

point of view  
**Collusion** [kə  
secret agreement  
illegal or deceitful

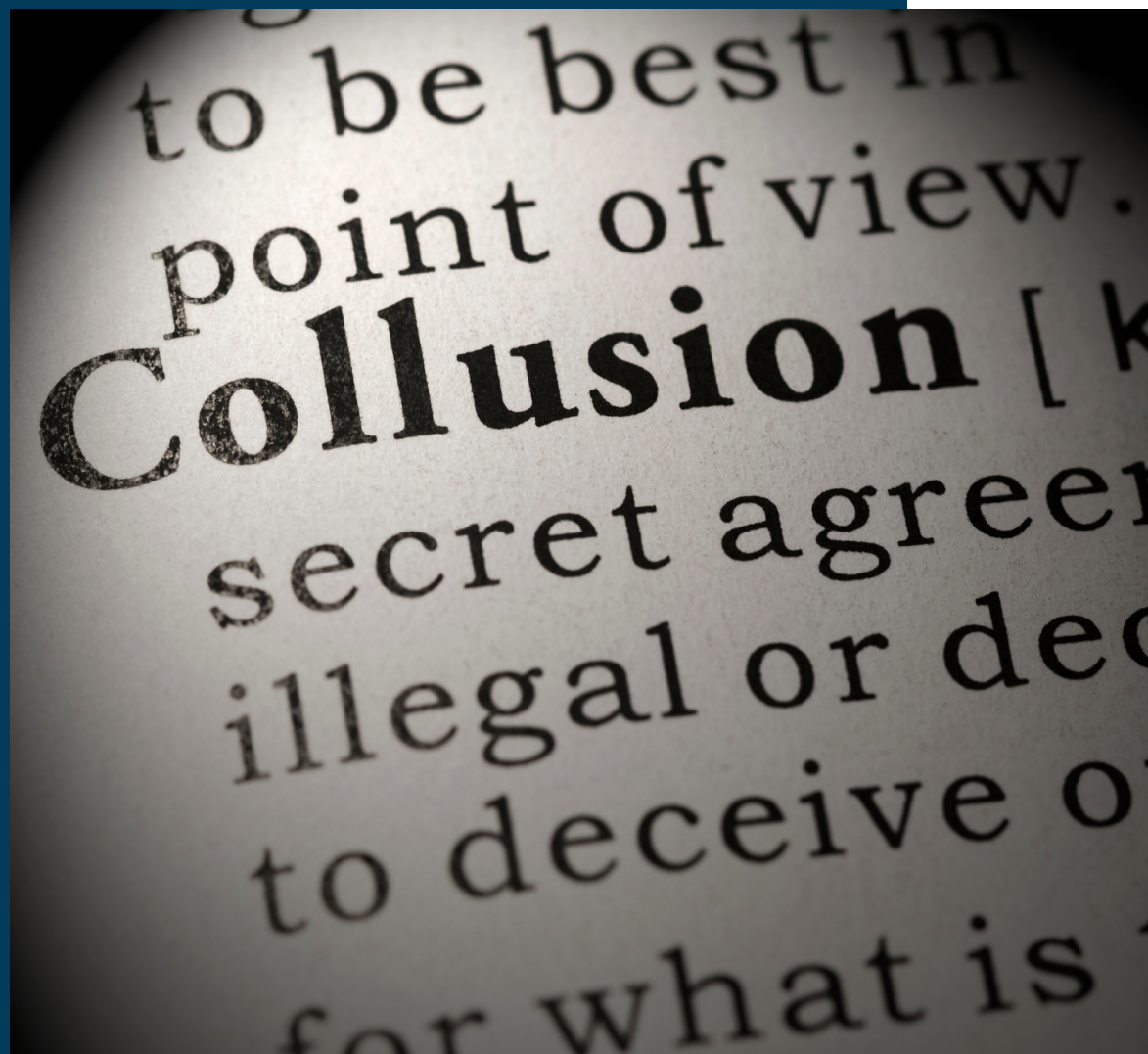
**IF BIDDERS COLLUDE,  
HOW CAN NATIONS COOPERATE?**

