

Public procurement

Public procurement: An overview of EU and national case law

Anticompetitive practices, Bid rigging, Price fixing, State aid (notion), Sanctions/Fines/Penalties, Criminal sanctions, Foreword, Judicial review, Merger (notion), Joint tender submissions, Buying power, Cartel, All business sectors

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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Both public procurement and competition law constitute particularly relevant fields of public policy and legislation in the EU. Their relevance throughout the process of construction of the internal market, and their key role in preserving the advances made so far and in pushing European economic integration forward can hardly be overstated. Indeed, both sets of economic regulation directly related to the internal market [art 3(3) and Protocol No 27 TEU, art 3(1)(b) TFEU] are instrumental in guaranteeing the principle of an *open market economy with free competition* as required by article 119 TFEU (ex art 4 TEC). Similarly, they are of the utmost relevance for companies active in the EU, since they represent two of the basic building blocks of market regulation and are primarily entrusted with guaranteeing the existence of a ‘level playing field’ within the internal market and the effectiveness of the fundamental freedoms enshrined in the TFEU. However, until very recently, they have largely remained as separate, watertight compartments in both regulation and practice. It is probably not an exaggeration to consider both competition and public procurement law as substantially independent branches within EU economic law—but there is also a growing need for further integration.

Indeed, the interplay between public procurement and competition law has traditionally been relatively asymmetrical both at the EU and national level. While competition authorities have been very active in prosecuting and sanctioning bid rigging in public tenders (and the cases where instances of collusion in procurement procedures is sanctioned seem to be significantly growing in recent years), other areas of potential competition enforcement in procurement markets (such as the control of public buyers’ market behaviour or the control of mergers of relevant suppliers in procurement-sensitive markets) have remained substantially unexplored (with the notable exception of some Member States, such as the UK [1], that other countries such as Spain, Ireland, the Slovak Republic, Romania or Bulgaria are following but only very recently [2]). Even further, due to the

case law of the CJEU (mainly in *FENIN* and *Selex*, as discussed below in Part II), those areas may remain unexplored for a long time—generating under-enforcement of competition law and the consequent welfare losses.

It is worth stressing that the effectiveness of public procurement and its ability to contribute to the proper and most efficient carrying on of public interest obligations is conditional upon the existence of competition in two respects or separate dimensions. One of them has been expressly recognised for a long time by public procurement regulations, which have tried to foster *competition within the specific tender*. Public procurement rules protect and promote competition—in this narrow sense—as a means to achieve value for money and to ensure the legitimacy of purchasing decisions. From this perspective, competition is seen as a means to allow the public purchaser to obtain the benefits of competitive pressure among (participating) bidders, as well as a key instrument to deter favouritism and other corrupt practices and deviations of power. However, a subtler and stronger dependence of public procurement on *competition in the market* exists, but it is implicit and has generally been overlooked by most public procurement studies [3]. *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 competitive markets* [4]. 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 [5]. 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 is not specifically designed to prevent distortions of competition between undertakings. However, *issues regarding competition in the market are not alien to public procurement* [6], and need to receive further attention and a stronger emphasis [7].

To be sure, these are issues that have been quite predominant in the very recent revision of the EU Directives on public procurement leading to the approval of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [8]. As the European Commission expressed in its 2011 Green Paper on the Modernization of EU Public Procurement Policy [9]: *‘[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**’* (emphasis added). This has eventually resulted in the consolidation of the principle of competition amongst the general principles of procurement recognised in Article 18 of Directive 2014/24, which clearly establishes that: *‘**The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators**’* (emphasis added). In my view [10], the recognition of this embedded principle of competition comes to strengthen the relationship between public procurement and competition law and may prompt a ‘more pro-competitive’ review of procurement rules and practices while Member States transpose Directive 2014/24 before March 2016. Hence, the opportunity and interest of this revised special issue on the enforcement of competition law in the public procurement setting can hardly be overstated.

This foreword will closely follow the structure of the first edition and will try to highlight how bid

rigging continues to seem pervasive in the public procurement setting despite increased enforcement efforts following the OECD July 2012 Recommendation on Fighting Bid Rigging in Public Procurement [11] (a situation that should come as no surprise to economists) (Part I). It will then move on to assess how there still are very significant limitations and almost absolute difficulties in curbing the market behaviour of power public buyers (Part II) and how other issues, such as the treatment of mergers or State aid in public procurement markets may require more refined analyses than those applied so far (Part III). Reference to EU and national case law will be used to colour the depiction of the current situation in the enforcement of competition law in the public procurement setting, but the selection of cases or jurisdictions considered does not attempt to be exhaustive. The additions made in this second edition mainly try to highlight the continuity of trends already identified in the first edition or the emergence of new enforcement trends that, in my opinion, may continue to gain relevance in the immediate future. The selection of cases is, consequently, rather personal.

I. Bid Rigging Seems Pervasive in Public Procurement, Despite Increased Enforcement Efforts

As mentioned in passing, restrictions of competition generated by private entities participating in public procurement processes—mainly related to bid rigging—have so far attracted most of the attention as regards the intersection of competition law and public procurement [12], and economics offers good reasons for this.

A. Brief Economic Background

Indeed, as clearly stressed by the OECD: *“The formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and «ordinary» markets, procurement regulations may facilitate collusive arrangements”* [13]. The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature [14] and it is out of question that, under most common market conditions, procurement regulations significantly increase the transparency of the market and facilitate collusion among bidders through repeated interaction [15]. However, this key finding has not generated as strong a legislative reaction as could have been expected—and most public procurement regulations still contain numerous rules that tend to increase transparency and result in competition-restrictive outcomes (such as bid disclosure, pre-bid meetings, restrictions on the issuance of invitations to participate in bidding processes to a relatively pre-defined or stable group of firms, etc.) [16]. In the end, given that public procurement regulations are likely to facilitate collusion amongst bidders, it is not surprising that a large number of cartel cases prosecuted in recent years have taken place in public procurement settings [17], and that the main focus of the (still limited) antitrust enforcement efforts in the public procurement setting lies with bid rigging and collusion amongst bidders, as the actual case law shows.

