Union economic trends.

However, this is not always the case; sometimes, the market pressure is replaced by illegal practices developed by the private undertakings upon the poorly managed public companies. This was the case where the owner of a private undertaking activating on the same market tried fixing a bid in order to favor his company against the state – owned 'CFR Marfa'.

By using a third person, he tried to find out from the public company's CEO the price that was to be delivered by CFR Marfa in a sealed bid procedure for a contract of coal transport estimated at about EUR 50 million over a period of 3 years;³²¹ it must be said that the sealed bids procedure is an 'arm's lengths competition over price', without the chance for revision of bids; two or more bidders are involved to submit their best bid by a sealed bidding process.³²²

The legal qualification of his endeavor was considered to be of influence buying. This crime is linked with trading in influence which most of the jurisdictions

³¹⁸ Directive 2014/24/EU art. 57 (4)

³¹⁹ Susanne Buchner, Andreas Freytag, Luis G. Gonzalez, Werner Guth, *Bribery and public procurement: an experimental study*, Public Choice, Vol. 137, No. 1 (2008) p. 104

³²⁰ *The Evolution of Competition in Key Sectors* (2012) p.22, seen on Romanian Competition Authority's webpage on 2014.04.28.

³²¹ *Romanian businessman Gruia Stoica taken in for questioning for alleged bid rigging* (2014) seen on Romania-Insider's webpage seen on 2014.05.02.

³²² Neil Andrews, *Contract Law*, (Cambridge, Cambridge University Press 2011) p. 75.

define ‘as a corrupt trilateral relationship’ in which an individual with real or alleged influence on other persons (e.g. public managers, politicians) offers this possibility of influencing in exchange for money or other benefices.³²³

Going further, there are other cases in which poor management and corruption ‘intertwine’. For example, there are cases in which market liberalization happens in a brutal way due to the fact that public authorities and managers commit themselves to undermine the functioning of public bodies. This was the situation in the *CET* case where deliberate unfavorable legislation and not diligent management lead to the bankruptcy of the public local heating company (CET Iasi³²⁴). The fact that the undertaking had higher expenses in relation to its economic status, lost a great deal of finances in reckless operation and was underfinanced by the local authorities³²⁵, all of them with the purpose of keeping, as much as possible the Gcal³²⁶ price at a low level (for electoral reasons) and after for assuring free way to a private investor got the attention of the prosecutors.³²⁷ As a result, the public managers were accused of deliberate bankruptcy and are faced criminal prosecution.

Summing up, it can be seen that corruption can take multiple forms and it can affect the price criteria in both, public procurement contracts and also in the process of liberalizing markets and, as a result of this, increase the costs for taxpayers, reduce the quality of the final product/service and reduce popular trust in the process *per se*.³²⁸

³²³ Council of Europe, *Trading in Influence and the Illegal Financing of Political Parties*, (Germany, Council of Europe Publishing, 2000) p. 10.

³²⁴ SC CET Iasi seen on CET Iasi’s webpage on 2014.05.01.

³²⁵ Simple Bankruptcy, seen on EuroAvocatura’s webpage on 2014.03.14.

³²⁶ Energy unit.

³²⁷ *DNA: "Local politicians have sold the city to a foreign company"*, seen on BZI’s webpage on 2014.03.09.

³²⁸ *Corruption by topic: Public Procurement*, seen on Transparency International’s webpage on 2014.04.10.

Conclusion

With regard to what has been presented, it can be interfered that there are lots of elements that can unbalance the consideration in a public (either procurement of privatization) contract.

Advantages that an economic operator can derive from breaching social, environmental, fiscal or intellectual property regulations have direct effect on the public tenders. Even though these companies become competitive enough to propose lower prices (in comparison with companies respecting the law) and the public authority receives a higher price for its demand, this kind of practice has, on the long term, a very damaging effect on the market. Tolerating such practice without a prompt and early intervention, companies engaging themselves into such behavior can first of all threaten legal certainty and secondarily, generate an artificial oligopoly or, in worst-case scenario, a monopoly that will enable them to charge higher prices *ex nunc*.

This effect is the same as the one that undertakings develop after being successful in predatory strategies and implicitly in abusing their dominance. As a result, it is equally important to keep under control any market behavior that can give way to exclusionary facts.

In the same time, tax avoidance, alike other advantages - subsidies, debt release - can be the result of state intervention on the market. In certain cases, such economical discriminatory policies (i.e. state aid) have the effect of artificially keeping on the market firms that underperform and do not have the strength to involve themselves in a fair market competition. Applied to the procurement area, this can be reflected in the final price that is delivered, which can evade normal economic efficiency calculations and disadvantage regular market operators. Furthermore, Member States can also 'deliver' such aid while lowering the price and imposing binding conditions (e.g. social) in privatization operations.

Continuing, when considering the links with Competition law, the rules on State aid and article 102 TFEU (i.e. predatory pricing) are not the only one of interest; in this resort, agreements between undertakings (i.e. cartels) have a direct impact on prices by making them rise as a result of non-competitive bidding. In contrast with the

issues discussed above, the effects take place on the very short term as no major economical machination (e.g. cross subsidization) is involved.

On the other hand, there are elements that, even though evading complex economical mechanisms have the same harmful result of influencing the consideration. In this matter, the *ex ante* corrupt agreements (e.g. based on bribes) and the *ex post* contractual hold-ups are materialized in lower value for money due to the fact that in each case the price increases or the quality are weakened in the detriment of taxpayers.

As it can be seen, there are mechanisms that have the effect of rising the price in a very brutal way on the short run as there are other strategies that, even though *prima facie* have the effect of lowering prices, create artificial economical environments that will injure competition and consumer welfare on the long run.

However, it must be emphasized that both categories are as harmful and, in order to achieve what the Commission codifies as ‘best value for money’, equal attention should be paid in combating any of the abovementioned practices.

In the same time, due to the fact that most of the practices are linked between them, authorities need to cooperate (i.e. NCAs, prosecutors, awarding authorities and even intelligence) in an efficient and effective way and not be overwhelmed by the complexity of the problem. Moreover, as nowadays we are face cross-border ramifications of the different groups involved, Member States must be prepared to cooperate in cross boarder logic.

In the author’s view and having regard to the huge amounts of money spent in public procurement, further research should be developed in the matter of the possibility of creating functional institutional networks that would have within reach multiple instruments that can help identify the vulnerabilities from an early stage and not just intervene when the ‘tip of the iceberg’ is seen. Moreover, public procurement/privatization represent strategic procedures and must be protected with maximum energy by involving much more public resources and know-how.

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