June 2, 2021, 9:00 Eastern US, 14:00 UK, 15:00 CET

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**FREE WEBINAR**

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# INTRODUCTION

Jessica Tillipman  
Assistant Dean for Government Procurement Law  
The George Washington University Law School

# Agenda



Asst Dean Jessica  
Tillipman, GW Law



Michael Bowsher QC,  
King's College London &  
Monckton Chambers



Daniel Glad, U.S.  
Department of Justice



Prof William Kovacic,  
GW Law



Wojciech Hartung, DZP  
(Warsaw)



Prof Albert Sanchez-  
Graells, U. Bristol



Juliette Enser, UK  
Competition & Markets  
Authority



Prof Alison Jones, King's  
College, London



	United States	European Union	United Kingdom
<b>“Per Se” Agreements in Restraint of Trade – e.g., bid price collusion</b>	Sherman Act	Treaty on the Functioning of the European Union, Art. 101	Competition Act 1998
<b>Potentially Anti-Competitive Agreements – e.g., illegal agreements among competitors</b>	Sherman Act	Treaty on the Functioning of the European Union, Art. 101	Competition Act 1998
<b>Contracting Agencies <i>May</i> Exclude Vendors for Anti-Competitive Agreements</b>	Federal Acquisition Regulation (FAR) 9.4	European Procurement Directive 2014/24/EU, Article 57	Public Contracts Regulations 2015, Regulation 57
<b>Remedial Measures (Compliance)</b>	<ul style="list-style-type: none"> <li>• DOJ/AT compliance guidelines</li> <li>• Contractor compliance (FAR 52.203-13)</li> <li>• US Sentencing Comm. Guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• “Self-cleaning” (EU Directive, Art. 57)</li> <li>• EU Guidance, Sec. 5.7 (Mar. 2021)</li> <li>• Member State compliance req’ts (e.g. “Sapin II” -- France)</li> </ul>	<ul style="list-style-type: none"> <li>• Cabinet Office Guidance – PPN 04/21</li> <li>• General corporate compliance per UK Bribery Act (Min. of Justice Guidance)</li> </ul>
<b>Pending Proposals re: Competition in Procurement Markets</b>		<ul style="list-style-type: none"> <li>• Sanction foreign subsidies</li> <li>• Price preferences against intransigent trading partners (IPI)</li> </ul>	:10



United States



## Harms from Collusion

- Consumers
- Competition
- Innovation
- Taxpayers

## Combating Collusion

- Rational Actors
- Deterrence
  - Increase Risk of Detection
  - Decrease Incentives



# The Sherman Act: 15 U.S.C. § 1 (1890)

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“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

