

**COMPETITIVE NEUTRALITY IN PUBLIC PROCUREMENT AND  
COMPETITION POLICY: AN ONGOING CHALLENGE ANALISED IN VIEW  
OF THE PROPOSED NEW DIRECTIVE**

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**ABSTRACT:** The relevance of effective competition in the public procurement setting can hardly be overstated, particularly in terms of value for money and system efficiency. However, the assessment of competition impacts (or distortions) derived from procurement still does not always rank on top of public buyers' priorities and concerns. Hence, advancing techniques and developing regulatory instruments for more competitively neutral tender design and procurement regulation reform deserves academic and policy-making attention.

This paper focuses on pro-competitive developments of EU public procurement law, particularly as a result of the 2011 EU Commission's consultation on the modernisation of EU public procurement policy and the ensuing proposal for a revised and updated version of the (growing) family of EU public procurement Directives. In the conclusions, the paper critically appraises the main aspects of the proposed reform of EU procurement rules aimed at guaranteeing increased competitive neutrality.

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## INTRODUCTION

The relevance of effective competition in procurement environments can hardly be overemphasised. Without effective competition—and regardless of how well designed and applied procurement rules are—the public buyer will hardly obtain value for money (OFT/ •econ, 2004), there will be an unavoidable waste of public resources due to the inefficiency of the system (OFT, 2010), and there is a significant risk of consolidating or even aggravating non-competitive or plainly anti-competitive market structures (European Commission, 2011a). Indeed, in order to attain value for money and to work as a proper tool for the public sector, public procurement activities need to take place in thriving, competitive markets (Kettl, 1993; Cox, 1993; Schooner, 1999; Cooper, 2003; Brunk, 2006; and Anderson & Kovacic, 2009). This is consistent with the majority scholar view, which clearly supports that competition has always been an essential element in the construction of public procurement systems and, together with non-discrimination and transparency, ranks (or should rank) amongst the top goals of every procurement system (Kelman, 1990; Arrowsmith *et al*, 2000; Schooner, 2001 & 2002; Trepte, 2004; Weiss & Kalogeras, 2005; Perlman, 2007; Schooner *et al*, 2008; Schiavo-Campo & Mcferson, 2008; Dekel, 2008; Sánchez Graells, 2010).

Nonetheless, public procurement rules assume that markets are generally competitive—in the broad sense—or, more simply, take as a given their economic structure and competitive dynamics (Thai, 2001; Piga & Thai, 2006). Indeed, the existence of competitive intensity in the market is usually taken for granted, or simply disregarded in public procurement studies. In general terms, this approach is correct in that public procurement rules are not (primarily or specifically) designed to prevent distortions of competition between undertakings. However, issues regarding competition in the market are not alien to public procurement (Sauter & Schepel, 2009), and need to receive quite a stronger emphasis (as pointed out long time ago by Sherrer, 1982, and more recently by Anderson, Kovacic & Müller, 2011; Sánchez Graells, 2011a; Chirulli, 2011; and Mukhopadhyay, 2011, among others). In this regard, even if the strong dependence of the efficiency and proper working of public

procurement on competition in the market has been generally overlooked by most public procurement studies (exceptionally, it has been stressed by Trepte, 2004; see also Munro, 2006); recently, it seems to be receiving increasing attention both in procurement practice (Taylor, 2011) and case law (Ølykke, 2011)—which are emphasizing the relevance of competition concerns in the analysis of procurement issues.

In this regard, it should be stressed that the interrelation between competition and procurement takes place at two levels, which feedback each other. On a general or broad level, the competitive intensity in the markets where the public buyer sources goods and services determines to a significant extent the efficiency of procurement (OFT/ •econ, 2004; OECD, 2007; Mathisen & Solvoll, 2008; for further references, see Sánchez Graells, 2009a). At a more specific or narrower level, public procurement rules and practice determine the actual competitive pressure in a given tender for a specific contract (which, in turn, affects the general level of competition in the market concerned). In my view, the crucial element that has so far received very little attention is that *public procurement rules can themselves generate significant distortions of competitive market dynamics* (Kettl, 1993; Amato, 2001; Anderson & Kovacic, 2009; and European Commission, 2011a)—and, in so doing, can be largely self-defeating (Spagnolo, 2002), since they can restrict the effective chances for the public buyer to obtain best value (Fiorentino, 2006). Therefore, any appraisal of the potential for increased competition in public procurement must start by analyzing the applicable rules in search for artificial restrictions or distortions.

To that end, it is important to recall that public procurement regulations tend to establish a market-like mechanism that, in most instances, ends up isolating a part of the market—*ie* artificially creating a ‘public (sub-)market’—that becomes highly regulated in various aspects (by public procurement rules themselves) and that, in the end, can result in restrictions or distortions of competition that limit the ability of the public buyer to obtain value for money (Sánchez Graells, 2009a). Hence, in order to promote the efficiency of the procurement activities and value for money (and, ultimately, increased social welfare), *public procurement rules need to be pro-*

*competitive and guarantee that they do not restrict or distort competition in the market* (similarly, Fiorentino, 2007; European Commission, 2011a). In the end, procurement rules need to promote competitive neutrality [1] (OFT, 2010; Taylor, 2011) and, generally, effective competition between bidders and in the markets where public procurement takes place—for when competition is stronger, we can confidently expect superior procurement outcomes (Caldwell *et al*, 2005; Takagi & Hosoe, 2008; PwC, London Economics & Ecorys, 2011; European Commission, 2011b).

Indeed, given that public procurement strongly relies on competitive markets, there is a strong need to ensure that the design of public procurement rules and administrative practices, while fit and appropriate to promote competition in the narrower sense (*ie* competition *within* the tender or procurement process), do not generate unnecessary distortions to competition in its broader sense (*ie* competition *in the market* where public procurement activities take place). This has been recently emphasized in the framework of the revision of the current EU public procurement rules, which is strongly oriented towards flexibility and simplification of procedures in order to promote SME access—but still stresses that, for instance, “[w]hilst greater use of repetitive purchasing techniques should have overall positive benefits for [contracting authorities], there are some concerns about market closure and the longer-term access of firms to such tools. This would have to be addressed to ensure transparency and non-discrimination and prevent a restriction of competition” (European Commission, 2011c). Indeed, “[t]he first objective [of this revision process] is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided. At the same time, it is crucial to increase the efficiency of procurement procedures as such” (European Commission, 2011a; emphasis added). Therefore, making the competition implications explicit and exploring the ways in which market distortions generated by (streamlined) public procurement rules and administrative practices can be avoided or minimized—*ie*

how public procurement can be designed in a more pro-competitive fashion—is clearly relevant and might result in a significant improvement of this body of regulation.