B. Reflections of Economic Theory in Practice

As the cases published in this issue show, most competition decisions related to public procurement involve bid rigging by tenderers, which may take several forms, such as bid rotation, submission of cover bids, bid hold-up, submission of excessive bids to force an increase in the expenditure ceiling estimated by the tendering authority, etc. Collusion is pervasive in almost all economic sectors

where procurement takes place, but maybe has a special relevance in markets where the public buyer is the main or sole buyer, such as roads and other public works [18], healthcare markets, education, environmental protection, or defence markets—where both EU and national competition authorities have been very active and aggressive recently. Some of these cases, however, still show a need for further economic analysis (or a better understanding of the mechanics of bid rigging) on the part not so much of competition authorities, but of national review bodies and courts.

1. Bid rigging in healthcare markets

On 9 June 2011 the Moldovan Competition Authority (ANPC) established the existence of bid rigging practices at the public tenders organized by the Medicines Agency (AMED) for the purchase of anti-diabetic medicines, since two suppliers of pharmaceuticals were submitting their bids with identical prices [19]. In this particular case, though, it is worth stressing that collusion was being strengthened by the contracting authority (AMED) by selecting both firms as winning bidders and dividing the purchase volumes equally between them thus leading to the elimination of competition—which rather naturally led the ANCP to recommend to refrain from dividing purchase volumes among the bidders submitting identical price offers.

In a similar case, on 10 December 2010 the Portuguese Competition Authority issued a prohibition decision concerning a retail price fixing agreement established between a supplier and a retailer of hospital equipment (automated medicine dispenser), which eliminated price competition between the two companies in public tenders for hospital equipment [20]. Prior to that, on 7 January 2010 the Lisbon Commerce Court upheld a 2008 decision by the Portuguese Competition Authority imposing a € 13.4 million fine on several pharmaceutical companies for participating in a bid rigging cartel concerning public tenders held by hospitals for the purchase of blood glucose monitoring reagents (test strips) [21].

The case is very similar to a 2011 decision by the Italian Competition Authority, which fined four suppliers of magnetic resonance equipment with fines totalling € 5.5 million for collusive agreements relating to public tender in the region of Campania [22]. Also in a similar case, in March 2008 the Romanian Competition Council fined a pharmaceutical producer and three distributors for participation into a market-sharing cartel active on the insulin market. In this case, involving an auction within the Diabetic National Program in 2003, the products of the same manufacturer were offered through the three distributors, each authorized to participate with different products, so that they did not compete against each other in the auction [23].

There are similar cases in almost every jurisdiction [24], and their incidence may be difficult to lower, particularly in countries where the retail price for pharmaceuticals is set by the public authority and/or where public buyers must disclose their estimates or maximum expense ceilings. However, precisely due to some of these regulatory restrictions, not all cases of apparent bid rigging in the healthcare sector (or in other markets) end up with the imposition of fines since the analysis of the available data may be complicated and requires detailed and careful appraisal. For instance, the Bulgarian Commission for Protection of Competition recently closed a probe into alleged bid rigging among suppliers of pharmaceuticals without establishing an infringement, particularly in regard to the transparency-enhancing effects of the domestic regulatory environment (which imposed price ceilings) [25]. Similarly, the Polish authority also dropped a case after thorough analysis of data that, *prima facie*, indicated potential collusion [26]. In this regard, clear rules on the

application and validity of proof by presumptions is very much needed, due to the relatively easy misreading of actual procurement data. In this regard, it is interesting to see cases like the judgment of the Spanish Supreme Court of October 2009, where some indications in this respect were advanced [27]. But a rather different approach can be found in the case law of the Paris Court of Appeals, which sets a strict standard of proof for undertakings to inhibit the existence of indicia of collusion in tendering procedures [28]. Hence, some further guidance by the CJEU on the application of the technique of proof by presumptions may be needed (although this is not exclusive of competition enforcement in the procurement setting).

2. Bid rigging in public works markets

Some of the most well-known bid-rigging schemes have taken place in this area. For instance, it has been widely reported that the European Commission fined members of lifts and escalators cartels over €990 million, since between at least 1995 and 2004 those companies rigged bids for procurement contracts, fixed prices and allocated projects to each other, shared markets and exchanged commercially important and confidential information [29]. It is also well known that one of the largest cartels ever prosecuted involved the (whole) construction industry in the Netherlands for at least the period 1992-2006, where firms systematically rigged bids by holding meetings prior to tendering for contracts [30].

Indeed, the construction sector piles up a number of bid rigging decisions in other jurisdictions, where massive cartel investigations have followed the Dutch example. For instance, in September 2009 the UK Office of Fair Trading (OFT) imposed £129.5 million in fines on construction firms for colluding with competitors after finding that the companies concerned were engaged in illegal and anti-competitive bid rigging activities on at least 199 tenders from 2000 to 2006, mainly by means of 'cover pricing' [31]. However, the fines have been substantially lowered by the UK's Competition Appeal Tribunal (CAT) [32], raising some issues on the accuracy and practicality of such massive cartel investigations and the ensuing fines—the most disturbing is, in my opinion, that the CAT found the OFT wrongly equated cover pricing to bid-rigging or “*traditional cartel practices*” (para 82), stating that “*Its purpose is not (as in a conventional price fixing cartel) to prevent competition by agreeing the price which it is intended the client should pay*” (para 100). These considerations are difficult to understand, since cover pricing is nothing but a mechanism of (indirect) price fixing in tender procedures, as clearly indicated in recent OECD guidelines: “*long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also **associated with firms submitting «cover» (higher) bids***” (emphasis added) [33]. Therefore, the disconnection between cover pricing and price fixing or pure bid rigging that the CAT tries to delineate just seems wrong. Moreover, the CAT ruling is particularly disturbing because, as already pointed out by one commentator, the “*divergence in attitude over the seriousness of cover pricing between the OFT and the CAT could lead to further reductions in fines*” [34]; and, hence, could significantly reduce deterrence in a sector where it is strongly needed in view of the longstanding anti-competitive practices.