## Other Statutory Tools

- Frauds: mail, wire, tax, bank
- Bribery and kickbacks
- Money Laundering

## Consequences

- Price Fixing Agreements
- Bid Rigging Agreements
- Allocation Agreements

- Criminal Fines & Penalties
- Civil Damages
- Debarment





# Procurement Collusion Strike Force

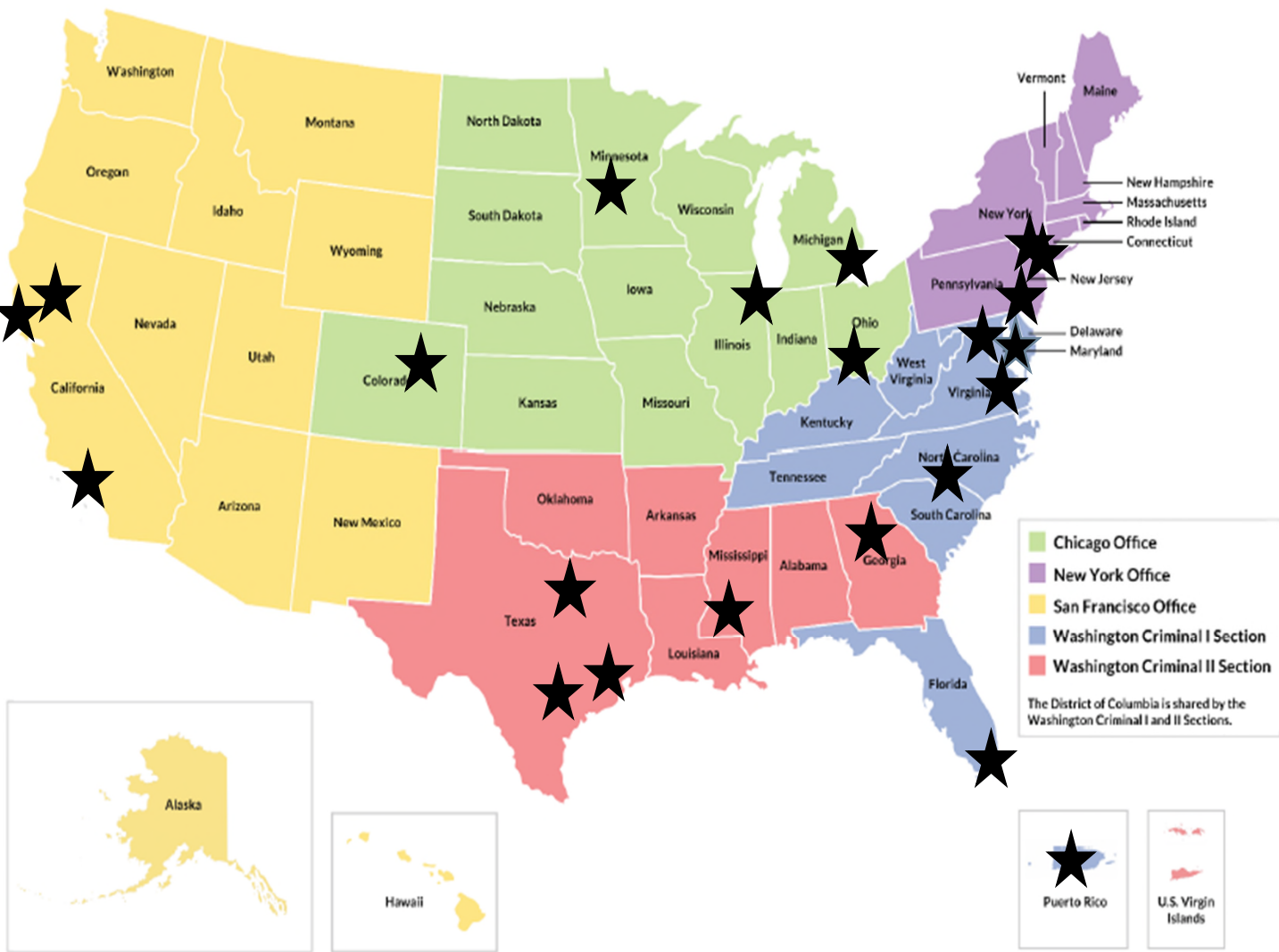
- Coordinated & National Approach
- Inter-Agency Partnership → Leverage Combined Expertise & Capacity
- Objective: Train, Educate, & Prevent
  - Buy Side
  - Sell Side
- Objective: Detect, Investigate, & Prosecute







# PCSF: The Partnership



**Department of Justice** :20  
 Antitrust Division  
 22 United States Attorneys' Offices (USAOs)



**Department of Defense OIG**  
 Defense Criminal Investigative Service (DCIS)



**U.S. Postal Service OIG**



**General Services Administration (GSA) OIG**



**Department of Justice OIG**



**Federal Bureau of Investigation (FBI)**



**Department of Homeland Security (DHS) OIG**



**Air Force Office of Special Investigations**



# PCSF: Implementation & Projects

- National & Localized Training
- Pandemic Response
  - Meeting the Moment, Going Where the Need Is Greatest
  - Emergency Spending & Guardrails
- Data Analytics Project
  - Data Is an Asset
  - Facilitating Collaboration
  - Focus on Proactive Red Flag Detection
- PCSF: Global