Indeed, this seems to be significantly in line the general trend underlying the current revision of the EU procurement Directives (together with modernization and procedural simplification). Article 15 of the proposed new Directive on Procurement (European Commission, 2011d), entitled “Principles of procurement” consolidates the relevance of undistorted competition (or competitive neutrality) by clearly emphasizing that: “*The design of the procurement shall not be made with the objective [...] of artificially narrowing competition*”. A twin provision is found in Article 29 of the proposed new Directive on procurement in the excluded sectors (European Commission, 2011e). In my view, these provisions agglutinate the pro-competitive orientation present in the EU procurement Directives from their initial design in the 1970s, and bring to light the underlying principle of competition embedded in their current version (Sánchez Graells, 2009b)—which could be defined or phrased in these terms: *public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition* (Sánchez Graells, 2011a). Therefore, it seems clear to me that the revision of the current EU public procurement rules have a clear orientation towards safeguarding (or, at least, promoting) competitive neutrality as a booster for enhanced competition and, in the end, increased value for money through better procurement efficiency.

Following this general approach, this paper reviews and appraises some ideas for reform introduced in the European Commission’s 2011 proposal for a new Directive on Procurement from the perspective of the prevention of competitive distortions or restraints. More specifically, this paper focuses on (a) new procedures and devices to cut red tape, facilitate SME access and increase competition, (b) streamlined disqualification causes for violators of competition law, (c) (stronger) controls of the risks of disguised State aid, and (d) capacity building and market intelligence provisions. The

conclusion offers a general appraisal of the current revision of the EU public procurement rules from a competitive neutrality standpoint.

### **NEW PROCEDURES AND SIMPLIFIED DEVICES TO CUT RED TAPE AND PROMOTE COMPETITION**

As mentioned in passing, one of the main aims of the revision of the current EU public procurement Directives is to fine tune the rules regarding selection of procedures and to make room for increased SME participation and for flexible innovation procurement. In this regard, the proposal for a new procurement Directive (European Commission, 2011d; hereinafter, *propDir*) flexibilizes the use of the competitive procedure with negotiation (giving way to increased discretion on the part of contracting authorities, in line with relatively recent reforms in other jurisdictions, and as supported by scholars as Kelman, 1990 & 2005), and stresses the relevance of the rules controlling the 'new' procurement techniques introduced in the 2004 version of the Directives (ie competitive dialogue, framework agreements, dynamic purchasing systems and electronic auctions) and creates a new procurement procedure for innovative products or services (the innovation partnership) and, finally, introduces electronic catalogues for consumption goods. Also, it sets certain maximum participation requirements, promotes the division of procurement requirements into lots, and simplifies documentary red tape to promote SME participation (giving special relevance to the creation of European Procurement Passport that, however, is still largely underdeveloped). These measures deserve some detailed scrutiny.

#### ***Flexibilization in the use of the competitive procedure with negotiation and emphasis on the use of 'new' procedures***

(1) *Increased possibilities for negotiations prior to contract award.* The *propDir* introduces significant flexibility in the choice of procurement procedures that imply direct negotiations with tenderers prior to the award of the contract. This is a significant policy shift that departs from the very restrictive approach to negotiation that has dominated EU public procurement rules from their inception, under the restrictive approach imposed by the European Council and the

Commission (1993)—which clearly established that “*in open and restricted procedures* [which were the general procedures at the time] *all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination*” (Arrowsmith, 2005: 523-540). Under the rules envisaged in Article 24(1)(e) *propDir*, contracting authorities and entities would be fundamentally free to choose the competitive procedure with negotiation (or the competitive dialogue, which would now be regulated jointly for these purposes) in cases where “*due to specific circumstances related to the nature or the complexity of the works, supplies or services or the risks attaching thereto, the contract cannot be awarded without prior negotiations*”. It must be stressed that the general orientation of the *propDir* towards increased flexibility (which is imported from the WTO GPA) indicates a likely broad interpretation of this provision. This seems particularly clear from recital (15) of the *propDir*, which indicates that “[t]here is a widespread need for additional flexibility and in particular for wider access to a procurement procedure providing for negotiations, as is explicitly foreseen in the [WTO Government Procurement Agreement], where negotiation is allowed in all procedures. Contracting authorities should, unless otherwise provided in the legislation of the Member State concerned, be able to use a competitive procedure with negotiation as provided for in this Directive, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes” (emphasis added). Therefore, rather than limiting the use of competitive procedures with negotiation (or competitive dialogue) to those cases where it is not possible to award the contract under open or restricted procedures, art 24(1)(e) *propDir* seems aimed at giving almost unlimited discretion to contracting authorities to choose this procedure, as long as they offer some motivation for such choice (subject always to transposition by Member States that “*may decide not to transpose into their national law the competitive procedure*

*with negotiation, the competitive dialogue and the innovation partnership procedures”, art 24(1) in fine).*

This development had been strongly pushed for by practitioners and seems to make procurement rules easier to adjust to the particular needs of each contracting authority or entity, in each procurement process. However, it would generate other, significant risks of coordination of public procurement and competition law in view of the increased discretion involved in the negotiations (particularly, regarding the control of State aid, see *infra*). Moreover, it would render useless (or at least, would leave in dear need for reinterpretation) a significant volume of case law of the ECJ regarding changes and clarifications in tenders and their impact on the obligation to retender (Sánchez Graells, 2011a: 338-341), which is also significantly altered with the introduction of a specific regime for modifications of contracts during their term in Article 72 *propDir*, as well as the provisions on termination in Article 73. In this regard, this seems a field where more detailed analysis will be required to ensure that choice of procedure does not artificially narrow competition—as mandated by Article 15 *propDir*.

(2) *New tools for innovative procurement.* A second relevant novelty is the creation of the “innovation partnership” as a procedure that goes beyond the current configuration of the competitive dialogue and allows “*the development and subsequent purchase of new, innovative products, works and services, provided they can be delivered to agreed performance levels and costs*”, in the terms of Article 29 (which refer back to Article 24 on competitive procedure with competition in many significant aspects). In its basic configuration, the innovation partnership is a mixed instrument for R&D funding and subsequent procurement that generates significant (contractual) difficulties (such as the assignment of IP rights, the regulation of commercial uses of the technology developed during the partnership, etc). It is conceived to serve as an instrument to foster innovation. According to recital (17) *propDir*, “[t]he partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market” (emphasis added) [in general, on the difficulties of using procurement to effectively influence innovation

rollover, see Edquist *et al*, 2000; Cabral *et al*, 2006; Aschhof & Sofka, 2008].

