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"Bid Rigging in Public Procurement in Greece: Legal Framework, Interactions and Contemporary Challenges"

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1. Introduction

Public procurement is one of the most vulnerable areas for bid rigging, as it involves large sums of public money and attracts a wide range of private sector participants.[1] As governments and public authorities seek to secure goods and services at the best possible price through competitive bidding, bid rigging undermines the core principles of fairness and competition that public procurement is designed to promote. Bid rigging in this context results in inflated prices, reduced efficiency, and lower quality of services or products provided to the public sector, ultimately harming taxpayers and the broader economy.[2]

Bid rigging, as a severe form of anti-competitive behavior, is regulated under a robust legal framework within the European Union (EU) and in Greece. Both systems of law aim to protect the integrity of competitive markets by prohibiting collusive practices that distort tendering processes. The intersection between EU and Greek law, as well as between competition law and public procurement law provides a complementary structure that governs both private and public tenders, ensuring that competition remains fair, transparent, and efficient.

Experience has shown that certain sectors are particularly prone to bid rigging in public procurement due to the nature of the goods and services provided, the frequency of tenders, and the market structures within those sectors. In Greece, as well as in other EU countries, the sectors of construction and infrastructure, healthcare and pharmaceuticals and transportation are most commonly affected by bid rigging.[3] All of these sectors are characterized by high entry barriers, recurrent contracts, and a limited number of major players, all of which create conditions conducive to bid rigging.

More specifically, public works projects such as road building, bridge construction, and infrastructure maintenance are among the most frequently targeted for bid rigging. These projects are often high-value and involve long-term contracts, making them attractive for collusion. Bid rigging in this sector has been well-documented in Greece, particularly in large-scale infrastructure projects financed by the state or through EU funds.

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[1] *OECD, Preventing Corruption in Public Procurement, 2016*
[2] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[3] *OECD, Preventing Corruption in Public Procurement, 2016* and https://www.epant.gr/enimerosi/kanonistiki-kataskeves.html

Furthermore, procurement of medical supplies, equipment, and pharmaceuticals by public hospitals and healthcare authorities is another area vulnerable to bid rigging.[4] This sector is critical due to its direct impact on public health and safety, and bid rigging can result in inflated prices for essential medicines and equipment, straining public healthcare budgets.

Accordingly, the provision of public transportation services, such as buses, trains, and ferries, as well as the maintenance of public infrastructure like airports and ports, is also at high risk of bid rigging. In many cases, a limited number of providers in these sectors increases the likelihood of collusion.

Competition within a specific tender allows the public buyer to benefit from the competitive pressures between participants. Additionally, it serves as a critical mechanism to prevent favoritism, corruption, and abuse of power. By fostering a fair and open competition environment, public procurement legislation helps to ensure that public resources are used efficiently and transparently, delivering the best possible outcomes for the public sector.

The purpose of this dissertation is to study bid rigging with reference the Greek and EU law and focus on understanding the different types of practices of bid rigging, their effects from competition and public procurement law perspectives. Furthermore, we will attempt to examine how competition law and public procurement law interplay and discuss certain practical issues arising therefrom. Finally, we will attempt to provide certain suggestions to improve detection and prevention of bid rigging in Greece.

It is noted that the significance of this topic lies not only in its theoretical importance but also in its practical relevance. With Greece undergoing significant economic and structural reforms, public procurement plays a crucial role in national development projects, particularly in sectors such as infrastructure, energy, and health. As such, understanding and addressing the legal mechanisms to prevent bid rigging is imperative for fostering a transparent and competitive market environment that supports both national and EU-level economic policies.

[4] European Commission, Public Procurement in Healthcare Systems, Opinion of the Expert Panel on effective ways of investing in Health (EXPH), 2021

2. Types of Bid Rigging Practices

The forms of secret agreements applied in tendering procedures vary, but they all share a common goal: to obstruct the efforts of the awarding authority to procure goods and services with the best price-quality ratio.

Bid rigging is a complex activity that occurs when some or all bidders agree in advance on who will be the winning contractor, thereby nullifying competition among members of the collusion. While the objective remains to subvert the competitive nature of bidding processes, bid rigging can manifest in various forms, each with distinct strategies and methodologies. Bid rigging through collusive tendering occurs when businesses that would normally be expected to compete against each other enter into a secret agreement or align their behavior regarding bid submission, with the aim of increasing prices or lowering the quality of goods or services for buyers/contracting authorities procuring products or services through (competitive) bidding processes. Agreements (and/or concerted practices) to rig bids can take various forms, all of which hinder the efforts of buyers/contracting authorities to procure goods and services at the lowest possible price. [5] Competitors agree in advance on the supplier who will submit the winning bid for a contract, which will be awarded to them after a competitive bidding process.[6] Participants who agree not to submit a bid or to submit a losing bid may receive subcontracts or supply agreements from the predetermined winning bidder as compensation.[7] Bid rigging may also involve monetary payments from the designated successful bidder to one or more participants as compensation.[8] Here follows a short analysis of different types of bid rigging.

2.1. Cover Bidding

One of the most common types of bid rigging is cover bidding, in which rivals submit non-competitive bids to create the impression of a genuinely competitive tender process.[9] Since the other bids are purposefully inflated or otherwise intended to fail, this tactic allows a pre-selected bidder to win the contract. Cover bidding is particularly insidious because it allows all participants to maintain the appearance of active

[5] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[6] Unified Independent Public Procurement Authority, Guideline 20 (Decision 42/30-5-2017) - Exclusion Grounds for Participation in Public Contract Procedures
[7] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009
[8] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[9] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009

competition, often making it difficult to detect.[10] The losing bidders may receive future promises of rewards or contracts, thereby ensuring their continued participation in the collusive scheme. In Greece, this practice has been identified in several sectors, particularly in public infrastructure projects, where bid rigging has led to inflated project costs and delays.

Specifically, cover bidding occurs when participants agree to submit a bid that includes at least one of the following elements: 1) a competitor agrees to submit a bid higher than the bid of the predetermined winning bidder, 2) a competitor submits a bid that is so high that it is clearly unacceptable, or 3) a competitor submits a bid that does not fulfill the awarding authority's requirements.[11]

From a legal standpoint, cover bidding is a direct violation of Article 101 of the Treaty on the Functioning of the European Union ("*TFEU*")), which prohibits agreements between undertakings that distort competition. Under Greek law, such practices are also prohibited by Article 1 of l. 3959/2011, which mirrors the provisions of EU law.

An example of cover bidding under EU case law is case COMP/E-1/38.823. In 2007, the European Commission has fined three company groups €992 million for operating cartels for the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands, in violation of EC Treaty rules that prohibit restrictive business practices (Article 81 at the time and currently Article 101 TFEU)[12]. From 1995 to 2004, these companies manipulated bids for procurement contracts, set prices, divided projects among themselves, divided markets, and shared commercially sensitive and confidential information. The cartel operated with companies mutually informing each other about bid submissions and coordinating their bids according to pre-determined quotas. Artificial bids, excessively high to be accepted, were submitted by the companies that were not supposed to win the tender, to create the illusion of genuine competition. The winning bidder was determined for each tender according to the companies' market shares in each country, aiming at maintaining specific pre-existing clientele, a principle referenced in the companies' agreements as the "existing customers remain" principle.

[10] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[11] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[12] European Commission Press Release: Brussels, 21st February 2007, IP/07/209

The Commission, considering the severity of the violation as very high, also taking into account the size of the markets for the products, the duration of the cartels and the size of the firms involved sought to set the amount of the fine in a way that would deter similar behaviour in the future.

2.2. Bid Suppression

Bid suppression occurs when one or more competitors agree to refrain from bidding altogether or withdraw their already submitted bids to allow a specific, predetermined competitor to win the contract.[13] This type of bid rigging can be explicit, where agreements are made in advance, or implicit, where bidders tacitly understand the dynamics of collusion. By reducing the pool of competitors, bid suppression can significantly limit the awarding authority's options, leading to the selection of a less competitive offer.

2.3. Bid Rotation

Bid rotation involves competitors taking turns winning contracts, often according to a prearranged scheme.[14] Each participant in the collusion agrees to submit competitive bids for certain tenders while submitting non-competitive or deliberately losing bids for others. Over time, each member of the cartel benefits by winning contracts at regular intervals, maintaining the facade of competition while securing mutual benefits.

Case law examples of this strategy include cartels operating in the transportation and the heating system pipes sectors. In 1998, the European Commission fined ten manufacturers of heating system pipes for coordinated practices in bidding processes.[15] In Germany and Denmark, the companies used a system of rotating bids to allocate the auctioned contracts among themselves. Members of the cartel designated the successful bidder, while the remaining participants submitted higher bids. Furthermore, in 2008, the European Commission imposed fines totaling €32,755,500 on nine Belgian international transport companies.[16] This cartel operated over a period of 19 years, manipulating public tenders through a strategy of rotating successful bids, using sham bids referred to as "facilitation offers". The involved companies divided profits via a system of compensatory payments, known as "commissions," which were included in

[13] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009
[14] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009
[15] European Commission, IP/98/917
[16] European Commission, IP/08/415

the final bid price and distributed among the unsuccessful bidders through fictitious invoices.

2.4. Customer or Market Allocation

Customer or Market Allocation involves competitors agreeing to divide customers or geographic markets among themselves.[17] This form of collusion is often paired with bid suppression or bid rotation techniques.

In practice, the parties involved may refrain from submitting a bid or submit only artificial bids, allowing the designated party to win a tender. This ensures that the company allocated a particular customer, category of customers, geographic area, or tender (project) is awarded the contract.[18] By doing so, the cartel members manipulate their bids to guarantee that the winning bid comes from the company assigned to the relevant client or market.

To ensure compliance with the agreement, the parties may appoint a coordinator (either an individual or a business) who monitors the adherence to the collusive arrangement.[19] This system allows cartel members to maintain control over the market, undermining fair competition and ultimately harming the integrity of procurement processes.

Certain examples from case law include cases in sectors such as audience measurement, electric cables, elevators and escalators, electrical switches and industrial plastic bags.

In 2015, the Hellenic Competition Commission ("*HCC*") imposed a total fine of €87,953.30 on two polling service companies for an agreement related to their joint participation in a tender for audience measurement in the Attica region.[20] The Commission found that the two companies had agreed on two terms that exceeded the necessary scope for their cooperation. One of these terms involved a geographic market allocation, as one of them agreed not to engage in audience measurement in the Thessaloniki area, either independently or in collaboration with any other entity.

Furthermore, in 2014, the European Commission imposed total fines of €301.6 million on major high-voltage cable manufacturers for their involvement in a market and customer allocation agreement for projects involving underground and submarine

[17] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009
[18] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012
[19] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022
[20] *Hellenic Competition Commission, Decision No. 620/2015*

cables in specific territories. [21] From 1999 and for approximately ten years, the main producers participated in a network of multilateral and bilateral meetings and contacts, allocating projects based on geographic region or customer. They also agreed on pricing and exchanged commercially sensitive information to ensure that the designated cable supplier would offer the lowest price, while other companies would either submit higher bids, refrain from bidding, or submit unattractive offers. Reporting obligations were established to monitor compliance, and additional practices were applied to reinforce the agreement, such as collectively refusing to supply components or technical assistance to specific competitors to maintain the agreed allocations. The cartel had two main aspects:

a) Japanese and South Korean producers avoided competing with European producers for projects within Europe, while European producers stayed out of projects in Japan and South Korea. Cartel members also allocated projects in most other countries globally, implementing a quota agreement for a specific period.
b) European producers divided projects and customers among themselves within Europe.

To ensure compliance with the agreements, the producers held periodic meetings and communicated via email, phone, or fax.

The already mentioned case COMP/E-1/38.823 is also an example of customer and market allocation. [22] The companies involved in the sale, installation, and maintenance of elevators and escalators were found guilty of dividing markets and customers and setting prices, sometimes also applying a compensation mechanism. In Germany and the Netherlands, cartel members agreed that the company with established, longstanding relationships with a particular customer would secure most of that customer's contracts. To create an illusion of competition, the companies submitted artificially high bids that were unlikely to be accepted. Members also exchanged trade secrets and confidential information on bid standards and pricing. The cartel participants held regular meetings to discuss and monitor these restrictions across national markets.

[21] *European Commission IP/14/358*

[22] *European Commission IP/07/209*

In 2007, the European Commission found eleven business groups guilty of cartel practices in the electric switch market, from 1988 to 2004. The cartel members exchanged information on tenders to coordinate bids and divide markets according to respective market shares. Specifically, Japanese and European companies agreed not to sell or bid outside their designated geographic areas. The cartel members took elaborate measures to conceal their collusive activities. Not only did they submit artificial bids to create the appearance of genuine competition, but they also used code names and increasingly sophisticated communication methods (e.g. emails from private accounts with encrypted messages, mobile phones with encryption) to avoid detection. The European Commission deemed the violation particularly serious due to its market impact and geographical scope, applying multipliers to the calculation of the fine to ensure a deterrent effect. Aggravating circumstances, such as the duration of the infringement and the leading positions held by some of the participating companies, further increased the fines imposed.[23]

In 2005, the European Commission imposed fines on sixteen companies involved in the manufacture of industrial plastic bags for collusion. The cartel operated in Germany, Belgium, the Netherlands, Luxembourg, France, and Spain, lasting up to twenty years in some cases. The cartel's market-sharing scheme was organized through a network of managers, with the company holding the largest share in a particular area or with a specific client taking on the role of coordinating bids from other applicants. This arrangement ensured its selection as the successful contractor, while creating the false impression of competition in the tendering process.[24]

2.5. Price fixing

Price fixing occurs when competitors agree to increase, set, or otherwise influence the price of a product or service.[25] Price fixing often forms part of bid rigging and may include[26]:

- Setting a minimum price (potentially within a bid rotation scheme, where competitors agree to submit the lowest bid in successive tenders),

[23] *European Commission IP/07/80*
[24] *European Commission IP/05/1508.*
[25] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022
[26] Heimler, Alberto, Cartels in Public Procurement, Journal of Competition Law & Economics, 2012.

