

POLICY ROUNDTABLES

Competition Policy and Procurement Markets

1998

Introduction

The OECD Competition Committee debated competition policy and procurement markets in June 1998. This document includes an executive summary, an analytical note by Mr. Darryl Biggar for the OECD and submissions from Australia, Denmark, the European Commission, Germany, Hungary, Italy, Japan, Korea, Norway, Spain, Sweden, Switzerland, Chinese Taipei, Turkey, the United Kingdom and the United States, as well as an aide-memoire of the discussion.

Overview

Public and private procurement, which constitutes a substantial fraction of economic activity, suffers from collusion, bid-rigging, fraud and corruption. Public procurement may be constrained by regulatory requirements, and it may also be used to address other public policy objectives.

Some procurement markets exhibit features favouring collusion: there are relatively few potential sellers who encounter each other regularly, with relatively high barriers to entry and a high degree of transparency. Collusion can be discouraged by lowering barriers to entry, which has the added advantage of improving the efficiency of the bidding process. Thus barriers to foreign participation in procurement should be eliminated.

Making it harder for bidding cartels to detect and punish defection also discourages collusion. Thus reducing the amount of information available about bidding outcomes may hinder bidding cartels. It may be possible to control corruption and favouritism without full transparency by limiting disclosure to designated procurement-oversight agencies.

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Procurement Markets which was held by the Committee on Competition Law and Policy in June 1998.

This compilation which is one of several published in a series named “Competition Policy Roundtables” is issued to bring information on this topic to the attention of a wider audience.

PRÉFACE

Ce document rassemble la documentation, dans la langue d’origine dans laquelle elle a été soumise, relative à une table ronde sur la passation des marchés. Cette table ronde s’est tenue en juin 1998 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Cette compilation qui fait partie de la série intitulée “Les tables rondes sur la politique de la concurrence” est diffusée pour porter à la connaissance d’un large public les éléments d’information qui ont été réunis à cette occasion.

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EXECUTIVE SUMMARY

by the Secretariat

In the light of the background paper, the country submissions and the oral discussion the following points emerge:

(1) Procurement - the purchase of goods and services by public and private enterprises - constitutes a substantial fraction of economic activity. Efficient procurement involves choosing the supplier who can supply the desired goods or services at the lowest price (or, more generally, the best "value for money"). Practices such as collusion, bid-rigging, fraud and corruption prevent efficient procurement. The stronger the incentive on the overall enterprise for efficiency, the stronger the incentive to control all inefficient procurement practices including corruption. The most common forms of procurement involve some form of tender or auction, although other practices are used, especially where the number of potential tendering firms is small.

The EC estimates that procurement by public authorities alone accounts for 11 percent of the EU's GDP.

Both public and private procurement processes may be subject to the problems of bid-rigging and corruption. Procuring enterprises affect the efficiency of the procurement through their design of the procurement process and related activities. The incentive on the agency to adopt efficient procurement depends upon the internal governance arrangements within the firm and the overall incentives for efficiency. These incentives may be weak in government agencies. Reforms which improve the productivity and efficiency incentives on government departments therefore can improve procurement outcomes.

Where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple auction or tender process (either sealed or open bid). When there are not enough firms to sustain competition, more sophisticated arrangements are necessary, often involving risk or cost-sharing contracts.

(2) Public procurement processes are often constrained by various regulatory requirements. For example, public procurement processes are often subject to transparency requirements. Public procurement may also be used as a tool to address other public policy objectives, such as environmental, affirmative action or industrial policy objectives.

Although both public and private procurers must take action to prevent corruption (allocating procurement contracts inefficiently in response to monetary incentives), public procurers face the additional challenge of preventing political favouritism - the practice of allocating procurement contracts inefficiently according to political favours. Many countries seek to control political favouritism through disclosure requirements which make transparent the identity and the size of the winning bids. Transparency may also be mandated as a means for ensuring other aims, such as compliance with international trade rules which seek to ensure equal opportunities for foreign companies. Such transparency may facilitate collusion, leading to a conflict between the desire to

promote competition and the desire to prevent corruption and favouritism. Rules which limit the pool of potential suppliers (for, say, industrial policy objectives) may have an important effect on the level of competition and on the efficiency of the procurement. Where procurement is used as a tool for the pursuit of such other public policy objectives, the benefits should be carefully weighed against the effects on competition.

(3) Some public procurement markets exhibit features which favour collusion among the bidders: there are relatively few potential sellers who encounter each other regularly in different procurement markets in different places and over time, with relatively high barriers to entry and a high degree of transparency. Simple collusive arrangements involve appointing designated winners in different geographic markets or in the same markets over time. More sophisticated systems involve transfers between the bidding parties.

In certain procurement markets, such as markets for public works or defence procurement, there are relatively few incumbent firms, and relatively high barriers to entry. These firms must typically compete with each other repeatedly in a number of different tenders. These market properties facilitate collusion. The simplest approaches involve designating a winning bidder with the other firms either withdrawing, bidding a larger amount or lower quality. Over time a collusive arrangement will be more stable if it allows the tender to be won by the firm with the lowest costs (because this is the firm that has the most to gain from cheating on the cartel arrangement). This could be achieved by transfers between the cartel members, perhaps via common payments to an industry organisation or via a system of subcontracting out some of the work to other members of the cartel.

(4) Broadly speaking, collusion in cartel markets can be restricted through policies which seek to lower barriers to entry; policies which reduce the ability of bidding cartels to detect and punish defection; and policies which enhance enforcement. Lowering barriers to entry has the double advantage of both improving the efficiency of the bidding process and reducing the likelihood of successful collusion. Barriers to foreign participation in procurement should be eliminated. The tender specifications should be carefully drafted so as not to exclude potential suppliers whether domestic or foreign.

The boundaries of a procurement market are essentially defined by the tender specifications itself. Therefore careful attention is necessary to the tender specifications to ensure that the market is defined as widely as possible, and barriers to entry are as low as possible. In particular, foreign firms should not be excluded from participating in procurement processes. The WTO plurilateral Agreement on Government Procurement ("GPA") binds those countries which have signed up to the agreement to use open, transparent and non-discriminatory procurement procedures for all government procurement above a certain size.

(5) It may be possible to reduce the ability of bidding cartels to detect and punish detection through policies which limit the amount of information available about bidding outcomes. There may be a trade-off between controlling collusion and controlling corruption and political favouritism. It may be possible to control corruption and favouritism without full transparency by limiting disclosure to designated procurement-oversight agencies.

Transparency of outcome enhances the ability of cartels to detect and punish cheating. Sealed bid auctions are, for this reason, preferred to open bid auctions. Similarly, private negotiations with potential suppliers are less likely to lead to collusion than public tender processes. Attempts to

control corruption and political favouritism through enhanced transparency may facilitate collusion. In some countries it may be possible to resolve this conflict of objectives by limiting disclosure to an agency charged with maintaining oversight of public procurement.

(6) Several OECD countries have explicitly focused enforcement efforts on policies to prevent bid-rigging. Bid-rigging is almost universally condemned and in some countries is prosecuted as a crime. Specific actions include compliance and/or self-certification programs. Several countries also have laws protecting whistle-blowers. Many countries permit "follow on" proceedings through which victims of collusion can recover losses, or multiples thereof, resulting from collusion.

Many countries noted that collusion in procurement markets was prosecuted vigorously and accorded little or no tolerance. Several countries have specific anti-bid-rigging legislation. In some countries bid-rigging can be prosecuted as a crime. Some countries enhance deterrence by allowing victims of collusion to recover losses in separate "follow on" actions. A few countries explicitly require firms to certify that they have not engaged in collusion as a condition for participating in a public tender. Several countries use publicity of the offending cartel as a form of deterrence. In some cases, bid-rigging may be able to be detected through careful analysis of bidding patterns over time (such as unexplained deviation of the pattern of prices from the pattern of underlying costs).

In any case, as a general principle, the expected penalty for colluding parties should exceed the expected benefits. Where it is considered that bid-rigging is difficult to detect and prosecute, the associated penalties should be large, possibly even several times larger than the harm to the victims (the treble-damage actions available in the US are an example).

SYNTHÈSE

par le Secrétariat

A la lumière du document de référence, les contributions des pays et des délibérations orales, il ressort les éléments suivants :

(1) *La passation de marchés et l'achat de biens et de services par des entités publiques et privées – constituent une part importante de l'activité économique. Une passation efficace des marchés implique le choix de l'entreprise pouvant fournir les biens ou services souhaités au prix le plus bas (ou, plus généralement optimisant la mise de fonds). Les pratiques comme la collusion, les soumissions concertées, la fraude et la corruption empêchent une passation efficiente des marchés. Plus l'incitation à l'efficience jouera dans l'ensemble de l'entreprise, plus l'incitation sera forte à lutter contre toutes les pratiques inefficientes de passation des marchés, notamment celles entachées de corruption. Les modalités les plus courantes de passation des marchés supposent une forme d'adjudication ou d'appel d'offres, bien qu'il existe d'autres formules, en particulier lorsque les entreprises susceptibles de soumissionner sont peu nombreuses.*

La CE estime que les marchés publics représentent à eux seuls 11 pour cent du PIB de l'Union européenne.

La passation des marchés publics ou privés peut être entachée de manipulations des offres et de corruption. Les entreprises donneuses d'ordre influent sur l'efficience de la passation des marchés par la façon dont elles conçoivent la procédure de passation et les opérations qui s'y rapportent. L'incitation à la passation efficiente des marchés dépend des dispositifs internes de gestion de l'entreprise et de l'incitation générale à l'efficience. Cette incitation peut être insuffisante dans des organismes publics. Les réformes qui améliorent l'incitation à la productivité et à l'efficience dans les entités publiques peuvent donc se traduire par de meilleurs résultats pour la passation des marchés.

Lorsque, pour les marchés à passer, il existe suffisamment d'entreprises pour susciter une concurrence raisonnable, on peut généralement obtenir un résultat efficient pour la passation des marchés en mettant en place une procédure simple d'enchères ou d'appel d'offres (avec soumission ou non sous pli cacheté). Lorsque le nombre des entreprises n'est pas suffisant pour susciter une concurrence, il faut recourir à des formules plus complexes, impliquant souvent des contrats avec partage des risques ou des coûts.

(2) *La passation des marchés publics est souvent soumise à tout un ensemble de prescriptions réglementaires. Par exemple, elle est souvent soumise à un régime de transparence. Les marchés publics peuvent également être utilisés pour réaliser d'autres objectifs d'intérêt public, par exemple dans le domaine de l'environnement, des mesures visant à compenser la discrimination dont certains groupes font l'objet ou de la politique industrielle.*

Les donneurs d'ordre publics et privés doivent prendre des mesures pour empêcher la corruption (qui se traduit par une attribution inefficiente des marchés sous l'effet d'incitations pécuniaires), mais les donneurs d'ordre publics doivent faire face à un problème supplémentaire : empêcher le favoritisme politique (qui se traduit par une attribution inefficience des marchés en fonction de choix politiques). Un grand nombre de pays s'efforcent de lutter contre le favoritisme politique en imposant des obligations d'information qui instaurent la transparence nécessaire quant à l'identité de l'attributaire du marché et aux caractéristiques de son offre. La transparence peut aussi être imposée afin de permettre d'atteindre d'autres objectifs tels que le respect des règles commerciales internationales destinées à assurer des chances égales aux entreprises étrangères. Cette transparence peut faciliter la collusion, ce qui crée une contradiction entre le désir de favoriser la concurrence et le désir d'empêcher la corruption et le favoritisme. Les règles qui limitent le nombre de fournisseurs potentiels (en vue, par exemple, d'objectifs de politique industrielle) peuvent avoir un effet important sur le niveau de la concurrence et sur l'efficience de la passation de marchés. Lorsque les marchés publics sont utilisés pour réaliser ces autres objectifs d'intérêt public, il importe d'en peser soigneusement les avantages et les effets sur la concurrence.

(3) *Certaines caractéristiques des marchés publics favorisent la collusion entre les soumissionnaires : il y a relativement peu de vendeurs potentiels qui se rencontrent régulièrement sur différents marchés, en différents lieux et à différents moments, avec des obstacles à l'entrée relativement élevés et un degré élevé de transparence. Les systèmes d'entente simples consistent à désigner les adjudicataires sur des marchés géographiquement différents ou sur le même? pendant une certaine période. Les systèmes plus élaborés comportent des transferts entre les soumissionnaires.*

Sur certains marchés, tels que les marchés des travaux publics ou des achats de matériels militaires, il y a relativement peu d'entreprises en place et des obstacles relativement élevés à l'entrée. Ces entreprises sont généralement obligées de se faire concurrence de manière répétitive pour un certain nombre d'appels d'offres différents. Ces propriétés du marché sont propices à la collusion. Les stratégies les plus simples consistent à désigner un adjudicataire, les autres entreprises se retirant ou offrant un prix plus élevé ou une qualité inférieure. Au fil du temps, une entente devient plus stable si elle permet à l'entreprise ayant les coûts les plus bas de remporter le marché (parce que c'est l'entreprise qui a le plus à gagner à ne pas respecter l'entente conclue). Cela peut se faire par transferts entre les parties à l'entente, peut-être par le biais de paiements communs à une entreprise industrielle ou par le biais d'un système de sous-traitance d'une partie des travaux à d'autres parties à l'entente.

(4) *D'une manière générale, la collusion dans la passation de marchés peut être limitée par des politiques qui visent à abaisser les obstacles à l'entrée, à réduire la possibilité pour les ententes de détecter et punir la tricherie et à renforcer l'application des règlements. L'abaissement des barrières à l'entrée a le double avantage d'améliorer l'efficience du processus d'appel d'offres et de réduire les risques de réussite de la collusion. Les obstacles à la participation étrangère dans la passation de marchés doivent être éliminés. Les spécifications techniques des appels d'offres doivent être rédigées avec soin de manière à ne pas exclure de fournisseurs potentiels, qu'ils soient nationaux ou étrangers.*

La délimitation du marché dépend essentiellement des spécifications de l'appel d'offres. Il faut donc prêter une grande attention aux spécifications de manière à ce que le marché soit défini de façon aussi large que possible et que les obstacles à l'entrée soient aussi peu élevés que possible. En particulier, les entreprises étrangères ne doivent pas être empêchées de soumettre des offres.

L'Accord multilatéral de l'OMC sur les marchés publics exige des pays signataires qu'ils utilisent des procédures de passation de marchés ouvertes, transparentes et non discriminatoires pour tous les marchés publics dépassant un certain seuil.

(5) *Il serait peut-être possible de réduire la possibilité pour les ententes de détecter et de punir la tricherie en mettant en œuvre des mesures qui limitent la quantité d'informations disponibles au sujet des résultats de la procédure d'adjudication. Il peut y avoir un dilemme entre la lutte contre la collusion et la lutte contre la corruption et le favoritisme politique. Il serait peut-être possible de lutter contre la corruption et le favoritisme en l'absence de transparence totale en limitant l'information aux organismes chargés de la surveillance de la passation de marchés.*

La transparence des résultats rehausse la capacité des ententes de détecter et punir la tricherie. Les adjudications sous pli cacheté sont, pour cette raison, préférables aux adjudications ouvertes. De même, des négociations privées avec des fournisseurs potentiels sont moins propices à la collusion que des procédures publiques d'appel d'offres. Tenter de lutter contre la corruption et le favoritisme politique en accroissant la transparence risque de faciliter les ententes. Dans certains pays, il serait peut-être possible de résoudre cette contradiction d'objectifs en limitant l'information à un organisme chargé de la surveillance de la passation de marchés.

(6) *Plusieurs pays de l'OCDE centrent délibérément leurs efforts sur les mesures visant à empêcher le trucage des offres. Les manipulations d'offres sont condamnées de façon presque universelle et, dans certains pays, elles donnent lieu à des poursuites pénales. On peut citer comme mesures spécifiques des programmes de mise en conformité et/ou d'auto-certification. Plusieurs pays ont aussi des lois protégeant les personnes qui donnent l'alerte. De nombreux pays autorisent des actions permettant aux victimes de récupérer leurs pertes, ou des multiples de ces pertes, dues à la collusion.*

De nombreux pays ont indiqué qu'ils sanctionnaient sévèrement les ententes dans la passation de marchés et qu'il n'y avait guère ou pas de tolérance à cet égard. Plusieurs pays ont une législation spéciale de lutte contre la manipulation des offres. Dans certains pays, les soumissions concertées peuvent exposer à des poursuites pénales. Certains pays renforcent la dissuasion en autorisant les victimes de la collusion à engager des actions pour récupérer leurs pertes. Un petit nombre de pays exigent formellement des entreprises qu'elles certifient ne pas se livrer à la collusion, et c'est une condition pour pouvoir participer à un appel d'offres public. Plusieurs pays rendent publiques les ententes illégales, à des fins de dissuasion. Dans certains cas, les soumissions concertées peuvent être détectées par une analyse minutieuse de la structure des soumissions au fil du temps (par exemple, un écart inexpliqué de la structure des prix par rapport à la structure des coûts sous-jacents).

En tout état de cause, et en principe, la sanction prévue pour les parties à une entente doit être supérieure aux avantages escomptés. Lorsqu'on estime qu'il est difficile de détecter et d'empêcher les soumissions concertées, les peines doivent être lourdes, et même, si possible, plusieurs fois supérieures au préjudice causé aux victimes (la condamnation à payer des dommages et intérêts triples, aux Etats-Unis, en est un exemple).

BACKGROUND NOTE

by the Secretariat

1. Introduction

This note raises several competition issues relating to public and private procurement. The note considers whether features of procurement might facilitate collusion, what actions are currently taken in OECD countries and what additional actions might be taken to reduce collusion in procurement and what issues arise from the enforcement of competition law in this area. The note concludes with several questions for further research.

In the broadest sense, procurement is the purchase of inputs in the chain of production. In this broad sense, therefore, procurement is little more than a simple focus on the “buying” side of economic markets. In other words, procurement issues are about achieving "value for money" for the buyer.

More narrowly, procurement problems are most interesting when the transaction will involve a relationship-specific investment (such as when the good or service is tailored to the particular buyer, or involves a specific commitment from the seller to be produced). In this context, the seller will typically insist, before production, upon the commitment of a formal contract. The procurement process then, is the process of selecting a contracting partner for the delivery of certain relationship-specific goods and services. Examples include the selection of a supplier for the provision of milk to school children, a supplier for the dredging of a harbour, or a the supplier of computers to all a firm's locations.

Procurement is carried out by all public and private sector economic enterprises including all layers of government, quasi-government and government-owned entities. The combined procurement purchases of government agencies and private entities through tendering or bidding processes amounts to a very sizeable fraction of national income. Purchasing by the European Union’s public authorities alone is estimated to amount to 720 billion ECU ($US 800 billion) or about eleven percent of the European Union’s total GDP (larger than the total GDP of Belgium, Denmark and Spain combined).[1]

The primary objective in public policy towards procurement is the promotion of efficiency - the purchase of the required goods and services at least cost. As we will see, there are important differences in the way this efficiency is achieved in the public and private sector.

Efficiency in procurement is, of course, a major factor in the overall efficiency of any public or private organisation. However, the incentives for efficient procurement will depend strongly on the overall incentives for cost-effectiveness faced by the organisation. Although the incentives for cost efficiency are generally strong in an organisation which competes in a highly competitive industry, the incentives for cost efficiency can be weaker in industries with monopolies or oligopolies, weaker still for state-owned monopolies and weakest of all in government departments. Incentives for cost-efficiency and quality of procurement can therefore be enhanced through measures such as privatisation, public sector reforms, or measures which enhance competition in the economy as a whole.

1.1 Procurement when there are many sellers: auctions and tenders

The efficiency of the procurement process will in turn depend upon how the process is designed and carried out. Procurement is often, but not always, carried out through competitive "bidding" or "tendering" processes. There are, of course, many desirable economic efficiency features of competitive processes. In particular, a bidding process may (subject to certain caveats which are discussed further below) both identify the most efficient producer of a certain good or service and simultaneously determine the efficient price. In addition, open, competitive processes may ensure access to business opportunities for new suppliers and can be more easily defended against claims of discrimination or favouritism.

The design of the precise features of the competitive bidding process can also have a strong influence on the efficiency of the outcome. For example, the number of bidders may be reduced where the initial specifications are drawn up unnecessarily tightly, the tender is not widely advertised or the time for responses is inappropriately short.

It may not *always* be efficient to adopt some form of bidding process, for several reasons:

- there are costs to organising and holding an "auction". Each potential bidder must incur costs analysing the requirements, assessing its own ability to fulfil the requirements and determining an appropriate bid. These costs of preparing bids may be significant. The bids must, in turn, be considered by the procurer. The total cost involved for a complex project may be substantial;

- the likely bidders and, indeed, the likely least-cost bidder, may already be known to the procurer. In this context it may be more efficient for the procurer to approach the least-cost bidder directly to negotiate a price (perhaps with the threat of competitive tendering if it is felt necessary);

- it may not be possible to hold a tender where the services to be supplied include elements which cannot be contractually specified in advance (such as quality of after-sales service or uncertain future demands);

- in certain circumstances there may be explicit reasons for *not* choosing the least-cost supplier, for example, where diversity of supply is essential to ensure continuity of service;

- in certain circumstances secrecy considerations may prohibit the public solicitation of bids;

- lastly, in certain circumstances, the number of potential bidders may be strictly limited, limiting the efficiency of a normal competitive auction.

1.2 Procurement when there are few sellers: explicit contractual arrangements

This last point may be explained further. As in all markets, the efficiency of bidding processes depends upon the number of potential bidders. When the number of potential bidders is very small a single bidder may have very significant market power. In this context a simple "auction" will not yield an efficient outcome. Instead, it may be appropriate to adopt more sophisticated contracting approaches to procurement. For example, the final price paid to the supplier might not be simply fixed in advance but might be made to depend upon the profit earned by the supplier.

As in Laffont and Tirole (1994)[2] we may distinguish different forms of procurement contracts differing in the "power" of the underlying incentives. While a simple cost-reimbursement contract ensures that the monopoly supplier does not make monopoly rents, it also limits the incentives on the supplier to minimise costs. A fixed-price contract on the other hand, provides strong incentives for the supplier to minimise costs but cannot guarantee that the supplier will not earn monopoly rents. There are obvious analogies to regulatory formulas such as rate-of-return and price-cap mechanisms .

1.3 Control over the procurers: controlling corruption and political favouritism

Given the importance of procurement processes both public and private enterprises often draw up elaborate procedural guidelines and put monitoring systems in place to ensure efficient procurement. Often larger, more complex or especially valuable procurement projects will be subject to special procedures or be handled by a special agency.

Since in both large enterprises and in the public sector, the amounts of money at stake in the procurement process may be very large, steps may be taken to minimise the possibility of corruption. Corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or other rewards. Examples might include drawing up the specifications in a way that excludes other firms from competing for the contract or cutting short the period for responses to limit the number of bidders.

In the context of public procurement, elected representatives may have incentives to use their control over the procurement process to direct contracts to supporters' firms or to firms located within their constituency. More generally, control over the allocation of procurement contracts may be used as a form of "favours" to reward loyal behaviour. We may call this "political favouritism". While procurers in both the public and private sectors are concerned about quality and cost of the final product to be delivered, to avoid political favouritism the public-sector procurer typically faces additional constraints: the bidding process must be seen to be open and fair; the process must be independent of political influence; and the winner must be seen to have won on the merits of its proposal.[3]

Note that we may draw certain distinctions between "corruption" and "political favouritism". Corruption may occur in both public and private entities, is related to the problem of bribery, and can be controlled (where there are incentives to do so) through close attention to management practices and supervision. Political favouritism, on the other hand, only arises in public organisations, is more closely related to the purchase of votes and can only be controlled through the generic processes by which voters constrain elected officials.

Public entities often also face additional constraints on their procurement procedures due to other government objectives, such as the desire to further environmental, affirmative action or industrial policy objectives.[4] Recent trends have, in the case of some OECD countries, relaxed some of these additional constraints on public procurement, including:

- trade liberalisation measures (such as those in the EU Directives) which prevent governments from discriminating in favour of domestic firms in procurement;

- lifting of requirements on government-owned enterprises to comply with government purchasing requirements, so that government-owned enterprises may compete on an equal footing with other private-sector entities; and

- public sector reforms which grant greater autonomy to government departments over their own costs, including their own procurement procedures, in exchange for greater accountability over results.

At the same time, objectives of public sector efficiency and privatisation have led to government "downsizing" and "contracting out" and therefore greater reliance being placed on arms length contracting and procurement arrangements in the public sector.

2. Competition Issues In Procurement

2.1 Why and how does procurement collusion occur?

Competition concerns in procurement, as in other economic markets, focus on the possibility of horizontal agreements between competitors, on the one hand, and abuse of a dominant position, on the other. For the purposes of this note, we will focus on horizontal agreements on collusion, but we note that abuse of a dominant position (through, for example, predatory pricing) may also occur in procurement markets.

If the number of prosecutions is an indication of collusive activity, it would appear that collusive activity in procurement is relatively common. What is it about certain procurement markets that might particularly favour collusion?

As in other industries, collusion is favoured when:

a) the industry is concentrated (so that it is straightforward to identify and negotiate with a collection of competitors who, collectively have some control over the market price);

b) there are important barriers to entry (that prevent the entry of new competitors in sufficient numbers to offset any restriction in output by the members of the cartel) and there are capacity constraints on the output of firms not in the cartel;

c) market transactions are transparent (so that the cartel can detect deviation from the cartel agreement);

d) the players compete with each other repeatedly, either in a single market over time, or simultaneously in several separate geographic markets (so that the cartel can punish members of the cartel who do not "play along"); and

e) the existence of a cartel agreement is easy to conceal (i.e., the members of the cartel may maintain the appearance of competing with one another).[5]

These considerations suggest that collusion may be favoured in procurement processes as a result of the following factors:

- certain procurement markets may be small geographically and are relatively highly concentrated with moderately high barriers to entry, including barriers to entry from other geographic regions. Examples include:
  - certain markets for defence procurement;
  - certain markets for public works (including large road or rail projects); and
  - markets for large construction projects;
- the firms in these concentrated markets typically compete against each other frequently, both in the same geographic market over time and in different geographic markets;
- particularly in the case of public procurement, the identity of the winning bidder and the terms and conditions of the winning contract are often made public;
- in many instances of procurement, the precise mechanism by which competing bids will be compared (which may be simply on the basis of price) is specified in advance in detail and there is often a precise weighting scheme for each of the components deemed important to the buyer;
- lastly, and perhaps most importantly, in certain procurement markets, there are weak incentives for efficiency on the part of the procurer - leading to a degree of "slackness" in purchasing arrangements, lack of vigilance against collusion, lack of incentive to open the bidding process more widely and, indeed, a tolerance for a certain amount of co-operative behaviour amongst bidders.

As with horizontal agreements more generally, collusion in procurement may take several forms:

a) simple price-fixing or "bid-rigging", whereby a winning bidder and winning bid is chosen and the other bidders are instructed to bid a certain amount higher. In order for this arrangement to be sustainable, the rents earned by the winning bidder need to be shared with the other cartel members. This could be achieved, for example, through changing the identity of the winning bidder according to some preset formula (such as a formula which preserved existing market shares);

b) market-sharing agreements under which customers are divided according to type or geographic location and competitors agree to submit higher bids in markets assigned to other firms. This may also be linked with a scheme for sharing the rents if demand in the difference markets is variable;[6]

c) "Bidding fees", whereby the industry association (or the association of colluding firms) charges a fee for the privilege of submitting a bid and the bidders simply add this fee to their bid price. The accumulated funds of the industry association are later returned to the members through some mechanism;

d) "Sharing the spoils", whereby the winning bidder agrees to compensate the losing bidders "for the costs of submitting their bids". This extra charge is then added to each firm's bid price. In a variant of this approach, the winning bidder may agree to subcontract work to the losing bidders, again, in order to share some of the rents.[7]

Procurement collusion is inefficient for two reasons: it both raises the price above cost and may also lead to the choice of a high-cost supplying firm. An efficient collusive arrangement may be able to eliminate this latter inefficiency. In general, it is in the interest of the cartel to assign the winning bid to the least-cost firm as this increases the total rents available for redistribution to the cartel. In addition, assigning the winning bid to the least cost firm may contribute to the stability of the cartel arrangements, as in general it is the least-cost firm who has the most to gain from deviating from the cartel and undercutting the others. By allowing the least-cost firm a slightly larger share of the rents from cartelization, the overall agreement may become more stable. Systems such as the "bidding fees" system above, or a system under which the members of the cartel must bid against each other internally for the right to submit the winning bid, both ensure that the winning bid is assigned to the least cost firm.

Combinations of the above forms are possible. In the well-known Addyston Pipe case in the US[8] the cartel members both divided markets geographically (with what they called "reserve cities") and, in regions which were not geographically allocated (so-called "pay territories"), implemented a system of "bidding fees" whereby the firms would bid to the cartel association for the right to submit the winning bid.

2.2 How might we enhance competition in procurement?

What actions can be taken to improve competition (and simultaneously reduce the likelihood of collusion) in procurement? There are several possibilities, which are considered below.

2.2.1 Increasing the knowledge of the procuring agency

Many public procurement processes are carried out by municipalities or small agencies which may not have the knowledge of how to design an efficient procurement process, how to minimise collusion and how to detect it. A process of education for public procurement bodies can therefore be important. This education, at the minimum, could be a document written by the antitrust authority describing collusion and bid-rigging, the forms it can take and how to detect it.

2.2.2 Careful specification of procurement requirements

The procurer, in defining the goods or services that it wishes to purchase, defines the scope of the market in which competition will occur. In order to enhance competition, therefore, it is important that the procurement requirements are carefully specified so as not to exclude any goods or services that might be effective substitutes. Therefore, the procurement specifications should, in preference, specify the outcomes desired and leave it to the bidders to suggest possible mechanisms for meeting those outcomes.

As a simple example, where the desired outcome is the movement of heavy goods from city A to city B, the procurement specification should specify this outcome and leave the precise mode of transport to the tenderers. Limiting the procurement to rail services would eliminate from the market alternatives such as inland shipping, thereby reducing competition, perhaps significantly.

2.2.3 Reduction in barriers to entry

Of course, competition may be enhanced not merely by attention to the demand side of the market (the number of potential substitutes) but also to the supply side of the market. In particular, it may be possible to enhance the number of competitors by reducing barriers to entry. There are several ways that this might be achieved:

a) the procurement process itself should not eliminate firms from the right to submit a bid on the basis of criteria which are not directly relevant to the procurement (for example, an experience or financial strength requirement may unnecessarily reduce the number of competitors) neither should the process exclude firms from other geographic areas;[9]

b) regulatory barriers to entry could be removed, such as controls on the number, size, composition or nature of firms which may submit a bid or policies which favour firms on the basis of economically irrelevant criteria[10] in the industry;

c) barriers to foreign trade could be removed, by removing constraints on foreign participation in procurement;

d) the use of electronic tendering may well reduce the costs of tendering, which in some cases can be substantial entry barriers[11];

e) sunk costs as a barrier to entry may be tackled directly. For example, where entry into a competing market requires a specialised piece of equipment, the procurer could purchase the equipment and lease it to successful bidders, thus reducing the sunk costs of entry.[12]

2.2.4 Reducing transparency

It was noted earlier that a high degree of transparency over market transactions may facilitate collusion as it may facilitate the detection and punishment of deviations from the cartel agreement. Competition may be enhanced, therefore, by simply not revealing the identity of the winning bidder and the terms and conditions of the winning contract.[13]

This highlights a sharp contrast between private and public procurement. In public procurement, it is argued that there is a need for transparency in announcing the winner and price in public procurement even if this facilitates collusion. There is a trade-off between the need to provide transparency and the desire to minimise collusion. In public procurement transparency appears crucial especially when foreign firms are involved or potentially involved. Thus European Union and WTO rules appear to require public notification of winning bids so as to minimise the potential for foreign claims of an unfair process. This need for transparency also appears to mitigate against other potential tasks to limit collusion. For example, randomising the weights assigned to bid components decreases the ability of bidders to collude. However, randomised weights can appear to increase the discretion of the buyer, decreasing transparency and increasing the risk of corruption.

In the case of private procurement, it has been noted that large industrial buyers typically rely on secret negotiations in their procurement operations. Private negotiations encourage price-cutting by individual bidders without fear of being detected by the other members of the cartel.

The European Commission rules on procurement strictly limit the conditions under which private negotiations are allowed. At first sight it appears that negotiation with tenderers could only improve upon the terms and conditions that the procurer could obtain through the tender (by, for example, inducing the most preferred supplier to lower its price). However, besides the potential that secret negotiations lead to favouritism, some recent economic thinking suggests that the option, ex post, to match a competitor's prices (the so-called "price-matching strategy") weakens the level of price competition in a market. If some tenderers know they may still have an opportunity, ex post, to match the terms of the winning bid, this may weaken their incentives to submit a low bid initially.

2.2.5 Reducing the number of procurement opportunities

It was noted earlier that collusion is facilitated when competing firms meet each other frequently in different markets. The reason is that repeated, frequent interaction facilitates punishment strategies among competing bidders which is necessary for sustained effective collusion.

Reducing the number of opportunities in which these firms meet, therefore, may reduce the opportunities for punishment and therefore may facilitate competition. This might be achieved, for example, by holding fewer, larger auctions, such as auctions for the right to provide certain services over the next five or ten years. If the period of time is long enough, the individual firms need not fear retaliation in future for undercutting the cartel price today.

Relatedly, where the same firms compete in neighbouring geographic markets, it may be appropriate for the procurers in the neighbouring markets to co-operate to limit the total number of procurement opportunities over the whole geographic region. For example, a single auction could be held to determine the firm which has the right to provide certain services over the entire region. Both these strategies run the risk of increasing the gains from collusion as the pie increases in size.

2.2.6 Alternative auction processes

There are numerous different forms of auctions that might be adopted in the procurement context. For example, under a traditional auction, each bidder submits a bid, the highest (or lowest, in the procurement context) bid wins and the winning bidder pays the amount of that bid. This is known as a "first price" auction. Under alternative approach, known as a "second price" auction, each bidder submits a bid and the highest bid wins, as before, but the winning bidder only pays the amount of the *second-highest* bid.

The second price auction has certain desirable theoretical properties. In particular, under a first-price auction, the bidders tend to bid less than he or she is prepared to pay in order that there remains some positive value from winning the auction. This is not true, however, in a second-price auction. It can be shown that in a second-price auction, each bidder has an incentive to bid up to the maximum amount that he or she is prepared to pay. Utilising such an approach is simple, yet it is not evident that the simple theory of auctions is sufficiently known so that the use of second best pricing would be feasible. Sophisticated economic theory of auctions is used however in a number of countries in the auction of spectrum for mobile communications and in the auction of oil leases, in particular. These auction designs also however show some ability of bidders to game even within significant constrained circumstances.[14]

From the competition perspective it has been suggested that the different approaches to auctions may have different characteristics with respect to facilitating collusion. In particular, it has been suggested that a first-price auction may be more immune to collusion. The early economic theory literature[15] showed that a sealed bid-high price auction minimised the ability to collude. The Government of Norway, for example, recommends sealed bid auctions over open bids.

2.2.7 Randomised outcomes

One approach that has been suggested to reduce collusion in procurement is the introduction of a certain degree of randomness in the outcome of the procurement process. For example, the procurer might decide to select randomly from among those firms whose price was within a certain percentage of the winning bid. Introducing a degree of randomness into the selection of the winning bid (combined with a degree of secrecy over the terms and conditions of the winning bid) makes it harder to sustain collusion as cartel members cannot tell, when the winning firm is not the firm selected by the cartel, whether the firm was undercutting the cartel, or was simply selected randomly. The GPA requires specific evaluation criteria and that the tender be awarded on the basis of the criteria.

The cartel may respond, however, simply by increasing the differences between the bid of the nominated winning firm and the "fake" bids of the others. This does, however, increase the transparency of the cartel and the risk that it will be detected.

2.2.8 Increasing the costs of collusion

An increasing number of jurisdictions are redesigning public procurement processes to ensure that bidders are aware of the penalties for collusion. In some jurisdictions there is an insistence that bidders attest to the fact that they have not colluded, or agreed with other firms as to the price or other conditions of the bid. Compliance programs, are also issued in several countries where those individuals within firms who are responsible for bidding are subject to mandatory briefings and programs ensuring knowledge of the penalties for collusion and bid-rigging. Some jurisdictions include penalties disallowing a firm found guilty of collusion in procurement supply from re-bidding for a number of years (such as Germany and Korea – six months). While these programs appear useful, there is no systematic analysis of the merits of these programs as there is no systematic data kept on the number and type of violations across OECD countries.

2.2.9 Strict competition law enforcement

In addition to the above possibilities, of course, collusion in procurement may be reduced through strict, effective competition law enforcement. This is taken up in the next section.

2.3 Is there a trade-off between competition and corruption?

It was noted earlier that a particular concern that arises in the context of procurement is the prevention of corruption. Is there a trade-off between enhancing competition and reducing corruption?

In general, the answer should be no. Corruption is possible only as a result of the monopoly rents that may be earned. Reducing the monopoly rents reduces the funds available for bribery and therefore the incidence and the seriousness of corruption. Promoting competition therefore reduces corruption.