However, this is an instrument that seems highly likely to generate (potential) distortions of competition and, in that regard, it must be welcome that the final restriction contained in Article 29(4) *propDir* clearly mandates that “[c]ontracting authorities shall not use innovation partnerships in such a way as to prevent, restrict or distort competition”. Even if the innovation partnership is a new instrument in the EU procurement toolkit, the competition risks it generates are not unknown. As stressed elsewhere, where public procurement activities refer to future goods (or services or works, but primarily goods) and the contracting authority funds or sponsors the required R&D activities for one or several selected contractors, it generates a *potential for deferred anti-competitive effects* (Sánchez Graells, 2011a: 43-44). In these cases, the temporal element can acquire particular significance for the competition analysis of such public procurement activities, since potential anti-competitive effects can be generated in the short term as regards the development of R&D activities themselves, but there is also room for potentially deferred anti-competitive effects in the products or services market. In this regard, the analysis of the procurement rules and practices shall not be restricted to short-term considerations, but shall also take into account the effects in the market for the future technology, goods or services, once they are developed (Park, 2009). These considerations will be particularly relevant if those goods (or services or works) are not for the exclusive use of the public buyer, since the public contractor could find itself in a starting position that prevented the development of effective competition in ‘private’ markets (or tranches of the market) from the outset (that is, an undue first mover advantage). To sum up, the analysis that the contracting authority (and surveillance bodies) will need to conduct to rule out competitive distortions derived from the selection of the innovation partnership will be particularly complex (although some guidance can be found in the general rules controlling State aid for R&D projects and the rules applicable to technology transfer agreements and other types of R&D-related agreements from a competition law perspective).

(3) *Increased scope for centralised procurement, including joint cross-border procurement.* The *propDir* also develops the rules concerning centralised purchasing activities and central purchasing bodies (art 35), expressly allows for the award of contracts regarding ancillary purchasing activities (art 36), and gives a framework for the development of occasional joint procurement by several contracting authorities (art 37), including joint procurement between contracting authorities from different Member States (art 38). Without entering into the details of each of these alternatives, it seems clear that the *propDir* encourages the use of these devices for the aggregation of procurement requirements. In this regard, it must be taken into account that the more buying power the (central / coordinating) purchasing entity holds, the larger the potential distortions of competition derived from the design and implementation of its procurement procedures—and, consequently, the potential restrictions of competition generated by central purchasing agencies will be of particular concern (Trepte, 2004; Sánchez Graells, 2011a). This is recognised in recital (20) *propDir*: “*the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises*”. Therefore, it will be necessary to increase the use of competition impact assessment methods and to follow closely the centralised procurement activities to make sure that they do not have a negative impact on the structure of the markets concerned—which should be appraised taking into consideration that central purchasing bodies and procurement platforms establish two-sided markets (Armstrong, 2007; Evans & Schmalensee, 2008), particularly if purchases from them are mandatory under applicable national law (Carpinetti, 2008).

In my view, the set of proposals oriented towards increasing the room for an actual choice of procurement procedure and the flexibility within any of them (coupled with increased negotiation alternatives before award and modification of contracts during their term) is a development that substantially increases the risk of competitive distortions derived from the choices made by the public buyer. This has been already stressed in the Green Paper (European Commission, 2011a): “*The possible advantages of more flexibility*

*and potential simplification must be weighed against the increased risks of favouritism and, more generally, of overly subjective decisions arising from the greater discretion enjoyed by contracting authorities in the negotiated procedure. Such subjectivity would in turn make it harder to show that the resulting contract did not involve State aid. Moreover, giving more leeway to contracting authorities will deliver useful results only if they have the necessary technical expertise, knowledge of the market and skills to negotiate a good deal with the suppliers".* It does not mean that the development is undesirable, but it does strengthen the case for a closer cooperation with (or even for direct intervention of) competition authorities in the oversight and control of procurement activities (Sánchez Graells, 2011a: 385-389)—particularly in view of the (renewed) risks concerning the increased possibilities for the disguised award of State aid through procurement (innovative, or otherwise, see *below*).

***Measures adopted to increase participation, particularly SMEs'***

Another group of proposals imposes limitations on requirements for participation with the aim of fostering SME access to procurement—following some of the recommendations of the European Code of Best Practices facilitating access by SME to public procurement contracts (European Commission, 2008).

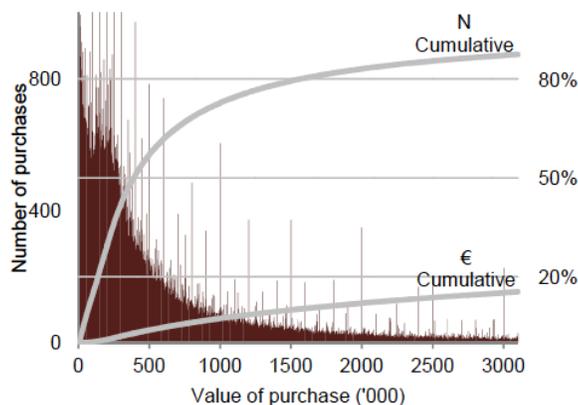
(1) *Reduction of (maximum) participation requirements.* Article 56(3) *propDir* limits turnover requirements to three times the estimated contract value, except in duly justified cases, and article 16 *propDir* complements this relative reduction of participation requirements by ensuring that any conditions for participation by groups of economic operators—an instrument the Commission considers of particular relevance for SMEs—must be justified by objective reasons and proportionate. Therefore, it must be considered a positive development that the proposed Directive sets absolute limits to the level of (economic) requirements that contracting authorities and entities can require to be met in order to participate in the tenders (Sánchez Graells, 2011a: 258). Notwithstanding this development, it is still important to stress that contracting entities and authorities still have to comply with the requirement of article 56(1) *in fine propDir*, so that within that limit the specific requirement set still are “related

*and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition”.*

(2) *Strong promotion of division of procurement requirements into lots.* The second line of reform in this area is a more aggressive policy towards the division of contract requirements in lots by the adoption of a principle of “divide or explain” for contracts above 500,000 euro in article 44 *propDir*, according to which “*where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons*”. This is in line with my proposal that “*public procurement rules should encourage lot division, unless it proves to be inadequate or disproportionate to the nature and amount of works, supplies and services concerned*” (Sánchez Graells, 2011a: 286-290). The rest of the rules on tendering for lots and evaluating bundled offers also seem well designed in the *propDir*, although their analysis exceeds the scope of this commentary.

The policy of (almost) mandatory lot division is well directed and forces contracting authorities or entities to make a ‘division feasibility analysis’ that could have been easily overlooked or disregarded under the current procurement rules. However, given that more than 50% of public procurement procedures have an estimated value below the 500,000 euro threshold (see figure below), there would be further potential for developments in this area if the threshold was removed and contracting authorities or entities always had to conduct a case by case analysis of the feasibility of splitting their requirements into lots—unless it proved disproportionately more costly or complicated to run the tender by lots, in which case they could always provide sufficient explanation as to why they tender a single lot.

Figure 1.8 Frequency of all contract values 2006-2010  
(Thousand € increments)



Source: (PwC, London Economics & Ecorys, 2011: 19).

### Novelties oriented towards cutting red tape and reducing the administrative burden associated to procurement participation

Increased participation is also sought by means of simplification efforts oriented at reducing the administrative burden faced by tenderers. One of the relatively simple ways to reduce red tape—at least at first sight—is to lower the documentary requirements and formalities that bidders have to complete in order to participate in public tenders. In this regard, the *propDir* includes two new tools that may seem to contribute to lower red tape and unburden bidders and contracting authorities and entities—but, in my opinion, generate higher risks and difficulties than benefits, at least in their current configuration.

