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Notice

on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground

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1. INTRODUCTION

1.1. The issue at stake

Public procurement is one of the most tangible forms of public spending, as its purpose is to provide works, goods or services that are directly used by citizens (such as a street or an airport, the materials used in a hospital and the public bus services). Public procurement accounts for a substantial share of the GDP of EU Member States[1], playing a key role in economic growth, social progress and the fulfilment of a State's key objective to provide good quality services to its citizens. Citizens have the right to see public money spent in the most efficient, transparent, accountable and fairest way, to be able to use quality public services and, ultimately, to continue to place their trust in public institutions.

The term collusion in public procurement (often also referred to as "bid-rigging") refers to illegal agreements between economic operators, with the aim of distorting competition in award procedures. Such agreements between economic operators to collude may assume various forms, such as fixing the content of their tenders beforehand (especially the price) in order to influence the outcome of the procedure, refraining from submitting a tender, allocating the market based on geography, contracting authority or the subject of the procurement or setting up rotation schemes for a number of procedures. The aim of all these practices is to enable a predetermined tenderer to secure a contract while creating the impression that the procedure is genuinely competitive.

Collusion essentially undermines the benefits of a fair, transparent, competition-driven and investment-oriented procurement market by restricting the access of companies to that market and limiting choice for public buyers. In a procurement market affected by collusion, law-abiding economic operators are usually discouraged from participating in the respective award procedures or from investing in public-sector projects. This has a particularly damaging effect on companies seeking or needing to develop their business, especially small and medium enterprises. It is equally damaging for companies that are capable and eager to develop innovative solutions to meet the needs of the public sector. Collusion has long been identified and treated as a major risk factor for efficient public spending. It is estimated to increase the costs that public buyers pay compared to what they would pay under normal market conditions by up to 60%[2]. Even a single case of collusion in a multi-million award procedure will cost the European taxpayer millions of euros of excess payments to the detriment of efficient and accountable public spending.

Collusion is a recurring phenomenon in public procurement markets (including in key economic sectors, such as construction, IT or health). Cases of collusion are regularly identified, investigated and prosecuted (administratively and, in many cases, criminally) in all parts of the world, including in the EU Member States[3]. In emergencies, such as the COVID-19 pandemic, the public authorities' urgent need to procure, in a very short time, large quantities of supplies and services for their health systems may exacerbate the risk of collusion among some economic operators, who may try to take

[1] Estimated at over 14% of the total GDP of EU Member States.

[2] For example: http://documents.banquemondiale.org/curated/fr/975181468151765134/Curbing-fraud-corruption-and-collusion-in-the-roads-sector. A pending case of alleged collusion under investigation in the United States, involving a number of big pharmaceutical companies, includes claims that the companies involved in the collusive scheme artificially fixed prices for a number of generic drugs as much as 1000% above their normal market price.

[3] Based on information received by Member States (see Section 2.2 of this Notice).

advantage of the emergency and artificially restrict competition in order to maximise their gains at the expense of public finances. The detrimental effects of collusion on public finances may prove even greater in the aftermath of such emergencies, at a time when economic recovery depends, to a great extent, on the best possible use of available public funds and on making sizeable investments in critical economic sectors. Undue spending of excessive amounts for works, supplies and services means fewer public funds for carrying out core state business, larger budget deficits and a more acute need for states to resort to lending, thus jeopardising their financial stability and undermining their recovery efforts. In addition, the hesitation of businesses to participate in public-sector projects in markets affected by collusion undermines efforts to attract private investment in infrastructure (for example in the case of concessions requiring private capital participation).

Under EU law[4], collusion between economic operators is addressed in Article 101 of the Treaty on the Functioning of the European Union (TFEU), which explicitly prohibits agreements or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market and that may affect trade between Member States. Moreover, since the adoption of the most recent generation of EU public procurement Directives in 2014, sufficiently plausible indications of collusion have, explicitly, become an optional ground to exclude an economic operator from an award procedure[5].

1.2. The difficulties in addressing the issue

Detecting and addressing cases of collusion in public procurement presents particular challenges for national authorities. Illegal agreements among economic operators to collude are, by definition, secret and, in most cases, set up and carried out in a very careful and sophisticated manner. There are indications that in many (if not most) cases, collusion goes undetected during the award procedure and is ultimately uncovered and prosecuted (if at all) by the competent authorities, usually long after the contract has been fully performed. Long term collusive schemes may even become part of doing business in some economic sectors, as economic operators are tempted or inclined to join in to “guarantee” their access to and share of the market.

Public procurement markets have specific characteristics, which make them more vulnerable to collusion compared to other markets. Contracting authorities usually follow relatively stable purchasing patterns, with frequently repeated award procedures, similar quantities and standard product or service specifications without major changes compared to previous procedures. This predictability of demand facilitates illicit market sharing among operators, as it guarantees a “fair” return for each one of them. In addition, a given market sector may have a very low number of economic operators bidding for public contracts, often due to the remote location of the contracting authority or the small size of the respective market. The scarcity of tenderers may be further aggravated by the choices made or the practices used by the contracting authorities themselves,

[4] Analysed in Section 5.1 of this Notice.

[5] See Article 57 paragraph (4) subparagraph (d) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242) and Article 38(7)(e) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64). The exclusion ground provided for in Directive 2014/24/EU may also apply to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374), by virtue of Article 80(1) of Directive 2014/25/EU.

such as not opting for open procedures or introducing stringent or over-specified bidding requirements, which may result in limiting even more the number of tenders submitted in an award procedure. The smaller the number of active operators in a procurement market the easier it is to collude. Lastly, contracting authorities may also be subject to a number of requirements to disclose information on the award procedures, which go beyond what is required by the EU public procurement Directives (for instance, disclosing details on who submitted a tender and for which price). This may facilitate colluders exchanging information and monitoring the observance of the illegal agreement by all its parties.

The inherent difficulty in addressing suspected cases of collusion is aggravated by the reality contracting authorities often face when carrying out procurement procedures. Contracting authorities (especially smaller ones) often lack properly trained and experienced staff capable of detecting collusion in a given award procedure. Procurement officers[6] are usually focused on ensuring that the procedure meets the basic procedural and legal requirements in place and is completed on time. Even when procurement officers do detect suspicious tenders, they are often not fully aware of the available means to react or the mechanisms possibly in place to get expert assistance from central procurement or competition authorities. In addition, the prospect of delays in the award procedure, which often carry administrative, budgetary or even political consequences, can dissuade procurement officers from dealing effectively with suspected cases of collusion. Doubts over the capacity or even the willingness of a contracting authority to deal decisively with collusion may act as an additional facilitator for economic operators to collude.

Lastly, collusion in public procurement is even harder to address when combined with corruption, for example when colluding economic operators bribe a person that has an influence in the award procedure to ensure that their illegal behaviour goes undetected. Although collusion and corruption are considered to be separate problems in public procurement for the purposes of this Notice, they may occur *in tandem* and undermine even further the reliability of the award procedure.

1.3. The efforts so far to address the problem of collusion

Until the adoption of the 2014 public procurement Directives, collusive practices in public procurement were primarily dealt with at EU level from the perspective of competition law. They were regarded as a typical case of an agreement between two or more independent market operators, which restricts competition and is prohibited under Article 101 of the TFEU.

Over the years, both the Commission and national competition authorities (empowered to apply Articles 101 and 102 of the TFEU) have handled several cases of collusion in public procurement[7].

[6] For the purposes of this Notice, the terms "procurement officers" or "procurement staff" refer to staff of contracting authorities or entities who are involved, to a greater or a smaller extent, in designing, launching and carrying out an award procedure for a public contract. This definition is without prejudice to Member States' competence when it comes to the organisation of their national administration, the decision-making levels, the involvement of various departments in the overall award procedures etc. In this sense, the capacity to detect and address a suspected case of collusion and the duty to ensure the reliability of the award procedure apply to everybody involved in the procedure, from the staff member who receives and opens the tenders up to the manager who signs the decision to award the contract.

[7] For cases investigated by the Commission, see, for instance, the SPO case (involving construction companies in the Netherlands) of 1992 (Cases IV/31.572 and 32.571), the pre-insulated pipe case of 1999 (Case IV/35.691/E-4), the elevators and escalators case of 2007 (Case (COMP/E-1/38.823), the power cables case of 2014 (Case AT.39610), as well as cases mentioned in the report by the Commission's Directorate-General for

National competition authorities in most EU Member States have issued specific guidance on fighting collusion. Guidance on synergies between procurement and competition authorities has also been developed in the context of the International Competition Network[8], in which the Commission participates. Competition authorities have been raising awareness among contracting authorities on how to take preventive action at the planning stage of public procurement procedures, as well as training procurement officers in fighting collusion. In recent years, methods for analysing data from electronic procurement systems are becoming an additional valuable tool for detecting collusion.

In November 2017, OLAF published a handbook entitled "Fraud in Public Procurement - A collection of Red Flags and Best Practices"[9], developed on the basis of Member States' expert input in the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF). The handbook includes a section on collusion, providing a very comprehensive and detailed list of "red flags" and hints for detecting collusion in the pre-tendering and tendering phase.

Other bodies, notably the OECD[10] and the World Bank[11], have also carried out important work on the problem of collusion in public procurement.

2. TOOLS AT EU LEVEL TO FIGHT COLLUSION

2.1. The policy commitment to take action

As mentioned previously, European and national competition authorities have been entrusted with investigation and enforcement powers to punish collusive practices and deter economic operators from colluding in the future. However, in most cases competition enforcement and penalties are carried out after the damage is done, i.e. after the contract has been awarded and, in most cases, fully performed. Although identifying collusive practices at this later stage does serve the purpose of penalising collusion and deterring similar practices in the future, it does not serve any tangible purpose for the tender procedures that are actually affected and may result in the contract being awarded to an operator that had colluded, to the detriment of public interest. Even though European and national competition authorities play a key role in fighting collusion, it is of utmost importance to also address collusion at the stage that it matters most, i.e. before the contract is awarded. This

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Competition on competition enforcement in the pharmaceuticals sector, adopted on 28 January 2019 (available at https://ec.europa.eu/competition/sectors/pharmaceuticals/report2019/report_en.pdf).