- Eliminating or restricting discounts,
- Applying a formula to calculate the price,
- Raising prices (potentially within a cover pricing scheme—where competitors agree to have one or more submit an excessively high bid), or maintaining prices at stable levels.

Price fixing limits the awarding authority's ability to purchase goods or services at the lowest possible price.

According to case law, direct or indirect price-fixing constitutes an obvious restriction of competition.[27] Since price is the primary competitive tool, arrangements aimed at setting prices inherently restrict competition.[28] In this respect, common practices involve setting specific prices, price ranges, target prices, framework prices, and/or discounts. Given that price-fixing is such a serious restriction, agreements or concerted practices of this nature between competitors constitute an infringement regardless of the market share of the economic operators in the relevant market. These arrangements cannot be exempted from the prohibitive provisions of Articles 1, par. 1 l. 3959/2011 and 101TFEU, nor can they qualify for individual exemption under par. 3 of said articles.

The term "prices" is interpreted broadly, encompassing discounts, profit margins, credit terms, and even price recommendations. The setting of even indicative prices affects competition, as it allows participants to predict with reasonable certainty the pricing policy their competitors will adopt. This method discourages businesses with lower costs from reducing their prices and offers an artificial advantage to businesses with higher production costs.[29] To determine direct or indirect price-fixing—under EU and national competition provisions—neither price alignment nor uniform price increases or adjustments are required. Direct or indirect price-setting, even for a target price, negatively affects competition because it allows all members of a collusion to reasonably predict the pricing policy their competitors will adopt. By expressing a shared intent to apply a given price level for their products, the producers in question

[27] *CFI Cases T-374/94, T-375/94, T-384/94, and T-388/94, European Night Services et al. v. Commission.*
[28] *Mikroulea, A., Bid rigging, in Free Competition Law, Nomiki Bibliothiki, 2020.*
[29] *ECJ Case C-45/85, Verband der Sachversicherer v. Commission, [1987] ECR 447, paras. 28-29; ECJ Case C-209/78, op. cit., para. 88; ECJ Case C-96/82, op. cit., para. 19; and CFI Case T-213/95, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Commission, [1997] ECR II-1746, paras. 169-172.*

cease to independently set their market policy, thereby contravening the principle enshrined in national and EU competition provisions.

In addition to price fixing through collusion, anti-competitive practices may also arise from invitations to participate in prohibited agreements or the announcement of future pricing intentions between competitors for future tenders under certain conditions, practices which may conflict with the new Article 1A l. 3959/2011.

2.6. Production restriction

Production restriction occurs when competitors agree to reduce or limit the supply of a product or service to restrict availability and, consequently, increase the awarded prices in a tender.[30] By deliberately limiting supply, the competitors create scarcity, which leads to higher prices, undermining the competitive process and harming the public buyer's ability to secure the best value for money.

Production restriction agreements constitute an obvious restriction of competition[31] and are a classic means of maintaining or raising price levels, as, without such agreements, prices would be lower and thus more competitive. This prohibition includes any limitation or control over the supply of products and services.[32]

A specific case of production restriction may arise when it is combined with an exclusive supply agreement. Specifically, two parties agree to restrict or cease production and procure the agreed-upon products exclusively from the other party. If the parties are also potential competitors, this raises an issue of infringement under Article 101(1) TFEU.

3. EU and Greek Legal Framework on Bid Rigging

In Greece, the protection of competition in public procurement tenders is achieved through the application of public procurement legislation (mainly l. 4412/2016 and l. 4413/2016), as well as competition legislation (l. 3959/2011 and Articles 101 and 102 TFEU).

[30] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*
[31] *Indicatively ECJ Decision 41/69 ACF Chemiefarma v. Commission, p. 669, and ECJ Decision 246/86 Belasco v. Commission, p. 2181.*
[32] *Commission Decision of 23.12.1992, CEMBAL, and also HCC Decision 492/VI/2010.*

3.1. Competition Law

3.1.1. Greek legislation

Greece's competition law is primarily governed by l. 3959/2011 on the Protection of Free Competition, which grants extensive powers to the HCC to investigate and sanction bid rigging practices. This legislation largely mirrors the principles enshrined in Article 101 TFEU, prohibiting any agreements or practices that restrict competition, including bid rigging.

The HCC has the authority to conduct dawn raids, request documents, and summon witnesses in its efforts to uncover collusive behavior. If a violation is established, then it has the right to impose substantial fines, as well as issue injunction orders to prevent further anti-competitive conduct. The fines in bid rigging cases can reach up to 10% of the offending company's annual turnover, depending on various aspects, also reflecting the gravity of such violations.

3.1.1.1. Article 1 l. 3959/2011

Article 1 l. 3959/2011[33] explicitly addresses horizontal agreements between competitors, such as price-fixing, market allocation, and bid rigging, making it illegal for businesses to collude in tenders.

The conditions for the application of the provision in Article 1 par. 1 l. 3959/2011 are: (a) the existence of an agreement, a concerted practice between undertakings, or a decision by an association of undertakings, and (b) that the object or effect of the above agreement, concerted practice, or decision is the substantial restriction, obstruction, or distortion of competition.

A) <u>The concept of "undertaking"</u>

Under competition law, an "undertaking" refers to any natural person or economic entity engaged in commercial or other economic activity, regardless of its legal status

[33] "*Prohibited Agreements*

1. *Subject to paragraph 3, all agreements and concerted practices between undertakings, and all decisions of associations of undertakings, that have as their object or effect the prevention, restriction, or distortion of competition within the Greek territory are prohibited, particularly those that: a) Directly or indirectly fix purchase or selling prices or other trading conditions; b) Limit or control production, distribution, technological development, or investments; c) Share markets or sources of supply; d) Apply dissimilar conditions to equivalent transactions, particularly through unjustified refusal to sell, purchase, or engage in other transactions, in a way that hampers competition; e) Make the conclusion of contracts conditional on the acceptance by the other parties of supplementary obligations, which by their nature or according to commercial practice are unrelated to the subject of those contracts."*

or method of financing.[34] The existence of an undertaking presupposes autonomy in economic actions and, consequently, the full assumption of the economic risks associated with each economic activity.[35] Economic activity is defined as any activity involving the supply of goods or services within a given market.[36]

B) The concept of "agreement"

According to case law, an agreement within the meaning of the above legislation is considered to exist when businesses, explicitly or implicitly, jointly approve a plan that sets the guidelines for their mutual actions (or abstention from action) in the market. For the purposes of applying competition rules, it is sufficient for businesses to express their shared intent to act in a predetermined way in the market.[37] This occurs, for example, whenever businesses express a mutual intent to achieve targeted prices, desired sales volumes, or market/customer allocation.[38]

Moreover, it is not necessary for the participants to have pre-agreed on a fully developed common plan. As ruled by case law, the concept of an agreement covers not only contracts in the strict sense but also gentlemen's agreements[39], whether executed or not. An agreement can also consist of the participating businesses at a meeting setting the "rules of the game" for their market behavior, as long as there was an expressed desire or intention to follow this specific conduct.[40] The existence of an agreement can be inferred directly or indirectly from the behavior of the parties and may apply to incomplete arrangements, as well as partial and conditional agreements reached during the negotiation process that leads to an agreement.[41] Based on the above, the notion of an agreement is indifferent to whether it is in written or oral form and to its binding nature. Similarly, it is irrelevant whether the representatives involved in the agreement were authorized to conclude agreements with such content.

C) The concept of "concerted practice"

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[34] Indicatively ECJ C-101 and 110/07, Coop de France Bétail and Viande v. Commission and ECJ C-218/00, Cisal di Battistello Venanzio & Co. v. Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro.
[35] Indicatively ECJ C-55/96, Job Centre coop.arl, I-7119, ECJ C-180-184/98, Pavel Pavlov vs Stichting Pensioenfonds Medische Specialisten.
[36] Indicatively ECJ C-118/85, Commission v. Italy and ECJ C-35/96, Commission v. Italy.
[37] Indicatively Counsil of State Decisions 2007/2013 and 2780/2012.
[38] Indicatively ECJ C-41/69 and ECJ joined cases C-209/78 to 215/78 and 218/78, Heinz van Landewyck v. Commission.
[39] *ECJ Case C-41/69., paras. 110-112, and Case C-44/69, Buchler & Co. v. Commission.*
[40] Indicatively ECJ C-204/00, Aalborg PortlandA /S v. Commission.
[41] European Commission Decision 2004/104/EC.

The concept of concerted practice refers to a form of coordination between businesses which, without reaching the level of an agreement, deliberately replaces the risks inherent in competition with practical cooperation among these businesses.[42] The requirement for businesses to act autonomously in the market, which is fundamental to competition regulations,[43] strictly opposes any direct or indirect contact between these business operators that could either influence the behavior of an actual or potential competitor in the market or disclose to a competitor the conduct the business operator has decided or is considering in the market. The condition of reciprocity is met whenever a competitor's disclosure of its future intentions or behavior in the market to another competitor was requested by the latter, or when the business operator did not express any reservation or objection when its competitor revealed its intentions.[44] The critical factor is that competitors knowingly accept or adhere to collusive mechanisms that facilitate the coordination of their commercial policy.

Accordingly, the concept of concerted practice includes two elements - a subjective and an objective one, which must be causally linked. The subjective element involves the expression of intent by the participating businesses to align their conduct, requiring evidence of mutual contacts among the businesses involved. As for the objective element, the notion of concerted practice requires the market behavior of the participating businesses, though it does not necessarily entail that such behavior must specifically produce an anti-competitive effect.

According to case law, it is presumed that businesses that have been in contact in the manner outlined above and continue to operate in the market, inevitably take into account the information exchanged with or received from competitors when determining their market behavior. Thus, for businesses that have engaged in contact as described above and continue to operate in the market, it is presumed that the legally required causal link exists between the expression of intent (subjective element) and conduct (objective element), thereby establishing a concerted practice between them.

[42] GC T-30/91, Solvay SA v. Commission and GC T-36/91, Imperial Chemical Industries Plc v. Commission.
[43] Indicatively State of Counsil Decision 2780/2012.
[44] Indicatively ECJ C-48/69, ICI v. Commission, ECJ C-199/92 P, Hüls v. European Commission, GC T-9/99, HFB Holding v. Commission, GC T-25/95, Cimenteries CBR v. Commission, and Athens Administrative Court of Appeal Decision 1617/2009.

To establish a concerted practice, it is not necessary to prove that a business formally committed to adopting specific conduct in relation to one or more entities, or that competitors jointly determined their future market behavior based on a plan.[45] It is sufficient to demonstrate the absence of autonomous determination of their commercial conduct. The crucial factor here is that competitors knowingly accept or join collusion mechanisms that facilitate the coordination of their commercial policies. Furthermore, coordination does not need to be explicitly expressed; it can also be implicit. The key characteristic of concerted practice is that it replaces the risks of competition with cooperation between businesses, which reduces the uncertainty each business has regarding the behavior that its competitors will adopt in the market.

As long as a business involved in the coordination continues to operate in the relevant market, this presumption applies even if the coordination stems from a single contact between the businesses involved—and is further strengthened when such contacts occur regularly over an extended period.

It has been held that participation in meetings aimed at setting target prices, during which competitors exchange information on the prices they intend to apply in the market and on their minimum profitable operating threshold, constitutes a concerted practice. This is because the participating businesses undoubtedly take this information into account when determining their market behavior. Similarly, it has been held that even if the stages of the negotiation process leading to the conclusion of a comprehensive agreement do not fall under the concept of an agreement, the conduct in question still falls within the prohibition of Article 101 TFEU as a concerted practice.

Furthermore, the participation of businesses in anti-competitive agreements or concerted practices, without clearly objecting to these agreements, serves as sufficient evidence of their involvement and liability in the collusion—regardless of whether the participating businesses ultimately adhered to the outcomes/agreements from the relevant meetings. Mere distancing, that is, a public expression of dissent from the agreed terms, signifies the end of a business's involvement in the collusion.

[45] *Bellamy & Child, European Union Law of Competition, Seventh Edition, Oxford University Press*

Finally, a collusion can simultaneously constitute both an agreement and a concerted practice within the meaning of the relevant legal provisions, and this characterization is not crucial for establishing any potential infringement.

3.1.1.2. Article 1A l. 3959/2011

Anti-competitive practices may also arise from an invitation to engage in prohibited collusion or from the announcement of future pricing intentions for products and services between competitors in upcoming tenders under certain conditions. Such practices may contravene the newly introduced – and quite innovative- Article 1A l. 3959/2011[46].

Article 1A aims to address unilateral conduct involving (a) invitations to engage in collusion aimed at obstructing, restricting, or distorting competition within the Greek territory, or (b) announcements related to the declaration of future pricing intentions for products or services among businesses that are competitors ("future price signaling"), if such disclosure restricts competition in the Greek territory and does not constitute a customary commercial practice.[47] Therefore, it does not apply to invitations or disclosures made within the context of a vertical relationship or a relationship between a business and the end consumer when there is no horizontal objective or effect, meaning that the invitation or disclosure does not target actual or potential competitors.

The purpose of paragraph 1 of Article 1A is to render unlawful the attempt to establish certain enumerated forms of horizontal competition restrictions by object through the

[46] *Article 1A of Law 3959/2011 "1. A business is prohibited from suggesting, coercing, incentivizing, or inviting in any way another business to participate in an agreement between businesses or in decisions by business associations or in concerted practices that aim to obstruct, restrict, or distort competition within the Greek Territory. These include:*
a) directly or indirectly setting purchase or selling prices in a market,
b) limiting or controlling production, distribution, technological development, or investments, or
c) dividing markets or sources of supply."
2. A business is prohibited from disclosing information regarding the price, discount, provision, or credit terms of products or services it supplies or procures if:
a) the disclosure restricts effective competition within the Greek Territory, and
b) it is not a customary commercial practice.
To assess whether the disclosure restricts effective competition, the following factors are considered:
a) the degree of specialization and the personalized nature of the information,
b) whether the information relates to future activities,
c) the extent to which the information is readily accessible to the public,
d) whether the disclosure forms part of a series of similar disclosures by the business,
e) whether there is a history of previous collusion in the specific market or sector among the same businesses, and
f) whether the relevant market to which the disclosure pertains is concentrated and oligopolistic.
Disclosure of information is not considered to restrict effective competition if it is directed exclusively at the end users of the product or service."