However, it is true that some of the possible approaches mentioned above for reducing collusion may enhance corruption. For example, the possibility was raised of holding fewer, larger auctions. The amounts at stake in these auction will be higher and therefore the incentives for corruption will also be higher.

We may note, however, that there are other instruments for controlling corruption. In many countries corruption is a criminal offence, punishable by a jail sentence. Private and public entities may also establish monitoring and auditing programs which oversee procurement procedures to detect instances of corruption. In at least one OECD country, this surveillance role is taken on by the competition authority.

In contrast, however, we have noted that there is, in general, a trade-off between enhancing competition and political favouritism. As discussed earlier, we distinguished political favouritism as the influence of elected officials on the procurement process in order to bestow political favours. As mentioned earlier, this may only be controlled through the normal mechanisms by which electors control the conduct of elected officials. Transparency, in particular, is a key element in this control. It is important, therefore, that the outcomes of public procurements which may be influenced by political processes are available, at the least, to institutions which control government conduct (such as Parliamentary purchasing oversight committees, or to members of the opposition, and so on).

Indeed, for this oversight to be most effective, it may be necessary to make the outcome of public procurements available to the public. As we noted above, such transparency enhances the possibilities for collusion by facilitating the detection of firms who are cheating on the cartel arrangements.

3. Enforcing competition law in procurement

Are there particular competition enforcement issues that arise in the context of procurement? In all OECD countries, competition law extends to cover horizontal agreements and abuse of dominance in the context of procurement, and this law is enforced by the national competition authority.[16] Competition enforcement issues in the context of procurement, therefore, relate to primarily to enhancing the efficacy of enforcement of the national competition law.

Successful prosecution of competition law violations requires:

a) warning of the existence of and access to evidence on, the violation;

b) meeting the relevant legal standards of proof required in the courts; and

c) adequate penalties or remedies.

In many OECD countries prosecution of collusion in procurement cases may be successfully undertaken by either private or public entities. Both forms of enforcement may be appropriate at different times. Some countries (including the US and Australia) enhance the effectiveness of public prosecutions by allowing so-called “coat-tail” actions by private entities. Once a public prosecution has successfully

proven the collusive conduct, a customer who has been damaged by the collusion may take a coat-tail action to recover the loss, needing only establish the degree of damage suffered as a result of the conduct.

In regard to access to information, competition enforcers (both public or private) need access to information that a violation has occurred and to collect evidence to be presented in court. This process may be made easier through, for example, laws protecting "whistle-blowers".

As noted, some OECD countries have explicit compliance programs where organisations self-detect bid-rigging. In such programs, firms introduce information programs to make everyone aware of the law and the penalties of contravening the law and also establish programs to ensure compliance with the law.[17] In its submission, Australia notes that an Australian court will generally take into account whether an enterprise had a trade practices compliance program in place when it sets the amount of the penalty for the enterprise involved in a contravention. In some countries the ability to bid on large public contracts is limited to those firms which institute such programs.

Even where compliance programs are not mandatory in order to bid, requiring statutory declarations of non-collusion as is done in the USA and Australia would appear to be an effective deterrent. First, such certification requires the firm and its managers to be aware of the risks and penalties of collusion. Second, once having signed such a certificate, a firm and its managers, if they do engage in bid-rigging, face stiff penalties.

It is suggested by several countries including the UK that strong publicity of bid-rigging cases is an important deterrent since such publicity will have serious effects on the company overall and can thus serve as an effective deterrent device.

All countries consider effective detection and penalties as crucial. Detection is difficult however for a once-for-all process and easier in the kind of repeated bidding process where economic theory suggest that collusion is also facilitated.

Some countries such as Canada, Norway and Hungary have specific anti-bid-rigging legislation, while other such as the US, the UK, Australia rely on the general anti-trust laws against anti-competitive agreements.

Clearly, it is crucial to examine the bids that have been submitted to determine if the patterns are consistent with a fully competitive process. It is evident that too little of this analysis takes place, and for several reasons. First, many procurement agencies are small and may not have the resources to undertake such analyses. Remember that the size of public procurement as a share of OECD GDP is large and monitoring the results of procurement processes would be a large undertaking. However, more needs to be done in this regard. An announcement that x percent of all bidding contracts would be statistically analysed could deter a number of potential conspiracies.

Another approach is to conduct an advance examination of the number and range of bidders undertaken. In fact, the standard hypothetical monopolist test on market definition could indicate the likely bidders and whether there are potential bidders constrained by regulation or barriers from bidding. It is the purchaser who sets the rules for bidding who defines the market as broad or narrow, and the ex-ante use of antitrust market definition tests would be useful.

In regard to the relevant legal standards, most OECD countries view horizontal agreements such as collusion in procurement as either illegal per se or, at least, do not require additional legal proof such as

demonstrating that harm was caused, or that the harm caused outweighed any benefits that might have been obtained. In those countries for which horizontal agreements are illegal only if they substantially lessen competition, it is typical to explicitly specify that agreements such as bid-rigging or price-fixing are deemed to substantially lessen competition without further proof.

In regard to penalties and remedies, it is clear that adequate prevention of collusion in procurement requires adequate penalties and remedies. In this context we may note that the relevant penalty should take into account the probability that the cartel may be able to escape detection. If it is considered that a proportion of all cartels may, for various reasons, escape detection, then the relevant penalties should be scaled up accordingly. In any case, the penalties should be large enough to exceed the gain to the cartel members from cartelization.

In conclusion we note that measures to enhance competition in procurement markets will have a direct impact on, for example, merger enforcement decisions. Other things equal, a merger is more likely to be tolerated the greater the current level of competition. For example, the European Commission has recently noted that rules on compulsory European Union-wide tendering have greatly expanded the market for city and inter-city buses and, as a consequence, permitted the purchase by Mercedes Benz of another German bus and coach manufacturer.

4. Further discussion

4.1 What is it about certain procurement markets that favours collusion? Which procurement markets are the most susceptible to collusion?

Are public procurement markets more susceptible to collusion than private procurement? As we detailed above, any procurement process can be open to supplier manipulation where the circumstances allow. It might be, however, that a combination of such circumstances exist more often in public procurement, if:

- the number of suppliers is low as the purchaser requires certain qualities or services - e.g. a construction project such as road building in region X;
- the suppliers tend to be localised as what is required by the buyer is site specific. E.g. bus services on a road from A to B rather than the delivery of a number of goods made in a number of factories, for example, computers;
- there are recurring demands for these site specific services, enabling frequent contacts among firms;
- because of the desire to maintain transparency, a single sealed bid tender with carefully enumerated characteristics and a well-defined point or grading system is used;
- the winning bidder and the bid are all made open, to maximise public scrutiny.

Australia established a Royal Commission to investigate collusion but the Commission found no evidence of wide-spread bid-rigging, and no difference in the amount of collusion between the public and private sectors. However in Japan, half of the resources of the Japan FTC is used for investigation of bid-rigging. Similarly in Korea, a good deal of resources of the Korean FTC are spent examining bid-rigging, with 23 cases in the last five years. The German submission stated that “the percentage of undetected

cases would seem to be very high", although no special circumstances in the public sector as compared to the private sector exist. In Hungary, no cases have been brought under the bid-rigging clause and no complaints have been registered. In Norway, few bid-rigging cases have been found.

4.2 What are the most common forms of collusion?

Given that the special circumstances of a public procurement process may inadvertently facilitate collusion among potential suppliers, procurement agencies need be aware of the forms of possible collusion and the signals that may signify such supplier co-ordination: A 1994 DOJ publication "An Antitrust Primer for Federal Prosecutors" raises a number of situations in which there is reason to be suspicious:

a) when there are only a few sellers;

b) in the absence of one or more bidders who are expected to bid;

c) unusual price points, such as a group of firms with prices in a small range above the winning bid;

d) unacceptable non-price terms in a number of bids;

e) rotation of winning bids;

f) the winning bid is above the generally accepted or list price for the good;

g) the same supplier is a recurring winner;

h) there is a geographic pattern to winning bidders;

i) there is regular subcontracting from winning bidders to losing bidders;

j) bidders are known to socialise or exchange price information;

k) bids drop in price when a new firm enters the market;

l) firms (perversely) charge lower prices on bids further away from their central operations.

4.3 Do regulatory constraints on public procurement (such rules favouring certain firms) facilitate collusion?

Since the number of bidders is very important in any procurement process, regulatory constraints that limit potential bidders may have high social costs. Thus antitrust authorities need to ensure that entry into procurement markets are as low as feasible.

A related problem is the asymmetry of information. The procurement agencies, especially if among the smaller localised agencies, may have limited ability to estimate the possible prices and to determine whether a policy of "political favouritism" has high costs.

4.4 What public policy actions directed at enhancing competition in procurement have been the most successful?

There appears to be no systematic data gathered at an international level on the number of horizontal collusion cases and their division within the public and private domains. Such a database would prove interesting. If that database were associated with data on the specific policies used in the country to combat bid-rigging in public procurement, an analysis of the efficiency of such policies could be undertaken. In Hungary, under the Public Procurement Act, data are gathered centrally on all bidders and winners. A statistical analysis of these data can identify possible bid-rigging in sub-markets. An issue for other countries is whether such centralised gathering of data and analysis is feasible.

4.5 What role can and should competition authorities play in the design of procurement policies?

In a number of countries, anti trust authorities have a crucial role to play in procurement processes. For example, in Denmark, all procurement is under the authority of the antitrust agency. This provides some advantages. First, the agency has data of bids across local authorities. Second, it is able to use informal methods to aid agencies in awarding contracts. An informal process has also been of great value in Italy. It would then appear advisable for OECD anti trust agencies to consider how to use ex-ante informal processes as a supplement to ex-post formal investigations.

There is a critical role to be played by antitrust authorities in the provision of information. The Norwegian Competition Authority examined the procurement process of Norwegian municipalities in 1993. The Authority re-examined the processes in 1996 and found significant unsatisfactory progress. It advocated a number of important changes:

a) common set of procurement rules across municipalities;

b) co-ordination of procurement across smaller municipalities to increase competition and efficiency;

c) open tenders;

d) education of government personnel especially in smaller municipalities.

The EU/GPA/EEA rules on procurement are designed to enhance market access. It appears that they may, unfortunately, assist collusion, although by opening up bidding to far greater numbers of firms, they certainly assist competition. Competition Authorities perhaps through the OECD could examine these agreements and suggest some changes which could minimise collusion. For example, under all these agreements, the amount of the winning bid must be published. Instead, the winning bid could be made known to government agencies and not to bidders.

NOTES

1. Source: EC Green Paper, *Public Procurement In The European Union: Exploring The Way Forward*, November 1996.

2. Laffont, J.J. and J. Tirole, *A Theory of Incentives in Procurement and Regulation*, 1994.

3 In addition, public procurement has come under international scrutiny to ensure that foreign firms are eligible to bid (the GPA re-negotiated under the Uruguay GATT Round, for example). Hence, an open process is needed to prevent complaints from foreigners. For example, The GPA pays particular attention to ensuring and enhancing transparency "….Notices of planned or proposed procurement must include a list of all elements needed to ensure transparency, including the mode of procurement, its nature and quantity, dates of delivery, economic and technical requirements, amounts and terms of payment, etc." (B.M. Hoekmann and P.C. Mavroidis, "The WTO's Agreement on Government Procurement", World Bank Policy Research Paper, March 1995). As we show below, there are however, likely important trade-offs between openness and efficiency of bidding outcomes.

4. The Australian government states that it uses procurement to support a range of policies. These are listed as: (a) policies to ensure the preservation of the environment and the national estate; (b) workplace relations policy, particularly freedom of association; (c) policies to advance the interests of Aboriginal and Torres Strait Islander people; (d) affirmative action; (e) occupational health and safety; (f) trade and foreign policy; and (g) Commonwealth–State co-ordination and co-operation. Australian Commonwealth Procurement Guidelines, Core Policies and Principles, March 1998.

5. We may note that there is some empirical evidence that when the basis of the selection of the bids is not specified in detail in advance, (for example, where the selection is based on subjective criteria, as in a "beauty contest") there may be less collusion. Alexander (1997) finds that collusion among bidders is rare where the prime contract is for a specialised product requiring the bidders to construct prototypes which are assessed during the bidding process, and common where the prime contracts involve non-prototyped products. Non-prototyped competitions give rise to price competition among bidders. In prototyped competitions, on the other hand, the winner is the bidder with highest quality product, which involves a subjective assessment. Cartelization would therefore require a very clear (and therefore easily detectable) difference in quality between the product of the winning bidder and the others. As a result, such markets are more difficult to cartels.

6. Such a scheme operated between roading contractors in Canada in 1959-61. Six roading contractors agreed to divide among themselves on a geographical basis the contracts let by Ontario Department of Highways. Under this plan, there was an annual settlement in which the total of all contracts received by six accused in 1960 was determined and divided by six. Those of the six accused who had received in excess of the resultant figure were charged with 10 percent of the excess, which was paid proportionately to those of the six who had received less. The apparent intention of this plan was to ameliorate inequities in the awarded monetary value of the contracts resulting from the division by the accused of the market on a geographic basis.

7. This has been observed by Alexander, who notes that winning bidders in auctions of prime defence contracts often award subcontracts to competing bidders. She concludes that the subcontracts are "vehicles for dividing the spoils of collusive bidding". Alexander, B. "Mechanisms for rent transfers: Subcontracting among military aircraft manufacturers", Public Choice, 91, 1997, pp. 251-269

8. US v. Addyston Pipe & Steel Co., 85 F.271 (1898)

9. Barriers to entry can also be reduced simply by allowing adequate time for firms (who may not have had advance notice of the intention to hold a tender) to prepare and submit a bid.

10. There are often many such criteria. The example of Australia is illustrative. In Australia, some States and Territories maintain local content requirements and preferences for local suppliers. When purchasing products from overseas in preference to products from Australia (or New Zealand) purchasers must be able to demonstrate that suppliers from Australia (or New Zealand) have had the opportunity to compete. Buyers "should give careful consideration to the claims of small and medium sized enterprises in their local areas". The Australian government is "committed to industry development through the promotion of national competitive advantage, consistent with achieving value for money."

11 The commission is launching a program "SIMAP", to allow electronic preparation and submission of tender.

12. There are presumably some restrictions on direct subsidies to entry in the context of public procurements, given the fears related to political favouritism.

13. In addition, it is not necessary to reveal the terms and conditions of *all* the bids.

14 R. Porter, J. McMillan

15. Robinson (1985)

16. In at least one case (the Czech Republic), the competition authority is also explicitly empowered with the role of surveillance of public procurement.

17 . (e.g., Section BC2.5 US Sentencing Guidelines).

NOTE DE RÉFÉRENCE

par le Secrétariat

1. Introduction

La présente note soulève plusieurs questions concernant la concurrence en matière de marchés privés et publics. Elle examine si certaines caractéristiques de la passation de marchés peuvent faciliter les ententes, quelles actions sont menées à l'heure actuelle dans les pays de l'OCDE et quelles initiatives complémentaires pourraient être prises pour limiter les risques de collusion et les problèmes que pose l'application du droit de la concurrence dans ce domaine. Pour conclure, la note présente plusieurs questions qui appellent une étude approfondie.

Dans son acception la plus large, la passation de marché correspond à l'achat de biens entrant dans la chaîne de production. Dans cette optique, elle n'est donc rien de plus qu'une approche mettant l'accent sur la partie des marchés économiques qui concerne les achats. En d'autres termes, les problèmes de passation de marchés portent sur les moyens d'obtenir le meilleur rapport qualité/prix pour l'acheteur.

Les questions d'approvisionnement sont particulièrement intéressantes lorsque l'opération implique un investissement spécifique d'une relation (notamment quand le bien ou le service est adapté aux besoins d'un acheteur particulier, ou suppose un engagement spécifique de la part du vendeur). Dans ce contexte, le vendeur exige généralement une commande ferme avant de lancer la production. La procédure d'approvisionnement consiste alors à choisir un partenaire contractuel pour la fourniture de certains biens et services spécifiques de la relation en cause. On peut citer en exemple la sélection d'un fournisseur pour la livraison de lait aux enfants des écoles, d'un opérateur pour le dragage d'un port ou d'un fournisseur d'ordinateurs pour l'ensemble des sites d'une entreprise.

Toutes les entreprises économiques du secteur public et du secteur privé, notamment les administrations publiques, les entités semi-publiques et les entités appartenant à l'Etat, recourent à la passation de marchés. Le total des achats effectués par les organismes publics et privés au moyen de procédures d'adjudication ou d'appel d'offres représente une part substantielle du revenu national. Les achats des seules autorités publiques de l'Union européenne sont estimés à 720 milliards d'écus (800 milliards de dollars), soit environ onze pour cent du PIB total de l'Union européenne (et davantage que les PIB de la Belgique, du Danemark et de l'Espagne réunis)[1].

Le principal objectif de la politique de passation de marchés est l'efficience, c'est-à-dire l'achat au moindre coût des biens et services nécessaires. Comme nous le verrons, la manière dont cette efficience est réalisée varie notablement selon qu'il s'agit du secteur public ou du secteur privé.

L'efficience en matière d'achats est bien entendu un facteur essentiel de l'efficience globale de tout organisme public ou privé. Toutefois, les incitations dans ce domaine dépendent fortement de l'ensemble des incitations à la productivité auxquelles est confronté l'organisme. Bien que ces incitations soient généralement puissantes pour un organisme qui opère dans un secteur très concurrentiel, elles peuvent être plus faibles dans les branches d'activité où existent des monopoles ou des oligopoles, et

davantage encore dans les administrations publiques. Les incitations à l'efficience des marchés en termes de coûts et de qualité peuvent donc être renforcées par des mesures telles que la privatisation, les réformes du secteur public, ou par des mesures qui développent la concurrence dans l'ensemble de l'économie.

1.1 Passation de marchés en présence de nombreux vendeurs : adjudications et appels d'offres

L'efficience des procédures d'achat dépend elle-même de la manière dont ces procédures sont conçues et exécutées. Les marchés sont souvent passés au moyen de procédures d'appels à la concurrence ou d'adjudications qui comportent évidemment un grand nombre de caractéristiques positives du point de vue de l'efficience économique. En particulier, une procédure d'appel d'offres peut permettre (sous réserve de certaines précautions examinées plus en détail ci-après) de déterminer simultanément le producteur le plus efficient d'un certain bien ou service et le prix optimal. Par ailleurs, les procédures concurrentielles peuvent offrir à de nombreux producteurs des possibilités d'affaires tout en étant moins exposées à des accusations de discrimination ou de favoritisme.

La structure détaillée de la procédure d'appel à la concurrence peut aussi influer sur l'efficience du résultat. Ainsi, le nombre des soumissionnaires peut être réduit lorsque les spécifications initiales sont définies d'une manière excessivement stricte, que l'appel d'offres ne fait pas l'objet d'une large publicité ou que le délai de réponse est trop court.

Toutefois, le recours à des procédures d'appel à la concurrence n'est pas toujours efficient, pour plusieurs raisons :

- l'organisation et l'exécution d'une adjudication comportent des coûts. Chaque soumissionnaire potentiel doit supporter des coûts pour analyser les prescriptions requises, évaluer sa propre capacité à les exécuter et déterminer une offre appropriée. Ces coûts de préparation peuvent être significatifs. Les offres doivent, elles-mêmes, être examinées par l'acheteur. Le coût total peut être substantiel pour un projet complexe ;

- si l'acheteur connaît à l'avance les soumissionnaires probables et, en fait, le moins-disant, il peut être plus efficient pour lui de s'adresser directement à ce dernier pour négocier un prix (peut-être en menaçant, si nécessaire, de recourir à un appel à la concurrence) ;

- il n'est pas possible de recourir à un appel d'offres si les services à fournir incluent des éléments qui ne peuvent être spécifiés contractuellement à l'avance (notamment la qualité du service après-vente ou les demandes futures incertaines) ;

- dans certains cas, il peut exister des raisons explicites de ne pas choisir le fournisseur le moins-disant, par exemple, lorsque la diversité de l'offre est essentielle pour assurer la continuité du service ;

- des exigences de secret peuvent parfois interdire de solliciter publiquement des offres ;

- enfin, dans certaines circonstances, le nombre de soumissionnaires potentiels peut être strictement limité, ce qui réduit l'efficience d'un appel à la concurrence normal.

1.2 Passation de marchés en présence d'un nombre restreint de vendeurs : accords contractuels explicites

Ce dernier point mérite peut-être quelques explications complémentaires. Comme sur tous les marchés, l'efficience des procédures d'appel d'offres dépend du nombre de soumissionnaires potentiels. Si ce nombre est très faible, un soumissionnaire peut occuper, à lui seul, une position de force sur le marché. Dans ce cas, une simple "adjudication" ne donnera pas un résultat efficient et il peut être utile d'adopter une méthode plus sophistiquée pour effectuer les approvisionnements. Par exemple, on ne fixera pas le prix définitif à l'avance, mais on le fera dépendre du bénéfice réalisé par le fournisseur.

Comme Laffont et Tirole (1994)[2], on peut distinguer différentes formes de contrats d'approvisionnement selon la "force" des incitations sous-jacentes. Alors qu'un contrat prévoyant un simple remboursement des coûts garantit que le fournisseur monopolistique ne bénéficiera pas d'une rente de monopole, il limite aussi les incitations pour le fournisseur à minimiser ses prix de revient. En revanche, un contrat à prix fixe incite fortement le fournisseur à réduire ses coûts mais il peut garantir qu'il ne bénéficiera pas de rentes de monopole. Il existe des analogies évidentes avec des formules de type réglementaire telles que les dispositifs fondés sur le taux de rendement ou sur le prix plafond.

1.3 Contrôle des responsables des achats : lutte contre la corruption et le favoritisme politique

Etant donné l'importance des procédures de passation de marchés, les entreprises publiques et privées élaborent souvent des lignes directrices complexes et mettent en place des systèmes de surveillance pour veiller à l'efficacité du processus. Fréquemment, des projets plus importants, plus complexes ou particulièrement coûteux font l'objet de procédures ad hoc ou sont confiés à une agence spéciale.

Compte tenu de l'importance des sommes en jeu lorsque les marchés concernent des grandes entreprises ou des organismes publics, des mesures peuvent être prises pour réduire au minimum le risque de corruption. La corruption peut résulter de l'influence exercée sur le responsable de l'attribution du marché pour qu'il modifie la conception ou le résultat de la procédure d'appel d'offres afin de favoriser une entreprise particulière en échange de pots-de-vin ou d'autres contreparties. Il peut par exemple rédiger les spécifications de manière à exclure d'autres entreprises de la compétition ou réduire le délai de présentation des offres afin de limiter le nombre des soumissionnaires.

Dans le cas des marchés publics, les responsables élus peuvent être incités à utiliser leur pouvoir de contrôle sur la procédure d'attribution des contrats pour accorder ces derniers à des entreprises qui leur ont apporté leur soutien ou qui sont situées dans leur circonscription. Plus généralement, le contrôle exercé sur l'attribution des marchés peut être utilisé comme une forme de "faveur" destinée à récompenser un comportement loyal, attitude que l'on peut qualifier de "favoritisme politique". Tandis que les responsables des achats, qu'ils soient privés ou publics, se préoccupent de la qualité et du coût des produits finis qui seront livrés, le responsable des marchés publics est confronté à des contraintes supplémentaires pour éviter d'être accusé de favoritisme politique: la procédure doit échapper à toute influence politique, on doit pouvoir constater que l'appel à la concurrence est ouvert et loyal et que le gagnant a été choisi en raison des mérites de son offre.[3]

On peut établir certaines distinctions entre la corruption et le favoritisme politique. La corruption se manifeste dans des entités publiques et privées, elle est liée au problème de la vénalité et elle peut être combattue (lorsqu'il existe des incitations dans ce sens) par une grande attention prêtée aux pratiques de gestion et au contrôle. Le favoritisme politique, pour sa part, ne se rencontre que dans le secteur public,

est plus étroitement lié au souci d'influencer les électeurs et ne peut être maîtrisé que par les processus génériques de contrôle des élus par les électeurs.

Les entités publiques sont souvent confrontées, par ailleurs, à des contraintes supplémentaires affectant les procédures d'appel d'offres et qui tiennent à d'autres objectifs gouvernementaux comme le souci de protection de l'environnement, de discrimination positive ou des objectifs de politique industrielle[4]. Certaines de ces contraintes supplémentaires ont été allégées dans plusieurs pays de l'OCDE par diverses évolutions récentes, notamment :

- les mesures de libéralisation des échanges (telles que celles résultant des Directives de l'Union européenne) qui s'opposent à ce que les pouvoirs publics adoptent des mesures discriminatoires en faveur des entreprises nationales en matière de marchés publics ;

- la levée de l'obligation faite aux entreprises publiques de respecter les règles des marchés publics afin qu'elles puissent concurrencer sur un pied d'égalité les entreprises privées ;

- les réformes du secteur public qui accordent une plus grande autonomie aux administrations publiques en matière de dépenses, y compris en ce qui concerne leurs propres procédures d'achats publics, en contrepartie d'une plus grande responsabilité vis-à-vis des résultats obtenus.

Dans le même temps, les objectifs d'efficience du secteur public et de privatisation ont conduit à une réduction de la dimension de l'Etat et au développement de la "sous-traitance" ce qui amène à recourir davantage, dans le secteur public, à des formes de contrats et de marchés conformes aux règles "de pleine concurrence".

2. Problèmes de concurrence dans le domaine des marchés

2.1 Pourquoi et comment les marchés sont-ils exposés à la collusion ?

En matière d'approvisionnements comme sur les autres marchés économiques, les préoccupations relatives à la concurrence résultent essentiellement, d'une part, du risque de constitution d'ententes horizontales entre les concurrents et, d'autre part, du risque d'abus de position dominante. Pour les besoins de la présente note, on se concentrera sur les ententes horizontales tout en notant que l'abus de position dominante (par exemple à travers la fixation de prix d'éviction) peut aussi affecter les marchés.

Si le nombre de poursuites intentées constitue un indicateur de l'importance de la collusion, il semblerait que cette dernière soit relativement répandue en matière de marchés. Quels sont les facteurs qui pourraient expliquer que les marchés constituent un terrain favorable à de telles pratiques ?

Comme dans d'autres domaines, la collusion est favorisée si :

a) le secteur est concentré (ce qui permet d'identifier facilement une série de concurrents qui détiennent collectivement un certain contrôle sur le prix du marché et de négocier avec eux) ;

b) il existe d'importants obstacles à l'entrée sur le marché (qui empêchent l'accès d'un nombre de concurrents suffisant pour compenser toute restriction de la production par les membres

de l'entente) et si les entreprises ne faisant pas partie de l'entente ne disposent pas de capacités non utilisées ;

c) les transactions effectuées sur le marché sont transparentes (ce qui permet de vérifier si les conditions de l'entente sont respectées) ;

d) les acteurs se font concurrence de manière répétitive, soit sur le même marché pendant une certaine période, soit simultanément sur plusieurs marchés géographiquement séparés (ce qui permet de sanctionner ceux qui ne respectent pas les règles de l'entente) ;

e) l'existence de l'entente est facile à dissimuler (ceux qui en font partie pouvant maintenir l'apparence d'une concurrence entre eux)[5].

Ces considérations suggèrent que la collusion peut être favorisée dans les procédures d'appel d'offres en raison des facteurs suivants :

- certains marchés d'approvisionnement peuvent être de taille géographique réduite et assez fortement concentrés, avec des barrières à l'entrée relativement élevées, notamment à l'encontre d'entreprises d'autres régions géographiques. On peut citer comme exemples :
  - certains marchés de matériels militaires ;
  - certains marchés de travaux publics (y compris de grands projets routiers ou ferroviaires) ;
  - les marchés concernant de grands projets de construction ;
- les entreprises opérant sur ces marchés concentrés se font généralement concurrence très souvent, aussi bien sur un même marché au fil du temps que sur des marchés géographiquement différents ;
- en particulier dans le cas des marchés publics, le nom de l'entreprise adjudicataire et les conditions du contrat sont souvent rendus publics ;
- dans de nombreux appels d'offres, le mécanisme de comparaison des offres (qui peut être simplement le prix) est précisé à l'avance, et il existe souvent une pondération précise de chacune des composantes jugées importantes pour l'acheteur ;
- enfin, et peut-être surtout, sur certains marchés faisant l'objet d'appels d'offres, l'acheteur est peu incité à faire preuve d'efficience, ce qui entraîne un certain "laxisme" dans les procédures d'achat, un manque de vigilance à l'égard de la collusion, un manque d'incitation à élargir davantage l'appel d'offres et, il faut le reconnaître, une certaine tolérance vis-à-vis de comportements d'entente entre soumissionnaires.

Comme c'est le cas plus généralement des accords horizontaux, la collusion dans les appels d'offres peut prendre plusieurs formes :

a) une simple fixation du prix ou une manipulation des offres, dans laquelle l'adjudicataire et l'offre gagnante sont choisis d'avance, tandis que les autres soumissionnaires reçoivent instruction de présenter des offres à des prix supérieurs. Pour que cette entente fonctionne, il

faut que les rentes acquises par l'adjudicataire soient partagées avec les autres parties à l'entente, ce qui peut se faire, par exemple, en changeant l'identité de l'adjudicataire selon une formule prédéterminée (telle que celle qui préserve les parts de marché existantes) ;

b) les accords de partage du marché : les clients sont répartis par catégorie ou par région et les concurrents acceptent de présenter des offres plus élevées dans les marchés régionaux attribués à d'autres entreprises. Ce système peut être complété par un mécanisme de partage des rentes si la demande sur les différents marchés est variable [6];

c) les "redevances de soumissions" : l'association professionnelle (ou l'association des entreprises constituant une entente) perçoit, en contrepartie du droit de déposer une soumission, une redevance qui est simplement ajoutée par les soumissionnaires au prix de leur offre. Les fonds accumulés par l'association professionnelle sont ensuite restitués aux membres par un mécanisme quelconque ;

d) le "partage des dépouilles" : l'adjudicataire accepte d'indemniser les perdants "des coûts exposés pour présenter leurs soumissions". Ce supplément est ajouté au prix d'offre de chaque entreprise. Une variante de cette approche consiste pour l'adjudicataire à sous-traiter une partie des travaux aux soumissionnaires non retenus afin, également de partager une partie des rentes.[7]

La collusion est inefficiente, pour deux raisons : elle conduit à des prix supérieurs aux prix de revient et elle peut aboutir au choix d'une entreprise dont les coûts sont élevés. Une entente efficiente peut permettre d'éliminer ce dernier facteur d'inefficience. En général, il est dans l'intérêt de l'entente d'attribuer le marché à l'entreprise qui produit au moindre coût puisque cette solution augmente le total des rentes qui peuvent être redistribuées aux autres membres de l'entente. Par ailleurs, l'attribution du marché à l'entreprise dont les coûts sont les plus faibles peut contribuer à la stabilité de l'entente, car cette entreprise est généralement celle qui a le plus à gagner à ne pas respecter l'entente et à offrir des prix d'éviction. En accordant à cette entreprise une part légèrement plus importante des rentes résultant de l'entente, on peut stabiliser cette dernière. Des systèmes comme celui des redevances de soumissions mentionné ci-dessus, ou un système d'appel d'offres interne à l'entente pour désigner la société qui obtiendra le marché, garantissent que le marché est attribué à l'entreprise dont le prix de revient est le plus bas.

Des formules mixtes sont possibles. Dans la célèbre affaire Addyston Pipe, aux Etats Unis[8], les membres de l'entente s'étaient répartis les marchés sur des bases géographiques (au moyen de ce qu'ils appelaient les "villes réservées") et appliquaient, dans les régions qui n'étaient pas attribuées (dites "territoires de paiement"), un système de "redevances de soumissions" en vertu duquel les entreprises participaient à des appels d'offres internes à l'entente pour obtenir le droit de présenter l'offre retenue.

2.2 Comment peut-on renforcer la concurrence dans les appels d'offres?

Quelles mesures peut-on prendre pour améliorer la concurrence (tout en réduisant le risque de collusion) dans les appels d'offres? Il existe plusieurs possibilités qui sont examinées ci-dessous.

2.2.1 Améliorer les connaissances de l'organisme d'achat

De nombreuses procédures de marchés publics sont effectuées par des municipalités ou des agences de taille réduite qui ne possèdent pas nécessairement les connaissances nécessaires pour concevoir une procédure de passation efficiente, minimiser la collusion et la détecter. Un processus de formation à l'intention des organismes publics acheteurs peut donc se révéler important. Cette formation pourrait à tout le moins prendre la forme d'un document établi par l'autorité chargée de la concurrence, qui décrirait la collusion et le trucage des offres, les différentes formes qu'elles revêtent et les moyens de les détecter.

2.2.2 Spécification attentive des conditions de l'appel d'offres

L'acheteur, lorsqu'il détermine les biens et les services qu'il veut acheter, définit le champ du marché dans lequel la concurrence va jouer. Afin de renforcer la concurrence, il est donc important de préciser soigneusement les conditions du marché pour n'exclure aucun bien ou service susceptible de constituer une solution de rechange efficace. Les spécifications de l'appel d'offres devraient, de préférence, préciser les résultats désirés et laisser les soumissionnaires suggérer les mécanismes permettant d'atteindre ces résultats.

Pour prendre un exemple simple, lorsque le résultat souhaité est le transport de marchandises pondéreuses de la ville A à la ville B, l'appel d'offres doit spécifier ce résultat et laisser le choix du mode de transport aux soumissionnaires. Si l'appel d'offres est limité aux services ferroviaires, il élimine les autres solutions possibles, telles que le transport fluvial, ce qui réduit la concurrence peut-être de manière significative.

2.2.3 Réduction des obstacles à l'entrée

Il est évident que la concurrence peut être renforcée non seulement par une attention portée aux aspects concernant la demande (nombre de produits de substitution possibles) mais aussi aux aspects relatifs à l'offre, en particulier en augmentant le nombre des concurrents par une réduction des obstacles à l'entrée sur le marché. Ce résultat peut être obtenu de plusieurs manières :

a) La procédure d'appel d'offres elle-même ne devrait pas refuser le droit de soumissionner à certaines entreprises sur la base de critères qui ne sont pas directement pertinents du point de vue de l'exécution du marché (par exemple l'exigence d'une certaine solidité financière peut réduire inutilement le nombre des concurrents), et elle ne devrait pas non plus exclure les entreprises appartenant à d'autres régions géographiques ;[9]

b) il devrait être possible de supprimer les obstacles réglementaires à l'entrée tels que les contrôles du nombre, de la taille, de la composition ou de la nature des entreprises admises à soumissionner ou les mesures qui favorisent certaines firmes en fonction de critères dépourvus de pertinence du point de vue économique[10] ;

c) les obstacles aux échanges extérieurs pourraient être supprimés en éliminant les contraintes affectant la participation étrangère aux appels d'offres ;

d) le recours aux appels d'offres électroniques pourrait réduire les coûts des soumissions, qui dans certains cas peuvent représenter d'importants obstacles à l'entrée[11] ;

e) les frais d'établissement non récupérables constituant un obstacle à l'entrée peuvent faire l'objet de mesures directes. Par exemple, lorsque l'entrée dans un marché concurrentiel nécessite un élément d'équipement spécialisé, l'acheteur pourrait acquérir l'équipement en question et le louer au soumissionnaire retenu, réduisant ainsi les coûts d'entrée non récupérables.[12]

2.2.4 Réduction de la transparence

Ainsi qu'on l'a déjà noté, un degré élevé de transparence concernant les transactions peut faciliter la collusion dans la mesure où il permettrait de détecter et de sanctionner plus aisément le non respect de l'entente. La concurrence peut donc être renforcée simplement en ne révélant pas l'identité de l'adjudicataire et les conditions du contrat.[13]

Cela souligne le contraste entre marchés privés et marchés publics. Dans la passation de marchés publics, on fait valoir qu'il est nécessaire d'assurer la transparence en annonçant l'adjudicataire et le prix même si cela facilite la collusion. La nécessité de maintenir la transparence se heurte au souci de minimiser la collusion. Dans les marchés publics, la transparence apparaît cruciale, surtout quand des entreprises étrangères participent ou pourraient participer à l'appel d'offres. Ainsi, les règles de l'Union européenne et de l'OMC exigent apparemment la publication des soumissions retenues, de façon à minimiser le risque de plaintes étrangères pour procédure déloyale. Ce besoin de transparence semble aussi militer contre d'autres mesures potentielles visant à limiter la collusion. Par exemple, rendre aléatoires les pondérations assignées aux composantes de l'appel d'offres réduit les possibilités de collusion des soumissionnaires. Toutefois, on peut estimer que les pondérations aléatoires augmentent le pouvoir discrétionnaire de l'acheteur, diminuent la transparence et accentuent le risque de corruption.

Dans le cas des marchés privés, on a observé que les grands acheteurs industriels recourent généralement à des négociations secrètes pour leurs opérations d'achat. Les négociations privées encouragent les soumissionnaires à proposer des réductions de prix sans crainte d'être détectés par les autres membres de l'entente.

