FORUMS

Global Forum on Competition
2010

Introduction

This publication includes the documentation presented at the ninth Global Forum on Competition held in Paris in February 2010.

Overview

The programme of the Forum included two main sessions on Competition, State Aids and Subsidies and on Collusion and Corruption in Public Procurement, as well as a Peer Review of Brazil.

Related Topics

Competition, State Aids and Subsidies (2010)
Collusion and Corruption in Public Procurement (2010)
Competition Law and Policy in Brazil: A Peer Review (2010)
Competition Policy, Industrial Policy and National Champions (2009)
Detecting Bid Rigging in Public Procurement (2009)
Designing Tenders to Reduce Bid Rigging (2009)
Guidelines for Fighting Bid Rigging in Public Procurement (2009)
State Owned Enterprises and the Principle of Competitive Neutrality (2009)

GLOBAL FORUM ON COMPETITION

Ninth Meeting
18-19 February 2010

BACKGROUND DOCUMENTATION

DRAFT AGENDA

GLOBAL FORUM ON COMPETITION

18-19 February 2010

OECD Headquarters, Paris (Room 1)

DRAFT AGENDA

(as at 17 February)

CHAIR: Frédéric **JENNY**
Chairman of the OECD Competition Committee (France)

Thursday 18 February

OPENING SESSION
(9.00am-9.40am)

OPENING REMARKS

Angel **GURRÍA**
Secretary-General
OECD

KEYNOTE SPEAKER
Joaquín **ALMUNIA**
Commissioner for Competition
EU

INTRODUCTORY COMMENTS
Frédéric **JENNY**

SESSION I
(9.40am-1.00pm)

ROUNDTABLE ON COMPETITION, STATE AIDS AND SUBSIDIES

Chair: Monkid **MESTASSI** (Secretary General, Ministry of Economic and General Affairs, Morocco)

Background Note by David Spector — DAF/COMP/GF(2010)3

Speakers:

David **SPECTOR**
MAPP, Paris School of Economics
France

Amadou **DIENG**
Director for Competition
WAEMU Commission

Michael **THÖNE**
FiFo Institute Cologne (Germany)
Global Subsidies Initiative Affiliate

For information:
Call for contributions — DAF/COMP/GF(2009)12

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(1.00pm-2.30pm) **BUFFET LUNCH OFFERED BY THE OECD TO ALL PARTICIPANTS** (Château)

SESSION II **PEER REVIEW OF COMPETITION LAW AND POLICY IN BRAZIL**

(2.30pm-5.30pm) (Open to country representatives and intergovernmental organisations only - Report under restricted circulation on Olis)

Chair: Frédéric **JENNY**

Competition Law and Policy in Brazil: A Peer Review — DAF/COMP/GF(2010)1

Speakers:

Richard A. **BOUCHER**
Deputy Secretary-General
OECD

Thursday 18 February (cont.)

SESSION II (cont.)

Speakers: (cont.)

Carlos M. **JARQUE**
Principal Advisor to the
President and Representative in Europe
IDB

Examiners:

Mona **YASSINE**
Chairperson
Egyptian Competition Authority
Egypt

Enrique **VERGARA**
President,
Físcalia Nacional Económica
Chile

William **KOVACIC**
Commissioner
US Federal Trade Commission
United States

Brazilian Panel:

Mariana **TAVARES DE ARAÚJO** (Head of Delegation)
Secretary
SDE

Arthur **BADIN**
President
CADE

Antonio Henrique **PINHEIRO SILVEIRA**
Secretary
SEAE

Diego **FALECK**
Chief of Staff
SDE

César **MATTOS**
Commissioner

CADE

(5.30pm-7.30pm) **COCKTAIL OFFERED BY BRAZIL TO ALL PARTICIPANTS** (Château)

Friday 19 February

SESSION III (9.30am–12.40pm)

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT: BREAKOUT SESSIONS

Compilation of Country Experiences DAF/COMP/GF/WD(2010)56

Each breakout session will successively discuss (see Annex 1):

1. **Value of Certificates of Independent Bid Determination ("CIBD") and similar tools**

   Briefing Note by the Secretariat DAF/COMP/GF/WD(2010)52
   Chair:
   Mervyn **KEEHN**
   Independent Consumer & Competition Commission
   Papua New Guinea

   Presenter: Chris **MARTIN**, Canada

2. **Discussion on the usefulness of Guidelines in Public Procurement**

   Briefing Note by the Secretariat DAF/COMP/GF/WD(2010)53
   Chair:
   Lindita **MILO**
   Chairwoman, Albanian Competition Authority
   Albania

   Presenter: Caldwell **HARROP**, United States

3. **Experiences on working with other parts of government to fight bid rigging**

   Briefing Note by the Secretariat DAF/COMP/GF/WD(2010)45
   Chair:
   Shan **RAMBURUTH**
   Commissioner, Competition Commission South Africa
   South Africa

   Presenter: Fernando **ARAYA**, Chile

SESSION IV (12.45pm–1.00pm)

FIFTH ANNIVERSARY OF THE OECD-HUNGARY REGIONAL CENTRE FOR COMPETITION

Chair: Frédéric **JENNY**

Speaker:
Zoltan **NAGY**
President, Competition Authority
Hungary

(1.00pm–2.00pm) **BUFFET LUNCH OFFERED BY HUNGARY TO ALL PARTICIPANTS** (Château)

Friday 19 February (cont.)

SESSION V (2.00pm-5.00pm)

ROUNDTABLE ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT
(see Annex 1)

Chair: Khalid A. **MIRZA** (Chairman of the Competition Commission, Pakistan)

Reports by the Chairs of breakout sessions on morning discussion

Introductory Paper by the Secretariat — DAF/COMP/GF(2010)2

Speakers:

Sue **ARROWSMITH**
Professor of Public Procurement Law
University of Nottingham
United Kingdom

Abdesselam **ABOUDRAR**
President
Central Authority for Corruption Prevention
Morocco

Benny **PASARIBU**
Commissioner
KPPU
Indonesia

David **LEWIS**
Gordon Institute of Business Science
South Africa

For information:
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Contributions by

- David Lewis DAF/COMP/GF/WD(2010)36
- William Kovacic and Robert Anderson DAF/COMP/GF/WD(2010)27

FINAL SESSION **EVALUATION OF THE MEETING AND FUTURE WORK OF THE GLOBAL FORUM**

(5.00pm-5.30pm)

Chair: Frédéric **JENNY**

Evaluation Questionnaire

ANNEX 1

ORGANISATION OF THE BREAKOUT SESSIONS AND ROUNDTABLE ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Friday 19 February

This annex provides further details on the objectives of the breakout sessions, how they are to be organised and the link to the roundtable in the afternoon.

Objectives

The morning will be devoted to breakout sessions. These will focus on the current activities and tools used by competition authorities in tackling collusion and corruption in public procurement. Members and non members are encouraged to have open and frank discussions in order to measure the value and usefulness of different approaches and to identify on-going problems still facing competition authorities. These problems and underlying challenges will then be picked up and discussed in the afternoon in the roundtable discussion which will be held in the Plenary room.

Organisation

Breakout sessions:

Three meeting rooms will be set aside for discussions in breakout sessions. Countries and jurisdictions will be divided into three groups and allocated to one of the three rooms by French alphabetical order. Chair and Presenter for each of the three topics mentioned in the agenda will rotate from room to room to address each of the three breakout sessions in their allocated rooms. This will mean that each group will discuss each of the three topics, one after the other. Participants should note that they will therefore not need to make a choice between the topics, because each session will cover all three topics during the course of the morning.

One hour will be allocated to each of the three topics. During that hour, the topic will be introduced via a brief presentation. The remaining part of the allocated 60 minutes will then be devoted to exchanges of views and sharing of experiences between the countries present in the room. This format will be repeated for each of the three topics.

Discussions in breakout sessions will stop at 12.40 sharp. Participants will be invited to go back to the Plenary Room for the speech of Mr. Nagy celebrating the 5th Anniversary of the Hungary – OECD Centre.

Plenary session:

After the buffet-lunch offered by Hungary, the three Chairs of the breakout sessions will act as *Rapporteurs* to the Plenary session immediately before the start of the roundtable discussion on Collusion and Corruption in Public Procurement. They will report on the commonalities that emerged from the morning's discussions both in terms of the usefulness of existing tools/methods and persistent problems. These underlying challenges will be addressed during the course of the roundtable discussion.

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Presentation by Mr. Michael Thöne

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OPENING SESSION

OPENING REMARKS
BY MR. ANGEL GURRÍA

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The road to recovery: Under construction – competition policy at work[1]

Opening remarks by Angel Gurría, OECD Secretary-General
at the 9th Global Forum on Competition

Paris, 18 February 2010

Ambassadors, Ladies and Gentlemen,

Let me start with a warm welcome to the OECD and to the 9th meeting of the Global Forum on Competition. It is my pleasure to welcome EU Competition Commissioner Almunia and to congratulate him on his new role. Commissioner Almunia takes the helm at a testing time, when a concerted global effort is needed to promote competitive markets which will support the recovery from the crisis. Let me also welcome Mr Frédéric Jenny, Chairman of the OECD's Competition Committee.

Emerging from the crisis

Today, the Global Forum on Competition meets as our economies are emerging from the worst financial and economic crisis of our lifetimes. We find ourselves in a situation which has tested faith in the open market model. But the crisis was not so much a failure of markets, but a failure of regulatory frameworks. We need to rebuild the global institutional framework to restore confidence in financial markets and prevent potential future crises. The economic turmoil has reminded us that the challenge for governments is to have stable but competitive financial markets. The OECD is at the forefront of this debate.

The priority now is to stabilise the financial system and restart lending. And so, the "question of the day" is: how are we going to get back on track? How do we restructure for sustainable growth and job creation? No matter what, competition must be at the heart of it. A consistent and clear competition framework will promote economic recovery; it is a key driver for productivity and growth.

Building sound market structures is key

Let me say it very clearly, there is no magic bullet here. Governments will need to balance the need for speed against getting the rules right. They must carefully weigh-up the extent and nature of reforms so that they avoid imposing unnecessary regulatory burdens. Competition authorities must make the case that markets underpin economic well-being – but only if they work well. Success will require cooperation between business, regulators, competition authorities and policy makers.

[1] Available at http://www.oecd.org/document/38/0,3343,en_2649_40381607_44628070_1_1_1_1,00.html.

Pro-competitive reforms raise productivity, stimulate economic growth and encourage employment. Economies that have supported stronger competition policy have enjoyed not only consistent growth in output, but high employment too. In Australia, the National Competition Policy reforms improved productivity and thus produced a permanent increase in GDP of 2.5%.

This Global Forum can make an important and timely contribution. It is an occasion to exchange experiences and views. It will help policy-makers around the world to understand better the common problems they face and to work together on solutions to them. Solutions that deliver value to consumers, innovation, and economic growth. Rest assured, the OECD will continue to work closely with all of you, to ensure the principles of sound competition are built into the foundations of recovery plans.

Aiming for less and better subsidies

As your first topic of the day highlights – we should all work to ensure that recovery plans do not become long-term protectionist measures.

Massive government interventions helped avoid the worst consequences of the crisis - the collapse of financial markets. We acknowledge that public subsidies may be necessary and appropriate in some circumstances. They must be well-targeted to only fill the gaps left by genuine market failures. History has shown that long-term protection will neither accelerate the recovery, nor deliver sustainable growth. And this is true for developed and developing countries alike.

The challenge for governments today includes defining a process for the timely withdrawal of state-funded crisis measures across the board. When this takes place, advocacy by competition authorities will be essential. You are uniquely placed to shine a bright competition torch on the economic consequences of subsidies and convince policy makers that a level playing field will be central to recovery strategies. The OECD is ready to assist governments in these trying times to ensure that their policies do not unduly restrict competition.

Better value for public procurement

The current crisis has also increased pressure on governments to make public expenditure more effective. Collusion and corruption in public procurement - your second topic for this Global Forum - significantly affect the economy. Public procurement accounts for at least 15% of GDP in OECD countries; even more in developing countries for example around 30% in India. Contract prices can rise by 20% or more when bid-rigging conspiracies are successful. It steals money from taxpayers and siphons it away from other important government programmes, such as health, education and construction. The poorest are thus often hit the hardest.

As the recovery gathers momentum, so must the determination to root out collusion and corruption. The OECD is working hard to increase awareness of the enormous harm caused by cartel activity and bid rigging, which are a significant part of the problem. The OECD Guidelines on Fighting Bid Rigging in Public Procurement help to identify and avoid possible cases early on.

And this is already delivering lasting results. Specific and targeted OECD projects in Brazil and Chile have strengthened detection of bid rigging and means to combat it. Following these successful initiatives, we are now launching a new project in South Africa.

Higher priority must be given to the fight against bid rigging and corruption. By working together competition authorities and anti-corruption officials can maximise their impact. This Forum is an opportunity to take this discussion forward, with the support of the OECD's multi-disciplinary platform.

The OECD's policy advice and best practices provide pro-competitive solutions for all countries. This includes emerging economies that have largely weathered the storm. But they may face infrastructure and institutional obstacles that hold them back. Today's Peer Review of Brazil's competition law and policy is a good example. It will support Brazil's efforts to implement essential reforms for a modern and effective competition regime.

I look now forward to hearing the Commissioner's keynote speech on competition, state aids and subsidies. It is indeed of great interest as we examine the role and effect of public subsidies in times of economic crisis.

Commmissioner Almunia, welcome again and let me say that I am glad that we share the main message for today: competition policy remains an essential tool for delivering economic growth and job creation. The road to recovery for a stronger, cleaner and fairer world economy must be paved with sound competition principles.

I wish you a productive meeting.

Thank you!

KEYNOTE SPEECH
BY MR. JOAQUÍN ALMUNIA

9th Global Forum on Competition

OECD, Paris

18 February 2010

"Competition, State aid and Subsidies in the European Union"

Joaquin Almunia

Commissioner for Competition

European Commission

* * *

I'm very pleased to be here today in only the second week as Competition Commissioner.

The OECD and its Competition Committee play a very important role in the field of competition. I very much appreciate the quality of your work, and applaud your efforts to achieve greater convergence in competition policy worldwide.

My key priority for the next five years is the same as it was under my previous responsibility as Commissioner for Economic and Financial Affairs: to help overcome the current financial and economic crisis and ensure that Europe emerges better equipped for balanced and sustainable growth and more jobs. This is an ambition which we all share for our respective countries – and the reason why we are meeting here at the OECD, to work together to achieve this ambition.

This is also the aim of the proposals the new European Commission is preparing for what we call "The EU 2020 Strategy": to lay the foundations for a more dynamic, knowledge-based, socially inclusive and greener economy that is both sustainable and fair.

I believe that competition policy has a vital role to play in this regard, by making markets work better, for the benefit of business and consumers.

Competition gives business the tools to succeed on the world stage, by enhancing their competitiveness and encouraging innovation. It helps create viable companies that can offer workers long-term employment prospects. And it gives consumers the benefit of lower prices, better choice and better quality of goods and services.

Competition policy is sometimes thought of as only addressing the behaviour of companies and businesses: cartels or abuses of market power, or mergers whose impact on competition needs to be assessed. But state subsidies to business ("state aid" in EU Treaty language) can also distort competition. A review of the impact of subsidies is, I believe, an important aspect of competition policy.

Subsidies are of course an essential tool for policy makers and governments. Government measures to support the financial system and other sectors of the economy over the past 18 months are a case in point. It is widely acknowledged that the money governments poured or committed in support of financial institutions prevented a catastrophic collapse of the global banking system.

On top of the immediate reactions needed to avoid a meltdown of the economy, in normal times subsidies can help remedy a market failure, promote investment in

environmentally friendly technologies, or foster economic and social development in a particularly depressed region. These are important public policy objectives – and it is crucial to ensure that governments have the best-designed tools available to achieve these objectives.

Our aim in recent years, before the crisis emerged, has been to ensure that subsidies are targeted towards horizontal objectives such as these, and to prevent subsidies that merely keep inefficient firms on life-support. In the mid-1990s, around 50 per cent of government subsidies to industry and services in the EU were earmarked for horizontal objectives as opposed to individual bailouts. By 2008 this figure had risen to nearly 90 per cent.

Overall, government subsidies in the EU amounted to just over 0.5 per cent of EU GDP in the period 2004-2008, excluding measures to address the financial and economic crisis. Over the longer term subsidies are on a downward trend, since they are down from nearly 1 per cent of EU GDP in the 1990s.

The EU system for reviewing State subsidies

What we have in the EU is a system that requires the European Commission to review state subsidies to business and to assess their impact on competition. The fundamental principles were laid down in 1957, as a necessary condition to achieving a common market in goods and services in the EU, and remain unchanged today in the new Lisbon Treaty. A single market across the EU requires a level playing field between businesses in different Member States, so that our review of subsidies looks not only at the impact on competition between businesses in a given country, but also at the impact on cross-border competition.

What we do is essentially carry out a balancing exercise, weighing up the efficiency and equity benefits that are expected to result from a subsidy, against the negative effects the subsidy might have on competition in the EU and on trade between EU Member States.

Specifically we consider whether the government's objective in providing the subsidy does not run counter to the common interest of EU Member States – including growth, employment, regional development, the environment, or research and development.

One element we take into account is whether the subsidy addresses a market failure. For instance, we recognise that small businesses find it difficult to access risk capital because of high transaction costs to assess small projects compared to the expected gains from investment. So subsidies to facilitate access to risk capital may be acceptable. Similarly, we are happy to encourage subsidies for the extension of broadband to remote regions, which is not profitable under normal market circumstances. Likewise, we allow subsidies to cover part of the costs of a research project knowing that markets are not always ready to take on the full risk of research especially when profitability horizon is very long.

We check that, in practice, the subsidy will help achieve that objective, that it creates the right incentives for companies to adjust their behaviour. We also check that the subsidy is proportionate, i.e. that the same adjustments to company behaviour could not be obtained with lower subsidy.

This balancing exercise, based on an economic assessment of the impact of the measure, is carried out before the subsidy is implemented. It can lead to the Commission imposing conditions to minimise the distortion of competition, for instance, a reduction in the amount of the subsidy. This helps ensure that subsidy measures do not have an unduly distortive effect on competition in the EU. It also gives Member States an insight into the effectiveness of a planned subsidy and whether it will give value for money to the taxpayer.

Of course, what we don't do – thankfully – is review every single subsidy measure adopted by EU Member States. Following recent reforms, far fewer measures require notification to the Commission. Some of them do not distort competition or trade between Member States, others benefit from a general exemption laid down by regulation, or a general scheme (for instance for aid to research and development, development of small businesses, training and the creation of new jobs, etc). The Commission only carries out an in-depth, individual, review of those large subsidies which have the potential to be really harmful to competition. And what I want to do is to make sure our procedures for notification and review are as simple and streamlined as possible, so as to keep the bureaucratic burden to a minimum.

However, where we find that a State subsidy is unlawful – that is it violates our rules for its acceptance - it must be recovered in full. That is the only effective way of remedying the distortion of competition created by the subsidy.

Why it works

I've mentioned before the role of state subsidies in the global financial crisis. Let me come back to this issue.

Early action by the European Commission helped ensure a common approach by Member States to financial sector bail-outs. Member States may have adopted different measures – those which they felt were best suited to their respective market situation – whether guarantee schemes, recapitalisation measures, or impaired asset relief measures, or a mixture of these. But the European Commission required that all of these measures complied with certain fundamental principles – non-discriminatory access to national schemes, subsidies limited to what was necessary, mechanisms to prevent abuse of state support, restructuring measures for certain financial institutions that received large amounts of aid.

This helped keep to a minimum any distortions of competition between banks within and across national borders, and helped preserve the integrity of the EU internal market. It prevented costly and damaging subsidy races between Member States, with each trying to outdo the other in an attempt to prevent business moving away.

Going forward, EU policy on reviewing State subsidies – notably through the restructuring measures being agreed as a condition of approving bank subsidies – is helping rebuild viable financial institutions which are able to carry out the essential function of providing finance to the real economy.

Reviewing subsidies at national, supranational and international level?

Naturally, the EU perspective on the control of subsidies is closely associated with its powers and role as a supranational body, pursuing common EU objectives such as a level playing field for business and the internal market.