Similarly, although in a smaller scale, in 2004 the Hungarian Competition Authority fined construction companies for bid rigging in Budapest public construction tenders after the documents seized in dawn raids at the premises of large construction companies indicated that several relevant

players in the Hungarian construction sector had been involved in bid rigging in a number of large public procurements [35]. Other, similar cases of sanctions imposed to bid riggers by the Hungarian Competition Authority have however recently been quashed due to insufficient proof of collusion under the theory of the single and continuous infringement [36]. Even if the companies had been held by the authority to be involved in at least 11 instances of bid rigging between 2002 and 2006, the reviewing court found that not all of them had been involved in every instance (since some of them did not participate in some of the tenders) and, hence, could not be charged and sanctioned under the theory of the single and continuous infringement—therefore, mandating the reopening of the case and the setting of new fines in view of the data supporting actual involvement by each company. This ruling is also troubling, in my view, due the fact that *bid hold-up* is a text book example of bid rigging practice, as also indicated in OECD guidelines: “*Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, **competitors who agree not to bid** or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them*” (emphasis added) [37]. Hence, requiring proof of actual participation (ie submission of a bid) generates a safe harbour for some of the companies involved in this type of collusion.

Very recently, the French National Competition Authority fined five undertakings for bid rigging in the reconstruction or refurbishment sector in what has been described as a perfect practical example of the notion of complementary bidding (or cover offers) typically referred to as an “*offre de couverture*” under French Law; a variety of bid rigging by which one of the tenders will submit an unattractive bid, in collusion with another bidder, that is intended not to be successful but rather to make the co-conspirator’s bid more attractive in comparison and allow him to win the contract [38]. The FCA thus concluded that the contracting authority was misled as to the scope and the intensity of competition between these undertakings, and generally as to the very existence of competition on the market. The fines imposed almost reached 1 million Euro, although some of the companies received very reduced fines due to the financial difficulties in which the economic crisis has left construction companies.

Also recently, and in view of the preliminary findings in four ongoing bid rigging investigations, this type of problems have been the object of a sector enquiry in Romania, where the Romanian Competition Council has found that the simultaneous organization of many awards with similar object such as street pavement works can enhance the opportunity of illegal coordination of conduct among tenderers and, consequently, is bound to recommend significant changes in the way public works are tendered [39].

3. Bid rigging in other markets

Recent decisions regarding bid rigging in other procurement markets are also worth noting, particularly in those jurisdictions where bid rigging is a criminal offence, such as Germany. Recently, in July 2011, the German Federal Cartel Office imposed fines on manufacturers of fire fighting vehicles and turntable ladders that had been rigging bids for a rather lengthy time period of around 10 years [40]. In this case, the colluding undertakings used the external help of an independent accountant (resembling other cases of illegal exchanges of information, such as the well-known *John Deere* case law [41]), which may raise awareness on the part of competition authorities as to new trends in bid rigging practices.

Not only markets for supplies or works are affected by bid rigging through exchange of information. Services markets have also been the object of recent decisions, although some of them have been improperly quashed at judicial review stage. In my view, a recent judgment of the Tirana District Court against a prior decision of the Albanian Competition Authority (ACA) constitutes one such case of improper review. In that case, the ACA found some companies guilty of rigging bids for security services. According to ACA, those companies used several schemes such as cover bidding and bid rotations. They also used subcontracting to each other in order to compensate for the “lost” bids and in several cases the winning bidder subcontracted the whole service, or parts of it, to the competitors in the same bid. However, following a very formalistic and difficult to understand reasoning, the reviewing district court declared that a bid rigging scheme was not possible since the tender procedures were open and the documents submitted were standard forms. In such procedures, according to the court, it is not possible to identify the competitors and therefore the reaching of an agreement distorting competition is impossible. The Competition Authority has appealed this case at the Tirana Court of Appeals [42]. In my view, the District Court has grossly failed to understand how bid rigging operates in practice and the shortcomings of (open) public tenders to prevent it. It is to be hoped that the Court of Appeals will reach a more informed decision.

Services had also been considered prior to this in other jurisdictions. For instance, the French Competition Authority fined 14 companies with almost € 10 million for having shared almost all public markets for the restoration of historic monuments. In this case, undertakings organized «roundtables» where they divided the regional restoration building markets in view of the annual schedule prepared and published by the relevant contracting authority. In this case, it is plain to see that an excessive transparency on the part of the contracting authority made collusion simple and easy to monitor. Companies also used cover bids for outside regions where they placed bids for contracts in order to ‘inflate numbers’ in the appearance of high levels of competition and then exchanged their services [43].

Shortly after this and also in the services industry, in its decision of 24 February 2011, the French Competition Authority considered that four companies had concluded anticompetitive arrangements between 2005 and 2006 by fixing their prices to respond to procurements launched in the painting services sector for naval equipment and engineering structures, which covered, in particular, the renovation of quays, cranes and locks in several harbours [44]. The French Authority found that the colluding companies had exchanged with each other the prices they intended to offer to the contracting entities and agreed to submit sham bids aimed at creating an impression of genuine competition. It is worth stressing that, in both of the mentioned cases, the French Authority understood the graveness of cover pricing and imposed rather heavy fines—which, however, were reduced in some case in regard of the weak financial situation of some of the companies (an issue that would merit a separate special issue of this review).

Almost contemporarily, on 25 March 2011, a Danish District Court convicted two environmental laboratories for bid rigging and imposed fines on each of the two companies and their directors [45]. The court found that the two directors intentionally had coordinated prices and agreed to share the bids between them, so that only one company would submit a bid in each of the two open tenders. The companies tried to defend alleging they had formed a consortium to bid jointly in both tenders, which the court dismissed easily, since there was no proof of consortium and the bids had been presented under the name of only one company in each of the procedures.

C. Preliminary Conclusion

Therefore, in view of the anecdotal evidence offered the abovementioned recent case law, no doubt can be harboured as to the pervasiveness of bid rigging in almost any economic sector where the public buyer sources goods, works and services—therefore, justifying the increasing efforts of competition authorities to prosecute and sanction bid rigging in procurement markets. However, as has also evaporated from some of the judgments by appeal courts in those same cases, there may be a need for additional backing up of the competition authorities at review level, for which a more economic approach (or a better understanding of the working of collusion in the public procurement setting) may be required.