Les règles de la Commission européenne en matière de marchés publics limitent strictement les cas dans lesquels des négociations privées sont autorisées. A première vue, il apparaît que la négociation avec les soumissionnaires ne peut qu'améliorer les conditions susceptibles d'être obtenues par l'acheteur (par exemple en incitant le moins-disant à baisser ses prix). Toutefois, outre le risque de voir les négociations secrètes déboucher sur le favoritisme, certains économistes ont estimé récemment que l'option offerte a posteriori de s'aligner sur les prix d'un concurrent (stratégie dite de l'"alignement sur les prix") affaiblissait le niveau de la concurrence par les prix sur un marché. Si certains soumissionnaires savent qu'ils auront encore la possibilité, a posteriori, de s'aligner sur les conditions du mieux-disant, ils seront moins incités à proposer des prix initiaux plus faibles.

2.2.5 Réduction du nombre des appels d'offres

Comme on l'a noté plus haut, la collusion est facilitée lorsque les entreprises concurrentes se rencontrent fréquemment sur différents marchés. En effet, la fréquence des interactions facilite le recours à des stratégies punitives entre soumissionnaires concurrents, stratégies nécessaires pour maintenir une entente efficace.

La réduction du nombre des occasions qu'ont ces entreprises de se rencontrer peut donc diminuer les possibilités de sanctions et favoriser ainsi la concurrence. Ce résultat peut être atteint par l'organisation d'adjudications moins nombreuses, portant par exemple sur la concession de certains services pendant des périodes de cinq ou dix ans. Si la période correspondante est suffisamment longue, les entreprises n'ont pas à craindre de représailles futures pour avoir proposé, à un moment donné, des prix plus bas que ceux fixés par l'entente.

De même, lorsque les mêmes entreprises se font concurrence sur des marchés géographiquement voisins, il peut être opportun que les acheteurs de ces marchés s'entendent pour limiter le nombre total des appels à la concurrence organisés dans l'ensemble de la région. Par exemple, une seule adjudication peut être organisée pour désigner l'entreprise qui aura le droit d'offrir certains services dans l'ensemble de la région. Ces deux stratégies portent en germe le risque d'accroître les gains découlant de la collusion, étant donné que la taille du "gâteau" augmente.

2.2.6 Autres procédures d'adjudication

Il existe de nombreuses formes d'adjudication susceptibles d'être adoptées pour l'attribution de marchés. Ainsi, dans une adjudication traditionnelle, chaque soumissionnaire présente une offre, l'offre la plus élevée (ou la plus basse, dans une passation de marché) l'emporte et l'adjudicataire paie (ou reçoit) le prix offert (ou demandé). Cette formule est connue sous le nom d'adjudication "au premier prix". Dans une autre formule appelée "adjudication au second prix", chaque soumissionnaire présente également une offre mais l'adjudicataire paie (ou reçoit) seulement le prix proposé par le soumissionnaire classé second.

La seconde formule comporte certains avantages d'un point de vue théorique. En particulier, dans le cas d'une adjudication au premier prix, les soumissionnaires tendent à proposer un prix inférieur (ou supérieur) à celui qu'ils sont prêts à payer (ou à recevoir) afin que le prix de l'appel d'offres procure une marge positive, tandis que dans le cas d'une adjudication au second prix chaque soumissionnaire est incité à offrir le prix le plus élevé (ou le plus bas). La mise en oeuvre d'une telle approche est simple, mais il n'est pas certain que la théorie simple des adjudications soit suffisamment connue pour que le recours à une adjudication au second prix soit praticable. Toutefois, une théorie économique complexe des adjudications est appliquée dans un certain nombre de pays pour la mise aux enchères de bandes de fréquence destinées aux communications mobiles et pour l'adjudication des concessions pétrolières en particulier. Toutefois, ces formules permettent dans une certaine mesure aux soumissionnaires de jouer gagnants même dans des conditions sensiblement restrictive[14].

Du point de vue de la concurrence, il a été suggéré que ces différentes approches présentaient une vulnérabilité plus ou moins grande à la collusion. En particulier, il semblerait que les adjudications au premier prix échapperaient davantage à la collusion. Les premiers ouvrages économiques sur le sujet[15] ont montré qu'un appel d'offres avec réponses sous pli fermé et attribution au mieux-disant permettait de réduire le risque de collusion. Le gouvernement norvégien, par exemple, donne la préférence aux appels d'offres avec réponses sous pli fermé sur les offres avec réponses sous pli ouvert.

2.2.7 Résultats aléatoires

Une approche qui a été suggérée pour réduire la collusion dans les appels d'offres consiste à introduire un certain degré d'incertitude dans le résultat de la procédure. Par exemple, l'acheteur peut décider d'attribuer le marché de manière aléatoire à l'une des firmes dont les offres se situent à l'intérieur d'une fourchette de prix donnée par rapport au moins disant. Cette formule (combinée au maintien d'une

certaine confidentialité des critères de choix de l'adjudicataire) rend plus difficile le maintien d'une collusion dans la mesure où les participants à l'entente ne savent pas, dans le cas où l'adjudicataire n'est pas celui qu'ils avaient choisi, si ce résultat est le fruit du hasard ou d'un non respect des règles de l'entente. L'accord sur les marchés publics exige des critères d'évaluation spécifiques, le marché devant être accordé sur la base de ces critères.

L'entente peut, toutefois, réagir en accroissant l'écart entre l'offre de l'entreprise désignée pour remporter le marché et les offres « fictives » des autres soumissionnaires. Ceci rend, toutefois, l'entente plus transparente et accroît le risque qu'elle soit détectée.

2.2.8 Accroître les coûts de la collusion

Un nombre croissant de pays sont en train de redéfinir les procédures de marchés publics pour faire en sorte que les soumissionnaires soient conscients des sanctions encourues en cas de collusion. Dans certains pays, on insiste pour que les soumissionnaires attestent qu'ils ne sont pas entrés en collusion ou ne se sont pas entendus avec d'autres entreprises sur le prix ou les autres conditions de l'appel d'offres. Des programmes de mise en conformité sont également établis dans plusieurs pays où les personnels des entreprises chargées des appels d'offres sont tenus de participer à des séances d'information et à des programmes destinés à les sensibiliser aux sanctions en cas de collusion et de trucage des offres. Dans certains Etats, une entreprise jugée coupable de collusion se voit interdire de soumissionner de nouveau pendant un certain laps de temps (c'est le cas notamment en Allemagne et en Corée -- six mois d'interdiction). Tandis que ces programmes apparaissent utiles, leurs mérites n'ont pas fait l'objet d'une analyse systématique, en l'absence de données régulières sur le nombre et la nature des violations dans les différents pays de l'OCDE.

2.2.9 Application stricte du droit de la concurrence

En dehors des diverses possibilités mentionnées ci-dessus, on peut réduire la collusion dans les appels d'offres par une application stricte et efficace de la réglementation de la concurrence. Ce point est abordé dans la section suivante.

2.3 Peut-on lutter contre la corruption sans affaiblir la concurrence ?

Comme on l'a noté plus haut, la prévention de la corruption constitue une préoccupation particulière dans le cadre des marchés. Existe-t-il une certaine incompatibilité entre le renforcement de la concurrence et la lutte contre la corruption?

La réponse devrait être généralement négative: la corruption n'est possible que s'il existe des rentes monopolistiques. Réduire ces dernières diminue le montant des fonds pouvant être utilisés à des fins de corruption et, partant, l'incidence et la gravité de cette dernière. Favoriser la concurrence a donc pour effet de réduire la corruption.

Il est vrai, toutefois, que certaines des approches mentionnées ci-dessus qui visent à réduire la collusion peuvent renforcer les risques de corruption. Par exemple, il a été proposé d'organiser des appels d'offres moins fréquents et portant sur des marchés plus importants. Or, les incitations à la corruption seront d'autant plus fortes que les montants en jeu seront plus élevés.

On peut noter, cependant, qu'il existe d'autres moyens de contrôler la corruption. Dans un grand nombre de pays, cette dernière constitue une infraction pénale passible d'une peine d'emprisonnement. Les entités publiques ou privées peuvent aussi mettre en place des programmes de contrôle qui surveillent les procédures d'attribution des marchés afin de détecter les cas de corruption. Dans un pays de l'OCDE au moins, c'est l'autorité responsable de la concurrence qui est chargée de cette tâche.

A l'inverse, on a noté, toutefois, qu'il existe généralement un conflit entre le renforcement de la concurrence et la lutte contre le favoritisme politique. Nous avons défini plus haut le favoritisme politique comme l'influence exercée par les élus sur la procédure d'attribution des marchés afin de dispenser des faveurs politiques. Comme on l'a déjà mentionné, ces pratiques ne peuvent être combattues que par les électeurs, au moyen des mécanismes classiques de contrôle de la conduite des élus. La transparence constitue en particulier un élément essentiel de ce contrôle. Il est important, par conséquent que les résultats des appels d'offres concernant des marchés publics exposés à certaines influences politiques puissent être consultés au moins par les institutions chargées de contrôler les actions du gouvernement (commissions parlementaires de surveillance des marchés, membres de l'opposition, etc.).

En fait, pour que cette surveillance soit la plus efficace possible, il peut être nécessaire de publier les résultats des appels d'offres pour l'attribution des marchés publics. Comme on l'a noté ci-dessus, cette transparence renforce les risques de collusion en facilitant la détection des entreprises qui ne respectent pas l'entente conclue.

3. Application du droit de la concurrence dans le domaine des marchés

Existe-t-il des problèmes d'application du droit de la concurrence spécifiques aux marchés ? Dans tous les pays de l'OCDE, le champ d'application du droit de la concurrence s'étend aux ententes horizontales et aux abus de position dominante affectant les marchés et ce droit est appliqué par l'autorité nationale de la concurrence[16]. En matière de marchés, les problèmes concernent donc principalement le renforcement de l'efficacité de l'application du droit national de la concurrence.

Pour être efficace, la répression des violations du droit de la concurrence nécessite :

a) d'être averti de l'existence des violations et d'avoir accès aux preuves de ces violations ;

b) le respect des règles juridiques applicables en matière de preuve devant les tribunaux ;

c) des sanctions ou des réparations adéquates.

Dans un grand nombre de pays de l'OCDE, des poursuites judiciaires pour collusion dans les appels d'offres peuvent être intentées avec succès par les entités privées ou publiques. Les deux types de recours peuvent être appropriés à des moments différents. Dans certains pays, (notamment les Etats-Unis et l'Australie), on renforce l'efficacité de l'action publique en permettant aux entités privées d'intenter des actions dites "coat tail" (menées à la suite de l'action publique et profitant de cette dernière). Lorsqu'une action publique a prouvé l'existence d'une pratique de collusion, les clients qui ont subi un préjudice du fait de cette pratique peuvent intenter une action connexe pour obtenir réparation du dommage subi, et ils ne sont pas tenus d'établir que l'importance de ce dernier.

En ce qui concerne l'accès à l'information, les responsables (publics et privés) de l'application du droit de la concurrence doivent pouvoir s'informer de l'existence de violations et rassembler des

preuves pouvant être présentées devant les tribunaux. Ce processus est facilité, par exemple, si des dispositions législatives protègent ceux qui “tirent la sonnette d’alarme”.

Ainsi qu’on l’a noté, dans certains pays de l’OCDE il existe, dans les organisations, des programmes explicites d’auto-détection des fraudes aux appels d’offres : les entreprises mettent en place des programmes d’information destinés à informer l’ensemble du personnel de la réglementation et des sanctions applicables en cas d’infraction ainsi que des programmes visant à assurer le respect de la législation[17]. L’Australie note dans sa contribution que les tribunaux australiens prennent généralement en compte l’existence, dans l’entreprise coupable d’une infraction, d’un programme de conformité aux pratiques commerciales pour fixer le montant de l’amende applicable. Dans certains pays, seules les entreprises qui instituent de tels programmes peuvent participer aux appels d’offres sur les grands marchés publics.

Même lorsque des programmes de conformité ne sont pas obligatoires pour soumissionner, la demande de déclaration statutaire de non collusion telle qu’elle est en vigueur aux Etats-Unis et en Australie semble avoir un effet dissuasif efficace. D’une part, ce type de certification implique que l’entreprise et ses dirigeants sont conscients des risques et des sanctions inhérents à la collusion. D’autre part, après signature de ce certificat, l’entreprise et ses dirigeants, s’ils se livrent au trucage des offres, s’exposent à de lourdes sanctions.

Plusieurs pays, et notamment le Royaume-Uni, estiment que donner une large publicité aux affaires de trucage des offres joue un rôle préventif important, étant donné qu’une telle publicité a de sérieuses répercussions sur l’entreprise dans son ensemble.

Tous les pays jugent qu’il est crucial de disposer de systèmes de détection et de sanctions efficaces. La détection est difficile dans une procédure ponctuelle, mais plus aisée dans les appels d’offres répétés, pour lesquels la théorie économique indique que la collusion se trouve également facilitée.

Certains pays comme le Canada, la Norvège et la Hongrie disposent d’une législation spécifique contre le trucage des offres, tandis que d’autres tels que les Etats-Unis, le Royaume-Uni et l’Australie s’appuient sur le droit général de la concurrence pour combattre les accords anticoncurrentiels.

A l’évidence, il est indispensable d’examiner les offres qui ont été soumises pour déterminer si les caractéristiques sont conformes à un processus pleinement concurrentiel. Il est clair aussi que cette analyse a lieu rarement, et ce pour plusieurs raisons. Premièrement, de nombreux organismes de passation de marchés sont de taille réduite et n’ont pas nécessairement les ressources requises pour entreprendre ces analyses. Il faut se rappeler que les marchés publics représentent une fraction notable du PIB de la zone de l’OCDE et que suivre les résultats des passations de marchés serait une lourde tâche. Toutefois, un effort accru s’impose à cet égard. Le fait d’annoncer que x pour cent de tous les contrats soumis à appel d’offres feront l’objet d’une analyse statistique pourrait décourager un certain nombre de collusions potentielles.

Une autre approche consiste à examiner à l’avance l’éventail des soumissionnaires. De fait, le critère classique du monopoleur hypothétique appliqué à la définition du marché pourrait mettre en évidence les soumissionnaires probables et indiquer s’il existe des soumissionnaires potentiels exclus de l’appel d’offres par la réglementation ou par d’autres obstacles. L’acheteur, qui fixe les règles de l’appel d’offres, définit le marché d’une manière large ou étroite, et l’utilisation ex ante de critères de définition du marché conformes aux règles de la concurrence serait utile à cet égard.

S’agissant des normes juridiques applicables, les ententes horizontales telles que les pratiques de collusion dans les appels d’offres sont considérées, dans la plupart des pays de l’OCDE, comme illégales

en soi ou, du moins, n'appellent pas une preuve supplémentaire de l'existence d'un préjudice ou du fait que le préjudice subi excède les avantages qui auraient pu être acquis. Dans les pays où les ententes horizontales ne sont illégales que si elles réduisent sensiblement la concurrence, il est, en général, précisé de manière explicite que cette condition est remplie, sans qu'il soit besoin d'autre preuve, pour les accords ayant pour effet de fausser les appels d'offres ou de fixer les prix.

En ce qui concerne les sanctions et les réparations, il est clair qu'elles doivent être appropriées pour être efficaces dans la prévention de la collusion. On notera, à cet égard, la nécessité de prendre en compte les chances qu'ont les ententes d'échapper à la détection. Les sanctions doivent être d'autant plus sévères qu'une certaine proportion des ententes peut, pour diverses raisons, rester indétectée. En toute hypothèse, les sanctions doivent être suffisamment importantes pour dépasser les gains procurés par les ententes.

En conclusion, on notera que les mesures visant à renforcer la concurrence sur les marchés des achats par appel à la concurrence auront une incidence directe, par exemple sur les décisions concernant les fusions. Toutes choses égales par ailleurs, une fusion est d'autant mieux tolérée que la concurrence est plus forte. Par exemple, la Commission européenne a noté récemment que les règles étendant les appels d'offres à l'ensemble de l'Union Européenne ont eu pour effet un élargissement important du marché des autobus urbains et interurbains, ce qui a permis à Mercedes Benz d'acquérir un autre fabricant allemand de bus et d'autocars.

4. Autres aspects à approfondir

4.1 Quels sont les facteurs qui favorisent la collusion sur certains marchés de produits faisant l'objet d'appels d'offres ? Quels sont les marchés de ce type qui sont les plus exposés à la collusion ?

Les marchés publics sont-ils plus exposés à la collusion que les marchés privés ? Ainsi qu'on l'a vu précédemment, toute procédure de passation de marché se prête à une manipulation par les fournisseurs lorsque les circonstances le permettent. Il se pourrait toutefois que ces circonstances soient plus souvent réunies dans les marchés publics, si :

- le nombre de fournisseurs est restreint car l'acheteur exige certaines qualités ou services -- par exemple un projet de construction routière dans la région X ;

- les fournisseurs ont tendance à être localisés, du fait que la demande de l'acheteur est spécifique d'un site : c'est le cas notamment des liaisons par autocar entre A et B, à l'inverse de la fourniture d'un certain nombre de biens, par exemple des ordinateurs, produits dans plusieurs usines ;

- il existe des demandes récurrentes pour ces services spécifiques d'un site, ce qui permet des contacts fréquents entre les entreprises ;

- dans le but de maintenir la transparence, on a recours à un seul appel d'offres sous pli fermé avec des caractéristiques soigneusement énumérées et un système de points ou de classement bien défini ;

- l'identité de l'adjudicataire et son offre sont dévoilées, pour maximiser le contrôle par le public ;

L'Australie a créé une Commission royale chargée d'enquêter sur les collusions, mais celle-ci n'a pas trouvé de preuves d'un trucage généralisé des offres et n'a pas mis en lumière de différences entre le secteur public et le secteur privé en ce qui concerne l'ampleur de la collusion. En revanche, la moitié des ressources de la FTC du Japon sont affectées aux enquêtes sur le trucage des offres. De même, la FTC coréenne consacre une bonne partie de ses ressources à enquêter sur la collusion : elle a été saisie de 23 affaires au cours des cinq dernières années. La note de l'Allemagne indique que "le pourcentage de cas non détectés semble très élevé", bien que le secteur public ne présente pas de caractéristiques spéciales par rapport au secteur privé. En Hongrie, aucune affaire n'a été évoquée dans le contexte de la clause relative au trucage des offres et aucune plainte n'a été enregistrée. En Norvège, on n'a détecté que quelques affaires de trucage des offres.

4.2 Quelles sont les formes de collusion les plus répandues ?

Etant donné que les circonstances propres à une procédure de marché public peuvent faciliter involontairement la collusion entre des fournisseurs potentiels, les organismes d'achat doivent être conscients des formes de collusion possibles et des signaux susceptibles de dénoter une entente entre fournisseurs. Une publication de 1994 du Ministère de la Justice des Etats-Unis ("An Antitrust Primer for Federal Prosecutors") décrit un certain nombre de situations dans lesquelles il y a lieu d'avoir des soupçons :

a) lorsqu'un petit nombre de vendeurs sont en présence ;

b) en l'absence d'un ou plusieurs soumissionnaires qui sont censés participer à l'appel d'offres ;

c) des caractéristiques de prix inhabituelles (par exemple lorsque les prix d'offre d'un groupe d'entreprises sont concentrés dans une fourchette étroite au-dessus du prix de l'adjudicataire) ;

d) des conditions hors prix inacceptables dans un certain nombre d'appels d'offres ;

e) une rotation des adjudicataires ;

f) l'offre retenue dépasse le prix généralement accepté ou le prix du tarif pour le produit en question ;

g) le même fournisseur remporte régulièrement des appels d'offres ;

h) les adjudicataires se répartissent selon une structure géographique ;

i) les adjudicataires sous-traitent régulièrement au profit des soumissionnaires non retenus ;

j) il est notoire que les soumissionnaires se fréquentent ou échangent des informations sur les prix ;

k) les prix d'offre baissent lorsqu'une nouvelle entreprise entre sur le marché ;

l) les entreprises proposent (à des fins de manipulation) des prix plus bas pour les appels d'offres éloignés de leur zone centrale d'activité.

4.3 Les contraintes réglementaires affectant les marchés publics (notamment les règles qui favorisent certaines entreprises) facilitent-elles la collusion ?

Etant donné que le nombre des soumissionnaires joue un rôle très important dans toute procédure d'achat, les contraintes réglementaires qui limitent le nombre des soumissionnaires potentiels peuvent engendrer des coûts sociaux élevés. Par conséquent, les autorités chargées de la concurrence doivent veiller à ce que les coûts d'entrée sur les marchés d'approvisionnement soient aussi faibles que possible.

Un problème connexe tient à l'asymétrie de l'information. Les organismes acheteurs, surtout les petites agences locales, peuvent avoir des moyens limités pour estimer les prix possibles et déterminer si une politique de "favoritisme politique" engendre des coûts élevés.

4.4 Quelles sont les mesures publiques visant à renforcer la concurrence dans la passation de marchés qui se sont avérées les plus efficaces ?

Il ne semble pas que des données systématiques soient recueillies au niveau international sur le nombre des affaires de collusion horizontale et sur leur répartition entre secteur public et secteur privé. Une telle base de données serait intéressante. Si elle était associée avec des informations sur les politiques spécifiques appliquées dans un pays pour combattre le trucage des offres dans les marchés publics, il serait possible d'entreprendre une analyse de l'efficience de ces politiques. En Hongrie, en vertu de la loi sur la passation de marchés publics, des données sont recueillies au niveau central sur tous les soumissionnaires et adjudicataires. Une analyse statistique de ces données permet de détecter les collusions possibles dans des sous-marchés. Dans d'autres pays, la question se pose de savoir si cette forme centralisée de collecte de données et d'analyse est réalisable.

4.5 Quel rôle peuvent et doivent jouer les autorités de la concurrence dans la conception des politiques d'achats publics ?

Dans un certain nombre de pays, les autorités chargées de la concurrence ont un rôle crucial à jouer dans les procédures de passation de marchés. Au Danemark, toute passation de marché relève de l'agence chargée de la concurrence. Il en résulte plusieurs avantages. Premièrement, l'agence dispose de données sur les appels d'offres pour l'ensemble des collectivités locales. Deuxièmement, elle est en mesure d'utiliser des méthodes informelles pour aider les organismes d'achat à attribuer les contrats. Une procédure informelle s'est également révélée très utile en Italie. Il semble donc souhaitable que les organismes chargés de la concurrence des pays de l'OCDE envisagent la possibilité de recourir à des procédures informelles préalables en complément des enquêtes formelles *a posteriori*.

Les autorités chargées de la concurrence ont un rôle crucial à jouer dans la diffusion d'informations. L'Autorité norvégienne de la concurrence a examiné les procédures d'achat des

municipalités norvégiennes en 1993. En 1996 elle les a réexaminées et a jugé les progrès peu satisfaisants. Elle a préconisé un certain nombre de réformes importantes :

a) élaboration d'un ensemble commun de règles de passation des marchés pour les municipalités ;

b) coordination des marchés d'approvisionnement entre les petites municipalités de manière à accroître la concurrence et l'efficience ;

c) recours aux adjudications publiques ;

d) formation du personnel public, surtout dans les petites municipalités.

Les règles de l'Union européenne, de l'Accord du GATT sur les marchés publics et de l'EEE relatives à la passation des marchés sont conçues pour élargir l'accès aux marchés. Il semble qu'elles peuvent malheureusement faciliter la collusion, encore qu'en ouvrant les appels d'offres à un plus grand nombre d'entreprises, elles favorisent certainement la concurrence. Les autorités chargées de la concurrence pourraient, peut-être par l'entremise de l'OCDE, examiner ces accords et proposer quelques modifications susceptibles de minimiser la collusion. A titre d'exemple, tous ces accords prévoient que le montant de l'offre retenue doit être rendu public ; de fait, il vaudrait mieux qu'il soit communiqué aux organismes gouvernementaux, mais non aux soumissionnaires.

NOTES

1. Source: Livre vert : Les marchés publics dans l'Union européenne: pistes de réflexion pour l'avenir, novembre 1996.

2. Laffont J.J. et J. Tirole, *A Theory of Incentives in Procurement and Regulation*,1994.

3. En outre, la passation de marchés publics fait l'objet d'une surveillance internationale, de telle façon que les entreprises étrangères soient autorisées à soumissionner (voir par exemple l'Accord sur les marchés publics renégocié dans le cadre du cycle d'Uruguay du GATT). Par conséquent, une procédure ouverte est nécessaire pour éviter que les concurrents étrangers n'aient lieu de se plaindre. Ainsi, l'Accord sur les marchés publics accorde une attention particulière au maintien et au renforcement de la transparence : "la notification des marchés prévus ou proposés doit inclure une liste de tous les éléments nécessaires pour assurer la transparence, notamment le mode de passation, la nature et la quantité, les dates de livraison, les prescriptions économiques et techniques, les montants et les conditions de paiement, etc." (B.M. Hoeckman et P.C. Mavroidis, "The WTO's Agreement on Government Procurement", Banque mondiale, Policy Research Paper, mars 1995). Toutefois, comme on le verra plus loin, il existe probablement d'importants arbitrages entre le degré d'ouverture et l'efficience des appels d'offres.

4. Le gouvernement australien déclare qu'il utilise les marchés publics pour appuyer un ensemble de politiques dont il donne la liste suivante: (a) politiques visant à assurer la préservation de l'environnement et du patrimoine national; (b) politique en matière de relations du travail, en particulier liberté d'association; © politiques visant à défendre les intérêts des populations aborigènes et des insulaires du Détroit de Torres ; (d) discrimination positive; (e) santé et sécurité des travailleurs; (f) politique étrangère et du commerce extérieur; (g) coordination et coopération entre la Fédération et les Etats. Australian Commonwealth Procurement Guidelines, Core Policies, mars 1998.

5. On peut noter que la collusion est moins fréquente, semble-t-il, lorsque les critères de sélection des offres ne sont pas spécifiés en détail à l'avance (par exemple, lorsque le choix est basé sur des critères subjectifs comme dans les « concours de beauté »). Alexander (1997) observe que la collusion entre soumissionnaires est rare lorsque le contrat principal concerne un produit spécialisé nécessitant la réalisation de prototypes qui sont évalués durant la procédure d'appel d'offres et fréquente lorsqu'il concerne des produits ne faisant pas l'objet de la construction de prototypes qui donnent lieu à une concurrence sur les prix entre soumissionnaires. En revanche les appels à la concurrence portant sur des produits nécessitant des prototypes sont remportés par le soumissionnaire qui offre le produit de meilleure qualité, ce qui suppose une évaluation subjective. Une entente supposerait une différenciation très nette (et donc aisément détectable) de qualité entre le produit du gagnant de l'appel d'offres et les autres. Il est donc moins facile de constituer une entente pour ces marchés.

6. Un système de ce type a fonctionné parmi les entrepreneurs de travaux publics du Canada dans la période 1959-61. Six entreprises de travaux publics se sont entendues pour se partager sur une base géographique les marchés attribués par la Direction des routes de l'Ontario. Ce plan prévoyait un règlement annuel selon lequel le montant total des contrats obtenus par les six accusés en 1960 était déterminé et divisé par six. Celles des six firmes qui avaient reçu une somme supérieure au résultat de ce calcul devaient reverser 10% de cet excédent, à répartir proportionnellement entre celles des six entreprises qui avaient reçu une somme plus faible. Ce plan était destiné apparemment à réduire l'iniquité de la répartition de la valeur monétaire des contrats attribués résultant de la répartition du marché entre les accusés sur une base géographique.

7. Ce système a été observé par Alexander qui note que les adjudicataires de contrats de matériels militaires sous traitent souvent l'exécution d'une partie du contrat à des soumissionnaires concurrents. L'auteur en conclut que les contrats constituent des «canaux permettant un partage des dépouilles résultant de la

collusion». Alexander B. «Mechanisms for rent transfers; Subcontracting among military aircraft manufacturers». Public Choice, 91, 1997, pp. 251-269.

8. US v. Addyston Pipe & Steel Co., 85 F.271 (1898).

9. Les obstacles à l'entrée peuvent également être réduits simplement en laissant aux entreprises (qui peuvent ne pas être informées à l'avance de l'intention d'ouvrir un appel d'offres) un délai suffisant pour préparer et présenter une offre.

10. De tels critères sont assez fréquemment utilisés, comme le montre l'exemple de l'Australie où certains Etats et territoires appliquent des obligations de contenu local et des préférences pour les fournisseurs locaux. Les acheteurs qui font appel à des fournisseurs étrangers de préférence à des fournisseurs australiens (ou néo-zélandais) doivent être en mesure de démontrer que ces derniers ont eu la possibilité de participer aux appels à la concurrence. Les acheteurs « doivent être très attentifs aux revendications des petites et moyennes entreprises de leur région ». Le gouvernement australien est « déterminé à encourager le développement de l'industrie par une promotion de l'avantage compétitif national qui soit compatible avec le souci de bonne utilisation des fonds publics ».

11. La Commission lance un programme "SIMAP" en vue d'autoriser l'établissement des appels d'offres et les soumissions par voie électronique.

12. Il existe probablement des restrictions visant les subventions directes à l'entrée dans le contexte des marchés publics, étant donné les craintes à l'égard du favoritisme politique.

13. Par ailleurs, il n'est pas nécessaire de révéler les conditions de l'ensemble des soumissions.

14. R. Porter. J. MacMillan.

15. Robinson (1985).

16. Dans un cas au moins (République tchèque), l'autorité chargée de la concurrence est aussi officiellement habilitée à assurer la surveillance des marchés publics.

17. (Voir par exemple section B.C.2.5, US sentencing Guidelines).

AUSTRALIA

1. Introduction

Australia is a federal state and this contribution has been largely prepared from a federal government procurement perspective because time and space constraints prevent canvassing in detail the experiences of other governments[1] or of the private sector. The competitive conduct rules set out in the federal competition statute, the *Trade Practices Act 1974*, apply universally and take in all business dealings with federal, state and local government as well as the private sector. These rules may be enforced in the courts by either the national enforcement agency, the Australian Competition and Consumer Commission (ACCC) or by private litigants. The remedies available include injunctions, pecuniary penalties and damages.

The questions guiding the preparation of this submission use procurement terminology in a manner that may not be consistent with general usage in other fora. It is important that all parties at the roundtable have a common understanding of the terminology underlying procurement issues. A theme running through the OECD paper appears to be that supplier collusion may be facilitated by public competitive processes and that therefore collusion is probably more prevalent in public sector procurement. Australia has reservations about this line of argument.

The Australian Government does not mandate any specific procurement methodology, although it advocates the use of open competitive processes to achieve best value procurement outcomes. The Commonwealth Procurement Guidelines: Core Policies and Principles requires procurers to select and implement the procurement method most likely to achieve the best value for money outcome for the Government from a range of possible methods. These include publicly competitive processes and private negotiation with one or more suppliers, where judged to be most appropriate.

Although supplier collusion can be a procurement matter, many of the fundamental issues behind collusion may perhaps be more appropriately considered in the context of the ongoing "health" of market sectors and marketplace evolution. Australia feels that, if further work is to be undertaken, a comparative study of market 'self-regulation' and instances of collusion may identify significant characteristic patterns that could prove useful in addressing the issue of collusion.

2. Procurement

2.1 Procurement philosophy

Australian Government procurers are required to select and use the method of procurement most likely to produce the best value-for-money[2] outcome, which appears generally consistent with the

statements listed as a prelude to the question. Government procurers need to comply with published principles relating to tendering and contracting arrangements.

Public competitive processes such as tendering may be used, but so may private negotiation with one or more suppliers, if that is identified as the approach most likely to produce best value for money. Procurers may use both approaches in a single procurement if they judge this approach to be warranted. Moreover, where a requirement is complex, or ill defined, procurers may adopt a 'staged-procurement' approach that may include a combination of requesting expressions of interest, statements of capability, proposals, bids and negotiation. While particular procurement methodologies are not mandated, public competitive processes are usually favoured because they tend to promote market efficiency through competition and through ensuring access to business opportunities for new suppliers. In addition, they can be more easily defended against claims of discrimination or lack of openness or fairness.

Improving market efficiency may result in benefit to a procurer in that market. In the Australian Government's case, this could include benefit to the procuring agency, or to the Government as a whole.[3]

Government procurement policy is principally directed to reducing fraud, theft or corruption (through ensuring processes are as open and transparent as possible) rather than the possibility that open, competitive processes facilitate supplier collusion. That said, Government buyers are required to have regard to any possibility of anti-competitive practice and to address that possibility appropriately.

2.2 Bid-rigging

Bid-rigging falls within the scope of the Trade Practices Act. In particular, section 45 prohibits agreements which involve market sharing or which restrict the supply of goods -where such agreements have the purpose or effect of substantially lessening competition in a market in which the businesses operate. Price agreements are deemed by section 45A to have the effect of substantially lessening competition.

On the basis of the cases that the ACCC has taken over the past five years, the incidence of bid-rigging would appear to be roughly equivalent between public procurement and private markets. Moreover, enterprises found to be engaging in bid-rigging often do so in both private and public sector markets.

The ACCC has successfully brought three bid-rigging cases in public procurement in the past two years; and eleven cases in the past five years. There have been four successful bid-rigging cases brought under the competitive conduct rules in private procurement in the past two years and ten cases in the past five years. The transparent and open nature of public procurement may increase the occurrence of supplier collusion being discovered, but it is difficult to draw any helpful conclusions from the few cases which have been concluded.

Bid-rigging (or collusive tendering) commonly takes one or more of the following forms:

- special Fees: prior to the closing of bids for a particular project, the industry association calls a meeting of all prospective tenderers where all tenderers agree to pay the industry association a "special fee". It is implicit this fee will be added by all tenderers to their tender price;

- unsuccessful Tenderer Fees: prior to the closing of bids for a particular project, all prospective tenderers would agree that the successful tenderer would pay a certain fee to all other unsuccessful tenderers to compensate them for the cost of submitting a bid. It was implicitly understood that this fee would be incorporated by all tenderers into their bid;

- cover Bidding: in the past it was common for State Governments to have a "preferred list" of tenderers, on the basis of previous good work. Enterprises held a significant advantage by being on this list because not all projects would go to open tender. In some instances, enterprises were not able to take on particular projects, due (for example) to already high work loads. In this situation, the enterprise not wishing to win the project would make a bid, based on a figure provided by a rival tenderer, which was deliberately inflated to ensure that they did not win the tender, but were not removed from the Government's 'preferred list' of tenderers.

2.3 Characteristics of the bidding process, and bidders/suppliers

It may be unwise to conclude that the causes of, and remedies for, bid-rigging arise from differences between public and private sector procurement. At the Australian Government level, the distinction between public and private-sector procurement is becoming increasingly blurred, as:

- each agency manages its own procurement function and may individually focus on achieving world-best commercial procurement practice[4]; and

- government services and programs become increasingly delivered by external, private providers under an Australian Government program.

On the other hand, it may be productive to consider bid-rigging in the context of certain characteristics of buying organisations and suppliers (such as business culture, size, shape, geographic location and the nature of operations) and the bidding process.

Some collusion may arise from suppliers seeking to achieve what they see as a "fair" return from the marketplace rather than trying to gain the maximum return possible. These suppliers may see collusion as necessary to survive in a homogenous market rather than a mechanism for maximising profits.

An important element in addressing potential collusion may be that suppliers and procurers have a consistent and common understanding about the levels of return that the marketplace can reasonably be expected to deliver. Market conditions may not enable procurers to develop the quality of relationship with their supply-base that supports this degree of understanding.[5] However, competent procurers with a suitably strategic understanding of the relevant markets should be able to implement strategies to reduce/manage the risk of supplier collusion.

3. Economic efficiency

Australia questions whether a sealed bid, high price auction minimises the "ability" to collude or actually minimises participants' "desire" to collude. The prevalence of collusion in 'market sectors characterised by homogenous products' may similarly not indicate an increased ability to collude, but a stronger desire to do so. This suggests a model where the primary factor is a "desire" to collude rather

than the "ability" to do so and the variable factor triggering collusive behaviour is the expectation of probable benefit/profit/return to potentially collusive parties.[6] Systemic actions to address suppliers' ability to collude may:

- be risk averse in nature, aiming to reduce collusive ability overall rather than specifically managing the risks associated with collusion; and

- fail to recognise that parties' ability to collude is not the underlying problem, in that the ability to collude is no danger unless the desire is present.

It may be productive to consider the nature of suppliers' desire to collude and its causes, in addition to, or rather than, their ability to do so.

It could be argued that, as markets become more competitive, collusive practices may become more widespread until certain break-points are reached. A practice regularly adopted in competitive markets that could be seen to manifest characteristics akin to collusion is where a group of suppliers agree to nominate a lead supplier – or a third party – to negotiate a contract to supply which will be used by the other supplier parties to the agreement. A study of the commonalties/differences between practices of this type, the processes and outcomes of "self-regulated" markets and of instances of collusion may identify significant characteristic patterns that could prove useful.

4. Alternative bidding strategies for public authorities

4.1 Experience with alternative bidding strategies

Australian Government procurers are required to consider all methods of procurement in selecting the method most appropriate in each circumstance.

4.2 Openness to foreign bidders

The Australian Government generally treats all suppliers equally, without regard to their country of origin.[7]

5. Bribery and the importance of the agreement on preventing bribery

In Australia bribery is a criminal offence under federal and State laws and is punishable by heavy fines and gaol sentences. This is in contrast to the non-criminal treatment of bid-rigging.

