ΕΠΙΤΡΟΠΗ ΑΝΤΑΓΩΝΙΣΜΟΥ
HELLENIC COMPETITION COMMISSION

GUIDE FOR CONTRACTING AUTHORITIES

DETECTION AND PREVENTION OF COLLUSIVE PRACTICES IN PUBLIC PROCUREMENT

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ΕΠΙΤΡΟΠΗ ΑΝΤΑΓΩΝΙΣΜΟΥ
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1. INTRODUCTION

Every year, over 250 000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies. In many sectors, including energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers.[1]

Procurement has been identified[2] as being able to play a big role in stimulating demand for net-zero products at a large scale, as procurement policy can play a role in maximising public-interest returns on public money, while fostering security of supply through diversification of sources.

In Greece public procurement represents a significant part of the economy and a large proportion of the State budget.

Anticompetitive practices in public procurement alter the competitive condition of the procedure in favor of participating companies and to the detriment of the contracting authority and ultimately the consumers and the taxpayer.

In this context, the integrity of competitive procedures in public procurement is particularly important for safeguarding the taxpayers' money, achieving policy objectives and providing higher-quality public services. The Hellenic Competition Commission ("HCC") is responsible for detecting and punishing anticompetitive behavior in public procurement procedures. Fighting anti-competitive practices in public procurement is a priority of the Hellenic Competition Commission.

[1] See Fit for Future Platform, Opinion on Public Procurement of 28.11.2023 available at https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f-2021-2024/adopted-opinions_en

[2] See Communication from the Commission, A Green Deal Industrial Plan for the Net-Zero Age COM(2023) 62 finaland Commission Staff Working Document for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), SWD(2023) 219 final.

The purpose of this Guide is to:

• provide useful tools for detecting illegal collusive tendering.

• assist public procurement officials in understanding the anti-competitive behavior of members of a cartel, as well as the techniques such a cartel applies when targeting tendering procedures.

• help public officials understand the competences of the HCC in fighting cartels and to avoid any liability on their part for facilitating, even unintentionally, such practices or for any failure to inform the HCC thereof in a timely manner.

• inform public officials about the framework of sanctions that may be imposed for participation in a cartel, and

• bring forward the specific procedures and technological tools that can be used to better detect cartels.

2. PUBLIC PROCUREMENT AND COMPETITION

Public procurement is governed by a rather complex legal framework. The basic national law, L. 4412/2016, as in force[3], is part of the reform of the national framework for public procurement and the transposition into national law of the package of EU public procurement legislation reform (Directives 2014/23 / EU, 2014/24 / EU and 2014/25 / EU).

The Greek national law on competition (L. 3959/2011, as in force[4], as well as Articles 101 and 102 of the Treaty on the Functioning of the European Union - "TFEU") aims amongst others to detect and punish collusion between suppliers in public procurement procedures and market factors / structures that encourage collusive agreements (or other anti-competitive practices). This is more likely to be achieved when few competitors are active in a market, e.g. where large incumbents dominate the market, product specifications are very narrow, products are standardised, suppliers are familiar with the tendering procedures, especially in repeated tenders, as well as where professional associations and other close business relationships exist.

[3] See subsequent amendments in Laws 4782/2021 4811/2021, 4903/2022, 4912/2022, 4914/2022, 5002/2022, 5036/2023, 5039/2023, 5043/2023, 5079/2023.

[4] See subsequent amendment in Law 4886/2022.

The core provisions of competition law concern the prohibition of anti-competitive agreements / collusions (article 1 of L. 3959/2011 and 101 TFEU) and the prohibition of abuse of a dominant position (article 2 of L. 3959/2011 and 102 TFEU). Cartels fall under article 1 of L. 3959/2011 and 101 TFEU. National competition law also has a provision prohibiting invitations to collude (art. 1A of L.3959/2011). Articles 1 and 1 A of national competition law are set out below:

Article 1 L. 3959/2011
Prohibited collusion
1. Without prejudice to paragraph 3, all agreements and concerted practices between undertakings and all decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition in the Hellenic Republic shall be prohibited, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, distribution, technical development or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent trading transactions, especially the unjustified refusal to sell, buy or otherwise trade, thereby hindering the functioning of competition;
e) make the conclusion of contracts subject to acceptance, by the other parties, of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

A similar wording is used in Article 101 TFEU which is applied in conjunction with the relevant national provisions in the event that an anticompetitive practice affects intra-Community trade, a condition which will usually be met in the case of public tenders.

Anti-competitive behaviour may also occur following an invitation to participate in a prohibited collusion or an announcement relating to communicating future pricing intentions for products and services between competitors in future tenders under certain conditions, practices which may be contrary to the new Article 1A of Law 3959/2011.

Article 1A[5]
Invitation to collude and announcement relating to communicating future pricing intentions for products and services between competitors
1. It is prohibited for an undertaking to propose, coerce, motivate or in any way invite another undertaking to participate in an agreement between undertakings or in decisions of associations of undertakings or in concerted practices aimed at preventing, restricting or distorting competition in the Greek Territory and which consist in:
a) directly or indirectly fixing purchase or selling prices on a market, or
b) limiting or control production, supply, technological development, or investments, or
c) sharing markets or sources of supply.
2. An undertaking is prohibited from disclosing price, discount, supply or credit information about products or services it supplies or is supplied where:
a) the disclosure restricts effective competition in the Greek Territory, and
b) does not constitute a normal business practice.
In order to assess whether a disclosure restricts effective competition, the following shall be taken into account:
a) the degree of specification and the individual nature of the information;
b) whether the information relates to future activities;

[5] This provision was inserted in Greek National Competition law in 2022 and is in force as of 1/7/2022.

c) the extent to which the information is readily accessible to the public;
d) whether the disclosure is part of a pattern of similar disclosures by the undertaking;
e) whether there is a history of past collusion in the specific market or industry between the same undertakings, and
f) whether the market to which the disclosure relates is concentrated and oligopolistic in nature.
Disclosure of information is not considered to restrict effective competition if it is addressed solely to the end users of the product or service.
3. Practices that fall under par. 1 and 2 are not prohibited, as long as they meet by analogy the conditions of par. 3 of article 1.
4. The undertakings with a total turnover of less than fifty million (50,000,000) euros and with less than two hundred and fifty (250) employees are excluded from the application of par. 1 and 2.
5. This Article is without prejudice to Articles 1 and 2 hereof or Articles 101 and 102 of the Treaty on the Functioning of the European Union. Where the conditions set out herein and in Articles 1 and 2 and Articles 101 and 102 of the Treaty on the Functioning of the European Union are met, including, inter alia, the exchange of commercially sensitive information, the latter articles shall apply to the exclusion of the present.

The HCC has adopted Guidelines on the implementation of Article 1A L. 3959/2011[6].

The major objective pursued by public procurement law is to enhance competition within the context of a specific procurement tender. Public procurement law protects and enhances competition stricto sensu as a means for achieving economic efficiency (better value for money) and integrity of tendering procedures, in order to safeguard taxpayers' money. In this respect, competition in a specific tender (e.g. through the avoidance of tailor-made specifications) allows the public purchaser to benefit from competitive pressures between tenderers and is a key instrument for preventing favoritism and other processes of corruption and abuse of power.

The Hellenic Competition Commission is not responsible for enforcing public procurement law (Ls 4412/2016 and 4413/2016), but is only responsible for the enforcement of competition law (L. 3959/2011 and Art. 101, 102 TFEU)

Public Procurement must take place in competitive markets in order to ensure value for taxpayers' money and to serve as an appropriate tool with a view to improving the efficiency of the public sector, but also to rewarding the most efficient undertakings.

The best way to prevent such collusions is the rigorous application of competition law and the imposition of fines, which will act as a deterrent, taking into account the difficulties of cartel detection. In order to ensure that fines have a deterrent effect, they should be proportional to the extent of the harm caused by the anti-competitive process and the likelihood of detecting the anti-competitive practice.

According to empirical studies only one in six to seven cartels are detected, i.e. the probability of detection is between 14 and 17%. Thus, a fine, to be effective, should be at least 6 times higher e.g. from the lost consumer surplus including wealth transfer from consumers to businesses. So, for a 5-year cartel this should represent 300% of the lost consumer surplus and wealth transfer [which is related to the revalued, due to the cartel, profit margin, which of course may even be different depending on the type of cartel - in some cartels, it is 40-50%, in others 10%, in others (7% of them according to a study[7]) almost zero].

The method of calculation of fines in the European Union is largely standardized and the HCC, like the European Commission, is not required to calculate profit margins to determine the amount of the fine. In any case, the HCC, based on the guidelines on the calculation of fines, in some cases, concerning for instance cartels, and in order to ensure the deterrent effect of the fine, may impose a final amount of the fine that exceeds the amount of gains improperly made by the company as a result of the infringement, where any such calculation is possible.

This Guide focuses on collusion practices in public procurement.

[6] See https://www.epant.gr/en/legislation/1aen.html

[7] See OXERA, Quantifying antitrust damages Towards non-binding guidance for courts (December2009), https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf p. 90. Also, see for instance, Y. Katsoulacos, D. Ulph, Antitrust penalties and the implications of empirical evidence on cartels overcharges, (2013) 123 The Economic Journal 558.

3. CARTELS AND COLLUSIVE TENDERING

The effectiveness of tendering procedures requires the existence of competition between the bidders. Competition rewards suppliers who innovate and strive to offer better-value products and services to the buyer. In contrast, companies that are less profitable and fail to meet customer needs are not selected.

A cartel exists when companies agree to adopt joint action, instead of competing. Collusive tendering may mean that the bidders have determined, in advance, the winner, the bid price or other commercial terms with a view to maximising their profit from the public tender.

Such unlawful agreements or concerted practices are usually designed to increase the profits of the members of the cartel at the expense of the public interest and, at the same time, to maintain the illusion of competition for the contracting authority in each tender.
Illegal cartels in public procurement have been identified in a wide range of industries, products and services, involving not only large and well-known companies, but also small local businesses.

Such secret agreements have a particularly negative effect both on competition in the markets for the tendered products and services and on the management of public resources. As a result, citizens are affected on two fronts: on the one hand, as consumers, due to the restriction or elimination of competition in the respective market, and, on the other hand, as taxpayers, due to the increase in the cost of supplies.
According to estimates, the cost of products and services obtained through tendering procedures is usually 20% higher in bid-rigging cases, without ruling out this percentage possibly being higher in some cases[8].

[8] See Smuda, F. (2015), Cartel Overcharges and the Deterrent Effect of EU Competition Law, http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf and Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (OJ C 91, 18.3.2021, p. 1).

4. COMMON TYPES OF COLLUSIVE TENDERING

The types of collusion in procurement procedures vary.

Bid-rigging or collusive tendering occurs when some or all tenderers agree in advance on who will submit the winning bid, thus eliminating competition between the collusion members.

Bid rigging is one of the most serious restrictions of competition, constituting a restriction by object, and may take various forms, such as agreeing the content of each party's tenders beforehand (especially the price) in order to influence the outcome of the award procedure, refraining from submitting a tender, allocating the market based on geography, the contracting authority or the subject of the procurement, or setting up rotation schemes for a series of procedures[9]. The aim of all these practices is to enable a pre-determined tenderer to win the contract while creating the impression that the procedure is genuinely competitive[10]. Under competition law, bid rigging is a form of cartel that consists in the manipulation of a tender procedure for the award of a contract[11].