[8] Notably, the chapter of the Anti-cartel enforcement manual elaborated by the International Competition Network (ICN) dealing with the "Relationships between Competition Agencies and Public Procurement Bodies".

[9] Collusion was also addressed in a study commissioned by OLAF on "Identifying and reducing corruption in public procurement in the EU", published in June 2013 (available at https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/identifying_reducing_corruption_in_public_procurement_en.pdf).

[10] On 17 July 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement (https://www.oecd.org/competition/oecdrecommendationonfightingbidriggininpublicprocurement.htm). The Recommendation calls on governments to strive for public procurement procedures that are designed to promote competition and reduce the risk of bid rigging. In 2009, the OECD Competition division had already drawn up very detailed guidelines and check-lists for fighting bid rigging in public procurement. The OECD Recommendation served as a basis for guidance texts issued by several national authorities addressing collusion.

[11] In 2013, the World Bank issued its Fraud and Corruption Awareness Handbook for civil servants involved in public procurement, which includes a dedicated section on collusion. In 2011, the Bank also issued specific guidance on fighting collusion in the construction sector, which it has identified as the sector most vulnerable to collusion, together with the medical supplies' sector.

requires addressing the problem also from the public procurement angle, which means empowering procurement officers running award procedures to efficiently prevent, detect and react to collusive behaviour during the procedure itself. This includes using the means provided for under the public procurement Directives, in particular the possibility to exclude a tenderer from the procedure where there are sufficiently plausible indications that it colluded in order to effectively restrict competition[12].

In its 2017 Communication entitled "Making public procurement work in and for Europe" (COM(2017)572)[13], the Commission identified six strategic priorities, where clear and concrete action can transform public procurement into a powerful instrument in each Member State's economic policy toolbox, leading to substantial benefits in procurement outcomes. Under the strategic priority of "Increasing transparency, integrity and better data", the Commission announced its intention to

"…develop tools and initiatives addressing this issue and raising awareness to minimise the risks of collusive behaviours on procurement markets. This will include actions to improve the market knowledge of contracting authorities, support to contracting authorities careful planning and design of procurement processes and better cooperation and exchange of information between public procurement and competition authorities. The Commission will also prepare guidelines on the application of the new EU procurement directives on exclusion grounds on collusion."

In addition to these specific actions, the 2017 Communication also included the strategic priority of "improving access to procurement markets". To that end,

"…the Commission encourages non-EU countries to join the WTO Agreement on Government Procurement and strives to conclude ambitious procurement chapters in the free trade agreements".

Opening up international procurement markets and allowing the entry of new economic operators in award procedures, especially in countries with a smaller procurement market and in sectors where there is limited supply, is generally acknowledged as a key means to increase competition, avoid market concentration or oligopolies and, consequently, deter collusive behaviours.

The Commission confirmed on 10 March 2020 its specific commitment to provide guidance on fighting collusion in public procurement in its Communication entitled a "Long term action plan for better implementation and enforcement of single market rules" (COM(2020)94 Final)[14].

2.2. The guiding principles in delivering on this commitment

Delivering on its policy commitment to address the problem of collusion, the Commission is working to produce tools that focus primarily on staff carrying out procurement procedures in the Member States. The aim is to ensure that they have the right tools, training and support that will enable them to effectively tackle collusion in an award procedure.

The Commission's intention is not to duplicate the work carried out so far but rather to address aspects of the regulatory or administrative framework where there is a clear and growing demand by the market for guidance and concrete action.

[12] Analysed in Section 5.1 of this Notice.

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN

[14] https://ec.europa.eu/info/sites/info/files/communication-enforcement-implementation-single-market-rules_en_0.pdf

The Commission draws inspiration from experiences and good practices already present in EU Member States. 21 Member States provided very substantial responses to a set of 10 questions the Commission put forward in February 2019, providing practical input to address this problem. The Commission will seek the continuous involvement of national procurement and competition experts in developing the announced tools, to ensure that any action taken provides real added value in the fight against collusion and focuses on the real needs of contracting authorities.

2.3. The purpose of this Notice

The current Notice details the tools announced in the abovementioned 2017 Communication, which the Commission envisages deploying in order to effectively assist Member States and their contracting authorities in countering the problem of collusion in public procurement. These tools aim at:

- **Supporting Member States and contracting authorities in building capacity to address the problem,** especially by incorporating methods to deter, detect and address collusion in the Commission's on-going professionalisation initiatives for public procurement. The methods include improving market knowledge, adapting procedures to encourage maximum participation by economic operators and limit the risk of collusion and raising awareness (see Section 3).
- **Fostering cooperation between national central procurement[15] and competition authorities** to ensure efficient and continuous support to contracting authorities (see Section 4).

This Notice also includes the announced concise, user-friendly and easily readable **guidance for contracting authorities on how to apply the collusion-related exclusion ground** provided for in the public procurement Directives. This guidance is set out in Section 5 with an annex setting out a set of means to better deter, detect and address suspected cases of collusion.

3. SUPPORTING MEMBER STATES AND CONTRACTING AUTHORITIES

Addressing the problem of collusion before the award procedure is concluded requires a combined effort by Member States and contracting authorities to build the administrative capacity that is needed to ensure that the award procedure is conducted properly. Measures that Member States and contracting authorities could consider taking in order to build such a capacity include:

[15] For the purposes of this Notice, "central procurement authorities" means the authority, department or institution entrusted at national level with drawing up, implementing, monitoring and/or supporting the functioning of the public procurement legal framework at national level. This is without prejudice to Member States' competence when it comes to the organisation of their national administration.

- **Making available resources** (especially human resources) that are capable of carrying out award procedures, including the capacity to properly and timely address cases of suspected collusion.
- **Making use of available administrative incentives for rewarding staff** that carries out procurement procedures and actively detects, addresses and reports possible cases of collusion.
- **Organising training and awareness-raising events for procurement staff**. Training for staff would primarily aim at drawing attention to the detrimental effect of collusion on award procedures, fostering a service culture throughout the administration that collusion must be actively addressed and equipping procurement staff with practical skills that enable them to address the problem in practice. Training courses could include ways to improve market knowledge, design and carry out procedures in a way that limits the risk of collusion and encourage operators to participate in award procedures, as well as make use of all tools and methods available to detect collusion during the award procedure. It is also advisable to provide procurement officers with training on basic principles of competition law related to cartels.

EU Member States are aware of the importance of professionalising their procurement staff in that respect. Most of them have published guidelines or other information on preventing and detecting collusion. Some Member States have also developed (or are in the process of developing) practical tools for screening available information to detect suspicious tenders more effectively. Most Member States are organising awareness-raising campaigns and training sessions on fighting collusion for contracting authorities and procurement officers.

In order to draw attention to this issue and support the actions taken by Member States, the Commission is working on different ways to incorporate the fight against collusion in its on-going professionalisation initiatives for public procurement (in line with its 2017 Recommendation on professionalisation).This includes:

- Including professional skills to prevent and detect collusion in the European Competency Framework for public procurement professionals (ProcurCompEU)[16].
- Sharing with all Member States good practices and tools developed at national level through the Commission's expert groups or available digital means of communication.
- Promoting the involvement of national competition authorities (especially officers who have dealt with collusion cases in practice) in awareness-raising events and in training for procurement officers, given the readily available expertise of national competition authorities in the matter (see also Section 4).
- Promoting targeted actions in support of smaller contracting authorities in the Member States. This could include ways to enable national central procurement authorities to provide comprehensive support to smaller contracting authorities when conducting award procedures or to draw up specific training modules adapted to their specific needs.
- Exchanging good practices on encouraging procurement officers to actively pursue cases of suspected collusion.

[16] https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers/professionalisation-public-buyers/procurcompeu-european-competency-framework-public-procurement-professionals_en

- Working together with other international organisations (such as the OECD, the WTO, the World Bank and the EBRD) to foster an international pool of knowledge and experience in fighting collusion, including knowledge and experience on opening up global markets and designing and carrying out procedures in a pro-competition way, drawing maximum participation by economic operators.

In line with the abovementioned 2017 Communication, special attention is given to economic sectors that are considered sensitive, because they are either vulnerable to collusion (for instance, due to a concentration of supply or demand, such as in low-scale award procedures carried out at sub-central or local level) or important due to their economic size or role in society (such as construction, healthcare and the IT sector).

4. IMPROVING COOPERATION BETWEEN NATIONAL CENTRAL PROCUREMENT AND COMPETITION AUTHORITIES

Effectively tackling collusion in public procurement requires a comprehensive approach by contracting authorities, making use of knowledge and expertise on both procurement and competition. Putting in place a comprehensive, stable and efficient framework to support contracting authorities in this task requires fully-fledged cooperation between the national central procurement and competition authorities.

In some Member States, these authorities set out (or are in the process of doing so) the terms for closer cooperation in fighting collusion in an *ad hoc* agreement. Such agreements promote in practice the exchange of information, experiences and good practices for fighting anticompetitive behaviour in public procurement. In some Member States, such as Sweden and Germany, the Competition Authority also plays a supervisory role in the enforcement of public procurement rules.

Irrespective of the form such cooperation may take, the Commission strongly encourages the initiative of central procurement and competition authorities in Member States to join forces in fighting collusion in public procurement. This would enable Member States and their central authorities to draw up and implement more efficiently actions in support of contracting authorities, such as:

- Putting in place a secure service (in the form of a contact point or helpline) providing support to contracting authorities.
- Promoting the use of tools available at EU or national level that enable and encourage individuals or businesses to come forward and report cases of collusion, especially whistle-blower mechanisms or leniency programmes[17].
- Elaborating the step-by-step practical arrangements for contracting authorities to seek the expert assistance of central procurement and competition authorities.
- Facilitating the authorities' access to the information they need to perform their tasks in handling suspected cases of collusion. Member States could consider, within their legal framework and with due respect to EU[18] and national data protection requirements:

[17] See an example of such a tool put in place by the European Commission: https://ec.europa.eu/competition/cartels/whistleblower/index.html

[18] In particular the General Data Protection Regulation (Regulation (EU) 2016/679).