[47] Hellenic Competition Commission Guidelines on the application of Article 1A l. 3959/2011, 2023

unilateral invitation of another business to participate in a collusion aimed at restricting competition. In cases of purely unilateral communication, the recipient of the invitation typically does not violate competition law. The rejection of a collusion invitation by the recipient does not alter the fact that the inviting business has initiated a process that could lead to collusion or a concerted practice. The inviting business intends to participate in a cartel and has not only taken steps in that direction but has already undertaken actions toward completing the infringement.[48]

3.1.1.3. Article 44 par. 3 l. 3959/2011

Another provision of l. 3959/2011 that is applicable in public procurement procedures is par. 3 of art. 44 thereof, which was amended by way of l. 4635/2019 as follows:

"*Paragraph 3 of Article 44 of Law 3959/2011 is replaced with the following:*
3a. If the following conditions apply: a) inclusion in the leniency program under paragraph 8 of Article 25, with full exemption from the fine or with the imposition of a reduced fine and full payment of it, or b) inclusion in the settlement procedure of Article 25a and full payment of the fine, the criminal liability for the offense in the first and third paragraphs of paragraph 1 and for related offenses shall be extinguished.
With the provision of a payment installment plan for the fine, criminal prosecution is suspended for the duration of the arrangement, provided that the debtor complies with the terms. During the suspension, the statute of limitations for offenses is also suspended, without the time limits of paragraph 2(a) of Article 113 of the Penal Code applying. Inclusion in the program under Article 25(8), resulting in a reduced fine, if not fully paid, constitutes a mitigating circumstance for the acts under paragraphs 1 and 2, and a reduced penalty is imposed in accordance with Article 83 of the Penal Code.

3b. If the following conditions apply: a) inclusion in the leniency program under paragraph 8 of Article 25, with full exemption from the fine or with the imposition of a reduced fine and full payment of it, or b) inclusion in the settlement procedure of Article 25a and full payment of the fine, the company and any other responsible persons under paragraph 2(c) of Article 25 are fully exempt from all administrative penalties. In these cases, the finding of the relevant violation does not provide grounds for excluding the company from public procurement or concession contracts, except in the case of

[48] Hellenic Competition Commission Guidelines on the application of Article 1A l. 3959/2011, 2023

repeated violations of Article 1 or Article 101 of the Treaty on the Functioning of the European Union. Repeated violation means the issuance of a related finding decision within six (6) years from the issuance of another finding decision. This provision also applies in cases of payment installment plans and as long as the arrangement is active and the debtor complies with its terms. This provision also applies to cases where a finding decision for a violation of Article 1 or Article 101 of the Treaty on the Functioning of the European Union has been issued, provided that less than three years have passed since its issuance."

Under Article 44, paragraph 3 l. 3959/2011, by participating in the settlement procedure of Article 29A l. 3959/2011 and fully paying the fine, or in the leniency program of Articles 29B l. 3959/201, with complete exemption from the fine or the imposition of a reduced fine and full payment, the company is fully exempted from all administrative penalties, except those provided in Article 25 and in paragraphs 1, 2, and 5 of Article 25B l. 3959/2011. In these cases, the confirmation of the relevant violation does not constitute a reason to exclude the company from public procurement tenders or concession contracts, except in cases of repeated violations of Article 1 of this law or Article 101 TFEU. A repeated violation is considered when a relevant decision is issued within six (6) years from the previous decision.

Exemption from all administrative penalties also applies in cases of installment payment arrangements for the fine, as long as the arrangement is complied with and the debtor complies with the terms of the settlement.

Furthermore, under Article 44, paragraph 3A l. 3959/2011, by participating in the procedure of Article 29A and fully paying the fine, or in the leniency program of Articles 29B onwards, with full exemption from the fine or the imposition of a reduced fine and full payment, the criminal liability is eliminated for former and current directors, administrative officers, other personnel, and any other responsible individuals referred to in paragraph 5 of Article 25B for offenses under the first and third sentences of paragraph 1 and paragraph 2 of Article 44, as well as for related offenses.

Lastly, former and current directors, administrative officers, and personnel, as well as any other responsible individuals referred to in paragraph 5 of Article 25B, are fully exempted from all types of administrative penalties and penalties imposed in non-criminal judicial proceedings.

A. The leniency program

The leniency program can only be applied to horizontal agreements (cartels) as defined in Article 1 l. 3959/2011 and/or Article 101 TFEU. Its primary aim is to encourage the disclosure of collusions by the participants themselves and assist the HCC in detecting and putting an end to cartels, as well as punishing those involved.

The leniency program sets out the framework for lenient treatment of companies and individuals that cooperate with the HCC to uncover agreements and practices within its scope. Successful inclusion therein may lead to either full immunity from fines or a reduction of fines. A cornerstone of the program is the obligation of the applicant to maintain continuous, sincere, and full cooperation with the HCC, from the submission of the application until the conclusion of the administrative process. This includes the requirement to keep the submission of the leniency application confidential from any third party.

The program offers significant incentives for participants of cartels to come forward, helping the competition authority to uncover anti-competitive practices that might otherwise remain hidden. Inclusion to the leniency program may result in complete exemption from fines, for companies, business associations, and individuals that cooperate with the HCC in uncovering cartel practices, especially secret horizontal collusions prohibited under Article 1 l. 3959/2011 and Article 1 TFEU.[49]

Eligible applicants include companies, business associations, and individuals involved in cartel arrangements. Applicants may receive full or partial exemption from fines if their cooperation is deemed essential for initiating an investigation or proving a violation, provided certain conditions are met. For individuals, participation in the program and complete fine exemption nullifies criminal liability, while reduced fines are considered a mitigating factor under Article 83 of the Penal Code. The provided evidence must enhance the HCC's ability to substantiate critical facts related to the violation.

The key criteria of whether the exemption shall be full or partial are the timing of the application, the extent to which it enables the HCC to prove the violation, the

[49] Hellenic Competition Commission Decision 791/2022

seriousness and completeness of the information provided, and the supplementary evidential value compared to existing evidence held by the HCC.

The leniency types are the following[50]:

- Full Exemption Type 1A: Granted to the first applicant submitting evidence enabling the HCC to conduct targeted inspections of a suspected cartel when the HCC lacks sufficient prior evidence for investigative action.
- Full Exemption Type 1B: Granted to the first applicant providing evidence substantiating the violation of Article 1 of Law 3959/2011 or Article 101 TFEU when the HCC has some but insufficient evidence to prove the violation.
- Fine Reduction Type 2: Available to companies and individuals who provide significant evidence that enhances the HCC's ability to address the suspected cartel.

Applications must include full identification details and a detailed description of the suspected cartel, including its objectives, affected products or services, geographical scope, duration, and background. Additionally, applicants must submit specific evidence under their control or available to them proving the cartel's existence and operation.

B. <u>The settlement procedure</u>

The settlement procedure was first introduced into Greek law through l. 3959/2011 under Article 25A (now Article 29A), which led to the issuance of Decision No. 628/2016 of the HCC, later supplemented and codified by Decision 704/2020.

The purpose of the settlement procedure is to simplify and expedite the administrative process for issuing decisions by the HCC concerning infringements of Article 1 l. 3959/2011 and/or Article 101 TFEU. Additionally, it aims to reduce the number of appeals filed against HCC decisions before the Administrative Court of Appeals[51], thus enabling the HCC to address more cases with the same resources and less administrative burden, thereby increasing the deterrent effect of its actions and fostering public interest in the effective and timely punishment of offenders. Within this framework, businesses that contribute to the efficiency of the administrative process before the HCC[52] may be

[50] Hellenic Competition Commission Decision 791/2022
[51] *T-456/10, Timab vs Commisison par. 60*
[52] *T-456/10, Timab vs Commisison par. 65*

subject to reduced fines under specific conditions. According to EU case law, a reduction in the fine due to cooperation during the administrative procedure is justified if the conduct of the undertaking facilitated the Commission's identification of the infringement and, possibly, its termination[53]. A reduction in the fine is also warranted if the undertaking assists the Commission in establishing the factual basis of the infringement more easily, especially through the company's acknowledgment of its participation in the infringement or by not disputing the factual claims on which the infringement is based.[54] This contribution involves the sincere, irrevocable, and unconditional admission by the involved business of its participation in the infringement and its associated liability, as well as its waiver of certain procedural rights, justifying a reduction in the fine imposed by the HCC. The reduction of the fine is justified in light of the cooperation of the involved undertaking in the above sense. The HCC, as an independent administrative authority with the exclusive competence to enforce competition law by issuing enforceable decisions subject to judicial review, does not negotiate with the controlled undertakings regarding the existence of the infringement and the imposition of the appropriate sanction.[55]

Specifically, within the settlement procedure framework, businesses under investigation for participation in horizontal collusion, against which evidence has been gathered establishing an infringement of Article 1 l. 3959/2011 and/or Article 101 TFEU, unconditionally acknowledge their participation in the infringement and their related liability under certain conditions, they waive their right to full access to the administrative file of the case and their right to an oral hearing during the proceedings before the HCC. In such cases, the HCC's decision confirming the infringement, pursuant to Article 29A, last paragraph l. 3959/2011, in conjunction with Article 25 paragraphs 1, 2, and 3 of the same law, is issued through a simplified procedure. This occurs after considering the legal and factual arguments and the positions of the involved businesses as submitted within the framework of the settlement procedure. The same decision stipulates the imposition of a fine on the involved businesses, in

[53] See ECJ Case C-297/98 P, SCA Holding v. Commission, para. 36, ECJ Case C-328/05 P, SGL Carbon v. Commission, para. 83, and CFI Case 311/94, BPB de Eendracht v. Commission, para. 325

[54] See ECJ Case C-298/98 P, Finnboard v. Commission, paras. 56, 59, and 60, and Case C-57/02 P, Acerinox v. Commission, para. 88), HCC Decision 526/2011, para. 2, and HCC Notice - Guidelines on the Calculation of Fines Imposed Under Article 9 of Law 703/1977, para. 15

[55] European Commission's Notice on the conduct of settlement procedures for the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases (OJ 2008 C 167/1), para. 2.

accordance with Article 25 paragraphs 1 to 3 l 3959/2011 and the HCC's Guidelines on the Calculation of Fines, reduced by 15% due to the case's submission to the settlement procedure.

Further analysis on the implications of this article under a public procurement perspective follows under section 3.2.3 below.

3.1.2. EU legislation

Article 101 TFEU includes a similar provision to Article 1 l. 3959/2011. The sole additional requirement for the parallel application of the EU provision, in relation to the national law provision, is the potential for a significant effect on intra-EU trade. Article 101 is the primary legal provision addressing bid rigging at the European level. Paragraph 1 thereof prohibits agreements between undertakings that have as their object or effect the prevention, restriction, or distortion of competition within the internal market. Bid rigging clearly falls within this scope, as it constitutes an agreement that restricts competition by rigging the outcome of a tender process. Notably, the prohibition applies to all forms of collusion, whether horizontal (between competitors) or vertical (between different levels of the supply chain).

Article 101 TFEU is directly applicable in all member states, including Greece, and takes precedence over national competition laws when cross-border issues arise. The European Commission has the authority to investigate and impose significant fines on companies found to be engaging in bid rigging. Additionally, private parties harmed by anti-competitive practices can seek damages through national courts based on EU competition law principles.

According to established case law, for an agreement to affect trade between Member States, it must be sufficiently probable, based on a set of legal and factual elements, that it can exert a direct or indirect, actual or potential, influence on trade flows between Member States[56] in a significant way[57]. Thus, intra-EU trade may be affected in cases where the relevant market is the national market or a part thereof[58], and in any case a

[56] *ECJ Cases C-209-215/78 and 218/78, Van Landewyck, para. 170, C-219/95 P, Ferriere Nord Spa, para. 20, HCC Decision 370/V/2007, and the Guidelines on the Concept of Effect on Trade, paras. 9-12.*
[57] *HCC Decision 277/IV/2005, with reference to ECJ Decisions C-8/72, Vereniging van Cementhandelaren, para. 29, and C-42/84, Remia et al., para. 22, and CFI Decision T-29/92, SPO et al., para. 299. See also the Guidelines on the effect on trade concept, paras. 33 and 74.*
[58] *Guidelines on the effect on trade concept, para. 22.*

substantial part of the internal market[59]. In the context of Article 101 TFEU, the substantial nature of the effect is assessed particularly in relation to the position and significance of the parties in the market for the relevant products, the nature of the agreement or practice, and the nature of the products/services involved. Accordingly, when the very nature of the products facilitates cross-border transactions or makes them particularly important for businesses looking to establish or expand their activities in other Member States, the fulfillment of this criterion is easier to establish than in cases where the demand for products from suppliers in other Member States is more limited due to the nature of the products, or where these products are of less interest in terms of cross-border establishment or expansion of economic activity for businesses operating through similar establishments. For example, agreements that cover more than one Member State or agreements concerning products that are easily imported/exported may be deemed, by their nature, to affect intra-EU trade.

3.2. Public Procurement Legislation

In 2014, the European Union deemed it necessary to modernize the at the time existing Directives on public procurement to enhance the efficiency of public resources. Consequently, it issued a set of Directives: the primary Directive 2014/24/EU of the European Parliament and of the Council on public procurement (the "*Directive*"), and Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport, and postal services sectors. The Directive provides the framework for ensuring fair competition in public tenders across the EU, mandating that procurement procedures must be designed to prevent collusion and abuse and emphasizing transparency, non-discrimination, and competition in public contracts. Public authorities are required to take proactive steps to ensure competitive neutrality and avoid practices that may lead to collusion, such as overly tailored specifications that favour certain bidders.