But the underlying principle – that subsidies should not unfairly distort competition between businesses so that companies can compete on merit to the benefit of consumers – is equally important at national level and on national markets for goods or services. Creating or supporting a national champion creates domestic casualties too – those companies that are not chosen for government support. Measures to support inward investment may result in obvious rewards – but it may be worth assessing for just how long those measures continue to produce net benefits, in particular if such support is open-ended.

National regimes for reviewing state subsidies do exist – for instance in Spain, my own country, the national competition authority has the power to issue opinions on subsidies granted by the regions or the central government. On the other hand, countries that are candidates to join the EU are required to set up systems for reviewing State subsidies. One of them, Croatia, has a system that mirrors the EU system – with the national competition authority entrusted with the relevant powers. Looking further afield, Russia also has a system of subsidy control and the Mexican competition authority has powers to deliver opinions on the impact of subsidies on inter-State trade.

I believe that there is scope for individual countries outside the EU to consider adopting a system of controlling State subsidies, for the benefit of business environment and quality of public policies

What about the international level?

All of us here today recognise the benefits of open markets and the downsides of protectionism. Subsidies can be an instrument of protectionism, countering the benefits of trade liberalisation. The WTO rules on subsidies for goods can play a role in removing the most harmful subsidies – but no rule can be applied properly without transparency. So I fully endorse the OECD ministerial conclusions of last June which state that government measures to support industry must be transparent and WTO consistent. Transparency helps contain protectionist measures by opening them up to public scrutiny – and helps ensure a level playing field for business in markets across the world.

With this in mind, I welcome the initiative by WTO Director General Pascal Lamy to report quarterly on measures adopted by G20 countries to counter the crisis. This is particularly important since the G20 is leading the drive towards a coordinated route out of the crisis for the world economy. In a move which underlines the importance we attach to transparency, the EU has already introduced this principle and reports regularly on all Member State actions, regardless of their G20 status. The next report will be published in early March. I look forward for other countries to follow that lead.

Conclusion

Let me conclude.

The EU rules on government subsidies are a key element of EU competition policy in that they help maintain a level playing field for business within Member States and across Europe. They have proved their worth in the context of the financial and economic crisis, helping avoid damaging subsidy races between EU Member States and minimising the distortions of competition resulting from large-scale government bail-outs for financial institutions.

But rules on government subsidies are not an exclusive EU issue. They have a place in all competition regimes – whether national, federal, supranational or international. They help maintain the level playing field between businesses implanted within a country, across regions, and across national borders. They help open up markets to international trade. Ultimately, they help governments assess the effectiveness of proposed subsidy measures, and help channel funds to where they are the most necessary and can deliver the most benefit to taxpayers.

SESSION I

ROUNDTABLE ON COMPETITION STATE AIDS AND SUBSIDIES

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

By the Secretariat

From the background paper, country contributions and the discussion at the roundtable held at the 2010 Global Forum on Competition, the following key points emerge on *Competition policy, State Aids and Subsidies*.

(1) State aids and subsidies represent a significant amount of public funds and governments grant subsidies in a multiplicity of ways.

Despite the downward trend in the amount of state aids and subsidies granted by governments, they still account for a significant share of the world economy. Even in the European Union, where control is the strictest, state aids represent about 1% of EU GDP excluding crisis-related measures.

Furthermore, globalisation intensifies competition between countries, especially for foreign investment. It could make the problem of subsidy races more acute. It could also in some cases result in a protectionist backlash, possibly inducing a growing use of subsidies. It thus appears essential to develop tools in order to help governments and competition authorities differentiate between efficient and inefficient state aid measures and limit the wasteful granting of subsidies.

Governments granting state aids may use a wide variety of different instruments, including direct subsidies, tax breaks or loan guarantees. They can subsidise inputs or buy a firm's products at an above-market price. Also, State-owned enterprises ("SOE") are often important recipients of state aids and in many countries, the largest share of subsidies is devoted to preserving loss-making SOEs.

(2) There exists a large heterogeneity among systems of control of state aids and subsidies, both at the supranational and national levels.

A government measure is usually considered an aid if it involves a certain degree of selectivity, i.e. if it is directed to a specific sector or a specific enterprise, and thus susceptible of significantly distorting competition. However, the definition of an aid may vary considerably across countries. For example, a measure could be considered as constituting an aid according to EU definitions, but not according to the WTO, and vice-versa.

Furthermore, control over state aids takes quite different forms from a jurisdiction to another. The most striking example of the variety of supranational state aid control rules is the difference between the WTO and the EU systems. WTO rules do not provide for any *ex ante* control. The control is *ex post* and allows a Member State to challenge the subsidy granted by another Member State before the WTO settlement body. On the contrary, in the European system, control takes place both *ex ante* and *ex post*. A country planning to grant an aid must notify the measure to the Commission and wait for a clearance decision before implementing the aid. *Ex post*, the Commission must keep existing aids under review and has the power to require the modification of the previously authorised scheme if market circumstances have evolved.

Other regional trade blocs, such as the West African Economic and Monetary Union ("WAEMU") also have specific supranational state aid control rules. The WAEMU state aid rules rely on control both *ex ante* and *ex post* but the WAEMU Commission acknowledges that the rules are not enforced effectively yet. One of the reasons is that the WEAMU Commission has to overcome the absence of a supranational culture that would be needed in order to ensure that state aid control rules prevail over national regulations.

Commercial agreements and regional integration often foster the development of national state aid rules systems. For instance, the Free Trade Area Agreement signed between Ukraine and the European Union obligates Ukraine to prohibit state aids that distort competition. Ukraine has been benefiting from EU technical support in order to implement an efficient state aid monitoring system. Likewise, Croatia, which is in the process of joining the EU, is currently improving its state aid control system in order to make it comply with the EU rules.

Finally, many countries, where no genuine state aid system is implemented, have laws ensuring a "competitive neutrality principle". This is the case of Brazil and Australia among other countries. This principle seeks to ensure that SOEs compete on fair grounds against private entities. However, the competitive neutrality principle does not address cases where governments provide specific private entities with a competitive advantage.

(3) State aids measures may cause distortions and inefficiencies

Subsidy races come from the existence of negative externalities between jurisdictions: the granting of an aid may be a sound policy from the narrow viewpoint of a local or national authority, but when such aid merely shifts economic activity from a region to another, it is globally wasteful. Subsidy races thrive in Federal States where cross-state competition leads local states or regions to engage in costly races to shift activities from neighbouring states to themselves without creating new activities. Subsidy races are somewhat kept under control by supranational systems such as the European Union, but even there, where state aid control is considered the most stringent, they are not entirely kept in check and they often yield inefficient allocation of resources among regions.

Allocative and technical inefficiencies are the first category of inefficiencies caused by state aid measures. Both types of inefficiencies result from the fact that subsidies interfere with market signals, usually creating various kinds of distortions and decreasing productive and allocative efficiency. Where state aids amount to a general subsidisation of inputs, the inefficiency results from the discrepancy between the prices perceived by economic agents and the underlying costs. The case of energy subsidies provides a striking example of such distortions. Subsidising fossil fuels tends to discourage conservation efforts and to induce economic agents to behave without taking into account the true marginal production costs of fossil fuels. Furthermore, this is environmentally costly since it counters efforts to limit emissions.

The provision of subsidies to specific firms may also yield capital misallocation. The source of the inefficiency is that if such subsidies are granted to inefficient firms, they shift production towards less efficient units, thereby increasing total production costs and/or lowering the quantity of output produced. Such productive inefficiencies are particularly likely to arise in countries where a large part of the subsidies are granted in order to keep loss-making companies (often SOEs) afloat rather than with the objective to correct market failures. Likewise, sectoral aid may lead to overproduction in the subsidised sector and underproduction in others.

A last consequence of the large amount of state aids and subsidies directed to inefficient firms is the distortions of firms' incentives resulting from the "soft budget constraint". In this case, the source of the inefficiency is not the subsidy itself, but rather the expectation that failing firms

could be bailed-out and subsidised in the future. This lessens incentives to innovate, raise quality or cut costs, both for efficient and inefficient firms. In particular, efficient firms' incentives are likely to be dampened if they expect that their resulting competitive advantage will be offset by the granting of an aid to their rivals. As regards the inefficient firm, two effects can arise from the expectation that it will be bailed-out in case of difficulties. It may be encouraged to engage in overly risky investments, or it may be less prompt to address the source of its inefficiencies.

(4) State aids policies are frequently rationalised as an instrument to tackle market failures and to produce positive externalities.

Many state aid measures aim at palliating credit and financial market imperfections. In the presence of credit market imperfections, firms that could engage in productive activities may be prevented from doing so because of insufficient access to credit due to asymmetrical information between lenders and borrowers. As standard economic theory has shown, the private supply of credit may be suboptimal in the presence of asymmetric information, which may in principle justify the subsidisation of credit even if governments are no better informed than private lenders. In developing countries, subsidised lending seems to often have a positive impact on economic activity and on the ability of small firms to invest.

Another common justification for state aids is that they can serve as a useful tool to help governments foster research, development and innovation. R&D&I is considered to give rise to externalities: new knowledge generated by R&D&I may be beneficial to society as a whole thanks to knowledge spillovers. However, some firms may be deterred from investing in R&D&I because their private benefits may be limited whereas social benefits could be important. Aid to R&D&I is often meant to remedy the suboptimal level of investment caused by the presence of externalities and informational asymmetries.

However, one should bear in mind that this kind of aids may give rise to inefficiencies. More generally, as is advocated by the European Commission, governments should balance the positive expected impact of a measure and the expected competition distortions when designing a state aid measure.

(5) Steps that could be taken to improve the assessment of state aid and subsidies measures

The greatest difficulty that must be dealt with, when balancing the positive and negative impact of a state aid measure, is that the analysis is mainly a prospective one. This difficulty is greatest in the case of aid aimed at fostering innovation, since the result of innovation is uncertain by nature.

To remedy these difficulties, avoid putting into force a too costly monitoring system, and meet the goal of less and better targeted state aid, governments should adopt general screening and limiting criteria. These criteria could be the following: (i) each subsidy should be subject to an economic analysis precisely identifying which market failure needs correction, and the extent to which the aid measure is likely to remedy it; (ii) a subsidy should be granted only if it can be proved that no more transparent, less discriminatory measure can meet the same goal; (iii) rules should be designed in a way limiting the magnitude and duration of aids; and (iv) there should be a rule implying that when large firms receive subsidies, they must provide something in return.

Ex post assessment mechanisms should also be put in place in order to limit the negative impact of state aids and subsidies. Furthermore, competition authorities should hold SOEs and government agencies to the same standards as private companies regarding the control of anticompetitive behaviour. Finally, advocacy by competition authorities should also contribute to keeping the granting of state aids in check.

SYNTHÈSE

SYNTHÈSE

Par le Secrétariat

Au vu du document de référence, des contributions des pays, et des débats lors de la table-ronde sur la concurrence, les aides publiques et les subventions qui a eu lieu à l'occasion du Forum mondial sur la concurrence en 2010, les points essentiels qui se dégagent sont les suivants :

(1) Les aides publiques et les subventions représentent une part importante des ressources publiques et les gouvernements accordent des subventions sous diverses formes.

Malgré la diminution tendancielle du montant des aides publiques et des subventions octroyées par les gouvernements, ces concours représentent encore une part importante de l'économie mondiale. Même au sein de l'Union européenne, où le contrôle est le plus strict, les aides publiques représentent environ 1 % du PIB hors mesures liées à la crise.

Par ailleurs, la mondialisation intensifie la concurrence entre les pays, surtout pour l'investissement étranger. Cela pourrait exacerber le problème de la course aux subventions ; cela pourrait aussi, dans certains cas, provoquer une recrudescence du protectionnisme, avec le risque d'un recours croissant aux subventions. Il paraît donc essentiel de mettre au point des outils afin d'aider les responsables gouvernementaux et les autorités de la concurrence à distinguer entre les mesures d'aide publique qui sont efficientes et celles qui ne le sont pas et à limiter le gaspillage dans l'octroi de subventions.

Les gouvernements qui offrent des aides publiques peuvent le faire au moyen d'instruments divers tels que subventions directes, allégements fiscaux ou garanties de prêt. Ils peuvent subventionner les moyens de production ou acheter les produits d'une entreprise à un prix supérieur à celui du marché. Les entreprises publiques, elles aussi, bénéficient souvent d'aides importantes de l'État et, dans bien des pays, la majeure partie des subventions est consacrée au maintien en activité d'entreprises publiques non rentables.

(2) Les systèmes de contrôle des aides publiques et des subventions sont très hétérogènes, tant au niveau supranational qu'au niveau national.

Une mesure gouvernementale est généralement considérée comme une aide si elle présente un certain degré de sélectivité, c'est-à-dire si elle vise un secteur ou une entreprise en particulier et est donc susceptible de fausser notablement la concurrence. Cependant, la définition d'une aide n'est pas la même dans tous les pays. Une mesure pourrait, par exemple, être considérée comme constituant une aide selon les définitions de l'UE mais non selon l'OMC, et vice-versa.

De plus, le contrôle des aides publiques revêt des formes très différentes selon les pays. L'exemple le plus frappant de la diversité des règles supranationales de contrôle des aides publiques est la différence entre les systèmes de l'OMC et de l'UE. Les règles de l'OMC ne prévoient aucun contrôle *ex ante*. Le contrôle s'exerce *ex post et* autorise un État membre à contester la subvention accordée par un autre membre auprès de l'organe de règlement des différends de l'OMC. Dans le système européen, au contraire, le contrôle s'exerce à la fois *ex*

ante et *ex post*. Un pays qui prévoit d'octroyer une aide doit en informer la Commission et attendre que l'autorisation lui soit donnée de mettre en œuvre cette mesure. *Ex post*, la Commission doit continuer de contrôler les aides existantes et a le pouvoir d'exiger la modification d'un dispositif qu'elle avait autorisé auparavant si la situation du marché a évolué.

D'autres blocs commerciaux régionaux, tels que l'Union économique et monétaire ouest africaine (UEMOA), ont aussi des règles supranationales spécifiques de contrôle des aides publiques. Celles de l'UEMOA prévoient un contrôle à la fois *ex ante* et *ex post* mais la Commission de l'UEMOA reconnaît que ces règles ne sont pas encore appliquées dans les faits. Une des raisons à cela est que la Commission se heurte à l'absence d'une culture supranationale qui serait nécessaire pour faire en sorte que les règles de contrôle des aides publiques prévalent sur les réglementations nationales.

Les accords commerciaux et l'intégration régionale favorisent souvent la mise en place de systèmes nationaux de contrôle des aides publiques. L'Accord de libre-échange signé entre l'Ukraine et l'Union européenne, par exemple, interdit les aides publiques qui faussent la concurrence. L'Ukraine bénéficie d'un soutien technique de l'UE pour la mise en œuvre d'un système efficace de suivi des aides publiques. De même, la Croatie, qui est en voie d'adhésion à l'UE, améliore actuellement son système de contrôle afin de se conformer aux règles de l'UE.

Enfin, de nombreux pays où il n'existe pas de véritable système d'aides publiques ont des lois qui assurent un « principe de neutralité concurrentielle ». C'est le cas, notamment, du Brésil et de l'Australie. Ce principe veut que les entreprises publiques concurrencent de façon loyale les entités privées. Toutefois, le principe de neutralité concurrentielle n'intervient pas dans les cas où les gouvernements accordent un avantage concurrentiel à certaines entreprises privées.

(3) Les mesures d'aides publiques peuvent causer des distorsions et inefficiences

La course aux subventions est due à l'existence d'externalités négatives entre les pays : l'octroi d'une aide peut être une mesure saine du point de vue étroit d'une autorité locale ou nationale, mais lorsque cette aide revient simplement à déplacer l'activité économique d'une région à une autre, elle n'apporte rien au plan mondial. La course aux subventions est particulièrement développée dans les pays à structure fédérale où la concurrence entre États conduit ces derniers ou les régions à se lancer dans une course onéreuse pour attirer des activités situées dans des États voisins sans en créer de nouvelles. La course aux subventions est limitée, dans une certaine mesure, par des systèmes supranationaux tels que l'Union européenne mais, même là, où le contrôle des aides publiques est considéré comme étant le plus rigoureux, il est impossible d'empêcher complètement ce phénomène, et il en résulte souvent une affectation inefficiente des ressources entre les régions.

Les inefficiences allocatives et techniques sont la première catégorie d'inefficiences causées par les aides publiques. Les deux types d'inefficiences sont dus au fait que les subventions interfèrent avec les signaux du marché, ce qui crée habituellement divers types de distorsions et réduit l'efficience productive et allocative. Lorsque les aides publiques reviennent à un subventionnement général des moyens de production, l'inefficience résulte de l'écart entre les prix perçus par les agents économiques et les coûts sous-jacents. Le cas des subventions en faveur de l'énergie offre un exemple frappant de ce genre de distorsions. Subventionner les combustibles fossiles tend à décourager les efforts de protection de l'environnement et à amener les agents économiques à ne pas tenir compte des véritables coûts marginaux de production de ces formes d'énergie. De plus, cette mesure nuit à l'environnement car elle va à l'encontre des efforts de limitation des émissions.

L'octroi de subventions à des entreprises particulières peut aussi fausser l'affectation du capital. Dans ce cas, le problème vient du fait que si ces subventions sont offertes à des entreprises qui manquent d'efficience, elles déplacent la production vers les unités moins efficientes, ce qui augmente les coûts de production totaux et/ou réduit le volume de la production. Ces inefficiences productives sont particulièrement susceptibles d'apparaître dans les pays où les subventions sont destinées principalement à maintenir à flot des entreprises (souvent publiques) non rentables et non à corriger des défaillances du marché. De même, une aide sectorielle peut conduire à une surproduction dans le secteur subventionné et à une sous-production dans les autres.

Une dernière conséquence de la masse d'aides publiques et de subventions qui va à des entreprises inefficientes est que cela fausse les incitations que représente pour les entreprises une « faible contrainte budgétaire ». Dans ce cas, la source de l'inefficience n'est pas la subvention elle-même, mais plutôt le fait que les entreprises en difficulté pourraient compter sur un sauvetage ou un subventionnement dans l'avenir. Cela affaiblit les incitations à innover, à améliorer la qualité ou à réduire les coûts, tant pour les entreprises efficientes que pour les autres. En particulier, les incitations pour les entreprises efficientes auront sans doute moins d'effet si ces dernières s'attendent à ce que l'avantage comparatif qui leur est ainsi conféré soit compensé par l'octroi d'une aide à leurs concurrentes. En ce qui concerne les entreprises inefficientes, le fait de s'attendre à un sauvetage en cas de difficultés peut produire un double effet : cela peut les encourager à se lancer dans des investissements excessivement risqués, ou atténuer leur promptitude à s'attaquer à la source de leur inefficience.

(4) Pour justifier les aides publiques, les gouvernements les présentent souvent comme un instrument permettant de corriger les défaillances du marché et de créer des externalités positives.

Bon nombre d'aides publiques visent à pallier les imperfections des marchés du crédit et des capitaux. En présence d'imperfections du marché du crédit, les entreprises qui pourraient se lancer dans des activités productives peuvent en être empêchées en raison de difficultés d'accès au crédit dues à une asymétrie de l'information entre prêteurs et emprunteurs. Selon une théorie économique traditionnelle, l'offre de crédit privée peut être sous-optimale en cas d'asymétrie de l'information, ce qui peut en principe justifier le subventionnement du crédit, même si les pouvoirs publics ne sont pas mieux informés que les prêteurs privés. Dans les pays en développement, le subventionnement du crédit semble avoir souvent un effet positif sur l'activité économique et sur la capacité d'investissement des petites entreprises.

Une autre raison couramment invoquée pour justifier les aides publiques est qu'elles peuvent être utiles pour aider les gouvernements à favoriser la recherche, le développement et l'innovation. La R-D-I est considérée comme créant des externalités : les connaissances nouvelles issues de la R-D-I peuvent avoir des retombées favorables pour la société tout entière. Toutefois, certaines entreprises peuvent être dissuadées d'investir dans la R-D-I du fait que leurs avantages privés seraient limités alors que les avantages sociaux seraient importants. L'aide à la R-D-I est souvent censée remédier au niveau sous-optimal de l'investissement dû à la présence d'externalités et à l'asymétrie de l'information.

Il convient cependant de garder présent à l'esprit le fait que ce type d'aides peut être source d'inefficiences. D'une manière plus générale, comme le préconise la Commission européenne, les gouvernements devraient mettre en balance l'impact positif attendu d'une mesure et les distorsions prévisibles de la concurrence lorsqu'ils envisagent d'accorder une aide publique.

