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**ROUND TABLE  
REDUCING BID-RIGGING IN BRAZIL AND CHILE  
UPDATES ON OECD PROJECTS IN LATIN AMERICA**

**11 SEPTEMBER**

**Manuel Sebastião  
President  
Portuguese Competition Authority**

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Ladies and Gentlemen,

I am very pleased to be here today to comment on the OECD project to reduce bid-rigging in Latin America - the so-called LA Project involving Brazil and Chile.

The Portuguese Competition Authority has participated in this project since the very beginning through its Brazilian connection. It was natural for us to do so, given the background of cooperation between the two countries in this field. The close relationship can, in fact, be traced back to the early days of the Portuguese Competition Authority, which was set up in 2003.

The major players and beneficiaries, Brazil and Chile, have already testified first hand about the success and practical benefits of the OECD LA Project. It has helped them to strengthen their institutional set-up, their powers of investigation and their sanctions framework. I will therefore not elaborate on these points, but will focus instead on the topic of public procurement and its vulnerability to bid-rigging.

It is commonly accepted that the main purpose of a procurement policy is the promotion of efficiency – the selection of the supplier who provides the best “value for money”. Cartel

overcharges, however, can account for ten per cent or more of the total value of procurement.

William Kovacic, President of the US Federal Trade Commission, emphasized this in a recent article on Competition Policy, Consumer Protection and Economic Disadvantage. It is his opinion *“that one of the most important contributions of competition policy to poverty reduction is the deterrence of suppliers’ collusion in public procurement. Even small improvements in the performance of public procurement programs can yield large social benefits, especial for the least affluent citizen. (...) Much of this expenditure is designed in large measure to assist the economically disadvantaged population.”*

This is a very good summary of why it is so important to fight bid-rigging and promote strong competition enforcement in public procurement, above all in developing countries.

As several speakers stated clearly yesterday, competition is a tool for development and should not be overlooked.

It is difficult to combat bid-rigging, however, because many factors - not all of them within the jurisdiction of the competition authorities - may come together and shoehorn collusive bids. The likelihood of collusion depends to a large extent on the legal rules concerning public procurement and on the way tenders are designed. This is what I call the original sin of public procurement.

No competition authority can have more than a limited role in the field of procurement legislation and tender design but what it does and says can be very effective if well understood and implemented. Competition Authorities can contribute to ensuring competition in the procurement process through recommendations to legislative bodies when they are drafting procurement bills and through cooperation with the sectoral regulators and procurement agencies in the design of procurement tenders.

As an example of this, I would like to mention an interesting innovation suggested by the Portuguese Competition Authority and introduced recently in the Competition Law as part of

the new Public Procurement Code.

The innovation consisted in a new specific additional sanction for participants in bid-rigging. Together with the application of a fine up to 10% of its turnover, participants in bid-rigging can be banned from participating in public tenders for a period of up to two years. This amendment came into force on 29 July this year. It is still too soon to see how it will work in terms of deterrence, but agents in the market know that it is there.

The introduction of this type of additional sanction sends out a clear message: that enforcement of competition rules is being carried out on a pro-active basis.

This brings me to my next point on enforcing competition rules in public procurement.

Strict enforcement of competition rules is an important deterrent in the fight against bid-rigging (or any breach of competition law). In fact, it constitutes the core business of the Competition Authority.

And here I want to focus on the “3-D Trinity” of enforcement – Detection, Dismantling, and Deterrence - to use the terminology of the former European Competition Commissionaire Mario Monti.

### **Detection**

The main methods for detecting cartels are (a) complaints, (b) whistleblowers, (c) informants, (d) leniency applications and, (e) as relations between competition agencies are increasingly developed, international cooperation.

These are the traditional methods used in the detection of bid-rigging. Now we can add one more: cooperation with procurement authorities.

We know that procurement authorities are well placed to detect signs of bid-rigging and to collect relevant evidence of unlawful behaviour. Procurement agencies know the market, its

participants and the history of past tenders.

Moreover, we all deal, in one way or another, with staff and budgetary constraints. Cooperation with procurement agencies not only gives access to expert knowledge that can be crucial for investigation and detection, but also offers competition authorities a greater degree of flexibility in terms of staff resources. So, the obvious suggestion is to make them work for you and with you!

