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Public Procurement: A 2015 updated overview of EU and national case law
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The intersection of public procurement and competition law has been receiving increasing attention since I first wrote this foreword for the 2011 edition of this special issue of e-Competitions on public procurement [1]. As discussed in the second edition of this foreword [2], the 2014 revision of the EU Directives on public procurement resulted in the consolidation of the principle of competition in Art 18(1) of Directive 2014/24 whereby: ‘The design of the procurement shall not be made with the intention … of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’ In my view, this has been a significant step-change in the integration of both sets of rules indispensable for the proper working of the internal market, and the principle of competition offers a key interpretative aid to practitioners and judges involved in public procurement enforcement, particularly when issues related to bid rigging arise [3]. However, the principle of competition as enacted in Art 18(1) Dir 2014/24 triggers some interpretative difficulties [4], which may make it difficult for the pro-competitive orientation of the 2014 public procurement directives to trickle down into the domestic rules of the Member States and their enforcement by domestic authorities and courts.

Hence, the purpose of this foreword is two-fold. Firstly, it aims to provide some critical discussion of the principle of competition as consolidated in Art 18(1) Dir 2014/24, as well as to propose an objective and functional interpretation that maximizes its potential. Second, it aims to discuss the rules now available to tackle and react to bid rigging in public procurement. This discussion is connected to the cases included in the e-Competitions database since 1st of January 2014 [5].

I. The principle of competition as consolidated in Art 18(1) Directive 2014/24

As already mentioned, Art 18(1) Dir 2014/24 has now consolidated the principle of competition amongst the general ‘principles of procurement’ and clearly indicates that ‘[t]he design of the procurement shall not be made with the intention … of artificially narrowing competition’ and that ‘competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators’. In my view, this is an incremental step in the pro-competitive approach to the regulation of EU public procurement and it follows to a large extent the proposal that I had been advancing since 2011 [6]. The wording of this provision could have been clearer and there are significant interpretative questions that need being addressed (which will be explored shortly), but it should be acknowledged that Art 18(1) Dir 2014/24 stresses the relevance of competition considerations in the public procurement setting across the board and provides an interpretative tool that is likely to further develop the pro-competitive orientation of the system of EU public procurement rules in the coming years.

That being said, it is rather evident that Art 18(1) Dir 2014/24 creates two sources of interpretative difficulty. Firstly, it promotes the conflation of competition and corruption
issues related to unequal treatment by setting an irrebuttable presumption of competition distortion where discrimination has taken place (A). Secondly, Art 18(1) Dir 2014/24 provides a formulation of the principle of competition that includes a subjective element by requiring that the there is an intention of artificially narrowing competition (B). An excessively formal interpretation of these new elements could run the risk of deactivating and neutralising the principle of competition. On the other extreme, an excessively lenient interpretation of the principle could result in an improper test of proportionality or reasonableness of the procurement decisions taken by the contracting authorities. And, in any case, a divergent interpretation of the principle and its requirements in different Member States could result in distortions of the level playing field for the enforcement of the EU public procurement directives.

Therefore, this section tackles both of these interpretative difficulties and proposes an interpretation that results in an effective tool for the shaping of a competition-oriented procurement system around the general principle of competition. It is important to stress that, in any case, the interpretation of the principle should comply with the general requirements derived from the (pre)existence of competition as a general principle of EU law [7] and the limits imposed by article 4(3) TEU on the adoption of any sorts of State activity that may diminish the effet utile of the competition rules in articles 101 to 109 TFEU [8].

A. The Problematic Conflation of Competition and Corruption Issues

The first interpretative difficulty derives from the fact that, by setting a presumption that competition is ‘artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators’, Art 18(1) Dir 2014/24 exacerbates the potential difficulties in disentangling competition and corruption and non-discrimination considerations. Before engaging in any other considerations, it is worth reminding that this presumption of distortion of competition did not exist in the original text of the 2011 proposal of the European Commission for a new procurement directive [9], which clearly separated competition and discrimination issues by clearly stating that

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition (art 15 of the Dec 2011 proposal, emphasis added).

This formulation, which would have avoided all problems derived from the conflation of different issues related to the enforcement of the principle of equal treatment and the principle of competition, evolved during the negotiations of what ended up being Dir 2014/24 and, in a compromise text of July 2012 [10], was drafted in a way that suppressed the principle of competition from the equivalent provision and, instead, included provisions more clearly oriented towards the fight of corruption and the prevention of discrimination:

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that avoids or remedies conflicts of interest and prevents corrupt practices. The design of the procurement shall not be made with
the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services (art 15 of the Jul 2012 comp text, emphasis added).