[9] Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01) see para 348.

[10] Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (OJ C 91, 18.3.2021, p. 1).

[11] Judgment of 14 January 2021, Kilpailu- ja kuluttajavirasto, C-450/19, EU:C:2021:10, para 35.

4.1. Bid-rigging

The main tactics used in bid-rigging by manipulating bids are:

Price fixing: It occurs when competitors agree to increase, fix or otherwise influence the price of a product or service. Price fixing is often part of bid-rigging and may involve:

• fixing a minimum price (possibly in the context of bid rotation, where competitors agree to submit the lowest bid in successive tenders);

• eliminating or limiting discounts;
applying of a formula for calculating the price;

• increasing prices (possibly in the context of cover pricing - where competitors agree with each other and select one or more of them in order to submit an excessively high bid), or

• keeping prices stable.

Price fixing affects the customer's ability to buy at the lowest possible prices.

Examples

Orthopaedic corsets

In 1992, the Spanish Competition Authority fined members of the Orthopedic Association of the Community of Castile-Leon for concluding an illegal agreement to fix prices and tendering conditions for tender concerning the purchase of orthopedic corsets launched by the National Institute of Health (INSALUD) of Burgos. The Association had also agreed on prices with five other non-member competitors, which participated in the tendering procedure.

Source: Decision of 12 December 1996 in Case 364/95 Orthopedics of the Community Castile-Leon

Cases in the construction sector

The Hellenic Competition Commission fined construction undertakings for participating in an agreement aimed at manipulating public tenders.

The undertakings coordinated their behavior regarding the invitations to tender by pre-agreeing on the grouping of contractors that would submit the winning bid. The coordination of the contracting undertakings involved included, inter alia:

- determining the amount of discounts offered

Source: HCC Decisions no. 642/2017, 644/2017, 647/2017, 674/2018

Cover bidding: In this practice, competitors agree to submit a bid that is higher than that of the pre-determined successful bidder or that includes terms that cannot be accepted by the buyer, in order to ensure that the tender will be not declared unsuccessful and the pre-determined successful bidder will finally be selected. In other words, cover biddings are designed to give the impression that conditions of genuine competition prevail.

Examples

Construction Sector

The HCC, following an ex officio investigation concerning tenders for contracts in public infrastructure project and in the context of the simplified Settlement procedure, ruled, in its Settlement Decision no. 642/2017, that fifteen (15) contractors were involved in a number of bid-rigging activities, in the period 1981- 2012. One of a joint plan for bid-rigging in public works tenders was continuously implemented during the period from 2005 to 2012 and concerned various types of infrastructure: metro projects in 2005-2006, PPPs in the period 2008-2009 and different infrastructure projects in 2011-2012. During the period 2005-2012, the collusion plan was implemented through regular meetings of high-ranking employees of Greek construction companies, while employees of European companies involved in the cartel participated in fewer meetings. During these meetings, the cartel participants agreed on which companies would be the selected winning consortium, drafted undated subcontracts before each tender, signed only by the prospective winning consortium, as a safeguard for the providers of coverage, and followed up the interest of any third company in participating in the tender. The value of the projects was allocated between them on the basis of their turnover and market share, thus maintaining the status quo. The metro rail projects were further allocated in such a way that at least one metro line project was awarded to each cartel member, as expertise in the construction of metro rail projects was deemed necessary for participation in any future tendering procedure involving metro construction works.

Business diaries of managerial staff members of one of the construction groups under investigation, detailed bidders' meetings (participants, dates, bids, project allocation, etc.), tables assigning rights, amounts and percentages to the construction groups that participated in the allocation of tenders and signed subcontracting agreements with blank spaces where essential terms of the contract were to be indicated, such as the date of subcontracting, the number and date of the contract signed with the contracting authority etc. These contracts, which were signed before the submission of the bids, were awarded to cover the bidders, as a compensation or even as a safeguard in case the successful bidder would not comply with the pre-arranged bid rotation scheme or additional profit sharing.

According to the HCC, the parties involved had coordinated their actions by "agreeing between themselves on who would submit the winning bid, who would submit the second lowest bid as well as by agreeing, prior to the submission of their bids, to jointly implement the projects".

Source: Hellenic Competition Commission, Decision no. 642/2017.

Subsequent bid rigging cases investigated by the HCC showed that the above bid-rigging practices were very common and occurred in all types of procurement procedures and in all industries, regardless of the bidders' size and the contract value[12].

[12] See ttp://oecdgvh.hu/pfile/file?path=/contents/about/newsletters/focus-on-bid-rigging-in-public-procurement---competition-policy-in-eastern-europe-and-central-asia&inline=true.

Also see Decision 647/2017 regarding non-settling companies in the constructors' cartel, Decisions 748/2021, 755/2021 which refer to the bid-rigging practices related to public tenders already sanctioned for other companies in Decisions 642/2017 and 647/2017, Decisions 644/2017, 674/2018 and 715/2020 (also in the construction sector) as well as Decisions 620/2015, 668/2018 703/2020, 703/2020, 721/2020, 731/2021, 742/2021, 772/2022 and 828/2023 in various sectors.

Examples

Elevators and escalators

In 2007, the European Commission sanctioned four elevator and escalator companies (OTIS, KONE, Schindler and TsyssenKrupp) for participating in collusive agreements between 1995 and 2004, involving bid-rigging. In tenders launched in Belgium, the Netherlands, Germany and Luxembourg, the undertakings involved used cover bidding to share markets. The successful contractor was determined according to market shares and the other bidders coordinated their bid prices at very high levels. In addition, in Germany and the Netherlands, guarantees were also given in terms of maintaining pre-existing customers, i.e. an undertaking which already supplied a particular organisation has been assured that it would be selected as a successful contractor in future tenders of that organisation.

Source: European Commission 1P/07/209

Medical waste management

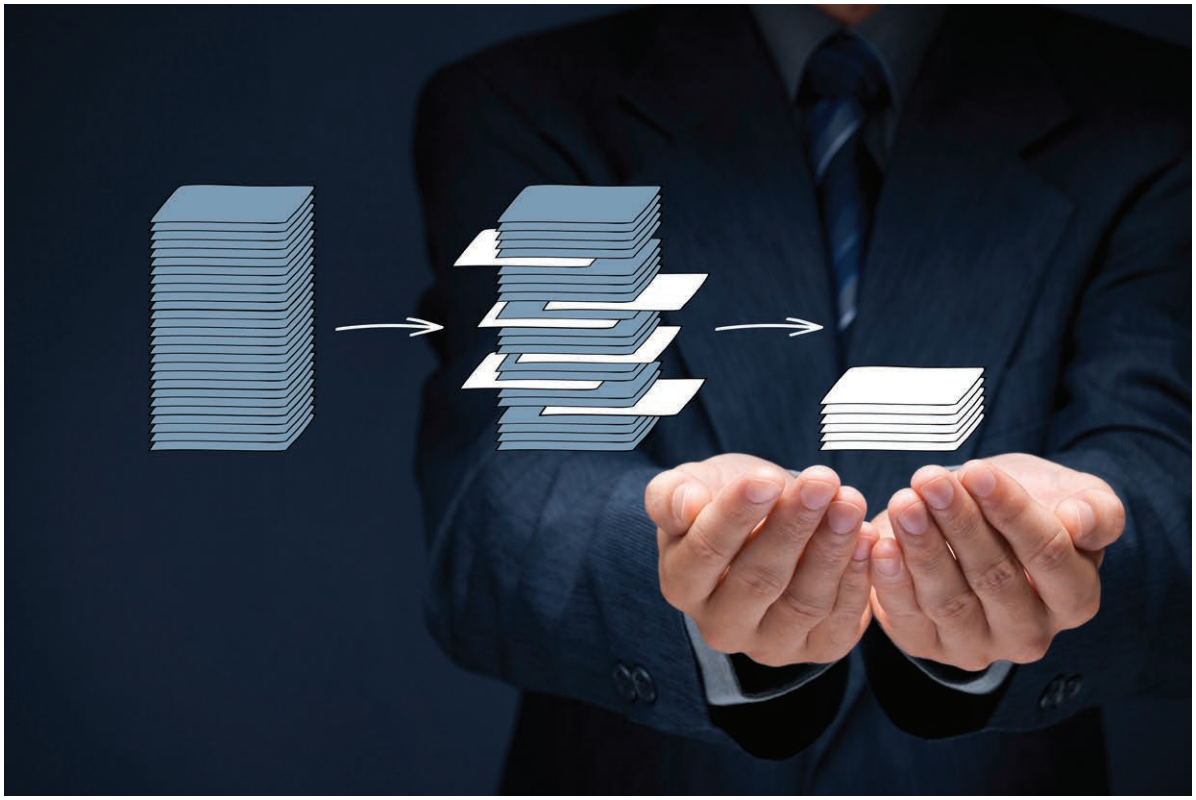
In 2010, the Spanish Competition Authority fined four undertakings active in the medical waste management sector for allocating tenders launched by regional authorities, at least during the period 1994-2007. It turned out that the undertakings had allocated State clientele, by coordinating their bids through temporary joint ventures, cover bidding and bid suppression.

Source: CNC Decision of January 18, 2010 on Case no S/0014/07 Medical Waste Management

Construction Sector

The UK Competition Authority has sanctioned more than 100 undertakings for submitting pre-arranged bids in public and private tenders for the construction of hospitals, school and university buildings between 2000 and 2006. Bid-rigging involved cover bidding and, in some cases, bogus invoices to cover compensatory payments between bidders. These conducts were investigated following a complaint filed by a national health system auditor.

Source: OFT – The UK construction sector CE/4327, April 4 2008



Bid suppression: In this practice, some competitors agree to refrain from tendering or withdraw a previously submitted tender, to make sure that the contract will be awarded to the candidate pre-determined between the collusion members.

Bid rotation: In this practice, some competitors agree on taking turns in being the lowest bidders. Contracts may be allocated, according to the volume of the materials supplied or the contract value, either evenly between competitors or by apportionment depending on the size of the undertakings.

Examples

International removal service operators

In 2008, the European Commission imposed sanctions on nine Belgian international removal service operators. The cartel operated for a period of 19 years and rigged the bids in public tenders using the tactic of bid rotation. The companies involved shared the profits through a system of financial compensation for lost bids, called "commissions", which were included in the final tender price and distributed among the other unsuccessful candidates through bogus quotes ("cover quotes").

Source: European Commission IP/08/415, Pending Judicial Review

Radiator piping

In 1998 the European Commission fined ten manufacturers of radiator piping for collusive practices in tenders. In Germany and Denmark the companies used a bid rotation system to allocate tendered contracts amongst themselves. The group would designate the company that was to win the contract and the rest of the bidders would then present higher bids.

Source: European Commission. IP/98/911

Customer or market sharing: This type of collusive tendering involves competitors agreeing on the sharing of customers or geographic markets. Customer or market allocation agreement is often combined with bid suppression or bid rotation techniques. For example, parties to the agreement refrain from bidding or submit only bogus quotes for the benefit of the party to which a particular customer, customer category or geographic market has been allocated. In this way, the members of the cartel rig their bids, in order to ensure that the successful bid will be the one submitted by the undertaking to which the customer or customer category or tender (project) or the specific geographic area, as appropriate, has been allocated. In order to monitor compliance with the agreement, the parties may use a coordinator (natural person or undertaking). the undertakings.