For this to happen and if we want cooperation with public procurement agencies to be effective and fruitful, the three following steps should be followed:

The first is to motivate their cooperation.

Show them that fighting bid-rigging is their fight as well and that it will contribute to the fulfilment of their duty to select the best supplier. Show them that cooperation between competition authorities and procurement agencies is a win-win situation, where both institutions gain. Finally, show them that helping to detect bid-rigging in the tenders for which they are responsible increases citizens' confidence in the competence of government.

There is, however, a difficulty we might encounter here, and that is the possibility that any signs of bid-rigging may be overlooked. In fact, although procurement staff are the best placed to detect and identify unlawful bids, they may lack the expertise to detect the tell-tale signs of bid-rigging.

The second step for effective and fruitful cooperation with procurement agencies is therefore to train their staff. This will require an awareness-raising campaign by competition authorities to increase focus on the possibility of bid-rigging in procurement tenders.

The third step for effective and fruitful cooperation with procurement agencies is to establish the terms for such cooperation. The simplest way to do this is to develop an understanding of the links with competition law enforcement and do everything possible to foster a good working relationship.

There are, however, more formalistic legal cultures (and the Portuguese is one such) where it could be of interest to have the terms of this cooperation set down in a document such as a memorandum of understanding. This would mean that both parties have the necessary guarantees to minimise the possibility of misunderstandings that could hamper institutional relations.

### **Dismantling**

Cooperation with procurement agencies, however, will not be fruitful if the competition authority itself does not have effective investigative powers vested in it. We all know that strict enforcement of competition rules needs strong investigative powers. The possibility of conducting dawn raids, the use of IT forensic tools, and the existence of a leniency program are important building-blocks in cartel investigation. This goes for enforcement in general and the fight against bid-rigging in particular.

Fernando Araya and Christian Warren have underlined specifically the importance of strengthening enforcement powers through a three-pronged attack: the adoption of a leniency program, an increase in sanctions and the legal possibility of conducting dawn raids.

The institutional set-up and legal framework have a critical impact on our capacity to act. But the internal organisation of a competition authority is also instrumental in harnessing its capacity to act.

Paulo Casagrande provided us with an example of how internal organisational arrangements – the creation of a new special Public Procurement Unit – have created institutional structures that can deal with bid-rigging in a more efficient way.

In terms of institutional set-up, there is no such thing as “one size fits all”. Much depends on the size of the agency, its institutional environment and its legal framework. But, the organisational arrangements should ideally reflect the optimal balance needed for the Competition Agency to carry out all its enforcement operations.

## Deterrence

First comes an unfettered capacity to detect and investigate cartels and a solid enforcement record. Then it is effective punishment of cartels that plays a major role in deterrence. It would not be too much to say that optimal deterrence implies optimal sanctions.

The discussion as to what makes for an optimal sanction is not, however, what brings here us today. For those interested, I would recommend the work produced by the OECD, UNCTAD and the International Competition Network.

To move on, there is a commonly accepted idea that: *“The principal purpose of sanctions in cartel cases is deterrence. (...) Sanctions have another, related purpose in the cartel context – that of providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators.”*

To ensure deterrence, bid-rigging should be the subject of heavy penalties, not only in the case of special deterrence against cartel participants, but also in terms of general deterrence in the global business community.

## Conclusion

Much of our talk today has been about the importance of capacity building in fighting bid-rigging. But international cooperation also plays an important role. One excellent example of how this works is the OECD Latin American cartel fighting programme. I am convinced that the main reason for the success of this programme is the fact that it is tailor-made, based on the needs of each country, and implemented with a strong sense of empowerment by the Brazilian and Chilean competition authorities.

The Portuguese Competition Authority has participated in the first phase of this project in Brazil. The second phase will start soon and we are eager to continue working closely with the OECD and the Brazilian authorities.

Looking ahead, I would like to renew the Portuguese Competition Authority's commitment to the OECD project to reduce bid-rigging in Latin America. And I do hope that our joint work is a milestone in the dissemination of competition policy and the fight against bid-rigging.

Thank you.