- Enabling their competition authorities to access the electronic procurement databases (such as available national contract registers) and tenders for cases under investigation.
- Allowing the exchange of available information between procurement and competition authorities, so that these authorities can assess whether there are patterns of collusion between economic operators.
- Making it mandatory for contracting authorities to inform their central procurement and competition authorities of cases in which they excluded an economic operator due to suspected collusion (see also Section 5.8). This would allow central authorities to keep track and monitor the use at national level of the exclusion ground provided for by the Directives and carry out the necessary follow-up to such cases (when, for instance, investigating the cases under competition rules or considering the exclusion of the operator from procedures for a period of time).

- Creating a national database of cases where economic operators were excluded on grounds of collusion, with due respect to national law as well as EU[19] and national data protection requirements. Such a database would provide contracting authorities with readily available information on the economic operators involved in collusion in the past, facilitating the task of assessing their integrity and reliability. It would also help central national authorities monitor, on the one hand, the way in which different contracting authorities handle similar cases and, on the other hand, the effective implementation of decisions to exclude economic operators from award procedures.
- Introducing in the national public procurement framework optional tools for contracting authorities that would effectively deter economic operators from colluding. This could include:
  - A requirement for any tenderer to submit a separate declaration of independent bid determination together with the tender[20] and
  - Explicit clauses in the contract providing for the right of the contracting authority to terminate the contract or to claim damages if the contractor is found to have colluded.
- Cooperating in analysing procurement data in order to detect traces of collusion in award procedures more easily. To that end, Member States are encouraged to put in place at national level simple and easy-to-apply methods to collect and analyse large volumes of data available on electronic procurement databases (possibly using algorithms, artificial intelligence algorithms or machine learning).
- Co-organising training sessions on public procurement and competition for procurement and competition staff, so that both professional communities become familiar with each other's working framework and practices.
- Putting in place a system to jointly periodically review selected award procedures to identify cases of collusion and to monitor procurement in sensitive sectors.
- Conducting awareness-raising campaigns targeted at the business community active in public procurement, drawing attention to the legal requirements in place for participating in public procurement procedures, the potential consequences of collusive behaviour, as well

[19] See footnote 18.

[20] Economic operators are already required to declare whether they entered into any collusive agreement when submitting the European Single Procurement Document (ESPD). The Commission may consider in the future complementing this provision by requesting a declaration confirming that the tenderer elaborated its bid independently.
The OECD has drawn up an example of this type of declaration: https://www.oecd.org/governance/procurement/toolbox/search/certificate-independent-bid-determination.pdf

as the benefits of fair competition in the public procurement market for both public purchasers and companies.

The Commission will consider ways to support Member States' efforts for putting in place the necessary synergies at national level between central procurement and competition authorities (notably, effective and practical mechanisms of permanent cooperation, exchanging information and assistance), such as:

- Making use of discussions in the Commission expert groups to bring forward good practices on national support mechanisms to procurement officers and on national cooperation modes between central procurement and competition authorities. This will ideally include showcasing presentations by Member States that have such arrangements in place. The guidance drawn up by the International Competition Network (see Section 1.3) could be a source of inspiration for this.
- Organising a first joint meeting or workshop bringing together the professional communities of public procurement practitioners and competition experts. The Commission could further consider the possibility of setting up, if deemed useful, a forum at EU level in order to encourage cross-border cooperation and exchanging information, experience and knowledge in this field. Such a forum could be used to discuss and exchange experiences on issues such as shared practices at EU level in data collection and in analysing indicators of collusion across the EU, the functioning of the "self-cleaning" possibility provided for by EU law (see Section 5.7) or how Directive 2014/104/EU[21] works for damages caused by collusive practices.

In addition, the Commission will consider possible ways to promote cooperation and information exchange at EU level between national central procurement and competition authorities, in compliance with EU[22] and national data protection law, with a view to enabling information sharing across the EU on the economic operators who have been excluded from award procedures on grounds of collusion. Inspiration could be drawn from existing facilities, such as the Internal Market Information System[23], the central information system of the European Competition Network (European Competition Network System) or the information exchange mechanism developed under the Commission's voluntary ex-ante mechanism for large infrastructure projects[24].

[21] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
[22] See footnote 18.
[23] See recital 128 of Directive 2014/24/EU.
[24] https://ec.europa.eu/growth/tools-databases/pp-large-projects/

5. GUIDANCE TO CONTRACTING AUTHORITIES ON HOW TO APPLY THE COLLUSION-RELATED EXCLUSION GROUND IN ACCORDANCE WITH ARTICLE 38(7)(e) OF DIRECTIVE 2014/23/EU, ARTICLE 57(4)(d) OF DIRECTIVE 2014/24/EU AND ARTICLE 80(1) OF DIRECTIVE 2014/25/EU

This section of the Notice sets out the Commission's non-legally binding views on how to apply the collusion-related exclusion ground provided for in Article 38(7)(e) of Directive 2014/23/EU, Article 57(4)(d) of Directive 2014/24/EU and Article 80(1) of Directive 2014/25/EU. It focuses on specific issues encountered by Member States when implementing the Directives and by procurement officers when assessing tenders in award procedures. These views are without prejudice to the competence of Member States when transposing and applying the Directives and do not create any new rules or obligations. Only the Court of Justice of the European Union (hereafter the "Court") is competent to give a legally binding interpretation of the provisions of EU law referred to in this Notice.

In the interest of completeness and usability of such guidance, this Notice also includes in the annex simple and concise advice that is primarily addressed to procurement officers preparing and carrying out award procedures for contracting authorities. It identifies a number of means and so-called "red flags" which, in the Commission's view, are the easiest for procurement officers to use throughout the whole award procedure to deter, detect and address collusion. This advice reflects valuable work carried out over the past years by organisations and services such as the OECD, OLAF or national competition authorities, which have provided procurement officers with comprehensive and readily available guidance and good practices on fighting collusion.

5.1. The applicable legal provisions and their implementation so far

Collusion between economic operators is prohibited by EU law under of Article 101 TFEU[25], which provides that:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"

When collusion does not (potentially) affect trade between Member States, it may still be prosecuted under national competition rules.

Before the 2014 generation of public procurement Directives came into force, tenderers who colluded could be excluded from tender procedures on the basis of Article 45(2) of Directive 2004/18/EC, provided that they had been convicted by final judgment for an offence related to their professional conduct (Article 45(2)(c)) or that they had been guilty of grave professional misconduct

[25] On 8 April 2020, the Commission adopted a Communication on a "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak" (C(2020) 3200 final). It concerns the handling, from a competition law point of view, of possible forms of cooperation between economic operators in order to ensure the supply and adequate distribution of essential scarce products and services during the COVID-19 outbreak.

proven by any means that the contracting authorities could demonstrate (Article 45(2)(d))[26]. When applying the latter optional exclusion ground, contracting authorities could include an infringement of competition rules, such as collusion, as an instance justifying such exclusion, provided that the conditions set out in that Article were satisfied[27].

The 2014 public procurement Directives amended the exclusion rules by introducing new mandatory and optional exclusion grounds, the possibility for economic operators to invoke "self-cleaning" measures and a maximum duration of exclusion. They explicitly identified, for the first time, collusion as an optional ground for excluding economic operators from award procedures. More specifically, Article 57(4)(d) of Directive 2014/24/EU (hereafter the "Directive") provides that a contracting authority may exclude or may be required by a Member State to exclude an economic operator from a tender procedure:

"(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition".

This optional exclusion ground is also mirrored in Article 38(7)(e) of Directive 2014/23/EU on concessions and may apply to procurement covered by Directive 2014/25/EU on utilities by virtue of its Article 80(1)[28].

Article 57(6) of the Directive introduces the right of the economic operator to make use of what are generally referred to as "self-cleaning" measures (further analysed in Section 5.7), providing that:

"Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective".

[26] These exclusion grounds were also applicable under Directive 2004/17/EC, according to its Article 54(4).
[27] See order of the Court of Justice of 4 June 2019 in case C-425/18, CNS, paragraphs 18 and 33.
[28] References in Section 5 of this Notice solely to Directive 2014/24/EU or its provisions should be understood as also covering the corresponding provisions in Directives 2014/23/EU and 2014/25/EU.

Lastly, Article 57(7) of the Directive provides that:

"Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4."

Member States have reported several cases where contracting authorities consult the national competition authority on how to handle suspicious tenders. In some Member States, contracting authorities have actually decided to exclude economic operators on suspicion of collusion. However, information about such exclusions is not conclusive, as in most Member States contracting authorities are not required to report these decisions to the national central procurement or competition authorities.

In a number of Member States cases concerning the implementation of the exclusion ground have also reached national courts.

The Directives do not specifically address the effect of either a possible successful legal challenge of the decision by a contracting authority to exclude an economic operator or a conflicting decision on the matter by the national competition authority after the award decision has been taken. Such effect is left to the Member States to determine.

5.2. The scope of the collusion-related exclusion ground: coverage of concerted practices and interplay with the exclusion ground due to grave professional misconduct

The possibility to exclude an economic operator for suspected collusion is not construed in the Directive as a penalty for its behaviour before or during the award procedure. It rather serves as a means to ensure compliance with the principles of equal treatment and competition in the award procedure, as well as ensuring the integrity, reliability and suitability of the future contractor to perform the contract[29].

In terms of the type of behaviour covered by the exclusion ground, differences between the letter of Article 57(4)(d) of the Directive and that of Article 101 TFEU have given rise to doubts as to which illegal practices are to be taken into account by the contracting authority for the purpose of applying this exclusion ground.