Examples

Media measurement services

In 2015, the Hellenic Competition Commission (HCC) imposed fines totalling EUR 87,953.30 on two undertakings providing opinion polling services (Focus Bari and MRB) for an agreement regarding their joint participation in a tender for conducting radio audience measurement in Attica. The HCC ruled by majority that the two undertakings had agreed on two terms which went beyond what was necessary for the purposes of the above cooperation. One of these terms concerned geographical market allocation, as MRB undertook not to be active in measuring the audience in the area of Thessaloniki, either independently or jointly with any other person.

Source: Hellenic Competition Commission, Decision no. 620/2015

Examples

High-voltage power cables

In 2014, the European Commission imposed fines totaling EUR 301.6 million on the major producers of high-voltage power cables for participating in an agreement aimed allocating markets and customers for underground and submarine high-voltage power cable projects in specific territories.

From 1999 onwards and for almost ten years, these major producers participated in a network of multilateral and bilateral meetings and contacts, during which projects were assigned according to the geographical area or customer. In addition, they agreed on the price level and exchanged commercially sensitive information to ensure that the selected power cable supplier would offer the lowest price, while the other undertakings would either refrain from bidding, or submit an offer that would be unattractive to the customer. Reporting obligations have been introduced so that what has been agreed could be monitored. Finally, complementary practices were implemented to strengthen the cartel, such as the collective refusal to supply components or technical assistance to certain competitors in order to secure the allocation arrangements agreed.

This two-fold cartel agreement provided the following:

a) On the one hand, Japanese and Korean producers refrained from competing with European producers for projects on European territory, and European producers similarly refrained from tendering for projects in Japan and South Korea. The parties to the cartel also allocated projects in most of the rest of the world and made use of a quota arrangement for a certain period of time.

b) On the other hand, European producers distributed between them projects and customers within the European territory.

To ensure the implementation of the agreements, the cartelists regularly met each other and maintained further contacts by means of e-mails, faxes and telephone calls.

Source: European Commission IP/14/358

Elevators and escalators

In 2007, the European Commission imposed fines totaling EUR 990 million on undertakings active in the sale, installation and maintenance of elevators and escalators. The European Commission's investigation has shown that the cartel members allocated public tenders and other contracts between themselves in Belgium, Germany, Luxembourg and the Netherlands, with the aim of allocating markets / customers and fixing prices, agreeing to apply a compensation mechanism in some cases. In Germany and the Netherlands, the parties agreed that the undertaking that had a long and good relationship with a particular customer would take on most of the contracts with that customer (i.e. the principle of retaining existing customers was applied). The parties to the agreement submitted cover quotes, too high to be accepted, in order to create the impression of genuine competition. The parties also exchanged business secrets and confidential information on bidding models and prices. The participants met regularly to agree to the above restrictions and they monitored their implementation within the national markets

Source: European Commission 1P/07/209

Examples

Gas insulated switchgear

In 2007, the European Commission fined eleven groups of companies for participating in a cartel in the gas insulated switchgear market, which operated from 1988 to 2004. The cartel members exchanged information on tendering procedures with the aim of co-ordinating tender bids and allocating markets between them, depending on their respective market shares. In particular, the Japanese and European undertakings that participated in the cartel had agreed not sell or to refrain from tendering in tenders outside their geographical area.

Source: European Commission IP/07/80

Cash-in-transit (CIT) security services

In 2007, the Hellenic Competition Commission fined two security service undertakings for concerted tendering practices. The two undertakings used the fictitious (cover) bidding system to allocate the tendered contracts.

Source: Hellenic Competition Commission, Decision no. 325/V/2007.

Industrial bags

In 2005, the European Commission imposed sanctions on 16 undertakings or operating a cartel in the plastic industrial bags market. The cartel operated in the markets of Germany, Belgium, the Netherlands, Luxembourg, France and Spain and, in some cases, for over 20 years. The market-allocation plan was organised by a network of operators, in which the undertaking that had the largest share in a geographical area or had a specific customer, had taken on the role of coordinating the bids submitted by the other bidders to ensure its selection as a successful contractor, while creating the false impression that conditions of genuine competition prevailed in that tender.

Source: European Commission IP/05/1508

Those involved in illegal collusive tendering often use combinations of these types of behavior, depending on the market, product or service as well as on the details of each tender and therefore the anti-competitive practices may affect both prices and size of the production as well as quality, innovation and variety of the products and services.

4.2. Output limitation

Output limitation occurs when competitors agree to reduce or limit the supply of a product or service with the aim of limiting availability. Even though this practice may not fall within the definition of bid rigging strictly speaking, it affects and may increase tender award prices.

Example

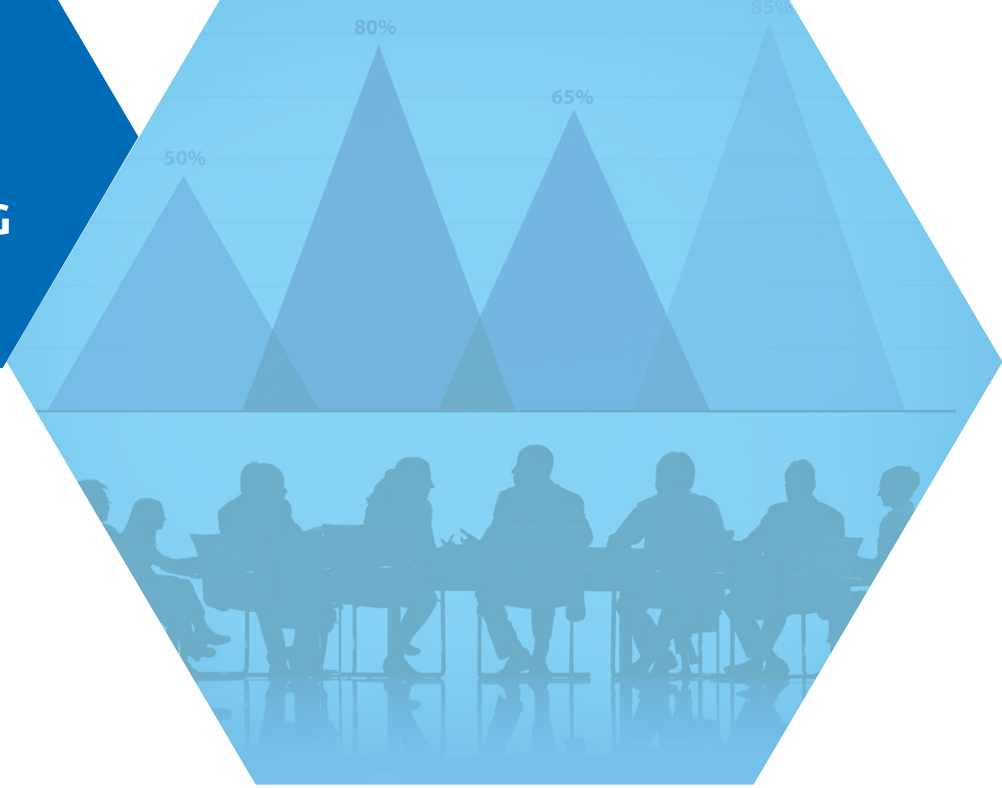
Case concerning the market for the provision of catering services to migrants/refugees

The Hellenic Competition Commission imposed sanctions on undertakings providing catering services to migrants/refugees for their participation in an agreement aimed at manipulating a public tender.

The obligation of exclusive cooperation contained in the agreements concluded between the aforementioned companies for a future number of tenders resulted in the exclusion of independent participation for each of the participating companies or in association with other companies and the exclusion of competing bids and the consequent limitation of the availability in the supply of the relevant services. Therefore, the above companies entered into a horizontal agreement with the object of restricting the provision of catering services in the specific islands of Lesvos and Chios, which constitutes a hardcore restriction of competition by object caught by Article 1(1) of Law 3959/2011.

Source: HCC Decision no. 767/2022.

5. MARKET FACTORS FACILITATING COLLUSION



In order for companies to implement a successful collusion, they need to agree on a common course of action to implement the agreement, monitor compliance, and determine a way to punish companies that do not comply with the agreement. Although unlawful agreements between suppliers may occur in any economic sector, there are some sectors in which such agreements are most likely to occur, mainly due to the particular characteristics of the industry or the products-services offered. The main factors that favor collusion are:

- **Limited number of undertakings**

Bid-rigging through collusion is more likely to occur when the good or service is offered by a small number of undertakings. The less the number of undertakings in the market, the easier it is for them to reach an agreement on how to rig bids (in terms of prices, bids, customers or geographic markets).

- **Limited or no entry of undertakings to the market**

When few undertakings have recently entered or are likely to enter a market because this entry is costly, difficult or slow (e.g. due to large incumbents in the industry), undertakings in the market concerned are protected from the competitive pressure of potential new entrants. This protective "barrier" is a factor conducive to the development of collusion.

- **Market conditions**

Significant changes in supply or demand conditions tend to destabilase existing bid-rigging agreements. On the contrary, a stable and foreseeable demand from the public sector tends to increase the risk of collusion. At the same time, in times of economic turmoil or uncertainty, competitors' incentives to collude increase as they seek to make up for lost profits.

- **Unique products with special specifications**

The likelihood of collusion increases if the products to be supplied cannot be easily replaced by other related products or if there are particularly restrictive specifications

- **Standardised products**

The more standardised a product is, the easier it is for competing undertakings to reach a price agreement. Agreements on

other competition aspects, such as design, features, quality or service, are by nature more difficult to reach.

- **Limited or no technological change**

Limited or no product or service innovation helps companies to agree with each other and maintain their agreement over time.

- **Repeated tenders**

Recurring purchases through tenders increases the likelihood of collusion between suppliers. This is because prospective suppliers expect to obtain benefits from a collusion as they are counting on future contracts.

- **Familiarity between competitors**

Collusion is more likely to occur when competitors know each other e.g. through social contacts, business associations, legal business relationships, or even through rrepeated participation in procurement procedures.

- **Trade/sector associations**

Trade and sector associations can be a mechanism for enhancing lawful cooperation between their members and promotion of common interests, however they may be used by their member undertakings as a means of reaching and implementing an unlawful bid-rigging agreement.

Conditions that can make the operation of a cartel easier	Why?
Suppliers	
The existence of a limited number of suppliers facilitates collusion. Few suppliers exist when: • Large incumbents dominate the market. • The industry is highly specialised or capital intensive and, therefore, starting a new business is costly and difficult (e.g. airlines). • A number of competitors are unable or even reluctant to supply due to their geographical location.	The more suppliers available, the more options the buyer has. If there are many potential suppliers, it is more difficult and riskier to contact each other and try to set up a cartel. If new suppliers enter the market regularly by participating in tenders, they are unlikely to be members of a pre-existing collusion.
Products	
Creating and operating a cartel is easier if the product / service: • is particularly important and has few, if any, alternatives (e.g. fire safety). • has a stable and foreseeable demand (e.g. constructions, steel or bricks). • is standardised and homogeneous for all suppliers and buyers (e.g. concrete). • is extremely technical or specialised (e.g. medical supplies).	The more product choices the buyer has, the more difficult it is for suppliers to manipulate the bidding process. If a product is relatively standardised and demand is stable and foreseeable, it is easier for suppliers to try to share the market and influence prices. On the contrary, a volatile market is much more difficult for a cartel to control.
Buyers	
The way buyers operate can create opportunities for suppliers to collude: • Regular and foreseeable tender procedures (e.g. road projects of local authorities). • Open and transparent tender procedures	Obviously, if buyers have no experience in a market, it is easier for suppliers to set higher prices. A cartel must be able to monitor buyers and understand their requirements in order to effectively allocate contracts and fix prices. A cartel should also be able to monitor its members to ensure that agreements between them are observed.

