

***23RD ANNUAL MEETING OF THE ASSOCIATION OF EUROPEAN COMPETITION
LAW JUDGES***

INFRINGEMENT BY OBJECT OR EFFECT: CONCEPTS AND CONSEQUENCES

**DEVELOPMENTS IN THE APPLICATION OF ARTICLE 101
IN CASES OF PUBLIC PROCUREMENT**

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Santarém, June 27, 2025

Honorable Judge Mercedes Pedraz Calvo,

Dear President Cani Fernández,

Dear Mr. Vasco Pinto da Rocha,

Ladies and gentlemen,

I am truly honored to join this Annual Meeting of the Association of European Competition Law Judges, that Portugal has the opportunity to host in the magnificent city of Santarém this year.

I would like to start by congratulating the Association of European Competition Law Judges, in the person of its President, Professor Dr. Wolfgang Kirchhoff, and the Competition, Regulation and Supervision Court, in the person of the Presiding Judge, Mrs. Susana Fontinha, for the wonderful organization, and thanking them for this kind invitation. The AdC is honored to support the organization of this important event.

I am thrilled to address this topic – the interplay between public procurement and competition law – as fighting against collusion in public procurement has been one of the priorities set by the AdC.

Competition as two sides of the same coin

Allow me to start by recalling that competition is a polysemic word.

It can have more than one meaning.

In the fields of competition law and of public procurement law, we observe different dimensions of the concept of competition.

It is important to understand these different dimensions of the same reality, when discussing the interplay between competition and public procurement.

First, in the context of competition law, as we well know, the aim is to protect the functioning of the markets, ensuring a level playing field for firms to the benefit of consumers.

Second, in public procurement, the principle of competition, primarily addressed to the contracting authorities and enshrined in the EU public procurement Directives, aims both to safeguard the widest possible participation in tendering procedures and, more generally, the need to prevent possible distortions of competition caused by contracting authorities within public procurement.

Despite their different framework and goals, both dimensions of competition contribute to the well-functioning of the economy and to the strengthening of the internal market at the EU level, as two sides of the same coin.

As I will mention later, this dichotomy is translated into different scopes of action by Competition Agencies in tackling bid-rigging, both in enforcement and advocacy.

The impact of bid-rigging in the economy, especially for public spending

Public procurement is, indeed, of paramount importance for the functioning of the economy.

It is a mechanism by which the States, including central government, local authorities and other public bodies, purchase goods and services at the best value for money, by selecting the most efficient providers.

By awarding contracts to the best performing firms, public procurement may enhance the competitiveness of the economy while pursuing other public goals¹.

Estimates show that public procurement represents, on average, 13% of GDP in OECD countries (data from 2023)².

In the European Union, around €2 trillion is spent on public procurement per year, which amounts to approximately 14 % of GDP of the 27 Member States³.

Collusion in public procurement, by undermining the goals of tender procedures, is truly harmful to contracting authorities, competitors, as well as to taxpayers in general.

¹ European Court of Auditors Special report 28/2023: Public procurement in the EU – Less competition for contracts awarded for works, goods and services in the 10 years up to 2021

[Special report 28/2023: Public procurement in the EU | European Court of Auditors](#)

² Government at a Glance 2023: https://www.oecd-ilibrary.org/governance/general-government-procurement-spending-as-a-percentage-of-gdp-and-total-government-expenditures-2007-2019-and-2021_2b47c558-en

³ https://single-market-economy.ec.europa.eu/single-market/public-procurement_en

On the one hand, it is estimated that around 57% of corruption worldwide is related to public procurement⁴, often involving the contracting authorities themselves.

On the other hand, it is estimated that 25% of global cartels arise in the context of public procurement⁵.

To give you a better idea, the OECD estimates that these practices can generate an extra cost of at least 30% in procurement of goods and services.

Bid-rigging is among the most severe infringements of Article 101 TFEU, it is considered a hard-core cartel, constituting a restriction by object.

Given the damaging impact of these agreements within the internal market, it is worth noting that the nature of their terms and objectives represent a sufficient degree of harm to competition.

Consequently, collusive behavior in public procurement is a serious concern and is also a complex reality, which requires the involvement of different entities to be effectively addressed.

Allow me to tackle three dimensions of the fight against bid-rigging:

First dimension – contracting authorities

On the first dimension, the fight against bid-rigging requires the active participation of contracting authorities.

⁴ V. OCDE, Foreign Bribery Report (2014) e NUNO CUNHA RODRIGUES, The Use of Public Procurement as a Non-Tariff Barrier: Relations between the EU and the BRICS in the Context of the New EU Trade and Investment Strategy, in Public Procurement Law Review, Issue 3, 2017, pp. 135-137.

⁵ Cf. JULIAN CLARKE e SIMON J. EVENETT, A multilateral framework for competition policy?, State Secretariat of Economic Affairs e Simon J. Evenett (eds), The Singapore Issues and The World Trading System: the Road to Cancun and Beyond, chapter II, Berna, pp. 77-16

Contracting authorities are not only the ones designing and handling tender procedures, but also first-in-line in detecting these anti-competitive practices.