(5) Les mesures qui pourraient être prises pour améliorer l'évaluation des aides publiques et des subventions

La plus grande difficulté à surmonter, lorsqu'on met en balance les effets positifs et négatifs d'une mesure d'aide publique, est que l'analyse est de nature principalement prospective. Cette difficulté est encore accrue dans le cas d'une aide destinée à stimuler l'innovation, puisque le résultat de l'innovation est, par nature, incertain.

Afin de remédier à ces difficultés, d'éviter de mettre en œuvre un système de suivi trop onéreux et d'atteindre l'objectif de réduction du nombre et de meilleur ciblage des aides publiques, les gouvernements devraient adopter des critères généraux de contrôle et de limitation. Ces critères pourraient être les suivants : (i) chaque subvention devrait faire l'objet d'une analyse économique afin de déterminer précisément quelle défaillance de marché à besoin de correction, et l'utilité que la mesure d'aide peut avoir à cet égard ; (ii) une subvention ne devrait être accordée que s'il peut être démontré qu'aucune mesure plus transparente et moins discriminatoire ne permettrait d'atteindre le même objectif ; (iii) des règles devraient être créées afin de limiter l'ampleur et la durée des aides ; et (iv) il devrait exister une règle exigeant que, lorsque de grandes entreprises reçoivent des subventions, elles fassent des concessions en contrepartie.

Il faudrait aussi mettre en place des mécanismes d'évaluation *ex post* afin de limiter l'impact négatif des aides publiques et des subventions. Par ailleurs, les autorités de la concurrence devraient assujettir les entreprises et organismes publics aux mêmes normes que les entreprises privées en ce qui concerne le contrôle des comportements anticoncurrentiels. Enfin, une action de sensibilisation de la part des autorités de la concurrence devrait aussi contribuer à maintenir sous contrôle l'octroi d'aides publiques.

BACKGROUND NOTE

COMPETITION, STATE AIDS AND SUBSIDIES

BACKGROUND NOTE

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COMPETITION, STATE AIDS AND SUBSIDIES

BACKGROUND NOTE[1]

1. Subsidies, state aids and state aid control: the current situation

1. Preliminary remark. As is explained below, many different types of government actions can be described as state aids or subsidies, and we do not stick to a single precise definition. In general, these two words are used interchangeably hereafter, except when referring to the European Union (where the standard expression is "state aids") or to the World Trade Organisation (which refers to "subsidies" in the context of the agreement on "subsidies and countervailing measures").

1.1 The importance of government subsidies to companies

2. Governments can subsidise companies in a multiplicity of ways. They can grant direct subsidies or tax breaks to specific firms, with or without any strings attached. They can subsidise inputs such as land, energy, water, bandwidth for telecommunication services, either because these inputs are under direct government control, or because they are marketed by state-owned enterprises. Governments can also guarantee the loans taken up by some companies, allowing the beneficiaries to borrow at a below-market rate. Government-owned banks, or banks that are under strong government influence for regulatory reasons, can also offer direct credit under preferential terms to targeted companies or sectors.

3. State-owned enterprises (hereafter, "SOE") are often an important conduit for, or recipient of, state aids. In many countries, governments devote considerable amounts to the subsidisation of SOEs, and in particular, loss-making SOEs. Historically, some countries have devoted substantial proportions of their national wealth to such SOE related state aid. For instance, in Sri-Lanka in the 1980s and 1990s, more than 30% of the budget, i.e., more than 10% of GDP was allocated to the "maintenance of SOEs".[2] In China, 95% of subsidies to SOEs between 1995 and 2005, were directed to loss-making SOEs.[3] Those countries have since embarked on significant reform and transformation processes, shifting towards improved governance and more market-oriented solutions. In many countries, governments also own utilities in order to provide selected companies with basic inputs, such as energy or water, at below-market prices.

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2 S. Kelegama, 1993, Privatization in Sri Lanka: The Experience during the Early Years of Implementation. Colombo: Sri Lanka Economic Association.

3 China fiscal yearbook, China statistical yearbook.

4. Governments can also subsidise companies by purchasing from them at above-market prices, or, less directly, by forcing some other companies to purchase from them at above-market prices. In some cases, such overpricing is part of an overt policy aimed to meet some public policy goal. For instance, in many countries, utilities have an obligation to purchase renewable energy at regulated, above-market prices. In many countries, the military purchases domestic armaments, at prices that are usually far above export prices, suggesting the existence of an implicit subsidy.

5. Ascertaining whether a given government measure constitutes aid is not a simple matter. For instance, in the European Union (hereafter, the "EU"), where strict control of state aids exists, a considerable part of the debate surrounding individual cases concerns whether the government measure at stake indeed constitutes aid. Also, as is explained below, the definition of an aid varies across jurisdictions; for instance, some measures are considered to constitute aid according to EU definitions, but not according to World Trade Organisation (hereafter, "WTO") definitions; and vice-versa.

6. The recent financial crisis provides a striking illustration. With the quasi-closure of some segments of the credit markets, some fundamentally sound banks, whose assets were unambiguously worth more than their liabilities, were facing the threat of short-run bankruptcy because they were entangled in a liquidity crisis. Suddenly, such banks found themselves deprived of the possibility of using their long-term assets (e.g., a portfolio of very safe long-term loans) as collateral in order to borrow and meet their short-term financial obligations, because the flow of credit directed to these refinancing operations had suddenly dried up. Many governments provided liability guarantees to such banks (at a cost), in order to allow them to borrow on financial markets. Whether this constitutes aid, and, if so, what the amount of the aid, is a moot question. According to the recent practice of the European Commission in the context of the financial crisis, when a government provides a liability guarantee, the amount of the aid is deemed equal to the amount of the guarantee. However, one could estimate the amount of the aid, or even its existence, differently. For instance, in the case of a fundamentally sound bank, the existence of the guarantee is enough to ensure that the beneficiary bank will have access to credit markets (on almost the same terms as governments) and will be able to meet its short term obligations, which rules out bankruptcy in the short run, and hence the calling of the guarantee. If, in addition, the bank is fundamentally sound in the sense that the market value of its assets (in all foreseeable post-crisis contexts) exceeds its total liabilities, bankruptcy is also ruled out in the long run. On the basis of such reasoning, one could argue that since the probability that the guarantee will be used is zero, it entails no cost for the government, and it thus does not constitute aid. Still, another reasoning could be based on the value of the guarantee for the recipient bank, i.e., the amount it would be willing to pay in order to obtain it, or alternatively, some measure based on past market benchmarks (such as the pre-crisis price of credit default swaps).

7. Whether a measure should be seen as aid usually depends on its degree of selectivity. An overall decrease in the level of corporate taxes is never seen as aid; conversely, a tax break granted to a specific firm is usually considered to constitute an aid. However, intermediate cases are often less clear-cut. For instance, determining whether a tax break targeted to small companies constitutes an aid involves a certain degree of arbitrary judgement.

8. Despite this uncertain delineation, the existing estimates, based on heterogeneous definitions, point to the large magnitude of subsidies and state aids. Subsidies have been following a global long-term downward trend, as most countries shifted away from government intervention to an increased reliance on market mechanisms, and as the financial requirements of health care and pension systems increasingly constrained budgets, leaving less room for other types of spending. However, the financial crisis caused a short-term upsurge, as governments bailed out distressed financial institutions and other companies.

9. The most comprehensive data about state aids are those covering the European Union. They show that in spite of a strict control over state aids, their total amount, excluding measures related to the

financial crisis, was still €113.4 billion in 2008, or 0.94% of EU GDP.[4] Not taking aid to railways into account, the volume of aid has been halved between 1992 and 2008, from 1% to 0.54%. The inclusion of crisis measures changes the picture dramatically, since they amounted to €212.2 billion, or 1.7% of GDP.

10. The EU figures (even not taking crisis measures into account) show that even under a strict control regime, national governments are prone to providing sizable subsidies to companies. This alone, even absent very precise data about non-EU countries, suggests that the global amount of subsidies is likely to be very large.

11. Data about non-EU countries are less available and usually lack homogeneity. However, the figures that are available indicate the importance of state aids and subsidies. Aid to agriculture in OECD countries alone amounted to $318 billion in 2002. Van Beers and van den Bergh (2001)[5] also estimate worldwide subsidies to companies as representing 3.6% of world GDP in the mid 1990s. Another indication of the importance of subsidies is that out of the 63 cases brought before the WTO's settlement body between 2001 and 2008, 14, i.e., 22% of the total, concern subsidies.

12. Subsidies take a variety of forms. To mention just a few, global energy subsidies (including both the general subsidisation of energy, support to coal mining in many countries, and, conversely, support to renewable energies) are well above $100 billion per year, with Iran's alone amounting to $55 billion.

13. Some industries are particularly likely to receive subsidies, especially in times of crisis. For instance, total worldwide subsidies proposed for the car industry in 2008 were about $48 billion, both in developed and developing countries. In addition to the US direct subsidy of $17.4 billion to its three national companies, Canada, France, Germany, United Kingdom, China, South Korea, Argentina, Brazil, Sweden and Italy, among others, have also provided direct or indirect subsidies to their car industries which combined are very substantial. Other sectors, such as shipbuilding and airlines, are also regular recipients of subsidies, as recurring overcapacity reduces margins and causes governments to step in.

14. The motives for state aids are as varied as the nature of their recipients. Government subsidies have often been used to foster the development of new industries, in the context of an "offensive" industrial policy, especially in developing countries. [6]This is the case for instance of Brazil's long-standing aid to the aircraft producer Embraer, initially an SOE that was later privatised, of the investments made by Fundacion Chile in many different sectors, and of the subsidies granted in the past by South Korea in order to encourage conglomerates diversification into many sectors. Subsidies granted to innovative clusters are another example of an offensive industrial policy.

15. Subsidies are also often granted as part of a "defensive" industrial policy, when they are targeted towards distressed firms, with the goal of preventing foreign takeover, avoiding the disappearance of an activity deemed essential for the country's economy, or avoiding layoffs and the ensuing social troubles. Examples include the recurring support to carmakers, airlines, and coal mining across the world. In some cases, governments grant subsidies to fragile sectors such as these because they feel compelled to do so in order to re-establish a competitive balance, given the subsidies granted by foreign governments.

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4 Report from the Commission, state aid Scoreboard, Autumn 2009 Update.

5 C. van Beers and J. van den Bergh, 2001, Perseverance of Perverse Subsidies and Their Impact on Trade and Environment, *Ecological Economics*, vol. 36(3), 475-486.

6 See the documentation of the 2009 GFC Roundtable on Competition Policy, Industrial Policy and National Champions: http://www.oecd.org/dataoecd/12/50/44548025.pdf.

16. Another motive for granting aid is to encourage activities deemed to generate positive externalities in addition to the private return to the company undertaking them. Examples include aid to renewable energies, aid to research and development, but also aid to investment in distressed regions.

17. Countries also grant subsidies in order to attract greenfield investments, often by foreign firms. Such competition between national or local governments sometimes gives rise to subsidy races leading to the granting of considerable sums, both in developed and developing countries. Such subsidy races are particularly frequent in large federal countries.

1.2 The treatment of state aids by the WTO

18. State aids and subsidies seem to be at odds with the idea that market mechanisms, under free competition, are the best way to promote social welfare. State aids and subsidies interfere with price formation and with the "Darwinian" processes that competition fosters and that are usually considered to be one of the main forces leading to economic efficiency (at least if one believes in the principles underpinning competition policy). One could therefore expect them to be subject to the intense scrutiny of competition authorities worldwide. This is however not the case. Only in the EU does the competition authority (the European Commission) have the power to exert a stringent control over state aids. In some other jurisdictions, competition authorities have some control over the actions of public entities. However, by and large, starting with a global perspective on the approaches to controlling state aid, the discipline on state aid with the widest multilateral reach, is the one derived from the agreement on subsidies and countervailing mechanisms (hereafter, the "SCM agreement") entered into by all WTO members at the end of the Uruguay Round.

19. The SCM agreement does not provide for any *ex-ante* control.[7] It contains two broad sets of rules. "Track I" refers to the imposition by a Member State of countervailing duties on imports from another Member State granting a subsidy, if that subsidy hurts the duty-imposing country's domestic industry. "Track II" rules allow a Member State to challenge a subsidy granted by another Member State before the WTO dispute settlement body.

20. According to the SCM agreement, a measure constitutes a subsidy if (i) it involves a financial contribution by the government, (ii) it confers a benefit upon its recipients, and (iii) it is specific to a company, an industry, or a group of industries. In practice, criterion (i) is interpreted broadly in WTO law, in that an instruction by the government to private companies to grant an advantage to some companies is considered sufficient for the criterion to be met, even without any actual cost to the government. In contrast, the selectivity criterion is interpreted quite narrowly. For instance, a measure benefitting only small companies, or only companies in a given region, is not considered to meet condition (iii).

21. Not all subsidies are illegal under WTO law. Once a measure is classified as a subsidy, it can be considered as a prohibited subsidy, or an "actionable" subsidy. Export subsidies and import-substitution subsidies are prohibited per se under WTO law. All other subsidies are actionable, meaning that in order for a country to impose countervailing duties or to challenge them before the dispute settlement body, it has to prove that the subsidy causes harm to itself.

22. Fourteen cases involving subsidies were brought before the dispute settlement body between 2001 and 2008. However, this number does not allow us to measure the true impact of WTO rules, which is mainly by deterring governments from granting aid in the first place.

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[7] For a detailed presentation of WTO rules and a discussion of their relationship to EU rules, see C.-D. Ehlermann and M. Goyette, 2006, The Interface between EU state aid Control and the WTO Disciplines on Subsidies, *European state aid Law Quarterly*, vol. 2006 (4), 695-718.

1.3 State aid control in the European Union

23. Stringent control over state aids is exerted by the European Commission. State aid control in fact predates the creation of the EU (then the "European Community") in 1957, since it was already an essential part of the treaty instituting the European Coal and Steel Community in 1951 (with the same six founding members as the European Community, i.e., France, Germany, Italy, Belgium, the Netherlands and Luxemburg). At the time, the main rationale of state aid control was market integration between the Member States.[8] In particular, state aid control was meant to prevent artificial vertical integration on a national basis, with each coal producer selling under preferential terms to steel producers in the same country.

24. Article 107(1) of the Treaty on the Functioning of the EU prohibits state aid which distorts or threatens to distort competition in so far as it affects trade between Member States. However, state aid contributing to well-defined objectives of common European interest without unduly distorting competition between undertakings and trade between Member States may be considered compatible with the common market (Article 107(3)). A major difference between EU and WTO disciplines is that EU control takes place *ex ante*: a Member State planning to grant aid or to enact a measure that might constitute an aid (in case its characterisation as aid is uncertain) must start by asking for the Commission's permission. A major similarity is that each respective regime applies only to state aids where the distortion to competition occurs (at least partly) within the countries that are party to the respective arrangements.

25. In practice, especially after the issuance of the state aid Action Plan in 2005, the Commission's way of handling individual cases revolves around the "balancing test". The main elements of this test are, on the one hand, the identification of the objective of the aid, an examination of whether the aid measure is an appropriate policy instrument (in the sense that it will achieve the purported goal and no less distortive measure could achieve the same goal), and finally, a balancing between the expected positive impact of the aid and the expected competition distortions.

26. The first step of the analysis often involves the identification of market failures, which the aid measure is meant to correct. This is consistent with the general philosophy underlying competition policy, namely the idea that markets in general deliver efficiency. The second test is very important in practice. For instance, in cases where an aid measure is meant to compensate a company for the provision of a "service of general economic interest", it usually leads the Commission to ask why an open, non-discriminatory tender (not considered to constitute aid since the Altmark ruling[9]) could not meet the same goal as the aid. In other words, the second leg of the test strongly restricts governments' ability to grant aid.

27. These general principles have been the foundation of the various guidelines published by the Commission in the last years, covering different types of aid such as the General Block Exemption Regulation, guidelines on aid to research and development, on aid to promote risk capital investment in small and medium-sized enterprises, on aid for environmental protection, and on regional aid etc (this list is not exhaustive). With the commencement of the financial crisis in August 2008, the Commission also published rescue and restructuring guidelines, and various communications on the handling of the financial crisis, including as a starting point the "Commission communication on the return to viability and the assessment of restructuring in the financial sector in the current crisis under state aid rules". It also issued guidelines about aid in response to the crisis in the real economy (i.e., aid to non-financial companies

8 G. Grin, 2003, *The Battle of the Single European Market: Achievements and Economic Thought, 1945-2000,* London : Kegan Paul.

9 Case C-280/00 Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH [2003].

negatively effected by the dramatic reduction of available credit), with the "Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis".

28. While EU rules are generally perceived to be more stringent that WTO rules, this is not always the case. For instance, according to the European Court of Justice, a measure by which the government imposes an obligation to private entities to subsidise other private entities is not considered an aid under EU rules if it does not imply a direct cost to the government.[10] It is also noted that an element of the EU law is that it affect trade between the Member States (which is, of course, a smaller grouping of countries than the WTO).

29. A point worthy of attention is that the notion of affectation of trade between Member States or of distortion of competition by the Commission or Courts has evolved over time. To start with, the standard of proof has changed. Before the ruling of the Court of First Instance (CFI) in *Tubemeuse*[11], the European Commission tended to consider that these conditions were necessarily met as soon as aid was granted and that they therefore did not warrant a specific investigation. In that ruling, the CFI confirmed a decision of the European Commission prohibiting an aid granted by the Belgian government even though the recipient was selling mostly outside of the EC. It held that neither the importance of intra-European trade in the affected market, nor the magnitude of the aid, mattered for the finding of a risk of trade distortion or affectation of trade between Member States. The CFI also claimed that "*the relatively small amount of aid […] does not as such exclude the possibility that intra-Community trade might be affected*". The CFI thus considered that while the European Commission needed to formally address the competition distortion and affectation of trade conditions, it was subject to a very low standard of proof, in that it was enough for the European Commission to show that distortion of competition or affectation of trade could not be ruled out *a priori*.

30. The recent *Wam*[12] ruling may represent a turning point. While it is not the first ruling annulling a prohibition decision by the Commission, it did so by setting a standard of proof that appears to be more demanding that in most of the previous case law. The Court stated that the fact that the aid recipient was engaged in intra-European trade was not by itself sufficient for the Commission to conclude that the aid was going to affect trade between Member States: "*The mere observation that Wam participates in intra-community trade is insufficient to conclude on trade affectation or distortion of competition, and an in-depth analysis of the effect of aids is necessary*."[13]

31. Beyond the issue of the standard of proof, the very meaning of these notions of competition distortion and affectation of trade has evolved over time as well. In Philip Morris[14], the CFI held that competition distortion relates to a change in the position of an undertaking compared with other undertakings in intra-Community trade. But in the Framework for Research, Development and Innovation (FRDI) the European Commission also mentions changes in the location of economic activity as a possible

10 Case C-379/98 – PreussenElektra AG v. Schleswag AG, [2001] ECR I-2099.

11 Case 102/87 [1988] ECR 4067.

12 CFI, 6 September 2006, Italy and Wam SpA v Commission, case T 304/04.

13 Author's translation of "*le seul constat de la participation de Wam aux échanges intracommunautaires est insuffisant pour étayer une affectation desdits échanges ou une distorsion de concurrence et, dès lors, nécessite une analyse approfondie des effets des aides*." (point 74).

14 Case 730/79 [1980] ECR 2671.

distortion[15], even though such changes may occur independently of any impact on competitors (for instance in the case of the granting of aid to a monopoly not threatened by potential entry).

32. The Commission's views as to which market structures make competition distortion more likely have also evolved over time. In several cases (Imepiel[16], Ramondin[17]), distortion was considered more likely if the affected market was highly competitive. This was even stated as a point with general relevance in the motor vehicle guidelines, as the Commission recalled in the DAF Trucks Decision: "*Under aid for modernisation and innovation, the guidelines stipulate that 'in the context of a genuine internal market for motor vehicles, competition between producers will become even more intense and the distortive impact of aid will be greater. Therefore, the Commission will take a strict attitude towards aid for modernisation and innovation'.*"[18] However, in its recent R&D&I Guidelines, the Commission takes a different view, claiming that the distortion of dynamic incentives or State-aid-driven market power creation are less likely in highly competitive markets.[19]

33. State aid control in the European Union has progressively shifted from a purely legalistic approach towards an effects approach. This evolution, in the jurisdiction with the longest state aid control experience, testifies to the need for a better assessment of the economic consequences of state aid and subsidies across countries.