The significant role of public contracts in the market for goods and services underscores the need to protect free competition. In the explanatory memorandum of Directive 2014/24/EU, the importance of competition is emphasized in various sections, such as in recital 92, which states that "*the chosen award criteria should not give the awarding*

[59] *Guidelines on the effect on trade concept, para. 78 ff.*

authority unrestricted freedom of choice and should ensure the possibility of genuine and fair competition."

In this context, competition intersects with public procurement law in Title II ("Rules on Public Contracts"), Section 3 ("Selection of Participants and Award of Contracts") of the Directive. Specifically, Section I outlines the qualitative selection criteria through which the awarding authority will assess and potentially exclude a bidder. These criteria relate to the professional suitability of the company, its economic and financial standing, its technical and professional capacity, and whether there are grounds for exclusion. Article 57 lists the reasons why a company may be excluded from a public procurement process. Similar provisions apply in Directive 2014/25/EU for sectors such as water, transport, and postal services, as well as in Directive 2014/23/EU for the award of concession contracts.

In 2016, the Greek legislator introduced l. 4412/2016 transposing the forementioned Directives and covering all types of public contracts (works, services, supplies), given that Directives do not automatically apply to Greece.

3.2.1. Distortion of competition as a ground for exclusion

Article 73 of l. 4412/2016 (transposing Article 57 of the Directive), distinguishes between mandatory and discretionary grounds for exclusion. As evident from the wording of this distinction, if a bidder falls under any of the mandatory exclusion grounds, the awarding authority must automatically exclude such bidder from the tender procedure. On the contrary, for the discretionary exclusion grounds, it is up to the awarding authority's discretion whether to include them or not as mandatory exclusion grounds, in the tender notice. Interestingly, distortion of competition falls under the discretionary exclusion grounds. The relevant provision reads as follows:

" *Contracting authorities may exclude any economic operator from participating in a public contract award procedure if they are in any of the following situations:*
(a) if the awarding authority can demonstrate, with appropriate evidence, a breach of applicable obligations as outlined in Article 18(2), concerning the principles applied in public procurement procedures;
(b) if the economic operator is bankrupt, under special liquidation, under compulsory management by a liquidator or court, involved in a bankruptcy arrangement, has

suspended its business activities, is under reorganization and fails to comply with its terms, or is in any similar state as per national legal provisions;
(c) if, notwithstanding Article 44(3b) of Law 3959/2011 (A' 93) concerning criminal sanctions and other administrative consequences, the awarding authority has sufficiently plausible indications that the economic operator has entered into agreements with other operators aimed at distorting competition;
(d) if a conflict of interest situation, as defined in Article 24 on conflicts of interest, cannot be effectively resolved with other, less intrusive measures;
(e) if a situation of competitive distortion due to the prior involvement of the economic operators in preparing the contract award procedure, as specified in Article 48 concerning previous involvement of candidates or tenderers, cannot be mitigated through less restrictive means;
(f) if the economic operator has shown serious or repeated deficiencies in the performance of a material requirement in a previous public contract, contract with a awarding authority, or concession contract that led to early termination, damages, or other similar penalties;
(g) if the economic operator has been found guilty of intentionally making serious fraudulent statements when providing required information to verify the absence of exclusion grounds or to meet selection criteria, has concealed such information, or is unable to provide the documents required under Article 79 concerning the European Single Procurement Document;
(h) if the economic operator attempts to unduly influence the awarding authority's decision-making process, to obtain confidential information that may provide an unfair advantage in the procurement process, or to supply misleading information that may materially influence decisions on exclusion, selection, or award;
(i) if the awarding authority can demonstrate, with appropriate evidence, that the economic operator has committed a serious professional misconduct that raises doubts about its integrity."

Examining the criteria for exclusion grounds to be discretionary, it becomes clear that they mainly relate to issues of integrity, insolvency, and reliability of the economic operator.

It is noted that, if the awarding authority chooses to incorporate one of these discretionary grounds in the tender notice as a condition leading to exclusion, it is then

obliged to exclude the economic operator to whom the particular reason applies.[60] Consequently, the awarding authority has, initially, the option to assess, at its discretion, whether it is relevant that the potential contractor has committed any of the enumerated offenses or falls within any of the described situations. That said, if based on its assessment it includes certain discretionary exclusion grounds in the tender documents, they become mandatory for that specific tender.

In line with the obligations to comply with the principle of equal treatment and the principle of transparency, the awarding authority must clearly specify the exclusion grounds in the tender notice, rather than leaving them open to interpretation under national law and practice. This ensures that foreign economic operators, interested in submitting a bid, are not disadvantaged by lacking the interpretive tools of the national legal framework.

According to subparagraph (c), if the awarding authority has sufficiently reasonable indications leading to the conclusion that the economic operator has entered into agreements with other economic operators with the aim of distorting competition, this constitutes a discretionary ground for exclusion.

The wording of the provision refers to "*sufficiently plausible indications*" leading to the conclusion that an agreement with other economic operators has been made. This means that the law does not require a prior conviction or a judicial or administrative decision with binding effect. The " *sufficiently plausible indications*" do not need to amount to indisputable proof of collusion. However, it seems that case law accepts that, given the serious legal consequences of exclusion and the obligation of the awarding authority to justify its actions based on the principle of proportionality, the indications must be serious, and ideally, there should be a final decision from a relevant authority (competition or judicial). This point is also emphasized in Case C-124/17 Vossloh, which introduces a stricter evidentiary framework regarding what is required to justify exclusion.[61] Specifically, the Court followed the opinion of the Advocate General, who interpreted the provision in light of the presumption of innocence. In paragraph 83 of his opinion, he stated that anti-competitive behavior "*may be regarded as proved*

[60] *Unified Independent Public Procurement Authority, Guideline 20 (Decision 42/30-5-2017) - Exclusion Grounds for Participation in Public Contract Procedures*
[61] *ECJ C-124/17 - Vossloh Laeis GmbH v. Stadtwerke München GmbH*

(account being taken of the presumption of innocence) only by way of decision of a court or administrative authority".

The question that naturally arises is how the awarding authority becomes aware of these facts so that they may be considered sufficiently reasonable indications. Primarily, these facts may be recorded in other administrative acts, especially by the relevant competition authorities, which identify violations of competition law and impose corresponding sanctions on the economic operators.[62] This is, indeed, the most common situation encountered in practice so far, where the competition authority, through its decisions, establishes collusion among economic operators aimed at manipulating public tenders and enforces the sanctions prescribed by law.

In regard to the burden of proof, the general procedural principle applies, which places the burden on the party asserting the existence of certain facts—in this case, the awarding authority. In the event of a conviction by a competition authority or a judicial decision, this burden is self-evident.

Following the above, the question that arises is whether it is certain that an economic operator will be excluded from a tender procedure if it has previously distorted competition. The answer is that public procurement legislation provides for certain cases where such exclusion may be remediated, and therefore, under specific circumstances, even an economic operator who has distorted competition may not be excluded from tenders.

3.2.2. The possibility of invoking self-cleaning measures

Article 73 par. 7 l. 4412/2016[63] (transposing Article 57(6) of the Directive) introduces a new mechanism, one of its most significant innovations: the possibility for an

[62] *Nikolakis, N., The exclusion of economic operators from public tenders for breaches of competition law, under the scope of directives 2014/24 and 2014/25, Association of Administrative Judges, 2021*

[63] *"Any economic operator falling within one of the situations listed in paragraphs 1 and 4, except for point (b) of paragraph 4, may submit evidence demonstrating that the measures taken are sufficient to establish its reliability, despite the existence of a relevant exclusion ground. If the evidence is deemed sufficient, the operator will not be excluded from the procurement process.*

To this end, the economic operator must demonstrate that it has paid or committed to pay compensation for damages caused by the criminal offense or misconduct, has clarified the facts and circumstances comprehensively through active cooperation with investigative authorities, and has taken specific technical, organizational, and personnel measures to prevent further offenses or misconduct.

The measures taken by economic operators are assessed based on the severity and specific circumstances of the criminal offense or misconduct. If the measures are deemed inadequate, the operator is informed of the reasoning behind this decision.

An economic operator that has been definitively excluded from participating in procurement or concession award procedures by a final decision cannot make use of this provision during the exclusion period specified in the decision in the Member State where the decision is in effect."

economic operator to invoke self-cleaning measures. This allows an economic operator to be deemed capable of executing public contracts, even if the grounds for exclusion under paragraphs 1 and 4 apply to them.

Self-cleaning measures essentially serve as a tool for the economic operator to restore its credibility after an offence, enabling them to demonstrate they are now trustworthy.[64] Recital 102 of the preamble of the Directive explains that economic operators should be allowed to adopt compliance measures with the aim of remedying the consequences of any criminal offenses or misconduct and effectively preventing further wrongdoing.

The rationale behind this provision serves two objectives: firstly, promoting competition and secondly, ensuring transparency and integrity among economic operators participating in public procurement processes. This involves the voluntary adoption of internal control and monitoring systems ("compliance systems" and "monitoring systems") to ensure transparency and integrity in the operation of economic operators.

It should be noted, however, that both the Directive and the corresponding national law in paragraph 7 specify one situation in which an economic operator cannot invoke self-cleaning measures: when the economic operator has been excluded by a final decision from participating in procurement or concession award procedures. As long as the exclusion remains in effect under that decision, the economic operator cannot invoke self-cleaning as a remedy for falling within an exclusion ground.

The types of self-cleaning measures that an economic operator must demonstrate, according to the provision, appear to fall into three categories:

a. Compensation for damages: The economic operator must prove that they have paid or committed to pay compensation for any damages caused by the criminal offense or misconduct.

b. Active cooperation with investigative authorities: The economic operator must show that they have thoroughly clarified the facts and circumstances through active cooperation with investigative authorities. Active cooperation can include participation in a leniency program or in a settlement procedure.

[64] *Unified Independent Public Procurement Authority, Guideline 20 (Decision 42/30-5-2017) - Exclusion Grounds for Participation in Public Contract Procedures*

c. Adoption of compliance systems[65]: This entails the voluntary implementation of internal control systems to ensure the transparency and integrity of the company's operations. Compliance measures may consist of actions particularly related to the personnel and organization of a business. These may include[66], but are not limited to, the following:

- Severing all ties with individuals or organizations involved in illegal conduct,
- Implementing appropriate personnel reorganization measures,
- Establishing reporting and control systems,
- Creating an internal audit structure to monitor compliance,
- Approving internal rules on liability and compensation,
- Adopting a Code of Business Ethics,
- Adopting a binding competition policy and a Compliance Code in respect to competition law,
- Conducting training seminars for staff by external consultants.

These measures aim to ensure that the economic operator complies with the law and fosters a culture of integrity and accountability, reducing the risk of future violations.

Self-cleaning measures involve the economic operator demonstrating that it has implemented specific technical, organizational, and personnel-related measures to prevent further criminal offenses or misconduct.[67] As derived systematically and teleologically from the provision, the proof of these measures is cumulative, even though there is no explicit conjunction "and" between the first and second types of measures. These are considered the minimum requirements for restoring the operator's credibility, with the possibility for national legislators to demand additional evidence.

According to the preamble of the Directive[68], measures related to personnel and organization could include terminating all connections with individuals or organizations involved in the illegal conduct, taking appropriate steps to reorganize staff, implementing reporting and control systems, creating an internal audit structure to monitor compliance, and adopting internal liability and compensation rules.

[65] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, Athens, 2022.*
[66] Unified Independent Public Procurement Authority, Guideline 20 (Decision 42/30-5-2017) - Exclusion Grounds for Participation in Public Contract Procedures
[67] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, Preamble par. 102.*
[68] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, Preamble par. 102.*

Furthermore, it is reiterated that when such measures provide sufficient guarantees, the economic operator should no longer be excluded for those reasons alone. In other words, if the measures are deemed adequate, the economic operator regains its credibility and is not excluded from the tender.

Economic operators must have the opportunity to request that the compliance measures they have implemented be reviewed for potential participation in the procurement process.

The awarding authority, in cases where one or more exclusion grounds apply to an economic operator, is required to assess whether the economic operator has implemented self-cleaning measures before excluding them from the tender.[69] It is crucial to note that the self-cleaning measures taken by the economic operator must be evaluated in relation to the seriousness and specific circumstances of the criminal offense or misconduct. If these measures are deemed sufficient, the awarding authority is obligated to take them into account and can no longer exclude the economic operator. Conversely, if the measures are considered inadequate, the awarding authority must exclude the economic operator and provide a reasoned explanation for its decision.

3.2.3. The leniency program and the settlement procedure

Following amendment of art. 44 l. 3959/2011, Article 73 l. 4412/2016 has been amended accordingly, so as to make explicit reference to the leniency program. With this addition, regarding whether an economic operator, who is subject to a leniency program or a settlement procedure and meets the conditions, will benefit from the favorable exemption from exclusion, previous interpretative ambiguities have been resolved. According to the new paragraph 3b, once the relevant violation is identified and the economic operator enters into a leniency program or a settlement procedure and fully pays the respective fine (if applicable), no grounds for exclusion from public procurement tenders are established.

That said, an exception is introduced for repeated violations of Article 1 l. 3959/2011 or 101 TFEU. A repeated violation is considered when a decision confirming such a

[69] *Article 73 par. 9 l. 4412/2016 "The awarding authority's decision on the adequacy or inadequacy of the corrective measures as set out in paragraph 7 is issued following the agreement of the committee in paragraph 9, which must deliver its opinion within a period of forty (40) days from receiving the awarding authority's draft decision along with all relevant documents. If this period lapses without action, the awarding authority may proceed to issue a decision on the adequacy or inadequacy of the corrective measures per paragraph 7, even without the committee's agreement as outlined in paragraph 9."*

violation is issued within six years of a previous decision. Apart from this exception, the exemption or non-exemption of economic operators from the consequence of exclusion from public tenders is now clarified.