Negotiations continued and, in the end, in the compromise text of July 2013 [11] that fundamentally crystallised the text of what is now Dir 2014/24, the general principles had been redrafted in a way that reintroduced the principle of competition, minimised the references to corrupt practices and conflicts of interest, and created the ‘hybrid’ presumption of distortion of competition based on unequal treatment that now remains in Art 18(1)

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement was made with the intention of unduly favouring or disadvantaging certain economic operators (art 15 of the Jul 2012 comp text, emphasis added).

Leaving aside the substitution of the element of “intention” for the previous mention to the existence of an “objective” to artificially narrow competition or unduly discriminate (below, B), it is worth stressing that the presumption of competitive distortion based on ‘unduly favouring or disadvantaging certain economic operators’ seems to be a result of the deficient legislative technique that plagues EU legislation.

Not surprisingly, this presumption raises a potential problem of (logical) ‘capture’ of the interpreters of this rule, as they may be tempted to consider that in the absence of (undue!) favouritism or corruption, no restrictions on competition are contrary to the precept—that is, they can be inclined to decide not to apply the ‘residual’ or ‘general’ part of the prohibition and limit it exclusively to cases covered by the presumption. Additionally, while it is true that most cases of favouritism or corruption will result in a restriction of competition, this is not always necessarily the case. For example, in cases where the beneficiary of favouritism could be awarded the contract under competitive conditions, or in cases in which corrupt practices are added to previous restrictions of competition created by the bidders active in the market; it could be argued that there is no (independent) restriction competition and, therefore, that the presumption is unnecessary or unjustified.

In any case, it is worth stressing that some of the instances of favouritism included in the irrebuttable presumption would (also) be covered by the new rules relating to conflicts of interest envisaged in Art 24 Dir 2014/24 (which requires Member States to ‘ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators’, emphasis added), and can even fit into one of the headings of mandatory exclusion of tenderers and candidates in Art 57(1)(b) for corruption, as supplemented by the obligation to terminate the contract under Art 73(b) Dir 2014/24. Therefore, the establishment of the presumption of anticompetitive intent in cases of favouritism or discrimination is, in my opinion, unnecessary and may be counterproductive.
Ultimately, it will be necessary for the bodies responsible for the implementation of these provisions to clearly distinguish instances of corruption from those of (simple) restriction of competition and, in the latter scenario, apply the first part of the principle of competition in an ‘objectified’ manner (as advocated below).

**B. The Introduction of a Subjective Element of “Intention” and the Need to “Objectify” It**

The second interpretative difficulty derives from the substitution of ‘objective’ elements with ‘intentional’ requirements in the drafting of the principle of competition during the legislative process leading up to the approval of Dir 2014/24. Remarkably, and with potentially larger implications for a limited interpretation and application of the principle of competition, Art 18(1) has included an apparently subjective element of intention in the generation of an artificial reduction of competition.

Indeed, as already mentioned, Art 18(1) provides a formulation of the principle of competition in which the subjective or intentional element of any restriction of competition is emphasized: ‘The design of the procurement shall not be made with the intention of […] artificially narrowing competition’ (emphasis added). This intentional element is common to different language versions of the Directive ("intención" in Spanish, "intention" in French, "intento" in Italian, "intuito" in Portuguese or "Absicht" in German), so it cannot be justified as a deficiency in translation or an error in the wording of the provision. However, the recitals of the directive do not provide any clarification and, ultimately, this provision can open the door to complex problems of identification and attribution of intentional elements in the field of public procurement—or, more generally, in administrative (economic) law.

In my opinion, if it was to be carried out with the purpose of preserving the subjective or intentional element derived from a literal reading of the provision, this very complex task could require establishing the parameters by which a decision that often involves various individuals (and potentially several administrative bodies) is considered affected by an underpinning anticompetitive (or discriminatory) intention. In fact, this task is virtually impossible. Given that the traditional mechanisms of allocation of subjective factors in (administrative) disciplinary or criminal law are not easily (or at all) applicable to this sort of decision-making processes, this clearly requires an ‘objectifying’ reinterpretation of the intentional element in the provision. As has rightly been pointed out, not only in public procurement but more generally, ‘important decisions within the spheres of economic and social law are taken by governments, companies or other collective or non-natural decision-makers. To speak of the ‘intent’ of such bodies is to run the risk of anthropomorphism’; and, consequently, ‘it is more common to understand economic and social EU law in terms of effects’ [12].