1.4 State aid control and control over government agencies outside of the EU

34. Some regional trade blocs also have specific state aid control rules. For instance, the West African Economic and Monetary Union ("WAEMU"), which regroups Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo, adopted in 2002 competition guidelines, which prohibit anti-competitive agreements, abuses of a dominant position, and "public subsidies liable to distort competition by favouring specific companies or products". However, according to the WAEMU contribution, these rules have yet to be enforced efficiently, which would require greater support from the member states.

35. Other free trade zones, such as the Andean Community, have rules restricting subsidies since Decision 45725 aims at preventing or correcting the distortions in competition generated by subsidies in imports that are produced in Member States.[20]

36. Some domestic competition authorities in non-EU countries also have at least nominal authority over state aids. For instance, Russian competition legislation is applied not only to enterprises but to State executive authorities as well, which is the basis for state aid control in Russia. According to Articles 7 and 8 of Russia's antimonopoly law, actions and agreements of the bodies of executive authority that limit the economic independence of enterprises, create favourable or discriminatory conditions for certain enterprises shall be prohibited. A recent legislative change granted the Antimonopoly authority the power of preliminary control over the adoption of decisions of the bodies of executive authority. Decisions on the granting of any privileges to specific enterprises or groups of enterprises need approval by the Antimonopoly authority.

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15 R&D&I Framework, point 7.4.

16 OJ L 172/76, 27/06/1992.

17 OJ L 318/36, 16/12/2000.

18 OJ L 015 , 20/01/1996 P. 0037 – 0045.

19 Sections 7.4.1. and 7.4.2.

20 http://www.comunidadandina.org/normativa/dec/D457.htm

37. China's Antimonopoly Law which came into effect in 2008 includes a whole chapter comprising six separate prohibitions against certain forms of abuse of administrative power to eliminate or restrict competition. These prohibitions explicitly refer to some governmental initiatives (e.g., setting discriminatory inspection standards or undertaking repeated inspections in a discriminatory way) that may extend beyond the European definition of state aid.

38. Competition authorities in countries currently in the process of joining the EU, such as Croatia and Turkey, also have some control over state aids. In addition, several countries (such as Pakistan and Peru, among others) indicated in their submissions for this GFC roundtable that competition law applies to SOEs, but also more generally to public entities.[21]

39. Finally, many countries, such as Brazil, Australia, Hungary, Peru and Norway, have laws that provide for a "competitive neutrality principle" applicable to government agencies and SOEs[22]. "Competitive neutrality" generally means that Government businesses should not enjoy any net competitive advantage vis-à-vis other businesses simply as a result of their public sector ownership.[23] In some cases there are complaints mechanisms handled by agencies with competition responsibilities available to private companies and private individuals.[24] In addition, competition authorities in many countries are consulted on matters possibly involving state aids, for instance, on the design of public tenders or of privatisation processes.

1.5 Where subsidies meet competition law: predatory pricing and merger control

40. As well as the various regimes that directly apply to state aid discussed above, the enforcement of competition policy even within its "traditional" boundaries can lead competition authorities to deal with state aids, at least indirectly, in two sets of circumstances (even in the absence of legal instruments attaching directly to state aid).

41. The first, and most frequent one, is when companies (often, but not always SOEs) use government subsidies in order to engage in predatory pricing or other exclusionary behaviour. In the EU, the landmark case illustrating this issue is *Deutsche Post*.[25]

42. At the time of the practices at stake (the 1990s), Deutsche Post was an SOE active on two very different markets. On the one hand, it handled letter mail monopoly in Germany, at government-regulated prices, providing a government-regulated public service. On the other hand, Deutsche Post was active on the business parcel delivery market, which was open to competition, in particular that from United Parcel Service (UPS), Federal Express, and other private companies. UPS complained to the European Commission that Deutsche Post was using letter mail monopoly profits to subsidise the sale of its parcel delivery services at below-cost prices. In March 2001, the EC found that for five years Deutsche Post

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21 See http://www.oecd/org/competition/globalforum.

22 Add reference to the October 2009 OECD work on SOEs.

23 See for example, the Competition Principles Agreement between the federal, state and territory governments in Australia.

24 The same agreement provides that each member government must provide a complaints mechanism. In the case of the federal government it is Competitive Neutrality Complaints Office the Productivity Commission and in the case of regional governments include agencies such as the Queensland is the Queesland Competition Authority, Victorian Competition and Efficiency Commission and the Independent Competition and Regulatory Commission of the ACT.

25 Case COMP/35.141 (2001/354/EC).

failed to cover incremental costs in its pricing of parcel delivery service, thereby abusing its dominant position.

43. At first glance, one might consider that there is no dearth of predatory pricing cases and that there is nothing special about the predatory company being a SOE. This impression is misleading, however, because of two specificities of SOEs. First, the definition of the incremental costs associated to the activity on the competitive market depends on which costs are attributed to the public service. The *Deutsche Post* decision clarifies that all costs that are necessary to the meeting of public service obligations should be ascribed entirely to these obligations, even if they also contribute to the activities exerted on the competitive market. Similar cases involved the former telecommunication monopoly in South Africa, Telkom, which was accused of using the profits derived from its monopoly over regulated voice services in order to cross-subsidise its Internet access broadband, leading to the predatory pricing of broadband services. The contribution from Peru also mentions similar cases: "*to date, there have been six cases (…) in which the plaintiffs claimed that a State-owned hospital was providing medical services to patients which otherwise will be attended in private hospitals*."

44. Implementing the *Deutsche Post* criterion is sometimes complex. For instance, in a recent case involving maritime transportation between a French island and mainland France, where an expensive (and highly subsidised) vessel was used for the provision of both a regulated and subsidised public service (winter transportation) and a service in a competitive market (summer transportation), the predatory pricing test revolved around the following question: should the entire cost of the vessel be ascribed to the public service obligation, or should part of it be considered part of the incremental cost of providing the service on the competitive market (summer transportation), given that a smaller vessel could have been sufficient for winter transportation?[26] These examples show that even when addressing a standard, "traditional" antitrust concept such as predatory pricing, competition authorities may be led to assessing the cost of providing a regulated public service – which is very close to what the European Commission does when assessing whether government compensation for services of general economic interest constitutes a subsidy.

45. A second difference between SOEs and private companies, as regards predatory pricing claims or more general claims of exclusionary behaviour is that SOEs' objectives are often not profit maximisation, but rather the maximisation of some combination of profits and size.[27] This implies that even in situations where exclusionary behaviour is incompatible with the maximisation of the discounted flow of future profits (say, because recoupment is unlikely after the elimination of a competitor, due to the absence of entry barriers), SOEs may nevertheless be tempted to engage in such behaviour, while private companies in the same situation would not. This observation has prompted some authors to argue that the treatment of exclusionary abuses should be stricter when the defendant is an SOE, and that the "recoupment" test, which is part of the assessment of predatory pricing claims in the US, would lead to overly lenient enforcement.[28]

46. Another, less direct relationship between subsidies and competition policy is in the field of mergers. Governments wanting to deter some mergers between private firms, for "industrial policy" or economic nationalism reasons can in some cases threaten a reduction in subsidies, or more generally a

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26 French Competition Authority, Decision #04-D-79 ; Cour de cassation ruling, 17 June 2008.

27 See, e.g., W. Niskanen, 1971, *Bureaucracy and Representative Government*, Aldine Transaction; William Niskanen, 1975, Bureaucrats and Politicians, *Journal of Law and Economics*, vol. 18.

28 D. Sappington and G.Sidak, 2003, Competition Law for State-Owned Enterprises. *Antitrust Law Journal*, vol. 71 (2), 479-523 ; 2000, Are Public Enterprises the Only Credible Predators?, *University of Chicago Law Review*, vol. 67 (1), 271-292.

worsening of the terms of trade with the government (in the case of firms selling to government entities, or at government-regulated prices, or purchasing some inputs from public entities). For instance, it is sometimes alleged that when the Swiss pharmaceutical company Novartis and the French pharmaceutical company Sanofi competed for the acquisition of Aventis, the French government leveraged its influence over drug price negotiations in order to favour a merger between two French firms. This is consistent with the empirical observation that countries with a high share of foreign firm ownership tend also to impose relatively high corporate taxes.[29]

47. In spite of the abovementioned interactions between competition law and subsidies, the general observation is that, outside the European Union, there is relatively little control over state aids, since WTO disciplines only cover some categories of aid (those that cause harm to other countries and give rise to complaints before the dispute settlement body). This invites a discussion of the impact of state aids. A review of the possible adverse impact of state aids, and the circumstances possibly justifying their use will now follow.

2. The possible adverse impact of state aids

2.1 A background element: the cost of public funds

48. Before considering the possible usefulness of state aids and subsidies, it is important to remember that collecting public funds entails cost, both direct (administrative) and indirect (due to the distortive effect of taxation) and that the granting of aid comes at the expense of other, possibly highly productive public expenditures.

49. According to some empirical estimates, raising 100 dollars for the government entails a deadweight cost between 18 and 24 dollars: when the government raises 100 dollars, other economic agents lose not 100 dollars, but between 118 and 124 dollars.[30] These figures are for the United States and one can suppose that the cost of public funds is greater in developing countries.

50. On the expenditure side, the magnitude of subsidies is so large in some developing countries that reducing them would allow governments to dramatically increase their spending on health care or education. For instance, by diverting SOE operating subsidies (which are just a part of the total subsidies granted by governments to companies) to basic education the central governments of Mexico, Tanzania, Tunisia and India could increase central government education expenditures by 50, 74, 160 and 550 percent, respectively. Likewise, redirecting SOE subsidies to health care would permit the central government of Senegal to more than double health care expenditures in that country, and the central governments of Turkey, Mexico, Tunisia, and India to increase health care expenditures threefold, fourfold and fivefold, respectively.[31]

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29 H. Huizinga and G. Nicodème, 2006, Foreign ownership and corporate income taxation: An empirical evaluation. *European Economic Review*, 1223-1244.

30 C. Ballard, J. Shoven and J. Whalley, 1985, General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States, *American Economic Review*, vol. 75 (1), 128-138; D. Jorgenson and K. Yun, 1990, Tax Reform and US Economic Growth, *Journal of Political Economy*, vol. 98 (5) ; D. Jorgenson et K. Yun, 1991, The Excess Burden of Taxation in the United States, *Journal of Accounting and Finance*, vol. 6 (4), p. 487.

31 D.A.C. Smith, and M.J. Trebilcock, 2001, State-owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies, *European Journal of Law and Economics* vol. 12 (3), 217–252.

51. These numbers are important because they imply that the opportunity cost of state aids is very large. According to existing estimates, the social return to public investment in education is about 8.5% in OECD countries, but above 20% in developing countries.[32] These numbers imply that state aids should be assessed against a strong standard. Aids that are tantamount to pure lump-sum transfers represent an enormous waste of resources (unless the lump-sum transfers contribute to some legitimate, well-identified distributive goal) since they use public funds that are costly to collect and that could have been put to a much more productive use had they been allocated to health care or education.

2.2 The magnitude and economic cost of subsidy races

52. One may wonder why governments would grant subsidies when more efficient uses of public funds would be possible.

53. A frequent answer has to do with the existence of negative externalities between jurisdictions, i.e., between countries or between regions within countries. In a nutshell, the granting of aid may seem to be sound policy from the narrow viewpoint of a local or a national government, but when such aid amounts to shifting economic activity from one region (or one country) to another one, it is globally almost useless and it amounts to a waste of public funds.

54. The deadweight cost of taxation and the opportunity cost of public funds are high and therefore state aids are likely to be wasteful even when they do not directly generate distortions (the observation that state aids, in addition, often generate serious distortions that are damaging to economic efficiency and to the environment, is explored later on in this study).

55. The mechanism behind the externality is the following. A firm's decision to set up, expand or maintain a plant in a country often generates sizable benefits for the host country or the host region: tax revenues (levied directly on the firm or indirectly, on employees' salaries), possibly a decrease in unemployment and in the associated costs, increased demand for the output of local suppliers, etc. It may also result into a transfer of skills to the local workforce, which can then benefit the economy more broadly as workers change firms. Each national or local government thus may have an interest in granting aid in order to lure firms into its territory. Competition across local or national governments wanting to attract or retain the same firms might result in large volumes of aid, shifting the location of firms' activities rather than creating new ones.

56. In theory, subsidy races might raise, rather than decrease, total welfare. This could be the case if two conditions were met: (i) the deadweight cost of taxation and the opportunity cost of government funds are low and (ii) the benefit derived from a firm's presence varies greatly across locations. In such a case, the countries or regions in which the presence of a firm would yield the largest benefits are willing to "bid" greater amounts than regions in which these benefits would be smaller. Just like price competition, cross-country competition would then reveal where the external benefits are greatest, and it would cause firms to locate where their presence is most valuable, which would be desirable.[33]]

57. If, as is generally the case, the deadweight cost of taxation and the opportunity cost of government funds is large (which is the case, as is explained above), and if subsidy races do not direct

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32 G. Psacharopoulos and H.A. Patrinos, 2004, Returns to investment in education: a further update, *Education Economics*, vol. 12 (2), 111-134.

33 W. Tiebout, 1956, A pure theory of local expenditures, *Journal of Political Economy*, vol. 64 (5), p. 416; T. Besley and P. Seabright, 1999, The Effects and Policy Implications of state aids to Industry: an Economic Analysis, *Economic Policy*, p. 15-53.

investments towards regions where they have the greatest positive external impact, then races are likely to be wasteful.

58. The available literature about the United States, where aid is not prohibited illustrates that competition across states to attract firms can be costly. States seem to engage in significant competition to shift activities from neighbouring states to themselves, often without creating new activities.[34] Simply changing the location of a business (as opposed to encouraging the creation of new activity) is unlikely to have net beneficial effects unless there is a markedly different cost / benefit balance in different regions within the one country. This cross-state competition also seems to have intensified lately,[35] and this has prompted some American authors to recommend a federal control over state aid.[36]

59. Even in the European Union, where state aid control is supposed to limit the occurrence of wasteful subsidy wars, and where one could expect subsidy competition to result only in "virtuous" outcomes, i.e., in directing investments where it generates the greatest positive externalities, the evaluation by the literature of existing aids is not very positive. According to a recent study, while regional policy aiming to attract firms to poor or peripheral locations apparently succeeded, they were very costly because the distortion of firms' location choices resulted into sizable inefficiencies.[37] The case for state aid as a tool for the alleviation of regional inequalities might thus not be so strong, and alternative policies, such as direct income transfers could be more efficient in many cases.[38]

60. The picture is not different in the developing world, where examples of highly wasteful subsidy competition abound, often within large, federal countries, where regional governments try to outbid each other in order to attract investment.

61. A recent example is the competition between various Indian states in order to attract a plant that Tata Motors was willing to build in order to produce a new, cheap car destined primarily for the Indian market. The location of the plant was finally decided to be in the state of West Bengal, after this state's government offered a highly attractive incentive package including preferential loans at a below-market rate of 1%, subsidised electricity (with a discount greater than 25%), subsidised land, and tax exemptions.

62. More interestingly, this example illustrates the intensity of competition across states. In particular, during the "bidding war", West Bengal offered a commitment to match the incentive packages offered by two other states (Uttarakhand and Himachal Pradesh). If, as is probably the case, what was at stake was the location of the plant, rather than the principle of its existence somewhere in India, it is likely that such a subsidy race was inefficient unless the cost / benefit balance varies considerably within the one country.

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34 R. Tannenwald, 2002, Are State and Local Revenue Systems becoming Obsolete?, *National Tax Journal*, vol. 55 (2), p. 467.

35 K. Chi and D. Leatherby, 1997, *State Business Incentives: Trends and Options for the Future*, Lexington, Kentucky: Council of State Governments.

36 P. Enrich, 1996, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, *Harvard Law Review*, vol. 110 (2), p. 377.

37 K.-H. Midelfart-Knarvik and H.-G. Overman, 2002, Delocation and European Integration: Is structural spending justified?, *Economic Policy*, vol. 35, 322-359.

38 K.-H. Ulltveit-Moe, 2007, Regional policy design: An analysis of relocation, efficiency and equity, *European Economic Review*, vol. 51, 1443-1467.

63. This example is far from being isolated in developing countries. For instance, there has been in the late 1990s an intense subsidy war across Brazilian states trying to attract automotive plants.[39] For instance, in 1995 and 1996, the state of Parana and the municipality of Sao Jose offered Renault an attractive package, including a capital contribution of about $ 300 million and subsidised electricity, launching what became known as the "fiscal war" across Brazilian states.

64. Similar subsidy wars have taken place in East Asia as well. In 1996, Thailand and the Philippines engaged into a hard-fought battle to attract a General Motors car plant. In the end, Thailand won the contest by matching the Philippines' package and, in addition, offering a 100 per cent refund on raw materials for car exports and a $15 million grant towards setting up a General Motors training institute. Again, the interesting element is that General Motors had announced its intention to build a $ 500 million car plant in Asia, irrespective of subsidies. Therefore, the subsidies did not, in all likelihood, contribute to the creation of new economic activities, and simply had an impact of the location of a plant that would have been built notwithstanding the subsidies provided.

65. Such subsidy wars are by no means limited to the car industry. Since the mid-1990s, several East Asian nations have launched various incentive schemes, involving very generous tax exemptions for high technology investments.

66. One may question the economic rationality of such subsidy races, both at the individual level of the country or regions granting a subsidy, and at a more global level.

67. At the individual level, since such subsidy races are mostly about attracting foreign investment (though not only, as the Tata Motors example shows), the relevant question is whether foreign investment generates large enough externalities to make the granting of subsidies rational. There is evidence that foreign direct investment generates benefits to other firms in the same sector or in vertically related ones (i.e., suppliers or customers). This evidence is so far more abundant in the case of developed countries. In the case of developing or transition economies, there is a (still admittedly small) body of evidence showing that the presence of affiliates of foreign-owned firms tends to increase the productivity of their local suppliers, but the evidence also shows that such effects vary a lot from one case to another.[40]

68. These findings imply that it may be rational for individual countries or regions to grant large subsidies in order to attract foreign investment. However, such behaviour is likely to be collectively irrational, in that a "prisoner's dilemma" is at play. In the end, most of the investments benefitting from subsidies would have taken place anyway, so that the main impact of subsidy races is a waste of public funds.

2.3 Strategic subsidisation in oligopolistic sectors: overcapacities and competition creation

69. In oligopolistic markets, state aid may also generate cross-country externalities by having an impact on the investment decisions of the rivals of the aid recipient. The underlying mechanism has been studied in the economic models of strategic trade policy,[41] and can be summarised as follows. In an

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39 This and the following examples are drawn from Andrew Charlon, 2003, Incentive Bidding for Mobile Investment : Economic Consequences and Potential Responses, OECD Development Centre, Working Paper No. 203.

40 B. Javorcik, 2004, Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages, *American Economic Review*, 2004, vol. 94(3).

41 J. Brander and B. Spencer, 1985, Export Subsidies and International Market Share Rivalry, *Journal of International Economics*, vol. 18, p. 83.

oligopoly, in which firms earn rents derived from their market power, a firm's profit increases if its rivals decrease their investment (to be understood in a broad sense, including R&D, advertising, set-up costs in order to operate in a new country, etc.) Therefore, a national government may have an interest in inducing the foreign rivals of one of its national champions to scale down their investments.[42] State aid may achieve this result in some circumstances. For example, if country A grants investment aid to a firm, competitors in country B may expect an expansion of the recipient of the aid, and thus a reduction in the residual demand facing them. This expectation may in turn induce them to scale down their investment. The overall result is a shift of part of the oligopoly rents towards the recipient of the aid, at the expense of its rivals.[43]

70. The granting of aid may thus allow the recipient to pre-empt a part of the demand which, absent any aid, would have been served by foreign rivals. This mechanism involves a cross-country negative externality because when a government grants aid, it fails to take into account the harm to foreign competitors.

71. Such logic is probably at work in sectors such as the automotive industry. As recalled above, governments across the world, in developed and developing countries alike, have granted massive subsidies to their automotive industries, with the total commitments estimated at $ 48 billion in 2008. Many governments justify the granting of aid by the need to re-establish competitive balance and to compensate for the subsidies granted by foreign governments.