Indeed, Article 57(4)(d) of the Directive refers only to "*agreements with other economic operators aimed at distorting competition*", whereas Article 101 TFEU covers "*agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". Interpreting the Directive in a manner consistent with the Treaty, it should be possible for Member States, when transposing the Directive into national law, to consider that not only agreements, but also concerted practices in public

[29] See recital 101 of the Directive.

procurement aimed at distorting competition may trigger the application of this exclusion ground. Alternatively, Member States could consider those other forms of breaches of competition rules as a case of grave professional misconduct, justifying a potential exclusion of an economic operator under Article 57(4)(c) of the Directive[30].

Some questions may also arise as to the difference between the collusion-related exclusion ground set out in Article 57(4)(d) of the Directive and the exclusion ground due to grave professional misconduct of Article 57(4)(c). As mentioned above, until the 2014 Directives came into force, the latter provision served as the basis for excluding an economic operator from the award procedure in cases of breaches of competition rules[31]. Both exclusion grounds could still serve the same purpose (a possibility confirmed by recital 101 of the Directive that explicitly qualifies the breach of competition rules as a case of grave professional misconduct) and both are optional for contracting authorities and have exactly the same effect, namely to exclude a tenderer from the procedure. The addition of the collusion-related ground in Article 57(4)(d) was designed as a more specific tool extending the available options of contracting authorities to address situations of collusion. The key difference between the two provisions appears to be the degree of certainty that is required for the contracting authority to exclude a tenderer from the procedure. In order to make use of Article 57(4)(c), the contracting authority needs to "*demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct*". By contrast, Article 57(4)(d) allows the contracting authority to consider excluding a tenderer even if there are "*sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition*". It is for the contracting authority to judge, on a case-by-case basis, which of the two grounds could be considered applicable, it being understood that nothing in the Directive precludes a contracting authority from excluding a tenderer from the procedure on the basis of more than one exclusion ground.

5.3. The competence of contracting authorities to apply the exclusion ground: wide margin of appreciation and limits to their discretion

Article 57(4) of the Directive gives contracting authorities a wide margin of appreciation as to whether or not to exclude a tenderer from the procedure, where there are sufficiently plausible indications of collusion.

Article 57(4)(d) does not further specify or imply what exactly could qualify as an indication or how such an indication could be considered sufficiently plausible to exclude the tenderer. The EU legislator's intention appears to have been to allow the contracting authorities to assess, on a case-by-case basis, whether the conditions for excluding a tenderer on that ground are fulfilled, without being over-prescriptive[32]. The optional nature of this exclusion ground means that contracting authorities are allowed to maintain in an award procedure a tenderer even if they have sufficiently plausible indications of collusion (unless national law requires contracting authorities to exclude the tenderer – see below).

[30] As confirmed in recital 101 of the Directive.

[31] See the abovementioned CNS order of the Court of Justice, paragraphs 18 and 33.

[32] See judgment of the Court of Justice of 24 October 2018 in case C-124/17, Vossloh Laeis GmbH, paragraph 23, judgment of 19 June 2019 in case C-41/18, Meca srl, paragraphs 28 and 31 and judgment of 3 October 2019 in case C-267/18, Delta Antrepriza, paragraphs 25 to 29.

The Court has consistently confirmed that, under Article 57(4) of the Directive, it is for the contracting authority (and not for another national instance or body) to independently assess whether an economic operator must be excluded from a specific award procedure[33]. As the Court very purposefully put it, "*the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers*", especially with a view to ensuring "*the reliability of the successful tenderer, on which the contracting authority's trust is founded*"[34].

Contracting authorities have a wide margin of appreciation when it comes to excluding a tenderer on suspicion of collusion. However there are certain limits, which are set out in the Directive.

Firstly, when transposing the Directive into national law, Member States are allowed to oblige their contracting authorities to apply the optional exclusion grounds provided for in Article 57(4) of the Directive and, for Article 57(4)(d), to exclude a tenderer from the award procedure if they have sufficiently plausible indications of collusion[35].

In addition, under Article 57(7) of the Directive, Member States have the right to specify the implementing conditions for this Article, in line with EU law, especially to ensure that contracting authorities take a consistent approach to the issue at national level. Recital 102 of the Directive acknowledges the possibility for Member States to set such conditions in the specific case of assessing "self-cleaning" measures put forward by a tenderer. However, any such condition should not alter, modify, extend or limit the scope or reasoning of the exclusion grounds set out in paragraph 4 of the Article, limit the discretionary power of contracting authorities or prejudice or pre-empt their decisions. The aim of such conditions is to set, at national level, the terms under which contracting authorities would exercise their powers provided for by the Directive[36].

Secondly, under Article 57(6) of the Directive, a tenderer may prove its reliability by submitting to the contracting authority the evidence referred to in that paragraph that it has taken sufficient compliance measures to remedy the negative effects of its misconduct (or "self-cleaning" measures). Recital 102 of the Directive states that:

"Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone".

The contracting authority is required to examine such evidence taking into account the gravity or particular circumstances of the offence and to provide justification when it decides that the evidence is not sufficient to allow the tenderer to continue participating in the procedure.

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[33] See the Vossloh Laeis judgment, paragraph 23, the Meca judgment, paragraphs 28, 31 and, especially, 34, the Delta Antrepriza judgment, paragraphs 25 and 27, the CNS order, paragraphs 34 and 35, as well as order of the Court of Justice of 20 November 2019 in case C-552/18, Indaco, paragraph 24.

[34] See the Delta Antrepriza judgment, paragraph 26.

[35] The replies that the Commission received to its February 2019 questionnaire indicate that most Member States chose to keep the exclusion ground optional for their contracting authorities when transposing the 2014 Directives.

[36] See the Meca judgment, paragraph 33 and the Delta Antrepriza judgment, paragraphs 25 and 27. The Court requires that such conditions "*respect the essential characteristics*", as well as the "*objectives and principles*" of the exclusion grounds. See also the Indaco order, paragraphs 23 and 25, as well as the judgment of the Court of Justice of 30 January 2020 in case C-395/18, Tim, paragraph 36.

Thirdly, the principle of proportionality, which covers all stages of the award procedure, also applies to the stage of assessing a potential case of collusion. This is confirmed by recital 101 of the Directive, which states that:

"In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality."

The contracting authority must also exercise proportionality when assessing the "self-cleaning" measures put forward by the tenderer concerned. Article 57(6) of the Directive provides that:

"The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct."

The principle of proportionality, for the purposes of applying this exclusion ground, generally requires the contracting authority to carry out a specific and individual assessment of the economic operator concerned[37], independent of previous decisions taken by other authorities (see Section 5.4) and respecting the right of the operator to put forward "self-cleaning" measures (see Section 5.7).

Fourthly, the discretion of the contracting authority as to whether to exclude an operator from the award procedure is also mitigated by the need for the decision to be well documented and properly motivated. If "self-cleaning" measures are put forward, Article 57(6) of the Directive provides that:

"Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision."

A properly motivated decision would substantially reduce the risk of a successful legal challenge by the economic operator concerned.

Generally, contracting authorities have to remain conscious at all stages of the award procedure that excluding an economic operator from the procedure results in effectively limiting competition and choice for the public buyer. It is a measure to be used with caution (especially in sectors where there is a limited number of active economic operators) and only if the integrity and reliability of the future contractor cannot be ensured by other, less drastic measures.

5.4. The notion of "sufficiently plausible indications": facts that may be considered as indications, what constitutes "indications" as opposed to "evidence" and how to handle leniency applicants

As mentioned in Section 5.3, the Directives do not detail what could qualify as "sufficiently plausible indications", which would enable a contracting authority to exclude an economic operator from the award procedure based on the collusion-related exclusion ground.

Therefore, it can generally be considered that, when examining the possibility of excluding a tenderer from a pending award procedure due to suspected collusion, a contracting authority has the right, under the Directive, to assess all facts it is aware of that could call into question the reliability of that tenderer as a potential future contractor. The contracting authority can take into account as a potential plausible indication the knowledge that, for instance, a tenderer has already concluded a

[37] See the CNS order, paragraph 34.

subcontracting contract with another tenderer in the same procedure or has pre-ordered the material needed to perform the specific contract in question well before the evaluation of the tenders is concluded. Other aspects for contracting authorities to assess (via available analytical methods or based on lists of the so-called "red flags") include:

- The overall market behaviour of tenderers participating in the procedure (for instance, tenderers who never bid in the same award procedure or tenderers who bid only in certain regions or tenderers who appear to be taking turns in participating in award procedures).
- The text of the tenders (for instance, the same typos or phrases in different tenders or comments left by mistake in the text of the tender indicating collusion among tenderers).
- The prices offered in the award procedure (for instance, tenderers who offer a higher price than in previous similar procedures or offer excessively high or low prices).
- Administrative details (for instance, tenders submitted by the same business representative)[38].

Contracting authorities have to assess in a cautious and proportionate way whether indications of collusion detected in a pending award procedure are sufficiently plausible for excluding a tenderer, focusing on the facts and avoiding presumptions. For example, it would be hard to justify excluding two tenderers from an award procedure solely because they submitted their tender electronically with a few minutes' difference.

Regarding some more specific issues as to what could be construed as a sufficiently plausible indication for the purposes of the Directive:

Firstly, in the light of the analysis in Section 5.3, the Directives can be considered to allow Member States to bring in national rules or guidelines that would qualify what a contracting authority could consider as "sufficiently plausible indications" for the purposes of applying the exclusion ground. However, as mentioned, national rules should comply with both the letter and the spirit of the Directive, which requires only "indications" of participating in illegal agreements that distort competition in an award procedure and not formal evidence, such as a court judgment confirming such participation. If the European legislator required evidence to trigger this exclusion ground, this would have been reflected in the text, as is the case with Articles 26(4)(b) and 35(5) of the Directive. The Court has also confirmed that a breach of EU public procurement rules, such as anti-competitive behaviour, "…may be proved not only by direct evidence, but also through indicia, provided that they are objective and consistent and that the related tenderers are in a position to submit evidence in rebuttal"[39].