6. DETECTING COLLUSION – RED FLAGS - COLLUSION INDICATORS*

Unlawful collusive agreements between suppliers in public procurement are very difficult to detect, as negotiations between companies are usually conducted in secret. This may become even more difficult as technological tools such as Artificial Intelligence and algorithms may limit even further the need for direct contacts and facilitate new sophisticated technology-based co-ordination between competitors. However, irrespective of the method used, unusual patterns of behavior and practices are likely to be detected in the bidding process that may indicate the existence of a collusion between the bidders.

The following factors are indications of a possible collusion between bidders and need further investigation. However, they should not be regarded per se as evidence of the existence of a cartel, in the sense that there may be legitimate business or market reasons justifying such conduct.

Bidding patterns

- A specific pattern of successful tenderers is revealed over time (e.g. a specific rotation pattern in contract awarding between undertakings, e.g. A, B, C, A, B, C, or awarding of a specific contract type or size to specific companies).
- An undertaking submits a relatively high bid in some tenders and a relatively low bid in other similar tenders.
- An undertaking continues to participate in tenders, although it is never successful.
- An undertaking rarely participates in tenders, but always appears successful in the few cases of its participation.

* See also OECD (2009), Guidelines for Fighting Bid Rigging in Public Procurement, OECD Publishing, Paris, https://doi.org/10.1787/8cfeafbb-en.

Behaviors in the bidding procedure

- Likely and regular bidders fail to submit a bid.
- Sudden withdrawal of tenders already submitted (e.g. when a new bidder emerges).
- Tenders submitted simultaneously by different companies on identical tender forms and letterheads and with a similar postmark.
- Bids submitted by different companies, but with identical wording, especially when this wording is unusual.
- Bids submitted by different companies that show identical errors (e.g. misspelling or miscalculations).
- Tenders less detailed and analytical than expected or with incomplete accompanying documents.
- Offers showing numerous last-minute adjustments, without objective justification.
- Identical modifications to bids submitted by different companies.

Bid prices

- Unreasonably high bid.
- Impressively high bids or impressively low discounts, in their entirety.
- Simultaneous increase or decrease of prices / discounts, which is not justified by changes in production costs.
- Identical bid price offered by different tenderers.
- Some bidders sometimes submit low bids and sometimes high bids, for the same procurement.
- Some bidders submit bids following the bid ("reference price") of the lead tenderer.
- The prices offered are well above those submitted in previous tenders or entered in published price lists, without, however, any objective justification (e.g. change in production costs).
- The bid price of a new entrant is lower than those offered by usual bidders. This may indicate that there might be a collusion between the existing tenderers.
- Bid prices fall significantly after the submission of a new tenderer's bid.

Market allocation practices

- Companies charge different prices in different geographical areas, although this is not justified by transport costs.
- A supplier refuses to participate in tenders concerning specific geographical areas, saying that he would not like to "hop the fence".
- A supplier declares inability to supply specific products or services, due to valid agreements it has concluded with other undertakings.
- A company representative states that another company should not supply the contracting authority due to existing agreements concluded within that industry.
- Bidders are waiting until the last minute to submit their bids and are interested in being informed if another, non-local or occasional bidder has submitted a bid.

Other warning signs

- A winning tenderer does not accept the awarded contract or withdraws his bid before his awarding, without any objective justification.
- A successful tenderer subsequently subcontracts to another tenderer.
- Communication between tenderers before the bidding process is concluded (e.g. a bidder is aware of the content of another bidder's tender or a bidder seems surprised when informed that it is the lowest bidder or a bidder is aware of details that you have only disclosed to another tenderer).
- Tenderers use references like "sector" or "standard" prices or practices.
- Different tenderers are represented by the same natural or legal person.
- Subcontracts to unsuccessful tenderers under the same contract.
- Refusal to sign the contract by the original lowest bidder and the following finding that he has entered into a subcontract with the bidder to whom the contract was finally awarded.
- The creation of consortia after the contract has been awarded with bidding, but not eventually selected undertakings.
- The enlargement of the contracting consortium with the inclusion of a bidding, but not eventually selected undertaking.

If there are signs of suspicious behavior of tenderers:

DOS	DON'TS
• Ask for clarifications from bidders (e.g. on their pricing, for not submitting a bid, etc.) and record their answers. • Carefully check the tender dossier as well as the record of previous tenders for any other suspicious indications. • Proceed with the tendering procedure and try not to arouse tenderers' suspicion. • Inform the Competition Commission.	• Immediately charge the bidders with collusive behavior. This could lead to the destruction of relevant evidence while, in the absence of a secret agreement, the contracting authority risks being accused of defamation. Instead, prompt communication with the Competition Commission is suggested. • Initiate an internal investigation and impose arbitrary sanctions for collusion, without prior communication with the Competition Commission.

See, in this respect, Annex I on «(√) COLLUSION INDICATORS (CHECKLIST):»

Detecting anti-competitive behaviors with New Technologies

New technologies and Big Data analysis, offer many possibilities in terms of collusion detection, as there is a plethora of usable information[13], due to the development of e-procurement and the collection of data from databases at both national[14] and European level. With the use of these technologies the Authority, in addition to the repressive (ex post) nature of its intervention,it may also act proactively (ex ante).[15]

These databases allow the development of special software programs based on algorithms and machine or deep learning. The relevant programs scrutinise tenders and information from contracting authorities in the light of the above indications and, in combination with other information related to the structure of a particular market, allow competition authorities, as well as public procurement authorities, to verify this information. The verification is based on econometric data analysis. However, econometric analysis is limited as it only depends on the human resources available. Advances in digital technology change manual data analysis to automated cartel detection through algorithms.[16] There are cartel detection software tools implemented and being developed by competition authorities around the world[17].

[13] See, D. Imhof, Detecting Bid-rigging cartels with descriptive statistics, (2019) 15(4) Journal of Competition Law & Economics 427; HCC, Computational Competition Law and Economics: An Inception Report (HCC, 2021), https://www.epant.gr/en/enimerosi/publications/research-publications/item/1414-computational-competition-law-and-economics-inception-report.html.

[14] E.g. Central Electronic Public Procurement Registry (KIMDIS) of art. 11 of L. 4013/2011

[15] J. E Harrington, Jr, 'Detecting Cartels' (Department of Economics, John Hopkins University, 2005), available at econ.jhu.edu/wp-content/uploads/pdf/papers/wp526harrington.pdf ; J E Harington Jr 'Behavioral Screening and the Detection of Cartels' in C-D Ehlermann & I Atanasiu (eds), Enforcement of Prohibition of Cartels, European Competition Law Annual 2006 (Hart Pub, 2007) 51.

[16] See., J. Harrington, Developing Competition Law for Collusion by Autonomous Price-Setting Agents, (2019) 14(3) Journal of Competition Law and Economics 331.

[17] I. Lianos et al., Algorithmic Collusion and Competition Law, Chapter 8 of the BRICS Digital Competition Era Report, (2019), http://bricscompetition.org/materials/news/digital-era-competition-brics-report/ ; A. Sanchez-Graells, 'Screening for Cartels' in Public Procurement: Cheating at Solitaire to Sell Fool's Gold?, (2019) 10(4) Journal of European Competition Law & Practice 199.

Based on experience to date, all parameters analysed with projection tools can be grouped into four categories:

- Number and type of bids.
- Suspicious pricing patterns
- Low bidding rate and similar submissions.
- Tender history data.

Proactive examination of public procurement elements can be an additional tool to initiate cartel investigations and help the HCC to conduct cartel detection by analysing data from previous tenders to identify any bid-rigging patterns.

In order to facilitate access to tender information, the following actions might be considered:

HCC's access, in cooperation with the competent authorities, to data of previous tenders that are electronically available via the e-procurement platform (including those related to unsuccessful bids);

Signing of a Memoranda of Cooperation between the HCC and the contracting authorities, for similar access of the HCC to the full details of previous tenders, which were not conducted electronically;

Cooperation of the HCC with the Public Procurement Authority as well as with other competition authorities, for the purpose of systematic use of cartel detection algorithms.

In the context of the exercise of its broad investigative powers, the HCC may, according to Article 38[18] of Law 3959/2011, request access to tender information and has already worked successfully with a number of contracting authorities to collect evidence on tendering procedures.

[18] Article 38 of L. 3959/2011 on requests for information and the obligation of public bodies to cooperate with the HCC.

7. DETERRENTS AGAINST COLLUSION

The risk of anti-competitive behavior in public procurement can be reduced by better planning each public call for tenders. In this context, the competent contracting authorities may consider the application of the following preventive measures.

Better market information

- Information on products, suppliers and conditions prevailing in the specific market, in particular on prices and costs of potential suppliers.
- Collection and analysis of information on previous relevant tenders.

Inclusion in the tender notice of specific terms aiming at ensuring a deterrence effect against cartels

- Indicate in the tender notice that any suspicion of collusion will be reported to the Competition Commission.
- Include in the notice a clear warning that in the event of a breach of free competition law, the undertakings involved will face both the fines and criminal penalties provided for in such cases, and civil liability for compensation of any damages suffered by the contracting authority.
- Require tenderers to sign a statement of independence when drafting the tender, as well as an assurance that they had no contact with the other tenderers regarding the price, the submission of the tender or its terms.
- In case it is not possible to ensure such a signed statement, to request notification of any communication with their competitors, which is related to the tender.
- Bidders should be asked to disclose any procedures related to an anti-competitive and a particular bidder, including affiliated undertakings and senior management.
- Indicate the legislatively provided non-award possibility in case of any suspicion of collusion.

Ensuring the maximum possible number of bids

- The probability of bid-rigging increases in case of participation of a small number of bidders. For this reason, the conditions for submitting a tender must be clear and simple in terms of their observance, in order to encourage the broader participation possible of bidders in the tender.
- Carefully review the tender notice to avoid the inclusion of conditions which unduly restrict the circle of undertakings that are entitled to bid[19], and, in general, any unnecessary restrictions on bidders that possibly exclude undertakings which, however, have sufficient capacity to implement the respective contract, and create artificial barriers preventing participation in the tender, restricting competition between bidders.

The tendering undertakings must have the necessary guarantees to meet the requirements of the tender, however not to a greater extent than necessary, as this may artificially limit the circle of bidders, creating or enhancing conditions that favor prohibited collusion between undertakings.

In this context:

- o Financial and technical capacity of the tenderers should be proportional to the tendered project, the size and the content of the contract.
- o The tender should be designed in such a way that the financial burdens of the bidders do not increase disproportionately. Thus, providing guarantees in excess of what is necessary may limit the circle of undertakings eligible to participate, excluding companies that are smaller in size but equally capable of meeting the supply terms.
- o Reducing the bidding costs helps or, in any event, does not discourage undertakings that do not have significant administrative capital or previous experience in a category of tenders to bid, thus enhancing competition through the entry of new players and making coordination more difficult.