72. In theory, the impact of such subsidies on social welfare is ambiguous, because they may generate a positive cross-country externality: if the recipient of aid expands production, or investment, consumers may benefit, not only in the country whose government granted the aid, but also abroad. A government caring only about the welfare of domestic economic agents would fail to take this effect into account. If this positive externality is more important than the abovementioned negative one (the one on foreign producers), it could be the case that, even absent state aid control, governments grant too little, rather than too much aid! [44]

73. Leaving theory aside, it is clear that such strategic subsidies impose a large cost to the global economy, at least in the automotive sector, because they hinder the much-needed balance between production capacities and global demand.

74. This result is however not universal. In some cases, especially when the subsidy is used in order to create a new competitor in a market lacking competition, it may be welfare-increasing. The positive externality at stake is the impact on the degree of competition. For instance, creating Airbus yielded benefits not only in the form of profits from the sale of aircraft, but also in the form of a decrease in the (quality-adjusted) prices of Boeing aircraft, which shifted monopoly rents away from US shareholders to airlines around the world (and their clients). The same can be said of the creation of Embraer, the Brazilian aircraft producer. The main finding from empirical research is that the impact of such competition-creation subsidies is very complex and multidimensional. For instance, it has been estimated that because of the increased competition in the aircraft sector fostered by the creation of Airbus, the corresponding subsidies

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42 See GFC 2009 Roundtable on Competition Policy, Industrial Policy and National Champions (cf. Footnote 6 above).

43 In some circumstances, the causality may be reversed. For example, a firm facing a decrease in its residual demand may have greater incentives to engage into R&D so as to re-establish a better market position.

44 D. Collie, 1998, State aid in the European Union: The prohibition of subsidies in an integrated market, *International Journal of Industrial Organization*, vol.18, 867-884; D. Collie, 2002, Prohibiting State aid in an Integrated Market, *Journal of Industry, Competition and Trade*, vol. 2 (3), p. 215; D. Collie, 2005, State aid to Investment and R&D, *European Economy, Economic Papers*, vol. 231, p. 1.

significantly raised European welfare, but decreased the global economic surplus (once the losses to pre-existing aircraft manufacturers are accounted for).[45]

2.4 Distortions caused by subsidies

75. The main source of inefficiency caused by subsidies, besides their possible wasteful nature (in which case the inefficiency results from the opportunity cost of public funds) is that they tamper with market signals. This can result in two types of inefficiencies. *Allocative inefficiencies* arise when the relative quantities produced and consumed of various goods are not optimal. Technical inefficiencies arise when, taking total output as given, production does not use the cost-minimising combination of inputs (taking environmental costs into account).

76. This interference with market signals can take two broad forms. When state aids amount to a general, across-the-board subsidisation of inputs, the inefficiency results from the discrepancy between the prices perceived by economic agents, which are affected by subsidies, and the "true", cost-based prices.

77. When state aids target specific firms, they alter the "Darwinian" mechanism by which capital is allocated to the most efficient firms, which tends to minimise total production costs. This effect can play both at the intra-sectoral and at the inter-sectoral level. At the intra-sectoral level, state aids may channel capital and labour to less efficient firms, thereby generating productive inefficiencies. At the inter-sectoral level, state aids may affect the relative magnitude of various sectors, leading to overproduction in subsidised sectors and underproduction in others.

78. These various mechanisms are highlighted hereafter with the help of a few examples. For illustrative purposes, we focus on examples from developing countries and on distortions having an impact on the environment. We also consider a few examples drawn from the recent financial crisis and bank bailouts.

Price distortions

79. The most striking example of economically and environmentally costly distortions caused by subsidies is that of energy subsidies.

80. These subsidies are quantitatively important, both on the consumption and on the production side, in developing and developed countries alike. Iran's fuel subsidies amount to about $ 55 billion per year. India's fuel subsidy has been estimated at $ 15 billion annually at least, 90% of which accrue to agriculture. Quite interestingly, large fossil fuel producers and exporters are most likely to heavily subsidise energy consumption: beyond the extreme case of Iran, Saudi Arabia and Venezuela, two of the world's largest oil producers, are also among the most important providers of domestic energy subsidies ($ 26 billion and $ 17 billion annually)[46]. The reason is probably that such subsidies are perceived as almost costless by governments. They are costly when the market price of oil is high, which also happens to be the time when governments earn large revenues from oil exports.

81. Even in the European Union, despite the existence of strict state aid control mechanisms, some fossil fuels benefit from very large production subsidies. Over the decade 1994 to 2005 over €80 billion in state aid for the coal industry was approved. In Germany the operating aid in 2004 was equivalent to over €86 per tonne suggesting that the cost of German coal production was more than twice the world market

45 D. Neven and P. Seabright, 1995, European Industrial Policy: the Airbus Case, *Economic Policy*, vol. 21, 313-358.

46 International Energy Agency, 2008.

price. On the consumption side, the persistence of a complex scheme of regulated electricity prices in France, well below the true marginal costs of electricity generation, is another case of tampering with price signals.[47]

82. Such subsidies have hugely distortive effects. On the consumption side, the long-term elasticity of demand for gasoline has been estimated to be around -0.7 in the sense that a 1% decrease in the price of gasoline causes demand to rise by 0.7% in the long run.[48] This relatively large number (in absolute value) implies that the abovementioned subsidies have a sizable impact on oil consumption. From a purely economic viewpoint, they tend to discourage conservation efforts and induce economic agents to behave without taking into account the true marginal production costs of fossil fuels. They are also environmentally damaging since they directly counter efforts to limit emissions.

83. The case of energy subsidies to Indian farmers is particularly interesting. The provision of cheap electric power since the 1970s was meant to support farmers (which formed, and are still forming the majority of the population, and are overwhelmingly poor) and encourage them to purchase and operate pumps to irrigate their crops. Obviously, the subsidisation of electric power meant that in many cases, the ensuing production decisions, while individually rational, were in fact value-destroying if considered on the basis of the true costs of electricity generation. This subsidisation policy also generated environmental damages. Because the cost of pumping water was artificially lowered, many farmers planted thirsty crops, which depleted water resources and increased salination.[49]

84. The case of European coal subsidies illustrates the various channels by which subsidies can be distortive. In principle, the level of subsidies was calculated so as not to change the "merit order" between different types of fuels, i.e., in order not to make coal-fired power plants artificially more economical than, for instance, gas-fired power plants. This limit on the subsidy plan was one of the reasons that led the European Commission to accept it. However, even with this restriction, the subsidy scheme was bound to create distortions. The reason is that it amounts to increasing the global supply of coal, i.e., to adding an artificially inflated amount of European coal on the global market, with the consequence of lowering the market-clearing price, thereby generating some substitution away from other energy sources towards coal.

85. Coming second just behind energy, water is probably the most heavily subsidised commodity in the world. In the developing world alone, it is considered that water subsidies amount to about $ 45 billion annually, leading to overconsumption and lack of investment in pipe networks (to reduce leaks).

Productive and environmental inefficiencies caused by capital misallocation

86. Another importance source of inefficiencies concerns the provision of selective subsidies to specific firms – in particular SOEs. The source of the inefficiency is that if such subsidies are directed to inefficient firms, they shift production towards less efficient units, thereby increasing total production costs. This can also entail large environmental costs, since inefficient firms tend to use more inputs per unit of output, and hence to pollute more.

87. The order of magnitude of the subsidies to SOEs is very large. The fact that, in some countries, almost the entirety of subsidies were allocated to loss-marking companies is consistent with the view that

47 D. Spector, 2007, *Electricité: Faut-il désespérer du marché?*, Editions Rue d'Ulm.

48 J. Hamilton, 2008, Understanding Crude Oil Prices, NBER Working Paper #14492.

49 R. Tongia, 2007, The Political Economy of Power Sector Reform in India, in *The Political Economy and Institutions of Power Sector Reform in the Developing World*, Victor, D. and Heller, T. (eds.), Cambridge University Press, Cambridge.

subsidies were often not allocated on the basis of a cost/benefit calculation, or by taking into account the presence of market failures in need of corrections, but merely by the need to keep inefficient production units afloat.

88. In addition to direct government subsidies, SOEs are often supported by preferential access to credit from state-owned banks.[50] These direct and indirect subsidies are directing resources to inefficient production units, implying a deadweight cost which can represent a non negligible percentage of industrial output.[51] This estimate is striking because it is an average across all SOEs, some of which are very efficient, especially after the Chinese government started to reform them by introducing private-sector style corporate governance rules.

89. In addition to this purely economic deadweight cost, the subsidisation of inefficient SOEs causes significant environmental costs. A burgeoning but convergent empirical literature finds that SOEs tend to be less environment-friendly than private firms. Some studies[52] find that SOEs can emit up to ten times more pollutants than private firms, everything else being equal. One of the reasons seems to be that SOEs are less monitored for environmental compliance than private firms[53]. But another likely reason is that since subsidies keep inefficient production units in activity, these units use up more inputs in general for a given amount of output, implying that they also pollute more.

90. Aid recently granted to financial institutions by many governments around the world can also have other sub-optimal effects. Government support was mainly directed to the larger banks, deemed essential for systemic stability. The result was that large banks had better access to credit than smaller ones, because creditors felt that they benefitted from an implicit government guarantee. According to a recent estimate, banks with more than $100 billion in assets are borrowing at 0.34 points lower than other banks. This may induce a squeeze and further strengthen the larger banks at the expense of their smaller rivals. This creates an inefficiency, and it was the sheer size of the largest banks, and the perception that they were 'too big too fail', which acted as a contributory factor in triggering the financial crisis.[54]

91. In developed countries, support to loss-making companies is less pervasive, but can sometimes take place to a significant extent when governments come to the rescue of "national champions". For instance, the United States' antitrust agencies' contribution to the 2009 OECD Competition Committee's roundtable on financial markets[55] cites the government's provision of loan guarantees to Chrysler Corporation in 1980 as another example of a failed effort which may have had adverse competition consequences. According to the U.S. paper, should Chrysler have failed, the assets could have devolved to

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50 L. Brandt and Z. Zhu, 2000, Redistribution in a Decentralized Economy: Growth and Inflation in China Under Reform, *Journal of Political Economy*, vol. 108, 422–439.

51 S. Claro, 2005, How Uncompetitive is the State-Owned Industrial Sector in Chinao, Documento di Trabajo N° 305, Pontificia Universidad Catolica de Chile, Instituto de Economia.

52 See for example H. Wang and Y. Jin, 2002, Industrial Ownership and Environmental Performance: Evidence from China, Discussion Paper 2936, World Bank Policy Research Working Paper; S. Pargal and D. Wheeler, 1996, Informal Regulation of Industrial Pollution in Developing Coun- tries: Evidence from Indonesia, *Journal of Political Economy*, vol. 104, 1314–1327.

53 S. Gupta and S. Saksena, 2002, Enforcement of Pollution Control Laws and Firm Level Compliance: A Study of Punjab, India, paper presented at 2nd World Congress of Environmental and Resource Economics, Monterey CA; H. Wang, N. Mamingi, B. Laplante, and S. Dasgupta, 2002, Incomplete Enforcement of Pollution Regulation: Bargaining Power of Chinese Factories, World Bank working paper.

54 D. Cho, Banks 'Too Big to Fail' Have Grown Even Bigger, *Washington Post*, August 28, 2009.

55 Competition and Financial Markets, OECD 2009 : http://www.oecd.org/dataoecd/45/16/43046091.pdf

a more efficient competitor, and the industry's competition position could have improved.[56] Similarly, according to the U.S. Federal Trade Commissioner William Kovacic, the provision of financial assistance to the distressed aircraft manufacturer Lockheed in the early 1970s generated large productive inefficiencies. Had Lockheed been allowed to fail, its assets would have gone to a then more efficient carrier, McDonnell Douglas, the MD10 producer. Today's landscape could have been very different, according to Commissioner Kovacic, with at least three effective major manufacturers of long-range commercial aircraft: Boeing, Airbus, and McDonnell Douglas. [57]

2.5 Another cost of subsidies: the soft budget constraint and the cost of rent-seeking

92. State aids can also have adverse effects on economic efficiency through two more mechanisms. The first one is the so-called "soft budget constraint". The striking characteristic of this mechanism is that the source of the inefficiency is not the granting of subsidies itself, but rather the expectation that failing firms could be bailed out and subsidised. If it is expected that failing firms will be rescued by governments with some probability, companies may be encouraged to undertake overly risky investments, or to adopt lax management practices. More generally, a firm's incentives to become more efficient so as to cut costs, raise quality or innovate are likely to be dampened if it expects that the resulting competitive advantage will be offset by the granting of aid to its lazier rivals. This idea has been formulated by the economist Janos Kornai when analysing attempts by the Hungarian government to partly liberalise the economy: *"Although state-owned enterprises were vested with a moral and financial interest in maximising their profits, the chronic loss-makers among them were not allowed to fail. They were always bailed out with financial subsidies or other instruments. Firms could count on surviving even after chronic losses, and this expectation left its mark on their behaviour"*.[58]

93. This type of mechanism is difficult to measure, because it does not involve a direct causal link between a specific aid and a measurable inefficiency. However, a recent study of the performance of Korean SOEs lends support to the view that the soft budget constraint, i.e., the expectation of bailout by the government in case of failure, has a strong impact on companies' operating efficiency. This study[59] finds that Korean SOEs increased their operating efficiency and their profitability between 1998 and 2002, at a time when they were facing the prospect of privatisation because of a commitment by the government in that direction. Hence, the source of the increased efficiency was not privatisation (which in fact did not take place for most of the companies considered), but simply the removal of the expectation that they would be bailed out in case of failure.

94. The recent debate about Air India's bailout provides another illustration of this mechanism of soft budget constraint. The government indicated that this was the "first and last time" that it would bail out the airline. As in any such situation, making this commitment credible was an important part of the overall strategy meant to force managers to make tough but necessary decisions, including staff reductions.

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56 Note by the United States, OECD Competition Committee Roundtable: Competition and Financial Markets, DAF/COMP(2009)11ADD1, at 225-29, available at http://www.oecd.org/dataoecd/45/16/43046091.pdf. The paper also cites federal aid to Penn Central as another example of failed state aid (at 228, fn 10).

57 W. Kovacic, participant in Industrial Policy and Competition Law and Policy Roundtable ("Industrial Policy Roundtable"), 2006 Fordham Comp. L. Inst. 239-40 (B. Hawk ed. 2007).

58 J. Kornai, E. Maskin and G. Roland, 2003, Understanding the Soft Budget Constraint, *Journal of Economic Literature*, vol. 41 (4), p. 1095. See also J. Kornai, 1986, The Soft Budget Constraint, *Kyklos*, vol. 39 (1), p. 3.

59 J. Kim and H. Chung, 2008, Empirical Study on the Performance of State-owned –enterprises and the Privatizing Pressure : The Case of Korea, paper presented at the Utrecht conference on "(Re)Regulation in the Wake of Neoliberalism. Consequences of Three Decades of Privatization and Market Liberalization", available at http://regulation.upf.edu/utrecht-08-papers/jkim.pdf.

However, outside observers considered this commitment not to be credible, inter alia, because Air India, like most national carriers, was "too big to fail", because of its symbolic weight and, last but not least, because it was an SOE."[60] Similar stories can be found in many countries, including in Europe.

95. In some sense, the financial crisis of 2008 is an extreme instance of the damage wrought by the existence of a soft budget constraint. One ingredient that contributed to excessive risk-taking by banks was the implicit government guarantee they felt to be enjoying (and that they indeed were enjoying, as has been revealed by the various, costly rescue plans). Here again, the damage caused by the excessive risk-taking was not caused by the granting of aid, but by the expectation that aid would be granted should the need arise. This remark should not be construed as meaning that the bank rescue schemes were inappropriate; even though there is scope for disagreement on their details; few economists deny the need for some kind of government rescue. However, this observation highlights the possibly major economic costs implied by the expectation of government aid.

96. All these effects share the striking characteristics that the harm is not caused by the subsidies themselves, but rather by the expectation that subsidies might be granted in the future. Such effects cannot, therefore, be accounted for on a case-by-case basis, when evaluating the merits and the costs of a given subsidy.

2.6 The political mechanisms behind inefficient subsidies

97. The above list of mechanisms which can lead to inefficient subsidies being granted fall into two broad categories: negative externalities across jurisdictions and an intrinsic propension of governments to make inefficient decisions. While wasteful subsidy races and the competition for rents in oligopolistic markets, leading to a global excess of production capacities, can be explained by the presence of negative externalities between rational, welfare-maximising (local, regional or national) governments, many other mechanisms are at play that explain why governments tend to grant subsidies that make little economic sense, even from their own narrow point of view.

98. One can find many examples of subsidies that obviously did not make sense from a collective interest viewpoint and can be better explained by rent-seeking or political motives - an extreme example is aid granted in the 1990s by the State of Michigan to various firms on job-creation grounds at a cost more than 2 million dollars per job4.[61] More generally, the ability of private interest groups to sway economic policy in their favour at the cost of others has been amply documented,[62] just as the impact of firms' political connections on business outcomes, both in developed and developing countries.[63] For example, according to existing literature, the degree of tariff protection enjoyed by various industries in the United States is directly correlated to the level of donations to political parties.[64] There is also evidence that sector- or firm-specific public policy (for instance trade policy) is in general tilted in favour of declining

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61 See R. Tannenwald, 2002, Are State and Local Revenue Systems becoming Obsolete?, *National Tax Journal*, vol. 55 (2), September, p. 467.

61 See R. Tannenwald, 2002, Are State and Local Revenue Systems becoming Obsolete?, *National Tax Journal*, vol. 55 (2), September, p. 467.

62 T. Persson and G. Tabellini, 2000, *Political Economics: Explaining Economic Policy*, MIT Press.

63 B. Roberts, 1990, A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits, *American Journal of Political Science*, vol. 34 (1), 31–58 ; R. Fisman, 2001, Estimating the Value of Political Connections, *American Economic Review*.

64 P. Goldberg and G. Maggi, 1999, Protection for Sale: An Empirical Investigation, *American Economic Review*, vol. 89 (5), p. 1135.

industries. This is a quite general pattern. It can be observed both in US trade policy[65], and in European state aid policy: for instance, many European governments spent billions of euros trying to keep inefficient coal mines afloat, only to delay their closure by a few years.

99. A recent econometric study of state aid in Europe[66] finds that the more a country's political system makes the provision of targeted aid politically profitable (e.g., in countries with small electoral constituencies, little ideological distance between parties, and little party unity), the greater the share of aid to firms that is indeed targeted ("sectoral", in EU parlance), as opposed to "horizontal". This suggests that the provision of support to specific sectors may be based, to some extent, on electoral considerations – despite strict control by the European Commission.

100. These findings have two consequences. First, rent-seeking and politically motivated decisions may affect the nature and destination of subsidies, often leading to an inefficient use of public funds and to productive and allocative inefficiencies. In addition, the more subsidy granting lends itself to capture by private interests, the more companies are likely to invest in rent-seeking activities, which represents a waste of resources: according to various estimates, the cost of rent-seeking activities is very high.[67]

101. The handling of the recent financial crisis is a case in point. Some observers argue that the U.S. bailout scheme was tilted in favour of banks' shareholders rather than to a potentially more efficient scheme, which would have involved the nationalisation of some insolvent banks.[68] Similarly, an analysis of US congressmen's voting patterns regarding the Emergency Economic Stabilisation Act ("EESA") in October 2008, which according to the authors of the study "transfers wealth from tax payers to the financial services industry" reveals that "higher campaign contributions from the financial services industry are associated with an increased likelihood of voting in favour of the EESA".[69]

102. Subsidies sometimes create new vested interests that engage in rent-seeking, for instance by pursuing the perpetuation of industrial policies which should in fact be interrupted because of changing circumstances. The Concorde project, sponsored by the British and French governments, illustrates this

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65 G. Hufbauer and H. Rosen, 1986, Trade Policy for Troubled Industries, Policy Analyses in International Economics 15, Institute for International Economics Washington, D.C.; G. Hufbauer, Gary, D. Berliner and K. Elliot, 1986, Trade Protection in the United States: 31 Case Studies, Institute for International Economics, Washington, D.C. ; E. Ray, 1991, Protection of manufactures in the US, in D. Green, *Global Protectionism: Is the US playing on a level field?* Macmillan, London.

66 U. Aydin, 2007, Politics of state aid in the European Union: Subsidies as Distributive Politics, University of Washington, Political Science Department, unpublished.