According to the explanatory memorandum of l. 3959/2011, this clarification was necessary to provide sufficient incentives for operators to apply for leniency or to participate in the settlement procedure. Additionally, the memorandum emphasizes that the amendments were necessary "*to ensure the public interest through the timely completion of tender procedures and the smooth operation of the construction sector. [...] It was particularly important to resolve pending issues arising from the successful scrutiny conducted by the Competition Commission on construction companies, which led to the issuance of decisions.*"

This clarification ensures that companies participating in leniency or settlement procedures are provided with a clear path to avoid exclusion, ensuring the continuity and fairness of public procurement processes.

3.2.4. Practical issues arising in respect to the submission of ESPD

Given the above analysis, economic operators that (a) are subject to an investigation by the HCC, (b) have participated in the leniency program or the settlement procedure or (c) have been found guilty of bid rigging by way of a decision by the HCC face the dilemma how will they manage such information during the submission of a bid and, most particularly, how will they fill in the European Single Procurement Document ("*ESPD*").

In order for the awarding authority to be in place to ascertain whether an economic operator falls under an exclusion ground and whether it fulfills the financial and technical criteria of the tender notice, the economic operators submitting a bid must fill in and submit to the awarding authority the ESPD. The ESPD is a declaration that serves as preliminary proof of the suitability, financial status, and technical capacity of an economic operator in all public procurement procedures that exceed a financial threshold stated in l. 4412/2016. The ESPD allows the awarding authority to have complete knowledge of all necessary details to determine the presence or absence of exclusion grounds at the appropriate stage of the tender process.[70] This mechanism

[70] *Article 57(1), (4), and (6) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014*

ensures transparency and equal treatment for all bidders, while providing each candidate an equal opportunity to present any elements they believe might counter grounds for exclusion.[71]

The ESPD allows economic operators participating in a public tender to confirm that they do not fall under any of the exclusion grounds and that they meet the relevant selection criteria, without submitting a full set of pertinent documents to the awarding authority. As a result, the administrative burden of the latter is alleviated, since only the preferred bidder is required to submit a full set of certificates proving the information stated in the ESPD.

The ESPD is drafted by the economic operator based on the standardized form in Annex 2 of the Commission's Implementing Regulation (EU) 2016/7 of January 5, 2016, which establishes the standard format for the ESPD and is provided exclusively in electronic format. The economic operator may clarify the statements and information provided in the ESPD with an accompanying declaration, submitted together therewith.

Furthermore, Article 104 of Law 4412/2016, as replaced by Article 44 of Law 4782/2021, specifies that "1. *The right to participate, along with the terms and conditions of participation as defined in the contract documents, is assessed*
a) at the time of submitting the expression of interest or the bid, with the submission of the ESPD, b) upon submission of the supporting documents outlined in Article 80, and c) during the review of the declaration in accordance with the provisions of paragraph 3(c) of Article 105 regarding contract award and conclusion.".

As per applicable case law[72], an inaccurate statement by a bidder regarding the presence (or absence) of exclusion grounds, as included in the ESPD submitted with their bid, is regarded by the awarding authority as an independent reason for exclusion and therefore the awarding authority is obligated to exclude a bidder whose ESPD statement is objectively found to be false. This assessment aligns with the provisions set forth in Articles 73(4)(g), 79(1) and (5), and 104(1) l. 4412/2016, as well as the implementing Regulation 2016/7 of the European Commission concerning the ESPD. Consequently, upon confirming such a discrepancy, the awarding authority is obligated to exclude the bidder from the tender if their ESPD is found to be factually inaccurate. This exclusion

[71] *Remedial measures or the end of an exclusion period, in line with the CJEU's decision of October 3, 2019, Delta, C-267/18, EU:C:2019:826, par. 36.*
[72] *Decisions 753 and 754/2020, and 2514, 2646, 2647/2022 of the Council of State*

ground materializes at the time of the ESPD submission, as it is when the bidder's conduct, constituting an independent exclusion ground due to a false declaration, becomes apparent, and cannot subsequently be remedied by additional documentation or explanations regarding the reasons behind such conduct.

Subsequent evidence submitted, even if capable of negating the existence of the exclusion ground under Article 73(4)(c) l. 4412/2016, does not eliminate the exclusion ground that arises due to an inaccurate declaration and concealment (through the ESPD) of information relevant to the aforementioned reason, which is essential for the awarding authority or entity to make an informed decision at the critical time of the ESPD submission.

This approach ensures the principles of transparency and equal treatment among bidders, granting all candidates the same opportunity to present the awarding authority with all relevant information (such as corrective measures, end of exclusion periods, etc.) that may counter the grounds for exclusion.[73] This ground for exclusion cannot subsequently be remedied by additional information or clarifications concerning the reasons that led to the submission of such a statement. Even if later submitted information could potentially negate the exclusion ground regarding agreements aiming to distort competition, they do not, however, negate the exclusion ground based on the inaccurate declaration and omission (within the ESPD) of the information required for the awarding authority to make an informed judgment.

When it comes to an economic operator that has participated in the leniency program or the settlement procedure or that has been found guilty of bid rigging by way of a decision by the HCC, the question on how to fill in the ESPD is quite simple: The economic operator must answer the question of whether it has concluded agreements to distort competition positively, and then elaborate on the self-cleaning measures it has engaged, in order to avoid exclusion from the tender. However, if the HCC has merely initiated an investigation (especially an *ex officio* one), and no decision has been issued, no settlement procedure or leniency program have been initiated, the following question arises: How should the economic operator respond to the respective question of the ESPD? Does the mere fact of an ongoing investigation by the HCC oblige the economic

[73] E*CJ Judgment of 3.10.2019, Delta et al., C-267/18, para. 36*

operator under investigation to respond positively in the question of the ESPD regarding participation in agreements that distort competition?

In this respect AEPP (now Single Public Procurement Authority), has ruled[74] in 2020 that a bidder's offer is judged exclusively based on what is stated in the ESPD, both regarding exclusion grounds and remedial measures. Specifically, only a relevant declaration in the ESPD submitted at the appropriate time to the awarding authority can legally initiate the process of assessing the adequacy of remedial measures taken by the bidder. AEPP further determined that the bidder's attempt to replace the ESPD with a voluntarily submitted declaration was inadmissible, as it was not legally equivalent to the ESPD (per Article 79(9) l. 4412/2016) and thus could not nullify the content declared therein, only clarify it. It also held that the mere fact that the HCC has initiated an investigation against a certain economic operator establishes the ground for exclusion referring to the participation in anti-competitive agreements. Consequently, if these facts are not declared in the bidder's ESPD, the latter is materially incomplete. As a result, in case an economic operator fails to disclose these critical facts in its ESPD, it is subject to exclusion under Article 73(4)(g) of l. 4412/2016, meaning the bidder will be excluded independently for concealing material facts supporting exclusion grounds.

Decision 93/2020 of the Suspension Committee of the Council of State has also ruled that the obligation for the bidder to declare in the ESPD any agreements distorting competition pertains not only to the conclusion of such agreements but also to the fact of an investigation by the competent Competition Commission regarding those agreements as factual events. This obligation is not waived based on any assessments by the bidder as to whether the ongoing investigation might ultimately exonerate them, whether the declared factual circumstances legally constitute reasonable grounds for exclusion, or whether any grounds exist for lifting the exclusion. Furthermore, this obligation is unrelated to any admission by the bidder or their participation (or lack thereof) in a dispute settlement procedure before the Competition Commission as outlined in Article 29A l. 3959/2011. Additionally, it held that the fact that a decision by the HCC does not include any findings regarding the involvement of a specific economic operator, nor does it foresee the imposition of sanctions thereon, does not eliminate the obligation of this economic operator, who was aware of the ongoing

[74] *AEPP Decision 1160/2020.*

proceedings concerning them, to declare the factual event that a case regarding their involvement in an agreement to distort competition is pending before the HCC.

As per the aforementioned decision, the ESPD question regarding agreements to distort competition requires the bidder to include all relevant information necessary for the awarding authority to determine if there are reasonable grounds to suspect the specific reason for exclusion. This includes any ongoing investigation by the Competition Commission concerning the bidder. Furthermore, a positive response to the question and subsequent disclosure of all relevant circumstances does not constitute an admission of guilt by the bidder, but rather fulfills a legal obligation within the procurement process. It does not violate the presumption of innocence, as the economic operator may reiterate their denial of any allegations before the awarding authority.

That said, in 2021, Article 79, par. 9 l. 4412/2016 has been introduced by way of l. 4782/2021. This provision explicitly allows bidders to submit a clarifying solemn declaration alongside their ESPD. Before l. 4782/2021, no such possibility was included in l. 4412/2016, and therefore any clarificatory declarations to the ESPD submitted by bidders were not based on the provisions of said law. According to the clear wording of the provision, this declaration may only serve to expand and clarify points that are already substantially stated in the ESPD; only in such cases may it be taken into account by contracting authorities. If it contradicts the statements made in the ESPD, it is disregarded.

Consequently, it could be argued that in case an economic operator is subject to an investigation by the HCC, yet this is at an early stage and no decision has been issued, such economic operator could respond negatively in the question of the ESPD whether it has distorted competition and submit An accompanying solemn declaration stating the facts in respect to the on-going investigation.

The question in regard to whether the economic operator has participated in agreements that may distort competition, as included in the ESPD, requires the economic operator to disclose only the existence or non-existence of agreements aimed at distorting competition, not the conduct of an investigation by the HCC. Additionally, an interpretative approach that would require the bidder to answer the ESPD question affirmatively simply due to an ongoing investigation by the Competition Commission

would contradict the presumption of innocence and violate the principle of proportionality.

This was also the minority's position in decision 1954/2023 of the Counsil of State, i.e. that in such a case, the exclusion ground under Article 74(3)(g) l. 4412/2016 is not established. This exclusion requires, by the letter of the provision, a "concealment" of crucial information by the bidder from the awarding authority. In this instance, all necessary information that the border must disclose, not only are not concealed but they are also fully disclosed to the awarding authority via the bidder's solemn declaration accompanying the ESPD. Consequently, the awarding authority is objectively in place to assess the overall reliability of its potential contractor.[75] According to ECJ case law, the ultimate purpose of the Directive's regulatory framework on the exclusion grounds for economic operators is precisely to allow the awarding authority to assess the reliability of bidders, provided that no "horizontal" exclusion is in effect against them. It would constitute excessive formalism, contrary to the principle of proportionality, to interpret the requirement as obliging the awarding authority to focus solely on the ESPD and the declarations within it while disregarding its broader context and the solemn declarations accompanying it.

4. Detection of Bid Rigging

Despite the robust legal framework, detecting and proving bid rigging in public procurement remains a significant challenge. Collusive practices are often well-hidden, and the evidence required to demonstrate an agreement between competitors is difficult to obtain. Public authorities may lack the expertise and resources to thoroughly investigate suspicious bidding patterns, particularly in smaller or more rural areas.

Moreover, the digitalization of procurement processes, while providing greater transparency, can also enable more sophisticated forms of collusion. Competitors may use encrypted communication platforms or other digital tools to coordinate their bids without leaving clear evidence of collusion. Therefore, competition authorities must continually update their investigative techniques to address these new forms of bid rigging.

[75] *Counsil of State Decision 1954/2023.*

The lack of whistleblowers willing to report bid rigging is another obstacle. Cultural and institutional factors may discourage individuals from coming forward with evidence of collusion, particularly in countries where whistleblower protections are not well-developed. Greece, in line with the EU's Whistleblower Protection Directive (2019/1937), has begun to strengthen protections for whistleblowers, but further efforts are needed to create a culture of reporting misconduct.

Detecting bid rigging in public tenders generally relies on two primary approaches: structural screening, which examines market and tender characteristics, and behavioral screening, which focuses on tenderer conduct.[76] Structural screening primarily serves as a preventive tool and can be applied both before and after the tender. By analyzing market structure and specific tender formats, it is possible to gain insights into which markets or types of procurement might inherently support or facilitate collusion. In forming a set of indicators for structural screening, guidelines from the OECD on combatting tender fraud and factors used to create a composite index of competitive pressure were considered. This index is valuable for assessing a market's susceptibility to anticompetitive behavior. Structural screening functions as a filter, highlighting industries or sectors where tenders may be more vulnerable to competitor agreements.

On the other hand, behavioral screening is performed after the tender, focusing on specific patterns of behavior that may signal collusion among bidders. This screening captures bid patterns or contract developments that may indicate agreements. Indicators suggested by the OECD's "Guidelines for detection of bid-rigging in public procurement" were incorporated for behavioral analysis. In contrast to structural screening, behavioral screening can pinpoint tenders with a higher likelihood of collusion, where certain indicators might initially prompt further investigation and potentially serve as evidence.

The privileged internal information held by awarding authorities, due to their role in initiating and managing tender processes, allows them to receive valuable insights and complaints regarding business participation in these processes. Awarding authorities can significantly aid the HCC in uncovering cartel practices, particularly in bid-rigging schemes, thereby enabling faster and more effective investigations. This cooperation

[76] *Busu, Mihail, and Cristian Busu, Detecting Bid-Rigging in Public Procurement. A Cluster Analysis Approach, Administrative Sciences, 2021.*

directly benefits the Greek economy, consumers, and taxpayers through the support provided by these authorities.

Through a dedicated anonymous information-sharing system, officials or employees of awarding authorities and other bodies can securely and anonymously share crucial details about specific practices or behaviors, such as bid rigging, cover bidding, bid suppression, bid rotation, and market allocation related to public tenders.

Illegal collusive agreements among suppliers in public tenders are challenging to detect, as negotiations between companies are typically conducted in secrecy. However, unusual patterns in behavior and practices during bidding processes may indicate the presence of an illegal arrangement among potential suppliers.

The following factors[77] serve as signs of possible collusion among bidders and warrant further investigation. Nevertheless, these indicators alone should not be considered as proof of an illegal agreement, as there may be legitimate business or market reasons justifying such behavior.

Suspicious bidding patterns often indicate potential collusion among suppliers. For instance, a consistent pattern of winning bidders may emerge over time, such as a fixed sequence of awards among companies or the consistent assignment of specific types or sizes of contracts to the same firms. Sometimes, a company may submit relatively high bids in certain tenders and significantly lower bids in comparable ones, or it may continue to participate in tenders without ever winning. Similarly, a company that rarely participates may nonetheless consistently win the few tenders it enters. These patterns may suggest a lack of genuine competition and require closer scrutiny.