- Specifications should be drawn up in such a way as to include, as far as possible, all the respective substitute products or any innovative solutions. The "opening" to undertakings with related but differentiated products makes collusion with each other more difficult.
- Avoid the selective treatment of certain categories of suppliers, as well as continuous extensions or automatic renewals of contracts with specific undertakings, because this discourages any participation of other suppliers in the tender procedures.
- Contract extensions, in particular the granting of successive extensions to the contractor, even if justified and permitted, should only be used in exceptional cases to avoid the risk of indefinite market foreclosure.
- It is generally preferable that the contracts be not of too long duration, so that the tendered products / services be open to competition.
- Especially with regard to public works concessions and public service management contracts, the duration of the contracts should result from a synergy of objective parameters, directly related to the time required to pay off the investments made for the implementation of the contract.

[19] See also OECD Recommendations in the 3rd "Peer Review of Competition Law and Policy in Greece" (https://www.oecd.org/daf/competition/OECD-Competition-Assessment-Review-Greece-2017-gr.pdf) , p. 85 et seq., regarding the restrictions set by the Registers of Contractors and Contracting Undertakings.

- When evaluating the possibility of subcontracting the objective of encouraging the participation of small and medium-sized enterprises in the tender should be weighed against the risk of reducing competition in the tendering process.
- Contractors must be vigilant in cases of a joint bid, in particular if bidders have previously been sanctioned for collusion by competition authorities, even in markets for products or services other than the tendered ones.
- In case of submission of identical bids, contracting authorities should be able cto reopen the tendering procedure or, where not possible for any reason, to nominate a contractor than split the contract between the bidders.
- Contracting authorities should be able to choose the most appropriate award criterion, not necessarily solely on price basis.

Limiting communication between bidders

- Bidders should not be given opportunities to contact each other (e.g. during meetings or on-site inspections before bidding). If such meetings are needed, attendees should be reminded of the prohibition of collusion and their obligations under current law.
- The identity of the bidders must not be revealed, in order to make it more difficult for the members of any existing collusion to communicate with the bidders in the tender.
- Information, such as the identity of undertakings that have obtained tender documentation or submitted bids, must not be disclosed throughout the process, as this will facilitate communication between interested parties, which identify their competitors and, consequently, the candidates to approach for possible participation in collusion with the aim of manipulating the tendering procedure.

Staff training

- Staff training in methods of detection and deterrence of cartels for all staff involved in procurement tenders, for example through training programs in collaboration with the Competition Commission, helps in designing tendering procedures that are less vulnerable to collusive behavior.
- Contracting authorities' staff should be encouraged and motivated to report suspicious behavior to the Competition Commission through internal cooperation procedures that will complement the contracting authorities' internal audit serviceFor example, it is proposed to put in place a mechanism for anonymous reporting of competition infringements, intended for use by the contracting authorities' staff, and, in general, to establish channels of secure communication with the Competition Commission.

Creation of a procurement database

- Entering information about the characteristics of previous tenders, such as bids submitted and the identity of the contractor, is helpful in understanding the market, facilitates costing and budgeting, and makes it more difficult for a cartel to target relevant tenders.
- Tracking the history of previous tenders can help detect suspicious patterns.
- The uncovering of long-standing cartels is often only possible after analysing the outcome of tenders during a specific period of time.
- It is of particular relevance to collect information on recent price changes and prices in adjacent geographic markets, as well as prices of possible substitute products.
- It is also useful to maintain and review the lists of undertakings that have expressed interest and of those that have submitted bids, with a view to identifying cases of withdrawal of bids and / or use of subcontractors.

Favors collusion	Discourages collusion	Why?
Foreseeability over time and periodicity of tenders.	Occasional change in the time schedule for tendering procedures.	Regularity makes it easier for a cartel to allocate market shares by rotating bids or by other bid-rigging techniques.
Regular procurement contracts of specific value.	Variety in contract values and in the type of supplies.	Regularity makes market sharing easier. Smaller supply volumes may attract smaller companies that are not members of an existing cartel. Large supply volumes (e.g. for a longer period of time) can lead to better purchase prices and prevent the practice of supply rotation.
Small group of regular suppliers.	Larger group of suppliers presenting frequent changes.	It is more difficult to maintain a collusion where new undertakings are constantly competing.
The uncovering of the undertakings that submitted bids before the completion of the tender.	Limited, or no, disclosure of the identities of the bidding companies.	The uncovering of undertakings makes it easier for undertakings to contact all bidders and try to manipulate the tender.
The disclosure of all bids (prices) after the completion of the tender.	Limited, or no, disclosure of unsuccessful bids.	Full disclosure allows a cartel to monitor all bids thus checking that all its members have complied with the agreements.

Favors collusion	Discourages collusion	Why?
The buyer does not know the procurement value and the relevant market for the products / services.	The buyer must have a clear understanding of the relevant market and the value of the products/services being supplied.	It is much more difficult to fix prices if the buyer is aware of the details of the relevant market and of any overpricing.
Buyers rely solely on suppliers and the bidding process to calculate the procurement value.	Buyers should have independent estimates of the value of the supply before calling for bids.	Such an estimate will give buyers a picture of whether the bids are excessive.
Staff is not trained in detecting suspicious behavior.	The staff is trained in detecting suspicious practices.	Without special training, staff is not able to detect any warning signs and does not know what to do in such situations.
Buyers do not keep a detailed record of previous bids.	Buyers analyse bids in previous tenders to identify any trends and irregularities.	The analysis of previous tenders may reveal long-standing trends that may not be apparent in the short term.

Example

Contracts for the supply of milk to schools

In the 1990s, authorities in the United States became aware of the existence of anti-competitive agreements between undertakings participating in public procurement contracts for the supply of milk to US schools. This practice involved the coexistence of the following conditions: supply of identical product, existence of a stable market and many recurring tenders with splitting of tenders for small batch supplies (one tendering procedure for each school per contract period). The cartel in this sector lasted for decades and was described as an "epidemic" by the US Department of Justice. The anti-cartel mechanism proposed in this case was a combination of contracts concerning different schools. This reduced the bidding cycle and increased the volume of the batches offered, thus limiting the predictability of the procedures and making market sharing between competitors more difficult.

Sources: Porter & Douglas (1999) "Ohio School Milk Markets. An Analysis of Bidding" Rand Journal of Economics, Issue 30

8. COMPETITION LAW AND PUBLIC PROCUREMENT LAW: INTERACTIONS

According to Directive 2014/24/EU[20] which was transposed into Greek law with Law 4412/2016[21], contracting authorities shall exclude an economic operator from participation in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

[20] 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 [2014] OJ L 94/65.

[21] L. 4412/2016 on "Public Works, Supply and Service Contracts", as in force.

8.1. Collusion as potencial grounds for exclusion from perticipation in public procurment and compliance / self cleaning measures

Article 73 (Grounds for exclusion) of Law 4412/2016 provides grounds for exclusion of economic operators from a public contract award procedure, distinguishing between mandatory and potential grounds. The term "potential exclusion grounds" means that a contracting authority has the discretionary power to select and include in the contract notice one, more, all or possibly none of the potential exclusion grounds. However, if it opts for including in the contract notice any of the potential grounds of art. 73 then these grounds become mandatory, in the sense that the contracting authority must consider whether or not its conditions are met[22].

Potential grounds for exclusion also provide for the existence of sufficiently reasonable indications for the participation of an economic operator in anti-competitive practices. In particular, point c) of art. 73(4) provides that the contracting authority may exclude an economic operator from participating in a tendering procedure if it has sufficiently reasonable indications to conclude that the economic operator has entered into agreements with other economic operators with a view to distorting competition.[23] In other words, this is a potential ground for exclusion, the establishment of which requires only the existence of sufficiently reasonable indications of an economic operator's involvement in anti-competitive practices with other economic operators and not the issuance of a previous court or administrative decision with final and binding effect.

Duration of exclusion: Three (3) years from the date of the decision of the authority finding the relevant infringement.

Starting date of exclusion: In the event of an HCC Decision issuing, the relevant starting point from which the maximum duration of the exclusion period will be calculated shall be the date of issuance of the Authority's decision and not the starting date of the participation of a company in the cartel[24].

Compliance / Self-cleaning measures: Derogation from the aforementioned exclusion of the economic operator is provided in par. 7 of art. 73 of Law 4412/2016, if

[22] See article 305 L. 4412/2016 "Use of the grounds for exclusion and selection criteria set out in Book I (Article 80 of Directive 2014/25/EU)"

[23] See also Guideline no. 20/14.06.2017 of the Hellenic Single Public Procurement Authority, p. 8 et seq. Art. 73 (4)(c) of law 4412/2016

[24] See CJEU C-124/17, Vossloh Laeis GmbH v. Stadwerke Munchen GmbH, Electronic Reports of Cases (Reports of Cases - General)- ECLI:EU:C:2018:855.

the economic operator has taken compliance / self-cleaning measures, in order to demonstrate its reliability and not to be excluded from the procedure, despite the existence of a relevant ground for exclusion in its respect[25].

The concept of self-cleaning (or compliance measures) refers to the possibility for an economic operator, which would otherwise be excluded from a public procurement procedure due to misconduct or criminal offense - as specified in the relevant national legislation - to be accepted by the contracting authority in the relevant procedure due to the taking on his part of all necessary measures which ensure that the offense (or criminal offense) committed in the past will not be repeated in the future[26] and thus restore its reliability vis-à-vis the contracting authority. It is therefore necessary for the economic operator to take burdensome and costly measures, which ensure that the unlawful conduct will not be repeated.
In relation to the above, art. 73 par. 7 of law 4412/2016, incorporating art. 57 of Directive 2014/24 / EU, stipulates that the economic operator, in order to restore its reliability, must prove that a) it has paid or has undertaken to pay compensation for any damage caused by the misconduct or criminal offense, b) has clarified facts in a comprehensive manner, through active cooperation with the investigating authorities and c) has adopted specific technical, organisational and personnel measures to prevent further criminal offences or further misconduct. In order for a contracting authority to determine whether certain measures taken by an economic operator constitute adequate compliance measures within the above meaning of self-cleaning, it should, in view of the principle of proportionality and equal treatment, consider the severity of the unlawful conduct[27], as evidenced by its duration, its recurrence as well as its economic impact.[28]

Measures that can be considered as compliance measures:

Compliance measures include measures relating to management of staff and internal organisation such as:

- the severance of all links with persons or organisations involved in the misconduct,
- appropriate staff reorganisation measures,
- the implementation of reporting and control systems,
- the creation of an internal audit structure to monitor compliance,
- the adoption of internal liability and compensation rules[29],
- the adoption of a Code of Business Conduct,
- the adoption of a binding competition policy and a Code of Compliance with competition law,
- organisation of seminars for staff by external consultants.

[25] Article 73 par. 7 of Law 4412/2016.

[26] For the definition of the concept of self-cleaning, see Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton "Self-Cleaning as a defence to Exclusions for Misconduct- An Emerging Concept in EC Public Procurement Law", Public Procurement Law Review (2009) 18, p. 257. See also Sylvia de Mars "Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?", Reformation or deformation of the EU Public Procurement Rules, Edward Elgar, 2016, Newcastle University ePrints, p. 253.

[27] See par. 7 art. 73 L. 4412/2016.

[28] See Sue Arrowsmith, Hans-Joachim Prieb and Pascal Friton «Self-Cleaning as adefence to Exclusions for Misconduct- An Emerging Concept in EC Public Procurement Law», Public Procurement Law Review (2009) 18.