There appears to have been no relevant work undertaken in Australia which might suggest whether efforts to curb bribery flow over to curbing bid-rigging or vice versa. However, because the criminal law focuses on the individual, it is likely that fewer individuals might be prepared to engage in bribery than might be prepared to engage in bid-rigging where enterprises tend to be the primary focus of enforcement action.[8] The motivation of a supplier willing to engage in collusion may also be relevant to whether the supplier will also be willing to act corruptly.

- For example, a collusive supplier trying to maximise profit may be likely to consider corrupt actions to support that objective, whereas a supplier striving to achieve what they see as a

'fair' level of return in a procurement may consider co-operating with other suppliers to be a reasonable approach, but would never contemplate acting corruptly with a procurer because they would see this as ethically unacceptable or not achieving this different objective.

6. The Role of competition law and policy

6.1 Specific bid-rigging clauses

The Trade Practices Act does not specifically prohibit bid-rigging or collusive tendering. Rather, as already mentioned, this type of conduct is caught by a more general prohibition against anticompetitive agreements that have the effect, or likely effect, of substantially lessening competition in a given market. Further, if bid-rigging or collusive tendering has an element of price fixing, it may be caught by the specific prohibition under the Trade Practices Act dealing with price agreements.

6.2 Mechanisms by competition authorities to reduce the risk of bid-rigging

In 1993 the Government of the State of New South Wales conducted a Royal Commission of Inquiry into Productivity in the Building Industry which revealed extensive collusive tendering and other anticompetitive practices. Following the release of the Inquiry's report, the ACCC participated in a co-ordinated approach by the Australian Government to implement a strategy for dealing with collusive tendering on Government projects. The strategy included determination of the eligibility of tenderers to tender for, and be awarded, contracts.[9]

The ACCC also maintains a strong program of education about the Trade Practices Act and of the types of conduct prohibited under the Act. The ACCC uses speeches, media releases, as well as industry and conduct guidelines, to educate industry and consumers about the Trade Practices Act and to promote compliance. These can be, and often are, targeted at industries where particular problems or patterns of anticompetitive behaviour have been identified.

6.3 Proof of injury

In order to prove a contravention of the relevant provision of the Trade Practices Act in respect of bid-rigging or collusive tendering, it is necessary to show that the conduct has the purpose, effect, or likely effect, of substantially lessening competition in a particular market. In general terms, where it is found that a client has been the victim of inflated tender prices, and these prices are inflated by agreement, it is likely that a substantial lessening of competition will be proven.

A further disincentive for enterprises to be involved in this type of behaviour is that customers damaged by such conduct can take 'coat-tail' actions for damages once the conduct has been proven in the court. Under a 'coat-tail' action, a claimant need only establish the degree of damage suffered as a result of the conduct, the case does not need to be proven again for each claim for damages.[10]

6.4 Calculation of fines/damages

Fines and damages can only be imposed on enterprises in Australia by the courts. The amounts imposed are at the discretion of the courts.[11] The courts will consider the seriousness of the offence,

generally taking into account: the frequency and duration of the conduct, the damage caused by the conduct, the parties affected by the conduct, any prior contraventions by the enterprise involved, and whether the enterprise involved had an effective trade practices compliance program in place when the conduct occurred, etc.

6.5 Usefulness of compliance programs

An Australian court will generally take into account whether an enterprise had a trade practices compliance program in place when it sets the amount of penalty for the enterprise involved in a contravention. The ACCC will also take this into account when preparing a joint submission to the court on the level of penalty. This will obviously depend on whether the enterprise takes their compliance program seriously, and perhaps more importantly, why the compliance program failed to prevent or detect the anticompetitive conduct in the first place.

Where the ACCC detects cases of bid-rigging or collusion and a settlement is achieved, either through the courts or administratively, the ACCC will require that the enterprise involved institute a trade practices compliance program/s to help ensure that the conduct does not recur.

6.6 Improved enforcement

"Enforcement" is a collection of policies and ideas relating to education, compliance and punishment for wrongdoers. Achieving the right balance of these policies with a limited budget is a question/problem faced by most enforcement agencies. Co-operation and discussion between agencies in this area is one method of how world's best practice can be achieved and promoted and efficiencies can be gained by the implementation of new enforcement strategies.

The ACCC adopts a clear and deliberate strategy in its enforcement of the Trade Practices Act with well defined and publicised priorities and methods of achieving outcomes through a variety of flexible mechanisms.

6.7 Use of high and publicised penalties

Cases where large penalties have been imposed are generally well publicised and act as a significant deterrent to other enterprises contemplating similar anticompetitive behaviour. The ACCC will publicise strongly any outcomes where high penalties have been imposed as part of its enforcement and compliance strategy.

NOTES

1. For example, the Independent Commission Against Corruption in the State of New South Wales has handled a number of procurement cases, and regularly publishes case studies based on these cases.

2. The Australian Government aims to achieve 'best value for money' outcomes from its procurement, rather than 'lowest price'. Purchase price alone is not always a good indicator of overall value.

3. In certain circumstances, there is a tension between a procurer's needs to achieve agency benefits and to achieve whole-of-government benefits.

4. An example is the 1997 Government decision that Government Business Enterprises (GBEs) not be required to implement the Government's general procurement policies, unless specifically directed to do so by stakeholder Ministers. In deciding this, the Government indicated its intention that GBEs would not be subject to Government intervention in matters that, in the private sector, are the business of management. Procurement is clearly a matter of this type.

5. Particularly so in public sector procurement, where propriety concerns may encourage buyers to maintain an arm's length relationship with their supply base.

6. This suggestion fits comfortably with other situations outlined in the Guide for Country Submissions. For example, collusion may also occur in markets characterised by high-value single events (mentioned at I.3), because: bidders may desire a higher level of profit to provide a return on invested capital, where there is no assurance of ongoing work beyond the immediate event to provide that return; and procurers may be unaware of (or not concerned with) this factor, and may strive to minimise the potential profits of bidders to a level consistent with those realised in other more repetitive marketplaces.

7. A detailed explanation of Australia's Government procurement regime can be accessed via the Government Procurement Website on the APEC Homepage, at http://www.apec.org

8. The principal players involved in a contravention by an enterprise are now routinely subject to Court proceedings, although maximum penalties for natural persons are only 1/20th of those applying to a corporate enterprise.

9. This process involved provision of statutory declarations, repayments of monies to the Australian Government and a requirement that tenderers co-operate with the ACCC. All tenderers for government projects must now lodge a statutory declaration that they have not participated in any collusive conduct in the preparation of their bid.

10. For example, the ACCC recently concluded an action against several concrete enterprises who were engaging in price fixing and bid-rigging in the market for pre-mixed concrete. The Federal Court imposed penalties of over AUD$20 million and several 'coat-tail' actions for damages have been taken by customers of the concrete enterprises who were overcharged on various construction projects.

11. While it is becoming more common for the ACCC and the parties to an offence to make a joint submission to the court regarding the level of fines, the final decision on whether any penalty is imposed, and the amount of that penalty, rests with the court.

DENMARK

1. Brief background information

Before Denmark joined the EEC/EU (in 1973), there was only limited "genuine" national legislation on public procurement (mainly in the construction and works area).

Written legal rules on procurement consist mainly of the procurement directives adopted by the European Commission which have been incorporated by reference into Danish law, i.e. the directives as such have been made part of Danish legislation without having been re-written as a Danish law. This, in turn, also means, of course, that a number of basic principles in procurement legislation are shared with some non-EC OECD countries (those adhering to the WTO Government Procurement Agreement).

This means that there are relatively few legal obligations in connection with procurement below the thresholds of the EC directives. Such obligations only exist in the construction and works field (according to the above-mentioned legislation, the Competitive Tendering Act from 1966) and for government (state) institutions which, according to a circular issued in 1994 by the Finance Ministry, must regularly undertake a "market testing" of their in-house performance of services. An obligation to contract out such tasks only exists where the market test shows that, evaluated against a number of criteria, the benefits of an ex-house performance outweigh the benefits of a continued in-house performance.

2. Questions for countries

2.1 Procurement

It follows from the above that the "philosophy" behind Danish procurement policy to a wide extent is identical with the policy in that field pursued by the European Union as a whole. The reasons listed in the secretariat note, therefore, form part of Danish procurement policy.

As examples of factors playing a role in connection with procurement policy other than those mentioned in the secretariat note must be mentioned some factors of a more non-economic nature:

- the ideological/political question of whether a given in-house-performed task should be contracted out or not;

- the often strong political desire/pressure to pursue environmental objectives through public procurement ("the public sector must take the lead, also when it procures, to secure that environmental considerations are taken into account, even at the expense of price considerations").

2.1.1 Bid-rigging clauses and cases

It should, however, be added that specific measures against oligopolistic behaviour in bidding are not really available under the procurement rules. Such cases have to be dealt with by using the relevant instruments available under competition law.

It should also be added that there is no accurate data of the number of bid-rigging cases in public procurement in the last two years of last five years.

3. Alternative bidding strategies for public authorities

The Danish experience with various criteria for the selection of tenderers and the award of public contracts is of course very much influenced by the fact that the EC directives have been incorporated as such into Danish law. This means, for example, that recourse to negotiation between a public authority and a bidder is only allowed in exceptional cases (with the exception of procurement covered by the so-called utilities directive (98/38/EEC) which allows for negotiation between a contracting entity and a bidder on a wider basis), and that, otherwise, tendering procedures could be regarded as relatively “rigid”.

This also means that adequate instruments to reduce collusion are not so much available under procurement law, but rather under competition law.

The Danish procurement market is open to bidders from foreign countries on the conditions laid down in the EC directives and the Government Procurement Agreement.

4. Bribery and the importance of the agreement on preventing bribery

In Denmark there has been very few incidents of claimed bribery which has been mentioned by the press. The problem does not seem to occur frequently and the Danish legislation does not include particular instruments to control bribery.

GERMANY

1. Procurement

1.1 Are these measures consistent with your procurement philosophy; what other motivations would you include?

The goals listed are largely consistent with German procurement philosophy. The normal standard to be applied in German procurement statutes, however, is the "most economical bid" (i.e. best value for money). The lowest price is the decisive criteria only in the case of homogeneous goods. Criteria not related to performance are not permitted to be used.

1.2 Is there a specific bid-rigging clause in anti-trust policy?

See the response to the first question in Section V.

1.2.1 How many bid-rigging cases have there been in public procurement in the last two years, last five years?

No exact figures are available, as the percentage of undetected cases would seem to be very high indeed.

1.2.2 Is bid-rigging significantly more prevalent in public procurement than in private markets?

In view of the high percentage of undetected cases, no figures can be supplied.

1.3 Are there characteristics of the bidding process (and bidders/suppliers) that increase the danger of bid-rigging in public procurement?

The listed characteristics, namely,

- uniqueness of the goods to be supplied or work to be performed;
- small number of bidders/suppliers;

do not apply to the overwhelming majority of tenders. As a rule, the state uses such goods, construction, and services as are normally traded on the market and offered by numerous suppliers.

The characteristics described may be found, if at all, on special sub-markets such as in the defence and construction sectors. Generalisations about unique features of the procurement markets

relative to other markets, that would suggest a particular vulnerability of public procurement to bid-rigging, are therefore not justified.

Just as in the case of private procurement, the smaller the number of suppliers invited to submit bids for government contracts, the larger the danger of bid-rigging. For this reason, German public procurement law fundamentally requires orders to be placed through open tendering since this guarantees the greatest possible market penetration. And the larger the number of suppliers, the more difficult are bid-rigging and collusion among them.

The incentive to oppose excessive prices tends to decline when it is possible to pass on one's own cost to third parties through unilateral price rises. This is particularly the case with monopolists. As a case in point, power cable prices had been about twice the amount of the competitive price for many decades in Germany. Since the buyers of these cables, the energy supply companies or the municipal undertakings, were able to unilaterally raise energy prices by virtue of their regional/local monopolies, they did not develop the necessary cost-consciousness. Otherwise they would have realised that for decades power cable prices in Germany significantly exceeded those in other countries. Interestingly, it was the industry itself rather than the power supply companies or the municipal undertakings who blew the whistle on the cartel agreements operated by the power cable manufacturers. Similarly there is no strong incentive for those awarding the contracts to control costs strictly when they have public rather than self-generated funds to spend without being held strictly accountable. Cost-conscious conduct is often less prevalent in public-sector procurement than in private-sector procurement. For no one in the public authority inviting tenders will be personally punished in the form of salary cuts if contracts are awarded at excessive prices. This applies not only to the individual officer but in particular to the organisation as a whole, if it can practically recover the higher cost from consumers by raising prices or charges.

2. Economic efficiency

2.1 What are the characteristics of the markets where bid-rigging has been found?

As already mentioned, the danger of collusion increases with the narrowness of the supplier markets. This is the situation in Germany, in particular in the construction sector since here, with the exception of a limited number of construction firms active in more than only one region, we largely find small and medium sized construction companies that operate only on narrowly defined regional markets owing to their limited radius of action.

3. Alternative bidding strategies for public authorities

3.1 What experience have you had with the above instruments?

a) Using randomised weighting criteria

Such a procedure does not conform either to national or EC procurement law, which requires prior publication of the award criteria listed by priority, above all to prevent corruption.

b) Opening bidding to more suppliers

As mentioned under 1.3, the best way to prevent collusion is to include as many competitors as possible in tenders. A suitable way of preserving a small and midsize competitive structure on the procurement markets is to divide larger contracts into lots.

c) Involving competition authorities in the bidding process

At all times, competition authorities are able to initiate anti-trust proceedings on suspicion of bid-rigging in the awarding of contracts.

d) Negotiations versus bidding

Reference is made to the remarks on the primacy of the open tendering procedure under *b)*. In the framework of the open tendering procedure, it is a matter of principle that negotiations cannot be conducted with bidders. This helps prevent corruption and protects the individual bidders from the exploitation of the government's market leverage.

e) Using electronic public procurement processes

Transparency on the procurement markets may be increased through the use of information and communication technologies. This increases the number of bidders in the tender and thus helps prevent bid-rigging.

3.2 Are there other instruments to reduce collusion?

a) Instruments provided for by competition law

Please refer to the remarks under V.

b) National procedures for the review of awarding procedures

Bidders who are disadvantaged because of bid-rigging by competitors also have the possibility of requesting a review of the awarding procedure by the competent review body. Independent of the review, bidders may claim damages before the responsible court. The federal government has introduced a bill in the Bundestag to alter the legal foundations of public procurement. The reform will give bidders, among other things, the possibility of having courts review awarding procedures. This will considerably strengthen the legal position of bidders. The possibility of review will help reduce the danger of bid-rigging.

c) Excluding bidders from tenders

National procurement regulations permit the exclusion of bidders from participation in public tenders if their reliability is questioned by factors such as proven participation in price collusion.

3.3 How open are the procurement markets in your country?

The national tender procedures are open to all bidders on an equal basis, whether they are from EU Member States or from EU third countries. This is the result of the anti-discrimination provisions in the national procurement regulations.

4. Bribery and the importance of the agreement on preventing bribery

4.1 Parallels between bribery and bid-rigging

Bid-rigging is facilitated if the awarding authorities are open to corruption. In some cases bribery is even a prerequisite for the successful implementation of bid-rigging agreements. Monitoring for and curbing bribery are therefore an important, if not the most important, means of preventing bid-rigging.

At the end of 1997, bidding fraud, which includes both bid-rigging and bribery, was defined in the German penal code as a criminal offence for the first time.

In addition, the federal government intends to set up a register listing companies that have been found guilty of serious violations such as bribery and bidding fraud. Information is to be provided to the tender authorities. The fundamental exclusion of these companies is now being advocated.

5. The Role of competition law and policy

5.1 Are there specific anti-bid-rigging clauses?

Within competition law, there are no special prohibitions against bid-rigging. Bid-rigging agreements are deemed illegal cartels within the meaning of Section 1 of the German Act against Restraints of Competition (ARC) and are punishable by fine. Fines can be imposed not only on the person who has acted and as such is actively responsible and possibly on the executive that violated his supervisory duty and is passively responsible, but also on the firm concerned as the party deriving the actual economic benefit. Exclusive responsibility for imposing the fine on an enterprise rests with the competition authorities. On August 20, 1997 a specific criminal law provision against "agreements in restraint of competition in the context of invitations to tender," Section 298 of the German Criminal Code (StGB), came into effect, (which also covers private-sector procurement).

5.2 How can competition authorities reduce the risk of bid-rigging?

Competition authorities reduce the risk of bid-rigging by the possibility of initiating anti-trust proceedings and of imposing sanctions: administrative fines, prohibitions. Moreover, damages may be awarded under civil law and penalties imposed under the German Penal Code. In addition, the awarding authorities themselves can achieve a deterrent effect, if (for a limited period) they exclude from future award procedures firms that participated in cartel agreements in the past.

5.3 Is proof of injury required, and also, how is it proven?

Concrete damage must not be proven. Rather, it is sufficient that the alleged collusion is suitable for influencing the level of competition. In looking into the question of whether collusion has occurred, the standards (*in dubio pro reo*) of criminal and administrative offence proceedings apply. The experience of the Bundeskartellamt has shown that in most cases bid-rigging can only be proven by conducting unannounced (!) searches of the suspected firms' premises that have been prepared in the strictest confidence. Every effort must be made to ensure that all participants and other parties who know about the agreement (e.g. corrupt staff of the awarding authorities) are searched simultaneously in a surprise raid. The presence of local police officers would be advisable.

5.4 How can damages/fines be calculated?

Whether or not the anti-trust authorities impose an administrative fine in the case of a violation of the Act against Restraints of Competition lies within their scope of legal discretion. The framework for fines allows sums of up to one million DM and may even exceed that limit and amount to three times the profit earned from the violation.

Under German criminal and administrative offence law, the personal fines for offenders depend not only on the seriousness of the offence, but also on the offender's economic situation. Special attention should be given to imposing a separate fine on the firm concerned. This fine must clearly exceed the gain the firm has derived from the cartel agreement. If that was the case, such agreements - considering the low risk of detection - would be economically profitable and would be operated deliberately also in future. In calculating the corporate fine it has to be borne in mind that the firm's profit situation must not be used, at least not as the primary basis for calculation. Apart from the fact that profit, unlike turnover, is a quantity easy to manipulate, the benefits a company derives from cartel agreements (e.g., higher turnover based solely on cartel-based price increases; cementing of a market position; deterrence to innovative, non-cartel-member competitors, etc.) cannot be easily determined on the basis of profits. Therefore, the turnover achieved by the firm on the cartelised products has to serve as a calculation basis.

5.5 Can compliance programs (e.g., Section BC2.5 US Sentencing Guidelines) where organisations self detect bid-rigging be of use?

Self detection of bid-rigging will always be of use. As the contents of the compliance program are unknown, it is impossible to comment.

5.6 Do high and publicised penalties help?

Yes.

5.7 What other roles for competition authorities are relevant?

To some extent, "tender review boards" have been set up as legal instruments within the competition authorities to examine public procurement decisions. In addition, the role of awarding authorities in the prosecution of bid-rigging agreements should not be underrated. If there are signs of bribery in this area, this should be followed up vigorously. It is also important that disadvantaged non-cartel-member competitors be free to go to court. With the help of the courts, those outsiders should be

able to have a corrective influence on the awarding procedure. If this is impossible on procedural grounds (risk of delay) then they should at least be able to claim damages.

HUNGARY

1. Introduction

Public procurements rules are covered by Act No XL on Public Procurement which entered into force on 1st November 1995. Before that from 1991 a law-decree with general scope had regulated the bidding process without distinguishing between public and private procurement. The practice of bidding became widespread recently in the building industry and in the field of execution of investments and helped market entry of private enterprises from outside the state construction industry and thereby assisted the establishment of competition. The law-decree was *lex imperfecta*, i.e., it did not contain its own sanctioning system, therefore infringement of the rules was not followed by legal consequences. Later the Competition Act, which entered into force in 1991 laid down that it was illegal to infringe the fairness of tenders. The competition law referred the establishment and sanctioning of violations to the competence of courts. Because of the length of court proceedings only a few proceedings have been started. This problem was solved -- *inter alia* -- by the Public Procurement Act, which established the institutional background of a quick legal remedy, the Procurement Arbitration Commission. The Arbitration Commission investigates violations of the Public Procurement Act. Complaints are typically lodged by bidders. Its decisions can be challenged before the court.

2. Answers to the CLP mini-roundtable questions

2.1 (Public) Procurement

2.1.1 Aims of public procurement regulation are summed up in the Preamble of the Act on Public Procurement; these are as follows:

- to rationalise expenditures of state budget;
- to ensure transparency and public control of public means;
- to ensure fairness of competition.

A further aim, the impact of which is contrary to the above and which is typical of transitional countries is:

- the promotion of the internal production of goods and encouraging employment.

According to the current regulation (an aim enforceable for a transitional period of a maximum ten years) a price advantage of a maximum of ten percent can be granted for domestic products. (According to the regulators this rule will exist until 2004.) Experience gained so far show that this advantage is not enforceable in practice. On the one hand it has budgetary-financial reasons, on the other, in the case of procurement of complex mass-produced goods non-price type considerations prevail (most advantageous offer).

2.1.2 There is no special regulation for the bidding process in the private sector.

The Competition Act contains a separate provision for the prohibition of bid-rigging. (Act LVII of 1996 on the Prohibition of Unfair an Restrictive Market Practices.)

It is included in Article 11 of the Competition Act which prohibits anticompetitive agreements or concerted practices between undertakings:

"(e) the collusion of competitors concerning biddings;"

There is, however, no antitrust experience in detection of bid-rigging on tenders; the Office of Economic Competition has not investigated such a case yet, it has not received any complaints concerning bid-rigging. A reason for this may be that contractors do not recognise this phenomenon. It may also be the case that the Hungarian internal public procurement market is too narrow compared to the relatively active competition. Since there have not been any complaints against bid-rigging, or market division - not even from the private sector - it may be concluded that either the signs indicating prohibited cartel agreements are generally not recognised, or because of more informal procurement methods bid-riggings does not occur in the private sector.

2.1.3 Although there have been no practical experiences yet, the relationship between supply and demand allows the prediction of the behaviour of market players.

In a public procurement procedure there is a higher risk of a cartel agreement, if

- there is a limited number of suppliers on the relevant geographic market;
- suppliers are quite sure that they may deal with similar large-volume orders in the future. (This is evidently necessary for the supplier hoping for a future win to be able to waive a seemingly guaranteed order occasionally. The system of round-winning can only operate this way.)

In principle, there is a higher likelihood of a concerted practice where price is the only factor relevant for the award. The most probable field would be the purchase of goods, however, foreign legal cases show that bid-rigging prevails in the sphere of construction industry, particularly on tenders for road and bridge construction.

3. Economic efficiency

Due to the lack of experience, characteristics of the market where bid-rigging would have been found in Hungary cannot be presented.

4. Alternative bidding strategies for public authorities

Under the heading “evaluation of bids” the Public Procurement Act provides that the contractor is obliged to evaluate the bids on the basis of criteria set out in the tender invitation. The Act does not

specify the weighting of each criterion, or the method of assessment, it leaves it to the contractor's discretion.

The Act takes the open system of bidding as a general rule. There are strict, restrictive rules concerning the negotiating and bidding process. In spite of that records show that the proportion of negotiating is larger than desirable (approximately 20 percent).

The Act does not authorise the competition authority to take part in the bidding process. The members of the Public Procurement Council may participate in the opening of bids. The Public Procurement Council is a 21-member body representing the interests of buyers, suppliers and the public. One member of the body is delegated from the Office of Economic Competition.

The Public Procurement Council examines conditions under which electronic public procurement processes may be introduced into the Hungarian public procurement system.

The Public Procurement Council publishes the Public Procurement Bulletin. Tender invitations and results of tenders, details regarding bidders and winners are published in the Bulletin.

Since the Public Procurement Act has been in force for two and a half years, quite a large data base has been gathered about the bidders and winners by now. A deeper analysis than just a simple statistical data service can provide sufficient information about the practice of bid-rigging on a sub-market. Following this route one can keep close watch on particular bids and suspicious practices, collusions may be brought to light, on the basis of which continuous competition supervision may be provided.

5. Bribery and the importance of the agreement on preventing bribery

Supervising authorities have gained more experience in disclosure of bribery. The State Audit Office and the Government Control Office make systematic investigations on the field of execution of public procurements, however, it cannot be stated at all that these subsequent supervisions have revealed briberies. Most of the briberies revealed so far have been disclosed during investigations started upon complaints. However, there is no information whether proof of collusion on prices has been found or not.

6. The role of competition law and policy

As explained earlier collusion of competitors over bidding is prohibited. The regulatory side is thus established in this sense. Because the Public Procurement Act and the new Competition Act have entered into force recently, there have been no antitrust cases so far. Detection of collusion needs more time since their existence can only be revealed in view of their recurring nature.

The Competition Office may provide assistance mainly through calling the attention of contractors to certain signs referring to collusion and division of the market. This may allow contractors to recognise these phenomena and complain to the competition authority. After all it is a teaching activity and its instruments are lectures held on professional forums, publications, issues in the topic and thematical explanations in the education material of public procurement. The Competition Office bears, of course, great responsibility in recognising and keeping close watch on the most exposed markets and in starting proceedings itself if it discloses signs of collusion. Systematic processing of the data base will be adding useful and exact information to this topic (see point 4).

It is expedient that the Competition Office builds up a close relationship with the supervisory authorities and with bodies providing legal remedy against infringement of public procurement rules.

ITALY

Pursuant to Section 24 of Law no. 287 of October 10, 1990 (the Competition Act), the Italian Antitrust Authority submitted in 1992 a report to the Prime Minister regarding action to be taken in order to adapt Italian legislation on public procurement to the principles of competition. In the report, the Authority laid down a number of criteria for reforming the system, mainly designed to rationalise the existing legislative framework, to improve the effectiveness of controls and to guarantee the sound and transparent management of public funds. In particular, the Authority stressed the importance of ensuring fair competition between companies in public procurement tenders, so that contracts are awarded following impartial and transparent procedures.

In 1994, Parliament enacted Law no. 109/94 concerning public works procurement, successively modified by Law no. 216/95. The new legislation is based on the same principles that inspired the Antitrust Authority. Public supplies procurement is regulated by Legislative Decree no. 358/92 that has implemented EC Directives 77/62/CEE, 80/767/CEE and 88/295/CEE. The legal framework has been completed by Legislative Decree no. 157/95, that has implemented EC Directive 92/50/CEE relating to procurement of service contracts and Legislative Decree no. 158/95, that has implemented EC Directives 90/531/CEE and 93/38/CEE on procurement of supplies, works and service contracts by the public utility sectors.

Besides exercising its consultative powers in order to guarantee that national legislation concerning public procurement develops in compliance with the principles of fairness and transparency promoted at the Community level, the Authority has prohibited anti-competitive behaviour that resulted in bid-rigging.

1. What are the motivations that inspire the public procurement policies in your country?

The most important objectives which may be identified in the new legislation concerning public procurement are the following:

- the rational and efficient allocation of public funds through the choice of the best offer presented;
- fairness, non-discrimination and transparency in procurement procedures;
- to guard against oligopolistic co-ordination in bidding.

2. Is there a specific bid-rigging clause in antitrust policy?

In Law no. 287 of October 10th 1990, there is no specific bid-rigging clause. However, bid-rigging can be caught by section 2(2), of the Competition Act, that prohibits agreements and/or concerted practices between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it. Bid-rigging can, in

fact, result either in price fixing, in limiting or restricting market access and/or in market sharing, respectively prohibited by section 2(2), letters *a*), *b*) and *c*), of the Law no. 287/90.

Moreover, it has to be stressed that bid-rigging is also a criminal offence (sections 353-354 of Italian Penal Code).

2.2 How many bid-rigging cases have there been in public procurement in the last two years and in the last five years?

So far, the Antitrust Authority has decided upon three cases of bid-rigging in the public procurement sector.

The first decision, taken in October 1996, dealt with bid-rigging among consortia and companies providing school bus services in the municipality of Rome. The results of the investigation showed that the parties firstly did not submit tenders for the school transport service and subsequently did not bid against each other when the contracts were defined under private negotiations. The Authority concluded that the only way of explaining the absence of any competitive bids during private negotiations was that each of the bidders knew the intentions of the others in advance.

In December 1996 the Authority completed an investigation into the four main security guard companies operating in the province of Cagliari, having an aggregate market share of over 94 percent, to ascertain possible violations of section 2(2) of the Act.

The evidence that emerged showed that none of these companies had exerted any competitive pressure in tendering for any of the contracts awarded in the period 1990-1995. In fact, the stability over time of the leading security guard companies market shares could be explained only by the existence of a collusive system of customer allocation. Moreover, comparing the invitations to tender for contracts of similar value, the Authority found that for those contracts awarded to other companies, each company had submitted higher bids than those it usually charged. Lastly, it emerged that the two leading companies, when competing against smaller companies, which were not members of the cartel, pursued an aggressive pricing policy. The Authority pointed out that the price-setting conduct of the four leading companies was clearly the result of collusive behaviour.

Finally, in September the Authority completed an investigation into an alleged agreement among the five main insurance companies in order to co-ordinate their behaviour relating to tenders, called by the municipality of Milan, for the provision of insurance services in the years 1995-98. More specifically, the companies had agreed not to compete individually at the tenders but to divide the risk among themselves through a co-insurance offer. The companies would have been able to participate individually at the tenders. Therefore, the Authority considered the agreement restrictive of competition.

At the moment, two alleged bid-rigging cases are under examination: the first one concerns an alleged agreement concluded by a consortium among 170 companies in order to divide the markets of public procurement of service contracts; the second deals with an alleged agreement concluded between two of the major insurance companies providing insurances to local public authorities in the municipality of Bologna.

2.3 Is bid-rigging significantly more prevalent in public procurement that in private markets?

As far as the experience of the Antitrust Authority shows, bid-rigging is significantly more prevalent in public procurement than in private markets. In fact, so far only one bid-rigging case has been found in the private purchasing sector. In particular, in December 1996 the Antitrust Authority completed an investigation into the main associations of advertising, public relation and communication companies, to ascertain whether their members concluded agreements designed to co-ordinate their prices and tenders. More specifically, the Antitrust Authority found evidence of rules of conduct regarding tendering in violation of competition rules (an obligation not to participate to tenders with more than four bidders and where the participants were not informed on the identity of the others), with which the member companies were required to comply.

3. How can public authorities reduce the risk of bid-rigging/collusion?

In several occasions, the Antitrust Authority pointed out that what matters, in order to reduce the risk of collusive practices, are the procedures that the public contractors follow when calling for a tender. In this respect, the Authority has stressed the importance of a fair pre-setting of calls for bids. In particular, the calls do not have to contain unjustified restrictions that, having no relation with the level of reliability of the companies concerned, automatically exclude on a discriminatory basis some companies (i.e. the condition of realising a certain amount of turnover out of proportion to the value of the bid).

4. To what extent efforts to control bribery facilitated bid-rigging, and vice-versa? What experience have you had in developing instruments which decrease the incidence of both bribery and bid-rigging?

The Antitrust Authority, even though it hasn't any competence in criminal suits, can nevertheless play a preventive function when the crime involves anticompetitive behaviour. In this respect, bribery can also be opposed by the detection of bid-rigging practices. In this sense the Authority has pointed out in several occasions the importance of introducing fair, transparent and non discriminatory procedures in public procurement in order to reduce the risk of bribery.

5. Can compliance programs, where organisations self detect bid-rigging, be of use in reducing the risk of bid-rigging?

Unlike the Community experience, there does not exist in the Italian system a specific compliance program. However, self-detection and effective co-operation by the enterprises concerned in the proceedings has been considered in the context of setting the amount of the sanction, as attenuating circumstances. So far, no self detection case has been experienced in bid-rigging.

6. Do high and publicised penalties help in reducing the risk of bid-rigging?

The Authority firmly believes in the deterrent effect of sanctions: high and publicised sanctions should, in fact, increase the incentive to denounce infringements of the competition rules and to co-operate when a proceeding has already been opened.

In the bid-rigging cases analysed by the Authority, severe sanctions were imposed, in consideration of the gravity and the duration of the restrictions on competition. More specifically, in the school bus services case, they ranged from two percent to one percent of the turnover of the companies concerned, in proportion to the role of each company in the agreement. In the security guard services case, fines ranged from 1.5 percent to one percent of turnover of the companies concerned. In the insurance case, the leader of the agreement was fined three percent of the value of the contract.

7. Is proof of injury required, and also, how is it proven?

The Competition Act does not require the proof of the injury in order to consider an agreement restrictive of competition.

JAPAN

1. Introduction

Bidding systems have been generally adopted in Japan to promote fair and free competition in the procurement market and to stimulate creative innovations within companies.[1]

Bids organised by national and local government, public corporations and others purport to determine the contract winner and the price through competitive bidding amongst participants. If bidders predetermine the contract winner or a minimum bidding price, this constitutes what is known as bid-rigging, which has the effect of restricting competition in the transactions of goods or services ordered through the bidding procedure. Such conduct undermines the bidding system and violates the provisions of the Antimonopoly Act (hereafter referred to as the AMA), which prohibits any act restricting competition.

2. Prohibited conduct

The prior discussion and predetermination of selling prices, production volumes, and other matters regarding goods and services are prohibited under the AMA as "unreasonable restraints of trade."[2] Unreasonable restraint of trade generally means a cartel. Cartels manipulate prices, volumes, and other conditions based on the intentions of the cartel participants, raising prices and having an adverse effect on the interests of consumers and purchasers. Cartels also stifle business activities and produce other negative effects such as prolonged inefficiency within companies. Bid-rigging is a typical form of cartel, and one of the most flagrant violations of the AMA.[3]

Bid-rigging consists of collusion between firms, which violates Section 3 of the AMA, or collusion effected by trade associations, which violates Section 8(1) (I) of the AMA.

3. Measures against violations

a. The table below shows the total number of cases in which legal measures were taken by the Japan Fair Trade Commission (hereafter referred to as the JFTC) in the last five fiscal years, including those involving bid-rigging. The JFTC makes determined efforts to expose bid-rigging and take the appropriate measures against such conduct.

Fiscal Year	1993	1994	1995	1996	1997
Number of cases in which legal measures were taken	31	24	31	21	31
(Number of bid-rigging cases)	(14)	(19)	(20)	(5)	(16)

Of the 16 bid-rigging cases which the JFTC acted upon in FY 1997, 12 involved civil engineering, construction, road paving and other related contracts awarded by government agencies, and three involved the procurement of goods by government agencies. The remaining 1 case related to procurement within the private sector. More than 360 firms were involved in these cases, some examples of which are listed below:

1. 12 construction companies predetermined the winners of construction contracts awarded by the Tokyo Metropolitan Expressway Public Corporation through rigged competitive bidding amongst certain designated participants (JFTC decision issued on August 6, 1997);

2. a total of 71 civil engineering companies predetermined the contract winners and rigged bids so that these companies would receive civil engineering contracts awarded by the Numata Civil Engineering Office of Gunma Prefecture through competitive bidding procedures. (JFTC decision issued on January 23, 1998);

3. a construction association representing construction companies operating in the geographical area covered by the Nagoya Civil Engineering Office of Aichi Prefecture predetermined the winners of civil engineering contracts awarded by this Office through competitive bidding procedures by designated participants. (JFTC decision issued on April 23, 1998);

4. 62 road paving companies operating in the geographical area of central and suburban Nagoya predetermined the winners of road paving contracts awarded by the Civil Engineering Division of Nagoya City through competitive bidding procedures by designated participants. (JFTC decision issued on April 23, 1998).

b. Bid-rigging has been dealt with by the JFTC through administrative procedures known as "decisions" which generally contain the following orders:

1. abrogation of the bid-rigging agreements;

2. nullification of the methods used to ensure compliance with agreements, and discontinuation of meetings;

3. publication of the revoked bid-rigging agreement;

4. prohibition of the recurrence of such conduct;

5. submission of reports to the JFTC concerning measures taken in accordance with the above four orders.

c. In addition to the above corrective orders, the JFTC also imposes surcharges on companies which engage in bid-rigging, price cartels, and other anti-competitive acts relating to prices. This is an administrative charge which cartel participants must pay to the National Treasury. Amounts are determined by the JFTC according to the formula stipulated in the AMA. In principle, the amount of the surcharge is six percent of the sales value of the goods or services of the cartel which was formed (three percent for small and medium-sized companies). Actual damages do not need to be calculated. Surcharge payment orders (including pending orders) totalling approximately 8.3 billion Yens were issued in 1997, including 2.5 billion Yens in orders for bid-rigging cases.

d. In June 1990, the JFTC adopted a more active policy for the imposition of criminal penalties against serious violations likely to have a widespread influence on society, with a view to reinforcing the prevention of bid-rigging and other violations of the AMA. The JFTC has made 4 criminal accusations since then, including two bid-rigging cases.

e. Bid-rigging is also potentially a violation under article 96-3 of the Criminal Code (Act No. 45 of 1907). Each year there have been several cases where the police and the public prosecutors' office investigate and prosecute the companies concerned. However, article 96-3 can only be applied to competitive bidding or designated bidding on public-funded projects.