# Developments in the United States: Comments on Daniel Glad's Presentation

William E. Kovacic

George Washington University

*GW/KCL Webinar*

June 2, 2021



# The Promising Department of Justice Policy Program

- Deeper Public Agency Cooperation
  - Education, detection, prosecution
- Greater International Cooperation
  - Example: MMAC Framework
- Growing Commitment to Analytics
- US Policy Challenge: Ensuring that New Leadership Embraces the Program



# Possible Future Focal Points Within the Emerging Policy Framework

- Embrace COVID-Era Lessons
  - Urgency for/feasibility of, agency cooperation
  - Data analytics as vital policymaking capability
- Underscore Importance of Procurement as a Competition Policy [and Anti-Corruption] Concern
- Historical Awareness of Policy Evolution: Arms Race
- Cartel Reconstructions (and Ex Post Analysis)
  - Who decided to collude?
  - What techniques did the participants use?
  - What circumstances facilitated success?
  - What measures will enhance compliance?



A nighttime photograph of a city street. In the foreground, a large, ornate street lamp with three glowing lanterns is the central focus. The background shows a city skyline with a prominent large dome building, likely St. Peter's Basilica, and other illuminated structures under a dark sky. The overall mood is serene and urban.

# European Union



# Combating collusion in public procurement

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Legal uncertainty – public procurement vs. competition law concepts

- Mandatory vs. discretionary exclusion grounds
  - ✓ Does **discretionary** really mean that a given exclusion ground may not be examined/applied?
- **Article 101 of the Treaty** (which bars certain agreements in restraint of trade in the European Union) vs. **Article 57(4)(d) of EU Directive 2014/24** (which may bar economic operators if contracting authority “has sufficiently plausible indications to conclude” that the economic operator has entered into agreements “with other economic operators aimed at distorting competition”) – relatively clear and well established legal basis vs. new and not at all self-explanatory text
  - ✓ Why was there a need to differ from the text of Article 101 of the Treaty?
- The definition of an *economic operator* in public procurement vs. the concept of an *undertaking* in competition law
  - ✓ What are (*if any*) the implications of single economic unit (*SEU*) concept in competition law for public procurement issues, and the exclusion ground under Art. 57(4)(d) of Directive 2014/24/EU in particular?



# Combating collusion in public procurement

## Practical challenges

- *Sufficiently plausible indication vs. proof* of collusion
  - ✓ Would a contracting authority be able to assess a collusion-like behaviour? Do we really want it to do so?
- *Exclusion period* in public procurement vs. *time bar* in competition law
  - ✓ What is a starting point for exclusion period to run? Act of collusion? Submission of a colluded bid? Decision (final?) of an exclusion? Decision (final?) of a competent competition authority on collusion?
- *Self-cleaning* in public procurement vs. *leniency* in competition law
  - ✓ What is the interplay between the two? Would a *payment of fines* imposed by the competition authority be sufficient to say that an economic operator *paid compensation* as required by Article 57(6) 2014/24/Dir?



# Excluding colluders: EU rules

Significant practical difficulties despite clear (or easily clarifiable...) legal bases for exclusion

- Art 57(4)(c) Dir 2014/24: ‘standard’ ground
- Art 57(4)(d): ‘smoking gun’ ground

CJEU shaping exclusion as an ‘authority by authority’ discretionary decision not helpful

Commission’s [2021 guidance](#) is [not useful](#) because it primarily focuses on the red herring, and it ignores domestic (and EU due process) requirements

Is this \*really\* a job public buyers can do (well)?



