

# Distortion of competition by contracting authorities

Dr Albert Sanchez-Graells  
Reader in Economic Law

Polish Public Procurement Law Association  
Warsaw, 12 June 2018

[bristol.ac.uk](http://bristol.ac.uk)



# Agenda

**Highlight the existence of public restraints of competition in public procurement settings**

**Discuss their economic relevance**

**Explore Art 18(1)II of Directive 2014/24 as a tool to combat distortions of competition by public authorities**

# Competition, State aid & public procurement rules

**Most usual combinations are**

- **Competition law & public procurement**
- **State aid rules & public procurement**

**Each of these two combinations triggers different issues**



# Competition & State aid

**A topic for another day, but highly relevant**

**Some positive steps in 2016 Commission Notice on the notion of aid, but very significant gaps in the context of public-public cooperation and *in-house* providing (see Ølykke (2016))**

# Competition & procurement

**Procurement requires competition at two levels**

- **First, in a narrow sense, it needs to ensure ‘sufficient’ competition within the tender procedure (ie a minimum number of interested tenderers)**
- **Second, and more importantly, for (public) procurement to be efficient and provide value for money, it must take place in competitive markets**

# Competition & procurement

**In this broader setting, competition can be excluded or distorted due to two main types of restrictions:**

- **Private and quasi-private restraints of competition:  
Collusion or Bid Rigging, and Abuse of Market Power**
- **Public restraints of competition:  
Anticompetitive Procurement Regulation**

# Anticompetitive Procurement Regulation

Mixed approach by CJEU

- Competition law excluded as non-economic activity ex FENIN, C-205/03 P, EU:C:2006:453
- Procurement law slowly recognising competition-based constraints on law and administrative practice (but somehow obscured by equal treatment)



# OFT (2004) Report on Public Sector Procurement

Public procurement can affect competition in a number of ways, including:

- **Short-term effects amongst potential suppliers - effects on intensity of competition among potential suppliers in the course of a tender process**
- **Long-term effects on investment, innovation and competitiveness**
- **Knock-on effects on competition in the supply of other buyers**

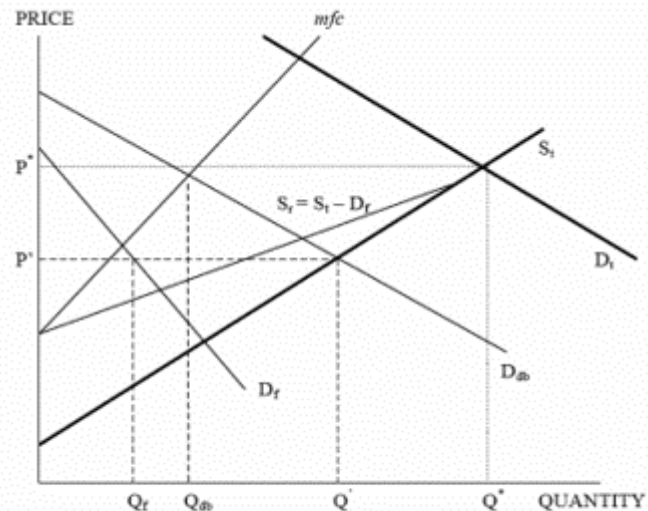




# Economic effects of public restraints

The main sources of distortions of competition (or market failure) derived from restrictive public procurement rules and practices are 'quasi' monopsonistic and result in:

- Waterbed effects
- Pro-collusive features
- More intense effects in case of centralisation or aggregation of demand



Source: Own elaboration, based on RD Blair and JL Harrison, 'Antitrust Policy and Monopsony' 76 *Cornell Law Review* 297, 323 (1990-91).

# Waterbed effects

**The extraction of particularly favourable conditions by the (public) power buyer generates**

- **Worse conditions for marginal buyers**
- **Exit by some suppliers**
- **Reduced long-term competition and innovation in the market**



# 'Enhanced' collusive scenarios

**Due to their (intrinsic) transparency requirements, procurement rules strengthen the possibilities for sustained collusion**

- **Increase foreseeability**
- **Provide 'focal points' or 'price signals'**
- **Reduce cost of monitoring**
- **Allow for effective retaliation against cheaters**



# **‘Stronger’ effects in case of centralisation**

**Centralisation/demand aggregation  
are in the ascent (CPBs) and are seen  
as ‘smart’ procurement tools**

**However, they can exacerbate the  
(negative) economic effects of (bad)  
procurement rules and practices ...  
... so great care is needed!**