(1) *Mandatory acceptance of self-declarations as prima facie evidence for selection purposes.* On the one hand, articles 22 and 57 *propDir* introduce the mandatory acceptance of self-declarations as prima facie evidence for selection purposes. Under this new system, bidders would be able to file *declarations on honour* that they have not and will not engage in illicit conduct (art 22 *propDir*) and *self-declarations* [2] whereby they represent that they are not affected by exclusion grounds, that they meet selection and short-listing criteria

(as applicable) and that they will be able to produce hard documentary evidence of such circumstances without delay, upon request of the contracting authority [art 57(1) *propDir*]. The contracting authority will be free to request submission of such documents at any point of the process where this appears necessary to ensure the proper conduct of the procedure and, in any case, prior to awarding the contract [art 57(2) *propDir*]. Failure to support any of the prior declarations (or proof of their falsity) will generate an impediment to award under article 68 *propDir*.

In my view, this proposal clearly reduces the costs of participating in the tender for unsuccessful bidders (increasing the incentive to participate), but generates a relatively small advantage for successful bidders (only a time gain, and of an uncertain length at that), increases the length of the procedure (there is no regulation concerning the time that the authority must give the successful tenderer to produce the requested documents prior to award) and generates a risk of potential award to non-compliant bidders that would require second or ulterior awards (with the corresponding difficulties regarding the need to ensure that other bidders keep their offers open, new award notices, etc). These risks are identified by the European Commission (2011b: 70), but simply dismissed on the hope that self-declarations would bring a significant reduction of time and costs and a potential automatization of selection and award procedures. In my view, the analysis conducted by the Commission is overly optimistic, *cfr.*: *"If measures reducing the information obligations placed on firms were to be implemented (e.g. through generalising the "winning bidder provides" provisions), this could theoretically reduce the efficiency of the evaluation process for contracting authorities and entities if, in some cases, a firm identified as a winner fails the evidentiary tests (and the contracting authority or entity would have to go to their second choice or repeat the process). From the information available, such instances are not that common, and in most cases contracting authorities and entities should save time by accepting self-certification of compliance from bidders who ultimately do not win the contract. Also, if more firms feel able to bid, competition could increase, which could lead to greater price savings or improvements in quality for the contracting authority or entity."* The premise that instances where the winner fails

to meet the evidentiary tests are rare simply cannot be imported from an *ex ante* full control scenario to an *ex post* verification paradigm—since the current possibilities of a bidder failing to meet documentary requirements during the process are practically excluded by their configuration as a participation requirement. In my view, the increase in risks based on strategic behaviour by bidders and the potential difficulties in meeting short submission deadlines prior to award of the contract are just not comparable with the current situation—at least, unless stronger consequences are attached to failing to provide the requested documentation or, more clearly, in cases of falsity of declarations.

In order to complete this proposal, I think that it would be necessary to set speedy but reasonable time limits to produce the requested documents and to strengthen the consequences of failing to produce supporting evidence for the self-declarations, which should not only be an impediment to award, but also be clearly identified as a ground for exclusion [most easily, as an undeniable instance of grave professional misconduct under art 55(3)(c) *propDir*]—and maybe expressly set it as a head of damage that allows contracting authorities to recover any additional expenses derived from the need to proceed to a second-best, delayed award of the contract (without excluding the eventual enforcement of criminal law provisions regarding deceit or other types of fraud under applicable national laws). Also, rules on annulment of the awarded contract and other sanctions are needed for those instances where the discovery of the falsity of the documents occurs after contract award.

(2) *Creation of the European Procurement Passport, as a new standardised document to reduce the documentary evidence burden.* Following article 59 *propDir* (and the additional criteria in Annex XIII) the actual production of documentary evidence aims to be further facilitated by a new standardised document, the European Procurement Passport, which is a means of proof of absence of grounds for exclusion. At the request of any economic operator established in the relevant Member State (and interested in participating in cross-border procurement), the corresponding national authority shall issue a European Procurement Passport [art 59(1) *propDir*] in a standard form (to be adopted by the European

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Commission in implementing, delegated acts) containing the following information [Annex XIII *propDir*]:

- (a) Identification of the economic operator;
- (b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in article 55(1) [mainly, participation in a criminal organisation, corruption, fraud, and terrorism].
- (c) Certification that the economic operator is not the subject of insolvency or winding-up proceedings;
- (d) Where applicable, certification of enrolment in a professional or trade register prescribed in the Member State of establishment;
- (e) Where applicable, certification that the economic operator possesses a particular authorisation or is member of a particular organisation;
- (f) Indication of the period of validity of the Passport, of not less than 6 months.

The European Procurement Passport (EPP) shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification—which, however, may be related to the fact that the passport was issued more than six months earlier [art 59(4) *propDir*].

Given the scarce regulation of the procedures and formalities involved in the obtaining of the EPP, it remains unclear whether red tape will be effectively reduced—and there is no guarantee that it will establish a level playing field across the EU, as it is rather easy to anticipate diverging requisites (and costs) in the application process before different Member States, as well as different remedies in case of denial or cancellation, etc. In a favourable scenario, maybe it can be assumed that the EPP would generate simplification for undertakings that keep an active participation in cross-border tenders (*ie* at least two or three bids every semester, in order to reduce the number of times they must effectively supply information) and, in any case, it remains unclear what advantage the EPP would generate over existing official contractors lists and certifications systems (Sánchez

Graells, 2011a: 266-268), other than harmonisation and standardisation—which could probably be attainable by adjusting the regulation of these already existing systems. An argument that, in my opinion, the European Commission (2011b: 71) has overemphasised: “*The EU public procurement passport would contain information, validated at Member State level, confirming that a business is compliant with certain, frequently requested criteria. Such measures would remove any uncertainty relating to the validity or appropriateness of a given piece of evidence, even when written in an unfamiliar language*”. The same goal could be attained by, for instance, requiring mandatory issuance of official documents in English (or both in the domestic language and English)—which, however, seems to be an unlikely development of EU procurement law (as pointed out elsewhere; Sánchez Graells, 2012).

Further, there is a risk that contracting authorities and entities impose or push tenderers to participate on the basis of their EPP (most likely, informally, since it would be against the Directives to impose this particular way to proof compliance with participation, selection or short-listing criteria), or that undertakings feel the need to obtain it as some kind of certification—which may generate redundant or unnecessary compliance costs, particularly for those economic agents that could easily and readily resort to other types of documentation. Rather than a move towards reduction of formalities, it seems to me that the EPP (as proposed) may still raise the red tape that undertakings have to comply with in order to participate in cross-border procurement.