3. Guidelines on bid-rigging

In addition to strict measures taken against violations that have already occurred, preventive measures to avoid such violations are also important. In July 1994 the JFTC devised and published the "Guidelines on Bid-rigging".[4]

In view of the fact that firms and trade associations frequently violate the AMA through bid-rigging, these Guidelines include specific descriptions of various violation cases, seeking to improve understanding as to what kind of activities may conflict with the AMA, to prevent bid-rigging and to promote lawful activities on the part of firms and trade associations in general.

These Guidelines focus on bids held in accordance with laws and regulations of local and national government and a wide range of other similar entities such as national and local public corporations, foreign-government agencies and international organisations.

Furthermore, the range of bidding activities covered by the Guidelines extends not only to those associated with public construction contracts, but to all bidding activities, including public projects and the procurement of goods and services.

4. Measures to prevent bid-rigging

From the viewpoint of preventing violations of the AMA, the JFTC makes continuous efforts to disseminate the Bid-rigging Guidelines to firms and trade associations participating in public bidding. A total of 60 explanatory sessions were conducted throughout Japan in FY 1997.

In addition, procurement bodies have designated liaison officers to provide information to the JFTC concerning potential violations of the AMA. The JFTC organises an annual conference for liaison officers on the issue of bid-rigging, set up in 1993 to build a closer relationship between liaison officers and JFTC officials. This conference outlines the points that procurement officers should take into consideration for the prevention of bid- rigging. Liaison officers are requested to provide the JFTC with any information they have found concerning suspected acts of bid-rigging.

Since FY 1994 the JFTC has also been running annual training programs for procurement officers of prefectures, municipalities, towns and villages in approximately 30 locations throughout Japan, and since FY 1995 it has also been running training programs for procurement officers of special public corporations.

These sessions include clarification of public bidding activities that may conflict with the AMA, and explanation of the points that procurement officers should take into consideration so that they can easily identify suspected bid-rigging and prevent such conduct in the future.

NOTES

1. Section 29 (3) of the Public Accounting Law

2. Section 3 of the Antimonopoly Act

3. See OECD Council Recommendations concerning Effective Action against Hard Core Cartels adopted in March 1998.

4. The Antimonopoly Act Guidelines Concerning the Activities of Firms and Trade Associations in Relation to Public Bids (June 1994).

KOREA

By "procurement system", we mean utilisation of a bidding procedure to supply goods and services. The procurement sector can broadly be divided into public and private sectors. Yet, most problems of procurement markets occur in public procurement, which was indicated by the OECD Guide for Country Submission. Therefore, this report will deal with the issues related to public procurement.

The goal of public procurement policy is to achieve economic efficiency by selecting the best supplier at the lowest cost. In Korea the "Government Related Contract Act" serves as the ground for regulating basic principles of public procurement and international bids. Furthermore, there are "Criminal Law", the "Fair Trade Act", and the "Government Related Contract Act" to regulate bid-rigging and bribery.

In Korea, with regards to public procurement, the Ministry of Finance and Economy is responsible for the drafting of procurement policy and the Office of Supply is in charge of implementation of such policy. However, such sectors as the defence industry which require special attention, are regulated by the related ministry. Actions such as bid-rigging and bribery arising from asymmetric information are regulated by the competition authority and the Ministry of Justice.

The fundamental objectives of public procurement policy are :

i) to maximise public welfare by guaranteeing fairness, transparency and efficiency in the procurement process;

ii) to carry out necessary measure to manage market conditions, etc.

In Korea, the basic principles and procedures of public procurement are stipulated in the "Government Related Contract Act". The opening of the public procurement market to foreign firms as required by WTO/GPA is conducted under the same act. For all government procurements exceeding certain amount, international tendering system is used without any discrimination for the lowest bid. The Screening system is jointly in operation to ensure efficiency. The "Government Related Contract Act" also stipulates international tendering procedures and rights of appeal.

According to the Act, public procurements are in principle to be carried out through open proceeding. However restricted proceeding and in some cases private contracts as well are allowed, provided that certain conditions are met.

With respect to public procurement, information is symmetric due to open tendering and the number of bidders falls due to the pre-examination system which screens participants. The former restricts competition, and the latter increases the likelihood of bid-rigging and bribery.

Whereas bribery may be said to be caused by the vertical relations between the bidders and the buyer, bid-rigging occurs in the horizontal relations among the bidders. As it has been noticed in the

restrictive lowest bid system, there is a trade-off between occurrences of bid-rigging and bribery. Therefore, to secure fairness and transparency, bid-rigging and bribery must be regulated simultaneously.

Due to the lack of empirical evidence, it is difficult to tell which procurement markets are prone to bid-rigging. However, it appears that a collusion is more likely in a market with fewer bidders as the fewer the bidders there are, the lower the level of competition.

The OECD secretariat proposed two measures to restrain bid-rigging. One is to set a random representative price and the other is to use a random weight for the screening criteria. Both methods may well reduce occurrences of bid-rigging. However, there still remains possibility of firms trying to obtain an expected contract price through illegal means. Also, it will be difficult to secure economic efficiency by using a random representative price or random weights when the given information is asymmetric. Therefore, the key to efficient and transparent procurement procedures lies in consistent operation of the criteria for bidder selection, based on clear and objective economic factors.

A more effective method to restrain bid-rigging would involve not only ex post measures but also means to enhance competition through simultaneous regulation of bid-rigging and bribery before the actual bidding takes place. Korea operates a system which restricts the participation of a party which has violated the bidding law. More specifically, a person or a party leading a bid-rigging is deprived of the right to bid for a period of a month to six months. Bidders who have participated in an agreement to predetermine the bidding price or the winner are deprived of the right to bid for the period of one month to six months.

A pre-bid screening system is also in operation to minimise the problems related to tendering and to examine the bidding prices of the participating firms.

The Fair Trade Act has no specific provisions on bid-rigging. However, Article 19 of the Fair Trade Act stipulates that bid-rigging is an unfair concerted act. According to the Fair Trade Act, bid-rigging involves at least two bidders, collusion, and anti-competitiveness. If it is proven that the actions by the bidders coincide and that there is an actual restriction of competition, it will be presumed that an agreement took place. The parties involved in the bid-rigging will be subject to corrective measures, surcharge, an imprisonment of up to three years or a fine of no more than 200 million Won. The bid rigger will also be liable to damage claims, according to the Civil Law. The Korea Fair Trade Commission imposes a high surcharge as an effective deterrent to bid-rigging. The amount of surcharge for bid-rigging has been increased from one percent of total revenues generated from the violation to five percent as of April 1995. In April, 1997, the rate of surcharge was drastically increased to five percent of average revenues for the three immediately preceding business years. Based on the "Government Related Contract Act", the government has asked procurers to exclude parties that have previous records for violation.

During the last five years, there has been 23 cases involving bid-rigging against which the Korea Fair Trade Commission took sanctions stronger than recommendation for correction. Of the 23 cases, 13 occurred within the past two years. All 23 cases occurred in the public procurement sector, and 12 cases, which account for more than 50 percent, involved bid-rigging in the construction sector. The Korea Fair Trade Commission issued orders for correction and imposed surcharge against the participants in the bid-rigging. Also the participants are barred from participating in future bids. The KFTC filed complaints with the prosecution for two cases to the Court.

Based on the Article 19 of the "Fair Trade Acts", the Korea Fair Trade Commission has issued "the Guidelines for Improving Fairness in Bidding Order" as a preventive measure against violation of the law regarding tender. The guidelines define different types of bid-rigging.

To prevent bid-rigging and to promote a competitive climate in the market, the fair trade monitoring system and the system of constant information gathering with regards to bid-rigging are in operation. As part of this effort, eight large public ordering institutions including the Office of Supply is obligated to designate an officer in charge of preventing bid-rigging. Furthermore, all contracts with a price exceeding 200 million Won and an over 90 percent chance of a successful bid are to be reported to the Korea Fair Trade Commission.

The Korea Fair Trade Commission, according to Article 23 of the Fair Trade Act has enacted and promulgated "the Notice on determining unfair trade practices related to public construction bids" to regulate unfair trade practices in the construction sector.

Pursuant to Article 63 of the "Fair Trade Act", which was revised in December 1997, new laws of regulations are subject to consultation and review prior to their legislation. Such a system is important in the sense that the competition authority is given the tools for efficient regulation of the procurement sector.

NORWAY

The membership in the European Economic Area (EEA) and the World Trade Organisation (WTO) commits Norway to those organisations' regulations on public procurement. The Norwegian policy in this area is also based on specific national regulations on public procurement, regulations on disqualification of politicians and civil servants, ethical guidelines for civil servants and for certain private professions (e.g. architects) to secure transparency and non-discrimination. As part of the regulations, bidding is encouraged whenever that is possible.

1. Procurement

1.1 Procurement criteria

Different criteria will be given different preference depending on what kind of purchase is to be done - high quantity items, highly technological or specialised items, e.g. in the building and construction area, or services. Generally, the aim is "best value for money", (e.g. costs divided on expected lifetime of product), rather than solely lowest price. This gives, *inter alia*, an opportunity to stress environmental friendly solutions.

The Norwegian Competition Authority (the NCA) is primarily concerned that public procurement creates economic efficiency, which is the objective of the Competition Act. The objective of the act encompasses not only consumers' welfare but also the welfare of taxpayers. The procurement policy may therefore be seen as an important aspect of competition policy.

1.2 Bid-rigging

The current Norwegian Competition Act of 1993 contains a prohibition on big rigging in Section 3-2:

> "Two or more undertakings must not, in connection with the sale of goods or services by agreement, concerted practices or by other conduct liable to influence competition, fix or seek to influence prices, calculations of volume or other terms connected with tenders, allocation of tenders, or direct or seek to induce any undertaking to abstain from submitting a tender.
>
> *The prohibition in the first paragraph also encompasses guidelines with contents that are contrary to the first paragraph. The prohibition encompasses both binding and recommended agreements or arrangements."*

The Act contains an exemption to Section 3-2 in Section 3-5, which permits two or more undertakings to collaborate on individual projects and submit a joint tender or offer for joint supply of goods or services. This exemption only applies when the parties to the agreement or arrangements clarify in the joint tender or offer what the collaboration involves and who the collaborating parties are.

Furthermore, under the Competition Act, Section 3-9, the Competition Authority may grant an individual exemption for a collaboration that would otherwise have been deemed illegal under Section 3-2. The exemption may be granted provided that the restraints on competition arising from the collaboration either lead to increased competition in the relevant market, or increased efficiency, or the restraints are found to be of little significance, or there are other special reasons for granting such an exemption.

The Authority has only encountered few cases involving bid-rigging. It would appear that such illegal practices are less common in Norway than other restrictive practices, however, this observation may also be a result of insufficient resources to uncover all illegal practices. Generally, the Authority would like to intensify and improve enforcement by focusing on major cases, which then serve as a deterrent for the industry as a whole. Severe and publicised penalties may of course be a useful instrument for deterring companies from engaging in illegal acts.

1.3 Important characteristics of the bidding process

The state is normally a large buyer, which is able to exercise buying power. Exercising such power means that purchase prices will be lower than the prices that suppliers normally obtain. This gives suppliers incentives to co-ordinate their activities thereby increasing the likelihood of collusive tendering.

Public buyers are subject to EEA rules on public procurements. When inviting tenders the buyer is required to inform all participants in the tender about the winning bid – the prices and the products. In oligopolistic markets this information may increase the danger for collusive tendering because deviations from the collusive arrangements will be detected more easily than if the terms of the bids were kept secret.

The design of the contract may influence market competition. Being a large player the state may wish to have large long-term contracts. This may have both short-term and long-term negative consequences on the number of enterprises being able to take part in the bid. On the other hand, small short-term contracts may have similar effects since large enterprises may find it uninteresting to participate in the tender. This will often be the situation for small Norwegian municipalities, meaning that collaboration between municipalities on public procurement may stimulate competition.

In 1993 the Competition Authority examined the procurement process of Norwegian municipalities. It showed that the practise was less than satisfactory. A new study was prepared in 1996. The situation had improved since 1993, but the results were still unsatisfactory:

- 70 percent of the municipalities never co-ordinate their procurements;
- in 1993 a significant number of 177 municipalities favoured their local suppliers. Only 70 municipalities reported to have changed their policies after the introduction of a prohibition against local favour;
- in the period since the enactment of the EEA agreement 359 tenders have been invited in the EEA. Bids from abroad have been submitted in 20 of the cases, while four of these were winning bids;
- nearly half of the municipalities have not taken any initiative to improve their procurement competence;

- a significant part of municipal production is protected from competition. In cases where there is competition the competitive conditions are often distorted.

Based on the report the Competition Authority advocated the following changes:

- introduction of a common set of procurement rules for all municipalities;
- municipalities, especially the smaller ones, should co-ordinate their procurement efforts, thereby increasing competition and efficiency;
- as a main rule tenders should be open;
- the municipalities, especially the smaller ones, should give priority to educating their procurement personnel;
- the municipalities should not protect their own production from competition on equal terms with outside suppliers;
- in order to minimise detrimental effects of unequal competitive conditions municipalities should to the greatest extent possible organise their competition activities as limited companies.

2. Alternative bidding strategies for public authorities

As already mentioned, Norway is committed to the EEA and the WTO and has adapted the regulations on public procurement of those agreements. In calls for tender, prioritised, not randomised, weighing criteria should be used to ensure predictability. The intention of the procedures is to ensure the quality of the bidding process. Dependent on the type of goods or services, bidding will generally be preferred to negotiating. Electronic public procurement processes are being introduced and will be encouraged, but are not commonly used.

The Competition Authority would like to focus on three measures that may reduce the likelihood of collusive tendering. First, open tender invitations will be preferable to restricted tenders. In addition pre-qualification of bidders should be avoided to the greatest extent possible. Both restricted tenders and pre-qualifications serve to identify the bidders, thereby increasing the danger of collusion. In addition the number of bidders will be reduced, thereby making competition less efficient.

Second, sealed bids are preferable to open bids, because sealed bids make it more difficult to monitor the behaviour of the suppliers. It will be harder to discover suppliers “cheating” on the collusive arrangement.

Third, the terms of the winning bid should if possible be kept secret, since such information is necessary if cheating is to be discovered. Of course, the possibility of keeping the winning bid secret depends on the weight being given to such matters as safeguarding against bribery or preventing procurement personnel from favouring certain suppliers.

3. Bribery and the importance of the agreement on preventing bribery

No distinctive measures have been taken; bribery is covered in existing laws and regulations, such as the General Civil Penal Code and the Act Relating to Civil Servants.

4. The role of competition law and policy

As explained above collusive tendering is prohibited under the Norwegian Competition Act. The application of the prohibition in Section 3-2 does not in itself require the Competition Authority to prove that injury has arisen from the collaboration. The Competition Authority may prohibit the parties from initiating the collaboration, and may prohibit an ongoing collaboration whenever the circumstances surrounding the collaboration fulfil the conditions for applying Section 3-2. Proof of injury may however be crucial in connection with a court decision concerning penalties for breach of Section 3-2.

In general, the Competition Authority may pursue illegal conduct in several ways. Under the rules of civil procedure, the Authority may require a company to relinquish any gains obtained by conduct which infringes either a prohibition in the Act or a decision issued by the Authority under the Act. The Authority's competence to demand relinquishment of gains has until now not been exercised, partly because of difficulties with calculating gains obtained from illegal behaviour. However, the Authority wishes to employ the competence more systematically, and the Authority is therefore currently working on a project, trying to establish methods for calculating the gains.

The Authority may also file a complaint with the Attorney General and ask that office to pursue an infringement under the rules of criminal procedure. Under these rules, a person may be liable to fines or imprisonment of up to six years and a company liable to fines. In the determination of a suitable penalty, the following circumstances will, among others, be considered: the danger of substantial damage or inconvenience, the gain expected, the extent and duration of the infringement, the degree of guilt demonstrated, whether the offender(s) attempted to conceal the infringement by falsifying records, and whether the offender previously has been convicted of criminal offences involving white collar crimes. The damage sustained by either an individual party or by the society as whole may also be considered when determining the size of a fine.

Since, in principle, the issuance of fines and damages for criminal behaviour is not within the Competition Authority's competence but is solely within the courts' jurisdiction the Authority does not have a broad experience with the calculation of such penalties. However, the Authority can naturally assist the Attorney General and the courts by suggesting an appropriate fine in a complaint to the attorney general. Furthermore, experience shows that the Authority may be in a better position to undertake such calculations than the courts due to the Authority's in-house expertise. This is clearly one aspect where the Authority may be able to influence and participate in an improved enforcement, and the Authority is therefore currently investigation how to optimise its contribution in this respect.

In reality, the Authority has only encountered few cases involving collusive tendering. It would appear that such illegal practices are less common in Norway than other restrictive practices, however, this observation may also be a result of insufficient resources to uncover all illegal practices. Generally, the Authority would like to intensify and improve enforcement by focusing on major cases, which then serves as a deterrent for the industry as a whole. Severe and publicised penalties may be a useful instrument for deterring companies from engaging in illegal acts.

The Authority does not have any experience with compliance programs or other steps that may be undertaken in collaboration with the industry, and there are no immediate plans for developing such programs. Given the relatively limited occurrence of these types of practices, and the limited resources available within the Authority, it is believed that priority should be given to actual enforcement rather than engaging in such more consultative functions.

With respect to other roles of the competition authorities, the above-mentioned studies on procurement practises in the municipalities are examples of possible competition advocacy efforts. In a hearing on public procurements the Competition Authority criticised a public report for not mentioning the prohibition against collusive tendering at all. The Authority emphasised how important it is that procurement personnel are aware of these rules and that they know how to guard themselves against such behaviour. Public buyers should contact the competition authorities in order to counteract illegal co-operation between suppliers.

Furthermore, the competition authorities should make private and public buyers alert to the possibilities for collusive tendering. Recently, an initiative has been taken to organise a procurement course for personnel in the municipalities. The Norwegian Competition Authority has strongly recommended putting collusive tendering and other competition issues on the agenda.

SPAIN

1. Introduction

Procurement policies should provide an efficient procedure to obtain the best provider for a very wide range of goods and services.

The Public Administration as guardians of the public interest, should, therefore, guarantee the best possible relation between the best quality offers and the least cost for the public finances.

Public competitive processes are usually appropriate to increase market efficiency through competition, while, at the same time, granting openness and transparency.

2. Spanish legislation on public procurement

Law 13/1995 of 18th May of The Contracts of the Public Administrations regulates all possible categories of public contracts. The new act intends to accommodate the Spanish legislation on this matter to the EU directives and to the new reality of a state with different autonomous administrations.

The main aim of Law 13/1995 is to guarantee transparency in procurement policies. It establishes the principles of equality, non-discrimination and free-competition.

The Public Administrations enter into different types of contracts:

1. 1. contracts of public works;
2. contracts for the administration of public services;
3. supply contracts: contracts by which the public administrations buy or acquire goods or chattels;
4. contracts for consulting and technical assistance services.

The Ministers and the Secretaries of State are the authorities in charge of the contracts of the General Administration.

When the budget for a project exceeds 2 000 million pesetas, the contract needs the authorisation of the Council of Ministers.

The Consultative Board of Administrative Contracts is an advisory body, attached to the Ministry of Economy, in charge of promoting regulations to improve the system of contracting in the Public Administrations, not only from the technical point of view but also from the point of view of economics and efficiency.

The awarding of a public contract can be carried out through three alternative ways:

1. open proceeding: any company can present a proposal;

2. restricted proceeding: Only those firms previously selected by the Administration are allowed to present a proposal;

3. negotiated proceeding: The contract is awarded to a company chosen by the Administration, after having consulted and negotiated the terms of the contract with one or several firms, ideally no less than three.

The authorities will choose any of these proceedings according to the criteria established for each type of contract in Law 13/1995.

The negotiated proceeding is only preferred when a number of different conditions are met: urgency, matter of secrecy, lack of bidders in a previous competitive bidding, small importance of the contract, etc. The reasons why the open proceeding is not chosen should be clearly justified and stated in the dossier.

The awarding of a contract can be carried out through public auction or through competitive process:

a) public Auction is the form to be used when the main element to be considered is the price;

b) competitive process: this process is preferred when there are other elements rather than the price to be taken into consideration.

Publicity is a key element when we need to guarantee transparency. All the proceedings of contract awarding (with the exception of the negotiated ones) are published in the State Official Bulletin and in the Bulletin of the European Communities, if the importance of the contract requires it.

The Public Register of Contracts allows a complete knowledge of all the contracts carried out by the Public Administrations and the awardees.

Foreign firms from countries outside the European Union have to prove their technical and economic reliability through a report issued by the Spanish Diplomatic mission in their respective countries.

For Public Works contracts the companies need to have a branch office in Spain with a legal representative and to be inscribed in the Mercantile Register.

3. Public procurement and competition law

Law 16/1989 on the Protection of Competition does not prohibit explicitly bid-rigging, although this kind of conduct falls in the general prohibition against agreements which have the effect of preventing, restricting or distorting competition. Art. 1 includes concerted or consciously parallel practices and recommendations.

Besides, bid-rigging contains usually an element of price fixing and it would be therefore, included in the list of prohibited conducts established in article one.

The Spanish Competition Authorities have had only a limited experience in dealing with bid-rigging cases.

In 1990, the Tribunal for the Protection of Competition passed a resolution against a number of pharmaceutical laboratories for having offered identical prices, previously agreed, for the supply of animal vaccines to the Ministry of Agriculture in a competitive bidding.

The coincidence in the prices offered was identical in 13 cases. The homogeneity of the products was such that competition was only a question of prices, as there were no differences in the quality of vaccines. The collusive agreements aimed at eliminate competition among the firms.

In 1992 a number of olive oil companies carried out collusive agreements to fix prices and share the market in the public auction hold by the National Service of Agricultural products (SENPA), according to EU regulation 2727/89.

The companies had agreed the prices and how to share the total of the olive oil auctioned by the SENPA. Even when the firms did not succeed completely in their aims, the Tribunal for the Protection of Competition considered that, according to the Competition Act 16/1989, the mere agreement to distort or restrict competition is an infringement of the Law.

The Resolution stated the seriousness of the offence and the Tribunal found that an important distortion of free competition had taken place, affecting the public interest through the fixing of prices for olive oil in the public auction hold by the SENPA. Fines were imposed amounting a total of 144 million pesetas.

Competition Authorities can play an important role increasing co-operation with other public bodies in order to minimise the risk of bid-rigging when tender and competitive bidding take place.

The publication of the awarding of the contracts to guarantee transparency and to uncover possible irregularities in the awarding of public contracts is also extremely useful. Electronic information on public procurement could also be a way to open this market to as many firms as possible and it is especially important in the case of small and medium enterprises “Black lists” of companies could be drawn up to act as an anti-corruption instrument.

UNITED KINGDOM

1. Introduction

This short paper discusses competition regulation in the context of procurement policies.

2. Policy on procurement

United Kingdom official policy on procurement, and its associated regulations and guidelines, apply to procurement and purchasing by central and local government bodies. Except when European Union and WTO measures apply, procurement and purchasing by private enterprises are governed by their own commercial judgement. At the root of United Kingdom public procurement policy lies the determination of successive governments to obtain good value for public money. To that end it issues published guidelines on Public Purchasing Policy. These are intended principally for use by central Government Departments, but also inform their relationship with other public bodies. Similar practices are required of local government under the Local Government Finance Act 1982. In particular, this ensures that the letting of contracts by local authorities below the value levels governed directly by the procurement directives is not subject to irrelevant political, social, or other considerations. The United Kingdom has implemented the European Union procurement directives, by means of regulations set out in a series of Statutory Instruments. The United Kingdom is also party to the WTO Government Procurement Agreement.

Within these constraints, Government Departments and Local Authorities are responsible for their own purchasing. The processes are intended to be fair and efficient, and to result in good value for money. This latter does not necessarily require acceptance of the lowest price or tender. Value for money is the optimum combination of whole-life cost and quality to meet users' requirements. Price is rarely the main determinant. In practice, local authorities are expected to award contracts based on either lowest price, or, more usually, the most economically advantageous tender. This is decided by reference to several economic criteria - e.g. quality, delivery, after sales service, price etc. Where the lowest price was not the criterion for the award, the local authority would need to record the reasons for its decision, in case it were subsequently challenged to show that it had met its duty to obtain best value for money under the Local Government Finance Act.

3. Competition regulation

The anti-competitive behaviour which procurement policies and procedures are principally designed to counter are the operation of cartels, and the rigging of tenders for particular contracts. The Restrictive Trade Practices Act (RTPA) provides for scrutiny by the Director General of Fair Trading (DGFT) of agreements between providers of goods or services which may be anti-competitive. Agreements containing significant restrictions of this nature may be referred to the Restrictive Practices

Court, which may strike down any which it considers to be contrary to the public interest. This is the principal statute for use against cartels, and is relied on when the DGFT needs to take action against specific instances of bid-rigging.

The DGFT won a case in the Restrictive Practices Court a few years ago against a cartel among providers of ready-mixed concrete. He also won a similar case in 1995 against a cartel among providers of grounds maintenance services to the Property Services Agency - a public sector body, responsible for government-owned real estate. In both cases, the cartels concerned operated a rota system for submitting winning bids. The cartel among grounds maintenance companies came to light as a result of an internal Property Services Agency report on bidding patterns.

The Office of Fair Trading (OFT) uncovered, and struck down by successful action in the Restrictive Practices Court, a similar arrangement between the two largest suppliers of bomb proofing polyester film. Smaller companies in the cartel were rewarded for not undercutting by being granted sub-contracting work. Currently, the OFT is preparing an action in the Restrictive Practices Court against two cartels involving local authority bus contracts.

Experience suggests that cartels are encouraged to form in markets (whether local or national) where there are comparatively few suppliers, so that the people involved are, or become, acquainted with each other. This seems particularly likely to occur where the goods or services provided have special characteristics, or require a particular expertise. In local markets, social activities provide opportunities for the sort of conversations at which the formation of cartels may begin. Rigging of specific bids can be facilitated by regular formal tendering and bidding processes. Factors facilitating the formation of cartels will also facilitate bid-rigging in specific cases: few suppliers, and well known to each other, whether for professional, social, or geographical reasons; and, where the products or services are such that suppliers compete principally on price.

United Kingdom legislation does not contain specific provisions against bid-rigging. However, the sections of the RTPA defining the sorts of agreements which must be scrutinised by the OFT reflect the characteristics found in bid-rigging arrangements. As we have said, enforcement takes place through the court. Initial court action, if successful, results in the objectionable features of an agreement being struck down as contrary to the public interest. No fines or other punishments are available. However, fines may be imposed by a court should a breach be subsequently discovered of any undertaking given, not to re-form a cartel or repeat its actions, for instance. Such a breach of an undertaking is not contrary to competition law as such, but constitutes contempt of court.

The nature of current United Kingdom legislation means that there is comparatively little which the OFT can do directly to reduce the risk of bid-rigging and similar conduct. We offer published advice to purchasers on how to detect, and protect themselves from, bid-rigging arrangements. We can also, and do as far as possible, seek publicity for successful enforcement action. However, at present, the DGFT has no power to impose penalties; and we have believed for some years that his present powers of investigation are inadequate.

We believe that efficient detection and action against cartels and bid-rigging is the best form of deterrent. United Kingdom legislation does not provide for the imposition of fines or other retributive penalties. However, we consider that publicity given to successful action against cartels is useful as an additional deterrent. Companies can be expected to be unwilling to risk the unfavourable effect on their business that such publicity brings. Nevertheless, the effectiveness of such publicity as a deterrent must depend on efficiency of detection in the first place and on a successful conclusion of action in the Restrictive Practices Court.

That is the case at present. However, a new Competition Bill is at present before Parliament. Subject to its passage through Parliament, it is expected to come into force in the Autumn of 1999. In summary, it will introduce into the United Kingdom a competition régime similar to that which applies under EU competition law. There will be a general prohibition of anti-competitive agreements, and a similar prohibition of abuse of a dominant position. Most important in the context of combating cartels and preventing bid-rigging, the OFT will have wider powers of investigation, including the right to carry out "dawn raids" similar to that already enjoyed by the EU competition authorities. Moreover, there will be provision for the imposition of fines of up to ten percent of a company's turnover for breaches of the prohibitions.

The new act will repeal the RTPA. However, the provisions of the Fair Trading Act which allow the DGFT to investigate practices which are widespread in an industry, which adversely affect competition, but which do not amount to abuse of a dominant position by a single company, or do not occur by agreement, will remain. We firmly believe that the new powers, combined with the retention of the most useful of the existing powers, will constitute a more efficient and robust competition régime; and thus a better system of detection, remedy, and deterrence to combat cartels and bid-rigging.

4. Conclusion

Official procurement policies are designed to be applied to purchasing by public bodies. Whether or not their principles are adopted by private businesses is a matter of commercial judgement for the businesses themselves. United Kingdom competition law contains provisions for combating cartels and anti-competitive agreements, but there is no specific provision against bid-rigging. Our experience of action against bid-rigging during recent years has been limited. In view of our inadequate powers of investigation and enforcement, this is more likely to be an indication of ineffective detection than of limited cartel activity.

The absence of a penalty system means that we have no direct experience of the effectiveness of fines and similar penalties; nor of how they should be calculated. The new legislation before Parliament, however, will remedy defects in the régime, by improving the DGFT's powers of investigation, and by providing for the imposition of fines. We will be guided by EU experience in administering the new legislation, and, inevitably, in operating a wholly unfamiliar system of penalties. The new law will be a considerable improvement in the United Kingdom competition régime in general, and will greatly strengthen our ability to detect and prevent cartels in particular.

UNITED STATES

This paper is divided into a background section on law and policy and annexes with materials from a Department of Justice antitrust primer for federal prosecutors on bid-rigging and from DOJ comments filed with the Federal Communications Commission regarding proposed changes in public auction procedures.

1. Bid-rigging and public procurement

Prosecution of bid-rigging related to procurement contracts in the US occurs mostly in the context of public procurement, which is extensively regulated so to ensure transparency and fairness, and typically uses a system of sealed bids. Private procurement in the US is usually handled through private negotiation, and hard-core collusive agreements in this context take the form of price-fixing or market, customer, or territorial allocation.

Bid-rigging is a *per se* violation of Section 1 of the Sherman Act, which prohibits any agreement among competitors unreasonably to limit competition. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the Department of Justice. Violations of the Sherman Act are felonies punishable by a fine of up to $10 million for corporations, and a fine of up to $350,000 or three years imprisonment (or both) for individuals. Alternatively, a defendant can be fined twice the gross pecuniary loss or gain resulting from the violation. Bid-rigging is also a violation of Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, for which the Commission can obtain injunctive relief and restitution.

Bid-rigging may also warrant prosecution for various other federal crimes, including mail or wire fraud; conspiracy to defraud the government with respect to claims; making false, fictitious or fraudulent claims; and making false statements to a government agency.

Criminal prosecution by the DOJ is generally confined to unambiguously harmful, *per se* offences, such as price-fixing and bid-rigging. The DOJ's experience is that prosecution, incarceration, and substantial fines are the most effective deterrent to antitrust crimes. However, civil actions for treble damages under the Clayton Act, and for civil penalties up to treble damages under the False Claims Act are also very effective government enforcement weapons. Finally, private parties (including state and local governments) can recover three times the damages they suffer as a result of an antitrust violation. The False Claims Act also provides for a private right known as a *qui tam* action which allows a private individual to sue in the name of the government for violations of the Act; the individual is entitled to a substantial share of the funds ultimately recovered (ranging from 15-30 percent) on behalf of the government, and whistle-blowers are protected against employer retaliation. Another extremely serious sanction for bid-rigging is suspension and debarment from other government contracts; under federal regulations, indictment for an antitrust offence is sufficient evidence for suspension, and a criminal conviction or civil judgement creates grounds for debarment.

As a *per se* offence, bid-rigging is conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm caused. Prosecution requires only the existence of an unlawful "contract, combination, or conspiracy" within the previous five years. No overt acts need to be proved, nor is an express agreement necessary. The offence can be established either by direct evidence from a participant or by circumstantial evidence (such as bids that establish a pattern of business being rotated among competitors).

The DOJ obtains information about bid-rigging violations from a wide variety of sources. Federal procurement regulations require executive agencies to notify the Attorney General about questionable bids or proposals, and contain an extensive list or practices and events that contracting personnel should consider suspicious. The Department conducts an active outreach program, with speeches to national associations of procurement officials to sensitise them to the indicia of bid-rigging. Disgruntled employees are a frequent source of information about bid-rigging. Probably the greatest source of recent criminal investigations has been the DOJ's amnesty program, expanded in 1993.

Under guidelines established by the US Sentencing Commission, bid-rigging offences are considered the most egregious criminal antitrust offences. "The Commission believes that the most effective method to deter individuals from committing [antitrust crimes] is through imposing short prison sentences coupled with large fines." For convicted individuals, the range of fines is from one to five percent of the volume of commerce done by the defendant that was affected by the violation, but not less than $20 000; if the defendant cannot pay the fine, "equally burdensome" community service may be substituted. The Guidelines also state "the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders." "Absent adjustments, the guidelines require confinement of six months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases." For corporate defendants, the minimum fine under the guidelines is fifteen percent of the volume of commerce.

Antitrust compliance programs can be very effective in deterring criminal antitrust violations, and often lead companies to seek amnesty under the Division's amnesty program. The Division's policy is not to give a company credit for its compliance program when deciding whether to initiate criminal proceedings, on the theory that senior management must have been aware of bid-rigging behaviour, which is so central to the activity of the organisation. Existence of a compliance program can be relevant at the sentencing phase, although the Guidelines' minimum sentence limits may eliminate any benefits to the defendant.

US Government procurement is regulated by the Competition in Contracting Act and the Federal Acquisition Regulation (FAR). The Act states that US government procurement policy is to promote "full and open competition." As noted above, the FAR requires government procurement personnel to notify the Attorney General of any bids or proposals that indicate antitrust violations, and provides a detailed list of practices or events that should raise suspicions. The FAR includes important certification obligations on contractors which have led to a number of procurement fraud prosecutions. Solicitations involving firm fixed- price contracts must include a Certificate of Independent Price Determination certifying that there were no consultations, communications, or agreements with competitors related to pricing or intent to submit an offer. Federal procurement laws and regulations also prohibit a prime contractor from impeding efforts by subcontractors to deal directly with the government.

Annex 1

The following discussion of bid-rigging is reproduced from a 1994 DOJ publication entitled "An Antitrust Primer for Federal Prosecutors."

Bid-rigging conspiracies usually fall into one or more of the following categories:

1. Bid suppression

In "bid-suppression" or "bid-limiting" schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winner's bid will be accepted. Sometimes, one or more conspirators may file fabricated bid protests in order to try to deny an award to non-conspirators. After the bid is let, the winning bidder may pay off the co-conspirators through cash payments or subcontracts.

2. Complementary bidding

"Complementary bidding" (also commonly called "protective" or "shadow" bidding) occurs when some competitors submit bids that are too high to be the winning bid or, if the bids are seemingly competitive in price, then they are unacceptable because of other non-price terms. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. This enables the designated winning competitor's bid to be accepted when the agency requires a minimum number of bidders.

For example, in a bid-rigging conspiracy among sheet metal contractors in the Chicago area affecting public projects, as a job was put out for bid by public entities, the conspirators held meetings (at a restaurant) where the project was allocated to one of the conspirators and the bid prices were rigged.

Contractors attending the meeting who wanted the job brought cost estimates for the job. These estimates were discussed, the highest and lowest were thrown out, and the remaining numbers averaged to determine what the estimated cost of the designated winning contractor would be. Added to this cost was a figure ranging from two to six percent to cover bonding, insurance and a payoff to the ringleader of the conspiracy who allegedly used the money to pay off union and public officials to insure the success of the conspiracy.

Jobs were allocated either to those who were next in line to receive a job, or by a drawing if more than one contractor was eligible. At times, "silent partners" shared an allocated job. These co-conspirators shared in the proceeds of an allocated job with the chosen contractor, but their involvement in the job was unknown to the awarding authority. Also determined at the allocation meeting were the intentionally higher bids that the unsuccessful contractors turned in to insure the chosen contractor was the successful low bidder.

Finally, the conspirators kept records of the allocation meetings and used them to determine who was eligible for upcoming jobs.

3. Bid rotation

In "bid rotation" schemes, all conspirators submit bids, but take turns being the winning low bidder. The terms of rotation may very; for example, competitors may take turns on contracts according to the size of the contract, trying to equalise the value of contracts won by each conspirator over time.

A strict rotating winning bid pattern defies the laws of chance and suggests collusion. In a case involving purchases of fresh fruits and vegetables for military commissaries and local school systems, an alert government purchasing agent detected a pattern of rotating awards among a select group of wholesale vendors. This evidence led to the investigation and successful prosecution of individuals, companies and a partnership for Sherman Act and mail fraud violations.