# Enforcement of competition law on public buyers and, in particular, CPBs

Dir 2014/24 changes nature of CPB activities, which become (tendentially) economic & triggers application of competition law [mostly, on abuse of dominance]

- **FENIN, C-205/03 P, EU:C:2006:453**  
*‘there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put’*
- **EasyPay, C-185/14, EU:C:2015:716**  
*‘in order to avoid classification as an economic activity, that activity must, by its nature, its aim and the rules to which it is subject, be inseparably connected with ...’*

# Enforcement of competition law on public buyers

**Generally, competition law can hardly be seen as a tool to address anti-competitive procurement legislation or administrative practice**



# Public restraints of competition

Preventing anticompetitive procurement  
regulation and practice through the  
principle of competition



# Principle of competition

**Art 18(1)II Dir 2014/24 / Art 36(1)II Dir 2014/25**

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



# Was there no principle of competition before that?

The principle of competition has been expressly identified by the Court of Justice of the EU

- Judgment in *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640 ¶ 76

But, more frequently, in AG Opinions

- AG Stix-Hackl of 1 July 2004 in *Sintesi*, C-247/02, EU:C:2004:399 ¶34–40

# What if a MS decided not to transpose it or misapplied it?

**Formally, it would be a clear mis-transposition**

- **Insufficient that national law is interpreted in line with the Directive (Lenaerts/Van Nuffel, EU Law, 3rd edn, 898; w/ ref to C-144/99 and C-292/07)**

**Materially, it would be irrelevant**

- **Direct effect (?) + General principles à-la-Mangold**
- **Indirect effect (Van Colson, 14/83 [1984] ECR 1891)**

# How do we interpret Art 18(1)II Dir 2014/24?

## Two main difficulties

- Intentional element
- Distinguishing restrictions of competition from corruption / prevarication (criminal law)

## My proposal\*: objectified interpretation

- ‘But for’ analysis of restrictions + assessment of the reasons provided by contracting authority

# Principle of competition as constraint on executive discretion

## Two-tier proposal

1. **Substantive presumption based on indicia/claim of restriction**
2. **Procedural safe harbour (counter-presumption) based on adequate transparency, market engagement and PAPER TRAIL**

**If both are present, need for careful substantive assessment (with difficult counterfactual) and scope for judicial deference**

# What are the likely practical consequences?

- **More litigation (and potentially more complex assessments of claims of restriction)**
- **Need for refined market intelligence & analysis**
- **Good practice of transparent and extensive use of preliminary market consultations**
- **Stronger management of conflicts of interest**



# What are the likely practical consequences?

**Stronger link to the enforcement of competition law**

- **Need to take due consideration of (bounded) possibility to exclude competition law infringers**  
[Art 57(4)(d) and *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469]
- **Issues with self-cleaning (see *Vossloh Laeis* later)**

**Also against public buyers, particularly CPBs**

- ***EasyPay and Finance Engineering*, C-185/14, EU:C:2015:716**  
**overcomes FENIN/Selex approach**

# Read more

**Sanchez-Graells, Albert, ‘Some Reflections on the “Artificial Narrowing of Competition” as a Check on Executive Discretion in Public Procurement’, in S Bogojević, X Groussot & J Hettne (eds), *Discretion in EU Public Procurement Law, IECL Series* (Hart, forthcoming).**

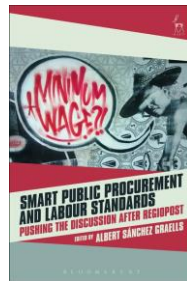
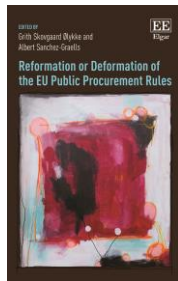
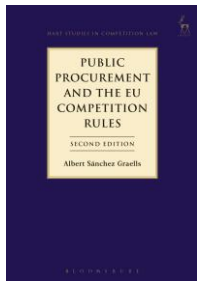
Available at SSRN: <https://ssrn.com/abstract=3125304>.



# Thank you for your attention & stay in touch

[a.sanchez-graells@bristol.ac.uk](mailto:a.sanchez-graells@bristol.ac.uk)

[@asanchezgraells](https://www.instagram.com/asanchezgraells)



**How to Crack a Nut**  
A blog on EU economic law

[bristol.ac.uk](https://www.bristol.ac.uk)