In practice, this means that contracting authorities are not required to have evidence of collusion in a pending award procedure, as this would contradict the letter of the Directive. Consequently, national legislation that requires a decision of a competition authority or a court judgment confirming that the operator in question colluded in the pending award procedure, before the contracting authority is able to reject the tender based on Article 57(4)(d), raises doubts as to its compatibility with the

[38] An outline of commonly used "red flags" is set out in the annex to this guidance.
[39] See judgment of the Court of Justice of 17 May 2018 in case C-531/16, Ecoservice projektai, paragraph 37.

Directive, given that such a decision constitutes, in fact, evidence of collusion[40]. This would unduly limit the power granted to contracting authorities under the Directive to exclude a tenderer based on sufficiently plausible indications of collusion rather than on evidence. What could be considered an indication of collusion is, for instance, information brought to the attention of the contracting authority of an investigation launched by the competition authority or of penal charges brought against the management of the operator for suspected collusion either in the pending award procedure or in other award procedures.

Secondly, when assessing the integrity or reliability of a tenderer in the sense of Article 57(4)(d) of the Directive, the contracting authority has the right to take into account any fact indicating an anti-competitive behaviour by that tenderer, irrespective of whether this concerns the pending award procedure or another one, past or present. Article 57(4)(d) of the Directive does not specify whether the facts giving rise to sufficiently plausible indications of collusion must refer to the pending award procedure or whether they can refer to other (past or ongoing) procedures, procedures in a different economic sector or procurement procedures carried out for the private sector. On the contrary, the second subparagraph of Article 57(5) of the Directive explicitly confirms that the contracting authority may take into account "*acts committed or omitted either before or during the procedure*". Therefore, a previous decision by another contracting authority to exclude the operator from an award procedure or a decision of a competition authority or judgment by a national court, by virtue of which the operator or a member of its management or its staff was found guilty of collusion in the context of previous award procedures, may be taken into account by a contracting authority when assessing the reliability of a tenderer in the context of the pending procedure[41]. However, the involvement of the operator in a previous case of collusion is not *per se* a ground for excluding the operator in a pending award procedure, given that, based on the Court's case law[42], the decisions of other authorities in previous cases do not prejudice the judgment of the contracting authority carrying out the award procedure. The same applies if, in a previous case, a tenderer was suspected of collusion but, finally, either the suspicions were dismissed or the tenderer remained in the award procedure regardless. The contracting authority is not bound by any such previous decision when conducting its award procedure[43], maintaining the right to consider excluding a tenderer from the award procedure if that tenderer's past behaviour creates credible and justifiable doubts to the contracting authority about the tenderer's integrity and reliability in the context of the pending award procedure.

As mentioned in Section 5.3, the contracting authority needs to justify how it reached its final decision to exclude the operator in question from the award procedure and especially how specific facts were considered to be sufficiently plausible indications of collusion and call into question the tenderer's reliability for the purposes of the pending award procedure. In order to allow the contracting authority to make an informed assessment, an economic operator must inform the

[40] In its recent judgment of 11 June 2020 in case 472/19, Vert Marine, the Court of Justice also underlined the need for implementing conditions put in place by Member States to be compatible with the time constraints of an award procedure, so as not to deprive the provisions of the Directive from their substance (see paragraphs 36 and 38 of the judgment).

[41] Although not bound by decisions taken abroad, contracting authorities may also take into consideration cases where the economic operator was involved in collusion in another country.

[42] See the Delta Antrepriza judgment, paragraph 27 and the CNS order, paragraph 34.

[43] Unless there is a decision taken for the operator's exclusion from any award procedure for a period of time (see Section 5.9).

contracting authority, when requested, about any previous decision taken by a competition authority or court judgments finding that the operator colluded. This information is requested through the questionnaire included in the European Single Procurement Document (ESPD) or similar national forms, which the operator is typically required to submit together with its tender[44]. If an economic operator withholds from the contracting authority information required to verify the absence of grounds for exclusion, the authority has the right, under Article 57(4)(h) of the Directive, to exclude that operator from the award procedure.

Thirdly, there are cases of economic operators that admitted in the past having participated in a case of collusion and cooperated with a competition authority, either as a leniency or immunity applicant and/or in the context of a settlement procedure. The question arises as to whether national law can stipulate that such previous cooperation automatically deprives contracting authorities of the possibility to consider this past involvement in a collusion scheme as a sufficiently plausible indication of collusion for the purposes of applying the exclusion ground in award procedures carried out after the competition authority made its decision public.

Before answering this question, it is useful to bear in mind that in most jurisdictions:

- A leniency or settlement decision presupposes that the operator in question admits that it participated in an illegal collusive agreement.
- It may be the case that an operator, who was investigated for collusion and finally opted for settling the case, initially refused to cooperate with the competition authority and undermined or hindered the investigation. This is the opposite of what would be expected under Article 57(6) of the Directive from the operator in order to restore its reliability as a future contractor.
- Lastly, settling these cases does not require a commitment by the operator to avoid similar practices in future or to take specific actions. The operator does not commit or guarantee that it will adopt specific measures ("self-cleaning" measures) to restore its reliability and integrity in the sense of the Directive. Competition law does not generally provide for exclusion of an operator from future public procurement award procedures as a sanction for its anti-competitive behaviour.

In the light of the above, one should distinguish between two cases: on the one hand, an award procedure or procedures which were the subject of an investigation and decision of the national competition authority and which involved an application for leniency or settlement and, on the other hand, other award procedures that are carried out after the abovementioned decision was made public.

- In the first case, Member States should generally be free to decide to fully or partly exempt leniency, immunity or settlement applicants from any sanction in relation to the award procedure or procedures that are covered by that application and where collusion among the operators concerned was established and sanctioned by decision of the national competition authority[45]. This could guarantee the efficiency of leniency or settlement

[44] See the Delta Antrepriza judgment, paragraph 36.
[45] Article 23(1) of Directive 2019/1 "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" provides for an obligation of

schemes put in place by Member States, given that dispensing an economic operator who admits participating in a collusion scheme from the grave consequences provided for in national legislation could provide a very strong incentive for operators to come forward and disclose cases of collusion.

The above should also be possible when an award procedure affected by the collusive agreement that the national competition authority decided to sanction is still pending when the competition authority makes its decision public. Notwithstanding the prerogatives of contracting authorities under Art.57(4)(d) of the Directive, an economic operator who admitted its participation in the collusion scheme, cooperated with the competition authority, paid the fines imposed and took appropriate measures to restore its reliability could be arguably considered as satisfying the conditions for its "self-cleaning", pursuant to Article 57(6) of the Directive. Consequently, it could be considered disproportionate for a contracting authority to exclude that operator from an on-going award procedure, in relation to which the operator's "self-cleaning" measures were partly already reflected in the respective decision of the national competition authority.

- In the second case, however, there is nothing in the Directive that can be construed as allowing Member States to introduce a mandatory, general and unqualified presumption of reliability for such operators and/or oblige contracting authorities to automatically accept their participation in award procedures carried out or concluded after a decision of the national competition authority is made public. This would effectively run counter to the specific discretionary power of contracting authorities (provided for by the Directive and consistently confirmed by the Court, as analysed above) to seek comfort or reassurance that the tenderer is reliable, including by possibly requesting evidence of the "self-cleaning" measures provided for in Article 57(6) and assessing whether measures brought forward by the operator are sufficient to maintain the tenderer in the award procedure[46]. As the Court also stressed[47], such a guarantee for participation in future award procedures may even be considered as directly contradicting (or, even, rendering ineffective) the "self-cleaning" provision of Article 57(6), as an economic operator with guaranteed access to future award procedures would have no incentive whatsoever to adopt measures to restore its reliability.

  The right of a contracting authority to assess the risk of collusion in the participation in a pending award procedure of a tenderer that in the past applied for leniency or settled a previous case of collusion is properly balanced with the obligation to assess, in a

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Member States to ensure that current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are fully protected from sanctions imposed in administrative and non-criminal judicial proceedings, in relation to their involvement in the secret cartel covered by the application for immunity from fines, for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU. Recital 64 confirms that this provision also covers national laws on bid-rigging. The 2006 Commission Notice on immunity from fines also limits immunity to "any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel".

[46] See the Vossloh-Laeis judgment, paragraph 32.

[47] See the Indaco order, paragraph 27.

proportionate manner, the proof that the operator may put forward under Article 57(6), as regards the measures it took to restore its reliability. If the contracting authority decides to exclude the tenderer, despite the "self-cleaning" measures brought to its attention, the contracting authority must justify of why those measures were considered insufficient for maintaining the tenderer in the award procedure.

5.5. Affiliated companies that participate in the same award procedure: the right of operators that may be suspected of collusion to demonstrate their independence when tendering

Contracting authorities often address the issue of how to deal with separate tenders submitted in the same award procedure by economic operators who are somehow affiliated (for instance, being members of the same group of companies, or one being a subsidiary of the other, or companies sharing members of their Board of Directors or legal representatives, or companies holding shares in the same third company). It may be that a contracting authority suspects that tenders submitted by affiliated tenderers are coordinated (i.e. that they are neither autonomous nor independent), thus putting at risk the respect of the principles of transparency and equal treatment among tenderers[48].

According to the case-law of the Court[49], the contracting authority must avoid making general presumptions that could lead to automatically rejecting such tenders[50]. Instead, it should allow the operators in question to demonstrate, by whichever proof they consider appropriate, that their tenders are truly independent and do not jeopardise transparency or distort competition in the award procedure[51]. This could include, for instance, facts proving that the respective tenders were drawn up independently, that different persons were involved in their preparation, etc.

The contracting authority has the right to judge whether such explanations provide sufficient proof that the affiliation of the operators did not influence their conduct in the award procedure or the content of the respective tenders within the meaning of Article 57(4)(d) of the Directive and to decide whether to allow the operators concerned to participate in the procedure.