By receiving, analyzing and selecting first-hand the proposals, contracting authorities are the “eyes and ears on the ground” in the fight against bid-rigging.

Additionally, contracting authorities are entrusted with assessing the seriousness of potential offences previously committed by the tenderer, and whether or not these question the tenderer reliability or integrity.

Therefore, they have the power to exclude a tenderer from a public procurement procedure, on the grounds of the existence of signs of violation of competition rules, regardless of the fact that the AdC has imposed a prior debarment sanction.

Indeed, this is an interesting feature provided for in the Portuguese law. It refers to the possibility of contracting authorities to exclude a tenderer from the procedure based on the existence of strong elements likely to distort competition rules.

This exclusion shall be communicated to the AdC⁶.

That adds up to the possibility of the Competition Authority to impose a bidder exclusion as an ancillary sanction.

In fact, the ECJ recently had the chance to clarify, in the *Infraestruturas* case [C-66/22]⁷, that the contracting authority may exclude a tenderer, on the basis lack of integrity and reliability due

⁶ Art. 70/2/ g), as well as 70/4 CCP.

⁷ Frutifer judgment of 21 December 2023, case C-66/22, ECLI:EU:C:2023:1016.

to suspicion for anticompetitive behavior or past sanctioning decisions by an NCA (v. para. 56).

The Court states very clearly that *“the integrity and reliability are liable to be cast into doubt not only in the event of the participation of such an operator in anticompetitive conduct in the context of that procedure, but also in the event of that operator’s participation in such conduct in the past.”* (para. 69). This may occur even if the NCA did not apply the debarment sanction.

This case reflects the Court’s interpretation of the EU Public Procurement Directives, and of the principle of competition in its various dimensions.

Therefore, the contracting authorities are entrusted with the task of **verifying the reliability and integrity of the tenderers**, which is necessarily associated with their potential participation in prior anti-competitive practices.

The role of contracting authorities, when applying Public Procurement Law, cannot be assumed to be equivalent to the mission of NCAs, but it is certainly complementary, both aiming to ensure competition.

Hence, two sides of the same coin.

Second dimension – national competition authorities

The second dimension is the role of National Competition Authorities (NCAs).

NCAs play a crucial role.

Firstly, competition authorities advocate for the prevention of competition distortions, while raising awareness of the potential damage to the market.

Secondly, the NCAs can cooperate with agencies responsible for public procurement in order to facilitate the detection of distortions of competition.

In this regard, the AdC has been carrying out **dedicated advocacy initiatives**.

The AdC just launched a new campaign this year, called «**Competition Plus**». This cycle of outreach and dialogue in key economic sectors, including education, health and construction, aims to create closer contact opportunities with public agencies that handle public procurement on a daily basis.

These agencies act as our window into ground-level realities, and it is relevant to understand their challenges and difficulties.

At the moment, the AdC has organized more than 70 sessions within these campaigns and has directly reached over 4,000 people involved in public procurement, raising awareness of the risks and rules of competition.

These actions have proven to be fruitful in several instances.

Contact with public entities enabled the AdC to detect the existence of anti-competitive behaviors in public tenders, for instance in the sector of security and surveillance services.

This case led to the issuance of a sanctioning decision by the AdC⁸.

⁸ https://extranet.concorrenca.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=PRC_2019_4

At the AdC, we also recognize the importance of maintaining ongoing dialogue and cooperation with institutions related to public procurement.

A great example of that is the “**Informal Group on Innovation and Efficiency in Public Procurement**”, together with Court of Auditors, the IMPIC - Public procurement regulator, the eSPap - Public Administration Shared Services Entity, and the IGF - Inspectorate-General of Finance, which constitutes a valuable forum of knowledge-sharing.

Moreover, the AdC is part of a recent OECD’s project aiming to strengthen the detection and reporting of evidence of collusion in public procurement, together with Czechia, France, Ireland, Latvia, and Poland, which will be launched this year. Among the planned activities are workshops with judges and contracting entities regarding the fight against bid rigging.

But advocacy always goes hand in hand with **enforcement**.

It is true that also regarding enforcement collaboration with other entities has proven to be relevant.

Cooperation with the Criminal Investigation Police has already shown its value in a recent ongoing investigation concerning corruption and collusion in public tenders for aerial firefighting resources. In this case, the AdC conducted joint search and seizure operations with the Criminal Investigation Police⁹.

⁹ <https://www.concorrenca.pt/en/articles/adc-confirms-participation-pj-raids-over-suspected-cartel-aerial-firefighting-procurement>

Moreover, regarding enforcement, *ex officio* **detection** continues to play a relevant role.

The AdC is strongly committed and investing in strengthening its detection toolbox.

It is known that competition authorities have long used behavioural screens to detect potential collusion in public procurement data.

By identifying, in public procurement databases, behaviour that seems consistent with collusion, authorities across several jurisdictions have been able to open investigations and sanction firms responsible for bid-rigging.

