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Competition infringements and procurement blacklisting

Albert Sanchez Graells¹

Introduction

Collusion in public tenders, or ‘bid rigging’, is a significant impediment to obtaining value for money: cartels often result in overcharges of 10% to 20% (and more), costing taxpayers millions of pounds.² Thus, the identification and prevention of bid rigging in public tenders has gained increasing attention from the Competition and Markets Authority (CMA).³ It has also resulted in significant advocacy⁴ and training efforts,⁵ which have been coordinated with those of the Crown Commercial Service (CCS), the relevant executive agency sponsored by the Cabinet Office. So far, these efforts have been oriented towards raising awareness of bid rigging and providing procurement professionals with clear channels to report instances of collusion in public tenders to the CMA for further investigation.

These developments should be considered in connection with the OECD’s July 2012 Recommendation on Fighting Bid Rigging in Public Procurement,⁶ and are in line with similar advocacy strategies developed by national competition authorities elsewhere in the EU and in a number of countries participating in the International Competition Network.⁷ While the advocacy approach can, in general terms, be an adequate strategy, it also runs the risk of marginalising or excluding the direct enforcement of statutory rules aimed at blacklisting infringers of competition law and excluding them from participation in public tenders. This could result in sub-optimal deterrence of bid rigging.

This article explores the rules, under EU and UK public procurement law, for the blacklisting of infringers of competition law. It also considers the practical difficulties for their enforcement by procurement professionals in the UK and suggests additional roles that the CMA and CCS could have in order to facilitate their effectiveness. Finally, it examines the existence of a trade-off between more active enforcement of procurement blacklisting rules

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² See ‘Letter from the CMA to procurement professionals on bid-rigging’ (20 June 2016), available at www.gov.uk/government/publications/letter-from-the-cma-to-procurement-professionals-on-bid-rigging.

³ Competition and Markets Authority Annual Plan 2016/17, at para 4.18, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/508136/AP2016-17-final_PRINT.pdf.

⁴ ‘Letter from CMA to procurement professionals’, n 2, above.

⁵ CMA press release, ‘Public procurers learn how to spot bid-rigging’ (7 January 2016), available at www.gov.uk/government/news/public-procurers-learn-how-to-spot-bid-rigging.

⁶ OECD, ‘Recommendation on Fighting Bid Rigging in Public Procurement’ (July 2012), available at <http://oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm>.

⁷ Including, eg, the US, Australia and New Zealand: see www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/procurement.aspx.

and the attractiveness of the CMA's cartel leniency policy. By way of concluding remarks, it sets out a blueprint for targeted policy reform.

Rationale for blacklisting infringers of competition law

The blacklisting or disqualification of competition law offenders (in particular, members of a previously discovered and sanctioned cartel) can be an important instrument in the prevention and deterrence of bid rigging in public procurement. If contracting authorities could exclude potential tenderers from participation in procurement processes if they have previously engaged in bid rigging and/or have otherwise infringed competition law, the (financial) interests at stake for any undertaking considering (continued) participation in bid rigging schemes would rise significantly.

If an effective blacklisting system was in place, cartelists would know that they risked not only competition law prosecution – which is what the CMA is concentrating its advocacy efforts on – but also losing all chance of securing public contracts for a significant period of time. The magnitude of the potential losses could significantly increase the incentive for tenderers to refrain from colluding.⁸ The risk of blacklisting thus seems a powerful tool that has, however, been used only in a very limited manner in EU law and in UK practice.

Recent developments at EU level

In a development aimed at strengthening the integrated enforcement of competition and public procurement rules and empowering contracting authorities to avoid dealing with economic operators that have proven unreliable,⁹ Art 57(4)(d) of Directive 2014/24/EU¹⁰ created a specific ground for the exclusion of infringers of competition law that allows contracting authorities to exclude tenderers that collude, 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.¹¹

In an almost parallel development, the European Court of Justice (ECJ) ruled that a proven previous infringement of competition law, particularly if it had triggered the imposition of a fine, also empowered contracting authorities to blacklist an infringer and to prevent its participation in public tenders.¹² This was on the basis that the infringement of competition law constituted grave professional misconduct that rendered its integrity questionable, which is a general discretionary exclusion ground now regulated in Art 57(4)(c) of the Directive.

Taken together, these two grounds of exclusion are aimed at empowering contracting

⁸ See R Preston McAfee and John McMillan, *Incentives in Government Contracting* (Toronto University Press, 1987), at pp 111 and 150.