In short, and bearing all these issues in mind, it is submitted that the only avenue to approach the interpretation and enforcement of Art 18(1) Dir 2014/24 in a possibilistic and pragmatic manner is to derive the element of intention to restrict or distort competition (ie, to artificially narrow it) from a reasonable objective assessment of the concurring circumstances, so that intention is inferred or derived from the effects or consequences of the way in which the
The procurement procedure is designed and carried out by the contracting authority. In the end, the context in which the distortions or restrictions of competition take place will be a determinant for their existence and little else identifiable can give meaning to the (implicit) intention of the contracting authority to artificially narrow down competition.

Generally, it is worth stressing that the reasons for the ‘objectification’ of the wording of Art 18(1) Dir 2014/24 are multiple and derived mainly from the need for coordination of this new rule with some of its ‘functional neighbours’. Remarkably, such coordination should take into account the objective character of the restrictions of competition derived from TFEU and its interpretation by the CJEU. Indeed, the prohibitions in Arts 101 and 102 TFEU apply in abstraction from any volitional element of the offending parties—that is, undertakings infringing competition law can be sanctioned without them having ‘an intention actually to violate’ the applicable rules [13], and the EU Courts have repeatedly upheld that

for an infringement of the competition rules to be regarded as having been committed intentionally, it is not necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition [14].

Hence, a competitive restriction in the market (almost) automatically results in a violation of those prohibitive norms, irrespective of the actual intention with which market players have conducted the practice restrictive of competition. The only exception will come where there was clearly no negligence in the oversight of the competition-restricting effects of the given market activity [15]. In that regard, and trying to achieve consistent enforcement standards, it is submitted that the objectification of Art 18(1) Dir 2014/24 seems the most appropriate functional solution—but, acknowledgedly, it can be seen as lying somewhat far away from a literal interpretation of the provision.

However, such an objectification of ‘intentional element’ in Art 18(1) Dir 2014/24 would not be a new or radical approach in the field of public procurement or, more generally, in the enforcement of EU economic law. Indeed, there have been other sorts of prohibition in the public procurement setting that included an ‘intentional element’, such as the traditional prohibition of calculating the value of the contract in a way that made it remain below the value thresholds that trigger the application of the EU public procurement directives and, ultimately, allowed the contracting authority to avoid them. Indeed, under the applicable rules, it is made clear that ‘[t]he choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive’ (emphasis added) and, in particular, that a ‘procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons’ [see art 5(3) dir 2014/24 and, previously, art 9(7) dir 2004/18].

In that regard, it is important to stress that the CJEU departed from the literal wording of the provision, which requires an intentional element in the same way as Art 18(1) Dir 2014/24, and clearly adopted an objective assessment based on the effects and consequences of the contracting authorities’ decisions concerning the estimation of the value of contracts that should have been tendered under the applicable EU rules. In a consistent line of case law, the
CJEU stressed that the analysis needs to be based on objective elements that create *indicia* of the intentional artificial split of the contract, such as ‘*the simultaneous issuance of invitations to tender ... similarities between contract notices, the initiation of contracts within a single geographical area and the existence of a single contracting authority*’ all of which ‘provide additional evidence militating in favour of the view that, in actual fact, the separate works contracts relate to a single work’ [16], which led the GC to stress that

a finding that a contract has been split in breach of European Union procurement legislation does not require proof of a subjective intention to circumvent the application of the provisions contained therein... Where such a finding has been made, as in the present case, it is irrelevant whether the infringement is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it (emphasis added) [17].

Indeed, the intentional element has been excluded where, on the basis of such analysis, there were *objective reasons* that justified the decision adopted by the contracting authority [18]. Moreover, the prohibition of artificially splitting the contract with the intention of circumventing the application of the EU procurement rules has been applied directly to determine the incompatibility of legal rules that objectively diminished the applicability of the relevant directives, without engaging in any sort of subjective assessment (which would have been impossible) [19]. Therefore, it seems plain that in the assessment of an identical (apparent) subjective element of intention, the CJEU has ‘objectified’ the test applicable to determine the existence of an eventual infringement of the EU public procurement directives.

It is true that the CJEU has not gone as far as simply presuming the existence of the intention to avoid the applicability of the EU procurement directives in all cases. As aptly put by Advocate General Trstenjak,

> Although the Court is decidedly strict in its examination of that prohibition, such intention to circumvent cannot be presumed without more. Each individual case in which a contract was split for the purposes of an award must be examined according to its context and specificities and, in that regard, particular attention must be given to whether there are good reasons pointing in favour of or, on the contrary, against the split in question (emphasis added) [20].