At the AdC, we have been pursuing this avenue by **securing access to e-procurement databases**, which is now foreseen in the Public Contracts Code, as a result of our advocacy efforts, and **seeking to identify patterns** which are consistent with collusion.

The access to the Portuguese “Portal BASE”, formalized through a Memorandum of Understanding between the AdC and the IMPIC (the public procurement regulator), has produced important results already.

Moreover, we have been improving our toolkit of detection mechanisms, that now benefits from a novel instrument called “**Screen-IT**”, a screening tool used to identify collusive behavior between companies in public procurement.

In this context, AI and machine learning are helping us to further enhance the process, by **increasing both the quality of the data, and the models that are used to detect these patterns**.

Indeed, proactive detection has proven to be fruitful.

Let me, for instance, remind you of a case concerning the acquisition of electrical cables, that resulted in the sanctioning of all the companies involved. This case was detected *ex officio*. And, the AdC concluded that, in the context of public procurement procedures launched by the National electric Transmission Network operator¹⁰, the undertakings defined in advance who would win the procedures in an alternating manner, subcontracted the losing bidder and offset the invoicing in a scheme of regular payments and settlements.

At the AdC, we are aware that detection has to be followed by effective **investigation**.

In order to dully investigate, competition authorities need to have at their disposal an adequate toolbox, enabling **effective enforcement**, as well as **deterrence**.

The European legislator was not oblivious to this fact.

Therefore, the so-called ECN+ Directive ensures that NCAs have the appropriate enforcement tools in order to avoid “safe havens” within the EU for competition infringements.

Among others, the ECN+ Directive is clear in including the **power to seize and use digital evidence** as part of the NCAs toolkit.

In fact, the power to seize digital evidence and to effectively apply EU law is currently under the assessment of the ECJ in three preliminary ruling cases sent by the Portuguese Courts.

¹⁰ https://extranet.concorrencia.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=PRC_2021_1

In the case of *Imagens Médicas Integradas*¹¹, concerning the infringement of Article 101 TFEU in the context of public tenders for the provision of teleradiology services to hospitals, the Opinion of Advocate General Laila Medina¹² clearly states the relevance of not rendering the implementation of EU law impossible or excessively difficult [ensuring the effective application of Articles 101 and 102 TFEU].

We eagerly await the ECJ's decisions.

The recognition of the power to seize and use digital evidence by national competition authorities is, above all, mandated by the duty of interpretation in conformity with EU law.

Third dimension - Courts

This leads me to the third dimension, held by the Courts.

The Courts are entrusted with the role of safeguarding the effectiveness of competition law, in accordance with the EU Treaties and the Portuguese Constitution.

We must not forget that national courts are also European courts, as they apply European law.

Even when applying national law, the link with the European competition law *acquis* cannot be absent from the interpretation of the norms.

An open and sustained judicial dialogue is fostered, in this regard, through the preliminary ruling procedure, which reinforces

¹¹ https://extranet.concorrenca.pt/PesquisAdC/Page.aspx?IsEnglish=True&Ref=PRC_2021_3

¹² <https://curia.europa.eu/juris/document/document.jsf?text=&docid=287318&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=1156648>

coherence in the interpretation of EU law across the several jurisdictions.

Within this framework, the Portuguese Specialized Court has revealed commendable dynamism and commitment.

In fact, the recent requests of preliminary rulings by Portuguese Courts related to the application of EU competition law have predominantly been adopted by this Court.

This demonstrates that national judges are, indeed, concerned with the importance of interpreting national legislation in a manner that is consistent with the goals and provisions of EU law.

Conclusion

It is time to conclude.

The Portuguese Competition Authority is committed to promoting the effective application of competition law in public procurement, ensuring a robust enforcement against anti-competitive practices which are harmful to consumers and the economy as a whole.

However, the fight against bid-rigging will not be successfully if it is pursued solely by competition authorities. This is a shared mission, in which contracting authorities and the Courts have a key role to play, shaping a virtuous circle of prevention, detection, enforcement and ensuring the rule of law.

The task ahead for our different institutions is not an easy one.

Anti-competitive practices are becoming increasingly sophisticated and the measures used to conceal this lucrative infringement are constantly evolving. Therefore, new detection

mechanisms must be used, benefitting from the technological evolution, which the courts also have to monitor, and, allow me to add, adapt themselves to. Digitization of evidence, as in so many aspects of our societies, is here to stay.

Moreover, as NCAs, we are aware of the importance of cooperation for the exchange of knowledge and best practices. Indeed, we have a privileged ecosystem within the European Competition Network, fostering effective collaboration among competition agencies, such as the CNMC.

In this context, it is worth highlighting the importance of international networks, such as the European Association of Competition Law Judges. We believe that they are of great value, and that should be encouraged and promoted.

I would further like to emphasise that collaboration and dialogue with different public authorities and stakeholders is vital, in pursuing both advocacy and enforcement efforts, and in all the relevant phases – prevention, detection, investigation, and judicial review.

That is precisely why initiatives like this one are of fundamental importance, as they contribute to effectively address the challenges at hand, and to advancing shared goals.

Thank you very much for your attention.