Other concerning behaviors during bid submission can also suggest collusion. For example, regular participants may unexpectedly fail to submit bids, or submitted bids may be suddenly withdrawn, particularly if a new competitor appears. Additionally, bids may arrive simultaneously from different companies, using identical or unusually similar language, sometimes even containing identical errors such as typos or miscalculations. Bids that lack the expected level of detail or supporting documents, or that show last-minute adjustments without clear justification, are also concerning.

[77] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, Athens, 2022.*

Identical modifications across bids from multiple companies may further indicate a coordinated effort, hinting at collusive practices that undermine competitive integrity.

Suspiciously high or inconsistent pricing can indicate collusion among bidders. Examples include unjustifiably high bids or uniformly low discounts across the board, as well as price adjustments unrelated to production costs. In some cases, identical bid prices are submitted by different candidates, or certain bidders alternate between high and low offers for the same contract. Other times, bidders may align their offers to match the price set by the dominant player, or bid prices far exceed those from previous tenders or published price lists without clear justification. When a new supplier offers significantly lower prices than regular participants, it may suggest that existing bidders are colluding. Additionally, if prices drop substantially following a bid by a new entrant, it could indicate a prior lack of genuine competition among existing bidders.

Other suspicious indicators of potential collusion include situations where a preferred bidder declines the award or withdraws their candidacy before the award without a clear reason. Often, the winning bidder may later subcontract parts of the contract to another supplier who had also bid. Communication between candidates prior to the closing of the bidding process is also concerning, especially if one candidate appears to know details of another's bid, shows surprise at being the lowest bidder, or has information that was exclusively shared with another candidate. Additionally, the use of terms like "industry-standard" or "usual" prices or practices by bidders may signal a lack of independent competition.

Further indications include multiple bidders being represented by the same person or entity and cases where subcontracting is awarded to losing bidders under the same contract. Suspicious behavior may also involve the initial winner refusing to sign the contract, only for it to emerge that they have secured a subcontracting agreement with the eventual awardee. Likewise, the creation of joint ventures after contract awards with previously unsuccessful bidders, or the expansion of the winning consortium to include bidders who had not been initially selected, may point to underlying collusive arrangements.

Furthermore, HCC may employ different tools to improve detection of bid rigging. New technologies offer significant opportunities for detecting collusion, as they provide a

wealth of exploitable data due to the development of e-procurement[78] and the consolidation of databases at both national and European levels. These databases enable the development of specialized programs based on algorithms and machine or deep learning. These programs analyze bids and information from awarding authorities, using the previously mentioned indicators and combining them with other data related to the structure of a specific market, allowing competition and public procurement authorities to review these elements.

Advances in digital technology are transforming manual data analysis into automated cartel detection via algorithms. Cartel detection software tools are already in use by competition authorities in Russia, Korea, and Brazil, and similar programs are currently being developed in Spain, Canada, and by the Hellenic Competition Commission.[79]Based on experience to date, all parameters analyzed using projection tools can be grouped into four categories: the number and type of bids, suspicious pricing patterns, low effort indices in bid submissions along with similar submissions, and historical bid data. [80] Proactive analysis of public contract data can serve as an additional tool for initiating investigations into cartel cases, helping the Competition Commission detect cartels by analyzing data from past tenders to identify potential patterns of bid manipulation.

To improve access to tender data, several actions could be considered. First, the HCC, in collaboration with relevant authorities, could gain access to historical tender data available electronically through the e-procurement platform, including details on rejected bids. Additionally, signing a Memorandum of Cooperation between the HCC and contracting authorities could facilitate similar access to full data from past tenders that were not conducted electronically. The HCC could also collaborate with the Single Public Procurement Authority and other competition authorities to systematically utilize collusion-detection algorithms. Under its broad investigative powers as granted by Article 38 l. 3959/2011, the HCC may request access to data related to tenders. It

[78] OECD, Preventing Corruption in Public Procurement, 2016, page 22

[79] Jones, Alison & Kovacic, William E., Fighting Supplier Collusion In Public Procurement: Proposals for Strengthening Competition Law Enforcement, Competition Policy International Antitrust Chronicle, April 2019.

[80] Lianos, I., Intervention: Public Procurement from the Perspective of Fair Competition, Sakkoulas Online, 2021.

has already effectively collaborated with several contracting authorities in recent bid-rigging cases to gather data on tender processes.[81]

5. Legal Consequences of Bid Rigging and Sanctions

The violation of the provisions of Greek competition law results in severe administrative fines for those responsible, whether legal or natural persons, as well as criminal penalties.

5.1. Administrative penalties

According to Article 25, par. 1 l. 3959/2011, if the HCC, following an investigation, finds an infringement of Article 1 par. 1 of the same law, it may, by its decision, require the businesses or business associations that committed the infringement to cease it and refrain from repeating it in the future, and/or impose a fine on them. Furthermore, based on Article 25, par. 2(a) l. 3959/2011, the fine may reach up to 10% of the total turnover of the business in the fiscal year during which the infringement ceased, or, if it continues until the decision is issued, the turnover of the fiscal year preceding the decision. Similar provisions apply in EU law as well.

For determining the amount of the fine, according to Article 25 par. 2(a) l. 3959/2011, factors taken into account include the severity, geographical scope of the infringement, its duration, the nature of the specific business's participation in the infringement, and the economic benefit it derived.

HCC determines a basic fine amount for each business or business association based on the severity and duration of the infringement and if deemed appropriate, increases or decreases the basic amount depending on whether aggravating or mitigating circumstances are present.[82] Specifically, the basic fine amount, determined by the criteria of the severity and duration of the infringement, is calculated as follows: (a) a percentage of up to 30% of the company's annual gross revenue from products or services related to the infringement is set based on its severity, and (b) this percentage is calculated on the aforementioned revenue for each year of the infringement cumulatively.

[81] Lianos, I., Intervention: Public Procurement from the Perspective of Fair Competition, Sakkoulas Online, 2021.

[82] *Hellenic Competition Commission, Guidelines for calculating fines by virtue of art. 25 and 25b l. 3959/2011, 2006.*

In respect to the range of gross revenues used as the basis for calculating the fine, the HCC takes into account the total gross revenue of the company in the relevant product market(s) affected by the infringement. This approach ensures that the relevant product market is typically a reliable criterion for determining the sales value of products directly or indirectly affected by the infringement, while also preserving the deterrent nature of the fine. The percentage of the company's gross revenue is calculated for the entire duration of its participation in the infringement.

To assess the seriousness of the infringement, the HCC takes into account, in particular, the type of infringement, the anti-competitive effects caused or threatened in the market, the specific role of each business in the infringement, the economic benefit gained or pursued by the offenders, the economic power of the entities involved in the relevant market, and the extent of the geographical market.

To calculate the duration of an infringement intended to restrict competition, the period of existence of the collusion must be established, i.e., from the date it was formed to the date it ceased to be effective. To demonstrate that it terminated its involvement, a participant in the collusion must provide sufficient evidence of withdrawal or distancing, or at least of its denunciation of the illegal conduct.

The basic amount of the fine may be increased or decreased depending on whether aggravating or mitigating circumstances are present. The final fine amount, resulting after the increase or decrease of the basic amount, cannot exceed the aforementioned 10% of the total turnover, as specified by Article 25 l. 3959/2011.

Finally, if the HCC issues a decision to settle the dispute through a simplified procedure, it reduces the fine by 15% from the amount it would have imposed in the absence of settlement, in accordance with Article 25 l. 3959/2011 and its Notice dated 12.05.2006.

The HCC may deviate from the method for calculating fines set out in its Notice dated 12.05.2006 depending on the specifics of each case. In this regard, it is permissible for the HCC, through self-commitment, to define the criteria it intends to apply when exercising its discretion. The HCC is expected to adhere to the fine calculation method it has committed to, though it may deviate from these established criteria due to exceptional circumstances in a specific case (whether to a stricter or more lenient degree), with such deviations requiring specific justification.

The HCC has broad discretion (within the legally defined maximum limit) in determining the fine to be imposed, to sufficiently ensure its deterrent effect. Effective enforcement of competition rules requires that the Competition Authority be able to adjust fine levels to meet the needs of this policy at any time. Accordingly, the need to ensure that the fine has an adequately deterrent character mandates appropriate adjustment of its amount, taking into account the intended impact on the business being fined. This ensures that the fine is neither negligible nor excessively high, particularly in relation to the financial capability of the business, in line with both the goal of effectiveness and the principle of proportionality.

The people managing legal entities (e.g. managers and all general partners of civil and commercial companies and joint ventures, members of the board of directors and those responsible for implementing the relevant decisions for sociétés anonymes) are personally liable with their assets, jointly and severally with the respective legal entity, for the payment of the fine.

The HCC may also impose an individual fine on these natural persons, ranging from €200,000 to €2,000,000, after hearing their case, if they are proven to have participated in preparatory actions, the organization, or the commission of the business's illegal conduct.

5.2. Criminal penalties

For those who violate Article 1 l. 3959/2011 and Article 101 TFEU, who are actual or potential competitors, a prison sentence of at least two years and a fine ranging from €100,000 to €1,000,000 may be imposed.

5.3. Civil claims:

Those who suffered damage due to a violation of competition law, including the awarding authority, are entitled to claim full compensation. The imposition of criminal penalties does not affect the right of victims who have suffered damage from a violation of competition law to claim full compensation for the damage, in accordance with the provisions of l. 4529/2018.

6. Bid rigging under Greek Case Law

6.1. HCC Decision 828/2023 (rapid tests)[83]

The decision concerns the investigation carried out by the HCC regarding potential anti-competitive practices in a public procurement tender organized by the National Central Health Procurement Authority (ΕΚΑΠΥ). The tender was for the urgent procurement of COVID-19 rapid antigen tests, with an estimated total value of €28,549,800. The investigation examined whether the companies involved violated Article 1 l. 3959/2011 and Article 101 TFEU, both of which prohibit anti-competitive agreements.

HCC conducted site inspections and gathered information from three companies which had submitted bids in the tender. Evidence was collected to determine whether the companies had engaged in prohibited horizontal agreements, specifically collusion to fix bids and manipulate the outcome of the procurement process.

Following this investigation, the HCC found sufficient evidence to conclude that the companies had engaged in bid rigging. The companies had coordinated their bids to ensure predetermined outcomes, depriving the awarding authority of genuine competition. This type of behaviour not only leads to inflated prices but also compromises the efficiency and transparency of public procurement processes.

The companies admitted their participation in the collusion, and as a result, the HCC proceeded with the settlement procedure under the provisions of Article 29A l. 3959/2011. As a result, fines were imposed on the three companies involved in the collusion, yet due to their cooperation and participation in the settlement process, the companies received a 15% reduction in their fines. The companies were required to cease the anti-competitive practices and refrain from engaging in similar conduct in the future. The HCC also imposed a financial penalty, calculated based on the companies' turnover and the severity of the infringement.

6.2. HCC Decision 772/2022 (wooden poles)[84]

The decision was issued following an investigation into anti-competitive practices, specifically bid rigging, during procurement processes organized by major public sector entities such as the Hellenic Electricity Distribution Network Operator (ΔΕΔΔΗΕ) and

[83] *HCC Decision 828/2023*
[84] *HCC Decision 772/2022*

the Hellenic Telecommunications Organization (OTE), among others. The focus of the investigation was on the procurement of wooden poles used for electricity and telecommunications infrastructure, and specifically whether the participating companies engaged in prohibited collusion under Article 1 l. 3959/2011 and Article 101 TFEU. The investigation focused on four companies.

Based on the reasoning of the Decision, the parties involved participated in a horizontal anti-competitive collusion in the form of an agreement/concerted practice among businesses, as defined by Article 1, par. 1 l. 3959/2011 and Article 101(1) TFEU. Specifically, the controlled entities participated in a scheme for allocating the tenders in question, setting the framework for their collective action to preemptively reduce the uncertainty that would result from independent competitive behavior. The aim of this scheme was to artificially adjust bids to levels different from those that would have been reached under conditions of genuine competition. In particular, they engaged in (a) an agreement/concerted practice for price and quantity setting and (b) an exchange of sensitive commercial information among competitors, especially regarding prices and quantities. For instance, they often participated in the tenders as a consortium, or one company was depending on the lending of technical capacity of another company to fulfil the criteria for participating in a tender. These agreements were designed to ensure that each party would win a share of the contracts, regardless of the actual competitive merits of their bids. Another strategy they were using was splitting the contract, with each company receiving part of the contract value.

HCC ruled that the practices mentioned above constitute a single and continuous infringement, as they are part of a broader, unified scheme to manipulate public tendering procedures with the common purpose of distorting the competitive process, specifically through the setting of prices and quantities. Notably, the individual agreements/concerted practices entered into/adopted between 2016 and 2018 were executed using the same anti-competitive methods, within the same relevant market, demonstrating continuity over time and characterized by a commonality of objectives, methods, and participants. Within this context, the colluding parties adopted a range of anti-competitive practices as described above. Viewed in its entirety, this conduct constitutes an agreement and/or concerted practice among businesses under the meaning of Articles 1 l. 3959/2011 and 101 TFEU.

The companies involved in the case opted for the settlement procedure under Article 29A l. 3959/2011, acknowledging their involvement in the prohibited practices and agreeing to fully cooperate with the investigation, in exchange for a reduced fine.

The settlement process aimed to streamline the resolution of the case, allowing the HCC to impose penalties while reducing the administrative burden associated with a full trial. By participating in the settlement process, the companies benefitted from a 15% reduction in the fines imposed, as provided for under the settlement rules. The fines were calculated based on the companies' cooperation during the settlement process and their turnover.

6.3. HCC Decision 767/2022 (refugee catering services)[85]

The decision was issued following an investigation conducted by HCC concerning potential anti-competitive practices, specifically bid rigging, in the provision of catering services for migrants and refugees at reception and identification centers on the islands of Lesvos and Chios. The investigation focuses on whether several companies violated Article 1 of Law 3959/2011 and Article 101 TFEU.