67 In the United States, total expenditures on transfer activity have been estimated at 25% of GDP (D. Laband and J. Sophocleus, 1992, An Estimate of Expenditures on Transfer Activity in the United States, *Quarterly Journal of Economics*, vol. 107(3), 959-983). Other estimates, based on regressions of gross national output on the relative number of lawyers (supposed to be a proxy for the magnitude of rent-seeking activities) and physicians or engineers (supposed to be a proxy for the magnitude of productive activity) point to similar or even higher costs of rent-seeking (S. Magee, W. Brock and L. Young, 1989, *Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium*, Cambridge University Press; K. Murphy, A. Shleifer and R. Vishny, 1991, The Allocation of Talent: Implications for Growth, *Quarterly Journal of Economics*, vol. 106(2), 503-530.)

68 M. Richardson and N. Roubini, Nationalize the Banks! We're all Swedes Now, *Washington Post*, February 15, 2009.

69 A. Mian, A. Sufi and F. Trebbi, 2009, The Political Economy of the U.S. Mortgage Default Crisis, NBER Working Paper # 14468.

point.[70] The launch of a supersonic plane made sense in the cheap oil world of the 1960s, but the project lost its economic rationale after the oil shock of 1973. However, its advanced stage implied that the large group of civil servants and businessmen with a stake in the Concorde project had a strong interest in the continuation of the project. Ultimately, this group prevailed over market signals and the project went ahead, at a considerable cost to both governments.

103. This type of harmful causal chain occurs in a variety of situations. In contrast to the high-technology example of the Concorde project, the policy followed by many Indian states that subsidised electric power for farmers in order to foster water pumping and irrigation created a similar lock-in effect. Faced with cheap power, many farmers acquired pumps and invested know-how in the growing of thirsty crops. This financial and human investment reinforced the demand for cheap power: basically, the idea is that subsidising a good (in this case, electric power) creates an incentive for the recipient of the subsidy to invest in a complementary good (in this case, electric pumps and the know-how regarding the growing of thirsty crops), which increases the demand for the original subsidy. In the end, the political pressure for the continuation of subsidies to electric power became the main driver of the continuation of this policy, long after politicians had realised how harmful it was.

104. The large subsidies to agriculture in many countries are another case in point. For instance, the common agricultural policy put in place by the European Union were initially justified on efficiency grounds, on at least two counts. First, it was meant to encourage European farmers to adopt more efficient technologies, which involved in some cases very difficult adjustments, such as exchanges of parcels of land between farmers so as to end up with farm shapes that lent themselves to modern techniques. Second, it was meant to bring Europe towards food self-sufficiency, which in the 1960s would have been a worthy goal, as in the context of the cold war the notion of "food security" made sense. However, by the 1990s these justifications had all but disappeared. One could have imagined that it would be easy to decrease the amount of subsidies to agriculture, but that did not happen because the beneficiaries of the subsidies had become a powerful political constituency. Similarly, subsidies to increase ethanol production in the United States, initially intended to develop an alternative to fossil fuels, turned out to be economically unsound when in 2007 and 2008 the price of corn and sugar cane (used to produce ethanol) started to rise. However, there was strong pressure to maintain the status-*quo*, in particular because the ethanol subsidies had been capitalised in land prices, which made a policy turnaround difficult.

105. A recent study of the investment decisions made by sovereign wealth funds confirms that the more politicians are involved, the more they tend to use these funds as vehicles for the subsidisation of domestic companies.[71] This study finds that sovereign wealth funds where politicians have a greater involvement in management tend to invest more in domestic companies (which is consistent with the view that they use such funds to reward friends rather than to diversify their countries' assets) and that they tend to invest in companies with higher price/earnings ratios, which have on average a negative valuation change after the investment. This last finding suggests that sovereign wealth funds where politicians have a greater involvement tend to subsidise the firms in which they invest, by supplying them with capital on terms that are below those that would have led to normal rates of return.

106. The recent spate of bailouts of troubled firms, in the wake of the financial crisis, illustrates the tendency for governments' funds to be handed out on the basis of somewhat-unclear economic criteria. For instance, in Russia, Vneshekonombnak (VEB), the state development bank, announced in 2009 plans to

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70 D. Myddlteon, 2007, *They Meant Well: Government Project Disasters*, Institute of Economic Affairs Monographs, Hobart Paper No. 160.

71 S. Bernstein, J. Lerner, A. Schoar, 2009, The Investment Strategies of Sovereign Wealth Funds, Harvard Business School Working Paper 09-112.

lend about $ 50 billion to distressed companies, with the possibility to convert loans into government shares should the beneficiaries be unable to repay. However, many observers, including in Russia, criticised the lack of objective criteria governing either the choice of the beneficiaries, or the nature of the assistance (and in particular the absence of any conditions attached to the granting of aid), to the point that some observers claimed that "a $50 Billion Bailout in Russia Favours the Rich and Connected"[72]. For instance, the carmaker Avtovaz received in 2009 a $ 730 million interest-free loan, a $ 230 million loan from state banks at a favourable rate, and a commitment by state-owned banks to help it raise an additional $ 2.6 billion from banks. In exchange, no commitment was demanded in terms of management, in spite of the broadly held view that Avtovaz is far from the efficiency frontier in the automotive industry. As a result, the Russian Union of Industrialists and Entrepreneurs called for the creation of transparent, public standards for financial aid distribution and warning about the dangers of favouritism. The financial advisor who originated this bailout strategy even criticised the "frittering away of funds, directing them toward inefficient companies with political connections".[73]

107. Another mechanism leading to inefficient subsidies is at play in the case of countries where a large share of government revenues comes from the export of raw materials, such as oil. Public knowledge of the windfall revenues that fall into government coffers in times of high world prices create a popular pressure for redistribution, and governments often feel that the least risky way for them to redistribute part of the windfall revenues is by subsidising the raw material that generated the windfall in the first place. This is because such a redistribution entails an automatic "fiscal stabiliser", since its cost is directly proportional to the windfall revenues. However, this redistribution mechanism is highly inefficient because it distorts price signals, as explained above. A possible solution is the creation of offshore funds allowing governments to tie their own hands, such as those created by Norway, Kuwait or Azerbaijan.

108. According to Rodrik (1995)[74], the subsidisation of nascent industries in East Asian countries in the last decades was relatively immune to rent-seeking, unlike the situation observed in most developing and many developed countries. As Rodrik (2004)[75] points out, the presence of rent-seeking does not by itself suffice to conclude against targeted subsidies and industrial policy, no more than rent-seeking in education justifies an end to the public provision of education. However, these findings plead against policies that endow governments with tools allowing them to arbitrarily favour specific firms. More across-the-board instruments, or aid targeted to new firms and new activities, on a temporary basis, would probably limit the scope for rent-seeking.

109. There exist good reasons for governments to grant subsidies to companies in specific circumstances. These reasons (often, but not exclusively falling into the category of "industrial policy") do not, however, justify signing a blank cheque for subsidies. As the above examples show, political dynamics may imply that a subsidy that is initially sound from an economic viewpoint creates vested interests that make its removal very difficult even after it has lost its initial justification. Also, as is explained hereafter, the existence of theoretical justifications for subsidies in some cases does not imply that governments, even benevolent ones immune from the pressure of special interests, can easily identify which subsidies are "right" and which would be wasteful.

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72 *New York Times*, 31 October 2008.

73 A. Kramer, Russian Auto Bailout Protects Jobs, Not Efficiency, April 7, 2009 ; the ISCIP Analyst, An Analytical Review, vol. XV (4), 6 November 2008 ; P. Pan, Russian élite look to Kremlin for aid as wealth evaporates, *Washington Post*, 17 October 2008.

74 D. Rodrik, 1995, Getting Interventions Right: How South Korea and Taiwan Grew Rich, *Economic Policy*, vol. 10(20).

75 D. Rodrik, 2004, Industrial Policy for the twenty-first century, Harvard Kennedy School Working Paper 04-047.

3. The possible justifications for state aids and their limits

3.1 A quick overview of the most frequent justifications for state aids and subsidies

110. The most frequent justification for state aids and subsidies is that they allow governments to correct market failures of various kinds.

111. For instance, markets may fail to deliver a distribution of income that is considered to be fair or politically desirable. In principle, the proper tool to address this type of market failure is not the granting of subsidies, but rather fiscal policy. However, in some circumstances, especially when governments' goal is to provide income support to a category of the population that is defined by its economic activity (for instance, agriculture), rather than by its monetary income, they choose to subsidise an economic activity directly.

112. Another frequent justification for the granting of subsidies to private companies is the goal of saving jobs, when a company faces the prospect of bankruptcy, or the "threat" of foreign takeover sometimes deemed to threaten jobs.

113. However, the most frequent justification for state aids and subsidies is the presence of positive externalities generated by some activities, i.e., the idea that the social value of some activities exceeds their private value. Unless the gap between the social and private value is filled by subsidies, private agents have an insufficient incentive to engage into a socially valuable activity. This idea is at the root of the subsidies that are part of "industrial policy".

114. The various mechanisms possibly justifying the granting of subsidies are reviewed hereafter. We also highlight the limits and the risks associated with the granting of subsidies even when objective justifications seem to exist; and we illustrate hereafter how the new economic approach implemented by the European Commission assesses the various possible justifications for state aids.

3.2 Subsidies as income support

115. The most natural instrument to redistribute income is taxation and transfers to individuals. However, in some cases, interest-group politics push governments to redistribute income not on the basis of monetary criteria, but on other grounds, such as supporting the members of certain professions. An obvious example is agriculture. For instance, the average income transferred to an average individual farmer in France, through the common agricultural policy, was €17,000 in 1999,[76] even though farmers are not, on average, poorer than the average population.

116. Subsidies are in general an inefficient way to redistribute income because they generate price distortions. For instance, the welfare loss induced by the common agricultural policy before its reform (which started in 2004) has been estimated at 0.9% of European GDP, which is a lot given that agriculture accounts only for 2% of European GDP.[77]

117. This example highlights that subsidies are not an efficient way to redistribute income. It creates vested interests that make the removal or even the mere adaptation of subsidies difficult, and creates significant economic costs.

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76 P. Messerlin, 2004, Forging a deal on Agricultural Trade Reform, communication at the conference entitled "Breaking the Deadlock in Agricultural Trade and Development", Oxford, June 2004.

77 B. Borrell and L. Hubbard, 2000, Global Economic Effects of the EU Common Agricultural Policy, *Economic Affairs: Reforming the CAP*, N° 20.

118. Another weakness of the use of subsidies as a redistributive tool, rather than direct income taxation and redistribution, is that subsidies often miss their goals because they may end up being appropriated by agents that are not the intended beneficiaries. Again, aid to agriculture is a case in point. The factor in agriculture is land, whose supply is inelastic, rather than labour. As a consequence, economic theory predicts that subsidies are most likely to be reflected in the price of agricultural land, rather than in the income of agricultural labourers. This reasoning has been confirmed by experience: from 1983 on, New Zealand drastically reduced its subsidies to agriculture, dividing them by 10. As a result, the income of agricultural labourers fell sharply in the first two years. However, this fall was followed by a large rebound, as the price of land fell, and the income of agricultural labourers' soon recovered and finally reached its initial level. This highlights the fact that subsidies are an awkward redistributive instrument.[78]

119. In order to tackle this difficulty, many countries, including the members of the European Union and the United States decided to reform agricultural policy by shifting from the subsidisation of production to direct income support, in the form of lump-sum transfers, the amount of which is determined on the basis of "historical" rights, depending on the amount of subsidies received in the past under the previous, price-distorting system. This type of subsidy seems to be less inefficient in that it is supposed not to alter production decisions. This is why the WTO (then GATT) agreements tend to view such subsidies favourably (meaning, technically, that they are classified as "green box" subsidies). However, in practice, even such subsidies appear to be somewhat distortive, because they may lack credibility. Agents tend to believe that since past activity gives a right to a lump-sum transfer today, then present activity might entitle them to some transfer in the future. Existing studies of the evolution of agricultural policies around the world therefore tend to caution against the view that lump-sum transfers are a panacea. While they are less distortive than direct production subsidies, they may still be distortive.[79]

3.3 Subsidies as a way to palliate credit and financial market imperfections

120. Credit market imperfections in many cases create a wedge between the social and the private value of economic activities. The reason is that firms that could engage in productive activities may be prevented from doing so because of insufficient access to credit, due to informational asymmetries between lenders and borrowers. Credit rationing has become particularly acute lately as a consequence of the financial crisis. The simple claim that governments know no better than banks which firms deserve credit, and that subsidising credit makes therefore little sense. As standard economic theory has shown, the private supply of credit may be suboptimal in the presence of asymmetric information, which may in principle justify the subsidisation of credit even if governments are no better informed than private lenders.

121. Directly or indirectly subsidised credit is prevalent in many countries, especially in developing ones. For instance, Indian law requires banks to direct at least 40% of their credit to "priority sectors", which include agriculture, agricultural processing and "small scale industry". Another important instance of subsidised credit is the case of microfinance institutions in developing countries, which provide small loans, often backed by subsidies from governments or aid organisations.

122. One difficulty in ascertaining the relevance of subsidies as a tool to palliate credit rationing is the risk that publicly subsidised lending will simply crowd out private lending rather than expand the total volume of lending and increase production, resulting in a purely distributional effect.

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78 Gilles Saint-Paul, 2007, Commentaire, in P. Chalmin and D. Bureau, Perspectives agricoles en France et en Europe, Conseil d'Analyse Economique.

79 A. Bouet, J.C. Bureau, Y. Decreux, and S. Jean, 2004, Multilateral Trade Liberalisation: The Contrasting Fortunes of Developing Countries in the Doha Round, Discussion Paper No. 60, Institute of International Integration Studies, Trinity College, Dublin ; E. O'Donoghue and J. Whitaker, 2006, How distorting are direct payments?, paper presented at the 2006 American Agricultural Economics Association conference.

123. While the situations are undoubtedly diverse, there is some evidence that subsidised lending in developing countries has an impact on economic activity and on small firms' ability to invest. A recent study of the abovementioned directed lending programme in India finds that subsidised credit is not used as a substitute for private credit, but rather as a complement. It has indeed been found that when changes in rules increased some firms' eligibility to the program, their total borrowing and their total production increased. While this study does not present an overall cost-benefit analysis, it shows that the subsidy at least meets its purported goal of expanding the production opportunities of small firms.[80]

124. Similarly, a study of microfinance institutions in South Africa found that rate subsidisation had an impact on takeup rates by the targeted populations, i.e., poor populations in developing countries.[81]

125. Credit rationing is not the only type of financial market imperfection. More generally, financial markets may be unable to provide instruments allowing companies to reallocate risk optimally. Nuclear energy is a good illustration of the wedge between the social and the private value of some investments. For countries deprived of fossil fuel resources, nuclear energy is a way to reduce the exposure to the fluctuations of fossil fuel prices. However, from the viewpoint of private companies, the fact that the cost of nuclear-generated electricity is insensitive to fossil fuel prices is a risk, because electricity prices are mostly determined by fossil fuel prices (since they are determined at every instant by the marginal cost of the marginal means of production, which is almost always a fossil-fuel burning plant, even in countries with large nuclear generation capacities). Therefore, the return on an investment in a nuclear plant is sensitive to the fluctuations of fossil fuel prices, unlike the returns on an investment in a fossil-fuel fired plant. If financial markets were perfect, firms engaging in nuclear investments could issue bonds that would be indexed on fossil-fuel prices and hence shift the risk to the market. However, such refined financial instruments barely exist, and the wedge between the social value of limiting the exposure to the volatility of fossil-fuel prices and private incentives cannot be bridged by market mechanisms alone. This reasoning explains in part why the U.S. government decided to subsidise investment in nuclear generation in its Energy Policy Act (2005), providing tax credits and insurance against construction delays.

3.4 Subsidies as a way to account for discovery and agglomeration externalities

126. The concentration of firms active in the same sector, in a given region, is often considered to generate local positive externalities. Three types of mechanisms can be distinguished, on the basis of the existing empirical studies. The first is input sharing: the concentration of firms in the same sector in a given area attracts input suppliers, which lowers all firms' costs. The second is labour market pooling: a concentration of firms attracts a large pool of workers with the requisite sector-specific skills, leading to reduced search costs for both workers and firms. The third is knowledge spillovers: a company's R&D efforts may benefit other companies because new knowledge diffuses outside the company undertaking R&D, through social and business interaction (for instance between suppliers and customers), or as a consequence of employees moving across companies. A variant of these arguments, especially relevant to developing economies, involves informational externalities: whenever a firm is established in a new sector, other agents observe its performance and learn about the prospects in that sector. According to Rodrik (2004)[82], this discovery process generates positive information externalities and therefore warrants government intervention aiming to identify promising sectors and to encourage firms to enter them.

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80 A. Banerjee and E. Duflo, 2002, Do Firms Want to Borrow More? Testing Credit Constraints Using a Directed Lending Program, MIT Department of Economics Working Paper No. 02-25.

81 D.S. Karlan and J. Zinman, 2008, Credit Elasticities in Less-Developed Economies: Implications for Microfinance, *American Economic Review*, vol. 98(3), 1040–68.

82 D. Rodrik, 2004, Industrial Policy for the twenty-first century, Harvard Kennedy School Working Paper 04-047.

127. The empirical evidence is twofold. On the one hand, there is a lot of evidence that positive agglomeration externalities exist, thereby making the theoretical claim for industrial policy reasonable. On the other hand, the evidence on governments' attempts to emulate the Silicon Valley or to jump start activity in a new sector is mixed. Many such attempts failed, and several success stories appear to owe little to governments. However, in some instances, especially in developing countries, government intervention played a key role in the successful development of entirely new sector, as is explained below.

128. The importance of agglomeration effects and sector-wide economies of scale has been substantiated by a series of convergent studies. Their magnitude is likely to be quite large: for instance, according to a recent study, a doubling in the regional scale of an industry leads on average, in Japan, to a 4.5% increase in productivity[83]. As opposed to intra-firm economies of scale, such intrasectoral economies of scale in theory justify public intervention in order to help industries reach a large enough scale. The various underlying mechanisms have been measured as well. The input sharing assumption has received empirical confirmation: the more firms are concentrated in an area, the more outsourcing one observes, which reflects the greater availability of outside inputs.[84] The best-documented type of local externality is knowledge spillovers. For instance, Agrawal et al (2006) showed, by studying patent citations, that the knowledge created by an inventor is applied disproportionately in locations where the inventor lived previously, which can be explained only by the importance of personal connections[85], and Audrestch and Feldman (1996) highlighted the geographic concentration of innovations.[86]

129. There is evidence that many developing countries' specialisations owes more to the development of sectors in which there was an initial presence, because of agglomeration and informational externalities, than to genuine comparative advantage. For instance, as Hausman and Rodrik (2003)[87] note, countries with nearly identical resource endowments end up with very different specialisations: Korea exports microwave ovens but no bicycles, while Taiwan exports bicycles but almost no microwave ovens; Bangladesh is one of the main exporters of hats worldwide while Pakistan exports almost none. These findings suggest that specialisation patterns are largely explained by random events occurring at the initial stage of development, i.e., on random attempts by lone entrepreneurs, which then give rise to self-reinforcing dynamics. If that is the case, then there would be a case for the temporary subsidisation of new sectors by the government.

130. Interestingly, there is some evidence pointing towards the fact that positive local spillovers (adjusting for firm size) are less important when a large firm settles in a region than when a small firm does.[88] This is probably because large firms have less need for interaction with outsiders. However, there

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83 R. Nakamura, 2005, Agglomeration economies in urban manufacturing industries: a case of Japanese cities,*Journal of Urban Economics*, vol.17, 108-124.

84 T.J. Holmes, 1999, Localization of Industry and Vertical Disintegration, *Review of Economics and Statistics*, vol. 81(2), 314-25.

85 A. Agrawal, I. Cockburn and J. McHale, 2006, Gone But Not Forgotten: Knowledge Flows, Labor Mobility, and Enduring Social Relationships, *Journal of Economic Geography*, vol. 6(5); see also E. Moretti, 2004, Workers' Education, Spillovers and Productivity: Evidence from Plant-Level Production Functions, *American Economic Review*, vol. 94(3).

86 D.B. Audretsch and M. Feldman, 1996, R&D Spillovers and the geography of innovation and production, *American Economic Review*, vol. 86, 630-664.