Moreover, in my view, according to the basic elements of the regime created by article 59 *propDir*, and even if national authorities remain under a duty of cooperation and must provide each other information regarding the authenticity and content of any EPP issued by them—there is a significant risk of abuse of the EPP due to the unforeseeable nature of changes in the information that it covers. Subject to scrutiny by the contracting authority or entity (based on sufficient justification, which may not exist), obtaining an EPP almost seems to be an undisputable pass or safeguard to participate in cross-border tenders for at least 6 months [even if the underlying circumstances concerning the economic operator have materially

adversely changed]. Contracting authorities are unlikely to systematically double check the content and validity of an EPP issued less than 6 months before [assuming they even could adopt such systematic check procedures, which could be against the tenor of art 59(4) *propDir* and, consequently, may generate liability], and issuing authorities do not have a good way to effectively liaise with them to communicate any changes in issued EPP (since they are in no position to know in which specific tenders any given EPP is being used) [assuming, at any rate, that they have the means to closely monitor in almost real time the evolution of the underlying circumstances covered by the EPP, which also seems rather implausible]. Therefore, for the first 6 months after issuance of the EPP, there is a risk of coordination and diffusion of information that may result in the award of contracts to holders of an EPP whose circumstances have actually changed and no longer qualify for it. Given this risk, the same cautionary and sanctioning devices proposed regarding the use of self-declarations and declarations on honour should be adopted (*ie* impediment to award, grounds for exclusion, damages claims and other types of applicable sanctions, *above*).

Maybe these problems could be overcome in the future, by means of advanced digital certification technology that allowed for daily or weekly updates of the information covered by the proposed EPP [in line with the provision in art 59(2) *propDir*, which requires the EPP to exclusively be issued electronically no later than two years after entry into force, *ie* around mid 2016, if adopted] but, at present, it seems a weak device to ensure compliance with participation, selection and award requirements. Also, the costs of setting up this device can be considerable (particularly in Member States with lower existing procurement capacities) and may be hard to finance in a scenario of contracting public expenditure. So, all in all, maybe the EPP is a good theoretical idea that remains too hard to implement, at least for the moment. Again, some of these risks are identified by the European Commission (2011b: 71), but simply dismissed: “[w]hilst the set up costs of such systems could be quite large in some countries where little such infrastructure exists, the use of such passports would be beneficial both within a country as well as outside”. In my opinion, by offering such optimistic, general appraisals the European

Commission is probably trying to spur support from Member States during the negotiation of the new EU procurement Directive. However, it would require some additional back-up to try to prove the actual advantages of this new system.

### STREAMLINED DISQUALIFICATION CAUSES FOR VIOLATORS OF COMPETITION LAW

As briefly reviewed in the previous section, the *propDir* includes several mechanisms to try to foster participation and, therefore, increase competition for public contracts by attracting a larger number of bidders. As a complement, and in order to strengthen competition (*ie* to make the competitive tension between bidders more intense), the *propDir* also includes a specific provision that clarifies the rules on disqualification of competition law infringers and, consequently, aims to prevent, deter and punish instances of collusion on public procurement [on the relevance of fighting collusion in this setting, see Kovacic *et al*, 2006; Albano *et al*, 2006; Sánchez Graells, 2011b]. To be sure, current EU procurement rules already contain provisions that would allow contracting authorities or entities to disqualify infringers of competition law, given that breaches of competition law should always be considered instances of grave professional misbehaviour [in particular, under art 45(2)(c) and (d) of Directive 2004/18; see Sánchez Graells, 2011a: 253-255; *contra*, Bovis, 2006: 16]. This seems clearly established in recital (34) *propDir*: “contracting authorities should be given the possibility to exclude candidates or tenderers for violations of [...] other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights” (emphasis added). However, some further clarification and a streamlining of the disqualification procedure are to be welcome.

As indicated in the explanatory memorandum of the *propDir*, it “contains a specific provision against illicit behaviour by candidates and tenderers, such as [...] entering into agreements with other participants to manipulate the outcome of the procedure [which] have to be excluded from the procedure. Such illicit activities violate basic principles of European Union result and can result in serious distortions of competition”. More specifically, Article 22 *propDir* requires that, at the beginning of the procedure, tenderers “provide a

*declaration on honour that they have not undertaken and will not undertake to: [...] (b) enter into agreements with other candidates and tenderers aimed at distorting competition*". Further, in accordance with Article 68, regulating impediments to award, "[c]ontracting authorities shall not award the contract to the tenderer submitting the best tender where [...] (b) the declaration provided by the tenderer pursuant to Article 22 is false". Therefore, if the contracting authority becomes aware of any illicit, anticompetitive behaviour on the part of tenderers, it must disqualify them by applying the impediment to award in art 68(b) *propDir*. However, this solution is partial and requires further thought.

In short, the disqualification system envisaged in arts 22 and 68 *propDir* falls short from ensuring that infringers of competition law do not participate in public procurement—mainly, due to two considerations. On the one hand, it only allows for disqualification prior to award of the contract. However, it can be foreseen that most instances of bid rigging will only be discovered later and, maybe even after the execution of the contract is complete (when the remedy of the impediment to award will be absolutely ineffective). On the other hand, it may generate some doubts as to the possibility to apply art 45(2)(c) and (d) [renumbered and consolidated as art 55(3)(c) *propDir*] in relation with violations of competition that are not connected with the tender at hand (which is the only competition infringement potentially covered by the declaration on honour required by art 22 *propDir*; unless a very broad reading of that provisions is promoted, which seems unlikely in view of the negative consequences that its infringement can trigger). Therefore, in my view, even if the *propDir* increases legal certainty in some cases, there is still a need for a further developed suspension and debarment system in EU public procurement rules (Sánchez Graells, 2011a: 382-385).

As mentioned in passing, current EU public procurement rules—and, particularly, article 45(2) of Directive 2004/18—do not regulate suspension and debarment mechanisms as such. The closest rules empower contracting authorities to exclude candidates or tenderers at the qualitative selection phase if they *have been* convicted of any offence concerning professional conduct, or *have been* guilty of grave

professional misconduct (which includes competition law violations, or at least some of them)—but they do not expressly regulate the case in which the infringement takes place *during* the tender procedure (which would now be covered by arts 22 and 68 *propDir*, up to the award phase), and it remains unclear whether exclusion can take place at later stages.

As pointed out, except in highly unlikely circumstances, breaches of competition law should always be considered instances of grave professional misbehaviour and, consequently, should qualify indistinctly under both paragraphs (c) and (d) of article 45(2) of Directive 2004/18 [in the future, art 55(3)(c) *propDir*]; to enable contracting authorities to take them into account at the qualitative selection stage in order to disqualify the (infringing) undertakings concerned from a given tendering procedure—unless the irrelevance of the previous breach can be proven.

However, as mentioned already, this regime falls short of instituting a full-fledged system of suspension and debarment of competition infringers. Firstly, because the non-automatic effects of article 45(2) of Directive 2004/18 (which is not a mandatory provision) leave it to the discretion of the contracting authorities to decide whether or not to exclude competition law infringers from participating in a given tender. Second, because the lack of express regulation at EU level can give rise to different regimes across different Member States and, consequently, might facilitate strategic behaviour by infringing undertakings—thereby reducing deterrence. And, third, because it does not apply easily to all phases of the tender procedure in which breaches of competition law can become evident to the contracting authority. Therefore, contracting authorities that are suspicious that competition violations might be taking place in these stages might not be able to adopt the necessary measures to protect their interests. In my view, a stricter and uniform system of suspension and debarment of competition law infringers would contribute to strengthening the pro-competitive orientation of the public procurement system and to limiting privately-created distortions of competition (which, however, would not be without cost; Albano *et al*, 2006).