5.6. Joint bidding and subcontracting: a careful yet balanced assessment by the contracting authority

In some cases, joint bidding raises doubts with the contracting authority, especially if the members of the group of companies that bid jointly could easily bid in their own right (or, even more, they were expected to do so). A number of Member States have taken specific steps on this issue, advising

[48] See the Ecoservice projektai judgment, paragraph 29. This may be the case, particularly when there are indications that the one company has privileged access to the method for drafting the tender of the other or that there is a form of coordination in elaborating their tenders or determining their pricing strategy.

[49] Judgment of the Court of Justice of 16 December 2008 in case C-213/07, Michaniki, paragraphs 42, 43 and 62, judgment 19 May 2009 in case C-538/07, Assitur, paragraphs 30 and 32, judgment of 8 February 2018 in case C-144/17, Lloyd's of London, paragraphs 35, 36 and 38, and the Ecoservice projektai judgment, paragraph 38.

[50] Especially in the light of the Court's acknowledgement that corporate structures of affiliated operators may include arrangements that guarantee independence and confidentiality in preparing tenders for the same procedure (see the Lloyds of London judgment, paragraph 37 and the Assitur judgment, paragraph 31).

[51] See the Lloyds of London judgment, paragraph 36 and the Assitur judgment, paragraph 30.

economic operators how to consider joint bidding without being accused of potential anticompetitive behaviour[52].

The contracting authority has a sufficient margin of appreciation under the Directive to assess whether a case of joint bidding presents risks for the proper conduct of the award procedure, in particular whether there are indications of collusion that could trigger the exclusion ground under Article 57(4)(d) of the Directive. However, when addressing such questions, the contracting authority needs to strike a balance between avoiding competition risks through joint bidding[53] and respecting the right of operators to jointly submit a tender (as acknowledged in Articles 2(1)(10), 19(2) and 63(1) of the Directive). It should be borne in mind that companies often consider strategic partnerships or cooperation as a key aspect of their growth strategy. Economic operators have the right to make legitimate business choices on the activities they will undertake and contracting authorities should not *per se* limit this right but should instead assess the risks of collusion on a case-by-case basis.

A similar approach is required in the case of subcontracting: the contracting authority should carefully assess cases where a suggested subcontractor could easily have participated in its own right in the award procedure and performed the contract independently. Cases where two tenderers cross-subcontract one another may also be considered by the contracting authority as a potential indication of collusion to be examined under Article 57 of the Directive, given that such subcontracting agreements usually allow the parties to know each other's financial offer, thus calling into question the parties' independence in formulating their own tenders. Although subcontracting agreements such as those mentioned above may be considered a "red flag" indicating potential collusion, contracting authorities should avoid general presumptions that subcontracting by the successful tenderer to another tenderer in the same procedure constitutes collusion among the economic operators concerned, without allowing those operators the possibility to provide arguments to the opposite[54].

5.7. "Self-cleaning" measures taken by the economic operators within the meaning of Article 57(6) of the Directive: the right of operators to prove their reliability and the need for contracting authorities to make a proportionate assessment of the arguments put forward

As mentioned in Section 5.3, Article 57(6) of the Directive gives economic operators that are in a situation justifying their exclusion the right to prove their reliability despite there being grounds for exclusion[55].

Article 57(6) details these so-called "self-cleaning" measures that economic operators may bring to the attention of the contracting authority for this purpose. Recital 102 of the Directive provides examples of these measures, notably personnel and organisational measures such as severing all

[52] Following the "Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements" adopted by the Commission in January 2011 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN) .

[53] A generally open market and a high number of tenders received in a given award procedure may be considered as limiting the risk that a joint tender could present in terms of limiting the competition.

[54] See the judgment of the Court of Justice of 22 October 2015 in case C-425/14, Impresa Edilux, paragraph 39.

[55] In its Vert Marine judgment (paragraph 17), as well as in its judgment of 14 January 2021 in case C-387/19, RTS, paragraphs 26 and 48, the Court of Justice confirmed that Member States must guarantee this right when transposing the Directives.

links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation arrangements.

The same recital makes reference to the possibility for Member States, under Article 57(7) of the Directive, *"…to determine the exact procedural and substantive conditions applicable in such cases*", which includes the possibility to provide, at national level, detailed criteria or guidelines on how the contracting authorities will apply "self-cleaning" provisions in practice. However, as analysed in Section 5.3, such national provisions put in place under Article 57(7) of the Directive, should be in line with the scope and reasoning of the respective provisions of the Directive, without calling into question the operator's right to put forward "self-cleaning" arguments or the discretionary powers of the contracting authority to assess them[56]. Member States may also opt to entrust the assessment of "self-cleaning" measures to authorities other than the contracting authority, at either central or decentralised level. However, in doing so, they must ensure that the conditions and objectives of the "self-cleaning" system are satisfied, especially when it comes to carrying out a proper and prompt assessment of the "self-cleaning" measures put forward by the operator[57].

The precise information or proof that the economic operator can submit for the contracting authority's assessment varies, depending on the case at hand. In the light of the proportionality principle, it should be possible to consider that the operator must demonstrate taking the measures set out in the second subparagraph of Article 57(6) that are applicable to the specific case. For instance, the operator must prove that it paid or undertook to pay damages for its illegal behaviour only if there is a claim against it. In addition, there may be cases where taking measures only on staffing may be sufficient to convince the contracting authority of the operator's reliability, without the need to take other technical or organisational measures.

The Directive requires contracting authorities to evaluate the arguments put forward by the economic operator concerned before they decide whether or not to exclude the economic operator from the procedure, even when they consider that they have evidence that the operator has colluded. As confirmed by the Court[58], the Directive does not specify whether explanations or "self-cleaning" measures are submitted by the tenderer at its own initiative or after a request by the contracting authority. In the absence of an explicit provision and in the light of Article 57(7), as mentioned above, it is for Member States to determine whether contracting authorities should ask operators to provide these explanations before taking a decision or this possibility should be left to the initiative of the operator. If national law opts for requiring a tenderer to submit spontaneously "self-cleaning" measures at the latest together with its tender, the contracting authority must inform tenderers of this requirement in a clear and precise manner when launching the procedure[59]. In any case, in the light of Court case-law[60], it would be advisable for contracting authorities to set out in clear terms in the tender documents the information that economic operators must include in their tender, including information on their links or agreements entered with other tenderers, and any

[56] See the Vert Marine judgment, paragraph 24.
[57] See the Vert Marine judgment, paragraphs 28, 33, 35 and 36.
[58] See the RTS judgment, paragraph 33.
[59] See the RTS judgment, paragraphs 36 and 42.
[60] See the Ecoservice projektai judgment, paragraphs 23 and 25.

"self-cleaning" measures taken following a previous infringement of competition rules. A requirement to declare any such agreements, as well as provide information on possible "self-cleaning" measures, is already included in the European Single Procurement Document (ESPD) or similar national forms, which the operator is generally required to submit together with its tender.

Article 57(6) of the Directive not only gives an economic operator the right to provide proof that would allow it to remain in the award procedure, but also enables the contracting authority not to exclude an operator who has sufficiently addressed the concerns about its previous behaviour in procurement procedures. The only limitation to the right of the operator to put forward "self-cleaning" measures is that this does not apply as long as the operator remains subject to an exclusion from award procedures for a period of time set by final judgment in the Member State where this judgment is effective (see Section 5.9)[61]. As a result, this provision does not preclude a contracting authority from maintaining in the procedure an economic operator who came forward during the procedure and admitted illegal agreements with other tenderers, actively cooperated with the contracting authority to clarify the situation and took all necessary measures to prevent further misconduct.

During an award procedure, the contracting authority assesses any "self-cleaning" measures brought forward by an operator found to have colluded with other operators in the past, taking into account any evidence provided by that operator[62]. As mentioned in Section 5.3, the contracting authority must assess the evidence provided by the operator in a proportionate way, i.e. taking into account the seriousness and the particular circumstances of the case[63], as well as the specific action taken by the operator to restore its reliability[64].

This also applies to operators involved in previous cases of collusion who participated in a leniency or immunity programme and/or settled the case (see Section 5.4.). Given the importance of leniency programmes in countering cartels and the need to provide leniency applicants with legal certainty and transparency as to the conditions of leniency, Member States should encourage contracting authorities to ensure the proportionate treatment of such operators when assessing the effective "self-cleaning" measures they took to guarantee their reliability and integrity. The Court already confirmed that "*in principle, the transmission to the contracting authority of the decision establishing the infringement of the competition rules by the tenderer, but applying a leniency rule to the tenderer on the ground that it collaborated with the competition authority, should be sufficient to prove to the contracting authority that that economic operator clarified, in a comprehensive manner, the facts and circumstances by collaborating with that authority…*" in accordance with Article 57(6) of the Directive[65].

[61] As the Court recently clarified, as long as the exclusion for a period of time has not been confirmed by final judgment, the economic operator has the right to present "self-cleaning" measures to demonstrate its reliability (see the Vert Marine judgment, paragraph 18).
[62] See the Vossloh Laeis judgment, paragraph 23.
[63] See, among other judgments, the Tim Judgment, paragraph 50.
[64] Such as the specific action taken to replace persons involved in the collusive behaviours or, if this has not been completed by the time of the award procedure, measures taken to ensure these persons cannot engage the operator in a further illegal anti-competitive behaviour. See the Delta Antrepriza judgment, paragraph 37.
[65] Vossloh Laeis judgment, paragraph 31.

If the contracting authority concludes that the measures submitted by the economic operator do not suffice to prove the operator's integrity, the authority must provide the reasons for this decision.

Close cooperation between the contracting authority and other authorities, such as the competition authority, authorities responsible for national business registers, etc. make it easier to assess "self-cleaning" measures. These authorities may provide, on a case-by-case basis, valuable advice on the impact of these measures and the information (with due respect to EU[66] and national data protection law) needed for the contracting authority to assess, for instance, whether the operator has sufficiently and actively cooperated with the competition authority in a previous case, whether the individuals involved in the past collusion have been replaced or whether the fines or damages imposed were properly paid. In the interest of concluding the award procedures within a reasonable timeframe, authorities should endeavour to carry out such cooperation promptly, making best use of available resources.