3.1 Detecting price fixing, bid-rigging and market allocation

3.1.1 Conditions favourable to collusion

While price fixing, bid-rigging and market allocation can occur in almost any industry, they are more likely to occur in some than in others. The milk, soft drink, steel drum manufacturing, highway, electrical and general construction, waste disposal, linen supply and dredging industries are examples of industries in which such conspiracies have been detected frequently. Investigators should be sensitive to the following industry conditions that increase the probability of collusion:

- collusion is more likely to occur if there are few sellers. The fewer the competitors, the easier it is to get together and agree on prices, bids, customers or territories. Collusion also may occur when the number of firms is fairly large, but there is only a small group of major buyers or sellers and the rest are "fringe" firms who control only a small fraction of the market;

- the probability of collusion increases if other products cannot easily be substituted for the conspirators' product;

- the more standardised a product or service is, the easier it is for competing firms to reach agreement on a common price structure. It is harder to agree on more subjective forms of competition, such as quality or service.

As with most other types of criminal activity, once a conspiracy to rig bids starts it may not stop unless an investigation should occur. The Antitrust Division successfully prosecuted a 35-year conspiracy to rig bids for the sale of military gloves. The conspiracy ended only after grand jury subpoenas were issued.

3.1.2 Checklist for possible collusion

3.1.2.1 Suspicious Behaviour

Certain patterns of conduct suggest the possibility of collusion:

- some bids are much higher than published price lists, previous bids by the same firms or engineering cost estimates;

- fewer than normal competitors submit bids;
- the same supplier has been the winning bidder on successive occasions over a period of time;
- there is an inexplicably large dollar margin between the winning bid and all other bids;
- there is an apparent pattern of low bids regularly recurring, such as company "X" always winning a bid in a certain geographic area for a particular service, or in a fixed rotation with other bidders;
- a company appears to be bidding substantially higher on some bids than on some bids than on other bids, with no logical cost differences to account for the difference;
- two or more competitors have a "silent" joint venture even though at least one of them could have bid for the work alone;
- a successful bidder repeatedly subcontracts work to competitors that submitted higher bids on the same projects;
- there are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors have copied, discussed or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or postal metering machine marks;
- a bidder appears in person to present his bid and also submits the bid (or bond) of a competitor;
- competitors regularly socialise, hold meetings or otherwise get together in the vicinity or procurement offices shortly before bid filing deadlines;
- competitors meet as a group with procurement personnel to discuss or review terms of bid proposals (this may facilitate subtle exchanges of pricing information);
- bid prices appear to drop whenever a new or infrequent bidder submits a bid;
- competitors exchange price information among themselves. When this occurs in markets with only a few sellers, it is potentially anticompetitive. Such exchanges may take quite subtle forms, such as public discussions of the "right" price;
- firms that ship their product short distances to the buyer charge the same price as those that ship long distances. This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of transportation;
- competitors are charging higher prices to local customers than to distant customers. This may indicate fixed prices in the local market.

3.1.2.2 Suspicious statements

Sometimes statements made by marketing representatives of suppliers suggest that price fixing or bid-rigging is occurring. Examples are:

- references to “Association price schedule,” “industry price schedules,” “industry suggested prices,” “industry wide” or “market wide” pricing;

- justification for the price or terms offered “because they follow industry pricing or terms” or “follow (a named competitor's) pricing or terms”;

- references to “industry self-regulation” etc., such as justifications for price or terms “because they conform to the industry's guidelines” or “standards”;

- statements indicating that the representative's company has been meeting with its competitors for whatever reason;

- statements that the representative's company “does not sell in that area” or that “only a particular firm sells in that area” or “deals with that business”;

- statements to the effect that a competitors's salesman should not be making a particular proposal or should not be calling on a particular customer;

- statements to the effect that it is a particular vendor's “turn” to receive a particular job or contract.

Such patterns of behaviour or statements do not always signal a prosecutable antitrust conspiracy. They do, however, warrant further inquiry.

Annex 2

The following is taken from comments filed in October 1997 by the Department of Justice with the Federal Communications Commission (FCC) concerning the FCC's Notice of Proposed Rulemaking on amendments to the FCC's competitive bidding procedures.

1. Summary

The Commission should adopt certain rules to ensure the integrity and competitiveness of its auction process. The FCC proposal to provide for minimum opening bids should be adopted with caution. Minimum opening bids may be beneficial if adopted when there are few bidders in a market and therefore an increased risk of collusion. They may also speed up the auction. However, minimum bid restrictions may also be inefficient, overpricing spectrum and delaying service consumers desire. The Commission should first try to address the problem of lack of competition directly by redesigning the auction or rejecting applications for joint bidding where it would not appear to result in a genuine efficiency.

The Commission should limit the number of bid withdrawals for each spectrum block to one per firm and end the use of trailing digits. These two measures would minimise the risk of tacit collusion by bidders. Further, the limit on bid withdrawals would have the added benefit of speeding up the auction process.

Finally, we recommend that the Commission proceed carefully in amending its anti- collusion rules to include "safe-harbour" treatment for discussions of merger, acquisition or other intercarrier arrangements during the auction process. To the extent the Commission adopts other rules designed to speed up the auction process, the safe-harbour system may not be necessary.

If the Commission decides to go forward with the safe-harbour rule, it should prohibit negotiations involving resale or roaming agreements for markets where two firms are currently bidding against each other. This will decrease the risk of an agreement between two firms to allow one to "win" the market cheaply and share the amount saved by not bidding against each other. If the Commission decides to allow merger discussions during an auction, it should impose a notification requirement.

2. Competitive bidding design

2.1 Minimum opening bids

Under current rules, the Commission may establish *suggested* minimum opening bids. The Commission may also set a reservation price if only two or three applicants have applied to bid for a valuable license to minimise the risk of collusion among the few bidders. The Commission proposes to modify the rules to provide for minimum opening bids, rather than suggested opening bids, which will have the virtually the same effect as setting a reservation price. The purpose is two-fold: to increase the likelihood that the public receives fair market value for the license and to speed up the auction.

The use of minimum opening bids may be beneficial in some circumstances. For instance, they may be useful when there are only small number of bidders and therefore, little competition and an increased risk of collusion. Minimum opening bids may also provide the added benefit of speeding up the

auction. These benefits are not costless, however. To realise the value inherent in licensing spectrum with only a few bidders, a minimum bid must be set relatively closely to the estimated value of the spectrum. If the Commission overestimates this value, the spectrum will not be sold, and services consumers desire will not be developed in a timely fashion.

The Commission should consider whether it can address the problem of too few bidders directly. First, the current auction design may discourage some bidders. For example, if the FCC proceeds from announcement to auction too quickly, firms may have insufficient time to make plans and line up the required financing. Similarly, if the FCC encumbers the spectrum with restraints that make commercialisation difficult, uncertainty about the value of spectrum may be very high, and few firms may be willing to bid. The Commission could remedy these problems by increasing the time between announcement and the auction or reconsidering the conditions being attached to the spectrum.

Second, incumbent firms' joint ventures or other bidding arrangements, which are currently legal under the FCC rules, may limit the number of competitors. Currently, competing bidders need only notify the Commission that they are in a "joint venture" prior to the start of the auction. There is a significant difference between a group of firms that decides to pool its resources, jointly bid, and jointly develop service and a group of firms that simply plans to jointly bid and later divide up the spectrum among themselves to develop independently. The former offers the potential for new service otherwise unavailable, while the latter merely eliminates competition among bidders. To address this problem, the FCC could reject applications to jointly bid on spectrum where there does not seem to be a genuine efficiency involved. In general, such efficiencies will be present when the group of bidders can collectively offer a more attractive product than they would be able to offer were they to bid on an individual basis, or if those bidders would be unable, or unlikely, to submit a bid absent that particular joint venture.

We recognise that these direct approaches may not always be feasible. The Commission may not be able to increase the notice period, or it may not be able to enforce restrictions on joint bidding arrangements without getting mired in endless legal proceedings. In these circumstances, setting minimum bids and re-auctioning unclaimed spectrum at a later date would be an alternative solution to the problem of limited competition.

2.2 Misuse of bid withdrawals

The Commission has requested comment on whether it should limit the number of bid withdrawals permitted to any individual firm, and if so, under what circumstances. The Notice explains that there are legitimate reasons for allowing bid withdrawals, including correction of mistakes,[1] as well as allowing efficient aggregation of licenses. On the other hand, bid withdrawals can be used to signal rival bidders, since they provide a tool for emphasising a bid. For example, a firm can threaten to bid in a particular market by bidding and then withdrawing a bid. As long as such withdrawals are superseded by other bids in later rounds, they provide a castles way to communicate with other bidders, and could be used in a strategic fashion.

In the recent auction of broadband PCS licenses for blocks D, E, and F, a total of 789 bids were withdrawn, or less than two per basic trading area ("BTA"). Although the majority of the withdrawals appear to have been innocuous, some firms may have used repeated withdrawals within the same market for reasons not related to creating efficient aggregations. In one instance, a firm, which was not the eventual winner, withdrew six out of eight bids it made over 25 rounds in one BTA. Certain firms also appear to have used withdrawal rights more extensively than should be necessary in an ordinary bidding

strategy. In particular, three firms accounted for over 360 withdrawals, or approximately 46 percent of all bids withdrawn during the auction. This aggressive withdrawal strategy does not appear to have depended upon the number of bids a firm made. For example, one large bidder that participated widely in many markets in the PCS auctions withdrew less than two percent of the total number of bids it made in the auction.

Withdrawals create two problems. First, as the Commission notes, withdrawals may be used to communicate bidding strategies (or threatened bidding strategies). Although firms could use an ordinary bid in much the same way as a withdrawn bid to send a signal, an ordinary bid does not convey the same level of information. Firms make bids with the intention of winning all the time. Separating an ordinary bid that is intended as a signal from an ordinary bid that is an actual attempt to win the auction is difficult. With a withdrawn bid, the firm can highlight a particular bid without increasing the price level of a license. By withdrawing a bid, a firm also can suggest to a second firm that it will allow that the second firm to take its place without increasing the bidding level. Such an "offer" may also be accompanied by a trade whereby the second firm stops bidding or withdraws from a contested market.

Another use of withdrawals that appears to have been widespread is the use of withdrawals to manage eligibility levels. Rather than bidding directly on blocks of spectrum of interest, some firms may bid elsewhere to preserve their eligibility while not driving prices higher in markets of interest to themselves. These "parking" strategies could be used repeatedly to retain large amounts of eligibility by repeatedly bidding and withdrawing in markets. Since this activity does not provide any new information to the bidders about the underlying value of the spectrum, this use of withdrawals simply delays resolution of the auction.

The Commission can limit these types of activity by allowing only one withdrawal per bidder for any block. This restriction would limit the use of withdrawals to communicate bid strategies, while still allowing for a change in strategy by a firm not attempting to use a withdrawal to send a signal. (If the FCC is auctioning spectrum for a nation-wide license rather than regional licenses for individual BTA's, then there is no need for any withdrawals at all, and each bid should simply be allowed to stand until it is superseded.) The Commission should not, however, penalise a withdrawing bidder by reducing its eligibility. A legitimate use of withdrawals is to change the aggregation of markets a firm is bidding upon, and a firm may need that eligibility to bid in other markets. If a firm withdraws from one market and decides not to bid elsewhere, then its eligibility will fall as the rules provide. If the firm elects to bid, the auction will move forward with a higher valuation on the firm's next best alternative.

2.3 Use of trailing digits

Current FCC auction rules do not prohibit the use of "trailing" digits; that is the use of the last few digits of a bid. Trailing digits, however, can be used to signal information about bid strategies. For example, bidders can point to markets by ending a bid with a market number. The use of trailing digits has been observed in several auctions, and may be a particularly effective signal in auctions with limited competition, such as the recent PCS auctions. Such signalling, which is virtually costless, appears to have been especially pervasive in the DEF auction. Based on the available evidence and a formal complaint filed with the FCC, it is clear that bidders received and understood these signals. The Commission should adopt a simple solution to this problem: the Commission should require all bids to be in increments no smaller than $1 000. Given the bids obtained for most spectrum, this minimum bid increment would hardly be limiting in expressing the value of spectrum, and for bids at very low levels, the difference between allowing bids in $1 000 increments and the current system would be insignificant in terms of overall government revenue raised.

3. Proposed safe-harbour from rules prohibiting collusion

The Commission, in its Competitive Bidding Second Report and Order, adopted rules to prohibit collusion because such conduct could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure. In general, the anti-collusion rules require that bidders identify on their short-form applications any parties with whom they have entered into any consortium, joint ventures, partnerships or other agreements that relate to the competitive bidding process. Between the time the short-form applications are filed and the winning bidder makes its required down-payment, all bidders are prohibited from co-operating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a joint bidding arrangement identified on the bidder's short-form application. The Commission intended to primarily rely upon these safeguards and the antitrust laws to detect and prevent collusion in the competitive bidding process. The Commission recognised the need to strike a balance between preventing collusion and facilitating the formation of efficiency-enhancing bidding consortia that pool capital and expertise and reduce entry barriers for smaller firms who might not otherwise be able to compete in the auction process. If the anti-collusion rules were too strict or overbroad, they might have a chilling effect on legitimate business transactions.

In its Notice, the Commission seeks comment on a proposed "safe-harbour" from the anti-collusion rules to allow auction participants to engage in discussions involving a merger, acquisition, or intercarrier arrangements (roaming agreements, resale agreements, and joint purchasing arrangements, among others).[2] Under this proposal, the respective bidder personnel would certify that persons involved in such agreements are not discussing bidding strategy or otherwise divulging bidder information in violation of the anti-collusion rules.

3.1 Speeding up the auction process

The safe-harbour proposal stems from the concern that auctions take too much time to complete. From the pre-auction notification stage until the auction closes can take more than six months; during this time bidders may be restricted by the anti-collusion rules from undertaking actions that are not anticompetitive. Firms have complained that because the telecommunications marketplace is so dynamic, they may need to enter into merger discussions unrelated to the auction process. Although this is a legitimate concern, the possibility that competition in the auction could be reduced by collusion is a very real threat. Most spectrum offered is valuable to a limited number of competitors because of the network qualities of the service -- firms value service in a number of contiguous areas more than scattered bits of spectrum across the country. For example, in the recent broadband PCS auctions the number of bidders in any block was fairly limited in most markets.

There would be much less need to alter the anti-collusion rules if the Commission simply speeded up the auction. This could be accomplished by adopting other proposed rules. In particular, limiting the number of withdrawals could considerably shorten the auction. In the recent PCS auction, for example, a large number of rounds in many markets were consumed with bids and withdrawals that did not advance prices. If the auction progresses more quickly, then the potential harm from collusion to both the government (from reduced revenues) and to consumers (due to a reduced number of alternate suppliers) may reasonably outweigh the short run efficiency cost of anti-collusion rules. If so, no safe-harbour exception to the anti-collusion rules would be needed.

3.2 Resale or roaming agreements

If the FCC nonetheless decides to create an exception to its anti-collusion rules, it should not alter the current prohibition on new (or ongoing) negotiations involving resale or roaming agreements for markets where two firms are currently bidding against each other.[3] The potential for anticompetitive results from these types of agreements made during an auction is high.[4] In particular, they could be used to compensate a firm for agreeing not to bid against another in a market. The "winning" firm could give the other firm an unusually favourable roaming or resale agreement for the previously-contested market, in essence, sharing the amount saved by not bidding against each other. Unlike other types of agreements to reduce competition, neither firm would have to compensate the other for exclusion from the market.

3.3 Mergers and acquisitions

Mergers between potential competitors for spectrum in an auction present a problem for antitrust enforcement. By agreeing to merge, two companies could alter their incentives to bid against each other for spectrum and reduce government revenues from the auction. Depending upon the timing of the merger announcement (which the parties can control), the ordinary merger review process may not begin until after the auction is concluded, by which point the two companies are no longer competitors for spectrum in the auction because the auction is over. At that point, a review under Section 7 of the Clayton Act would not find that the merger reduced future competition because the competition for the spectrum had concluded. Although the merger must still face review on other grounds, the primary effect may not be reached by regular merger enforcement.

On the other hand, mergers are less likely than roaming agreements to be used as a method of arranging a collusive agreement. Acquiring a competitor will reduce competition in the auction, but there are also significant costs associated with negotiating and executing such agreements that make them a more costly mechanism for colluding unless the amount of competition reduced is substantial. In addition, some mergers may enhance the combined companies' ability to compete and increase efficiency with little or no impact on competition. Firms that are not competing against each other in a given region are one obvious example. Likewise, firms that were competing but have dropped out of an auction prior to any merger discussion do not pose a competitive problem.

Although we are concerned that merger discussions during an auction may reduce competition for spectrum, designing a simple rule that does not impede efficient mergers beneficial to the public may be impossible. Determining which mergers are harmful and which are beneficial is a difficult task. However, if the Commission decides to permit firms to engage in merger discussions during an auction, it should require the parties to notify the FCC they are considering entering into merger discussions. The FCC may wish to halt such discussions if *(1)* prior to the beginning of the auction but after submission of the short form applications the ratio of bidding eligibility to total spectrum is low, or *(2)* during the auction it is clear that the two firms are actively bidding against each other in a number of markets.

NOTES

1. Under the current rules, if a high bid is withdrawn prior to the close of a simultaneous multiple round auction, the Commission will impose a payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. In this respect, the bidder who withdraws is still liable for the mistake. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.

2. The Commission also proposes modifying the rules to allow entities to invest in multiple applicants if the original applicant withdraws from the auction. We agree with this proposed modification.

3. The prohibition would bar an agreement for access to spectrum currently up for bid or spectrum in the same market obtained previously by one of the parties.

4. We do not object to safe-harbour treatment for firms engaged in roaming or resale agreements *outside* of the geographic regions where they are active bidders or current service providers. However, such a rule would be difficult to apply until the auction is well advanced, since many firms claim to be planning to bid in "all markets" on their form FCC-175 to maximise their options for bidding strategy. To make the safe-harbour rule workable, the FCC may consider allowing firms to amend their short form applications to reduce the geographic area they are bidding on. Such an amendment could also help clarify when a firm has "dropped out" of the auction.

EUROPEAN COMMISSION

1. Preliminary remarks

The basic philosophy behind the European Community's law on Public Procurement is to provide a competitive playing field to all enterprises engaged in the Public Procurement sector. Indeed, the main key to achieving efficiency is ensuring competition between suppliers. It is important to note that this does not necessarily mean that traditional suppliers will be replaced by new ones. Only that all suppliers, including traditional ones, need to come up with competitive offers (value for money) in order to be able to win a contract. In this sense, Competition is at the very heart of the Community's procurement policy.

In the European Union, general public procurement rules stem from the Treaty of Rome which implies that openness, transparency and non-discrimination must be ensured in all public procurement. The free movement of goods, freedom of establishment, freedom to provide services or the respect of competition are paramount principles in the European Union. This means that all authorities of Member States at central, subcentral and local level as well as all public companies and companies which have been granted special or exclusive rights have to comply with those requirements.

In principle, the choice of method of ensuring that those principles are respected is left to the Member States. However, when contracts to be awarded exceed certain thresholds, the European Commission has considered it appropriate to co-ordinate the various rules and practices followed in the different Member States, thereby completing the requirements of the EC Treaty, in particular with respect to procedural requirements. This has been done by a set of EU Directives. EU Directives regulating Public Procurement provide therefore a legislative framework designed to encourage competition amongst enterprises tendering for a contract with Public Authorities.

In practice, such competition is made possible by offering equal chances to all suppliers to win a bid. This means first of all ensuring transparency (announcing purchasing opportunities publicly, indicating clearly what the government entity intends to buy and the requirements which need to be met, setting appropriate time-limits between the publication and the award of the contracts,...). Secondly, real competition requires openness (e.g. that technical requirements are not defined so as to fit only the products/services of one company). Thirdly, infringements of these rules should be addressed through an appropriate enforcement structure, including a possibility for aggrieved bidders to challenge any unlawful decisions before a national body.

The EC directives are divided into two main groups depending on the nature of the purchasing entity. One group of directives apply to public authorities within the traditional meaning of the word. These are the so-called classic sectors directives[1]. The other group applies to public authorities, public companies and companies which have been granted special or exclusive rights which operate in the sectors of water, energy, transport and telecommunications[2]. This means that in practice the European Union has completely opened its public procurement market to competition at EU level. Indeed, public procurement market should be understood as comprising not only the classic purchases made by public authorities, but also the purchases made by entities operating in regulated sectors in which there is no full

and effective competition, regardless of the legal nature (public or private) of the contracting entity. This is one of the main features of the EU public procurement regime, if compared to others.

Further to the Directives, the European Commission has concluded a number of bilateral and multilateral agreements on public procurement. They mostly relate to market access issues, therefore relate to the questions of the eligibility of third country goods, services and suppliers for tendering in EC public procurement procedures.

Competition in the procurement process is not only promoted by the public procurement rules, but also by Articles 85 and 86 of the Treaty of Rome. It must be stated that competition law, as provided for in Articles 85 and 86, is the Commission's main means of addressing anti-competitive disturbances in the Single Market for Public Procurement. Taken together, these articles seek to address every form of anti-competitive behaviour in the market place.

Essentially Article 85 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition and which may affect trade between member states. Article 86 on the other hand prohibits within the Common Market the abuse of a dominant position which may affect trade between Member States.

Bid-rigging is an anti-competitive practice which the European Court of Justice has found to come within the terms of Article 85[3]. As such, it is in the European Commission's interest to examine ways and means to discourage it, and in this context, the European Union welcomes the OECD's initiatives in evaluating the relationship between bid-rigging in the public procurement process and competition law.

In responding to the OECD's questionnaire, the Commission has sought to give an overview of the EU legislation and procedures in the fields of both Public Procurement and Competition Law. We also make reference to recent policy initiatives as provided for in the Green Paper -"Public Procurement in the European Union: Exploring the way forward"[4], the Communication on Public Procurement[5] and the Communication on a Union Policy Against Corruption[6].

2. Procurement

2.1 "Procurement policies are used for a variety of reasons

- to provide the lowest price for a specified high quality item;
- to provide the most efficient procedure for identifying the best provider of a complex, not well specified, product;
- to ensure fairness, transparency and non-interference;
- to guard against oligopolistic co-ordination in bidding;"

- *Are these measures consistent with your philosophy, what other motivations would you include?*

EU Procurement Policy aims to provide the best quality product and services at the most economical price; to give value for money to EU taxpayers and to encourage efficiency in the marketplace. Therefore, the award of contracts must be done on the basis of economic criteria only. In this

respect, purchasing entities may award the contracts on the basis of one of the two following criteria: either the lowest price or the most economically advantageous tender. The first criterion is easy to apply and put a stress on the cost element. The second criterion intends to make a balance between the price and the quality of the item in question. Although their approach is not completely identical, both criteria are based on the economic efficiency principles.

These objectives are achieved by using a variety of means. EC Public Procurement Policy stresses first and foremost the importance of competition in the marketplace. Competition is facilitated by rules and practices providing for transparency and equality of treatment of offerers. In addition, opening up of markets and elimination of barriers to trade in goods and services both at the internal and the international level are key elements in this respect.

2.2 "In many OECD countries there appear to be a significant number of anti-trust cases dealing with bid-rigging in public sector procurement (in Canada, the USA and France)

- *Is there a specific bid-rigging clause in anti-trust policy?*

No, there is no specific bid-rigging clause in anti-trust policy. Bid-rigging falls to be considered under the auspices of Article 85 of the EC Treaty which prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices that prevent, restrict or distort competition and which may affect trade between member states.

- *How many bid-rigging cases have there been in public procurement in the last two years, last five years?*

In this time period Community competition authorities have only taken formal action in one case of Community dimension dealing with bid-rigging in the public procurement process.[7]

- *Is bid-rigging significantly more prevalent in public procurement than in private markets?*

Information at our disposal does not allow us to conclude that is significantly more prevalent in public procurement than in private markets.

2.3 "Several characteristics of public procurement may be responsible for the prevalence of bid-rigging

- important differences exist in the bidding processes used in public --and private-- sector procurement, as suggested above "the openness" of the public process may inadvertently increase collusion;

- there are significant unique characteristics of the "market" used for public procurement --the award is often a single event, such as the construction of a road from A to B. That is there is not a normal market for the good or service in the sense of a repetitive process between buyers and sellers establishing the price. Moreover in these types of situations there are often a limited number of suppliers able to produce the good or service. Having unique events with one buyer and few sellers is not the set-up for a competitive market;

- some recent research suggests that bidder characteristics may be relevant."

- *Are there characteristics of the bidding process (and bidders/suppliers) which are important? If so, what are they?*

First the role of the purchaser in the bidding process cannot be neglected as, in particular, it defines the market in question for each single procedure. This is done by drafting tender documentation, by choosing the technical specifications etc. The way this is done will have important consequences for the reaction of interested bidders, as the definition of the market does not always facilitate competition: i.e. specifications are defined (voluntarily or involuntarily) in a way that few bidders will be able to comply with. Therefore, a higher degree of professionalism among purchasers could significantly increase the number of potential competitors and thus improve the environment in which public procurement takes place. This is why, the public procurement policy, as defined in the Communication in public procurement, insist on the role of training purchasers in purchasing methods and best practice as an instrument to foster competition between suppliers and therefore reduce anti-competitive practices.

Transparency and access to information probably plays a different role within the public procurement process than within business-to-business transactions. Information given on public procurement is a key element in creating a business friendly environment. Indeed, low supplier participation (an incentive to collusion) may indicate that information on potential public procurement markets must be extended and made more accessible.

As to the procurement procedures, one may argue that rigid procurement procedures may give rise to collusive practices. The EU Directives that apply to the classic public authorities specify three types of procedures[8]:- the open and restricted procedures, which contracting authorities are free to choose, and the negotiated procedure, which may only be used in exceptional circumstances.

Open[9] and restricted procedures[10] are rigid in the sense that while contracting authorities may request further information from tenderers in order to facilitate assessment of the offers received, the possibilities to negotiate the terms of such offers are severely restricted, or even at times non-existent. This aspect of the transparency of these two procedures has been described by the Council and the Commission as follows " In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations of which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities, and provided this does not involve discrimination"[11].

Negotiated procedures, on the contrary, are those procedures whereby contracting authorities consult the service providers of their choice and negotiate with one or more of them the contract conditions. Such conditions could for example be technical, financial or administrative. In the negotiated procedure the contracting authority has the possibility of acting as a free agent not only in the award of the contract but also in the preliminary discussions. The contracting authority must respect certain rules of good administration however when:

- setting the contractual conditions particularly in relation to price, deadlines and technical characteristics;
- comparing the offers and their respective advantages;
- applying the principle of equality of treatment among the candidates.

Use of the negotiated procedure is justified only in the exceptional cases set out in the Directives. In accordance with the case law of the European Court of Justice these provisions must be interpreted strictly and the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances.[12]

It may be argued that purchasers can use their negotiating and bargaining powers to reduce the risk of collusive practices. However, negotiations can normally only take place with a limited number of suppliers, which is a violation of the equal treatment principle which is so fundamental to the regulatory regime in procurement. Lack of equal treatment often lead to a loss of efficiency. The remedy may therefore be worse than the problem.. This is why the rules limit the use of negotiation to exceptional circumstances. It can also be argued that the lack of flexibility in the procurement process could contribute to the occurrence of bid-rigging. Lack of flexibility has recently been addressed by the Commission in its "Communication on Public Procurement" which states that the Commission intends to table a set of amendments to the existing legal framework. These amendments will provide for, amongst other things, the introduction of a competitive negotiated procedure in addition to the existing negotiated procedure[13]. This procedure will facilitate dialogue between suppliers and purchasers in the course of the procedure and not just in exceptional circumstances, while respecting the principles of transparency and equal treatment.

As far as the utilities are concerned[14], the situation is somewhat different in the sense that as purchasers they have recourse to the negotiated procedure without limitations. Therefore, the rules are more flexible in these sectors. Moreover, utilities are in most cases in a monopolistic or oligopolistic situation which increases their market power. Therefore, the risk of big-rigging is, in theory, reduced.

3. Alternative bidding strategies

"Alternative instruments to reduce the risk of collusion:

- using randomised weighting criteria;
- opening bidding to more suppliers;
- involving competition authorities in the bidding process
- negotiating versus bidding;
- using electronic public procurement processes."

- *What experience have you had with the above instruments?*

  a) Using randomised weighting criteria. As explained before (see 2.1), the EU public procurement system allows to award contract on the basis of the economically most advantageous tender. Hence, entities may define the criteria that they intend to apply to the award as well as the weight they will give to each in the evaluation. While random weights on criteria can be instrumental in avoiding collusive outcomes, one can not forget that the very nature of the public procurement process requires that criteria for the evaluation of bids shall be set up in advance and be made known by the purchaser to interested suppliers. In addition, those criteria shall be objective and cannot lead to disguised discrimination. So flexibility is limited by the necessary equality of opportunities.

b) Opening bidding to more suppliers. The main objective of the EU public procurement policy is the opening up of its market to competition. This has been done by a set of rules (see above) aiming to dismantle the barriers and to facilitate intracommunity trade in this area. However, rules on procurement are not enough to ensure competition. As indicated above the number of suppliers depend first and foremost on the way in which the purchaser defines "the market". By doing so in a narrow manner, the number of possible bidders is not only reduced but also made very easy to determine. This is why the WTO Government Procurement Agreement requires purchasers to refer to performance rather than product standard where possible. The GPA is in itself a good example of an attempt to broaden the number of suppliers. Generally speaking it is part of the European Union's policy to open its procurement markets to third parties on a reciprocal basis. In this context the European Union is a member of the GPA At bilateral level the European Union has concluded the European Economic Area Agreement ("the EEA agreement") and the "Europe Agreements" with a number of countries of Central and Eastern Europe. The agreements in force relate to Bulgaria, the Czech Republic, Hungary, Poland, Romania, Latvia, Lithuania, Estonia and the Slovak Republic.

c) Involving competition authorities in the bidding process. The European Commission is the authority responsible for competition enforcement at European Union level, though there are also national authorities at Member State level which are also responsible for enforcing competition in their own jurisdiction. The European Commission do also conduct surveillance activities in the field of public procurement so as to ensure that public procurement legislation is complied with. Using these powers it can intervene in the bidding process if a violation of the European Union rules is detected. This is done by using the powers conferred to it by the Treaty, in particular art. 169. Its enforcement powers are not dependent on claims introduced by interested parties, but the Commission can also act on its own initiative. In addition to its enforcement role, the Commission is also at the origin of the regulatory policy of the European Union in this field, as it prepares draft legislation.

d) Negotiating versus bidding. This seems to be based on the idea that in tender procedures the purchaser would be unable to control the behaviour of the would be suppliers while in negotiations the purchaser would maintain a lot more control over such behaviour. However, in reality the loss of efficiency in negotiations, particularly of complex purchases, when tenders are the prevalent method of purchasing, may be in same cases more important than the gains which can be obtained from such increased control of supplier behaviour. Generally speaking the limits implied by the fundamental principle of equal treatment greatly reduce the scope for negotiation. Currently under the terms of the Directives a purchasing entity within the European Union has the choice between open or restricted tendering procedures or negotiation. In the case of negotiated procedures, the contracting entity consults suppliers or contractors of its choice and negotiates the terms of the contract with one or more of them. In such cases the contracting authority has the possibility of acting as a free economic operator not only in the award of the contract, but in the preliminary discussions. The contracting authority must however respect certain rules of good administration. Recourse to this procedure is allowed only in certain exceptional cases as enumerated by the Directives (except in the case of the Utilities Directive, where entities can freely choose between the three procedures).

As mentioned above however the Commission has stated that it intends to introduce more flexible procedures.

e) Using electronic public procurement processes. The importance of using electronic means in order to reduce bid-rigging does not result from the actual electronic means themselves, but from the fact that their use increases transparency and increases the knowledge of suppliers that a certain purchase is intended. However, whether or not such increased transparency leads to a higher number of competitors and hence reduces the possibility of bid-rigging depends on many other elements which have been mentioned above. A transparent announcement to purchase a particular type of satellite will still not lead to thousands of offers. As indicated above, in the end the market is often defined largely by the purchaser.

For a variety of reasons, however, it is true that the European Commission encourages the use of Electronic tendering.

The programme launched by the Commission is known by the acronym SIMAP[15] ("Système d'information pour les marchés publics"). which as its name suggests, provides information about procurement both as regards opportunities and as regards the rules and procedure applicable. On the 12th of December 1997 the Commission proposed a second phase in the development of SIMAP which aims at comprising the entire procurement process.

In the Communication on Government Procurement the Commission has enumerated its plan of action in this regard as follows:

i) it will provide the possibility to all contracting entities to electronically prepare and submit their notices for publication through the procurement transparency system operated by the European Union institutions. Several option, including electronic mail and the internet will be provided;

ii) it will consider incentives to encourage contracting entities to use these electronic means of submission;

iii) it will encourage the publication of all tender documents, in particular in open procedures, on the internet;

*iv) i*t will seek a commitment from the Member States to ensure mutual compatibility and interoperability of electronic procurement systems which they set up for below threshold purchases;

v) it will come forward with recommendations for further measures to be taken in modifying the legal regime, developing standards or specifications or establishing a regulatory framework. It will ensure that the requirements of electronic procurement are taken into account in any proposals for standards or legislation on digital signatures.

The Commission will also promote the active participation of all interested parties in order to stimulate the development of a pan-European electronic procurement environment in which a substantial number of all procurement transaction takes place by the year 2003.

- *Are there other instruments to reduce collusion?*

Generally speaking the main instrument to reduce collusion is to define the product or service in a broad manner thus allowing a large number of potential suppliers to take part and thus make it hard for the latter to agree on a certain type of behaviour. Thus competitors should be in a position to adequately compete for public contracts. This means in particular that access to information is effectively provided, and that this information is adequate for the purposes of competing effectively. The role of transparency is therefore paramount. This has an obvious link to the information on electronic procurement above.

A higher degree of professionalism among purchasers could significantly improve the environment in which public procurement takes place. Competition is also facilitated by the way purchasers define the rules of the game: that is to say, by drafting tender documents and specifications that effectively promote competitive behaviour from bidders. Training on best practice is therefore an important instrument to reduce anti-competitive practices.

- *How have your country opened the market to foreign bidders?*

As per (b) above.

4. "Bribery and the importance of the agreement on preventing bribery

- ***To what extent have efforts to control bribery facilitated bid-rigging, and vice versa?***

- ***What experience have you had in developing instruments which decrease the incidence of both bribery and bid-rigging?"***

The European Union recognises that any form of bribery or corruption runs contrary to the principles of non-discrimination and free competition which are inherent in achieving the objectives of the internal market[16], including those particularly related to public procurement as per section 1.1 above.

The Directives relating to Public Procurement provide for the possibility to exclude any enterprise or supplier from participation in the tendering process who:

- has been convicted of an offence concerning professional conduct by a judgement which has the force of *res judicata*.

- has been found guilty of grave professional misconduct proven by any means which the contracting authorities can justify.[17]

In the Green Paper -"Public Procurement in the European Union: Exploring the Way Forward"[18] the Commission examined gaps in the existing framework for dealing with corruption and proposed, amongst other measures ,the adoption of a procedure whereby the National Official responsible for the tender in question would be obliged to sign a statement of personal accountability certifying that the EU's public procurement rules have been followed.

The Communication on Corruption follows through on this and suggests that 'all competitors for a specific project might be required to give a written undertaking that they will not use bribery to obtain the contract. This commitment discourages bribery and can leave the enterprise open to a civil action for damages or a contractual fine. Another approach is to restrict certain tenders to enterprises who

have adopted special codes of conduct or practices against the use of corruption in seeking to obtain contracts.' It adds that 'caution would have to be exercised with this latter approach to ensure that it does not unduly restrict fair competition for tenders.'

This line has been confirmed by the Communication on Public Procurement[19]. In this communication the Commission has suggested that it will explore the possibility of obliging public procurement entities to enter into anti-corruption pledges and a corresponding obligation on tenderers to agree that they will not use bribery to obtain a contracts. In addition it will explore the possibility of a blacklisting system as a corruption tool.

In this regard the Commission has stated that it will work on a scheme of commitments against corruption applicable to areas where community finances are at risk. It will also allow for an inter-sectorial exchange of information on persons and enterprises who have engaged in corruption while respecting data protection requirements.

As such initiatives have yet to be implemented it is not possible to assess the extent to which efforts to control bribery in this form will effect the occurrence of bid-rigging. It is apparent that enterprises which are not confident in winning tenders through the competitive process of the procurement process may then consider the plausibility of colluding with other enterprises as an alternative to obtaining the contract through bribery. However, such enterprises must consider the potential financial penalties which they may incur if prosecuted under Article 85.

5. "The role of competition law and policy

- ***Are there specific anti-bid-rigging clauses?***

No.

- ***How can competition authorities reduce the risk of bid-rigging?"***

Competition authorities can reduce the risk of bid-rigging by monitoring the procurement markets, focusing on those sectors in which the risk of anti-competitive practices are higher. Action could be initiated where there is suspicion that collusion has taken place. In addition, preventive measures based on the lessons learned should be adopted: this would include for instance sharing information on anti-competitive practices with contracting entities in order to facilitate for them the conducting of sound public procurement procedures.

- ***Is proof of injury required, and also how is it proven?***

The jurisdiction of the EU Competition rules is limited to conduct which 'may effect trade between member states'. The test as to whether trade between states is affected is met whenever it is probable that the concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade in goods or services between member states. In this sense, proof of economic injury is not required. (cf; the Miller International case).