From a comparative perspective, it seems important to highlight that the United States' Federal Acquisitions Regulation (US FAR) establishes a clearer regime of suspension and debarment of competition infringers (Whelan & Nagle, 2007). At the very least, it is remarkable that a '*violation of Federal or State antitrust statutes relating to the submission of offers*' constitutes both a cause for suspension [US FAR 9.407-2(a)(2)] and for debarment [US FAR 9.406-2(a)(2)] of the offending contractor. Thus, the infringer can be suspended for a temporary period pending the completion of investigation and any ensuing legal proceedings [US FAR 9.407-4(a)] and, eventually, debarred (*ie* prevented from participating in all public tenders) for a period commensurate with the seriousness of the cause, and generally of up to three years [US FAR 9.406-4(a)(1)]. The decisions on suspension and debarment are not taken by the contracting authority itself, but by a previously designated suspension and debarment official [US FAR 9.406-3(a) and US FAR 9.407-3(a)]. Generally, debarment will exclude the contractor from all public tenders conducted during its extension, unless it is restricted to certain types of contracts or certain contracting authorities [US FAR 9.406-3(e)(1)(iv) in relation with US FAR 9.406-1(c)]. It is worth noting that suspension and debarment decisions are not meant to punish contractors, but to protect the public interest in the proper functioning of the procurement system [US FAR 9.402(b)].

In a nutshell, the general features of the regime established in the US FAR make it seem superior to the current EU public procurement rules in that: i) it captures situations where the infringement of competition laws is not previous to the tender [which would be covered by art 45(2) dir 2004/18], but takes place *during* the development of the tender [which would be covered in arts 22 and 68 *propDir*, but only if directly linked to the tender in question]; ii) the decision on the exclusion of the affected tenderer is not discretionary for the specific contracting authority (which might have a conflict of interest, particularly if the competition infringer is a well-known or an incumbent contractor), but adopted by a previously designated authority within the same agency; and iii) debarment can be set for a given period of time and applies to all tender procedures conducted during that period (unless restricted on the basis of overriding reasons in the public interest).

Therefore, in light of the US regime, it is my opinion that it is desirable to strengthen the rules contained in the current Directives by adopting a rule whereby competition infringers could be suspended and/or debarred by an authority different from the contracting authority—and, subject to Member States' internal organization, the best alternative seems to be the competition authority or, eventually, the courts—and for a pre-established period of time (of up to three to five years)—during which the offending undertaking would be prevented from participating in all public tenders, unless the scope of the debarment is limited. Suspension and debarment should be triggered particularly by mandatory reporting of competition law breaches, but should also be available as a self-standing sanction in case the investigation is initiated by any other means—particularly, competition authorities should be empowered to adopt debarment decisions as a complement of any other competition sanctions and remedies (such as criminal sentences, fines and damages awards).

Such a regime should apply to all breaches of substantive competition law rules (not only collusion in public procurement processes), unless it can be proven that they are irrelevant in the public procurement setting (which seems unlikely): *ie* they should not be automatically limited to cases of bid-rigging, and the (high) burden of proving the irrelevance of the anticompetitive practices in the public procurement setting should rest with the infringers. However, in the case of violations of competition law other than collusion in public procurement contracts, the duration and scope of the debarment could be more limited than in the case of the former, and clearly aimed at protecting the public interest in the proper functioning of procurement procedures—*ie* not as an additional or substitutive competition sanction.

An exception to the suspension and debarment regime could be created to avoid reducing disproportionately or completely eliminating competition in highly concentrated markets (US FAR 9.405; Zucker, 2004 and Kramer, 2004)—where the exclusion of a potential contractor would render the procurement procedure largely ineffective. However, in these highly exceptional cases, a waiver of suspension or debarment should only be granted at the request of the affected contracting authorities (which should advance sufficient

reasons in the public interest associated to the participation of the suspended or debarred tenderer) and, in any case, it should be substituted with an alternative sanction, such as the imposition of substitute fines or a deferral or extension of the debarment period after market conditions allow for the development of competition (if this is plausible). Moreover, the provisions related to ‘self-cleaning’ included in art 55(4) *propDir* could help mitigate the effects of suspension or debarment when tenderers actually adopted effective measures to prevent further violations of competition law.

To sum up, it is submitted that the rules on the exclusion of tenderers for violations of competition law currently included in the EU public procurement directives are insufficient because they i) do not fully capture infringements that take place within the tender procedure (since they must be discovered prior to award to be effective), ii) grant full discretion to contracting authorities, and iii) do not establish the possibility of debarring infringers for a pre-established period of time. After briefly considering the system applicable in the US, it seems desirable to review the current EU rules by granting the competence to suspend and debar infringers to an authority other than the contracting authority (and, preferably, to the competition authority), to make suspension and debarment decisions mandatorily enforceable by contracting authorities, and to make explicit the maximum duration of debarment decisions as well as the rules regarding their scope (which should be general, unless expressly restricted to certain types of contracts or to certain contracting authorities). Suspension and debarment should not only be triggered by mandatory reports of suspected competition violations, but should also be configured as self-standing competition remedies aimed at protecting the public interest in the proper functioning of the procurement system. Limited waivers of the suspension and debarment regime could be introduced to avoid situations in which competition for public contracts might be excessively restricted—subject to adequate substitutive measures.

#### **(STRONGER) CONTROLS OF THE RISKS OF DISGUISED STATE AID**

As mentioned in passing, and regarding a different aspect of competition in the procurement setting, the move of the *propDir* towards increased flexibility and discretion of contracting authorities and entities generates risks related to the disguised granting of State aid that, to date, were minimised in view of the constraints imposed by most common award procedures (Sánchez Graells, 2011a: 118-120). Discussing issues related to the greater degree of discretion enjoyed by contracting authorities (in that case, due to the possibility to include policy objectives such as green or social procurement in their decision-making), the Green Paper made it clear that “*public procurement policy must ensure the most efficient use of public funds. At the same time, this guarantee of purchases at the best price ensures a measure of consistency between EU public procurement policy and the rules in the field of State aid, as it makes sure that no undue economic advantage is conferred on economic operators through the award of public contracts. Loosening the link with the subject-matter of the contract might therefore entail a risk of distancing the application of EU public procurement rules from that of the State aid rules, and may eventually run counter to the objective of more convergence between State aid rules and public procurement rules*” (European Commission, 2011a). However, the *propDir* contains no rules setting further controls of procurement awards as potential instances of State aid.