The companies under investigation were accused of coordinating their bids in a manner that distorted competition in the tender process for catering services for migrant centers.

The HCC launched an *ex officio* investigation for four companies after receiving reports and signals indicating potential collusion in the tendering process for catering services.

The investigation revealed that these companies had engaged in coordinated behavior during the tender processes, violating competition laws. The companies exchanged information, submitted non-competitive bids, and, in some instances, divided the contracts among themselves to ensure predetermined outcomes.

The companies involved in this case submitted settlement proposals, admitting their participation in the bid-rigging scheme. The HCC accepted the settlement proposals, and the companies were required to cease their anti-competitive practices and refrain from engaging in similar conduct in the future.

[85] *HCC Decision 767/2022*

As part of the settlement, the HCC imposed fines on the companies involved. The fines were calculated based on the companies' turnover and the severity of the violation, but they were reduced by 15% due to the companies' cooperation in the settlement process.

6.4. HCC Desicion 755/2021 (road construction)[86]

The decision was issued following an investigation into potential anti-competitive practices related to a public procurement tender for a significant infrastructure project—the Northern Road Axis of Crete. The focus of the investigation was to determine whether the controlled company (Athoniki) violated Article 1 l. 3959/2011 and Article 101 TFEU.

The investigation revealed that Athoniki engaged in (a) an agreement/concerted practice (i) for the prior designation of the winning bidder in the tender, (ii) to submit a cover bid in favor of the pre-agreed bidder, maximizing the chances for the designated bidder to be awarded the contract, (iii) to adopt a compensation mechanism to ensure compliance with the agreement, and (b) in the exchange of sensitive commercial information among competitors.

HCC ruled on the legal concept of "agreement", which under both Greek and EU law is broad, encompassing not only formal agreements but also informal understandings or coordinated behavior that restricts competition.

Additionally, the investigation addressed whether the alleged collusion had a significant impact on intra-EU trade, a key criterion for the application of Article 101 TFEU. Given that the project was a major public infrastructure endeavor with EU funding, the HCC concluded that the collusive behavior likely affected intra-EU trade.

The HCC determined that Athoniki had violated both Article 1 l. 3959/2011 and Article 101 TFEU by engaging in bid rigging. As a result, the HCC imposed sanctions on Athoniki, including a fine calculated based on the company's turnover and the severity of the violation. It is noted that the fine was extremely low (only 6,000 €), as HCC took into account the economic crisis of the previous decade.

The decision also required Athoniki to cease its anti-competitive practices and to refrain from engaging in similar conduct in the future. The HCC further threatened the

[86] *HCC Desicion 755/2021*

company with additional fines and penalties if it continued to engage in anti-competitive behavior or failed to comply with the decision.

6.5. HCC Decision 748/2021 (road construction)[87]

HCC Decision no. 748/2021 also refers to the abovementioned investigation in regard to anti-competitive practices related to the public procurement tender for the Northern Road Axis of Crete. The investigation primarily focuses on the company Mesogeios S.A., which a) concluded an agreement (i) to pre-determine the lowest bidder in a tender, (ii) to submit a cover offer in favor of the pre-agreed bidder, (iii) to adopt a compensation scheme to ensure compliance with the agreed and (b) exchanged sensitive commercial information with its competitors.

Mesogeios S.A. opted to participate in the settlement procedure provided under Article 25a l. 3959/2011, admitting its involvement in anti-competitive practices in exchange for a reduced fine. Mesogeios S.A. formally admitted its participation in the bid-rigging scheme and submitted a settlement proposal to the HCC.

As a result of its cooperation and participation in the settlement process, Mesogeios received a 15% reduction on the fine imposed by the HCC. The final fine was calculated based on the company's turnover and the severity of the violation. In addition to the financial penalty, the company was required to cease its anti-competitive practices and refrain from engaging in similar conduct in the future.

6.6. HCC Decision 742/2021 (chemical toilets)[88]

The HCC Decision no. 742/2021 was issued following an investigation into potential anti-competitive practices, specifically bid rigging, in the market for the supply, rental, and management of portable chemical toilets. The investigation focused on whether five companies violated Article 1 l. 3959/2011 and Article 101 TFEU.

The HCC found that five companies, in pairs, rigged tenders and allocated markets before the submission of financial offers, determined the lowest bidder for the provision of installation, removal, cleaning and general management services of chemical toilets to public law entities and private entities.

[87] *HCC Decision 748/2021*
[88] *HCC Decision 742/2021*

The decision was issued following the parties' expressed interest in entering the settlement procedure. The aforementioned companies engaged in horizontal collusions with the aim of bid rigging and market allocation before submitting financial offers, designating a winning bidder for the provision of services related to the installation, removal, cleaning, and general management of chemical toilets for public legal entities and private organizations. By entering the settlement process, the companies received a 15% reduction in their fines and HCC imposed reduced fines for the established infringement, totaling to €199,491.

6.7. HCC Decision 731/2021 (security services)[89]

The HCC Decision no. 731/2021 was issued following an investigation of anti-competitive practice in the security services sector. The investigation was triggered by a complaint against several private security service providers.

The HCC found that there was evidence of coordinated behaviour between the companies under investigation. In particular, the Association of Manned Security Services Enterprises was found to include in the Sectoral Collective Labour Agreement of the years 2009-2011, in addition to the minimal wages, also other "minimum" costs for the provision of security personnel services (3% administrative cost, additional costs such as uniform and training costs, costs for sick leaves and severance pay etc.). It was held that the aim was to set the price of security services by regulating the profits of the employer companies that were members of the association, thereby distorting price competition in the market for security services tenders.

Furthermore, it was found that there was an exchange of information, specifically financial bids, in connection with the companies' participation in tendering processes announced in 2010 and 2011. These bids, which were the subject of the information exchange between the companies, matched exactly, in numerical terms, with the final bids submitted as compared to the awarding entity's records. Specifically, the bidding processes were rigged by the participating companies, facilitated by the exchange of information, while also submitting cover bids to secure a prearranged contract award.

[89] *HCC Decision 731/2021*

No fines were imposed in the present case, yet in earlier related cases, some companies had participated in a settlement procedure, admitting their participation in the bid-rigging scheme and receiving reduced fines.

6.8. HCC Decision 674/2018 (construction)

The HCC Decision no. 674/2018 was issued after an investigation following an anonymous complaint against certain construction companies for collusion in the bidding process related to public procurement tenders for public works projects in the region of Fthiotida, particularly regarding the construction of the "5th High School of Lamia." Five companies were implicated in colluding to manipulate the tender process, violating Article 1 l. 3959/2011.

The companies coordinated their behavior regarding bid invitations, agreeing on the contracting entity that would submit the winning bid, with the aim of:

a) suppressing their bids (bid suppression) on the initial date of the tender to reach a coordination agreement,
b) pre-determining the winning consortium for the project, i.e., the consortium that would submit the highest discount in the tender,
c) submitting cover or sham bids from participants other than the designated winning bidder,
d) determining the level of discounts that the pre-agreed winning bidder and the other participants would offer in the tender to maximize the chances of the agreed-upon bidder being awarded the contract,
e) the exchange of sensitive commercial information among competitors, directly related to the manipulation of the tender and the setting of the discount rate, concerning each company's participation or non-participation in the upcoming tender and the bid amount they intended to submit,
f) implementing a "compensation" mechanism for companies that withdrew from actively competing in the tender by submitting cover bids,
g) this coordination achieved the desired outcome, in the sense that the tender was ultimately won by the pre-selected companies as a result of the cartel arrangement.
For the established infringement, the HCC imposed a total fine of €244,787.4 on the above companies, following a settlement procedure.

6.9. HCC Decision 647/2017 (construction)[90]

The HCC Decision no. 647/2017 was issued following an *ex officio* investigation into potential collusion and bid rigging in various public works tenders, particularly involving significant infrastructure projects. The projects under scrutiny included road development, metro stations, and other transportation infrastructure across Greece.

The HCC, through the above decision, found that seventeen contracting companies and two associations of contractors violated Articles 1 l. 3959/2011 (and/or l.703/1977) and Article 101 TFEU by participating in horizontal collusions aimed at market allocation and bid rigging in public works tenders. These were companies that did not participate in the settlement procedure initiated as part of the same *ex officio* investigation by the HCC concerning the same tenders, on which the HCC had previously issued and published Decision no. 642/2017.

The investigation revealed that the companies involved often met in advance to discuss how to divide up the market, with some agreeing to submit artificially high bids while others submitted more competitive offers. In some cases, the companies involved agreed on a predetermined winner, while others in the cartel were compensated through subcontracts or profit-sharing from the winning bid.

The cartel activity spanned multiple years and included many of the largest construction companies in Greece, which were responsible for major infrastructure projects. These companies often held the highest construction licenses, allowing them to participate in tenders for high-value public works. The impact of their collusion was significant, as it not only inflated project costs but also restricted competition and innovation in the sector. During the course of the investigation, several companies opted to participate in the HCC's settlement procedure under Article 25A l. 3959/2011. For a large number of entities prescription applied and the HCC could not impose fine. For the remaining entities, the fines exceeded 30 million euro.

The decision was mostly upheld at the Athens Administrative Court of Appeals.

[90] *HCC Decision 647/2017*

6.10. HCC Decision 642/2017 (construction)[91]

In its Decision no. 642/2017, the HCC, within the framework of the simplified Settlement Procedure and the application of the Leniency Program, found that a total of fifteen contracting companies involved in this process violated Articles 1 l. 3959/2011 (and/or Article 1 l. 703/1977) and 101 TFEU by participating in distinct horizontal collusions for market allocation and bid rigging in public infrastructure works tenders. This collusion aimed to consolidate their market shares and reduce the level of discounts offered in public tenders. According to the decision, between 2005 and 2012, companies with the highest contractor classification (7th class) each accepted and participated in a shared plan for market allocation and tender manipulation at different times.

This bid rigging was mainly achieved through pre-determining the winning bidder and submitting cover bids before the submission of financial offers. In some cases, the specific entities that would execute the critical projects were also pre-determined. This horizontal collusion was implemented primarily through regular meetings of the involved competitors and/or through securing/compensation agreements. The allocation mechanism included, among others, metro projects (2005-2006, 2012), PPP projects (2008-2009), and infrastructure projects (2011-2012). Companies with a lower contractor classification (6th class) also participated in specific tenders during their periods of involvement.

The HCC granted TECHNIKI OLYMPIAKI S.A. full immunity from the fine for its participation in the infringement during the 2005–2012 period, marking the first successful application of the Leniency Program by the HCC.

The HCC also reduced the fines for several companies by 15% for their cooperation in the Settlement Procedure.

Additionally, the HCC recognized a mitigating factor for two companies, as they provided new evidence of the infringement during 2005-2012, and another company due to its distancing from the collusion. However, an aggravating factor was noted for a certain company due to obstruction of two on-site inspections conducted at its offices.

[91] *HCC Decision 642/2017*

The HCC also considered the prolonged economic crisis affecting the construction sector in recent years when calculating the fines.

Two of the companies requested relief from the imposed fines due to financial inability to pay. The HCC, for the first time, partially accepted these requests, reducing the fines imposed on these companies.

Based on the above, the HCC imposed total fines of €80.7 million.

Finally, the decision confirmed for certain contracting companies both the existence of single and continuous infringements from 1989 to 2000 and a series of separate practices involving the allocation of public works tenders from 1981-1988 and 2001-2002. However, the HCC's authority to impose sanctions for these infringements had expired, in accordance with Article 42 l. 3959/2011.

For other Greek and foreign construction companies involved in the *ex officio* investigation by the HCC Directorate-General for Competition, which did not request inclusion in the Settlement Procedure, a separate autonomous process was conducted before the HCC.

6.11. Conclusions drawn from the case law in regard to settlement procedure

Since the enactment of settlement provisions in 2016, there have been twelve bid-rigging cases, with nine resolved through settlement and only three as non-settlement cases. Bid-rigging involves companies competing in public tenders, and it is crucial for these companies to continue bidding even after an infringement finding. The provision in Article 44, paragraph 3(c), is pivotal in incentivizing companies to apply for settlement, although it still allows infringing companies to participate in public tenders almost immediately after their participation in a cartel. This is particularly relevant in sectors known for corruption, such as construction. The settlement procedure has shown gains in administrative effectiveness, expediting some cases, as seen in the faster resolution of Case 674/2018 (a settlement case) compared to Case 715/2020 (a non-settlement case) involving similar bid-rigging practices.[92] Although most HCC

[92] *Trouli Emmanouela, 1st Multi-Disciplinary Conference, Emerging Challenges in Competition Law Enforcement: forging links between enforcers and academia, 2024, presentation under publication.*

decisions are upheld by the Athens Administrative Court of Appeals, the process still demands significant resources from the HCC for the defense of appeals.

7. Challenges in combatting bid rigging

There are several key factors that foster collusion, including the following:

A. Restricted number of companies: Bid rigging through collusion is more likely to occur when a small number of companies supply the good or service.[93] The fewer the companies in the market, the easier it is for them to reach an agreement on how to manipulate bids (such as prices, offers, clients, or geographic markets).[94] The presence of few suppliers makes collusion easier. Fewer suppliers are common when large, established companies dominate the market, the industry is highly specialized or capital-intensive, making it costly and difficult for new companies to enter (e.g., airlines), and many competitors cannot or are unwilling to supply due to their geographic location.

   The more suppliers available, the more choices the awarding authority - buyer has. When there are many potential suppliers, it becomes harder and riskier for them to communicate and attempt to form a cartel. If new suppliers regularly enter the market and participate in tenders, they are unlikely to be part of an existing collusive arrangement.