II. Limitations and Difficulties in Curbing Public Buying Power and Potential Distortions of Competition Due to Procurement Activities

Even if there has been extensive activity regarding the detection and prosecution of privately-generated distortions of competition in procurement markets through bid rigging, a trend in stark contrast can be identified regarding publicly-created distortions of competition since, generally, *they have not yet been effectively tackled by either competition or public procurement law*—probably because of the major political and governance implications embedded in or surrounding public procurement activities, which make development and enforcement of competition law and policy in this area an even more complicated issue, and sometimes muddy the analysis and normative recommendations.

In this regard, it may be worth stressing that EU public procurement rules seem to be increasingly tilting towards a more flexible approach, thus conferring increased discretion to the public buyer [46] and towards developing more “competition-friendly” devices [47]. This evolution is freeing the public buyer from the straightjacket that stricter public procurement rules used to impose on its market behaviour (to allow it to function more like a private buyer). Somehow, though, a paradoxical development of EU public procurement can be identified. While the 2004 and the new 2014 EU directives try to increase competition in the public procurement setting by freeing the public buyer from some restrictions that were considered to limit its ability to exploit market-like mechanisms in the procurement process, they also increase the discretion of the public buyer in running the system and try to leave room for increased administrative efficiency in public procurement. The paradox is that *some of the rules that provide for an increased flexibility can also generate anti-competitive results* [48]. Consequently, the aims pursued by the EU directives on public procurement can be relatively inconsistent or hard to reconcile and, as a result, the effect on the aggregate efficiency of the system is unclear. In short, *the market behaviour of the public buyer seems to require the same treatment under competition law than the purchasing behaviour of any other undertakings*.

Nonetheless, the case law of the CJEU in *FENIN* [49] and *Selex* [50] has set an apparently insurmountable barrier to the analysis of public procurement activities under the competition law lenses by excluding (pure) public buyers from the concept of undertaking for the purposes of competition law. Hence, in light of the current CJEU case law, unless the public buyer develops a downstream economic activity, its purchasing (market) behaviour will be shielded from competition law scrutiny, regardless of the potential significance of the competitive distortions generated by the rules governing public procurement or by the administrative practices developed thereupon.

As already pointed out somewhere else, this position of the CJEU case law sets a very significant limitation and an almost impassable difficulty in curbing the exercise of public buying power and the potential distortions of competition due to procurement processes—and, therefore, has triggered strong and well-founded criticism [51]. In order to limit the criticism to the ambit of this special issue, it is worth stressing that one of the major sources of disappointment with the *FENIN-Selex* case law is that it runs contrary to the previous practice in various Member States—at least the United Kingdom [52], Germany [53], The Netherlands [54], France [55] and Spain [56]—where a clear and largely consistent approach towards subjecting public procurement activities as such to competition rules existed.

In general terms, an overview of these national precedents seems to make it clear that national competition authorities and judicial bodies in these Member States generally tended to answer in the affirmative the question whether public procurement or purchasing activities *as such* have to be considered ‘economic activities’ and, hence, suffice for the entities conducting them to qualify as ‘undertakings’ and thus be subject to the corresponding ‘core’ competition rules—*ie* to the prohibitions set by the domestic equivalents of articles 101 and 102 TFEU. The common rationale underlying the solutions adopted at Member State level seems to be that the potential anti-competitive effects generated by certain public procurement practices triggered the application of those rules—which, nonetheless, the CJEU simply brushed out rather lightly in its *FENIN-Selex* case law.

As a matter of EU law, the discussion remains open as to what scope is there for Member States to depart from the *FENIN-Selex* case law and, hence, what scope is there to develop effective competition law controls on the market behaviour of the public buyer—or, put otherwise, whether they have to soften their previous criteria and national practices regarding the subjection of public procurement activities *as such* to competition law. In this regard, it could be argued that, given the supremacy of EU law and the binding character of CJEU case law as regards its interpretation, the *FENIN-Selex* approach is to take precedence over rulings of Member States’ courts—however better suited to (economic) reality they are [57]. Nonetheless, in my opinion, this conclusion is not automatic or unavoidable.

According to established EU case law [58], and to article 3(2) of Regulation 1/2003, Member States must completely align with EU competition law as regards collusive behaviour, but can adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings [59]. Arguably, the expansion of the concept of undertaking at domestic level would result in a subsequent expansion of the competition rules equivalent to articles 101 and 102 TFEU and, while the first is forbidden, the latter is tolerated by EU law. In this regard, and taking into consideration that publicly-generated restrictions to competition in the public procurement setting will be *primarily of a unilateral nature*, there seems to be no impediment under EU law for Member States’ competition authorities and judicial bodies to maintain their previous criteria and to continue enforcing domestic competition rules on public buyers conducting public procurement activities *as such* (at least as regards unilateral conduct developed by public buyers). However, the prospects for development of competition law in this area are highly dependent on political commitment and, to a certain extent, on the activism of national competition authorities and, hence, are highly difficult to forecast. At any rate, in my opinion, they would be highly desirable.

III. Other Issues, such as Treatment of Mergers or State Aid in Public Procurement

Markets

Finally, it may be worth recalling that there is also interplay between competition law and public procurement regarding merger and State aid control cases but that, to a large extent, the analyses in these two areas have remained very superficial and rather formal. On the one hand, the existence of a public power buyer has been usually used by competition authorities as a blunt (but rather formal and oftentimes unwarranted) argument to adopt a relatively lenient approach towards merger control, on the assumption that the merged entities would be unable to curb the bargaining power of the public buyer [60]. In general, there is very limited discussion of that premise, although there may be some exceptions [61]. On the other hand, State aid control in the public procurement setting has also been almost entirely chopped off by virtue of two lines of cases.

