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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from Portugal --

12-13 April 2016, Mexico City, Mexico

The attached document from Portugal is circulated under Session III of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

Session III: Promoting Effective Competition in Public Procurement

Part 2 The use of screens to prevent and detect bid rigging in public procurement

-- CONTRIBUTION FROM PORTUGAL --

1. Background: The PCA's Strategic Action Plan for Public Procurement

1. Enhancing competition in public procurement has been set a key priority by the Portuguese Competition Authority (PCA), and will likely remain so for the coming years. Competition is crucial in achieving efficient public procurement and good value for taxpayers' money. Public procurement accounts for an important fraction of the economic activity, representing around 12% of GDP in OECD countries, 16-18% in the EU and 10% in Portugal.

2. The scope for cost savings from strengthening competition and efficiency in public procurement is substantial. For example, a study on the introduction of e-procurement in Portugal estimated gains after one year of 6-12% of total government spending.¹ These gains were attributed to increased competition as only a small fraction - 2% of the savings – were found to stem from administrative cost savings.

3. In spite of the benefits generally brought about by competitive tendering (auctions or tenders), in Portugal direct awards accounted for more than 80% of the total number of public procurement contracts signed in 2013, and for about half of the corresponding value.

4. These numbers highlight the need for increasing awareness as to the potential gains that can be achieved through enhanced competition in public procurement. With this in mind, the PCA has devised a Strategic Action Plan for Public Procurement, built around three interrelated cornerstones – fighting bid rigging, promoting efficiency and aligning incentives.

¹ "A strategy to reduce public expenditure based on e-tendering and procurement business intelligence: The case of Portugal". European Vortal Academy 2011.

5. Fighting bid rigging is the core goal of the PCA's strategic plan for public procurement, as cartels are the most serious breach to competition, with the highest impact on welfare. Bid rigging can arise in public tenders for the supply of goods and services for the pursuit of important social goals, such as for example health care and education. This is well represented in the PCA's enforcement record – the PCA has, in the past, fined pharmaceutical firms for colluding in public tenders (for acquiring reactive test strips) organised by hospitals spread all over the country². In August 2015, the PCA fined 5 firms for a cartel in the supply of pre-fabricated modules for the purpose of setting temporary classrooms to the entity in charge of the Modernisation Programme of schools in Portugal³. The PCA's Strategic Action Plan on Public Procurement envisages scaling up both the advocacy and the enforcement strategy in fighting bid rigging conspiracies.

6. However, fostering competition in public procurement goes beyond breaking up existing cartels or preventing new bid rigging conspiracies. Inadequate preparation and bad tender design, as well as incomplete or misspecified contracts, often prevent the benefits of competition from being realized. The PCA's strategic plan addresses efficiency issues beyond bid rigging, namely through strong advocacy for good tender design.

7. The other cornerstone of the PCA's strategic plan is the alignment of the incentives of all entities involved in public procurement for promoting competition and efficiency. Public procurement officials are in charge of designing public tenders and are first in line to detect bid-rigging indicia. In the PCA's view, aligning the goals of public procurement related entities with those of competition and engaging public procurement officials in the fight against bid rigging is a *sine-qua-non* condition for achieving the overarching aim of efficiency in public procurement. Addressing this challenge involves raising awareness and accountability of procurement officials towards competition in public tenders.

8. The PCA issued *Guidelines on Fighting Collusion in Public Procurement* in December 2015, and is preparing a “*Fighting Bid-Rigging*” Campaign, to be launched in the spring of 2016, which includes a series of outreach sessions across different regions of the country, aimed mostly at contracting authorities and their procurement officials. These sessions seek, notably, (i) to raise awareness regarding the benefits of competition for public procurement efficiency; (ii) to increase contracting authorities' skills in detecting suspicious bidding patterns; as well as (iii) to promote skills regarding contract design and implementation to reduce the risk of bid rigging.

9. It is also key to provide greater legal certainty as to the consequences of reporting suspicions of collusion on public procurement procedures. On a day-to-day basis, procurement officials may be mainly concerned about getting a specific contract signed on time. Procedural length is often accounted for in performance indicators. Procurers may worry about the impact of a cartel suspicion on the procurement procedure and fear disruption and delays. Advocacy should thus also focus on allaying these fears, which in many cases hinder the incentives to report these suspicions to competition authorities.