⁹ 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, recital 101. <Author – should footnotes 9 and 10 be swapped with each other?>

¹⁰ For a general overview of the reform of exclusion rules, see Sylvia de Mars, 'Exclusion and self-cleaning in Article 57: discretion at the expense of clarity and trade?', in GS Ølykke and A Sanchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016), at pp 253–273.

¹¹ For discussion, see Albert Sanchez Graells, 'Prevention and deterrence of bid rigging: a look from the new EU directive on public procurement', in GM Racca and C Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014), at pp 137–157. See also Sue Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1 (Sweet & Maxwell, 3rd edn, 2014), at pp 12–102 and 12–103; and H-J Prieß, 'The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive' (2014) 23(3) *Public Procurement Law Review* 112.

¹² *Generali-Providencia Biztosító Zrt v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* (Case C-470/13) EU:C:2014:2469.

authorities to take specific enforcement decisions that can result in the exclusion or blacklisting, for the purposes of public procurement, of infringers of competition law infringers. However, depending on its future interpretation, the specific ground included in Art 57(4)(d) of the Directive may be too narrow and riddled with practical difficulties for its enforcement. Consequently, it is worth exploring whether there is a more general possibility, under Article 57(4)(c) of the Directive, to exclude infringers of competition law. These issues are analysed in the following sub-sections in relation to the transposition of these rules into UK law.¹³

Competition-based exclusion grounds under the Public Contracts Regulations 2015

The Public Contracts Regulations 2015 (PCR 2015)¹⁴ transposed Directive 2014/24/EU following a copy-out approach and thus reproduced the exclusion grounds regulated at EU level without significant changes.¹⁵ The PCR 2015 thus contain discretionary exclusion grounds that cover competition-based justifications for the blacklisting of economic operators. Loosely understood, these include exclusion grounds based on distortions of competition resulting from the involvement of tenderers in prior market consultations,¹⁶ as well as those based in (some types of) conflicts of interest¹⁷ and those built on the undertaking's attempts to unduly influence the decision-making process of the contracting authority¹⁸ or to obtain confidential information that may confer upon it undue advantages in the procurement procedure.¹⁹ Each of these exclusion grounds aims to protect level or undistorted competition within a specific tender, but are not connected, or only very indirectly, with competition rules in the sense of Arts 101 and 102 TFEU and Chapters I and II of the Competition Act 1998 (CA 1998).²⁰

Strictly understood, discretionary competition-based exclusion grounds directly connected with infringements of UK and EU competition law are those 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 competition²¹ and where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.²² This

¹³ References to UK law should be understood as references to the law applicable to England and Wales. The devolved administrations have the power to enact specific procurement rules. However, to the best of the author's knowledge, there are no significant differences in this area in Scotland or Northern Ireland.

¹⁴ SI 2015/102, as amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 (SI 2016/275). For an annotated commentary, see Albert Sanchez Graells and Pedro Telles, *Commentary to the Public Contracts Regulations 2015* (2016), available at www.pcr2015.uk.

¹⁵ See Luke Butler, 'Exclusion, qualification and selection in the UK under the Public Contracts Regulations 2015', in M Burgi, M Trybus and S Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (DJØF, 2016), at pp 189–243.

¹⁶ PCR 2015, reg 57(8)(f).

¹⁷ PCR 2015, reg 57(8)(e).

¹⁸ PCR 2015, reg 57(8)(i)(i)(aa).

¹⁹ PCR 2015, reg 57(8)(i)(i)(bb).

²⁰ SI 1998/41, as repeatedly amended. <Author - is this the correct SI no? Please give full name and SI number.>

²¹ PCR 2015, reg 57(8)(d) and Directive 2014/24/EU, Art 57(4)(d).

²² PCR 2015, reg 57(8)(c) and Directive 2014/24/EU, Art 57(4)(c). For extended discussion and further references, see Albert Sanchez Graells, *Public procurement and the EU competition rules* (Hart, 2nd edn, 2015), at pp 296–301.

creates both the possibility to exclude or blacklist tenderers engaged in contemporaneous bid rigging (ie, it allows the contracting authority to self-protect against collusion that is taking place in the given tender) and those that have been previously sanctioned for infringements of competition law (ie, it allows procurement officials to support the general policy of keeping markets competitive by adding to the legal consequences that arise from bid rigging and other practices that distort procurement markets).

Exclusion of tenderers engaged in contemporaneous bid rigging

Regulation 57(8)(d) of the PCR 2015 transposes Art 57(4)(d) of Directive 2014/24/EU and creates a new (limited) ground for the exclusion of infringers of competition law ‘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’.