87 R. Hausman and D. Rodrik, 2003, Economic Development as Self-Discovery, *Journal of Development Economics*, vol. 72.

88 Rosenthal, S. S. and W. C. Strange, 2003, Geography, Industrial Organization, and Agglomeration, *Review of Economics and Statistics*, vol. 85 (2), 377-393.

also is some anecdotal evidence in the other direction, pointing to the importance of large firms in the success of some innovative clusters (like Nokia in Finland).[89]

131. In contrast to the accumulation of knowledge about the nature and magnitude of agglomeration externalities, the evaluation of the public policies supposed to stimulate them yields mixed results. Many governments' attempts to emulate the Silicon Valley have proved inconclusive, even in the United States where first-hand, detailed information was available. A comprehensive study of innovative clusters by the OECD highlights the diversity of the mechanisms that allowed some clusters to flourish and concludes that (i) it is very difficult to measure the contribution of public policy to the success of some of these clusters, and (ii) there is no single, one-size-fits-all policy prescription. Tellingly, one of the most successful technological clusters in the developing world, in the Bangalore region, appears to have been caused by a series of serendipitous events (such as IBM's refusal to let Indian shareholders purchase 60% of its Indian subsidiary, which led IBM to leave India and forced Indian software professionals to turn towards open platforms, thereby acquiring the skills that would prove highly valuable more than ten years later).[90]

132. Conversely, Rodrik (2004)[91] argues that some industrial policies followed in Latin America and East Asia succeeded in taking into account informational externalities and fostering the development of entirely new sectors. For instance, in Chile, the public agency Fundacion Chile started to subsidise salmon farming in the 1970s. Whereas this industry was inexistent in Chile prior to this policy, Chile is now one of the main exporters of salmon. Similarly, Rodrik argues that the launch of orchid production by government firms in Taiwan, that is, with government funds, was a good way to reveal the profitability of this sector in order to stimulate private investment and the development of a new sector. According to Rodrik (1995), the case of the Korean conglomerate Hyundai is a stunning illustration of the usefulness of a properly implemented policy targeting a national champion. On the one hand, government support to diversification allowed Hyundai to internalise labour market externalities, as managers who had acquired skills in the cement and construction industry could then apply them to other sectors, as Hyundai developed new activities, such as car manufacturing and shipbuilding. On the other hand, the government's direct and indirect subsidisation (including in the form of implicit purchase guarantees for the ship building division, as explained above) encouraged Hyundai to catch up with foreign incumbents in terms of efficiency.

133. However, Rodrik stresses the limitation of such policies. Unless subsidies to investors in new sectors are strictly limited in their scope (with a restriction to really new sectors) and duration (long enough for discovery to occur, but not longer) and made conditional on some market-based measure of performance, they may well be inefficient.

134. The general implication of the empirical literature on agglomeration effects is that while they are important, the appropriate policy tools to deal with them are complex and not yet fully understood. In particular, while some kind of industrial policy is likely to be helpful, there seem to be good reasons to focus them on smaller firms at an early stage of development rather than on existing champions, because the various abovementioned externalities are likely to be more acute in the case of small firms.

135. In the European Union, the possible use of public funds to foster the development of innovative clusters has been recognised. The FRDI[92] states that *"Aid for innovation clusters aims at tackling market*

89 See the chapter on Finland in OECD, Innovative Clusters, 2001.

90 H. Pack and K. Saggi, 2006, Is There a Case for Industrial Policy? A Critical Survey, The World Bank Research Observer, vol. 21(2).

91 D. Rodrik, 2004, Industrial Policy for the twenty-first century, Harvard Kennedy School Working Paper 04-047.

92 Community Framework for state aid for Research and Development and Innovation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:323:0001:0026:en:PDF).

failures linked with coordination problems hampering the development of clusters, or limiting the interaction and knowledge flows within clusters. State aid could contribute in two ways to this problem: first by supporting the investment in open and shared infrastructures for innovation clusters, and secondly by supporting cluster animation, so that collaboration, networking and learning is enhanced."

136. The detailed recommendations of the Community Framework highlight the way in which it is possible to tread the fine line between subsidising truly externality-generating activities and wasting public funds. The Commission recognises the positive externalities often generated by clusters and acknowledges that they may justify the granting of subsidies, but it also mentions two safeguards. First, the maximum authorised aid intensity is 15% (with exceptions for some underdeveloped regions or Member States). Second, and more important maybe, aid should be targeted to expenses that directly relate to the externalities, i.e., those that contribute to the functioning of the cluster without their benefits being directly appropriated by specific companies. The expenses include for instance "marketing of the cluster to recruit new companies to take part in the cluster, management of the cluster's open-access facilities, and the organisation of training programmes, workshops and conferences to support knowledge sharing and networking between the members of the cluster."

3.5 Subsidies to research, development and innovation as a way to account for knowledge spillovers

137. More generally, research, development and innovation (R&D&I) is often considered to give rise to externalities. As is explained in a recent commentary of the new Framework on Aid to R&D&I published by the European Commission, positive externalities may be present for the following reasons: "R&D&I activities generate new knowledge, which is beneficial to society because it can be used by many companies to invent or improve products and services. However, from the perspective of a single company, only the private benefits from investing in R&D&I are accounted for. As a result, R&D&I activities are sometimes not undertaken by private companies, because they consider the resulting private benefits too limited, whereas the benefits for society, due to the knowledge spillovers of R&D&I, could be important. R&D&I activities generate new knowledge, which cannot always be protected (e.g. through patents). Private companies may thus refrain from investing in R&D&I because they are afraid that the results of their investments may be used by competitors and they consequently cannot generate any profit from their investments. Imperfect and asymmetric information: R&D&I activities are particularly risky and uncertain. This means that they are affected by imperfect and asymmetric information. As a result, too few human and financial resources may be invested in R&D&I projects, which would however be highly valuable for society. Coordination and network failures: R&D&I activities are often unsure and complex and it is not easy for private companies to work together, identify suitable partners and coordinate R&D&I projects. As a result of these coordination and network failures, R&D&I projects that could have been conducted in common between a group of firms are sometimes not undertaken at all, whereas society as a whole would have benefited."[93]

138. All the praise lavished on aid to R&D&I notwithstanding, some caveats must be borne in mind. True, R&D&I combines externalities (due to knowledge spillovers) and informational asymmetries (which may result in underfunding). But these asymmetries also imply that aid to R&D&I may give rise to inefficiencies.

[93] T. Kleiner and R. Repplinger-Hach, 2007, "The new community framework for state aid for research and development and innovation", *Competition Policy Newsletter,* vol. 1.

139. One of the main reasons is that subsidised R&D may crowd out privately funded R&D, since firms may misrepresent the extent to which their R&D investments are sensitive to the granting of aid.[94] Some recent European state aid cases illustrate this difficulty. In its Quaero decision[95], the Commission granted subsidies to a joint public-private research program. Its reasoning was based on the following two elements. First, the existence of an externality induced by the private firm's R&D expenditures, since the results of this effort would be disseminated by its public (academic) partners rather than appropriated privately. Second, in order to assess whether the aid was likely to have an impact on the private firm's R&D investment, the Commission relied on the beneficiary's internal estimates of the resources it was planning to devote to the R&D project at stake, according to the level of aid. This type of assessment is probably the best that can be conducted. However, it is strikingly simple when compared to the economic analyses undertaken by competition authorities investigating mergers for instance, and one may wonder whether it might be easily manipulated by companies lobbying for public funds without a real public interest justification.

3.6 Environmental subsidies

140. As is explained above, many existing subsidies have harmful effects on the environment, if only because they shift production away from more efficient to less efficient companies, which are often less environment-friendly.

141. However, many subsidies are also targeted to the development of renewable energies, as part of a global effort to curb carbon dioxide emissions. In the European Union, such "environmental aid" represent a quarter of total aid to industry (about $ 13 billion in 2008), and the Commission issued in 2008 the Community guidelines on state aid for environmental protection, which allow national governments to engage in a variety of measures, ranging from subsidised credit for all kinds of environment-friendly actions (such as the replacement of a polluting industrial equipment with a cleaner one) to feed-in tariffs, i.e., guaranteed prices at which the government commits to purchase electricity produced from renewable sources, such as wind and solar.

142. As a result, 18 EU countries were using feed-in tariffs in 2007, and as such tariffs also exist, among others, in Canada, China, Israel, and several Australian states. At first glance, the rationale for such subsidies is obvious, since environment-friendly investments are a pure case of a positive externality. However, the rationality of such subsidies is far from obvious, because the combination of various environmental subsidies often amounts to an incoherent combination, with each mechanism assigning a different price to carbon dioxide emissions. As an example, the current feed-in price for solar energy in France involves an implicit price of about € 1,000 per tonne of carbon dioxide. This amount can be compared to the current price in the European Emissions Trading Scheme, that is below € 20, and to the level of the "carbon tax" envisioned by the French government, i.e., €17.

143. As the Stern report[96] highlighted, the least costly way to curb emissions is to provide a uniform price signal (through a tax or a cap-and-trade permit system), inducing all economic agents to make all emissions-reducing decisions whose cost falls below a certain threshold, without deciding arbitrarily how emissions should be reduced. Direct subsidies to specific ways of reducing emissions may in the end increase the cost of the emissions reduction effort, and make this effort less effective. One may, however, qualify this view by arguing that certain renewable technologies, still at an infant stage, deserve specific

94 P. David, B. Hall, and A. Toole, 2000, Is public R&D a complement or substitute for private R&D? A review of the econometric evidence, *Research Policy*, vol. 29(4-5), 497-529.

95 Case N° C-243/02, http://ec.europa.eu/community_law/state_aids/comp-2007/n469-07.pdf.

96 N. Stern, 2007, The Economics of Climate Change: the Stern Review, Cambridge University Press.

support, precisely because of the type of informational externality discussed above in the context of aid to new sectors.

4. How should state aids and subsidies be controlled?

4.1 The limits of economic analysis: measurement issues

144. In an ideal world, the policy prescription would be that benevolent governments should assess each potential subsidy on its specific merits, evaluating whether a positive externality is present, possibly quantifying it, assessing the incentive impact of the aid, and conducting an overall cost-benefit analysis.

145. However, this type of assessment, that would be based on a neutral presumption and would consider each aid measure on its merits alone is unrealistic, because many of the abovementioned positive and negative consequences of state aids do not lend themselves to measurement.

146. The assessment of the impact of an aid bears some similarities to the assessment of the competitive impact of mergers. In both cases, the goal is to assess how the market will be affected by a given change. However, in the case of state aid, this exercise is far more complex that in the case of mergers.

147. The assessment of unilateral effects, which lies at the heart of horizontal merger control, provides for a helpful comparison. Its ambition, compared with the scope of the questions raised by the analysis of state aid control, is relatively narrow: it limits itself to short-run effects, and takes market structure as given (except for the merging parties, of course). It lends itself to the econometric technique of merger simulation, which yields quantitative predictions based on parsimonious data requests. Yet, even within this well-delineated framework, merger control is far from being completely predictable, especially as regards the assessment of efficiencies.[97]

148. The questions which need to be addressed in order to assess a state aid measure are both more numerous, and often less liable to quantification than unilateral effects.

149. Consider for example aid to R&D. One of the main justifications for the granting of aid to R&D is the existence of a positive externality due to knowledge spillovers. But how can the likelihood of such spillovers be proved in an individual case? The empirical research on this topic almost never proceeded by identifying the presence of spillovers in individual cases; but rather by studying large datasets and identifying the existence of knowledge spillovers on average, using sophisticated statistical techniques. Besides, even this approach fails to end up on firm ground, since the findings of the various studies are significantly divergent. In the case of mergers, the study of past mergers in the same market can often be considered to have some predictive value. But in the case of R&D, such an approach is less promising, because of the difficulty of finding relevant precedents, especially when the goal is to assess an innovation which has not yet occurred and the nature of which is uncertain by definition. This difficulty is reminiscent of the one faced by firms making efficiency claims when defending a merger. Such claims are often rejected for want of verifiability up to competition authorities' high standards. But the problem may be even more acute for state aid control, since the innovations purportedly encouraged are more radical, and thus more uncertain and less verifiable, than the incremental improvements representing the majority of efficiency claims in merger control. If and when spillovers can be shown to be likely, one should also ascertain whether the amount of R&D is sensitive to the volume of aid. Answering this question requires one to know not only the cost of funds available to the firm and the possible credit constraints facing it, but also the list of alternative possible investments for the recipient of the aid, the impact of the R&D effort on

97 D. Gifford et R. Kudrle, 2005, Rhetoric and Reality in the Merger Standards of the United States, Canada and the European Union, Antitrust LawJournal, vol. 72, p. 423.

the firm's future production costs, as well as an estimate of market demand and rivals' marginal costs, so as to calculate how a given cost reduction, if achieved thanks to R&D, will affect profits. In many cases, the question is even more complex because R&D often aims to create new products rather than to decrease the cost of producing existing ones. Therefore, in order to calculate whether the firm's behaviour is likely to be impacted by the aid, one needs to make assumptions about the demand function in the hypothetical post-R&D world, i.e., for example, about the elasticity of substitution between rivals' goods and the hypothetical, not yet existing new good which the subsidised R&D might – or might not – bring into existence.

150. This difficulty is by no means limited to R&D, as can be seen by moving to the question of dynamic inefficiencies - which is often, and probably rightly, mentioned as a justification for state aid control. There is no simple way of quantifying with full certainty to what extent the granting of an aid will change economic agents' expectations in the long-run, and thus their investment and innovation behaviour. Answering this question would require one to assess the impact of any given aid on other firms' expectations as to the likelihood of being granted state aid in the future under different types of circumstances, and to measure the impact on this change in expectations on firms' future behaviour (excessive risk-taking or "X-inefficiency" resulting from the reinforced soft budget constraint, diversion of resources from productive to rent-seeking activity, etc.)

151. Finally, any quantitative assessment of the welfare impact of a state aid must start by making an assumption about the cost of public funds, because, when calculating the overall impact of an aid on welfare, the loss to taxpayers is usually a major element. In fact, in all simple models of distortive state aid, as well as in simple models of subsidy races, there is no harm at all unless this deadweight cost of taxation is large enough.

152. These observations appear to indicate that a presumption that state aids are neutral for competition may not be justified. Since the available evidence points towards a negative impact of most subsidies, this should support the idea that it is up to the government granting the aid to demonstrate that the benefits of such a measure outweigh its negative effects on competition. Such an approach would signal the concerns with a systematic policy of granting state aids, leaving however room for the necessary flexibility through a case-by-case assessment.

153. While the recourse to economic analysis should not be seen as a panacea justifying a neutral a priori presumption, it can still be very helpful in order to assess whether a given aid measure is likely to be beneficial to social welfare. In particular, economic analysis can play a crucial role in identifying the presence of market failures and whether a proposed subsidy is likely to remedy it without creating serious offsetting distortions.

4.2 Meeting the goal of "less and better targeted state aids"

154. The above developments point, overall, to the dangers of state aids and subsidies. On the one hand, even benevolent governments, local, regional or national, may rationally engage into destructive subsidy races, at an enormous cost to public funds. On the other hand, it is very difficult for state aids to escape the pressure from special interests, and they also contribute to creating special interest groups with then push for the continuation of the granting of aid even after it has lost its initial justification. Even in the European Union, where control is strict, there is evidence that aid often lacks proper justification and does not make for a very efficient use of public funds.

155. Since one should not be overly confident in the ability of any government of specialised agency to evaluate each possible subsidy on its merits, it makes sense to consider that countries should enact rules that make the granting of subsidies difficult on a general basis, while leaving some margin of flexibility (since aid is sometimes justified).

156. Currently, many countries have no strict state aid control rules, and even the controls that do exist leave room for much aid to be granted.

157. All in all, one could think of the following actions that governments could take in order to limit the granting of wasteful subsidies and encourage those with positive effects on the long run for their economies.

158. In the case of large federal countries, one might envision some federal control over the incentive packages that sub-federal government levels can offer to companies.

159. Bankruptcy laws should limit governments' incentives to bailout firms simply in order to save jobs. In other words, they should allow companies to fail at a minimal cost to employment and activity.

160. The development of offshore funds could help governments resist the temptation of subsidising raw materials of which their country is an exporter. Similarly, improvements in the tax system and in governments' ability to redistribute income directly can decrease the political pressure to use distortive subsidies for redistributive purposes.

161. Competition authorities should hold SOEs and government agencies to the same standards as private companies regarding the control of anticompetitive behaviour. In particular, the implausibility of recoupment of losses should not be deemed an acceptable defence in predatory pricing cases and in cases involving other types of exclusionary behaviour. This could be complemented by the "public sector competitive neutrality rules" already existing in many countries.

162. Countries or regional grouping not yet equipped with competition rules on state aids and subsidies should consider introducing them. Even in the absence of such rules, competition authorities should use the tools they possess (especially as regards the repression of anticompetitive unilateral behaviour) in order to address the competition-distorting effects of state aids as much as they can. Since there are many ways for governments to grant aid under the guise of non-targeted, general policy measures, advocacy by competition authorities is also an essential part of the effort to limit the wasteful granting of subsidies.

163. Competition authorities should therefore be consulted prior to making decisions on state aids with significant potential effects on the markets in a given sector. Finally, cooperation between competition authorities and the relevant Ministries can only facilitate a better evaluation of the pros and cons of specific subsidies.

164. More generally, some criteria inspired by the recent overhaul of European state aid control policy could probably be adapted in domestic competition laws, subject to taking into account institutional and cultural settings. The most important ones are, (i) the requirement that each subsidy be the focus of an economic analysis precisely identifying which market failure is in need of correction, and the extent to which the aid measure is likely to correct it; (ii) the requirement that a subsidy be granted only if it can be proved that a more transparent, less discriminatory measure (such as an open public tender), or one less costly for public funds (such as the provision of a long-term loan or the purchase of shares by the government, rather than the granting of aid) cannot meet the same goal; (iii) rules limiting the magnitude and duration of aids, and the ability of the same recipient to be granted subsidies on a regular basis; and (iv) a rule implying that when large, distressed firms receive subsidies, they must give away some compensation concession, such as divesting some activities or committing to refrain from using the aid in order to engage in exclusionary behaviour.

165. Transparency and the availability of *ex post* assessment mechanisms should also be ways to limit special interests' ability to extract subsidies deprived of any economic justification.

NOTE DE RÉFÉRENCE

CONCURRENCE, AIDES PUBLIQUES ET SUBVENTIONS

NOTE DE RÉFÉRENCE

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CONCURRENCE, AIDES PUBLIQUES ET SUBVENTIONS

NOTE DE RÉFÉRENCE[1]

1. Point sur la situation des subventions, des aides publiques et de leur contrôle

1. **Remarque préliminaire.** Comme on le verra, divers types d'actions gouvernementales peuvent être qualifiés d'aides publiques ou de subventions et nous ne conférons pas ici une définition unique et précise à ces deux termes. Nous les utilisons, dans l'ensemble, indifféremment sauf quand nous nous référons à l'Union européenne (pour laquelle l'expression consacrée est « aides d'État ») ou à l'Organisation mondiale du commerce (qui parle de « subventions » dans le contexte de l' « Accord sur les subventions et les mesures compensatoires »).

1.1 L'importance des subventions gouvernementales pour les entreprises

2. Les gouvernements peuvent subventionner les entreprises de très nombreuses façons. Ils peuvent accorder des subventions directes ou des allègements fiscaux à certaines entreprises, conditionnellement ou non. Ils peuvent subventionner les moyens de production comme la terre, l'énergie, l'eau ou la largeur de bande pour les services de télécommunication soit parce que ces moyens de production sont placés sous leur contrôle, soit parce qu'ils sont commercialisés par des entreprises publiques. Ils peuvent aussi garantir les prêts souscrits par certaines entreprises, permettant ainsi aux bénéficiaires d'emprunter à un taux inférieur à celui du marché. Les banques nationalisées ou celles qui sont étroitement contrôlées par les pouvoirs publics pour des raisons réglementaires peuvent aussi offrir des crédits directs à des conditions préférentielles à des entreprises ou des secteurs ciblés.