[29] See Recitals of Directive 2014/24/EE, par. 102, id. see Recitals of L. 4412/2016 p. 19 "Paragraph 7 allows economic operators for the first time to adopt compliance measures, with the aim of removing the consequences of any criminal offenses or misconducts and effectively preventing illegal activities. These measures may consist, in particular, in personnel and organisational measures. Where these measures provide sufficient guarantees, the said economic operator is not excluded only on these grounds", as well as Guidelines 20/2017 issued by the HSPPA.

8.2. Leniency and settlement procedures before the Hellenic Competition Commission and their effect on tendering procedures

What is the Leniency Programme?

The Leniency Programme was first introduced in the national legal order by HCC's Decision no. 299/V/2006. It is explicitly provided for in L. 3959/2011 in articles 29B to 29G. The Leniency Programme can only apply to horizontal agreements-cartels of article 1 of Law 3959/2011 and/or article 101 TFEU. Its purpose is to assist the HCC in its efforts to identify and terminate cartels and to punish those who participated in them. The Leniency Programme sets the framework for a favourable treatment of undertakings and natural persons who cooperate with the HCC to uncover agreements and practices that fall within its scope. Successful granting of leniency to an undertaking can lead to either its immunity from a fine or a reduction in the amount of the fine. The cornerstone of the Leniency Programme is the obligation of continuous, honest and full cooperation of the leniency applicant with the HCC, from the submission of the application until the completion of the administrative procedure, which consists in the observance by the former of the confidentiality of its leniency application against all third parties.

What is the Settlement Procedure?

The Settlement Procedure (SP) was first introduced in L. 3959/2011 in 2016. It is set out in article 29A of the Law and Decision 790/2022 of the HCC. The Settlement Procedure aims at simplifying and speeding up administrative procedures as well as providing a scope for a reduction in the number of appeals against the HCC's decisions before administrative courts. This procedure is expected to allow a better allocation of resources, in order to deal with more cases, thereby increasing the deterrence effect of the HCC's enforcement action, while simultaneously increasing citizens' awareness in the effective and timely punishment of undertakings infringing competition law. This procedure is expected to shorten the timescale for completion of the procedure for adopting a decision and ensure a better allocation of the Autnority's financial and human resources in order to deal with more cases, thereby increasing the deterrence effect of the HCC's enforcement action, while simultaneously increasing citizens' awareness in the effective and timely punishment of undertakings infringing competition law. In addition, according to the SP Decision, the HCC will not initiate the relevant procedure where it does not serve the prospect of achieving procedural efficiency.

The cornerstone of the Settlement Procedure is the voluntary, free, honest, irrevocable and unconditional acknowledgement of the parties' participation in and liability for the alleged infringement (participation in a prohibited horizontal and vertical agreement, invitation to enter into a prohibited agreement and announcement of future pricing intentions for products and services and abuse of a dominant position) in clear terms which cannot be misinterpreted, as any such infringement is briefly described by the HCC in terms of its subject matter, its possible implementation, the main facts constituting the infringement, their legal classification, the role of the party involved and the duration of its participation in the infringement. The successful completion of the SP entails a reduction of the fine for the settled company. Its purpose is reemphasised in relation to the rate of the fine reduction. In particular, according to the Recitals of Law 4389/2016, the possibility of reducing the fines to a maximum of 15%, in relation to the amount that would be imposed in case of non-settlement, is important in order to provide incentives to the undertakings under investigation to settle and, therefore, to achieve the intended purpose of shortening the timescale for the procedure's completion, thus releasing HCC's resources that could be used to speed up the completion of other cases.

What does the Settlement Procedure and/or the Leniency Programme entail?

1) Non-exclusion of undertakings from participating in public procurement tenders

According to article 44(3C) of L. 3959/2011, where an application for settlement is approved, pursuant to article 29A providing for **full payment of the fine**, and/or an application for leniency is approved pursuant to articles 29B et seq. providing for total immunity from fine or reduction of fine and full payment thereof, the undertaking concerned shall be relieved from any administrative sanction, except those set out in article 25 and in par. 1, 2 and 5 of article 25B. **In the above cases, the finding of the relevant infringement shall not establish grounds for exclusion of the undertaking from public procurement procedures or concessions, except for a repetitive breach of article 1 or article 101 TFEU**. A repetitive breach shall mean the issuing of a relevant declaratory decision within six (6) years from the earlier issuing of another declaratory decision.

Immunity from fines shall also apply in case there is an agreement between the debtor and the competent tax authority (which is competent for the actual collection of the fine) **to pay the fine in instalments and for as long the arrangement is in force and the debtor is consistent with its terms** as well as where a declaratory decision on the infringement of article 1 or article 101 TFEU has been issued and **a three-year period from its issuing has not yet elapsed.**

2) Decriminalisation of acts for natural persons

According to article 44(3A) of L.3959/2011, where an application for settlement is approved, pursuant to article 29A providing for full payment of the fine and/or an application for leniency is approved pursuant to articles 29B et seq. providing for total immunity from fine or reduction of fine and full payment thereof, **criminal liability is excluded** for former and current directors, executives and other staff members as well as for any other person responsible under par. 5 of article 25B for the offense of the first and third sentence of paragraph 1,2 and the offences linked by notional concurrence with them[30]. In case an agreement for payment of fine in instalments is granted (the criminal prosecution is suspended for as long as the arrangement lasts and the debtor complies with its terms.

3) Immunity of natural persons from administrative sanctions

According to article 44(3B) of L. 3959/2011, where an application for settlement is approved pursuant to article 29A providing for full payment of the fine and/or an application for leniency is approved pursuant to articles 29B et seq. providing for total immunity from fine or reduction of fine and full payment thereof, full immunity takes effect for former and current directors, executives and other staff members as well as for any other person responsible under par. 5 of article 25B **from any administrative sanction and penalty imposed in non-criminal judicial proceedings[31].**

[30] Provided that these persons have actively cooperated with the Competition Commission and are actively cooperating with the Public Prosecutor, as well as that the application for Settlement has been submitted before being duly notified of the criminal prosecution against them, or the possibility of criminal prosecution against them.

[31] Provided that these persons have actively cooperated with the Competition Commission throughout the examination of the infringement and that the application for Leniency or Settlement has been submitted before being duly notified of the possible imposition of the relevant administrative sanctions against them.

What happens when economic operators indicate in the European Single Procurement Document (ESPD) that they have participated into an anti-competitive agreement and are subject to the Settlement Procedure but have not paid a fine nor entered into an arrangement due to non-completion of the procedure and non-issuance of a decision by the Competition Commission HCC?

Immunity from other administrative sanctions, including the exclusion of the company from public procurement tenders, as a consequence of the inclusion of an economic operator in the settlement procedure (and in the Leniency Programme) occurs **only** if the fine has been paid in full or is subject to an arrangement for payment in instalments.

In case of non-completion of the settlement procedure with the issuance of the relevant decision by the Hellenic Competition Commission and the payment or arrangement of the fine, article 73 par. 7 of Law 4412/2016 applies and possibly the economic operator must invoke the adoption of (additional) compliance measures, as indicatively indicated above. In any event, its inclusion in the settlement procedure without the above procedure having been completed and the decision of the HCC having been issued, shall be assessed by the contracting authority in the above context, in view of the principle of proportionality and the principle of equal treatment taking into account the gravity and the particular circumstances of the case. It is specified that the above only applies in the settlement procedure as the disclosure of an undertaking's participation in the leniency programme before the end of the administrative procedure leads to a non-lenient treatment of the undertaking, as defined in article 29C of L. 3959/2011.

Pursuant to article 73 par. 8 of L. 4412/2016, the responsibility for determining whether any remedial measures put forward by the economic operator are adequate, in the context of a public tendering procedure, **lies with the contracting authority, following the assent of the committee referred to in par. 9 of that article.** Therefore, the Hellenic Competition Commission **has no power** to assess or issue an opinion on the adoption of compliance measures by companies.

9. JOINT BIDDING / BIDDING CONSORTIA

Submitting a joint bid (through a consortium or other legal form) as well as subcontracting[32] a project / service can be a legitimate business choice, depending on the specific market conditions during the award process. There is no general presumption that joint bidding or subcontracting between tenderers participating in the same procedure constitutes collusion between the undertakings concerned[33].

A new section on bidding consortia in the revised Guidelines of the European Commission on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, provides guidance in assessing the compatibility of such conduct[34].

The Commission Guidelines on horizontal cooperation agreements[35] state that a bidding consortium agreement will not restrict competition within the meaning of Article 101(1) if it allows the parties to participate in projects that they would not be able to undertake individually, on the basis that in this case the parties are neither actual nor potential competitors. This may be the case where the parties to a bidding consortium agreement supply complementary services or where the parties, although all active in the same market(s), cannot carry out the project individually, for example due to the size of the project or its complexity.

The Guidelines also state[36] that the assessment of whether the parties are capable of competing in a tender procedure individually, and are thus competitors, depends firstly on the requirements included in the tender rules and should be assessed on a case by case basis, taking into account the specific circumstances of the case, such as the size and capabilities of the undertaking, the level of financial risk induced by the project as well as the level of the investments required for the project, and the present and future capacity of the undertaking assessed in light of the contractual requirement.

If it is not possible to exclude that the parties to the bidding consortium agreement could each participate individually in the tender procedure (or if the bidding consor-

[32] From a competition law perspective, subcontracting and consortia both constitute joint bidding.

[33] Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Section 5.6

[34] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).

[35] Ibid. para 352.

[36] Ibid. para 353.

tium agreement contains more parties than necessary), the joint bid may restrict competitio[37]. It is necessary to carry out an individual case-by-case assessment of the bidding consortium agreement, taking into account all relevant factors[38]. In any event, a bidding consortium agreement between competitors to which Article 101(1) applies may fulfil the conditions of Article 101(3). The conditions of Article 101(3) may be fulfilled if the joint bid allows the parties to submit an offer that is more competitive than the offers that they could have submitted on their own – in terms of price and/or quality – and the benefits accruing to the contracting entity and final consumers outweigh the restrictions of competition[39].

Case-law and legislative initiatives

In Ski Taxi SA case,[40] the EFTA Court held that, in order for a joint bidding to be regarded as sufficiently harmful, so that it may be considered as a restriction of competition by object, regard must be had to the substance (content) of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor to determine the restrictive nature of an agreement. Since the submission of joint bids involves price-fixing, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint. Disclosure of the joint bidding to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings, without, however, this being a decisive element as to whether an agreement can be regarded as a restriction of competition by object.

[37] Ibid. para 355.

[38] Ibid. paras 356, 357.

[39] Ibid. paras 358, 359.

[40] Case E-3/16, Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v The Norwegian Government, represented by the Competition Authority (2016), https://eftacourt.int/wp-content/uploads/2019/01/3_16_Judgment_EN.pdf, notably rec. 101, 102 and 108, in the context of which a question was referred for a preliminary ruling relating to the interpretation of the Agreement on the European Economic Area and, in particular, of Article 53, the content of which corresponds to that of Article 101 TFEU.

10. CARTEL FACILITATOR – STATE MEASURES WHICH DISTORT FREE COMPETITION

The concept of cartel facilitation by third parties, non-members of the cartel has been shaped by the case-law of Union courts to cover cases where natural or legal persons which, although they are not competitors of the cartel members, provide facilitation services to anti-competitive collusion, in full knowledge of its illegal nature.