Broadly speaking, in my opinion, the ‘objectification’ of the principle of competition in Art 18(1) Dir 2014/24 should indeed be carried out by establishing a *rebuttable presumption of restrictive intent* in cases where, in fact, the tendering procedure has been designed in a manner that is *in fact* restrictive of competition. The disproval of this rebuttable presumption would require the contracting authority or entity to justify the existence of objective, legitimate and proportionate reasons for the adoption of the criteria restrictive of competition (*ie* to provide a plausible justification on objective grounds for the imposition of restrictive conditions of competition in tendering the contract, so as to exclude the plain and simple explanation that it was otherwise simply intended to restrict competition therewith). In other words, if it could be justified that a ‘*reasonable and disinterested contracting entity*’ (meaning free from any intent to restrict competition) would have taken the same decision on the design of the tender in a form restrictive of competition, the presumption of restrictive intent would not be applicable and, ultimately, the tender would be compliant with Art 18(1)
Dir 2014/24. Obviously, this test requires some further development and the CJEU will most likely have the opportunity to address these issues in the future.

C. Preliminary Conclusion: Towards and Objective Interpretation of the Principle of Competition as Consolidated in Art 18(1) Directive 2014/24

By way of preliminary conclusion, it is submitted that the consolidation of the principle of competition in Art 18(1) Dir 2014/24 should be welcomed, but its wording requires two major adjustments designed to ensure its functionality. Firstly, it is necessary to objectify the interpretation and application of the provision by establishing a rebuttable presumption of competition-restrictive intent based on a reasonable objective assessment of the concurring circumstances, so that intention is inferred or derived from the consequences and effects of the way in which the procurement procedure is designed and carried out by the contracting authority. In other words, the test should be limited to assessing whether the restriction of competition can be justified on objective grounds and whether the restriction of competition is proportionate to the alternative aim pursued by the contracting authority. Moreover, the irrebuttable presumption of restriction of competition in cases of favouritism or corruption should be interpreted as not being exhaustive and should not prevent the widespread application of the general test of competitive restraint in the absence of (clear) discrimination.

II. New rules to tackle bid rigging and their likely impact in view of existing case law

Together with the consolidation of the principle of competition in Art 18(1), Dir 2014/24 has brought about two important tools to tackle instances of bid rigging in public procurement. First, it now allows contracting authorities to prevent the participation of undertakings previously sanctioned for infringements of Art 101 TFEU and its domestic equivalents by final decisions holding the force of res iudicata (A). Second, it allows contracting authorities to react to contemporaneous instances of bid rigging and to exclude of the tender procedure undertakings that it suspects to be engaging in collusion (B). These are bound to be powerful anti-collusion tools in the hands of well-informed contracting authorities (and competing undertakings), particularly in view of the level of bid rigging in reported case law (C).

A. Exclusion of tenderers previously convicted of bid rigging offences

Unless Member States decide otherwise in its transposition, Art 57(4)(c) Dir 2014/24 allows contracting authorities to prevent undertakings that have ‘entered into agreements with other economic operators aimed at distorting competition’ from participating in the tender for a public contract. This has been supported by the CJEU, and the compatibility of these rules with the fundamental freedoms enshrined in the TFEU has been explicitly accepted:

Articles 49 TFEU and 56 TFEU do not preclude the application of … legislation excluding the participation in a tendering procedure of an economic operator which has committed an infringement of competition law, established by a judicial decision having the force of res judicata, for which a fine was imposed [21].

This is a relatively clear ground for the exclusion of convicted infringers of competition law. However, some interpretative difficulties deserve some further thoughts. Not least because
there may be doubts as to the possibility to apply Art 57(4)(d) Dir 2014/24 in relation with violations of competition that are not connected with the tender at hand or, more generally, with other types of infringements of competition law (covered by arts 101 and 102 TFEU)—which has been interpreted as now being expressly excluded by the wording of Art 57(4)(d) [22], in what is in my opinion a criticisable restriction of the disqualification mechanism.

Indeed, the drafting of Art 57(4)(d) Dir 2014/24 deviates from that of Art 101(1) TFEU 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 covers 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 application of the ground for exclusion in Art 57(4)(d) as compared to that of Art 101(1) TFEU, which would make no sense [23], and in any case would be contrary to the supremacy of the latter and the duty of sincere interpretation imposed by Art 4(3) TFEU.

In this regard, even if the interpretation of the grounds for exclusion must be carried out in a restrictive manner, 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) Dir 2014/24 (above). Consequently, in order not to devoid Art 101(1) TFEU of its effet utile and to ensure the consistency of the system, it is submitted that the only rational and acceptable interpretation of the ground for exclusion in Art 57(4)(d) is to make it at least cover all conduct that would be prohibited under Art 101(1) TFEU, clarifying at the same time that bid rigging being a very serious restriction of competition by object, it can (almost) never be exempted under Art 101(3) TFEU. However, in my view, even this interpretation of the exclusion rule would fall short from ensuring that the public procurement system supports the effectiveness of EU competition law.