In this regard, it seems appropriate to stress once again that there is an increasing need for further cooperation with and involvement of competition authorities in the oversight of public procurement operations. The current EU public procurement system and the main relevance of the competition principle embedded therein impose contracting and supervisory authorities particularly demanding oversight responsibilities and, amongst them, a general duty to ensure that procurement activities do not distort competition (Benacchio and Cozzio, 2008). Indeed, as it has been already suggested, there are numerous instances in which a close cooperation between competition and public procurement authorities can result in more pro-competitive results (Carpinetti *et al*, 2006). Furthermore, given the specialisation of competition authorities and their detachment from procurement processes, they seem to be particularly well situated to assume competences or at least provide

substantial input (through mandatory or non-binding guidance) for the review of those aspects of public procurement processes that have clear competition implications or that are most prone to generate distortions in the markets concerned. Moreover, competition authorities seem to be in an advantageous position to assume competences as regards suspension and debarment of undertakings that infringe competition laws—be it upon report from contracting authorities, or on their own initiative (*above*). Therefore, from a general perspective, exploring mechanisms that contribute to strengthening the relationships between competition and public procurement authorities seems desirable.

To be sure, it lies within the competence of Member States to determine their internal organizational structures and levels of authority and, consequently, there is limited room for the adoption of (binding) measures at the EU level (Fenger & Broberg, 1995; Hjelmberg *et al*, 2006). However, at least two possible developments for the strengthening of the relationship between procurement agencies and competition authorities seem to merit further scrutiny: the appointment of competition advocates or liaison officers in some or all contracting authorities, either on a permanent or a temporary basis; and granting competition authorities competences to oversee some or all procurement decisions. Both measures could be introduced in the EU public procurement system as either voluntary mechanisms for Member States to adopt, or as mandatory institutions whose implementation still allowed Member States a substantial degree of discretion. Either way, it is my view that they would contribute to reinforcing the institutional framework for a more competition-oriented public procurement system.

(1) *Appointment of Competition Advocates or Liaison Officers.* One possible way to strengthen the relationships between competition and public procurement authorities is for the latter to appoint officers entrusted with the specific task of ensuring that procurement activities do not generate distortions of competition within the tender procedures and in the markets concerned (Hunter *et al*, 2008). Such officers would internally oversee the procurement activities and decisions of contracting authorities—at least in relation with contracts above certain (value) thresholds, as well as general practices or

trends in procurement in the given agency—and would maintain a close relationship with competition authorities—particularly as regards the reporting of suspected competition law violations. Given that there would likely be restrictions in the resources available, the appointment of such officers could be limited to certain types of contracting authorities. For instance, permanent appointments could be made by central purchasing authorities and by contracting authorities running framework agreements and dynamic purchasing systems (over a certain value threshold, if justified)—since these are the types of contracts and contracting entities that can more easily generate distortions of competition. Also, temporary appointments could be made in special cases, such as those of contracting authorities that had been found to have a *bad* procurement record (for instance, as a result of independent reviews conducted by the competition authority or by any other oversight bodies), or contracting authorities facing particularly demanding procurement procedures—such as those run through technical dialogue, or innovation partnerships. In all these cases, the existence of increased risks for the maintenance of undistorted market competition conditions seems to justify the appointment of officers specifically entrusted with the oversight of tender procedures and public procurement activities from a competition standpoint.

From a comparative perspective, it is important to stress that the figure of the *competition advocate* is regulated by the US FAR (Keyes, 2003). All federal agencies (which are roughly comparable to central purchasing agencies) ‘*shall designate a competition advocate for the agency and for each procuring activity of the agency*’ [US FAR 6.501]. It is worth noting that, in order to guarantee that they can properly develop such a highly demanding task, they must be ‘*provided with staff or assistance (eg, specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small business concerns), as may be necessary to carry out the advocate’s duties and responsibilities*’ [US FAR 6.501(c)]. Competition advocates “*are responsible for promoting the acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of*

*commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses*" [US FAR 6.502(a)]. They have special responsibilities as regards some task and delivery orders issued under multiple award contracts (the US equivalent of framework agreements) [US FAR 6.502(b)(2)(vii)]. Also, their activities include recommending '*goals and plans for increasing competition on a fiscal year basis*' [US FAR 6.502(b)(3)]. Competition advocates report to the senior management of the contracting agency, which is then responsible for taking the appropriate decisions (ABA, 2007).

Generally, the US model seems to be particularly fit for the purpose of reinforcing internal competition oversight by contracting authorities. As anticipated, the creation of an equivalent institution within the EU public procurement system—whose specific features, such as the rank of the officer, its specific tasks and reporting relations and obligations, or the possibility to create a centralised *body* of competition advocates within an already existing oversight agency, should be established by each Member State according to its institutional structure—could contribute to the development of more competition-oriented public procurement practices and, arguably, could improve the system without increasing litigation levels (as it should be largely dedicated to developing a preventive role and to avoiding competition distortions in procurement processes *ex ante*). Moreover, competition advocates should be assigned (new) responsibilities derived from the obligation of mandatory reporting of suspected competition law infringements and, hence, develop a close relationship with competition authorities. Given that Article 84 *propDir* contains specific provisions regarding public oversight that mandate the appointment of a single independent body responsible for the oversight and coordination of implementation activities—which may prompt institutional changes at Member State level, at least in some of them—this seems a good opportunity to take into consideration the competition advocate model.

In this regard, and in my opinion, there is room in the EU public procurement system for the creation of an institution equivalent to the US competition advocate. Such competition advocates should be

entrusted with guaranteeing the absence of competitive distortions derived from public procurement activities of the public buyer and work as liaison officers between public procurement and competition authorities. Their specific regime and regulating rules should be left to Member States to develop, but a requirement that an equivalent institution be created—permanently, at least in some contracting entities (such as central purchasing agencies), and temporarily in special cases (of contracting authorities with particularly restrictive procurement records or facing particularly demanding procurement processes, such as technical dialogue, or innovation partnerships)—should be imposed as an obligation on all Member States. Such a development would contribute to unrolling more competition-oriented procurement practices and, arguably, could do so without generating a significant impact on the level of litigation (Sánchez Graells, 2011a).

*(2) Granting Competition Authorities Oversight Competences over All or Some Public Procurement Decisions.* Another possible development that would reinforce the institutional framework for a more competition-oriented public procurement system implies the granting of competences for the oversight and review of (all or some) public procurement decisions to competition authorities (Berasategi, 2007). This development is not foreign to the systems of some Member States and their experiences seem to offer solid grounds for the extension of this institutional arrangement to other Member States. In this regard, it is important to stress that some Member States have integrated their competition authorities and central public procurement authorities entrusted with oversight responsibilities, or (almost identically) have granted oversight competences in public procurement matters to their national competition authorities—which become public procurement tribunals or bid protest bodies. This is currently the case, at least, in Germany, Sweden, Denmark, and the Czech Republic—and it used to be the case in Finland until 2002 (when a Market Court took over the handling of public procurement issues).