One of the first difficulties in its interpretation requires clarification of which competition law infringements are covered. The drafting of reg 57(8)(d) of the PCR 2015 deviates from that of Art 101(1) TFEU and s 2 of the CA 1998 in significant ways, given that it only mentions agreements between undertakings (but not concerted practices or collective decisions and recommendations) and it only refers to those that ‘aim at distorting competition’, whereas Art 101(1) TFEU and s 2 of the CA 1998 cover all those that ‘have as their object or effect the prevention, restriction or distortion of competition’, hence making the subjective element of intention irrelevant. However, this cannot be interpreted as an intended restriction of the scope of the application of the ground for exclusion in reg 57(8)(d) of the PCR 2015 as compared to that of Art 101(1) TFEU; this would make no sense and, in any case, would be contrary to the supremacy of the latter and the duty of sincere interpretation imposed by Art 4(3) TEU. Moreover, it would also not be logical to consider that it was intended that reg 57(8)(d) of the PCR 2015 would deviate from the content of Art 101(1) TFEU and s 2 of the CA 1998, because its enactment followed a simple ‘copy out’ of the provisions of Directive 2014/24.

In this regard, even if the interpretation of the grounds for exclusion must be carried out in a restrictive manner (as repeatedly stressed by the ECJ), that interpretation must still comply with the general rules under EU law and the systematic interpretation requirements derived from the principle of competition embedded in Art 18(1) of Directive 2014/24, as transposed in reg 18(2) of the PCR 2015.

Consequently, in order not to devoid Art 101(1) TFEU of its effet utile and to ensure the consistency of the system in relation to s 2 of the CA 1998, the only acceptable interpretation of the ground for exclusion in reg 57(8)(d) of the PCR 2015 is that it at least covers all conduct that would be prohibited under Art 101(1) TFEU and/or s 2 of the CA 1998, clarifying at the same time that since bid rigging is a very serious restriction of competition by object, it can (almost) never be exempted under Art 101(3) TFEU and/or s 4 of the CA 1998. However, even this interpretation of the exclusion ground would fall short of ensuring that the public procurement system sufficiently supports the effectiveness of competition law.

In this vein, it must be stressed that even if the PCR 2015 and Directive 2014/24 increases legal certainty by regulating this ground of exclusion for undertakings engaged in contemporaneous bid rigging, there is still a need for a more developed blacklisting system under the EU and UK public procurement rules. Moreover, given the optional terms in which the discretionary ground for exclusion is drafted, it may, as is explained below, be prone to reduced enforcement by public procurement authorities, thus reducing deterrence.

A more general ground to exclude infringers of competition law

Despite the existence of the new rules discussed above, there are good reasons to extend the competition-related exclusion grounds beyond the limited situation of contemporaneous collusion — ie to undertakings that have infringed the competition rules, but not in relation to the contract being tendered in the specific instance. This can be done on the basis of reg 57(8)(c) of the PCR 2015, which transposes Art 57(4)(c) of Directive 2014/24/EU and provides continuity with the same rules contained in reg 23(4)(e) of the Public Contracts Regulations 2006 (PCR 2006).²³ Regulation 57(8)(c) allows for exclusion ‘where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable’. Doing otherwise would run contrary to the general mandate to provide effectiveness to the EU rules on competition, and would equally diminish the effectiveness of the domestic equivalent rules in s 2 of the CA 1998.

Accordingly, it is highly relevant to clarify whether general breaches of competition law qualify as ‘grave professional misconduct’, which renders the undertaking’s integrity questionable, and which the contracting authority can take into account in order to disqualify a candidate or tenderer under reg 57(8)(c) of the PCR 2015. In that regard, it should be stressed that the ECJ, in interpreting the concept of ‘professional misconduct’ under Art 45(2)(d) of Directive 2004/18 (which was transposed by reg 23(4)(e) of the PCR 2006), established that:

‘... the concept of “professional misconduct” ... covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belongs ... *the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion under Article 45(2)(d) of Directive 2004/18.*’²⁴

Therefore, all kinds of anti-competitive behaviour should be of relevance from a public procurement perspective, and the concept of ‘grave professional misconduct, which renders the undertaking’s integrity questionable’ should be interpreted to include all kinds of practices prohibited by competition laws (including those not captured by reg 57(8)(d) of the PCR 2015 or by Art 57(4)(d) of Directive 2014/24/EU). A possible exception may be those cases where it can be proven by the undertaking that the breaches of competition law being considered are irrelevant in the specific public procurement setting.