5.8. The importance of contracting authorities informing and/or seeking assistance from the competition authority or other central authorities involved

The Directives do not require the contracting authority to seek advice from the national central procurement or competition authority before deciding whether to exclude an economic operator from an award procedure. However, it is generally advisable for contracting authorities to make use of any available assistance as soon as they identify a suspicious tender. Expert advice from those authorities would facilitate the overall assessment of the case, assist the contracting authority in properly justifying the choices made and thus substantially reduce the risk of a successful legal challenge of the final decision. For smaller contracting authorities with limited resources in particular, assistance from the central procurement or competition authorities can prove essential in addressing a case of collusion, especially when this assistance takes the form of advice on indications identified by the contracting authority or assistance in assessing the "self-cleaning" measures submitted by a tenderer. With respect to the latter, recital 102 of the Directive explicitly acknowledges the possibility for Member States to entrust another authority with the assessment of "self-cleaning" measures submitted by a tenderer suspected of collusion in order to prove its reliability. As mentioned in Sections 5.3 and 5.4, involving the national central procurement or competition authorities in assessing a potential case of collusion should not prejudice the competence of the contracting authority to ultimately decide whether to exclude a tenderer from an award procedure.

Smooth and efficient cooperation between a contracting authority carrying out an award procedure and the national central procurement or competition authorities in addressing a suspected case of collusion requires both sides acknowledging the importance of tackling the problem, making use of all available resources and exchanging information in a timely manner. Even before launching the award procedure, contracting authorities should have contact points available in the central national procurement authority and/or the competition authority to contact as soon as suspicions arise during the procedure. The central procurement or competition authorities should endeavour to respond, as soon as possible, to calls for assistance and advice by a contracting authority. The two sides should be ready to share, as appropriate, any information that may be critical for detecting and

[66] See footnote 18.

assessing cases of collusion[67]. Even if contracting authorities do not consult their central procurement or competition authorities, it is highly recommended that they notify those authorities of any cases of suspected collusion addressed and of any final decisions taken to exclude economic operators from award procedures.

Last but not least, any contact between the contracting authority and other authorities, within the period between identifying a suspected case of collusion and (if possible under national law) asking the economic operator for clarifications, should be made under strict confidentiality and not be disclosed to the suspected tenderer or to other participants in the award procedure. Failing to do so is likely to result in colluding tenderers illegally disposing of any proof of their agreement as soon as they become aware of the action taken against them, thus depriving the enforcement authorities of valuable evidence in a future investigation.

5.9. Setting the terms for excluding an economic operator under Article 57(7) of the Directive

As already mentioned[68], Article 57(7) of the Directive enables Member States to specify the implementing conditions for this Article. These conditions may include setting the maximum period during which an economic operator will not be allowed to participate in any public procurement procedure, criteria or examples of what could be considered as a circumstance justifying such exclusion and the national body that will be competent to impose it (as confirmed in recital 102 of the Directive). Article 57(7) provides that, where the period of exclusion from award procedures has not been set by final judgment, that period cannot exceed three years from the date of the relevant event in the cases of Article 57(4). In its recent case-law[69], the Court clarified that "the date of the relevant event" for determining the starting point for calculating the period of exclusion is the date on which the illegal conduct of the economic operator was the subject of a decision by a competent authority, without taking into account the date on which the facts giving rise to that conviction occurred.

The Directive does not preclude Member States from specifying that an exclusion for a period of time, under the terms of Article 57(7), may be imposed by a contracting authority as regards its own future award procedures, or by another body (such as the national competition authority, the central procurement authority or a special body set up for this purpose) with a more general scope of application.

Under Article 57(7), the maximum exclusion period of three years applies only if the exclusion period has not been set before by final judgment. This does not preclude national law from allowing judicial authorities to consider applying an even longer exclusion period when a final judgment is delivered on a case of collusion, depending on its gravity.

If an economic operator, who has been excluded from award procedures for a certain period under Article 57(7) of the Directive, submits a tender during the period of exclusion, the contracting authority, without any further need for assessment, must automatically reject that tender. Once the period of exclusion of an economic operator has elapsed, a contracting authority may still decide to

[67] Subject to the conditions set out in EU and national law (in particular, Article 31 of Directive 2019/1).
[68] See Sections 5.1 and 5.3.
[69] Vossloh Laeis judgment, paragraphs 37, 38 and 41.

exclude that operator from an award procedure, but only if the conditions for applying Article 57(4)(d) are fulfilled.

Lastly, exclusion decisions on grounds of collusion refer only to the economic operator found to have colluded and not to other economic operators in some way affiliated to that operator (such as mother companies, other companies belonging to the same group or subsidiaries of the excluded companies) and which were not involved in the given award procedures. This is, of course, without prejudice to a contracting authority's right to exclude from an award procedure any economic operator who is in one of the situations justifying exclusion under the terms of the Directives.

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ANNEX TO THE NOTICE

Means and tips for effectively countering collusion in public procurement

1. Introduction

Any effort to ensure real competition and best value for money in public purchases presupposes that the procurement community, especially procurement officers, are fully conscious of a very simple fact: however well an award procedure for a public contract is organised and carried out, it will fail to deliver the best possible result for the public buyer if tenderers participating in it have colluded to determine in advance who, among them, will win the contract. Collusion among tenderers means that the citizen will not receive the best possible product or service at the best possible price, to the detriment of public interest.

The procurement officer, i.e. the person in the forefront of an award procedure, plays a central role in minimising the risk of collusion in public procurement and addressing collusion when it occurs. It is the person best positioned to limit the risk when preparing the procedure, to detect collusion when assessing the tenders and to use the tools provided for under EU and national law to actively address it and ensure that the award procedure is competitive and fair. Often working under difficult conditions and to tight deadlines, the procurement officer is called upon to take this additional step and make this additional effort to ensure that public money is well spent.

To support the procurement officers in this task, the Commission has compiled a concise set of advice on how to:

- Design award procedures in a way that would deter collusion between tenderers (Section 2 of the Annex).
- Detect potential collusion when evaluating tenders (Section 3 of the Annex) and
- React to such suspected collusion (Section 4 of the Annex).

For more comprehensive advice, see the more detailed guidance published by the OECD[70] and OLAF[71], as well as by the national competition authorities of EU Member States.

2. Advice on how to design award procedures in a way that would deter collusion between tenderers

- When framing your overall procurement strategy and designing award procedures, **strive for maximum participation of tenderers,** both from your country and from abroad.

[70] https://www.oecd.org/daf/competition/guidelinesforfightingbidriggininpublicprocurement.htm
[71] https://ec.europa.eu/sfc/sites/sfc2014/files/sfc-files/Fraud%20in%20Public%20Procurement_final%2020.12.2017%20ARES%282017%296254403.pdf

Making it easier for economic operators to participate increases competition and minimises the risk of collusion. In addition, participation of economic operators from abroad limits the risk of collusion in concentrated sectors, where a small number of national economic operators are active.

- Once you know the subject of your contract and before planning and launching the award procedure, **thoroughly research the market**, which will provide the service or product to be procured.
  - ✓ *Try to get as much information as possible on what is available on the market, the specifications that can be offered, which operators are active in the sector, the prices charged in similar instances (both for public and private-sector procurement of the same kind), the contractor's expected costs etc.*
  - ✓ *If you don't have a clear idea of the expected real market cost of the service, good or work you intend to tender out, you will not be able to assess how appropriate or reasonable the tenders are or whether there is manipulation in the price offered.*
  - ✓ *Use the internet to scour the market, your national electronic procurement database to find precedents from previous purchases of the same or similar nature and official professional registers of certified contractors.*
  - ✓ *Discuss the matter with colleagues in your service or in other contracting authorities that recently purchased the same product or service and draw on their experience.*
  - ✓ *Remember that there is no rule prohibiting the procurement officer from carrying out thorough market research, as would anyone before making private purchases.*

- When planning your purchases, **avoid, where possible, predictability** or stable repetition in the award procedures that you run frequently.
  Knowledge or certainty that, for the coming years, you will launch award procedures every six months for the same quantity of a certain work, product, service or supply with the same estimated budget and under the same contractual terms, will greatly facilitate collusive behaviours, as colluding economic operators will know that there will be enough contracts for everybody. Although it is useful to inform the market in advance of your medium-to-long term needs, try to organise your purchases with a sufficient degree of diversity as regards timing, quantities and budget. This makes it difficult for colluders to split the market between them in a "fair" way.

- **Plan and launch your award procedures early enough**, so that you have sufficient time to evaluate tenders properly and address suspected cases of collusion without missing the deadlines for concluding the procedure.

- If possible and suitable for your purchase, **consider using central purchasing**, which may provide additional guarantees for the availability of resources and the know-how necessary to detect collusion.
  Central purchasing usually takes the form of framework contracts. Although this technique has considerable advantages for both the contracting authority and for operators (it can be particularly useful meeting public needs and guaranteeing supply swiftly), it may, in some cases, have adverse effects that may be conducive to collusion. A framework contract, in

principle, limits competition in a sector, because for up to four years no operator other than the framework contractors will be able to tender for a specific (or "call-off") contract under the framework contract. The lack of new market players over this period could increase the risk of collusion among framework contractors, especially for framework contracts where competition is reopened at the stage of the specific contracts.