Firstly, and after considerable academic debate, the analysis of whether the award of a public contract amounts to State aid has finally been subjected to a vicious cycle that sets an almost impossible to meet standard. Indeed, based on the case law of the EU judicature, the practice of the European Commission has established a presumption that no State aid incompatible with the EU Treaty exists where the award of the contract: i) is a pure procurement transaction, and ii) the procurement procedure is compliant with the EU public procurement directives and suitable for achieving best value for money—inasmuch as no economic advantage which would go beyond normal market conditions will usually arise under these circumstances [62]. Hence, according to the Commission's practice, compliance with the EU public procurement directives in the tendering of a contract that would otherwise raise *prima facie* concerns about its compatibility with the State aid rules establishes a rebuttable presumption of compliance with the State aid regime (*rectius*, of the inexistence of illegal State aid). To rebut such a presumption, it would be necessary to determine that, despite having complied with procurement rules, the public contractor actually received an unjustified economic advantage because the terms of the contract did not reflect normal market conditions. It follows that, in the absence of a clear disproportion between the obligations imposed on the public contractor and the consideration paid by the public buyer (which needs to be assessed in light of such complex criteria as the risks assumed by the contractor, technical difficulty, delay for implementation, prevailing market conditions, etc.), State aid rules impose a very limited constraint on the development of anti-competitive public procurement.

Secondly, and in view of the CJEU case law on procurement and the new drafting of article 69 of Directive 2014/24, the granting of illegal State aid cannot automatically imply the disqualification of the beneficiary/ies from public tenders [63] and, hence, State aid control is also limited from this perspective. However, the new drafting of the provision on disqualification of abnormally low tenders tainted with State aid does offer some room for improvement, as it deviates from the traditional approach of only considering illegal State aid to broaden the test and, particularly, cover instances of misuse of State aid to (cross)subsidise abnormally low offers. Indeed, under article 69(4) of Directive 2014/24: '*Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, **the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.** Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof*' (emphasis added). Hence, more litigation can be expected at the cross-roads of State aid and public procurement law [64].

IV. Conclusion

As seen in this foreword, most of the activity of competition authorities in public procurement markets, both at EU and national level, has so far focused in detecting and sanctioning instances of bid rigging—which are pervasive and almost inherent to public procurement, due to the generation of competitive environments particularly prone to bidder collusion. In view of the CJEU case law, further developments in other areas of interaction between public procurement and competition law—most notably, the development of effective mechanisms to curb the exercise of market power by public buyers and an effective control of procurement conditions that may generate undesired, spill over competition-distorting effects—seem highly unlikely at present (but just as desirable, in my opinion). Nonetheless, it is to be hoped that better knowledge and understanding of public procurement and the issues it raises may foster legal developments in the future. In this regard, the present special issue of *Concurrences* seems a valuable contribution.

[1] Indeed, the OFT has been very active in the conduct of research and the issuance of guidance regarding procurement. See *Assessing the impact of public sector procurement on competition* (2004), available at www.oft.gov.uk/shared_of/re.... More recently, see *Government in markets. Why competition matters - a guide for policy makers* (2009), available at http://www.oft.gov.uk/shared_of/bu..., *Choice and Competition in Public Services. A guide for policy makers* (2010), available at http://www.oft.gov.uk/shared_of/bu...; and *Commissioning and competition in the public sector* (2011), available at http://www.oft.gov.uk/shared_of/re... (all last visited 04/11/2011).

[2] Recently, for instance, the Italian Competition Authority prioritised the fights against bid rigging amongst its top enforcement strategies; see [Article from European Competition Network Brief, The Italian Competition Authority launches initiative to fight bid-rigging, 1 October 2013, e-Competitions Bulletin October 2013, Art. N° 62150](#). Danish authorities followed a similar path; see [Article from European Competition Network Brief, The Danish Competition and Consumer Authority publishes guidelines on fighting bid rigging in public procurement, 29 November 2012, e-Competitions Bulletin November 2012, Art. N° 51257](#). Previously, the Spanish Competition Authority issued a *Guide on Competition and Public Procurement*, where it offers guidance to public buyers as to how to keep effective competition, focusing both in public and private distortions of competition in procurement markets; available at <http://www.cncompetencia.es/Inicio/...> (last visited 31/03/2014). Recently, it has issued policy documents on the basis of that guide; see [Albert Sánchez Graells, The Spanish Competition Authority publishes a report on the application of its guide on public procurement and competition to public health care provision-related procurement in Spain, 30 September 2013, e-Competitions Bulletin September 2013, Art. N° 59551](#). The Slovakian Competition Authority had also issued a document specifically focused on bid rigging in 2010. See [Article from European Competition Network Brief, The Slovakian Competition Authority publishes a brochure on cartel agreements in public procurement, 23 June 2010, e-Competitions Bulletin July 2010, Art. N° 33524](#). Romania has also prioritised public procurement; see [Adrian Ster, The Romanian Competition Council holds public procurement as a priority \(Report: The challenges of the Single Market and the competition in sensitive sectors\), 14 October 2010, e-Competitions Bulletin October 2010, Art. N° 33218](#). Bulgaria published similar guidelines; see [Alexandr Svetlicinii, The Bulgarian Competition Authority issues guidelines on identification and prevention of bid-rigging practices, 20 May 2010, e-Competitions Bulletin May 2010, Art. N° 31752](#). Ireland also issued guidelines on the subject; see [Article from European Competition Network Brief, The](#)

[Irish Competition Authority publishes booklet on the detection and prevention of collusive tendering, 20 December 2009, e-Competitions Bulletin December 2009, Art. N° 33445.](#)

[3] Exceptionally, the relevance of competition in the market (as protected by competition law) for the proper functioning is stressed by PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 57, 61 and 122. See also C Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) 15 *Public Procurement Law Review* 352. Compare with JF Brisson, *Les fondements juridiques du droit des marchés publics* (Paris, Imprimerie Nationale, 2004) 25; and O Black, *Conceptual Foundations of Antitrust* (Cambridge, Cambridge University Press, 2005) 9.

[4] The case has been made convincingly by RD Anderson and WE Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 *Public Procurement Law Review* 67, 70-2. Similarly, stressing the importance to shield public procurement from anticompetitive market practices, see DE Brunk, 'Governmental Procurement: "FAR" from a Competitive Process' in G Piga and KV Thai (eds) *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (Boca Ratón, PrAcademics Press, 2006) 156.