Accordingly, except in highly unlikely circumstances, all breaches of competition law – whether committed within or without a public procurement setting – should qualify as ‘grave professional misconduct, which renders the undertaking’s integrity questionable’ and, consequently, be considered to meet the requirements of reg 57(8) (c) or (d) of the PCR 2015 (and of Art 57(4) of Directive 2014/24/EU). Hence, procurement professionals should be able to take such infringements into account in order to disqualify the undertakings concerned from a given tendering procedure, unless the infringement’s irrelevance can be demonstrated by the undertaking.

Should contracting authorities exercise discretion to exclude?

²³ SI 2006/5.

²⁴ *Generali-Providencia Biztosító*, n 12, above, at para 35 (references omitted and emphasis added).

Contracting authorities have discretion to exclude or blacklist both undertakings that are *at that time* colluding to alter the result of the public tender for a given contract, and those that have been previously found to have infringed competition law (and been fined for it). However, the exercise of that discretion by specific contracting authorities triggers the need to consider additional issues. From the perspectives of sound administration and due process, different issues arise from each of the exclusion grounds.

In relation to the exclusion ground for undertakings engaged in contemporaneous bid rigging (reg 57(8)(d) of the PCR 2015), one of the main difficulties for its practical application stems from the need for the procurement professional considering blacklisting to have ‘sufficiently plausible indications’ of the collusion. It has been suggested that this ‘would seem to be an explicit reference to the general requirement for reliable evidence’.²⁵ This still seems to fall short of the desirable level of clarity about the evidentiary threshold that contracting authorities need to be able to discharge, particularly in view of the complexities in the assessment of bid rigging cases involving sophisticated schemes of cover bidding and other strategies.

In addition, even if the contracting authority is in possession of reliable evidence, significant due process issues can arise in view of the fact that the exclusion or blacklisting of the economic undertaking can be seen as (or, at least, be argued to amount to) the imposition of a sanction²⁶ and, therefore, subject to stringent due process requirements.²⁷ In that regard, it is important to stress that engaging in an inter partes phase of the process to allow the undertaking to respond to a contracting authority’s assessment that there are sufficiently plausible indications of bid rigging (as well as any subsequent challenges to a decision to exclude) will, or at least will be perceived to, impose significant delays to, and complications in the management of, the procurement process. For these reasons, contracting authorities may be discouraged from relying on this discretionary exclusion ground and may decide simply to refer the matter to the CMA for further investigation or, even further, to ignore the indications of bid rigging. For these reasons, as is examined below, support from the CMA could make a difference in the enforcement of the discretionary exclusion ground in reg 57(8)(d) of the PCR 2015.

In a related fashion, contracting authorities may be discouraged, for several reasons, from relying on the exclusion ground for (sanctioned) previous infringements of competition laws contained in reg 57(8)(c) of the PCR 2015. The most likely arguments against the use of this provision could concern any doubts as to whether this could be construed as an additional sanction that infringed the principle of *ne bis in idem*, as well as fears of inconsistency in the exclusion of undertakings previously sanctioned for infringements of competition law across different parts of the UK public sector. Individual contracting authorities may thus not wish to face potential challenges for the exclusion of those economic operators, which could also trigger the additional complication of having to engage in an assessment of any ‘self-cleaning’ measures they may have been implemented (under reg 57(13)–(17) of the PCR 2015) and, eventually, result in a loss of competitive tension for the award of their specific contract if a number of potential tenderers (in particular, relevant key players) are affected by

²⁵ Arrowsmith, n 11, para 12-103.

²⁶ For discussion in the context of competition law enforcement, see Albert Sanchez Graells, ‘The EU’s accession to the ECHR and due process rights in EU competition law matters: nothing new under the sun?’, in V Kosta, N Skoutaris and V Tzevelekos (eds), *The Accession of the EU to the ECHR* (Hart, 2014), pp. 255–270.

²⁷ For discussion, see Albert Sanchez Graells, ‘“If it ain’t broke, don’t fix it”? EU requirements of administrative oversight and judicial protection for public contracts’, in S Torricelli and L Folliot Lalliot (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Larcier, 2017, forthcoming), available at <https://ssrn.com/abstract=2821828>.

that exclusion.

In that regard, the CMA could make explicit findings as to the blacklisting of competition infringers from future public contracts for a specific length of time (up to three years from the date of the relevant event, which may refer to the date of the CMA's infringement decision). In addition, as is considered below, the CCS could provide support and develop effective tools to ensure the consistent application of this exclusion ground across the UK's public sector.

What role can there be for the CMA and/or the CCS?

Both the CMA and the CCS could have a more active role in providing support to contracting authorities and facilitating the effectiveness of the competition-related exclusion grounds in reg 57(8)(c) and (d) of the PCR 2015.