B. Limited or no market entry: When a small number of companies have recently entered or are likely to enter a market—due to high costs, significant barriers, or slow entry (for example, due to large, established players)—the companies in that market are shielded from competitive pressure from potential new entrants.[95] This protective "barrier" facilitates collusion.[96]

C. Market conditions: Major shifts in demand or supply conditions often disrupt established bid-rigging agreements, whereas consistent and foreseeable demand from the public sector generally heightens the likelihood of collusion.[97] Additionally, during

[93] *OECD, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012*
[94] *OECD, Guidelines for fighting bid rigging in public procurement, 2009*
[95] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009.
[96] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012.
[97] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009.

times of economic turmoil or uncertainty, the incentive for competitors to coordinate rises, as they seek to recover potential lost profits through collusion.[98]

D. Unique products with specific requirements: The likelihood of collusion increases if the products in question cannot be easily substituted with similar ones or if there are particularly restrictive specifications.[99]

E. Standardized products: The more standardized a product is, the easier it is for competing companies to agree on price levels. Agreements on other competitive aspects, such as design, features, quality, or service, are naturally more challenging to achieve.[100]

F. Emergency situations: In emergency situations, such as the COVID-19 pandemic, the urgent need of public authorities to secure large quantities of supplies and services for healthcare systems within a very short timeframe can increase the risk of unfair collusion among certain economic operators. These operators may attempt to exploit the emergency situation by artificially restricting competition to maximize their profits at the expense of public finances. The negative impact of unfair collusion on public finances can become even more severe in the aftermath of such emergencies, during a time when economic recovery heavily relies on the optimal use of available public resources and substantial investments in critical economic sectors. The unjustified allocation of excessive funds for projects, supplies, and services leads to fewer public resources for essential state functions, larger fiscal deficits, and an increased need for states to resort to borrowing. This, in turn, endangers their financial stability and undermines their recovery efforts. Moreover, the reluctance of businesses to participate in public sector projects in markets affected by collusion hampers efforts to attract private investment in infrastructure (for example, in concession contracts requiring private capital involvement).

G. Limited or no technological change: Minimal or no innovation enables firms to establish and sustain agreements.[101]

H. Repeated bidding processes: Recurring purchases through tenders increase the likelihood of collusion among suppliers, as potential suppliers become familiar with

[98] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012.
[99] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022.
[100] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022
[101] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012

each other and anticipate benefits from collusion if they expect future contracts. Furthermore, cartel members may retaliate against a defector by focusing on the bids that were initially assigned to them.[102]

I. Familiarity with bidding processes: Frequent tender-based purchases increase the chances of collusion among suppliers because bidders become not only familiar with one another but also with the tendering process itself, looking forward to potential gains from collusion for future contracts.[103]

J. Competitor familiarity: Collusion is more likely when competitors know each other well, such as through social interactions, professional associations, or legitimate business relationships.[104]

K. Industry associations: Associations within an industry can serve to stimulate competition, mainly by promoting innovation. However, in some cases, associations have been used by member companies as a tool for forming and enforcing illegal bid-rigging agreements.[105]

8. Proposals for bid rigging prevention methods

While significant strides have been made in detecting and prosecuting bid rigging, future challenges remain as anti-competitive practices evolve and public procurement systems become more complex. The fight against bid rigging is a dynamic and ongoing process, requiring continuous adaptation to new threats, technological developments, and market conditions.

As an initial measure to boost competition and address collusion in public procurement, awarding authorities should aim for procurement tenders across all levels of government that foster more effective competition and lower the risk of bid rigging while ensuring value for money. Specific recommended actions include analyzing the relevant market and supplier landscape, establishing transparent and competition-friendly requirements for bidder participation, setting pro-competitive tender specifications and award criteria, supporting the involvement of smaller suppliers and,

[102] *OECD*, Guidelines for fighting bid rigging in public procurement, 2009
[103] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022
[104] Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022
[105] *OECD*, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012

where feasible, non-local suppliers, implementing e-procurement[106], enforcing sanctions against anticompetitive behaviour, and informing bidders about the presence and scope of these sanctions.[107]

The risk of anti-competitive behaviors in public procurement tenders can be reduced through better design of each tender notice. In this regard, a thorough understanding of the market is essential, including detailed knowledge of the products, suppliers, and prevailing conditions, particularly regarding prices and costs of potential suppliers.[108] This, also, involves gathering and analyzing information from previous relevant tenders to gain insights that help in designing competitive and effective procurement processes.

The tender notice should also include terms that explicitly aim to deter potential collusion.[109] This can involve stating that any suspicion of collusion will be reported to the Competition Commission and clearly warning that any identified breach of competition law will expose businesses to fines, criminal penalties, and civil liability for compensating the awarding authority for damages incurred. Participants should be required to sign a declaration affirming that they have had no communication with other bidders regarding price, bid submission, or terms.[110] If such a declaration cannot be secured, they must disclose any relevant communication with competitors related to the tender. Additionally, bidders should report any procedures linked to anti-competitive behavior associated with a specific bidder, including affiliated companies and senior management. Finally, the announcement should mention the legal provision allowing the tender to be canceled if there are suspicions of collusion.

Furthermore, ensuring the maximum possible number of bids is essential, as the risk of bid-rigging increases with fewer participants.[111] Therefore, tender requirements should be clear and straightforward to encourage the broadest possible participation. Additionally, the tender specifications should be carefully reviewed to avoid conditions that unnecessarily limit the pool of potential bidders or impose superfluous restrictions.

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[106] *European Commission, Guidance Document for Professionals on Avoiding Common Mistakes in Public Procurement Contracts Funded by the European Structural and Investment Funds, 2018*
[107] *OECD, Preventing Corruption in Public Procurement, 2016, and OECD, Guidelines for fighting bid rigging in public procurement, 2009.*
[108] *OECD, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2024.*
[109] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*
[110] *OECD, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2024.*
[111] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*

These unnecessary barriers can exclude capable businesses and create artificial obstacles to participation, thereby reducing competition among bidders.

Participating businesses must meet the necessary requirements to respond effectively to the tender demands; however, these requirements should not be excessive, as they could artificially limit the number of participants and create or reinforce conditions conducive to prohibited collusion among firms. In this context, the economic and technical capacities of bidders should be proportionate to the scope of the tender, including the scale and specific needs of the contract. Additionally, tenders should be designed to avoid disproportionately increasing the financial burdens on bidders; for instance, requiring guarantees beyond what is necessary can limit eligibility to larger firms, excluding smaller, yet equally qualified, businesses from participation. Reducing the cost of bid submissions also encourages competition by enabling companies without extensive administrative resources or prior experience in certain types of tenders to participate, facilitating the entry of new players and making coordination more challenging.[112]

Specifications should be structured to include, as much as possible, all relevant substitute products and any innovative solutions. Opening the process to businesses with related but distinct products makes collusion among them more challenging. Selective treatment of certain supplier categories and repeated contract extensions or automatic renewals with specific companies should be avoided, as these practices discourage potential new participants in tenders. Contract extensions, especially consecutive ones, should be granted only in exceptional cases—even if justified and permissible—to mitigate the risk of indefinitely sealing off the market. Generally, it is preferable to avoid excessively long-term contracts, ensuring that products and services offered through tenders remain exposed to competition.

For public works and concession contracts, the contract duration should be based on objective parameters closely related to the time required to recoup the investments made to implement the contract. When assessing the possibility of permitting subcontracting, it is important to balance the goal of encouraging small and medium-sized enterprises to participate with the risk of reducing competition during the tendering process. Contracting authorities should remain vigilant when joint bids are

[112] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*

submitted, particularly if the bidders have previously been sanctioned by competition authorities for collusion, even in markets outside the specific goods or services tendered. In cases where identical bids are submitted, it is advisable to relaunch the tender; if this is not feasible, selecting a single contractor rather than splitting the contract between bidders is recommended. Authorities should also choose the most suitable award criterion, which need not be exclusively the lowest price.[113]

Limiting communication between bidders is essential for preventing collusion. Opportunities for bidders to interact with each other should be minimized, such as by restricting joint meetings or site inspections prior to bid submission. If such gatherings are necessary, attendees should be reminded of the prohibition on collusion and their legal obligations under current legislation. Additionally, the identities of the bidders should not be disclosed to make it more difficult for colluding parties to communicate with participants in the tender. During the process, details such as the identity of companies that have purchased tender documents or submitted bids should remain confidential, as disclosing this information facilitates coordination among interested parties, allowing them to identify competitors and target candidates for potential collusion to manipulate the tender.

Training staff on detecting and preventing collusive agreements is essential for all personnel involved in procurement tenders.[114] Programs, possibly developed in collaboration with the Competition Authority, can strengthen the design of procurement processes, making them less susceptible to collusive behaviors. Additionally, internal procedures should be developed to encourage and incentivize procurement employees to report suspicious activities to the Competition Authority, complementing the internal audit functions of the contracting authorities. For instance, establishing an anonymous whistleblower mechanism for reporting competition violations and creating secure communication channels with the Competition Authority can provide employees with safe and confidential ways to report concerns.[115]

Digital communication tools, encrypted messaging, and data manipulation software have also made it easier for companies to coordinate collusive schemes while leaving

[113] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*
[114] *OECD, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2012*
[115] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*

little traceable evidence. As a result, competition authorities need to continuously upgrade their investigatory techniques, employing more advanced forensic tools and data analytics to detect suspicious bidding patterns.[116] This necessitates greater investment in technological resources and expertise, which may prove challenging for smaller national authorities like the HCC with limited budgets.

Creating a comprehensive database of tenders can serve as an effective tool for understanding market dynamics, aiding in budgeting, and making it harder for cartels to target relevant tenders.[117] By recording details from past tenders, such as submitted bids and the identity of winning contractors, authorities can streamline cost assessments and improve transparency. Tracking the history of previous tenders also aids in identifying suspicious patterns, which may indicate collusion. Detecting long-term collusive practices often requires analyzing tender outcomes over a set time period. Additionally, gathering data on recent price shifts, neighboring geographic market prices, and prices of potential substitute products provides valuable context. Maintaining records of businesses expressing interest in tenders and those submitting bids can help identify instances of bid withdrawal or use of subcontractors, offering further insights into procurement trends and behaviors.

However, the effective use of digital tools in detecting bid rigging requires a robust infrastructure for data analysis and interpretation. Competition authorities must be equipped with the technical expertise and resources to handle large datasets and employ sophisticated analytical methods. In Greece, the continued development and improvement of e-procurement systems are essential to both preventing and identifying bid rigging. Nevertheless, the challenge lies in ensuring that these systems are adequately designed to flag potential red flags, such as identical bids, recurring winners, or unusual price variations, while avoiding false positives that could overwhelm authorities with unnecessary investigations.

Whistleblower protections and leniency programs have been key tools in uncovering bid rigging schemes. However, the effectiveness of these tools relies heavily on the willingness of individuals and companies to come forward with information. In recent years, there has been growing recognition of the need to enhance protections for

[116] *OECD, Recommendation of the Council on Fighting Bid Rigging in Public Procurement, 2024*
[117] *Hellenic Competition Commission, Guide for Contracting Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders, 2022*

whistleblowers, particularly in Greece, where cultural and institutional factors may discourage individuals from reporting corporate wrongdoing.

The fight against bid rigging is far from over, and new challenges continue to emerge as markets and technologies evolve. Increasingly sophisticated collusion schemes, cross-border coordination, the digitization of public procurement, and the need for stronger whistleblower protections are among the primary obstacles that authorities will face in the coming years. For Greece, overcoming these challenges requires a multi-faceted approach, combining legal reforms, technological innovation, public awareness campaigns, and stronger international cooperation. By addressing these future challenges, Greece and the EU can ensure that their public procurement systems remain competitive, transparent, and fair.

9. Conclusions

The application of competition law (l. 3959/2011, as well as Articles 101 and 102 TFEU) and public procurement law (l. 4412/2016 and l. 4413/2016) aim to prevent collusive practices between suppliers in public procurement procedures and avoid market structures or conditions that facilitate collusion (or other anti-competitive practices). Collusion is more likely when few competitors operate in a market, such as large, well-established companies dominating the market, when product specifications are highly restrictive, products are standardized, suppliers are familiar with procurement procedures (especially in repeated tenders), and when there are professional associations or other close business relationships.

These conditions can create an environment conducive to collusion, reducing the competitiveness of public procurement and potentially harming market dynamics and public interest. Therefore, the interplay between public procurement laws and competition laws is critical in safeguarding fair competition in public tenders.

As a type of horizontal anti-competitive conduct, bid rigging has been the most serious threat to public procurement, artificially influencing tenders, violating the basic principles of free competition usually leading to higher prices and lower efficiency with public financial resources wasted or even embezzled.

A common point between competition law and public procurement law, is the protection of fair competition and market openness, ideologically grounded in a market economy. Both of these subsystems—competition rules and procurement rules, which have

multiple interconnections—aim to prevent competition distortion caused by private and state actions and measures. Competition now serves as a guiding principle and foundation for public procurement law, applying both at the level of the awarding authority and among companies participating in a public tender. This regulatory reach, like that of primary EU law and national competition laws, encompasses companies operating in the supply and demand fields.

Collusion in public procurement involves anticompetitive agreements among bidders to raise prices, limit supply, or reduce quality, a practice widely known as bid rigging and a clear violation of competition law. To effectively prevent and detect bid rigging, essential steps include strong cooperation between competition and contracting authorities, as well as other public bodies, thorough reporting by procurement officials of any suspicious bidding behavior to relevant competition authorities, and heightened awareness in the private sector of the risks and impacts associated with bid rigging.

Most recently, in September 2024, OECD[118] launched a program dedicated to supporting Austria, Bulgaria, Croatia, Cyprus, Greece, and Romania in enhancing their prevention and detection efforts against bid rigging. Funded by the European Union through the Technical Support Instrument, the project aims to deliver capacity-building initiatives for both public and private sectors, conducted via workshops in each participating country, a comprehensive report summarizing effective practices and insights in combating bid rigging, a training package to promote competition law compliance in public procurement and recommendations for improving collaboration between competition authorities, contracting authorities, and other public bodies within each jurisdiction.

One thing is for sure: the battle against bid rigging is constant and is far from over. We are looking forward to see how this initiative may enhance prevention and detection of bid rigging within the next years.

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