[5] G Piga and KV Thai, 'The Economics of Public Procurement: Preface' (2006) *Rivista di Politica Economica* 3; KV Thai, 'Public Procurement Re-examined' (2001) 1 *Journal of Public Procurement* 9.

[6] See W Sauter and H Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge, Cambridge University Press, 2009) 49.

[7] This issue has been covered previously in *Concurrences*. See [Elias Berkani, Competition Law and Public Procurement : An «inventory of fixtures», 5 February 2007, Concurrences Journal N° 1-2007, Art. N° 13046, pp. 58-67](#), and [Laurence Idot, Public tenders and competition law, February 2008, Concurrences Journal N° 1-2008, Art. N° 15218, pp. 52-63](#).

[8] [2014] OJ L94, 28.03.2014, pp. 65-242.

[9] European Commission, *Green Paper on the Modernization of EU Public Procurement Policy—Towards a More Efficient European Procurement Market*, COM(2011)15 final, 27 January 2011.

[10] See A Sanchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart Publishing, 2011) pp. 189-220.

[11] OECD, *Recommendation on Fighting Bid Rigging in Public Procurement*, C(2012)115, 17 July 2012.

[12] Indeed, this has been the main focus of international efforts, particularly by the OECD, which has recently published detailed guidelines to help design public procurement regulations to prevent collusion; see OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money* (2009). See also *ibid*, *Public Procurement: The Role of Competition Authorities in Promoting Competition* (2007). This is also the focus of recent scholarly

studies in this field; for instance, C Cabanes and B Neveu, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions* (Paris, Le Moniteur, 2008); as well as some practitioners' guidance, see WE Kovacic, *The Antitrust Government Contracts Handbook* (Chicago, ABA Section of Antitrust Law 1990).

[13] OECD, *Public Procurement: Role of Competition Authorities* (2007) 7.

[14] For recent references, see GL Albano et al, 'Preventing Collusion in Public Procurement' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 347.

[15] For a theoretical framework see RP McAfee and J McMillan, *Incentives in Government Contracting* (Toronto, Toronto University Press, 1987), and F Naegelen and M Mougeot, *Les marchés publics: règles, stratégies, politiques* (Paris, Economica, 1993). For recent references, see WE Kovacic et al, 'Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 381.

[16] However, some contracting authorities do adopt certain anti-collusion measures when designing their procurement processes; see L Carpineti et al, 'The Variety of Procurement Practice: Evidence from Public Procurement' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 14

[17] KL Haberbusch, 'Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime' (2000-2001) 30 *Public Contract Law Journal* 97, 98; and Anderson and Kovacic, 'Competition Policy and International Trade Liberalisation' 67.

[18] For a worrying description of the pervasiveness of bid rigging in construction markets all over the world, see OECD, *Policy Roundtable on the Construction Industry* (2008), available at <http://www.oecd.org/dataoecd/32/55/...> (last visited 04/10/2011).

[19] See [Alexandr Svetlicinii, The Moldovan Competition Authority finds bid rigging practices in purchases of anti-diabetic medicines \(Medicines Agencies\), 9 June 2011, e-Competitions Bulletin June 2011, Art. N° 37384.](#)

[20] See [Article from European Competition Network Brief, The Portuguese Competition Authority punishes resale price maintenance affecting hospitals' public tenders, 10 December 2010, e-Competitions Bulletin December 2010, Art. N° 35733.](#)

[21] See [Miguel Mendes Pereira, Nuno Carrolo dos Santos, The Lisbon Commerce Court confirms decision against bid-rigging cartel by pharmaceutical companies but substantially reduces fines \(Abbott, Menarini and Johnson & Johnson\), 7 January 2010, e-Competitions Bulletin January 2010, Art. N° 30637.](#)

[22] See [Article from European Competition Network Brief, The Italian Competition Authority sanctions suppliers of magnetic resonance equipment with fines totalling € 5 500 000 for collusive agreement relating to public tender \(Siemens, Philips, Toshiba Medical Systems and Alliance Medica\), 27 July 2011, e-Competitions Bulletin July 2011, Art. N° 40445.](#)

[23] See [Georgeta Harapcea](#), [The Romanian Competition Council fines a pharmaceutical producer and three distributors for participation into a market-sharing cartel active on the insulin market \(Eli Lilly Export, A&A Medical, Mediplus Exim and Relad Pharma\)](#), 12 March 2008, [e-Competitions Bulletin March 2008](#), Art. N° 19850

[24] For instance, regarding Italy, see [Luca Crocco](#), [An Italian administrative Court confirms that a cartel took place in hospital supplies but slashes down fines \(Bristol Myers Squibb\)](#), 6 June 2008, [e-Competitions Bulletin June 2008](#), Art. N° 23296.

[25] See [Dessislava Fessenko](#), [The Bulgarian Commission for Protection of Competition closes a probe into alleged bid-rigging among suppliers of pharmaceuticals without establishing an infringement \(Alta Pharmaceuticals, Roche\)](#), 12 December 2010, [e-Competitions Bulletin December 2010](#), Art. N° 34785.

[26] See [Robert Gago](#), [Piotr Borowiec](#), [The Polish competition authority finds pharmaceuticals companies and their distributors not guilty of price fixing and market sharing on the EPO medicines market \(Johnson & Johnson, Roche\)](#), 14 June 2007, [e-Competitions Bulletin June 2007](#), Art. N° 14073.

[27] See [Jaime Garcia-Nieto](#), [Hervé Ajouc](#), [The Spanish Supreme Court provides guidance on the application of the proof by presumptions test in the context of a bid rigging case in the healthcare sector \(Amersham Health\)](#), 3 October 2009, [e-Competitions Bulletin October 2009](#), Art. N° 31175.

[28] See [Charles Saumon](#), [Pierre de Montalembert](#), [The Paris Court of Appeal confirms the fines imposed in a collective boycotting case and its strict case law on standard of proof \(Defibrillators\)](#), 8 April 2009, [e-Competitions Bulletin April 2009](#), Art. N° 26442.

[29] See [Vanessa Eline Post](#), [Andrés Font Galarza](#), [René Plank](#), [The European Commission fines cartel in the elevators and escalators sector \(Otis, KONE, Schindler and ThyssenKrupp\)](#), 21 February 2007, [e-Competitions Bulletin February 2007](#), Art. N° 36176.