In the most important case (Judgement of the Court on C-194/14 P, AC-Treuhand), the Court of Justice of the European Union (CJEU) held, inter alia, that the main purpose of Article 101(1) TFEU is to ensure that conditions of fair competition are maintained within the common market and that, for the purposes of full effectiveness of the prohibition laid down in that provision, the prohibition also applies to active involvement of an undertaking in a restrictive of competition agreement / concerted practice, even if the undertaking carries out an economic activity in a market other than that to which the agreement / concerted practice relates.

In particular, the above case concerns a decision of the European Commission, which imposed fines on several undertakings for prohibited agreements and concerted practices having as their object the distortion of competition in the heat stabiliser sector and the epoxidised soybean oil and esters sector. A fine was imposed, inter alia, on the consultancy firm AC-, although it was not active in the same markets as the members of the cartels, because it played a key role in the infringements in question by organising meetings for the cartel participants which it attended and in which it actively participated, collecting and supplying to the participants data on sales on the relevant markets, offering to act as a moderator in case of tensions between the undertakings concerned and encouraging the parties to find compro-

mises in short, because, it has substantially facilitated unlawful collusion[41].

Under certain conditions, a contracting authority could be considered an undertaking, within the meaning of competition law, in public procurement procedures, if if it purchases services / products with a view to using them as input for an economic activity[42]. In this context, and taking into account the AC-Treuhand case-law, any conduct of a contracting authority that facilitates / contributes to the success of the cartel's purposes in terms of distorting a competitive procedure could be considered as falling within the prohibitive scope of Articles 1 of Law 3959 / 2011 and 101 TFEU.

For completeness, it is also noted that the CJEU has held that there is a violation of Articles 4 (3) TEU and 101 TFEU where, through state measures, the conclusion of agreements that are contrary to Article 101 TFEU is either required or favoured or the effects of such agreements are strengthened or the state nature of regulation is removed and the responsibility for decision-making on intervention in economic matters is shifted to private operators. In particular, the CJEU has held that *"Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty (now Article 4(3) TEU) not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures;* ***nor may they introduce or maintain in force measures****, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings*" and that *"[…] this is what happens when a Member State imposes or favours the creation of cartels contrary to Article 85 (now Article 101 TFEU) or reinforces their effects"*[43]. The concept of state measures may also include, inter alia, the administrative acts issued by contracting authorities in the framework of public procurement procedures, which may, in such a case, be assessed under conditions in the light of Articles 4 par. 3 TEU and 101 par. 1 TFEU.

41 Relevant, indicatively, is also the Court Judgement on T-180/15, Icap and Others v. European Commission, para 101.

42 Cf. CFI Decision T-319/99, Fenin v European Commission.

43 Cf., indicatively, C- 229/83-Leclerc v Au blé vert, rec. 14; C-231/83- Cullet v Leclerc, rec. 16, C-267/86 -Van Eycke, rec. 16, C-185/91- Reiff, rec. 14.

11. SANCTIONS

A. The violation of the provisions of the Greek law on protection of competition entails heavy administrative fines for those responsible, legal or natural persons, as well as criminal sanctions.

Administrative sanctions *(Article 25(1, 4 and 5) L. 3959/2011)*

- Regarding undertakings / associations of undertakings, the fine can reach up to **10% of the total worldwide turnover** of the undertaking / active members of the association of undertakings of the financial year preceding the issuance of the decision (or of the total worldwide turnover, in case of a group of undertakings).
- Entrepreneurs in sole proprietorships, managers in civil law partnerships and trading companies and joint ventures and all general partners, especially in public limited companies the members of the board of directors and the persons responsible for the implementation of the relevant decisions and in listed public limited companies, the executive members of the board of directors, while in associations of undertakings, their governing body **shall be liable with their personal property in its entirety with the relevant legal entity, for the payment of the amount of the fine.**
- The Hellenic Competition Commission may impose on the above natural persons, following their previous hearing, **a separate fine from two hundred thousand (200,000) to two million (2,000,000) euros,** if it is established that they participated in preparatory acts, the organisation or the unlawful conduct.

Criminal sanctions *(Article 44 par. 1 of L. 3959/2011)*

- Actual or potential competitors who have infringed Articles 1 of Law 3959/2011 and 101 TFEU are subject to **imprisonment of at least two years and a fine of one hundred thousand (100,000) to one million (1,000,000) euros.**

B. Those who have suffered damage arising from a breach of competition law, including the contracting authority, are entitled to claim full compensation.

Civil claims *(Article 44 par. 9 of L.395/2011, as in force)*

- Any imposition of criminal sanctions shall be without prejudice to the right of victims who have suffered damage arising from a violation of competition law to claim full compensation for such damage, in accordance with the provisions of Law 4529/2018 (A' 56).

C. The contracting authorities' staff members must immediately notify the Hellenic Competition Commission of any information which comes to their knowledge in any way, related to the infringement of Articles 1 and 1A (and Article 2 which relates to an abuse of dominant position) hereof, as well as Articles 101 (and 102) TFEU. Notification failure is subject to criminal penalties.

Criminal sanctions for civil servants *(Article 36 par. 6 of L. 3959/2011)*

- Civil servants, employees of legal entities under public law, employees of local authorities, employees of public or public utility companies and those temporarily mandated to perform public service who fail to fulfil the obligation to notify the Hellenic Competition Commission shall be punished with imprisonment of up to six (6) months or a fine from three hundred (300) to one thousand five hundred (1,500) euros.

12. ANONYMOUS INFORMATION SERVICE FOR PUBLIC TENDERS – RED ALERT BID RIGGING

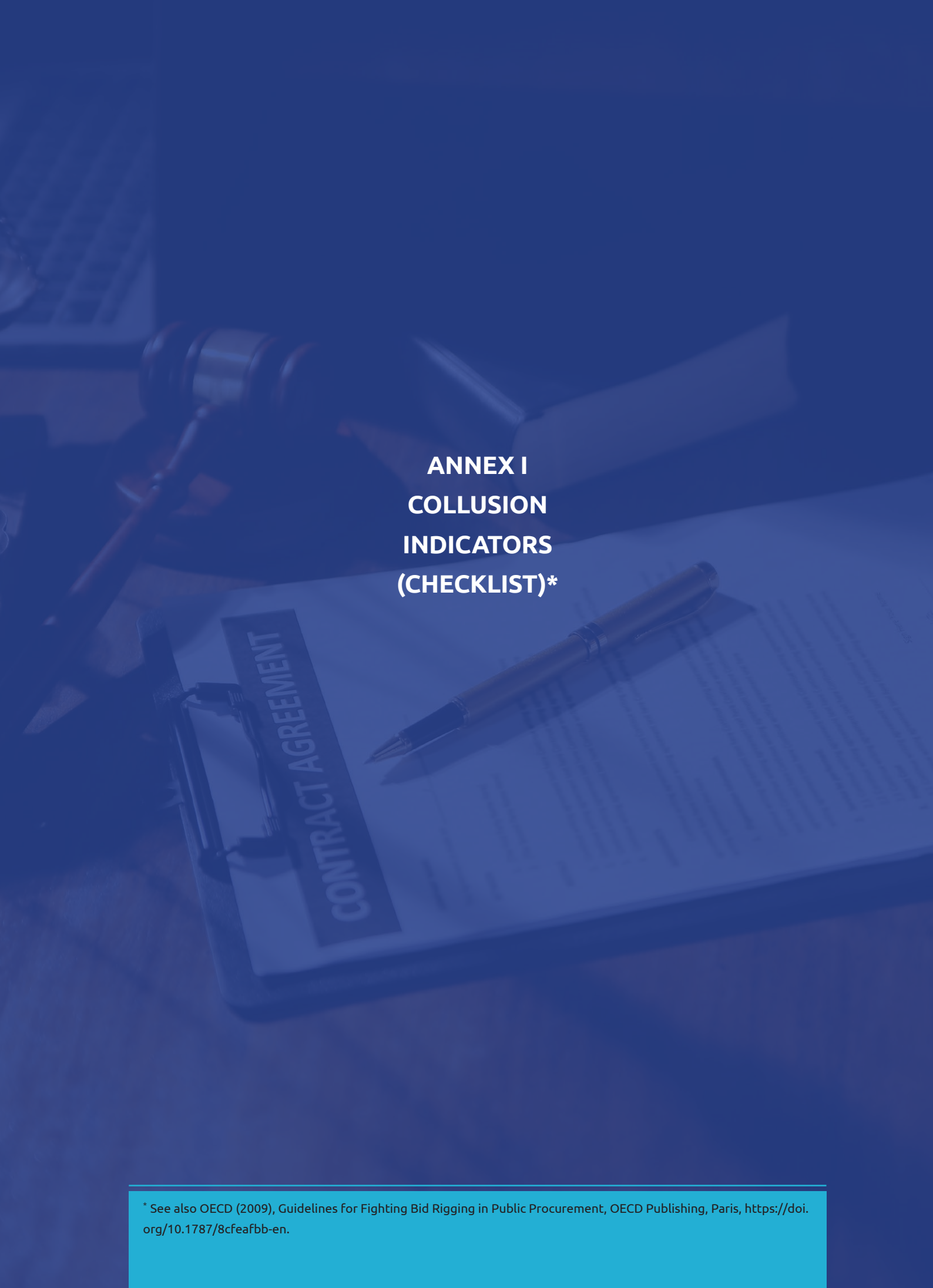
Internal information available to them because of their role as contract-awarding / tender-launching bodies, allows **Contracting Authorities** to receive information and complaints regarding the participation of undertakings in these procedures. **Contracting Authorities** can assist the HCC's work in uncovering cartel practices (bid-rigging) and proceeding with our investigations swiftly and effectively, directly benefiting the Greek economy, consumers and taxpayers, thanks to their help.

Through our **dedicated whistleblowing system, the officials in charge or the employees of the Contracting Authorities** and other bodies can share valuable information regarding the following practices and / or behaviors, while fully securing their anonymity.

If you are an official in charge or an employee of a Contracting Authority and other body and have information about:

- Collusive tendering /bid-rigging;
- Cover bidding;
- Bid suppression;
- Bid rotation;
- Market allocation

concerning a particular tender or any information that might be helpful to the HCC's work, you can send your message through the dedicated Whistleblowing Platform by clicking **https://www.epant.gr/digital/anonymi-paroxi-pliroforion/bidrigalert.html .**



ANNEX I
COLLUSION INDICATORS (CHECKLIST)*

* See also OECD (2009), Guidelines for Fighting Bid Rigging in Public Procurement, OECD Publishing, Paris, https://doi.org/10.1787/8cfeafbb-en.