- Design and carry out each award procedure in a way that **encourages maximum participation by economic operators**.
  - ✓ *Set out clear, reasonable, comprehensive and easy-to-understand technical specifications and selection criteria that are proportionate to the work, service or good to be procured and that meet European and national requirements.*
  - ✓ *Avoid terms that are unnecessary, over-complicated, irrelevant or discriminatory (i.e. favouring or disfavouring certain operators), that limit competition and that, in the end, call into question the objectivity of the award procedure and the reliability of the contracting authority as a potential future client.*
  - ✓ *Use quality-based award criteria: using exclusively price as an award criterion facilitates collusive agreements, as the outcome of the evaluation becomes more predictable and can be manipulated easier. Assessing tenders on the basis of quality criteria makes it more difficult for colluders to manipulate their offers, as they would not be able to easily prejudge how the evaluation committee would evaluate them.*
  - ✓ *Wherever possible, seek innovative solutions to your needs. Members of a collusive scheme, usually relying on stable and predictable public purchases, often cannot guarantee the provision of innovative services or supplies, unlike new market players that enter the market to fill this gap. This drastically limits the certainty within a collusive scheme that one of its members will win a contract.*
  - ✓ *Give operators enough time to prepare and submit their tender: irrespective of the minimum time imposed by the EU Directives or national law, feel free to set a longer deadline for submitting tenders, by taking into account the complexity of the deliverable service or good.*
  - ✓ *Avoid charging operators fees for access to information regarding the award procedure.*
  - ✓ *Make full use of electronic procurement, that makes it much easier for tenderers to access information and submit a tender.*
  - ✓ *Publish the information and the contract notice as widely as possible and avoid publishing during holiday periods, which reduces the time available to operators to prepare their tender.*
  - ✓ *Try to conclude the procedure as swiftly as possible, limiting to the extent possible the period between the deadline for receiving tenders and the decision to award the contract. This encourages economic operators to participate and, at the same time, limits the time available to tenderers to strike collusive arrangements (such as negotiating the withdrawal of a tenderer from the procedure in exchange for getting part of the contract as a subcontractor).*

- Use methods to **raise economic operators' awareness of potential consequences and to discourage them from colluding.**

- ✓ *Include in the tender documents provisions and clauses, such as:*
  - A requirement that tenderers submit a declaration that they have prepared their tender independently of other tenderers.
  - Penalties for the future contractor found to have colluded in the context of the award procedure or the explicit possibility for the contracting authority to terminate the contract or seek damages for that reason.
  - Information about potential penalties provided for under national law for cases of collusion (such as exclusion from public tenders for a certain period of time or fines under competition law).
- ✓ *Require tenderers, under the terms prescribed by national law, to disclose as soon as possible during the procedure whether or not they intend to subcontract part of the contract.*
- ✓ *Consider carefully what information to disclose during the award procedure. You do not need to go beyond what is required by European and national law. If possible, avoid disclosing information (such as who submitted a tender, for which price, the details of the procedure, etc.) that could facilitate contacts between operators or allow colluders to easily check whether they have all followed the terms of their illicit agreement when participating in award procedures.*

3. Advice on how to detect potential collusion when evaluating tenders

- **Take the time necessary to examine in detail the tenders submitted during the procedure**. *Often collusion is discovered from small details, which usually go unnoticed but can provide plausible indications that certain tenders were prepared by the same person or coordinated between the tenderers. Watch out for:*
  - ✓ *Identical mistakes or spelling errors in different tenders.*
  - ✓ *Different tenders drafted with similar handwriting or typeface.*
  - ✓ *Tenders using another tenderer's letterhead or contact details.*
  - ✓ *Different tenders with identical miscalculations or identical methodologies to estimate the cost of certain items.*
  - ✓ *Tenders submitted by the same person or with persons having the same contact details.*

- **Pay more attention to tenders that are well below the minimum standards required by the tender documents,** largely incomplete or coming from an operator that is obviously not fit to perform the contract.
  Such tenders are an indication that there may be a collusive arrangement, which includes the submission of so-called "cover bids" (i.e. tenders with no chance or not intended to win the contract) to manipulate the assessment and reach the desired outcome.

- **Carefully study the prices offered by the tenderers**, especially prices that do not make sense because they are either excessively low or excessively high compared to the estimated cost of the contract, without any obvious explanation. Look for:

- ✓ *Indications that suggest that companies may be coordinating their prices, such as the same price increases that cannot be explained by market cost increases or discounts withheld, especially in a market where discounts were historically given.*
- ✓ *A large difference between the price of a winning tender and other tenders.*
- ✓ *A certain supplier's tender being much higher for a particular contract than that supplier's tender for another similar contract.*
- ✓ *Significant reductions from past prices after a new or infrequent economic operator submitted a tender, which means that the new operator may have disrupted an existing cartel.*
- ✓ *Local suppliers offering higher prices for local delivery than for delivery to destinations further away.*
- ✓ *Local and non-local companies offering similar delivery costs.*
- ✓ *Most tenderers offering the same price.*
- ✓ *Some tenderers offering considerably different prices for similar procedures.*

- **If possible, check** (using electronic procurement databases, such as national contract registers, or any other available IT tool) **whether the tenders you received match a bidding pattern** based on previous similar award procedures. Such patterns may be considered as an indication of a collusive agreement. In order to identify such patterns, check:
  - ✓ *The frequency with which economic operators win or lose contracts.*
  - ✓ *Operators who consistently offer high prices in some procedures and low prices in others for the same type of supply, work or service.*
  - ✓ *Whether the same operator always offers the lowest price.*
  - ✓ *Operators who submit tenders that win in only certain geographic areas.*
  - ✓ *Operators who regularly submit tenders but do not bid in your procedure, although they were expected to participate.*
  - ✓ *Operators who unexpectedly withdraw their tenders during the procedure.*
  - ✓ *Operators who always submit tenders but never win.*
  - ✓ *Operators who take turns in winning the contracts.*

- Make use of the possibilities under EU and your national law to **obtain information at any stage of the procedure about the intention of a tenderer to subcontract part of the contract and, if so, to which company.**
  The selected tenderer subcontracting work to unsuccessful tenderers for the same contract or the selected tenderer not accepting to sign the contract and later found to be a subcontractor of the tenderer that is finally awarded the contract may be considered sufficiently plausible indications of collusion.

- **Pay attention to tenders submitted by a consortium of economic operators** who could have tendered in their own right or would have been expected to do so.
  A joint tender can be a legitimate business choice, depending on the specific market conditions of the procurement procedure, or a matter of necessity when operators can only meet the selection criteria or stand a better chance of winning the contract by bidding as a

consortium. When none of the above appears to be the case, you should carefully assess whether a joint tender may be considered as an indication of collusion.

- **Pay attention also to tenders submitted in the award procedure by economic operators who are somehow affiliated** (for instance tenders submitted by the mother company and its subsidiary or by two companies belonging to the same group).
  Although it is not necessarily self-evident that such affiliated companies had access to the preparation of one another's tender or that they colluded, tenders by affiliated companies could cover a collusive agreement and you may need to be ensured that all tenders have been prepared in a fully independent way.

- **Pay particular attention to tenders submitted by economic operators who have been excluded in the past by your contracting authority or another contracting authority due to collusion or have been found guilty in the past of collusive practices by a national competition authority.**
  Although such a finding does not automatically lead to exclusion of the tenderer from a pending award procedure, you could consider it, under certain circumstances, as a sufficiently plausible indication of collusion. Nothing prohibits you from also taking into consideration collusion cases identified abroad involving the same economic operator. It goes without saying that if the economic operator has been excluded from all award procedures in your country for a period of time and submits a tender during this period, you must exclude it from your award procedure without assessing the tender submitted.

4. Advice on how to react to cases of suspected collusion

- If you have concluded that there are sufficiently plausible indications that a number of economic operators have colluded to limit competition or to predetermine the winner of an award procedure, **EU law gives you the right to consider excluding the tenderers involved from the award procedure.**

  - ✓ *Before taking such decision, thoroughly assess the indications you have and document your findings (including all related contacts).*
  - ✓ *Take into account aspects, such as the nature and seriousness of the facts that led you to suspect a collusive arrangement, the possible explanations provided by the tenderer (see below) and the state of the market in the sector.*
  - ✓ *Consider excluding only tenderers that pose a real threat to competition, for instance only the tenderers that initiated or led the collusive scheme.*
  - ✓ *Keep in mind that any "red flag" indicating collusion may have a reasonable explanation that you need to take into account before excluding a tenderer from the procedure.*

- Make use of the possibilities provided for under EU and national law, to **allow tenderers to provide clarifications of their tender**, especially on the aspects that gave rise to suspicion of collusion.

Tenderers suspected of having colluded in the context of an award procedure have the right, under EU law, to bring to your attention arguments in favour of maintaining them in the procedure. This includes evidence that they have taken measures to restore their reliability (if they were excluded from a previous procedure or found guilty of collusion by a national competition authority) or that their participation in the procedure does not put at risk the necessary genuine competition. If you consider that the arguments put forward by the tenderer or "self-cleaning" measures taken under the EU Directives or national law are sufficient for demonstrating its reliability, you must maintain the tenderer in the procedure. This would increase competition, especially in cases of concentrated markets where few economic operators are active.

- ✓ *When receiving and assessing such arguments, do not directly accuse tenderers of collusion or even hint that you may, as this may prompt colluding tenderers to illegally destroy evidence that may be useful in the process.*
- ✓ *Respect the principle of equal treatment of tenderers (i.e. give all tenderers concerned the same possibility to address any concern you may have about their tender) but never discuss these concerns with the tenderers collectively.*
- ✓ *When assessing the explanations you may receive, pay attention to any statement that could confirm your suspicions, such as tenderers justifying their prices by referring to "industry suggested prices", "standard market prices" or "industry price schedules", indicating that they do not sell in a particular area or to particular customers without any reasonable explanation, or using common arguments or even the same terminology as other tenderers when explaining the price they offered.*
- ✓ *Examine the arguments put forward by tenderers in a proportionate way and with an open mind.*

- **Contact your national competition and/or central procurement authority** (or any other competent authority, depending on the arrangements in place at national level), especially if you are in doubt, to seek their advice and expert assistance in addressing the issue.

  - ✓ *If available and/or provided for, you may also consider seeking advice from your legal or audit department.*
  - ✓ *Keep these contacts confidential and do not inform either the tenderer under suspicion or other tenderers about them to avoid potentially colluding tenderers having the time to illegally destroy evidence before the competition authority decides to intervene.*

- If you decide to exclude a tenderer on this ground, **inform your national competition and/or central procurement authority**, providing as much detail as possible. This will enable them to possibly follow up on the case and to, more generally, keep track of the use of this exclusion ground by contracting authorities at national level.