[30] For a comprehensive explanation of this very outstanding case (due, notably, to the enormous amount of undertakings involved), see the site of the Construction Unit at the Dutch Competition Authority (<http://www.nma.nl/en/competition/mo...>, last visited 04/10/2011).

[31] See [Andrea Lista](#), [The UK Office of Fair Trading imposed £129.5 million in fines on construction firms for colluding with competitors \(Construction Industry Cartel\)](#), 22 September 2009, [e-Competitions Bulletin June 2010](#), Art. N° 31546.

[32] See [Andreas Stephan](#), [The UK Competition Appeal Tribunal cuts fines in the construction cover pricing appeal case \(Kier Group and others\)](#), 11 March 2011, [e-Competitions Bulletin March 2011](#), Art. N° 38585.

[33] OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping governments to obtain best value for money* (2009), available at <http://www.oecd.org/dataoecd/27/19/...> (last visited, 04/10/2011).

[34] See [Simon Barnes](#), [The UK Competition Appeal Tribunal holds its decision in the construction cover pricing appeal case \(Kier Group and others\)](#), 11 March 2011, [e-Competitions Bulletin March](#)

2011, Art. N° 35158.

[35] See [Gábor Báthory](#), [The Hungarian Competition Authority fined construction companies for bid rigging in Budapest public construction tenders \(Alterra\)](#), 18 March 2004, [e-Competitions Bulletin March 2004](#), Art. N° 21785.

[36] See [Zsuzsanna Németh](#), [A Hungarian Court annuls the decision of the Competition Office having found guilty construction companies of bid rigging taking into account lack of proof of single and continuous infringement \(Heves – Nógrád county tenders\)](#), 19 April 2011, [e-Competitions Bulletin April 2011](#), Art. N° 35772.

[37] OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*.

[38] See [Jocelyn Delatre](#), [The French National Competition Authority fines five undertakings for collusive tendering in the field of public procurement \(Vilmore, Eiffage\)](#), 17 April 2013, [e-Competitions Bulletin April 2013](#), Art. N° 51793.

[39] See [Emanuela Matei](#), [The Romanian Competition Council concludes its sector investigation on the market for construction of roads and highways](#), 28 August 2013, [e-Competitions Bulletin August 2013](#), Art. N° 55789.

[40] See [Jochen Baier](#), [The German Federal Cartel Office imposes fines on manufacturers of firefighting vehicles and turntable ladders](#), 27 February 2011, [e-Competitions](#), Art. N°38335.

[41] On the CJEU case law related to information exchange, see [Christian Roques](#), [L'échange d'informations en droit communautaire de la concurrence : Degré d'incertitude et jeu répété](#), September 2009, [Concurrences Journal N° 3-2009](#), Art. N° 26897.

[42] See [Petrina Broka](#), [The Tirana District Court quashes a decision of the Albanian NCA on bid rigging in the security and guarding services public procurement \(Eurogjici\)](#), 4 June 2013, [e-Competitions Bulletin June 2013](#), Art. N° 58576.

[43] See [Malgorzata Pujdak](#), [Ajit Dhaliwal](#), [The French Competition Authority fines 14 companies 9 803 590 M € for having shared almost all public markets for the restoration of historic monuments](#), 26 January 2011, [e-Competitions Bulletin January 2011](#), Art. N° 35150.

[44] See [Charles Saumon](#), [Iphigénie Fossati-Kotz](#), [The French Competition Authority fines four companies for bid rigging in the painting services sector for naval equipment and engineering structures \(Philippe Lassarat, Prezioso-Technilor, Grivetto, Sorespi Bretagne\)](#), 24 February 2011, [e-Competitions](#), Art. N° 35148.

[45] See [Jacob Borum](#), [A Danish court imposes fines on two environmental laboratories and their directors for bid rigging \(Environmental Laboratory and Milana\)](#), 25 March 2011, [e-Competitions Bulletin March 2011](#), Art. N° 35708.

[46] S Treumer, "The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice?" (2006) 15 *Public Procurement Law Review* 71.

[47] See, for instance, some of the issues brought up under the heading “Ensuring fair and effective competition” in the *Green Paper on the modernisation of EU public procurement policy—Towards a more efficient European Procurement Market*, Brussels, 27.1.2011 COM(2011) 15 final, available at <http://eur-lex.europa.eu/LexUriServ...> (last visited 04/10/2011). The Commission is expected to publish draft new procurement rules on the basis of the replies to the public consultation, so changes could be expected in this area in the near future.

[48] The reader will excuse a reference to one of my prior works, where those effects are described: see Albert Sánchez Graells, *Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It*, University of Oxford, CCLP (L). 23, 21 August 2009, available at <http://ssrn.com/abstract=1458949> (last visited 04/10/2011).

[49] Case C-205/03 P *FENIN v Commission* [2006] ECR I-6295 ¶26. See comment [Didier Ferrier, Notion d'entreprise : La CJCE considère que l'opérateur qui achète des produits pour les utiliser dans le cadre d'une activité "sociale" n'est pas soumis au droit de la concurrence \(FENIN\), 11 July 2006, Concurrences Journal N° 4-2006, Art. N° 27388.](#)

[50] Case C-113/07 P *Selex v Commission* [2009] ECR I-2207 ¶¶102, 103 and 114. See [Jean-Philippe Kovar, Notion d'entreprise : La CJCE confirme les jurisprudences Eurocontrol et Fenin sur la notion d'activité économique et la qualification de l'acte d'achat \(Selex Sistemi Integrati - Eurocontrol\), April 2009, Concurrences Journal N° 2-2009, Art. N° 26095, pp. 212-213.](#)

[51] For its clarity, see W-H Roth, ‘Comment: Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission*, Judgment of the Grand Chamber of 11 July 2006, [2006] ECR I-6295’ (2007) 44 *Common Market Law Review* 1131, 1135-42.