# EU rules in a global context

**Significant practical difficulties in applying exclusion rules in cross-border situations and, in particular, to non-EU bidders**

**EU's broader attempt to 'curated' competition within the internal market is patchy and problematic – eg incompatible incentives for contracting authorities**

- [Proposed foreign subsidies regulation](#) (see previous [GW/KCL webinar on white paper](#))
- [International Procurement Instrument](#)

**Unilateral action and push for extraterritoriality of EU rules unlikely to have positive long-term effects**





# United Kingdom

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# CMA approach to bid rigging in public procurement

- Bid rigging is a key risk in public procurement
- Public procurement spend = £290bn p/a in UK (approx. 1/3 of all UK public spending)
- Infrastructure spend set to increase as we emerge from the COVID-19 pandemic
- CMA, public procurers and other public bodies all play an important role in reducing the risk of bid rigging
- CMA's role is to enforce the UK competition (antitrust) rules as they apply to bid rigging



:00

Juliette Enser, Senior Director of Cartels



# CMA work to reduce risk of bid rigging in public procurement

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## CMA enforcement action and deterrence

- High fines (up to 10% of global turnover)
- Individual sanctions including director disqualification
- Increased risk of detection
- Cooperation with other agencies

## CMA supporting public procurers

- New [e-learning training module](#)
- [CMA bid rigging advice for public sector procurers](#)
- CMA training for public procurement teams
- Part of wider education programme to encourage compliance [‘Cheating or Competing’](#) campaign



# Further information

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Find out more: [gov.uk/cheating-or-competing](https://www.gov.uk/cheating-or-competing)



# A problem in the UK?



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UK has comprehensive public procurement, bribery and competition laws (see civil and criminal cartel offences in Competition Act 1998 and Enterprise Act 2003). Latter help to protect public procurement system from internal and external threats. Robust system appears to exist. BUT

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Concern, weaknesses in public procurement (collusion – and corruption – risks), enforcement of cartel and bribery laws (relatively few investigations – insufficient sanctions), and policy coordination, may be reducing effectiveness of system and allowing collusive (and corrupt) practices to operate unexposed.

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Underlines importance not only of good laws but effective enforcement of them. Additional measures required to protect the integrity of processes through – improvements to individual regimes and uniting them around a cohesive strategy – joined-up approach to protect the system and facilitate investigation/ enforcement.

# Combatting Supplier Collusion in Public Procurement - Proposals

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Safeguard against Collusion Risks	Increase Risk of Detection	Increase Sanctions Beyond Corporate Fines
<ul style="list-style-type: none"> <li>• Mandatory competition law training for procurers – anti-collusion tender clauses and improved tender design and vigilance</li> <li>• Ensure measures designed to ensure internal integrity (eg transparency provisions) do not facilitate collusion (external threat)</li> </ul>	<ul style="list-style-type: none"> <li>• Prioritise enforcement</li> <li>• Bolster leniency programmes (increase responsibility of directors)</li> <li>• Bolster tools for detecting breaches (e.g. procurement data analysis tool, reporting incentives for procurers and improved whistleblowing tools)</li> <li>• Cooperation with procurers/ anti-corruption agencies</li> </ul>	<ul style="list-style-type: none"> <li>• Debarment (make mandatory? and improve)</li> <li>• Routine damages actions (and voluntary redress)</li> <li>• Director Disqualification (and individual fines?)</li> <li>• Use – and expansion – of criminal cartel offence (corporates and aiding)?</li> </ul>



# Questions & Discussion





GW LAW'S GOVERNMENT  
PROCUREMENT LAW PROGRAM &  
KING'S COLLEGE LONDON PRESENT:

# **Bid Challenges: International Perspectives**

JUNE 15, 2021  
9 AM ET, 14:00 UK, 15:00 CET

Info: [www.publicprocurementinternational.com](http://www.publicprocurementinternational.com)

# Conclusion

Recording at GW Law Government Procurement Law  
Program's [YouTube page](#)

Recording and materials posted at  
[www.publicprocurementinternational.com](http://www.publicprocurementinternational.com)