The CMA could engage with contracting authorities to help them assess evidence that indicates the existence of contemporaneous bid rigging. If the CMA would be able to provide 'quick look' assessments to contracting authorities and to support them in their subsequent engagement with the affected economic operators, this would reduce the uncertainties that contracting authorities face. This would also allow the CMA to open investigation proceedings at an early stage and to cooperate with the contracting authorities in the collection of relevant evidence that can then be used in a competition enforcement procedure leading to the imposition of a fine and the eventual blacklisting of the undertakings concerned. In that regard, the CMA would be in an ideal position to include debarment orders in its decisions declaring the existence of an infringement of competition law and imposing fines. This could ensure that there is no risk of excessive punishment and that the right level of specific deterrence is achieved, given that this would be taken into consideration at the time of imposing the relevant financial penalty.

For its part, the CCS could create and operate a debarment or blacklisting register²⁸ to ensure the uniform application of this exclusion ground across the UK. This could operate on the basis that undertakings that have committed infringements of competition law are registered there. The CCS would also be the authority assessing any claims of 'self-cleaning' and successful claims could result in de-registration of the undertaking. Registration, for as long as it lasted (which could not be for more than three years for these competition-related exclusion grounds), would trigger an 'in principle' default obligation for contracting authorities to exclude registered undertakings from tender procedures, unless there were good reasons not to do so – for example, due to the elimination of competition for the contract, in which case a system of alternative penalties or an extension of the registration for other purposes could be considered.²⁹

How might this impact on the CMA's leniency programme?

One of the possible drawbacks of the development of exclusion policies along the lines described above would be whether this might reduce the attractiveness of the CMA's cartel

²⁸ For discussion of this possibility, see Butler, n 15, above, at pp 241–243.

²⁹ For a view of the systems in existence or being created as a result of the transposition of Directive 2014/24 in other EU Member States, see Albert Sanchez Graells, Luke Butler and Pedro Telles, 'Exclusion and qualitative selection of economic operators under public procurement procedures: a comparative view on selected jurisdictions', in Burgi, Trybus and Treumer, n 15, above, at pp 245–274.

leniency programme (the scope of which includes acts of bid rigging)³⁰ for undertakings active in public procurement markets.

It could be argued that a policy of active enforcement of procurement blacklisting for undertakings having been found to have infringed competition laws could act as a deterrent against the submission of applications for leniency. The argument would rely on the fact that leniency applicants would not be able to shield themselves from financial consequences (under procurement law) resulting from their disclosure of a cartel to the CMA, as the CMA's subsequent infringement decision would trigger the ground for exclusion, regardless of the existence of the centralised CCS register proposed above. Similar concerns could arise in relation to settlements³¹ and other flexible enforcement tools, which could be interpreted in different ways by contracting authorities seeking to blacklist undertakings on the basis of their involvement in competition infringements.

However, far from being an obstacle to the suggestions made above, this issue would support the case for the development by the CMA and CCS of a full policy on exclusion and blacklisting, which would need to balance its overall deterrent effect with the specific impact it might have on the CMA's current leniency policy. It could also provide a good opportunity for further research into the system of incentives that debarment from procurement procedures adds to the now relatively well understood trade-off between the promotion of public and private enforcement and its relation to leniency programmes.³²

Conclusion

There is scope for a more active policy, in the UK's public procurement setting, of blacklisting of competition law infringers.

Beyond raising awareness of the competition-related discretionary exclusion grounds included in reg 57(8)(c) and (d) of the PCR 2015 and the way they interact with Arts 101 and 102 TFEU and Chs I and II of the CA 1998, the development of such a policy would require a more active involvement of both the CMA and the CCS. It would be necessary to support the development of targeted policy reform through an expansion of the powers and competences of both institutions. It would also be necessary to assess the impact of policy reform on other existing policies and, in particular, on the CMA's cartel leniency programme.

Such targeted policy reform should be actively promoted in order to support the existence of competitive tension in the markets in which public procurement takes place. The main elements of such policy reform would include the development of mechanisms for the provision by the CMA of support to procurement professionals that identify indicia of bid rigging, the development of a policy on the imposition of procurement blacklisting as a sanction for infringement of competition law, and the creation of a UK-wide blacklisting register operated by the CCS.

³⁰ See, generally, OFT, 'Applications for leniency and no-action in cartel cases' (OFT1495, July 2013), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

³¹ See, generally, CMA, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (CMA8, March 2014), at section 14, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf.

³² For some critical remarks and further references, see Okeoghene Odudu and Albert Sanchez-Graells, 'The interface of EU and national tort law: competition law', in P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar, 2017, forthcoming).