- ***How can damages/fines be calculated?***[20]

The award of damages is a question for national courts. A right of action for damages in cases involving Article 85 has been recognised by the courts in many of the member states.[21] However they have been awarded only in a few cases.

Article 15 of Regulation 17 allows firms to be fined between ECU 1000 and ECU one million, or a sum in excess of this figure up to ten percent of the firm's total turnover in its preceding business year.

However, the Commission has recently drafted Guidelines on the method for the setting of fines under Articles 85 and 86 of the Treaty of Rome and Article 65.5 of the ECSC Treaty[22].

According to this system a base sum defined by reference to the duration and gravity of the infraction will be calculated. It will be raised when aggravating circumstances exist or reduced to take account of attenuating circumstances. Corrections may be made to take account of the individual circumstances of the case.

- *Can compliance programs (e.g. Section BC2.5 US Sentencing Guidelines) where organisations self detect bid-rigging be of use?*

The EU procurement policy focuses on compliance programmes by purchaser. These so-called "attestations" exist for the moment only in the utilities field and do not yet include attitudes to prevent bid-rigging, e.g., by specifying markets in a broad sense. However, in it's recent Communication and preceding Green Paper the Commission encourages broader use of attestation procedures. Such procedures could very well include attitudes to combat or prevent bid-rigging.

As for compliance programmes of suppliers, such programs can be introduced which provide specifically for financial penalties to be levelled against companies whose agents initiate and execute collusive practices.

Penalties may also be directed towards the individuals who engaged in the collusive practice in the form of civil or criminal prosecutions, and in the case of senior company management, disqualification from holding such positions for either a specified period of time or permanently.

If may also be provided that the shareholders of a company should have a civil right of action for damages against the particular individual whose actions have effected their rights in involving the company in collusive practices.

Legislation to this effect should be a significant deterrent and lead to the incorporation of in-house monitoring of policies relating to the procurement practices.

- *How can enforcement be improved?*

The European parliament has proposed strengthening the Commissions powers to conduct investigations and impose penalties in the public procurement field along the lines of the powers it exercises in the competition field so that it can enforce the legal framework effectively.

The Amsterdam European Council has also requested the Commission to make proposals to it for the setting up of an efficient mechanism for combating serious infringements of Community law in the field of free movement of goods.

In it's Communication on Public Procurement the Commission has stated that it will consider providing such a mechanism for dealing with infringements within the public procurement field. It may also consider having recourse, in appropriate cases, to Article 90(3) of the Treaty of Rome.

The Commission has stated that it will also take a more proactive approach in exists initiating proceedings under Article 169 of the Treaty of Rome.

Other areas to be considered in the enforcement process relate to the further training of officials engaged in the procurement process to identify possible cases of collusion and increasing co-operation between the Commission and Member States.

- *Do high and publicised penalties help?*

This is a premise of the EU's policy approach. No evidence either way however, because specific studies have not so far been carried out.

- *What other roles for competition authorities are relevant?*

The effective monitoring of sectors of industry designated to be high risk together with initiative in pursuing potential collusive practices and effective preventive measures.

NOTES

1. Directives 93/36, 93/37, 92/50 and 89/665, as amended by Directive 97/52.

2. Directive 93/38 as amended by Directive 98/4.

3. Joined Cases 40-48,50,54-56,111,113 and 114/73, *Co-operative Vereniging 'Suiker Unie' UA and Others v. EEC* (1975) E.C.R. 1663 ar 2010; Commission Decision 92/204/EEC in cases IV/31.572 and 32.571

4. COM (96) 583

5. COM (98) 143

6. COM (97) 192

7. Vereniging Van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission of the European Communities. ECR 1995 p II-0289

8. Public authorities within the sense of Directives 93/36/EEC, 93/37/EEC and 92/50/EEC.

9. Procurement is open to any interested provider to tender an offer in response to the publication of the procurement notice

10. In the restricted procedure there are two stages. In the first stage any interested provider may tender a request to participate in the tendering procedure in response to the publication of the procurement notice. At this stage the provider is termed a 'candidate'. In the second stage the contracting authority selects appropriate candidates and invites them to tender for the contract. Selection of candidates is governed by the objective qualitative criteria laid down at the commencement of the procedure. A restricted procedure may be accelerated when circumstances make it impractical to respect the normal deadlines for restricted procedures. As this is an exception which may limit competition, it must be interpreted restrictively and limited to those cases where the contracting authority can prove the existence of objective circumstances giving rise to urgency and a real impossibility of respecting the normal deadlines for restricted procedures.

11. OJ L111, 30.4.94, p.114

12. Case 199/85, *Commission v Italy* (1987) ECR 1039, at paragraph 14.

13. COM (1998) 143, of 11 March 1998.

14. Entities operating in the water, energy, transport and telecommunications sector, as provided for in Directive 93/38.

15. Simap's homepage can be visited at http://simap.eu.int

16. Communication on a Union Policy Against Corruption - COM(97) 192

17. Criteria for qualitative selection.

18. November 1996

19. COM (1998) 143, of 11 March 1998.

20. See Witter Brown and Rawlinson, 'EEC Competition Law - A practitioners Guide' p711.

21. E.g. Ireland: *Cadbury Ireland v Kerry Co-operative Creameries* HC (1982) ILRM 77, UK: Garden cottage Foods? House of Lords, June 23,1983 CMLR 43, France: SACEM, Cour de cassation, Dec 13 1983, 1984- 1983 CMLR 233.

22. OJ C9, 14 January 1998

COMMISSION EUROPÉENNE

Le droit communautaire des ententes ne comporte aucune disposition spécifique applicable aux marchés publics. Cependant, les dispositions générales, notamment l'article 85 du traité s'appliquent sans réserve aux accords, décisions et pratiques concertées des entreprises ou associations d'entreprises intervenant dans le cadre de leur participation à des marchés publics ou privés, dès lors qu'ils sont susceptibles d'affecter de façon sensible le commerce entre Etats membres et qu'ils ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun.

Tomberaient notamment sous le coup de cette disposition les pratiques suivantes :

- concertations visant à faire obstacle à l'abaissement des prix ou à les majorer ;

- désignation concertée du futur titulaire d'un marché, par exemple en faisant en sorte que cette entreprise apparaisse comme la moins disante lors de l'ouverture des soumissions ;

- échange d'informations entre concurrents préalablement au dépôt des offres (ex.: indications ou assurances sur le montant des soumissions qu'une entreprise envisage de présenter ; échange d'informations sur l'existence de compétiteurs et de leur disponibilité à répondre aux appels d'offres).

Plusieurs de ces pratiques ont par exemple été condamnées par la Commission Européenne dans sa décision "SPO"[1].

L'expérience montre cependant que les condamnations formelles de la Commission sont peu fréquentes. Plusieurs raisons permettent d'expliquer cette situation.

1. Le champ d'application du droit des ententes

Les dispositions de l'article 85 ne sont applicables que si les pratiques en cause restreignent la concurrence. Or la Commission a indiqué dans sa communication du 29 juillet 1968 relative à la coopération entre entreprises[2] que ne restreignent pas la concurrence les accords qui ont uniquement pour objet la constitution d'associations temporaires en vue de l'exécution en commun des commandes, dans les cas suivants :

- Lorsque les entreprises participantes ne sont pas en concurrence pour les prestations à fournir

Tel est le cas notamment des entreprises qui appartiennent à des secteurs d'activité différents ou des entreprises d'un même secteur, dans la mesure où elles ne participent à l'association temporaire qu'avec des produits ou des prestations qui ne peuvent pas être fournis par les autres participants. Il importe peu que les entreprises soient en concurrence dans d'autres secteurs. Ce qui importe c'est de savoir si, étant donné les circonstances concrètes des cas particuliers, une concurrence est possible dans un avenir rapproché pour les produits ou les prestations en cause. Si l'absence de concurrence entre les

entreprises repose sur des accords ou pratiques concertées, on peut être en présence d'une restriction de concurrence.

- Lorsque les entreprises ne sont pas individuellement en mesure d'exécuter les commandes

Tel est le cas lorsque isolément, faute d'une expérience, de connaissances spéciales, de capacité ou de surface financière suffisantes, elles travaillent sans aucune chance de succès ou sans pouvoir terminer dans les délais les travaux ou supporter le risque financier.

Cette position est confirmée par la pratique décisionnelle de la Commission. Ainsi, dans décision "Korsortium ECR 900", la Commission a estimé qu'un accord visant à mettre au point et à produire en commun un système de téléphonie mobile, ne constituait pas une limitation de la concurrence dans la mesure où le travail demandé ne pouvait être assuré par les entreprises isolément, en raison du coût élevé qu'il impliquait et des délais très brefs impartis par les maîtres d'ouvrage[3].

L'article 85 serait tout de même applicable si les entreprises se livraient à un simulacre de concurrence : par exemple si elles se groupaient à l'insu du maître d'ouvrage afin de présenter la meilleure offre et présentaient ensuite des offres individuelles. Une telle pratique, en effet, trompe le maître d'ouvrage sur la réalité et l'étendue de la concurrence.

Par ailleurs, les pratiques ne tombent sous le coup du droit des ententes que si elles sont susceptibles d'affecter de façon sensible le commerce entre Etats membres et la concurrence. Or cette condition est peu souvent remplie dans les affaires liées aux procédures d'appel à la concurrence portées à la connaissance de la Commission, notamment dans les secteurs de la construction ou des gros travaux d'infrastructure routière ou ferroviaire. En effet, l'interpénétration des marchés des différents Etats membres est encore faible dans ces secteurs. A titre d'illustration, la décision SPO, déjà citée, fait référence à un rapport du ministère des affaires économiques des Pays-Bas de 1989 qui montre que cinq pour cent seulement des activités de construction dans les différents pays d'Europe sont exportées et que cette situation devrait rester inchangée jusqu'à l'an 2000.

La décision SPO précise que parmi les éléments qui concourent à limiter cette interpénétration figurent les conditions spécifiques du marché de la construction au niveau communautaire, telles que les prescriptions différentes en matière de construction et les normes différentes d'un Etat membre à l'autre, et les caractéristiques particulières des entreprises de construction.

Par ailleurs, si la Commission n'exclut pas a priori qu'un projet particulier puisse constituer un marché de produit au sens des règles de concurrence, elle a cependant précisé, dans l'affaire SPO que la thèse du SPO selon laquelle chaque projet de construction constituerait un marché partiel, ne pourrait avoir pour conséquence l'absence d'un marché de la construction comprenant tous les ouvrages[4]. Dans cette dernière hypothèse, qui est sans doute la plus fréquente, la condition d'affectation sensible est évidemment plus difficile à remplir.

2. Répartition des tâches entre les autorités communautaires et celles des Etats membres

Le champ d'application du droit des ententes ne permet pas à elle seule d'expliquer l'activité réduite des autorités communautaires dans la lutte contre les pratiques anticoncurrentielles mises en oeuvre dans le domaine des marchés publics. En effet, les procédures d'appel à la concurrence ne sont pas limitées aux secteurs de la construction et les travaux d'infrastructure. Ils s'étendent également à la

fourniture de produits (il est vrai que les pratiques anticoncurrentielles y sont, semble-t-il moins fréquentes).

Par ailleurs, l'interpénétration des marchés de construction et de travaux est encore réduite, mais elle tend à s'accentuer, avec l'achèvement du marché intérieur.

Enfin, les directives "marchés publics"[5] imposent une publicité au niveau européen pour les marchés de travaux dépassant cinq millions d'écus, ce qui tend à démontrer que pour les marchés d'une certaine dimension, la concurrence s'exerce dans un cadre plus large que le territoire national.

Un autre facteur explicatif important réside dans le partage des tâches opéré au sein de l'Union européenne. Les dispositions de l'article 85 sont applicables non seulement par les autorités communautaires, mais aussi par les Etats membres.

Même dans les cas où une affectation sensible du commerce entre Etats membres peut être établie, la Commission peut renoncer à agir lorsque l'affaire ne revêt pas une importance particulière pour la Communauté, et laisse le soin d'intervenir à un Etat membre. Tel est notamment le cas lorsque le marché géographique en cause est un marché limité au territoire d'un Etat membre et que l'accord ou la pratique n'est mis en oeuvre que dans cet Etat. Dans un tel cas, les effets se produisent essentiellement dans ledit Etat. Les règles qui gouvernent ce partage de compétence, appliquées de longue date, ont été exposées formellement dans la communication de la Commission du 10 octobre 1997 relative à la coopération entre la Commission et les autorités de concurrence des Etats membres pour le traitement d'affaires relevant des articles 85 et 86 du traité[6].

L'expérience montre enfin que même lorsqu'une affaire revêt une importance communautaire suffisante, la Commission peut être amenée à renoncer à intervenir, à la demande d'un Etat membre, lorsque celui se déclare disposé à agir.

3. Ressources disponibles

Certains Etats membres consacrent à la lutte contre les pratiques anticoncurrentielles dans le secteur des marchés publics des moyens considérables. Le souci d'efficacité et de bonne gestion des ressources de l'Union conduit donc corrélativement la Commission à réduire ses propres interventions.

A titre d'exemple, certains Etats membres sont dotés de services chargés de façon spécifique de détecter les irrégularités lors de la passation des marchés publics. Ces services exercent leur activité en collaboration étroite avec les autorités nationales de concurrence.

Ces ressources permettent aux Etats membres de lutter efficacement contre les pratiques anticoncurrentielles en s'appuyant non seulement sur leur législation nationale, mais aussi sur l'article 85. A titre d'exemple, en 1995, les autorités françaises de concurrence ont condamné 31 entreprises du secteur du génie civil pour avoir procédé à un partage du marché de la construction du Train à Grande Vitesse du Nord de la France. L'objectif de ces entreprises était notamment d'empêcher les entreprises étrangères de pénétrer le marché. De fait, les investigations ont été ouvertes à la suite d'une plainte d'une entreprise italienne qui estimait qu'elle avait été empêchée par le cartel de participer à la procédure de marché public. Dès lors, certaines condamnations ont pu être fondées à la fois sur les dispositions du droit français de la concurrence et sur celles de l'article 85.

NOTES

1. Com. CE 5 févr. 1992, JOCE n° L 92/1, p. 271

2. JOCE 29 juil. 1968, n° C75/3

3. Com. CE déc. 27 juil. 1990, JOCE L 228/31 du 22 août 1990

4. Au cas d'espèce, la Commission a précisé sa position comme suit : "la mise en adjudication des marchés de travaux est un processus presque continu. Beaucoup de constructeurs, lorsqu'ils estiment avoir suffisamment de travail à court et à moyen terme, sont tentés de s'abstenir de soumissionner (dans une procédure ouverte) ou feront moins d'efforts pour offrir le prix le plus bas (dans une procédure restreinte). En d'autres termes, les marchés constituent pour les constructeurs des alternatives globalement équivalentes, ce qui démontre bien l'existence d'un marché de la construction en tant que tel. Plusieurs constructeurs, notamment les plus grandes entreprises, disposent pour toutes les grandes catégories de travaux de connaissances et savoir-faire à peu près identiques, de matériel et machines adaptés, de personnel qualifié, etc. Au surplus, la plupart de ces offrants - et notamment les constructeurs spécialisés ou d'une grande taille - n'ont pas une attitude passive à l'égard du marché; ils mènent une politique de promotion active pour s'assurer dans la mesure du possible d'une quantité de travail suffisante et régulière (pt. 73).

5. Notamment la directive 93/37/CEE du Conseil du 14 juin 1993 portant coordination des procédures de passation des marchés publics de travaux (JOCE L199 du 9 août 1993).

6. JOCE n° C 313, 15 oct. 1997, p. 3

AIDE-MEMOIRE OF THE DISCUSSION

by the Secretariat

Chairman Jenny opened the round table on procurement markets by making a number of general comments based on the written contributions from Member countries:

i) there is a certain homogeneity in the way different countries deal with rigged bids in the context of public procurement. As a rule, procurement practices are regulated in accordance with the provisions of the WTO agreement and/or (in Europe) with the European directives. The purpose of such regulations is to ensure that procurement processes are both transparent and non-discriminatory, and that they comply with the criterion of the best price in the choice of the best bid, even if there are other objectives. There are no specific antitrust provisions with respect to rigged bids, but the practice comes under the heading of the general prohibition on cartel agreements. A rigged bid is often seen as a breach *per se* of competition law and is considered a serious offence, sometimes even a criminal offence;

ii) there seems to be something of a divide between what economic theory would deem the best way to discourage bid-rigging, and what the OECD countries practice. This might be because procurement regulations are pursuing two different objectives at the same time, one being to promote fair competition and the other to promote economic efficiency;

iii) the degree of implementation of competition law with respect to bid-rigging varies a lot from one country to another. This is particularly surprising in view of the fact that all Member countries appear to see it as a practice that seriously infringes competition law;

iv) it is striking to find that Member countries differ to some extent in their assessment of a number of points, such as whether:

- transparent procedures serve to encourage competition or, on the contrary, facilitate collusion;
- bid-rigging is more common in public or in private procurement;
- allowing a public procurement agency to negotiate would increase or reduce competition in public procurement.

v) Also striking is the fact that a variety of specific instruments are used by the OECD countries to prevent or punish bid-rigging.

At the invitation of Chairman Jenny, Dr. Waverman[1] made a few introductory remarks.

He pointed that as a seller of property, the State increasingly uses auctions (in the USA, the UK, the Netherlands) whereas for procurement, the State doesn't seem to use auctions. Several features may explain this situation:

i) the economics of purchasing is less well developed than the economics of auctions;

ii) it is not well recognised that economics can help;

iii) there is a greater prevalence for bid-rigging in state procurement than in the private sector because the buyer in the State is usually a municipality, and most of the time, municipalities have not the sophistication of a commercial operation; the Norwegian submission refers to a 1993/1996 survey which shows that in 50 percent of the municipalities surveyed, local authorities have not improved their procurement procedures in those three years;

iv) Simple rules can help and most countries appear to agree to the following principles:

- do not restrain those who can bid;
- one-shot-sealed bid is preferable to transparency;
- economics says: "do not advertise who won or what the bids were; transparency can only help collusion".

Dr. Waverman suggested a number of possible remedies:

- an educational process; because of the quite unsophisticated nature of most of the State buyers, an educational process seems very important;
- a warning label from the competition authorities; it is important to introduce in the tender, as is already the case in a number of countries, a warning label from the competition authorities which would say: "collusion would lead you to fines and to jail.";
- a compliance programme; for major projects, only bidders who have a compliance programme in place would be allowed to bid;
- an hypothetical monopolist test; because there are so many players in bid-rigging, it would be interesting for Competition authorities to do an hypothetical monopolist test in advance of some of the largest bids. Too often, indeed, one does not know what the market is, and by suggesting the use of market analysis, the Competition Authorities would help to find in advance where potential problems may be.

1. Specificity (or lack of specificity) of rules for public procurement markets

Chairman Jenny then turned to the Australian Delegate and requested him to expand on the statements made in his contribution: "it may be unwise to conclude that the causes of and remedies for bid-rigging arise from differences between public and private sector procurement"...and ..."public competitive processes such as tendering may be used, but so may private negotiation with one or more suppliers, if that is identified as the approach most likely to produce best value for money."

The Delegate from Australia explained that the contribution reflects the scepticism of Australian officials regarding the empirical evidence on the differences. The Commission, notably, has had some involvement in bid-rigging cases and recently, it has taken several big cases in the building and ready-mix concrete sectors. Both cases showed that rigging was evenly spread between public and private sectors. These cases, and the sanctions imposed (notably heavy fines), helped people to draw lessons on the severe consequences of collusive bidding. In addition, at the Australian government level, a more systematic strategy for dealing with collusive tendering has been adopted: firms must have compliance programmes, give statutory declarations about certain elements of their practices, and tenders from people who breached the law in the past are not accepted without prior compensation.

Chairman Jenny, then referred to the German contribution which states "generalisations about unique features of the procurement market relative to other markets that would suggest a particular vulnerability of public procurement markets to bid-rigging are not justified". However, as he pointed out, the contribution continues by offering a number of reasons for which there could be specific problems such as the fact that public buyers are often monopolistic buyers or that they don't care about the public funds for which they are not necessarily accountable. The German contribution also mentions the revision of the German law and states that Germany felt the necessity "to alter the legal foundations of public procurement".

The German Delegate explained that, in line with tougher legislation, a new provision has been recently introduced in the criminal law--this is quite unusual in Germany since violations to competition law are only administrative offences. It concerns companies which engaged in bid-rigging in the public procurement sector. This supports the assumption of a greater vulnerability of the public sector to bid-rigging risks.

The representative from the German Ministry of Economy added that the German contribution to the roundtable was submitted a few weeks before the adoption of the new law by the Parliament, which has just occurred. According to the new procurement law which will come into force on 1st January 1999 -- and this is the main change introduced -- bidders who feel disadvantaged can file a complaint to an extrajudicial review board (there will be three to four chambers at the Bundskartellamt with three weeks to review the process, and then other chambers at the länder level); on appeal, bidders can go to an Administrative Court. This change has been justified mainly by the European Commission's dissatisfaction concerning the current German implementation of the EC remedies Directive.

Chairman Jenny requested the EC Representative to comment notably on two quotations drawn from his written contribution: "there are unique characteristics of the market for public procurement which are conducive to competition problems" and "negotiations can normally only take place with a limited number of suppliers, which is a violation of the equal treatment principle which is so fundamental to the regulatory regime in procurement. Lack of equal treatment often leads to a loss of efficiency. The remedy may therefore be worse than the problem".

The EC Representative argued that any substantial difference in procurement between public and private sectors is related to the purchasing side. In public procurement, the purchaser defines the market, contrary to what normally happens in private procurement. He suggested a number of solutions, including:

- the use of performance standards rather than product standards;
- the development of training programmes to increase the purchaser's sophistication;

- the increase in transparency: a purchaser can become more sophisticated if there is more transparency about what other purchasers are doing. In addition, transparency will help to combat political favouritism[2].

- Outsourcing ; however, the danger from a competition point of view is to increase concentration in the purchasing sector; but the supply side is also heavily concentrated.

On the supply side, competition is the only way to achieve efficiency in procurement. However, although enforcement powers exist when competition is restricted on the supply side, they don't to the same degree and with the same effectiveness when competition is restricted by behaviour on the purchaser's side. In this respect, independent agencies which would have genuine investigative powers vis-à-vis purchasers, including compulsory process could play an important role.

At Chairman Jenny's request, the Danish Delegate described his country's position. The main problems in Denmark, he said, are political favouritism and the insufficient sophistication of most public buyers. Therefore, the question in Denmark is how to remedy this situation rather than fighting bid-rigging as such.

In procurement markets, the difficulty for competition enforcers is to stop bad practices when the work has started or has already been carried out. Because quick enforcement is crucial, in Denmark the procurement office uses informal methods, notably the threat to bring complaints to Court. Other tools will be considered and Denmark is part of a group which has been set up to study possible improved enforcement tools in all EU countries.

A stiff prohibition on negotiation should also be reconsidered and a competitive dialogue, as it is considered for the moment by the European Union, should be established. This possibility for a second round of discussions is important when one does not know what should be purchased.

Chairman Jenny referred to the Italian contribution which states that "bid-rigging seems significantly more prevalent in public procurement than in private markets" and which also stresses the importance of procedures followed by public contractors when calling for a tender.

The Italian Delegate stated that it is felt in his country that the situation in public and private procurement markets is quite different, not so much because of the lack of sophistication of the purchasers but because of the rigidity of the procedures in public markets. In public procurement, the supplier is chosen according to a large set of written conditions, which is not the case in private markets where the purchaser has always the possibility to go to other suppliers if he is not satisfied with the outcome of the bidding procedure.

There are few recorded bid-rigging cases (five) because they are difficult to detect. In general, they resulted from schemes that favoured all the parties involved; hence, the absence of complaints. The Authority has, therefore, been trying to combat collusive bidding in public procurement markets with indirect evidence such as pricing, modalities of participation by companies to the bids etc.. but this evidence can sometimes be misleading or not significant enough.

An important case arose in the co-insurance sector in Milan. The five major insurance companies in the market combined to bid to insure the risk of the Milan's municipality. The Municipality came to the Authority to complain because it did not find any other competitor. Although co-insurance can have pro-competitive effects when risks are very high[3], it can also be anticompetitive. In the Milan's case, the Authority felt that this was the case despite the size of the contract.

The Italian Delegate also referred to an agreement concluded by a consortium of 170 cleaning companies to divide the market for public procurement of cleaning service contracts. These were companies which operated throughout the country but on local markets; they were not competing on the same market. This consortium was allocating the contract to the companies on an alternating basis; companies were forbidden to participate in the tendering procedure in other local markets.

2. Transparency

Chairman Jenny introduced this part of the discussion quoting the Norwegian contribution which outlines some of the difficulties with transparency: "Public buyers are subject to EEA rules on public procurement. When inviting tenders the buyer is required to inform all participants in the tender about the winning bid, the prices and the products. In oligopolistic markets this information may increase the danger for collusive tendering because deviations from collusive arrangements will be detected more easily than if the terms of the bids were kept secret." As a contrast, the position of Spain on this issue is quite different: "the publication of the awarding of the contracts is extremely useful to guarantee transparency and to uncover possible irregularities in the awarding of public contracts."

The Delegate from Spain pointed out that while efficiency is a major factor in procurement market, public authority, as guardian of the public interest, should take into account other considerations. It should act independently when awarding public contract and should ensure that the system is well protected against corruption. Spanish law 13/1995 of 18th May on the Contracts of the Public Administration provides for the awarding of contracts through competitive processes either public auctions or competitive bidding.

He agreed that procurement markets are particularly prone to collusion: industries on these markets are often quite concentrated; the products are homogeneous and the competitors know each other, well. A high degree of transparency may also facilitate collusion; however it is necessary to avoid corruption and to strengthen the neutral role of the State. As stressed by the EC Representative, there is indeed an important difference between private and public markets, and this is the purchaser's role. Its characteristic in public procurement makes transparency a necessary element. Non transparency can lead to lack of neutrality or additional barriers to entry. Collusion should be fought through strong enforcement of competition law and through co-operation with other government's bodies. [4]

The French delegate felt that the question of transparency could be looked at in terms of information about market conditions, both on the supply side and on the demand side. As the Norwegian contribution stated it, it is true that too much transparency about programmes, particularly programmes of a public nature, encourages or facilitates collusion, while on the bidders' side it is important to ensure opacity, not transparency.

The representative of the Competition Council described the jurisprudential procedure adopted by the Council, which is designed to punish practices in which firms seek to reduce uncertainty as to intentions between competitors. The object of reducing uncertainty is to increase the asymmetry of information between the supply and demand side, to the advantage of the former and the disadvantage of the latter. Uncertainty is generally reduced in two ways: by limiting operators' independence in individual decision-making and misleading the contractor as to the reality and extent of competition. As a result, all practices which allow or facilitate the co-ordination of bidding by bidding firms and all exchanges of information between tenderers prior to the date when the result of the bidding process is known are forbidden. The exchanged information might relate to the existence, name and size of the

competitors, their supply of materials, their interest or lack of interest in the public or private procurement envisaged, and the prices at which competitors propose to tender.

3. Deterrence and sanction of bid-rigging in procurement markets

Chairman Jenny referred to the enforcement record in Japan in public procurement which has been quite different from that of other countries. Over the last five years the JFTC has dealt with roughly 15 bid-rigging cases a year. The JFTC uses a variety of devices to prevent bid-rigging including issuing guidelines. It also entertains a close working relationship with liaison officers designated by procurement bodies, and runs training programme.

The Delegate from Japan stated that tackling bid-rigging has been the most important task for the JFTC and it has been performed on two front: law enforcement and advocacy. In fiscal year 1997, 31 decisions were taken, out of which 16 were on bid-rigging. Guidelines have been issued on bid-rigging and every year training programmes are offered to procurement officers. On the 550 JFTC officials more than a half are tackling bid-rigging.

The Japanese Delegate explained that over the last five years the number of bid-rigging cases against which the JFTC has taken measures are 14 in 1993, 19 in 1994, 20 in 1995, five in 1996 and 16 in 1997. In 1997, of these 16 cases, 12 involved civil engineering, construction, road paving and other related contracts awarded by the government, three involved the procurement of goods by government agencies and one procurement within the private sector; more than 360 companies were involved in these cases.

To prevent bid-rigging, the JFTC published, in July 1994, Guidelines on bid-rigging. It makes continuous efforts to disseminate them to firms and trade associations. These Guidelines include specific descriptions of various AMA violation cases by firms and trade associations, seeking to improve understanding as to what kind of activities may conflict with the AMA, to prevent bid-rigging and to promote lawful activities on the part of firms and trade associations. These Guidelines comprise two parts: part I outlines the provisions of the AMA by listing the prohibited conduct and by describing the legal actions against such violations; part II provides an outline of the view point of the JFTC interpreting firms and trade associations' past experience in bidding activities in light of the provisions of the AMA. In addition, conduct is classified as follows: *i)* conduct, in principle, constituting violation ("black conduct"); *ii*) conduct suspected to be in violation ("grey conduct"); *iii)* conduct, in principle, not constituting violation ("white conduct").

Chairman Jenny pointed out that Korea's experience in enforcement in bid-rigging is not unlike that of Japan with 23 bid-rigging cases over the last five years dealt with by the KFTC, out of which half involved bid-rigging cases in the construction sector. A combination of strict disciplines such as criminal sanctions and the exclusion of violators from future procurement markets are also used; however, in Korea, contrary to the JFTC, the KFTC monitors the large procurement market.

The Korean Delegate explained that in Korea there is a restriction of participation of parties which have violated bidding orders. They are deprived of the right to bid for a certain period of time (from one month to 12 months). Article 19 of the Fair Trade Act provides that bid-rigging is unfair conduct and the KFTC imposes high charges to deter effectively bid-rigging (up to five percent of average revenue for three years). In case of very severe violations, jail penalties (up to three years) can be sentenced.

He confirmed Chairman Jenny's statement on the bid-rigging record over the last five years, and explained that to promote competition and prevent bid-rigging, the KFTC applies the Fair Trade Monitoring system whose main purpose is to watch the market. The number of monitors has been significantly increased from 200 to 300 officials.

Turning to the US Delegate, Chairman Jenny noted two particular features in his contribution: *i)* the role of compliance programs and *ii)* the role of certificates of non collusion required from bidders.

The Delegate from the United-States recalled that bid-rigging is a *per se* offence under the Sherman Act and as such, subject to the penalties under that Act, i.e. three years of imprisonment, $10 million fines for firms. An alternative law allows fines equivalent to twice the harm suffered by consumers or twice the gain of the criminal. In addition there are other laws which provide criminal or civil damages; under the False Claims Act, treble damages are available to local or State governments that are harmed as well as a private right of action known as the *qui tam* action[5]. Under that action, whistle-blowers are protected against employer's retaliation.

Suspension and debarment provisions are extremely important, as a penalty, in procurement cases.

On certificates of compliance, the Federal acquisition regulation which covers federal procurement provides for a lot of certificates; this makes prosecution easier because one has only to prove a false statement on one of these certificates.

Under the sentencing Guidelines, bid-rigging is perceived as the most serious offence in the antitrust area; although, there is a presumption of incarceration; judges have been so far reluctant to impose jail on white collar criminals. That is changing.

On compliance programmes, which have proven to be very effective, they typically involve getting senior management in the firms to be educated about the antitrust laws and to have all employees involved in sales with the government to sign a statement saying that they have read the laws and will comply with them.

On Chairman Jenny's request, the Delegate from Hungary explained that public procurement rules are covered by Act No XL on Public procurement, which entered into force on 1st November 1995, and which substituted for a 1991 law-decree on public and private procurement. Competition law, and in particular the ban on collusive agreements and practices by firms, applies to bidders taking part in public and private procurement. There is a Procurement Committee whose responsibility it is to inquire into and punish breaches of the law on procurement. It is possible to appeal against the Committee's decisions. However, no banned cartel has as yet been discovered, probably because contractors are unable or unwilling to do so.

In the absence of complaints or information concerning such a cartel, the Competition Agency cannot investigate - a situation which shows that some sort of training is needed.

Chairman Jenny noticed that the lack of power to sanction bid-rigging has been a major problem in the United-Kingdom, although the OFT has published advice to purchasers on how to protect themselves from bid-rigging. To what extent do current legislative changes increase the power to sanction?

The Delegate from United-Kingdom agreed that the new legislation which is expected to be enacted in 1998 and to come into force in 1999, will improve the situation and notably the enforcement powers of the Competition Authority. In the meantime, the OFT tries to do what it can, and in particular to encourage whistle blowers within cartels in purchasing departments in central and local government as well as in private companies. There is a hot line telephone number which is widely publicised and a booklet which is designed to help purchasers identify the symptoms of bid-rigging, encourage them to complain to the OFT and give them some ideas on how to protect themselves against it. In addition some small scale education programmes are designed to support these efforts. It is difficult to draw a direct link between these publicity efforts and the specific complaints received by the OFT; around 80 complaints were received in 1997 through the hot line and as a result, about 40 investigations were started but despite suspicions the Office was unable in a significant number of cases to pursue them further[6].

The Representative from the procurement Unit in the Treasury emphasised the dangers of random criteria, on the importance of output specifications and transparency and on training programmes. Some of the contradictions mentioned would be solved by a higher level of sophistication amongst purchasers.

4. General discussion

The Delegate from Mexico explained that where government agencies or State-owned enterprises are colluding, abusing market power and affecting the interests of the sellers, it is very difficult to enforce the law because other government bodies or State-owned enterprises are usually quite disrespectful of competition authorities.

The Swedish Delegate explained that in Sweden it is rather common that local municipalities have standing agreements on joint purchasing; normally that would be considered as efficiency enhancing (through economies of scale); in addition, by increasing the number of possible participants to the tender, collusion may be impeded. This situation has, however, drawbacks because in municipalities of a certain importance, the design of the tender may not allow SMEs to participate and in the long term, one can wonder if this is really efficiency enhancing.

The French Delegate argued that a limited transparency would impede collusion from the supply side; from the purchasers's perspective, however, the situation is less clear: either rough criteria are set and this leads to an arbitrary choice or there are no set criteria and the price alone determines the choice. By contrast setting criteria which take into account quality and performance of the products and hence increase transparency, can result in collusion.

The Delegate from Ireland explained that guidelines on collusive tendering were issued to all public sector purchasing agencies. There is indeed a need to increase their awareness of their potential to be victims of this type of behaviour. In addition, experience shows that in certain circumstances, transparency can be overdone. This was the case in the construction industry where the Federation circulated to its members the names of those who intended to submit tenders on public contracts before the deadline for tenders closed; this was a degree of transparency which the Irish competition authority felt was going too far. On the lack of sophistication of local purchasers, the Irish Delegate mentioned an on-going investigation involving a school construction project which showed that the tenders are handled by different sections of the Department of Education, thereby preventing any possibility to establish evidence of possible bid-rigging.

The Delegate from Switzerland made three points:

- as a follow-up to its commitments in WTO, Switzerland has adopted federal and local rules on public procurement and as a monitoring body, the Commission has intervened many times to amend these rules; in addition, stricter rules are now being enforced including suspension and debarment provisions;

- a lot, however, remains to be done on the purchaser side to impede negotiations with a limited number of suppliers selected beforehand, and to avoid a choice where the only criteria is price;

- unsuccessful tenderer can appeal and can be granted damage; penalties on public purchasers, however, are not severe enough.

The EC Delegate commented on previous speakers' interventions. Procedures laid down in the GPA and the EU Directives do indeed entail important transaction costs, and the European Commission will address this important issue. He agreed with the Mexican Delegate on the difficulty for a governmental body to control another governmental body. The interest of the consumer, who in general is also a taxpayer, is, however, a serious motivation to ensure efficient purchasing. In the end, it is up to parliaments to take up this point and demand that public money is spent efficiently. Competition authorities can only play a role by ensuring that competition is not restricted in public procurement transactions. On the other hand, there is a role for regulation of purchaser's behaviour. Indeed, companies operating in competitive markets will be punished by the market when they purchase inefficiently. Similar sanctions are not available when governments purchase inefficiently. Lacking market pressure must therefore be off-set by regulation in order to "force" governments to purchase efficiently.

The Delegate from the Netherlands emphasised that although some improvements have been accomplished, especially in the lower levels of government and municipalities, there is still a serious problem of too low a level of compliance with EU Directives. It is felt that the structure of incentives should be examined; a lot of firms operating in regional markets are afraid to push complaints because they know that in the next round they will be affected. Also, recourse to outsourcing by municipalities should be increased.

The Delegate from Germany emphasised the crucial role of transparency. Although, in some cases, transparency can help collusion, decreasing transparency may cause more serious problems like corruption, and discrimination notably against foreign bidders. Therefore, the primacy of open tendering procedures should be maintained and bid-rigging should be solved by other means, including economic incentives, rather than reduction of transparency.

The Delegate from Italy stressed the importance of the EU Directives: they have potentially enlarged the market for the larger procurement contracts notably, since information on these contracts is available in many languages, and is published in the EU Journal.

The Delegate from Brazil explained that a few cases are under investigation in his country where, despite legal determination, the absence of bid-rigging is not guaranteed notably because the division of responsibilities between competition authority and Tribunal is not that clear. He also argued that procurement policy is linked in Latin America with fiscal and political reforms.