ANNEX I
(√) COLLUSION INDICATORS (CHECKLIST):

√	
√	**At the stage of bid submission by undertakings**
☐	Number of bids lower than usual
☐	Some bidders unexpectedly withdraw their bids
☐	Some suppliers are constantly bidding, but they are never successful
☐	Regular bidders refrain from bidding in tenders
☐	Joint bidding by undertakings that could bid separately
	Different bids featuring: ☐ identical errors (e.g. spelling, grammatical errors or miscalculations), ☐ identical blank spaces where information is required, ☐ same terminology, especially when it is informal, ☐ identical formatting, spelling or last-minute corrections, ☐ identical letterheads, similar printed forms or with the same contact details, ☐ identical stamps, similar postmarks or delivery dates or same handwriting, incidentally or, in the case of electronic mail, the same IP addresses
√	**In commercial terms / pricing terms**
☐	Identical price bids
☐	Uniform price increases that are not justified by respective cost increases
☐	Sudden price alignment between competitors
☐	Significant price reduction compared to the price level of the past following a bid submission by a new supplier / competitor
☐	Large difference between the price of the approved bid and those of other bids
☐	Price differences in the bids represent fixed quotas / amounts
☐	Significant and unjustified change in the bid price by the same company
☐	Local suppliers charge higher prices for local services than for services to more distant destinations
☐	Similar transport costs between local and non-local businesses
☐	Similarities in the timeframe and cost components among different bids
√	**In the statements of competitors**
☐	Reference to competitive bids or to the existence of an agreement between lowest bidders
☐	Reference indicating geographical or customer exclusivity (geographical or customer allocation)
☐	Reference to sectoral guidelines, e.g. by business associations to "purchase price list"
√	**In the outcome of the tendering procedure**
☐	Each company seems to follow a rotation pattern in being awarded a contract as a successful bidder
☐	There is a geographical distribution of successful bids. Some undertakings submit bids that become successful only in certain geographical areas
√	**In the conduct of undertakings**
☐	The contractor repeatedly subcontracts to other competitors
☐	The successful bidder refuses the awarded contract and is later appointed as subcontractor
☐	Some suppliers do not request an offer from a necessary supplier
☐	Several competitors hire the same consultant to prepare the bids

ANNEX II
HYPOTHETICAL EXAMPLES

ANNEX II
HYPOTHETICAL EXAMPLES

HYPOTHETICAL EXAMPLE 1

Four technical undertakings are bidding for different projects without obvious problems. Their bids are relatively close, and all the undertakings are successful, winning tenders at different times. In the last tender, all four undertakings submitted bids ranging between 2,300,000 euros and 2,400,000 euros, which is slightly below the budgeted project value. However, another undertaking, appearing for the first time in related tenders, submitted the lowest bid, thus winning the tender.

Possible bid-rigging	
FACT	The newcomer submitted a bid price of 1.850.000 euros, i.e. lower by 20% from the others.
WARNING SIGN	The four undertakings had overpriced the project.
ACTION	Fact recording and monitoring of future bids.
FACT	In the next relevant tender, the new undertaking is not a bidder. One of the four original undertaking wins the tender at a price slightly below the project budget.
WARNING SIGN	The newcomer may have contacted other undertakings.
ACTION	Fact rrecording and continuing to monitor future bids.
FACT	Part of the project is subcontracted to the new undertaking.
WARNING SIGN	The new undertaking may have entered into an agreement with the original undertakings.
ACTION	Informing the undertaking's management and contacting the Competition Commission.
Possible market allocation	
FACT	The newcomer offered 1,850,000 euros, which is about 20% lower than the others' bids.
WARNING SIGN	The four undertakings had overpriced the project.
ACTION	Fact recording and monitoring of future bids.
FACT	At the end of the next tender, all bids are lower than expected. It seems that the four original undertakings have reduced their bid prices.
WARNING SIGN	Competitive response by the four undertaking to the newcomer.
ACTION	Fact recording and monitoring of future bids.
FACT	During the next tender process, the newcomer does not submit a bid. In response to a relevant question, the undertaking offers pretexts implying, or explicitly mentioning, the existence of a collusive agreement.
WARNING SIGN	Existence of an unlawful agreement.
ACTION	Complaint to the Competition Commission.

ANNEX II
HYPOTHETICAL EXAMPLES

HYPOTHETICAL EXAMPLE 2

For many years, the three largest local concrete suppliers have been successfully participating in related public works procurement tenders. Their bids are generally high, i.e. they are close to the project budgets, and there are no other undertakings that have the production capacity to meet such large supply contracts. Their offers have always been close to each other and seem to be competitive with each other.

Possible price-fixing	
FACT	During the review of bids in previous project tenders for the drafting of the procurement budget, it is noticed, on the one hand, that the three undertakings have signed contracts of approximately the same value in euros over the last five years and, on the other hand, that the undertakings seem to be awarded procurement contracts in rotation. In the most recent tender, all three undertakings offered prices between 20% and 25% above the estimated cost of the project. There is no indication that the price of concrete has increased above inflation.
WARNING SIGN	Bid rotation.
ACTION	Fact recording and contacting the Competition Commission.
FACT	When asked about this, the three undertakings answer that the rate of return on capital in the industry is very low and should be increased.
WARNING SIGN	Possible collusion and price- fixing.
ACTION	Complaint to the Competition Commission.
Possible emergence of a whistleblower	
FACT	A staff member of the organisation meets a former employee of one of the concrete undertakings during a social event. The employee says that he believes that the undertaking should pay him more, taking into account all the profits it obtains from public sector procurements. He also says that the three bosses of the undertakings know each other well and that he has seen tendering documents of other undertakings at the offices of the undertaking he works with.
WARNING SIGN	Red Alert. He is probably an important witness of unlawful anti-competitive agreements.
ACTION	Encourage the undertaking's employee to contact the Competition Commission. Contact the Competition Commission yourself.
FACT	The whistleblower wants to remain anonymous for fear of retribution.
WARNING SIGN	Confidence must not be broken.
ACTION	Contact the Competition Commission.

ANNEX II
HYPOTHETICAL EXAMPLES

HYPOTHETICAL EXAMPLE 3

Your organisation plans to acquire equipment to upgrade its information and telecommunication networks. Following project and cost budget approval, you contact three large local undertakings with appropriate capacity, according to past data on the implementation of similar projects, to bid in the forthcoming tender.

Possible bid rigging

FACT	An undertaking refuses to submit a bid. The second undertaking submits a bid which is close to the budgeted cost, but it subsequently withdraws it. The remaining third undertaking offers a price by 28% above the estimated cost.
WARNING SIGN	Indication bid suppression. However, it can also be due to other market factors.
ACTION	Fact recording and project cost control. Analysis of the two bids to understand their difference in project costing.
FACT	The bid is rejected, and the tender is re-opened with broadened specifications, so that smaller and non-local undertakings can participate in the tender. A large undertaking offers the lowest bid, but still by 15% above the budget cost.
WARNING SIGN	Local undertakings are not competitive, but this fact does not necessarily involve a collusion.
ACTION	Fact recording and monitoring of future tenders. Local undertakings may have colluded or more competition may be just needed in new tenders to reduce procurement costs. There is insufficient evidence to endorse a complaint to the Competition Commission.

ANNEX II
HYPOTHETICAL EXAMPLES

HYPOTHETICAL EXAMPLE 4

Every year, your organisation assigns road construction projects through a tendering procedure. The organisation's technical service has a good understanding of the market, contractors and pricing structure. For the current year, it has been estimated that the relevant projects cost is around € 1,000,000, while six contractors submitted bids in the relevant tender.

Possible bid rigging

FACT	One week before bid submission, the relevant industry association met, with the participation of executives from all the undertakings which subsequently submitted bids in the tender.
WARNING SIGN	Opportunity for an arrangement between the undertakings.
ACTION	Fact recording.
FACT	All bids are, with the lowest being 40% above your cost estimate. Over the past five years, no contract has ever been awarded above the original cost estimate.
WARNING SIGN	Either a sudden increase in the cost of inputs or a collusion among the undertakings.
ACTION	Analysis of all bids to understand the cost of inputs. Comparison with previous bids. Searching for similarities or differences in the elements of the tender to determine any common pattern.
FACT	Observation that the layout and wording in specific sections of the bid documents are almost identical.
WARNING SIGN	Strong indication of collusion.
ACTION	Complaint to the Competition Commission.

ANNEX II
HYPOTHETICAL EXAMPLES

HYPOTHETICAL EXAMPLE 5

A service of the Ministry of Health (e.g. hospital) launches a tendering procedure for the supply of consumables.

Possible market allocation

FACT	Twelve undertakings submitted bids, ten of which did not meet the same formal requirement and were thus rejected. The two remaining bids were not comparable as they concerned different items.
WARNING SIGN	The undertakings have entered into an agreement and submit cover bids.
ACTION	Fact recording and checking of previous tenders' records. Annulment and re-launching of the tendering procedure.
FACT	Twelve undertakings participated again in the new tender, eight of which had expressed an interest in the previous call for tenders. Nine of the twelve undertakings were rejected again for non-compliance with a procedural requirement while one of them was newly established and, therefore, was not eligible. Once again, the remaining bids were those of the companies that had remained in the previous tendering procedure, each of them again for different items.
WARNING SIGN	Existence of an unlawful market-allocation agreement.
ACTION	Informing the undertaking's management and contacting the Competition Commission.

EXAMPLE OF ANALYSIS OF SUCCESSIVE TENDERS		
Hypothetical example of analysis of successive low-value tenders for consumables.		
CONTRACT 1	CONTRACT 2	CONTRACT 3
Contractor A €18.000 Contractor B €19.440 Contractor C €20.880 Contractor D €22.320	Contractor C €8.000 Contractor B €11.000 Contractor D €18.000	Contractor D €6.500 Contractor B €8.000 Contractor A €10.000
CONTRACT 4	CONTRACT 5	CONTRACT 6
Contractor B €18.000 Contractor A €21.000 Contractor D €21.000 Contractor C €23.000	Contractor C €10.000 Contractor A €15.000 Contractor B €19.000	Contractor D €11.500 Contractor B €15.100 Contractor A €15.250 Contractor C €15.750

It is very difficult to detect the existence of a collusion between suppliers directly from the details of the bids. Bids usually provide only indicative information that raises reasonable grounds of suspicion but does not constitute sufficient per se aggravating evidence.

Factors to consider

1. Does each of the tenderers obtain an equal market share?

Each undertaking has won contracts worth 18,000 euros over three years. Contractor A wins contract 1 and Contractor B wins contract 4, worth 18,000 euros each. Contractor C wins 8,000 euros with contract 2 and € 10,000 with contract 5, i.e. a total of 18,000 euros. Contractor D wins 6,500 euros with contract 3 and 11,500 euros with contract 6, i.e. a total of 18,000 euros.

2. Is there a pattern in unsuccessful bids?

In contract 1 there are equal increases of 8% (€1,440) between the amounts of each bid.

3. How are the bids linked with each other?

In a competitive market, bid prices should be close to each other. Therefore, it may be useful to compare the differences between the lowest and highest bids but also between the bids in general. For example, contract 4 has two identical unsuccessful bids. In contracts 4 and 5, the discrepancy between the lowest and the highest bid is very large in relation to the respective discrepancies in the other contracts.

4. How are each undertaking's bids formed in the successive tenders?

Undertakings sometimes offer very high and sometimes very low bids, which may indicate that their actual costs are not taken into account in the bids. For example, Contractor A offers a very low bid for contract 1 and a very high bid for all other contracts.

5. What is the average bid price and how much lower than the average bid price is the winning bid? Is there a pattern in unsuccessful bids in relation to the average bid price

In contracts 4, 5 and 6, the average bid price may set a threshold of 20,000 and 15,000 euros for undertakings submitting non-competitive cover bids.

Notes

Notes

ΕΠΙΤΡΟΠΗ ΑΝΤΑΓΩΝΙΣΜΟΥ
HELLENIC COMPETITION COMMISSION

The Hellenic Competition Commission needs to be assisted by contracting authorities and competent officials conducting procurement tenders to carefully investigate public procurement procedures and possible infringements of competition law.
If you notice any warning signs, please contact the Hellenic Competition Commission, providing as much information as possible.

Whistleblowing System for Contracting Authorities
website: https://www.epant.gr/digital/anonymi-paroxi-pliroforion/bidrigalert.html

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