In this vein, even if the new Directive increases legal certainty in some cases, there is still a need for a further developed suspension and debarment system in EU public procurement rules. Moreover, given the optional terms in which Art 57(4) is drafted (which could result in some or all Member States not applying the ground for disqualification of bid-riggers), such open regulation at EU level can give rise to different regimes across different Member States and, consequently, might facilitate strategic behaviour by infringing undertakings—thereby reducing deterrence. In my view, a stricter and uniform system of suspension and debarment of competition law infringers would contribute to strengthening the pro-competitive orientation of the public procurement system and to limiting privately-created distortions of competition.

B. Exclusion of tenderers suspected of engaging in contemporaneous bid rigging

Regardless of the scope of general application of this provision, and more remarkably, the full text of Art 57(4)(c) Dir 2014/24 indicates that economic operators can be excluded ‘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' (emphasis added) and contracting authorities may exclude or may be required by Member States to exclude an economic operator for that reason at any time during the procedure [art 57(5) dir 2014/24]. Consequently, contracting authorities can now self-protect against instances of bid rigging [24] and, for that to happen in an effective manner, they must be able to liaise effectively with national competition authorities. As the following discussion of the main areas of development of national case law regarding bid rigging shows, the practical impact of these provisions is likely to be very substantial.

C. Selected recent domestic case law on bid rigging in public procurement

There are some issues related to bid rigging in public procurement that feature quite prominently in the cases reported in this special edition, which cover decisions in domestic EU jurisdictions for the 16 months between January 2014 and April 2015. References to cases are meant to be impressionistic, and are simply used to exemplify the general trends that I observe in the case law.

Firstly, competition authorities continue to impose sanctions in a significant number of bid rigging cases particularly in newer Member States of the EU [25], and domestic courts tend to uphold those sanctions in judicial review processes [26]. This should come as no surprise, given that public procurement tends to favour the running of cartels in concentrated markets as a spillover of the rules on transparency, which may be excessive in many instances [27]. This is, consequently, an area where early intervention by contracting authorities applying Art 57(4)(c) Dir 2014/24 may continue fuelling competition enforcement, but the issue of excessive transparency requires a deeper rethink by the legislator (at EU level).

Secondly, competition authorities are developing toolkits and guides for the detection, sanction and prevention of bid rigging in public procurement cases [28], and continue giving enforcement of competition law in public procurement markets high priority, including ‘soft’ areas such as advocacy or through amicus submissions [29]. Again, this should not be surprising, particularly as the 2012 OECD Recommendation on fighting bid rigging in public procurement [30] and the efforts of the procurement working group of the International Competition Network (ICN) [31] continue to influence enforcement of competition law.

Finally, were they given powers to review the award of public contracts, competition authorities are becoming increasingly active in the set-aside of awards that restrict competition or follow non-competitive procedures, and they even pursue the imposition of fines on contracting authorities that fail to meet their statutory duties to prevent distortions of competition in public procurement [32].

Overall, a brief look at the case law supports the view that this is an area of growing relevance for competition law enforcement. I hope that a closer reading of the cases will provide academics, practitioners and judges significant insights on how this area of economic law is bound to evolve in the coming years. I hope there will be more editions of this foreword, so that we can continue tracing the evolution of the interaction between public procurement and competition law together.
End Notes

[5] A simple search for ‘public procurement’ in the database returned 378 case comments, which made it necessary to restrict the scope of this comment. Since previous editions of this foreword covered the existing cases until December 2013, the choice seemed obvious. This foreword consequently focuses only on selected cases from the 66 cases included in e-Competitions between 15 January 2014 and 30 April 2015.


[20] Opinion of AG Trstenjak in Case C-271/08 Commission v Germany 165. Cf Opinion of AG Jacobs in case C-16/98 Commission v France 38, where the AG stresses that the intentional or subjective element cannot be eliminated, but suggests that the applicable test still lies on whether the decision under assessment can be ‘justified on objective grounds’.


[23] Even Prieß, despite advocating for the indicated interpretation of the provision, acknowledges that ‘it could be concluded that the provisions have a different scope of application—although this makes little sense’ (emphasis added).


[31] The working group has published a substantial amount of materials on cartel awareness in procurement, which are available at http://www.internationalcompetitionnetwork.org/working-groups/current/cartel-awareness/procurement.aspx [last accessed 1 June 2015].