Chairman Jenny concluded in raising a number of questions:

- Negotiation/discrimination between public versus private buyers: private buyers are not bound to the same disciplines as the public buyers; shouldn't the competition law settle such a discrimination?

- Transparency: Should information be made available to all competitors or should it be made available to the people in charge of making sure that the corruption problem does not happen?

- Level of sophistication of purchasers; this is not always a sufficient feature to explain bid-rigging.

Dr. Waverman, noticed that many of these markets have been closed for decades and it has only been with the EU Directives and the GPA that many of these markets are now becoming competitive. He agreed that transparency is a double-edged phenomenon: to make market more transparent requires often a costly and formal process which may in the end help collusive activities. Ways should be explored to get a less rigid process whereby information and formalities can be made less rigid; for instance on the information side, the names of the winners and the prices could be given to administration but not the bidders. Similarly where there is a lack of information at local municipalities' level , information can be made available to administrations but not to bidders.

NOTES

1. Dr.Waverman was invited by the Secretariat, as a consultant, to participate to the roundtable discussion. Dr. Waverman is Visiting Professor of Economics, London Business School.

2. Predefined criteria is another option to combat political favouritism; however, randomised selection is a danger because this gives a lot of possibility for the purchaser to adjust accordingly in a discretionary manner.

3. See the proceedings of the Roundtable on Insurance, held on 8th June 1998, also available on internet: http://www.oecd.org/daf/clp

4. Law 16/1989 on the protection of competition does not explicitly prohibit bid-rigging; this conduct falls under the general provision of article 1 against agreements which prevent or distort competition. including parallel practices and recommendations.

5. A *qui tam* action is an action which allows a private individual to sue in the name of the government for violations of the False Claims Act.

6. To issue a formal request for information to a company, the OFT needs reason to believe that an offence is taking place.

AIDE-MÉMOIRE DE LA DISCUSSION

par le Secrétariat

M. Jenny introduit la table ronde sur la passation des marchés en formulant, à partir des contributions écrites reçues des pays Membres, un certain nombre de commentaires généraux :

i*)* il existe une certaine homogénéité de traitement des offres truquées dans le cadre de la passation des marchés publics dans les différents pays. Habituellement, les pratiques en matière de passation de marchés sont réglementées en conformité avec les dispositions de l'accord de l'OMC et/ou (en Europe) avec celles des directives européennes. L'objectif de ces réglementations est de veiller à ce que les achats publics soient effectués de manière transparente et non discriminatoire, et qu'ils obéissent au critère du meilleur prix dans le choix de la meilleure offre même s'il existe d'autres objectifs. Il n'existe pas de dispositions spécifiques antitrust visant les offres truquées, mais cette pratique tombe sous le coup de l'interdiction générale des ententes ; le trucage des offres est souvent analysé comme une violation *per se* de la législation de la concurrence et est considéré comme une infraction grave, parfois même comme une infraction de nature pénale ;

ii) il semble qu'il y ait un hiatus entre ce que la théorie économique jugerait approprié de faire pour décourager l'offre truquée et les pratiques suivies par les pays de l'OCDE. Ceci s'explique peut-être par la coexistence de deux objectifs poursuivis simultanément par les réglementations en matière de passation de marchés, à savoir la promotion d'une concurrence équitable et la promotion de l'efficience économique ;

iii) le degré de mise en oeuvre de la législation de la concurrence s'agissant des offres truquées varie considérablement d'un pays à l'autre ; c'est d'autant plus surprenant que tous les pays Membres semblent estimer que cette pratique représente une atteinte sérieuse à la législation de la concurrence;

iv) il est frappant de constater qu'il existe une certaine diversité de jugement entre les pays Membres, notamment sur les questions de savoir :

- si la transparence des procédures favorise la concurrence ou au contraire facilite la collusion ;
- si le trucage des offres est plus fréquent dans les marchés publics que dans les marchés privés ;
- si permettre à un organisme d'achat public de négocier sera de nature à augmenter ou réduire la concurrence sur les marchés publics.

v) Il est également frappant de voir qu'il existe une diversité d'instruments spécifiques utilisés dans les pays de l'OCDE pour prévenir ou sanctionner les pratiques de trucage des offres.

A l'invitation du Président Jenny, le Dr. Waverman[1] formule quelques observations liminaires.

Il souligne qu'en tant que vendeur de biens, l'Etat recourt de plus en plus aux enchères (aux Etats-Unis, au Royaume-Uni et aux Pays-Bas), alors que celles-ci s'inscrivent normalement dans le cadre d'une théorie économique complexe. Pour les marchés publics, l'Etat ne semble guère s'appuyer sur les critères économiques. Plusieurs éléments peuvent expliquer cet état de choses :

i) l'économie des achats est moins développée que l'économie des adjudications ;

ii) l'utilité de la science économique n'est pas pleinement reconnue ;

iii) le trucage des offres est plus fréquent dans les marchés publics que dans le secteur privé car l'acheteur est généralement une municipalité et la plupart du temps celle-ci n'a pas les compétences d'une entreprise commerciale en matière d'adjudications ; la contribution de la Norvège se réfère à une enquête de 1993/1996 qui montre que dans 50 pour cent des municipalités étudiées, les autorités locales n'ont pas amélioré leurs procédures de passation de marchés au cours des trois années en question ;

iv) des règles simples peuvent s'avérer utiles, et la plupart des pays sont apparemment d'accord sur les principes suivants :

- ne pas imposer de restrictions aux soumissionnaires potentiels ;
- un seul appel d'offres avec réponse sous pli fermé est préférable à la transparence ;
- la théorie économique conseille : "il ne faut pas rendre public le nom de l'adjudicataire ou le montant des offres ; la transparence ne peut que favoriser la collusion".

Le Dr. Waverman propose un certain nombre de remèdes :

- un processus d'information ; étant donné le manque d'expérience de la plupart des acheteurs publics, un programme de formation apparaît très important ;
- un avertissement de la part des autorités chargées de la concurrence ; il importe d'insérer dans l'appel d'offres, comme cela se fait déjà dans un certain nombre de pays, une mise en garde des autorités chargées de la concurrence : "la collusion est passible d'amendes et de peines de prison" ;
- un programme de mise en conformité ; pour les grands projets, seuls les soumissionnaires qui appliquent un programme de mise en conformité seraient autorisés à participer à l'appel d'offres ;
- un contrôle des monopoleurs potentiels ; étant donné le grand nombre d'acteurs qui interviennent dans une collusion, il serait intéressant que les autorités chargées de la concurrence effectuent un test pour mettre en évidence des monopoleurs éventuels avant certains des principaux appels d'offres. Trop souvent, en effet, le marché est mal connu, et en proposant le recours à l'analyse des marchés les autorités de la concurrence aideraient à détecter les problèmes potentiels.

1. Spécificité (ou absence de spécificité) des règles applicables aux marchés publics

Le Président Jenny s'adresse ensuite au délégué de l'Australie et lui demande de développer les déclarations qu'il a faites dans sa contribution : "Il n'est peut-être pas judicieux de conclure que les causes du trucage des offres et les remèdes à appliquer reflètent des différences entre marchés publics et marchés privés" ... et ... "des procédures publiques faisant appel à la concurrence, notamment les appels d'offres, peuvent être utilisées, mais on peut aussi recourir à des négociations privées avec un ou plusieurs fournisseurs, si cette approche est la plus susceptible d'engendrer le meilleur rapport coût-efficacité".

Le délégué de l'Australie explique que sa contribution reflète le scepticisme des responsables australiens en ce qui concerne les preuves empiriques des différences. La Commission, notamment, a eu à connaître quelques affaires de trucage des offres, et récemment elle a été saisie de plusieurs affaires importantes dans les secteurs de la construction et du béton prêt à l'emploi. Dans les deux cas, il est apparu que la collusion touchait dans les mêmes proportions le secteur public et le secteur privé. Ces affaires, et les sanctions imposées (notamment de lourdes amendes) ont donné à réfléchir sur les graves conséquences d'un trucage des offres. Par ailleurs, au niveau du gouvernement australien, une stratégie plus systématique de lutte contre la collusion dans les appels d'offres a été adoptée : les entreprises doivent appliquer des programmes de mise en conformité, produire des déclarations statutaires sur certains éléments de leurs pratiques, et les offres d'opérateurs qui ont enfreint la loi dans le passé ne sont pas acceptées sans compensation préalable.

Le Président Jenny cite ensuite la contribution allemande : "il n'est pas justifié de se livrer à des généralisations selon lesquelles les caractéristiques uniques des marchés d'approvisionnement par rapport aux autres marchés impliqueraient une vulnérabilité particulière des marchés publics vis-à-vis du trucage des offres". Toutefois, la note donne un certain nombre de raisons pour lesquelles il devrait y avoir des problèmes spécifiques, dans ce secteur, notamment le fait que les acheteurs publics sont souvent des acheteurs monopolistiques ou qui ne se soucient pas des fonds publics dont ils n'ont pas nécessairement à rendre compte. La note allemande mentionne aussi la révision du droit allemand et précise que l'Allemagne juge nécessaire "de modifier les fondements juridiques de la passation des marchés publics".

Le délégué allemand explique que, conformément à une législation plus stricte, une nouvelle disposition a été récemment introduite dans le droit pénal -- ce qui est tout à fait inhabituel en Allemagne car les violations du droit de la concurrence ne sont que des infractions administratives. Cette clause concerne des sociétés qui se sont livrées au trucage des offres dans le secteur des marchés publics, et cela semble confirmer l'hypothèse d'une plus grande vulnérabilité du secteur public aux risques de collusion.

Le représentant du ministère allemand de l'Economie ajoute que la contribution allemande à la table ronde a été soumise quelques semaines avant l'adoption de la nouvelle loi par le Parlement. En vertu de la nouvelle loi sur la passation de marchés qui entrera en vigueur le 1er janvier 1999, les soumissionnaires qui s'estiment désavantagés -- il s'agit là de la principale modification -- peuvent saisir une commission de contrôle extrajudiciaire (trois ou quatre chambres seront mises sur pied à l'Office fédéral des ententes et chargées d'examiner les procédures d'appel d'offres dans un délai de trois semaines ; ultérieurement, d'autres chambres seront créées à l'échelon des Länder) ; en appel, les soumissionnaires peuvent saisir un tribunal administratif. Cette modification a été justifiée principalement par le fait que la Commission européenne n'était pas satisfaite de la mise en oeuvre actuelle par l'Allemagne de la Directive de la CEE sur les recours.

Le Président Jenny demande au représentant de la Commission européenne de commenter notamment deux citations extraites de sa contribution écrite : "Le marché des approvisionnements publics présente des caractéristiques uniques qui sont propices aux entorses à la concurrence" et "les négociations

ne peuvent normalement avoir lieu qu'avec un nombre limité de fournisseurs, ce qui constitue une violation du principe d'égalité de traitement qui est si fondamental pour le régime réglementaire de la passation de marchés. L'absence d'égalité de traitement entraîne souvent une perte d'efficience. Le remède peut donc se révéler pire que le mal."

Le représentant de la Commission européenne soutient que les différences de fond éventuelles dans la passation de marchés entre secteur public et secteur privé concernent les acheteurs. Dans le secteur public, c'est l'acheteur qui définit le marché, contrairement à ce qui se passe normalement dans les marchés privés. Il propose un certain nombre de solutions, notamment :

- le recours à des normes de résultats plutôt qu'à des normes de produits ;
- l'élaboration de programmes de formation pour améliorer les compétences de l'acheteur ;
- l'accroissement de la transparence : un acheteur peut devenir plus averti si les opérations des autres acheteurs sont plus transparentes. En outre, la transparence aide à combattre le favoritisme politique[2] ;
- la sous-traitance : le danger, du point de vue de la concurrence, est une concentration encore plus forte du secteur acheteur, mais l'offre elle-même est fortement concentrée.

Du côté de l'offre, la concurrence est le seul moyen de parvenir à l'efficience dans les approvisionnements. Cependant, quoiqu'il existe des pouvoirs de mise en oeuvre lorsque la concurrence est limitée du côté de l'offre, ils n'existent pas au même degré et avec la même efficacité lorsque la concurrence est limitée par le comportement du côté de l'acheteur. A cet égard, des agences indépendantes qui auraient de véritables pouvoirs d'enquête vis-à-vis des acheteurs, y compris des pouvoirs de nature coercitive, pourraient jouer un rôle important.

A la demande du Président Jenny, le délégué danois décrit la position de son pays. Au Danemark, les principaux problèmes sont le favoritisme politique et les connaissances insuffisantes de la plupart des acheteurs publics. Par conséquent, il s'agit de remédier à cette situation et non de combattre le trucage des offres en tant que tel.

Dans le domaine de la passation de marchés, la difficulté pour les autorités chargées de faire respecter le droit de la concurrence est de mettre fin aux pratiques répréhensibles lorsque les travaux ont commencé ou ont déjà été exécutés. Etant donné que la rapidité d'action est décisive, au Danemark, l'Office de la passation des marchés a recours à des méthodes informelles, notamment la menace de porter les plaintes devant les tribunaux. D'autres moyens d'action sont à envisager, et le Danemark fait partie d'un groupe qui a été mis en place pour étudier d'éventuels moyens d'exécution améliorés dans tous les pays de l'Union européenne.

Une interdiction absolue de négocier devrait aussi être réexaminée et il conviendrait d'instaurer un dialogue concurrentiel, comme les Etats-Unis l'envisagent à l'heure actuelle. Cette possibilité d'une seconde série de discussions est importante lorsqu'on ne sait pas ce qui devrait être acheté. Toutefois, abolir la transparence ne constitue pas une réponse dans une démocratie.

Le Président Jenny mentionne la contribution italienne qui relève que "le trucage des offres semble nettement plus fréquent dans les marchés publics que dans les marchés privés" et qui souligne en outre l'importance des procédures suivies par les maîtres d'ouvrage publics lorsqu'ils lancent un appel d'offres.

Le délégué de l'Italie déclare que dans son pays on estime qu'il y a une grande différence entre la passation de marchés publics et la passation de marchés privés, non pas tant à cause du manque d'expérience des acheteurs mais en raison de la rigidité des procédures dans les marchés publics. Dans la passation de marchés publics, le fournisseur est choisi en fonction d'un large éventail de conditions écrites, ce qui n'est pas le cas dans les marchés privés où l'acheteur a toujours la possibilité de s'adresser à d'autres fournisseurs s'il n'est pas satisfait du résultat de la procédure d'appel d'offres.

On recense peu d'affaires de trucage des offres (cinq), car elles sont difficiles à détecter. En général, il s'agissait de stratagèmes qui favorisaient toutes les parties impliquées, d'où l'absence de plaintes. L'Autorité s'efforce par conséquent de combattre les soumissions concertées dans les marchés publics au moyen d'éléments de preuve indirecte tels que les prix, les modalités de participation des sociétés aux appels d'offres, etc., et ces preuves sont parfois fallacieuses ou peu concluantes.

Une affaire importante s'est produite dans le secteur de la co-assurance à Milan. Les cinq grandes compagnies d'assurances présentes sur le marché ont fait une offre collective pour couvrir le risque de la municipalité de Milan. La municipalité a porté plainte auprès de l'Autorité du fait qu'elle n'a pu trouver d'autres concurrents. Bien que la co-assurance puisse avoir des effets favorables à la concurrence lorsque les risques sont très élevés[3], elle peut être anticoncurrentielle quand les risques sont moins importants. Dans l'affaire de Milan, l'Autorité a jugé que tel était le cas, en dépit du montant élevé du contrat.

Le délégué italien mentionne également un accord conclu par un consortium de 170 sociétés de nettoyage afin de se partager les contrats publics de services de nettoyage. Ces entreprises dispersées sur tout le territoire opéraient sur des marchés locaux. Elles n'étaient pas en concurrence sur les mêmes marchés. Ce consortium attribuait les contrats aux entreprises à tour de rôle ; il s'agissait d'une collusion à grande échelle puisque les sociétés n'étaient pas autorisées à participer à la procédure d'appel d'offres sur les autres marchés locaux.

2. Transparence

Le Président Jenny cite en introduction la contribution norvégienne qui résume quelques-unes des difficultés liées à la transparence : "les acheteurs publics sont soumis aux règles de l'EEE sur les marchés publics. Dans le cadre d'un appel d'offres, l'acheteur est tenu de notifier à tous les participants le montant de l'offre retenue, les prix et les produits. Sur des marchés oligopolistiques, ces informations peuvent accroître le risque de collusion puisque les agissements contraires à l'entente seront détectés plus aisément que si les conditions des offres étaient tenues secrètes. La position de l'Espagne sur cette question est tout à fait différente : "la publication des noms des adjudicataires est extrêmement utile pour garantir la transparence et dévoiler les irrégularités possibles dans l'attribution de contrats publics".

Le délégué de l'Espagne souligne que si l'efficience est un facteur majeur dans la passation de marchés, la puissance publique, en tant que gardienne de l'intérêt public, devrait prendre en compte d'autres éléments. Elle devrait faire preuve d'indépendance en attribuant les contrats publics et veiller à ce que le système soit dûment protégé contre la corruption. En Espagne, la loi 13/1995 du 18 mai sur les contrats de l'administration publique prévoit que les contrats sont attribués au moyen de procédures faisant appel à la concurrence, à savoir les enchères publiques ou les appels d'offres.

Il convient que la passation de marchés est particulièrement vulnérable à la collusion : les industries sur ces marchés sont souvent très concentrées ; les produits sont homogènes et les concurrents se connaissent bien les uns les autres. Un degré élevé de transparence peut aussi faciliter la collusion ;

cependant, il est nécessaire d'éviter la corruption et de renforcer le rôle neutre de l'Etat. Comme l'a souligné le représentant de la Commission européenne, il y a en effet une différence importante entre les marchés privés et les marchés publics, qui tient au rôle de l'acheteur. Sa particularité dans les marchés publics fait de la transparence un élément nécessaire. La non-transparence peut engendrer un manque de neutralité ou des obstacles additionnels à l'entrée. Le combat contre la collusion implique une mise en oeuvre énergique du droit de la concurrence et une coopération avec les organismes compétents des autres pays[4].

Le délégué français estime qu'on peut considérer le problème de la transparence du point de vue de l'information sur les conditions de marché, aussi bien du côté de l'offre que du côté de la demande. Certes, comme le dit la délégation norvégienne, un excès de transparence sur les programmes à caractère public encourage ou facilite la collusion, et du côté des offreurs il faut veiller à l'opacité et non pas à la transparence.

Le représentant du Conseil de la concurrence décrit la démarche jurisprudentielle suivie par le Conseil de la concurrence, qui vise à sanctionner les pratiques par lesquelles les entreprises cherchent à réduire l'incertitude sur les intentions entre concurrents. Cette réduction de l'incertitude a pour but d'accroître l'asymétrie de l'information entre offreurs et demandeurs au profit des offreurs et au détriment des demandeurs. La réduction de l'incertitude se fait généralement de deux manières : limiter l'autonomie des opérateurs dans leurs décisions individuelles et induire en erreur le maître d'ouvrage sur la réalité et l'étendue de la concurrence. En conséquence, sont interdites toutes les pratiques qui permettent ou facilitent la coordination des offres des entreprises soumissionnaires et tous les échanges d'informations entre les entreprises soumissionnaires, antérieurement à la date où le résultat de l'appel d'offres est connu ou peut l'être. Cet échange d'informations peut porter sur l'existence, le nom, l'importance des compétiteurs, sur leur disponibilité en matériel, sur leur intérêt ou absence d'intérêt pour les marchés publics ou privés envisagés, ou sur les prix auxquels les compétiteurs se proposent de soumissionner.

3. Mesures dissuasives et punitives contre le trucage des offres dans la passation de marchés

Le Président Jenny fait observer que le bilan du Japon en matière d'application de la réglementation sur les marchés publics est très différent de celui des autres pays. Au cours des cinq dernières années, la Commission de la concurrence (JFTC) japonaise a traité une quinzaine d'affaires de trucage des offres par an. Elle a recours à divers moyens pour empêcher cette pratique, notamment la publication de directives ; elle entretient en outre des relations de travail étroites avec les agents de liaison désignés par les organismes acheteurs, et administre un programme de formation.

Le délégué du Japon déclare que la lutte contre le trucage des offres est la tâche la plus importante de la JFTC, et qu'elle a été menée sur deux fronts : l'application de la loi et la sensibilisation aux impératifs de la concurrence. Au cours de l'année budgétaire 1997, 31 décisions ont été prises, dont 16 portaient sur des soumissions concertées. Des directives ont été publiées sur le trucage des offres et chaque année des programmes de formation sont organisés à l'intention des responsables de la passation de marchés. Sur les 550 agents de la JFTC, plus de la moitié s'occupent des soumissions concertées.

Le délégué japonais indique qu'au cours des cinq dernières années le nombre de soumissions concertées contre lesquelles la JFTC a pris des mesures s'est établi à 14 en 1993, 19 en 1994, 20 en 1995, cinq en 1996 et 16 en 1997. En 1997, sur les 16 affaires en question, 12 concernaient des contrats de génie civil, de construction, de revêtement des routes et d'autres contrats connexes attribués par l'Etat, trois portaient sur l'achat de marchandises par des agences gouvernementales et un sur un contrat d'approvisionnement dans le secteur privé ; plus de 360 sociétés étaient impliquées dans ces affaires.

Pour prévenir le trucage des offres, en juillet 1994 la JFTC a publié des directives visant les soumissions connectées, et déploie des efforts constants pour les diffuser auprès des entreprises et des associations professionnelles. Ces directives incluent des descriptions spécifiques de diverses affaires de violation de la loi antimonopole (AMA) par des entreprises et des associations professionnelles, l'objectif étant de mieux comprendre quels types d'activités sont susceptibles d'entrer en conflit avec l'AMA, de prévenir le trucage des offres et de promouvoir des activités licites de la part des entreprises et des associations professionnelles. Ces directives sont présentées en deux parties : la première partie résume les dispositions de l'AMA en énumérant les pratiques interdites et en décrivant les actions légales contre ces infractions ; la deuxième partie expose l'interprétation de la JFTC sur le comportement passé des entreprises et des associations professionnelles en matière d'appels d'offres au regard des dispositions de l'AMA. Par ailleurs, les agissements sont classés comme suit : *i)* conduite qui en principe constitue une violation ("conduite noire") ; *ii)* conduite soupçonnée d'être en violation ("conduite grise") ; *iii)* conduite qui en principe ne constitue pas une violation ("conduite blanche").

Le Président Jenny note que le bilan de la Corée pour la répression des soumissions concertées n'est pas sans rappeler celui du Japon, avec 23 affaires traitées par la Commission coréenne de la concurrence (KFTC) au cours des cinq dernières années, dont la moitié portait sur des offres truquées dans le secteur de la construction. Les autorités recourent également à un ensemble de disciplines strictes, notamment des sanctions pénales et l'exclusion des contrevenants des marchés futurs ; toutefois, contrairement à la JFTC, la KFTC surveille la passation des grands contrats.

Le délégué coréen explique qu'en Corée des restrictions sont appliquées aux parties qui ont enfreint les conditions des appels d'offres. Elles sont privées du droit de soumissionner pendant un certain laps de temps (qui va d'un à douze mois). L'article 19 de la loi sur la concurrence (Fair Trade Act) dispose que le trucage des offres est une pratique déloyale et la KFTC impose des amendes élevées pour décourager efficacement cette pratique (jusqu'à cinq pour cent du chiffre d'affaires moyen pendant trois ans). En cas de violations très graves, des peines d'emprisonnement (jusqu'à trois ans) peuvent être prononcées.

Le délégué confirme la déclaration du Président Jenny sur le bilan en matière de soumissions concertées au cours des cinq dernières années, et explique que, pour promouvoir la concurrence et prévenir le trucage des offres, la KFTC applique le système de suivi des pratiques concurrentielles (Fair Trade Monitoring), dont l'objectif essentiel est de surveiller le marché. Le nombre des contrôleurs a augmenté considérablement, pour passer de 200 à 300.

S'adressant au délégué des Etats-Unis, le Président Jenny relève deux traits particuliers de sa contribution : *i*) le rôle des programmes de mise en conformité et *ii)* le rôle des certificats de non-collusion exigés des soumissionnaires.

Le délégué des Etats-Unis rappelle que le trucage des offres est une infraction en soi au regard de la loi Sherman, et passible de ce fait des sanctions prévues par cette loi, à savoir des peines d'emprisonnement de trois ans et des amendes de dix millions de dollars pour les entreprises. Une autre loi prévoit des amendes équivalant à deux fois le montant des dommages subis par les consommateurs ou à deux fois le bénéfice du contrevenant. En outre, d'autres lois prévoient des dommages-intérêts au pénal et au civil ; en vertu de la False Claims Act, des dommages-intérêts triples peuvent être accordés aux collectivités locales ou aux Etats lésés, et il existe un droit d'action privée dite action *qui tam*[5], en vertu de laquelle les personnes qui "tirent le signal d'alarme" sont protégées contre des représailles éventuelles de la part de leur employeur.

Les mesures de suspension et d'exclusion sont des sanctions extrêmement importantes dans les affaires de marchés publics.

En ce qui concerne les certificats de conformité, la Federal Acquisition Regulation qui vise les marchés fédéraux impose un grand nombre de certificats. Les poursuites sont d'autant plus aisées qu'il suffit de démontrer l'existence d'une fausse déclaration concernant l'un de ces certificats.

Conformément aux lignes directrices pour les infractions, le trucage des offres est considéré comme l'infraction la plus grave dans le domaine de la concurrence ; bien que l'incarcération soit possible, les juges ont jusqu'ici hésité à imposer des peines de prison aux délinquants en col blanc, mais les choses évoluent dans ce domaine.

S'agissant des programmes de conformité, qui se sont révélés très efficaces, ils consistent normalement à former les dirigeants des entreprises au droit de la concurrence et à faire en sorte que tous les salariés intervenant dans les ventes avec l'Etat signent une déclaration stipulant qu'ils ont pris connaissance de la législation pertinente et qu'ils s'y conformeront.

A la demande du Président Jenny, la déléguée de la Hongrie explique que la loi hongroise sur les marchés publics est en vigueur depuis le 1er novembre 1995 ; auparavant les règles étaient définies par un décret-loi qui couvrait les achats publics et privés. La loi sur la concurrence, et en particulier l'interdiction des accords et pratiques concertées des entreprises, s'applique aux soumissionnaires participant à des marchés publics et privés. Il existe une Commission des marchés publics qui a pour tâche d'enquêter sur les infractions à la loi sur les marchés publics et de prendre des sanctions en conséquence. Il est possible de faire appel à des décisions de la Commission. Aucune entente prohibée n'a toutefois été détectée à ce jour, probablement parce que les maîtres d'ouvrage ne sont pas en mesure de le faire ou ne le souhaitent pas.

En l'absence de plaintes ou d'informations sur une entente de ce type, l'Office de la concurrence ne peut pas procéder à des enquêtes. Cette situation démontre que des efforts de formation sont nécessaires.

Le Président Jenny fait observer que l'absence de pouvoirs permettant de sanctionner le trucage des offres constitue un problème majeur au Royaume-Uni, même si l'OFT a publié des conseils aux acheteurs sur les moyens de se protéger contre ces pratiques. Dans quelle mesure les réformes législatives actuelles sont-elles susceptibles de renforcer les pouvoirs répressifs ?

Le délégué du Royaume-Uni confirme que la nouvelle législation qui devrait être promulguée en 1998 et entrer en vigueur en 1999 améliorera la situation et notamment les pouvoirs répressifs de l'autorité chargée de la concurrence. Entre temps, l'OFT fait tout son possible, et s'efforce notamment d'encourager ceux qui dénoncent les ententes dans les directions des administrations centrales et locales ainsi que dans les entreprises privées. Il existe un numéro d'appel d'urgence largement diffusé ainsi qu'une brochure destinée à aider les acheteurs à détecter les symptômes de trucage des offres, à les inciter à porter plainte auprès de l'OFT et à leur donner certaines indications sur les moyens de se protéger contre les soumissions concertées. Quelques programmes de formation d'ampleur restreinte sont conçus pour appuyer ces efforts. Il est difficile d'établir un lien direct entre ces actions de publicité et les plaintes adressées à l'OFT ; environ 80 plaintes ont été reçues en 1997 sur la ligne d'appel d'urgence, et une quarantaine d'enquêtes ont été lancées en conséquence, mais en dépit des soupçons, dans bon nombre de cas, l'Office n'a pas pu les poursuivre jusqu'au bout[6].

Le représentant de l'Unité des marchés publics du Trésor met l'accent sur les dangers des critères aléatoires, sur l'importance des spécifications de résultats et de la transparence et sur les programmes de formation. Certaines des contradictions mentionnées pourraient être résolues si les acheteurs étaient plus avertis.

4. Discussion générale

Le délégué du Mexique explique que lorsque des agences gouvernementales ou des entreprises se livrent à des pratiques collusives, abusent de leur pouvoir de marché et nuisent aux intérêts des vendeurs, il est très difficile de faire appliquer la loi car les organismes publics ou les entreprises d'Etat ne montrent en général aucune considération envers les autorités chargées de la concurrence.

Le délégué suédois explique qu'en Suède il est assez courant que les municipalités appliquent des accords permanents sur une procédure d'achats conjoints ; normalement, on peut estimer que cette pratique améliore l'efficience (par le biais des économies d'échelle) ; en outre, en augmentant le nombre des participants possibles à l'appel d'offres on peut faire obstacle à la collusion. Cette solution n'est pas cependant dépourvue d'inconvénients, car dans les municipalités d'une certaine importance, la conception de l'appel d'offres ne permet pas nécessairement aux PME de soumissionner, et dans le long terme on peut se demander s'il y a réellement un gain d'efficience.

Le délégué français fait valoir qu'une transparence limitée empêcherait la collusion du côté de l'offre ; du point de vue des acheteurs, toutefois, la situation est moins nette : soit on fixe des critères approximatifs et cela aboutit à un choix arbitraire, soit il n'y a pas de critères définis et le prix seul détermine le choix. En revanche, il peut y avoir collusion si l'on fixe des critères qui permettent de prendre en considération la qualité et les performances des produits et d'accroître ainsi la transparence.

Le délégué de l'Irlande explique que des lignes directrices sur les soumissions concertées ont été publiées à l'intention de tous les organismes acheteurs du secteur public. Il faut en effet les sensibiliser davantage au risque d'être victimes de ce genre de pratiques. En outre, l'expérience montre que dans certaines circonstances la transparence peut être excessive. Tel a été le cas dans le secteur de la construction, où la Fédération a diffusé auprès de ses sociétés affiliées les noms de ceux qui avaient l'intention de soumettre des offres sur des contrats publics avant la date limite de clôture des appels d'offres ; l'autorité irlandaise chargée de la concurrence a estimé que cette forme de transparence allait trop loin. S'agissant du manque d'expertise des acheteurs locaux, le délégué irlandais mentionne une enquête en cours sur un projet de construction scolaire, qui fait apparaître que les appels d'offres sont traités par différentes sections du Ministère de l'éducation, ce qui exclut toute possibilité de détecter un trucage possible des offres.

Le délégué de la Suisse fait trois observations :

- suite à ses engagements au sein de l'OMC, la Suisse a adopté des règles fédérales et locales sur les marchés publics, et en tant qu'organisme de surveillance, la Commission est intervenue à de nombreuses reprises pour modifier ces règles ; des dispositions plus strictes sont désormais applicables, avec notamment des mesures de suspension et d'exclusion ;

- il reste toutefois beaucoup à faire du côté des acheteurs pour éviter les négociations avec un nombre restreint de fournisseurs choisis à l'avance et pour éviter le choix fondé sur le seul critère du prix ;

- un soumissionnaire évincé peut former un recours et obtenir des dommages-intérêts ; toutefois, les sanctions à l'encontre des acheteurs publics ne sont pas assez sévères.

Le délégué de la Commission européenne commente les interventions des orateurs précédents. Les procédures fixées dans l'Accord du GATT sur les marchés publics et dans les directives de l'Union européenne entraînent en effet des coûts de transaction élevés, et la Commission européenne examinera cette question importante. Il partage l'avis du délégué mexicain sur la difficulté pour un organisme gouvernemental de contrôler un autre organisme gouvernemental. Le consommateur qui est en général également un contribuable, a cependant une sérieuse motivation à réaliser un achat efficient. En définitive, il appartient aux parlementaires de se saisir de la question et d'exiger que l'argent public soit dépensé efficacement. Les autorités de la concurrence ne peuvent que se borner à veiller à ce que la concurrence ne soit pas limitée dans les transactions de marchés publics. Par ailleurs, il y a place pour réglementer le comportement de l'acheteur. En effet, des entreprises opérant sur des marchés concurrentiels seront punies par le marché lorsqu'elles feront des achats inefficients. Le manque de pression exercé par le marché doit alors être compensé par la réglementation pour forcer les gouvernements à acheter efficacement.

Le délégué des Pays-Bas souligne que, même si quelques améliorations ont été apportées, surtout aux échelons inférieurs d'administration et dans les municipalités, il subsiste un sérieux problème de défaut de conformité avec les directives de l'Union européenne. On estime que la structure des incitations devrait être réexaminée. Beaucoup d'entreprises opérant sur des marchés régionaux craignent de porter plainte parce qu'elles savent qu'elles en subiront les conséquences lors de l'appel d'offres suivant. Par ailleurs, les municipalités devraient recourir davantage à la sous-traitance.

Le délégué de l'Allemagne met l'accent sur le rôle crucial de la transparence. Même si dans certains cas la transparence peut favoriser la collusion, une perte de transparence risque d'engendrer des problèmes plus graves tels que la corruption et la discrimination, notamment à l'encontre des soumissionnaires étrangers. Par conséquent, il faut maintenir la primauté des procédures d'appel d'offres et s'attaquer aux soumissions concertées par d'autres moyens qu'une réduction de la transparence, notamment en instaurant des incitations économiques.

Le délégué de l'Italie souligne l'importance des directives de l'Union européenne. Elles ont très efficacement élargi le marché potentiel des grands contrats d'approvisionnement, notamment depuis que les informations sur ces contrats sont disponibles dans plusieurs langues et publiées au Journal officiel de l'Union européenne.

Le délégué du Brésil explique que quelques affaires sont en cours d'instruction dans son pays où, malgré la réglementation en vigueur, la prévention du trucage des offres n'est pas assurée, notamment parce que la répartition des compétences entre l'autorité chargée de la concurrence et le Tribunal de la concurrence n'est pas bien claire. Il fait également observer qu'en Amérique latine la politique de passation des marchés est liée aux réformes budgétaires et politiques.

Le Président Jenny conclut en posant un certain nombre de questions :

- Négociation/discrimination entre acheteurs publics et acheteurs privés : les acheteurs privés ne sont pas soumis aux mêmes disciplines que les acheteurs publics ; le droit de la concurrence ne devrait-il pas remédier à cette discrimination ?

- Transparence : Les informations devraient-elles être communiquées à tous les concurrents ou seulement aux personnes chargées de veiller à ce que le problème de la corruption ne se pose pas ?

- Niveau de connaissances des acheteurs : ce n'est pas toujours un facteur suffisant pour expliquer le trucage des offres.

Le docteur Wavermann fait remarquer que beaucoup de ces marchés ont été fermés pendant des décennies, et ce n'est qu'à la faveur des directives de l'Union européenne et de l'Accord du GATT sur les marchés publics que nombre d'entre eux sont en train de devenir concurrentiels. Il reconnaît que la transparence est un outil à double tranchant. Rendre le marché plus transparent exige souvent un processus coûteux et formel qui peut en définitive favoriser les activités de collusion. Il convient de rechercher un processus moins rigide dans lequel les informations et les formalités seraient assouplies ; s'agissant par exemple de l'information, les noms des adjudicataires et les prix pourraient être communiqués à l'administration mais pas aux soumissionnaires. De même, lorsqu'il existe un manque d'information au niveau des collectivités locales, les renseignements peuvent être mis à la disposition des administrations et non des soumissionnaires.

NOTES

1. Le Dr. Waverman a été invité par le Secrétariat à participer à la table ronde en qualité de consultant. Le Dr. Waverman est Visiting Professor of Economics, London Business School.

2. Les critères prédéfinis constituent une autre solution pour combattre le favoritisme politique ; toutefois, la sélection aléatoire présente un danger car elle offre à l'acheteur de larges possibilités de s'adapter en conséquence.

3. Voir le compte rendu de la table ronde sur l'assurance tenue le 8 juin 1998, également disponible sur internet: http://www.oecd.org/daf/clp

4. La loi 16/1989 sur la protection de la concurrence n'interdit pas explicitement le trucage des offres ; cette pratique tombe sous le coup des dispositions générales de l'article 1 visant les accords qui empêchent ou qui faussent la concurrence, notamment les pratiques parallèles et les recommandations.

5. Une action *qui tam* est une action qui permet à un particulier d'intenter des poursuites au nom du gouvernement pour infraction à la False Claims Act.

6. Avant d'adresser une demande officielle de renseignements à une société, l'OFT doit avoir des raisons d'estimer qu'une infraction est en train d'être commise, ce qui limite les possibilités d'ouvrir des enquêtes.