However, a full integration of competition and public procurement (oversight) authorities in all cases would not be desirable in instances where competition elements are not relevant to the substance of the

case—which can be based on issues of pure administrative law or in due process considerations. In this regard, the assignment of competences for the review of all public procurement cases by the competition authority could result in submitting some cases to the consideration of an authority that might lack the required expertise (at least, in the initial phases), and could drain significant resources that the competition authority could use more efficiently in the development of other tasks. Therefore, an intermediate model seems preferable, where competition authorities should file guidance opinions (preferably, of a binding character) in bid protest procedures to be decided by specialised public procurement oversight authorities or by the courts (*ie* an *amicus curiae*-like device). Alternatively, a system of case assignment between both bodies (competition and general public procurement oversight authorities, or the courts) could be implemented, so that competition authorities were competent only in cases where competition-related issues were preponderant. Be it as it may, this issue seems to remain fully within Member States' competences and the adoption of a uniform solution at EU level seems problematic. Nonetheless, the suggested developments seem worth considering.

In any case, given the increased risks for competitive neutrality that some of the provisions in the *propDir* generate, particularly in relation with the generation of competition distortions due to increased discretion and the ensuing risk of disguised State aid; I think that it is worth taking into consideration the abovementioned two potential developments that could foster the introduction of more pro-competitive public procurement practices and enforcement. The creation of the figure of the competition advocate could serve as a useful preventive instrument to avoid publicly-created restrictions of competition by means of internal oversight at the contracting agency level—at least in relation with certain contracting authorities and pre-determined types of contracts or contracts that exceed certain (value) thresholds. Moreover, competition advocates could develop an important liaison function with competition authorities. In a complementary manner, entrusting independent competition authorities with oversight competences for some public procurement decisions—through the assignment of decision or guidance responsibilities in bid protest procedures—could also contribute to

generating better results. Therefore, Member States should take these possibilities into account when implementing Article 84 *propDir*.

### CAPACITY BUILDING AND MARKET INTELLIGENCE PROVISIONS

Finally, and as clearly indicated in the Green Paper (European Commission, 2011a): “[a]ll measures aiming at enhancing competition in procurement markets presuppose that contracting authorities have a good knowledge of the markets on which they purchase (e.g. via studies on the structure and shape of the targeted market prior to the actual procurement). Putting these (or other) safeguards into practice would require an additional effort on the part of contracting authorities, which would probably only be justified for large contracts with a considerable potential impact on the market structure”. In this regard, it seems increasingly clear that lack of effective capacity may be a significant hurdle to the development of more refined, competition-oriented public procurement (Phillips, Harland & Telgen, 2008; Trepte, 2011). However, the capacity building and market intelligence provision in the *propDir* remains unfocussed and still too vague as to ensure improvements in this area.

Indeed, there is a block of proposals to reduce participation hurdles as regards information and search costs. The *propDir* includes two sets of soft instruments in this area. On the one hand, the art 87 *propDir* introduces knowledge centres to assist and guide contracting authorities and businesses in the carrying out of their procurement activities. More specifically, according to article 87(2) *propDir*, with a view to improving access to public procurement for economic operators (in particular SMEs) and in order to facilitate correct understanding of the applicable procurement rules, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance. And, further, article 87(3) *propDir* imposes even more specific duties towards economic operators intending to participate in a procurement procedure in another Member State, whose assistance shall at least cover administrative requirements in the

Member State concerned, as well as possible obligations related to electronic procurement. However, no specific provisions on market research are included

The doubts that this proposal raises are almost self-evident and refer to the level of resources (human and other) required to set up such knowledge or one-stop-shop procurement information centres. The Commission is itself aware of such difficulties but, quite boldly, dismisses them in the explanatory memorandum of the *propDir* in the following terms: *“It is not foreseen that requirements concerning oversight bodies and knowledge centres will generate overall additional financial burden for Member States. If some costs are expected to re-organise or fine tune the activities of existing mechanisms and structures, they will be neutralised by a reduction of litigation costs (both for contracting authorities and business), costs related to delays in the attribution of contracts, due to misapplication of public procurement rules or to the bad preparation of the procurement procedures, as well as costs related to the fact that advice to contracting authorities is currently provided in a fragmented and inefficient manner”*.

While providing better information and assistance to contracting authorities (*ie* investing in capacity building, even in a centralised manner) should have some of the positive, offsetting effects, providing such advice to businesses may as well generate the opposite. In any case, it seems naïve to expect Member States to assume that there will be no increase in financial burden and, more fundamentally, that they will be able to find additional finance to set up such knowledge centres (at least, with sufficient dimensions to actually be operational and readily available for businesses). Therefore, this proposal and related soft law initiatives (such as the issuance of general guidance documents, etc as suggested in some policy documents; European Commission, 2011c) seem difficult to implement in the current circumstances and may deserve some additional thought in search for more (readily) viable alternatives, such as fostering advice functions by chambers of commerce and business associations—which may already be in a relatively good position to do so.

## CONCLUSION

It evaporates from the prior sections that the current review of the EU public procurement rules is clearly oriented towards simplification and furthers the discretion of contracting authorities and entities in several key aspects. It has also been established that this generates significant risks of distortion of competition (both in the abstract, and in quite specific fashion) that require additional monitoring and oversight efforts. In that regard, it seems that the development of more refined, advanced procurement activities and the adoption of sophisticated (multi-year, aggregated) procurement techniques requires some investments in capacity building and the development of closer cooperation mechanisms with competition authorities. In that regard, it should be clear that the mere adoption of the instruments without increasing procurement capacity and without setting proper (internal and external) oversight mechanisms is highly likely to result in unrestrained procurement activities, prone to abuse and with a great difficulty design effective remedies that can prevent or restore damages in the competitive dynamics in the markets where public procurement accounts for a significant part of market demand. Therefore, the modernisation of the procurement rules will be welcome in the same degree as procurement (and competition) oversight and enforcement capabilities are strengthened. Otherwise, the rules may be better on the books, but that will hardly translate into increases of efficiency or any other competitive gains in practice. In the end, keeping (a sufficient degree of) competitive neutrality in the public procurement setting is an ongoing (hard) challenge that requires close coordination with other aspects of competition policy and a non-negligible investment of resources. Nonetheless, economic theory and some empirical studies clearly indicate that the gains further exceed the costs—but they cannot be obtained without the required investments of time and resources (economic and human) accompanying the regulatory reforms (those proposed, or any other).

## NOTES

[1] Even of the term ‘competitive neutrality’ can be identified with efforts to ensure that competition conditions are not distorted in

mixed public/private markets, where state-owned or quasi-public bodies line up to compete with private sector companies—in my view, the principle of competitive neutrality, or undistorted competition, should be all-encompassing and, therefore, aim to guarantee that all operators have an equal chance to compete for public contracts (regardless of the private/private, public/private, or public/public nature of the issue at hand). Therefore, the expression ‘competitive neutrality’ is used rather freely.

[2] It may be a purely terminological issue, but the difference between declarations on honour and self-declarations remains unclear and it may be desirable to unify this (or clarify the differences).

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