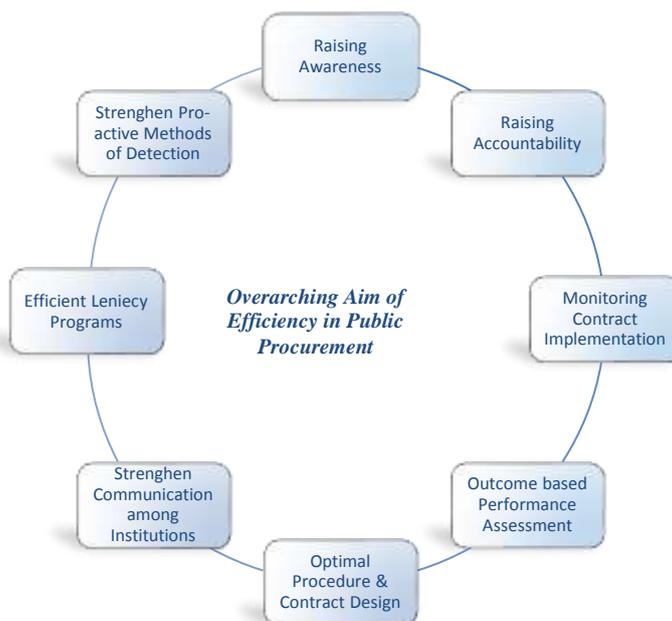
10. Addressing incentive alignment may, however, require further efforts. It is crucial that awareness is combined with accountability. Having the efficiency of the tender outcome matter for the performance assessment of contracting agencies would promote accountability towards competition and efficiency. Public entities should take steps to shift from the formalistic compliance and box-ticking approach to performance assessment towards an outcome based approach, where the success of contracting agencies' activity is pinned to the outcome of their procurement procedures in terms of efficiency and that these outcomes are duly monitored.

² http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200801.aspx.

³ http://www.concorrenca.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201518.aspx.

11. The PCA’s strategic plan builds on these three cornerstones through a policy mix: advocacy & enforcement; *ex-post* & *ex-ante* action on cartels; reactive & proactive detection tools. Given the intricate complementarities between the different tools, getting the right policy mix is one of the challenges in pursuing increased efficiency in public funds allocation and better value for taxpayers’ money. The figure below illustrates the multidimensional approach envisaged by the PCA and the broad range of interrelated factors that are required for efficient public procurement, among which the use of proactive detection tools.

Policy-mix approach to promoting competition and efficiency in public procurement



Source: PCA

2. Scaling up enforcement: proactive detection methods

12. The core goal of the PCA’s Strategic Action Plan for Promoting Competition in Public Procurement is the strengthening of enforcement in fighting bid rigging conspiracies by scaling up detection.

13. As most national competition authorities, the PCA has traditionally relied on reactive tools for the detection of concerted practices, namely complaints and leniency, which provide hard evidence in most cases. Since 2003, only 15% of the cartel cases of the PCA were *ex officio*, 45% were triggered by leniency applications and 40% by complaints.

14. Reactive detection tools are thus key in the PCA’s enforcement agenda on bid rigging. The PCA’s Leniency Programme has been revamped in 2012 and was further aligned with the European Competition Network Model Leniency Programme to make it easier and more attractive for companies to unveil cartel agreements.

15. However, the PCA is seeking to further strengthen its capabilities in detecting bid rigging conspiracies by diversifying the detection toolbox and exploring the complementarities between reactive and proactive detection methods.

16. As thoroughly discussed in the OECD Roundtable on “*Ex-officio cartel investigations and the use of screens to detect cartels*”, proactive detection methods may increase the efficiency of reactive action in different ways. Proactive detection methods increase colluders’ perceived risk of being fined and thus may raise incentives for leniency applications. Ultimately, proactive tools may work as an *ex ante* deterrence device of bid rigging. Proactive detection tools may further complement reactive methods by allowing detecting stable cartels sooner.

17. Proactive detection tools are usually based on empirical screens covering a variety of elements of market information, which can assist in flagging market circumstances where collusion is more likely to occur. The use of screens to spot bid-rigging markers poses, however, a number of challenges related with the intrinsic ad-hoc nature of screening techniques, the risk of false positives and false negatives, and with the availability, coverage and quality of data. Screens can only be implemented when adequate data is available. Ensuring data availability can, in itself, constitute a sizeable challenge.