[52] The *FENIN-Selex* approach runs contrary to the previous findings of the *UK Competition Appeals Tribunal (CAT) BetterCare* decision, that expressly dismissed the argument that ‘the simple act of purchasing without resale is not an «economic» activity’ on the basis that the relevant factor for the analysis was ‘whether the undertaking in question was in a position to generate the effects which competition rules seek to prevent’; *BetterCare Group Ltd v Dir Gral Fair Trading* [2002] CAT 7 ¶264, see [Sandrine Delarue, The UK Competition Commission Appeal concludes that a public body is an undertaking when "engaging in purchasing activities" \(Bettercare Group Limited\), 1 August 2002, e-Competitions Bulletin August 2002, Art. N°.](#)

[53] The *FENIN-Selex* approach also runs contrary to precedents in *Germany*, where the Federal Supreme Court (*Bundesgerichtshof*) has consistently ruled that activities in the ‘upstream’ (purchasing) market should be considered economic and, thus, within the scope of competition law since, in most cases, the effects of such activity are not insignificant. See Roth, Comment: Case C-205/03 P (*FENIN*) (2007) 1140-1; and BundesKartellamt, *Buyer Power in Competition Law - Status and Perspectives* (2008) available at <http://www.bundeskartellamt.de/wEng...> (last visited 04/10/2011).

[54] Similarly, the EU case law opposes precedents in *The Netherlands*, where the national competition authority (*NMa*) decided that public healthcare entities should be regarded as undertakings in relation to their purchasing policy to the extent that they had sufficient freedom to influence the activities of their providers in the healthcare sector. See V Louri, ‘The *FENIN*

Judgment: The Notion of Undertaking and Purchasing Activity. Case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission* (2005) 32 *Legal Issues of Economic Integration* 87, 94.

[55] As regards the situation in *France*, it is notable that the *Cour de Cassation* (overruling the prior criteria of the *Conseil de la Concurrence* and the Paris Court of Appeals) also held that competition rules apply to public procurement, even if it is conducted by administrative bodies with no (subsequent) commercial activities—hence, expressly overruling an approach coincident with *FENIN-Selex* case law.

[56] The *FENIN-Selex* case law also runs contrary to precedents in Spain, where the traditional practice of the competition authority (*Comisión Nacional de la Competencia*) and the jurisprudence of the Spanish Supreme Court (*Tribunal Supremo*) held that competition law is fully applicable to public procurement activities and, in more general terms, to all activities of public authorities. However, the approach may have changed recently; see [Antía Tresandí Blanco, The Spanish Competition Authority overturns earlier decision and rules that an agreement between a regional health service and a professional association of pharmacists infringes Art. 1 of the Competition Act \(Colegio Farmacéuticos Castilla-La Mancha\), 22 April 2009, e-Competitions Bulletin April 2009, Art. N° 26242.](#)

[57] This position seems to have been adopted both by the OFT (departing from its position in *BetterCare*, see Policy Note 1/2004—*The Competition Act 1998 and Public Bodies* (2004) available at http://oft.gov.uk/shared_oft/busine... (last visited 04/10/2011), and to have been endorsed by German commentators. But see J Skilbeck, ‘Just when is a Public Body an “Undertaking”? *FENIN* and *BetterCare* Compared’ (2003) 12 *Public Procurement Law Review* NA75; S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet and Maxwell, 2005) 66-7; BJ Rodger, *The Competition Act 1998 and State Entities as Undertakings: Promises to Be an Interesting Debate* (CLaSF Working Paper No. 1, 2003) available at <http://www.clasf.org/assets/CLaSF%2...> (last visited 04/10/2011); and A Ezrachi, *EC Competition Law. Analytical Guide to the Leading Cases* (Oxford, Hart Publishing, 2008) 8-10.

[58] Case 14/68 *Walt Wilhelm* [1969] ECR 1; and Joined Cases 253/78 and 1 to 3/79 *Guerlain* [1980] ECR 2327. See M Waelbroeck and A Frignani, *Commentaire Mégret—Droit communautaire de la concurrence*, 2nd edn (Paris, LGDJ, 1997) 148-57.

[59] A Jones and B Sufrin, *EC Competition Law: Text, Cases, and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 1282-3.

[60] See PD Klemperer, ‘Bidding Markets’ (2007) 3 *Journal of Competition Law and Economics* 1; *ibid*, ‘Competition Policy in Auctions and Bidding Markets’ in P Buccirosi (ed), *Handbook of Antitrust Economics* (Cambridge, MIT Press, 2008) 583, 583 and 608-9; K T’Syen, ‘Market Power in Bidding Markets: An Economic Overview’ (2008) 31 *World Competition* 37 (2008); P Szilágyi, ‘Bidding Markets and Competition Law in the European Union and the United Kingdom’ (pts. 1 and 2) (2008) 29 *European Competition Law Review* 16 and 89; and C Doyle, *The Countervailing Buyer Power Merger Defence* (London School of Economics and Political Science (LSE) - Department of Economics Working Paper, 5 February 2009), available at <http://ssrn.com/abstract=1338322> (last visited 04/11/2011).

[61] Regarding the situation in France, see [Simon Genevaz, Charles Bertin, Concentrations sur les marchés d'appels d'offres : L'expérience française, September 2011, Concurrences Journal N° 3-2011, Art. N° 36896, pp. 70-81.](#)

[62] See Assessment of the Commission of 30 May 2007, in case N 46/2007 *Welsh Public Sector Network Scheme* [C(2007) 2212 final] ¶18. See also N Tosics and N Gaál, 'Public Procurement and State Aid Control—The Issue of Economic Advantage' (2008) 2007(3) *EC Competition Policy Newsletter* 15, 19.

[63] Case C-94/99 *ARGE* [2000] ECR I-11037 ¶¶32 and 38. See GS Ølykke, 'Submission of Low Price Tenders by Public Tenderers—Exemplified by Public Procurement of Railway Services in Denmark' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009) 253, 263 and, in further detail, GS Ølykke, *Abnormally Low Tenders, with an Emphasis on Public Tenderers* (Copenhagen, DØJF, 2010) 172-82.

[64] A Sánchez Graells (2014): 'Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts' 10(1) *Competition Law Review* forthcoming, available at <http://ssrn.com/abstract=2271674> (last visited 31/03/2014).

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