2.1 Challenges of using screens for detecting bid rigging

18. The use of screens for detecting bid rigging must rely on the most common forms of bidding rings. However, suspicious bidding patterns may take several different and quite complex forms. Furthermore, the different bid rigging schemes are not mutually exclusive. Also, the coordination mechanism for a bid rigging conspiracy may involve not only various procurement procedures over time (*e.g.*, when the same contract is frequently re-tendered), across different geographical areas or organised by different contracting authorities, but also different procurement procedures, for the acquisition of different goods and services.

19. In order to optimise the data screening methodology, the PCA will seek collaborations with academic experts for the design of screening algorithms. The PCA is also seeking to collect experiences from other competition authorities that use proactive detection methods to discuss approaches to overcome the challenges in putting together data screening programs for bid rigging detection. In particular, the collaboration and experiences shared by the team devoted to public procurement data screening in CADE (Brazil) have been very fruitful.

20. While the persuasiveness of the economic evidence is very much linked to the specific collusion mechanism, data screens can hardly, by themselves, produce proof of anticompetitive behaviour. They can, however, both guide the investigation to detect bid rigging conspiracies and be articulated with other elements of evidence to prove unlawful behaviour.

21. To overcome these limitations, as well as the challenges in terms of data availability, rather than pursuing a generalised screening of procurement data, the PCA is currently seeking to target data screening to sectors or set of procurement contracts for which there is some sort of aprioristic expectation that bid rigging might be a concern. The information brought to the PCA in its interaction with procurement agencies and other procurement related institutions, such as the Court of Auditors, is key in flagging the sectors and procurement procedures for which it might be worth to pursue data analysis in search of bidding patterns suggestive of collusive behaviour. This information can also bring valuable contributions in identifying the type of coordination mechanism that may eventually be in place to game the procurement procedure outcome and is thus useful for fine-tuning the data screening methodology (*e.g.*, cyclical winning patterns in bid rotation schemes, or subcontracting when this is the perceived rent sharing mechanism). The PCA will also seek to develop a top-down approach, by flagging sectors through structural screens or based on the rate of incidence of cartels in Portugal and other jurisdictions.

22. This approach entangles the enforcement and the advocacy sides of the PCA's Strategic Action Plan for Public Procurement, and explores further synergies between reactive and proactive detection methods. This is to say that the PCA is seeking to develop a hybrid approach to strengthening bid rigging detection, and the close communication channels that the PCA is seeking to build with procurement related entities are key for achieving this end.

2.2 Data availability, coverage and quality

23. Portugal is the EU pioneer in mandatory e-procurement for competitive public procurement procedures. In Portugal, e-procurement and the registration of centralised public procurement in web portals is in place since November 2009. The centralized web portal (*Portal Base*) – an interaction of several web portals – is managed by IMPIC (the Portuguese Institute of Public Markets, Real Estate and Construction). *Portal Base* covers public contracts from 2009 to date, with a large number of variables for each contract, ranging from the contracting agencies, invited bidders and competitors, bids (price, products or services), among other information. The existence of a broad e-procurement dataset opens interesting avenues in terms of data screening for detecting cartels in public procurement and may spur the detection rate.

24. However, the data available in Portal Base covers mostly competitive procedures (tenders and auctions) and framework agreements. In 2012, the public contracts reported to Portal Base accounted for around 20% of the total value of public contracts awarded throughout the year, in Portugal. Portal Base is thus only a partial sample of all public procurement contracts.

25. The PCA has been endeavouring efforts to obtain this dataset and to overcome challenges regarding personal data protection issues, which have been raised, and have been delaying the PCA's full access to the dataset gathered through Portal Base.

26. Nonetheless, and in line with its hybrid approach toward data screening, the PCA has, in the meanwhile, requested data regarding public procurement procedures in certain sectors, following the information brought about by third parties regarding potential anticompetitive behaviour in a given procedure or set of procedures. The analysis that is being carried out to these datasets is uncovering a number of issues in terms of the quality of the data, in particular information gaps. The PCA thus anticipates that tackling these issues in the broader dataset will require considerable time and effort.

27. The crucial steps are now *i*) to ensure access to a broader set of information, *ii*) to address the issues related with the quality of e-procurement data, in collaboration with IMPIC, the entity in charge of the e-procurement dataset in Portugal and *iii*) to build partnerships/collaborations with academic experts to develop the methodological approach to data screening and simultaneously promote in-house capacity building.