3. Les entreprises publiques sont souvent d'importants intermédiaires pour les aides publiques ou elles en sont les principaux destinataires. Les gouvernements de nombreux pays consacrent des sommes considérables au soutien des entreprises publiques, et en particulier, d'entreprises publiques non rentables. Certains pays ont consacré, dans le passé, une part substantielle de la richesse nationale à ce type d'aide gouvernementale. Par exemple, dans les années 80 et 90, Sri-Lanka a alloué plus de 30% de son budget, soit plus de 10% de son PIB, au « soutien des entreprises publiques ».[2] Entre 1995 et 2005, 95% des subventions accordées par la Chine à ses entreprises publiques ont bénéficié à des entreprises non rentables.[3] Ces pays ont depuis engagé d'importants processus de réforme et de transformation et s'orientent vers une meilleure gouvernance et des solutions qui laissent davantage jouer les mécanismes du marché. Les services d'utilité publique sont sous contrôle étatique dans bien des pays pour fournir à certaines entreprises des moyens de production essentiels, comme l'énergie et l'eau, à des prix inférieurs à ceux du marché.

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1 Rédigée par David Spector, École d'économie de Paris et MAPP. L'auteur tient à remercier Antoine Chapsal (MAPP) pour sa contribution à ce document. Les vues qui y sont exprimées n'engagent que l'auteur. Elles ne sauraient être attribuées ni au Secrétariat ni aux pays membres de l' OCDE. L'auteur invite ceux qui auront des observations à formuler ou des erreurs factuelles à signaler à les lui communiquer à l'adresse électronique suivante: spector@pse.ens.fr.

2 S. Kelegama, 1993, « Privatization in Sri Lanka: The Experience during the Early Years of Implementation ». Colombo: Sri Lanka Economic Association.

3 Annuaire des finances publiques et annuaire statistique de la Chine.

4. Les gouvernements peuvent aussi subventionner les entreprises en achetant leurs produits à des prix supérieurs à ceux du marché, ou, moins directement, en obligeant d'autres entreprises à le faire. Ces pratiques s'intègrent parfois dans une politique visant ouvertement à atteindre un objectif de politique générale. Dans beaucoup de pays, par exemple, les entreprises de service public sont tenues d'acheter l'énergie renouvelable à des prix réglementés, supérieurs à ceux du marché. Très fréquemment aussi, l'armée achète des armements nationaux à des prix qui sont en général très supérieurs aux prix à l'exportation, ce qui dénote l'existence d'une subvention implicite.

5. Il n'est pas simple de déterminer si une mesure gouvernementale donnée constitue une aide. Par exemple, dans l'Union européenne (ci-après, l' « UE »), où les aides d'État sont strictement contrôlées, le débat consacré à chaque cas porte en très grande partie sur la question de savoir si la mesure gouvernementale en cause constitue bien une aide. De plus, comme on le verra plus loin, la définition de l'aide varie d'une juridiction à l'autre; par exemple, certaines mesures sont considérées comme constituant une aide aux termes des définitions de l'UE, mais non aux termes de celles de l'Organisation mondiale du commerce (ci-après l' « OMC »), et vice-versa.

6. La crise financière récente offre une illustration frappante. Avec la quasi-fermeture de certains segments des marchés du crédit, des banques fondamentalement saines, dont la valeur de l'actif dépassait incontestablement celle du passif, étaient menacées de banqueroute à court terme parce qu'elles étaient aux prises avec un manque de liquidités. Ces banques se sont trouvées brusquement privées de la possibilité d'utiliser leurs avoirs à long terme (par exemple, un portefeuille de prêts de longue durée très sûrs) comme garantie pour emprunter et faire face à leurs obligations financières à court terme du fait que le flux de crédit destiné à ces opérations de refinancement s'était soudainement tari. De nombreux gouvernements ont garanti la dette de ces banques (à titre onéreux) pour leur permettre d'emprunter sur les marchés financiers. La question de savoir si cette garantie constitue une aide, et dans l'affirmative, à combien celle-ci s'élève, est discutable. Dans le contexte de la crise financière récente, la Commission européenne a évalué, dans ce cas, le montant de l'aide au montant de la garantie accordée par les pouvoirs publics. On pourrait toutefois considérer autrement le montant de l'aide ou même son existence. Par exemple, dans le cas d'une banque fondamentalement saine, l'existence de la garantie suffit pour que celle-ci ait accès aux marchés du crédit (aux mêmes conditions, ou presque, que l'État) et puisse satisfaire à ses obligations à court terme, ce qui exclut le risque de faillite à court terme et donc la mise en jeu de la garantie. Si, en outre, la banque est fondamentalement saine en ce sens que la valeur de marché de son actif (dans tous les scénarios envisageables après la crise) excède celle de son passif total, sa faillite est aussi exclue à long terme. Sur la base de ce raisonnement, on pourrait soutenir que la probabilité de sa mise en jeu étant nulle, la garantie n'implique aucun coût pour l'État et ne constitue, de ce fait, pas une aide. On pourrait fonder un autre raisonnement encore sur la valeur de la garantie pour la banque bénéficiaire c'est-à-dire sur le montant que celle-ci serait disposée à payer pour l'obtenir ou toute autre mesure reposant sur des données de référence du marché (comme le prix, avant la crise, des contrats d'échange sur le risque de défaillance).

7. C'est généralement le degré de sélectivité d'une mesure qui détermine si celle-ci doit ou non être considérée comme une aide. Une réduction générale du niveau de l'impôt sur les sociétés n'est jamais considérée comme une aide, mais ce n'est le plus souvent pas le cas d'un allègement fiscal accordé à une entreprise particulière. La situation est toutefois moins nette pour les cas intermédiaires. Une certaine dose d'arbitraire intervient, par exemple, dans la question de savoir si un allègement fiscal ciblant les petites entreprises constitue ou non une aide.

8. Malgré ces contours incertains, les estimations existantes qui reposent sur des définitions hétérogènes mettent en évidence l'ampleur des subventions et des aides publiques. Les subventions ont, toutefois, eu tendance à diminuer à long terme dans le monde du fait que dans la plupart des pays les interventions gouvernementales ont cédé la place à un plus large recours aux mécanismes du marché et que les besoins de financement des systèmes de santé et de retraite ont pesé de plus en plus sur les budgets

nationaux, réduisant la part des autres postes de dépenses. La crise financière a cependant provoqué un retournement à court terme de cette tendance avec le renflouement, par les pouvoirs publics, d'institutions financières et d'entreprises en difficulté.

9. Les données disponibles les plus complètes sur les aides publiques sont celles qui couvrent l'Union européenne. Elles montrent qu'en dépit du contrôle rigoureux dont elles font l'objet, ces aides ont atteint un total de 113,4 milliards EUR en 2008, soit 0,94% du PIB de l'UE, abstraction faite des mesures liées à la crise financière.[4] Si l'on exclut l'aide aux chemins de fer, le volume des aides d'État a diminué de moitié entre 1992 et 2008, passant de 1% à 0,54% du PIB. L'inclusion des mesures prises face à la crise d'un montant de 212,2 milliards EUR, soit 1,7% du PIB, modifie radicalement le bilan.

10. Les chiffres de l'UE (même hors mesures de crise) montrent que même lorsqu'ils sont soumis à un contrôle strict, les gouvernements sont enclins à accorder des subventions assez importantes aux entreprises. Cela permet de penser, en l'absence de données très précises sur les pays extérieurs à l'UE, que le total mondial des subventions est probablement très élevé.

11. Les données sur les pays non membres de l'UE sont plus rares et le plus souvent insuffisamment homogènes. Celles dont on dispose indiquent, toutefois, que le volume des aides publiques et des subventions est important. L'aide à l'agriculture dans les seuls pays de l'OCDE s'est élevée à 318 milliards USD en 2002. Van Beers et van den Bergh (2001)[5] estiment aussi qu'à l'échelon de la planète, les subventions aux entreprises représentaient 3,6% du PIB mondial au milieu des années 90. Le fait que sur les 63 affaires soumises à l'instance de règlement des différends de l'OMC entre 2001 et 2008, 14, c'est-à-dire 22% du total, concernaient des subventions est une autre indication de l'importance de celles-ci.

12. Les subventions revêtent des formes variées. Pour n'en citer que quelques unes, les subventions mondiales à l'énergie (qui incluent à la fois les subventions générales à l'énergie, le soutien des charbonnages dans beaucoup de pays et le soutien des énergies renouvelables) s'élèvent à bien plus de 100 milliards USD par an, la part de l'Iran dans ce total atteignant à elle seule 55 milliards USD.

13. Certaines branches d'activité sont particulièrement susceptibles de recevoir des subventions, surtout en temps de crise. Par exemple, le total des subventions mondiales proposées pour l'industrie automobile des pays développés et des pays en développement se situait aux alentours de 48 milliards USD en 2008. En dehors de la subvention de 17,4 milliards USD accordée par les États-Unis à ses trois constructeurs nationaux, le Canada, la France, l'Allemagne, le Royaume-Uni, la Chine, la Corée du Sud, l'Argentine, le Brésil, la Suède et l'Italie, entre autres, ont aussi accordé des aides directes ou indirectes à leur industrie automobile qui, globalement, sont assez considérables. D'autres secteurs, comme la construction navale et les transports aériens, bénéficient aussi régulièrement de subventions, des problèmes récurrents de surcapacité réduisant leurs marges et incitant les pouvoirs publics à intervenir.

14. Les raisons pour lesquelles les aides publiques sont octroyées sont aussi variées que la qualité de leurs bénéficiaires. Des subventions gouvernementales ont souvent été utilisées pour favoriser le développement de nouvelles industries dans le cadre d'une politique industrielle « offensive », surtout dans les pays en développement.[6] C'est le cas, par exemple, de l'aide accordée depuis longtemps par le Brésil au

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4 Rapport de la Commission, Tableau de bord des aides d'État, mise à jour de l'automne 2009.

5 C. van Beers et J. van den Bergh, 2001, « Perseverance of Perverse Subsidies and Their Impact on Trade and Environment », *Ecological Economics*, vol. 36(3), pp. 475-486.

6 Voir la documentation relative à la Table ronde sur la politique de la concurrence, la politique industrielle et les champions nationaux, organisée en 2009 dans le cadre du Forum mondial sur la concurrence: http://www.oecd.org/dataoecd/12/50/44548025.pdf.

constructeur aéronautique Embraer (entreprise publique privatisée par la suite), des investissements effectués par Fundación Chile dans de nombreux secteurs et des subventions accordées, dans le passé, par la Corée du Sud pour encourager les conglomérats à diversifier leurs activités. Les subventions consenties aux pôles d'innovation sont un autre exemple de mesure de politique industrielle offensive.

15. Des subventions sont aussi souvent octroyées dans le cadre d'une politique industrielle « défensive » lorsqu'elles ciblent des entreprises en difficulté dans le but d'éviter une reprise par des intérêts étrangers, la disparition d'une activité jugée essentielle pour l'économie nationale ou des mises à pied et les troubles sociaux qui s'ensuivraient. Entre notamment dans cette catégorie, le soutien récurrent apporté aux constructeurs automobiles, aux compagnies aériennes et aux charbonnages à travers le monde. Dans certains cas, les gouvernements accordent des subventions à des secteurs fragiles comme ceux-ci parce qu'ils estiment qu'ils doivent le faire pour rétablir l'équilibre concurrentiel face aux subventions consenties par leurs homologues étrangers.

16. Une aide peut aussi être accordée pour encourager des activités considérées comme génératrices d'externalités positives indépendamment du revenu privé qu'elles procurent à l'établissement qui les entreprend. C'est notamment le cas de l'aide octroyée pour les énergies renouvelables et la recherche-développement ainsi que des aides à l'investissement dans les régions en difficulté.

17. Les pays octroient également des subventions pour attirer des investissements entièrement nouveaux de la part, souvent, d'entreprises étrangères. Cette concurrence entre administrations nationales ou locales donne parfois lieu à des courses aux subventions qui se soldent par l'octroi de sommes considérables tant dans les pays développés que dans les pays en développement. Ces courses aux subventions sont particulièrement fréquentes dans les grands pays fédéraux.

1.2 Le traitement des aides publiques par l'OMC

18. Les aides publiques et les subventions semblent incompatibles avec l'idée que, dans un contexte de libre concurrence, les mécanismes du marché sont les meilleurs instruments de l'amélioration du bien-être social. Les aides publiques et les subventions s'ingèrent dans la formation des prix et les processus « darwiniens » que la concurrence favorise et qui sont généralement considérés comme l'une des principales forces conduisant à l'efficience économique (au moins si l'on croit dans les principes qui étayent la politique de la concurrence). On pourrait donc s'attendre à ce qu'elles fassent l'objet d'une surveillance attentive de la part des autorités de la concurrence dans le monde entier. Ce n'est toutefois pas le cas. Ce n'est qu'au sein de l'UE que l'autorité de la concurrence (la Commission européenne) est habilitée à exercer un contrôle rigoureux sur les aides d'État. Dans d'autres juridictions, les autorités de la concurrence exercent un certain contrôle sur les actions d'entités publiques. Mais, dans l'ensemble, si l'on considère globalement les façons dont les aides publiques sont contrôlées, l'ensemble de règles les concernant qui a la plus large portée multilatérale, est celui qui découle de l'Accord sur les subventions et les mesures compensatoires (ci-après, l' « Accord SMC ») auquel ont souscrit tous les membres de l'OMC à la fin du Cycle d'Uruguay.

19. L'Accord SMC ne prévoit pas un contrôle préalable.[7] Il contient deux grands ensembles de règles. La « piste I » vise l'imposition, par un État membre, de droits compensateurs aux importations en provenance d'un autre État membre octroyant une subvention préjudiciable à l'industrie nationale du pays qui impose les droits. Les règles de la « piste II » autorisent un État membre à contester devant l'organe de règlement des différends de l'OMC une subvention accordée par un autre État membre.

[7] Pour un exposé détaillé des règles de l'OMC et un examen de leurs relations avec celles de l'UE, voir C.-D. Ehlermann et M. Goyette, 2006, « The Interface between EU state aid Control and the WTO Disciplines on Subsidies », *European state aid Law Quarterly*, vol. 2006 (4), pp. 695-718.

20. Aux termes de l'Accord SMC, une mesure constitue une subvention si (i) elle implique une contribution financière des pouvoirs publics, (ii) elle confère un avantage à ses bénéficiaires, et (iii) elle est spécifique à une entreprise ou à une branche de production ou à un groupe de branches de production. En pratique, le critère (i) est interprété dans un sens très large dans le droit de l'OMC dans la mesure où une instruction donnée par les pouvoirs publics à des entreprises privées d'accorder un avantage à certaines entreprises est considérée comme suffisante pour satisfaire au critère, même si elle n'implique aucun coût effectif pour les pouvoirs publics. Le critère de sélectivité est, par contre, interprété très étroitement. Par exemple, une mesure ne bénéficiant qu'à de petites entreprises ou qu'aux entreprises d'une région donnée, n'est pas considérée comme remplissant la condition (iii).

21. Toutes les subventions ne sont pas illégales au regard du droit de l'OMC. Une fois qu'une mesure est classée comme une subvention, elle peut être considérée comme une subvention prohibée ou « pouvant donner lieu à une action ». Les subventions à l'exportation et les subventions au remplacement des importations sont interdites en tant que telles en vertu du droit de l'OMC. Toutes les autres subventions peuvent donner lieu à une action, ce qui veut dire que pour qu'un pays impose des droits compensateurs ou saisisse l'organe de règlement des différends, il doit prouver que la subvention lui porte préjudice.

22. Quatorze affaires concernant des subventions ont été portées devant l'organe de règlement des différends entre 2001 et 2008. Ce chiffre ne permet toutefois pas de mesurer l'effet réel des règles de l'OMC c'est-à-dire essentiellement le degré auquel celles-ci dissuadent en fait les pouvoirs publics d'accorder une aide.

1.3 Le contrôle des aides d'État dans l'Union européenne

23. La Commission européenne exerce un contrôle sur les aides d'État. Ce contrôle est, en fait, antérieur à la création de l'UE en 1957 (qui s'appelait alors la « Communauté européenne ») puisqu'il constituait déjà un aspect essentiel du traité instituant la Communauté européenne du charbon et de l'acier en 1951 (avec les six mêmes membres fondateurs que la Communauté européenne, à savoir: la France, l'Allemagne, l'Italie, la Belgique, les Pays-Bas et le Luxembourg). La principale raison d'être du contrôle des aides publiques était alors l'intégration des marchés des États membres.[8] Ce contrôle devait notamment permettre d'éviter une intégration verticale artificielle sur une base nationale dans le cadre de laquelle chaque producteur de charbon vendrait sa production à des conditions préférentielles aux producteurs d'acier du même pays.

24. L'article 107, paragraphe 1 du Traité sur le fonctionnement de l'Union européenne interdit les aides accordées par les États qui faussent ou qui menacent de fausser la concurrence dans la mesure où elles affectent les échanges entre les États membres. Toutefois, les aides d'État qui contribuent à la réalisation d'objectifs bien définis d'intérêt européen commun sans fausser exagérément la concurrence entre les entreprises et les échanges entre les États membres peuvent être considérées comme compatibles avec le marché intérieur (article 107, paragraphe 3). Une différence importante entre les règles de discipline de l'UE et de l'OMC est que le contrôle de l'UE est effectué préalablement: un État membre qui a l'intention d'accorder une aide ou d'adopter une mesure qui pourrait constituer une aide (si elle ne constitue pas une forme patente d'aide) doit tout d'abord solliciter l'autorisation de la Commission. Une similitude importante entre les deux systèmes est qu'ils ne visent que les aides publiques qui faussent la concurrence (au moins partiellement) dans les pays qui sont parties aux accords respectifs.

25. En pratique, surtout depuis la diffusion, en 2005, du Plan d'action dans le domaine des aides d'État, le traitement de chaque cas par la Commission s'articule autour du « critère de mise en balance ».

8 G. Grin, 2003, *The Battle of the Single European Market: Achievements and Economic Thought, 1945-2000,* Londres: Kegan Paul.

L'application de ce critère consiste principalement à déterminer l'objectif de l'aide, établir si l'aide est un instrument approprié (en ce sens qu'elle permettra d'atteindre l'objectif qui est censé être visé et ne pourrait être atteint par aucune autre mesure moins créatrice de distorsions) et, enfin, à mettre en balance les effets positifs attendus de l'aide et les distorsions anticipées de la concurrence.

26. La première étape de l'analyse implique souvent de définir les défaillances du marché que la mesure d'aide doit corriger. Cette démarche s'inscrit dans le droit fil de la philosophie générale qui sous-tend la politique de la concurrence, c'est-à-dire l'idée que les marchés sont en général efficients. Le deuxième critère est très important en pratique. En effet, lorsqu'une mesure d'aide est destinée à rétribuer une entreprise pour la fourniture d'un « service d'intérêt économique général », la Commission est généralement amenée à demander pourquoi un appel d'offres ouvert et non discriminatoire (non considéré comme constituant une aide depuis la décision Altmark[9]) ne pouvait permettre d'atteindre le même objectif que l'aide. En d'autres termes, le deuxième volet du critère limite fortement la possibilité pour les gouvernements d'octroyer une aide.

27. Ces principes généraux ont été à la base des diverses lignes directrices couvrant différents types d'aide, publiées par la Commission au cours des dernières années, comme le Règlement général d'exemption par catégorie et les lignes directrices sur les aides à la recherche et au développement, les aides visant à promouvoir les investissements en capital-investissement dans les petites et moyennes entreprises, les aides pour la protection de l'environnement et les aides à finalité régionale, etc. (cette liste n'est pas exhaustive). Avec l'éclatement de la crise financière en août 2008, la Commission a aussi publié des lignes directrices concernant les aides d'État au sauvetage et à la restructuration d'entreprises en difficulté ainsi que diverses communications sur le traitement de la crise financière y compris, tout d'abord, la « Communication de la Commission sur le retour à la viabilité et l'appréciation des mesures de restructuration dans le secteur financier dans le contexte de la crise actuelle, conformément aux règles relatives aux aides d'État ». Elle a également diffusé des lignes directrices sur les aides accordées pour faire face à la crise dans l'économie réelle (c'est-à-dire les aides consenties aux entreprises non financières touchées par la réduction spectaculaire des crédits disponibles) avec « le cadre communautaire temporaire pour les aides d'État destinées à favoriser l'accès au financement dans le contexte de la crise économique et financière actuelle ».

28. Les règles de l'UE passent généralement pour être plus rigoureuses que celles de l'OMC, mais ce n'est pas toujours vrai. Par l'exemple, d'après la Cour de justice européenne, une mesure gouvernementale obligeant des entités privées à subventionner d'autres entités privées ne constitue pas une aide aux termes des règles de l'UE si elle n'implique pas un coût direct pour l'État concerné.[10] Le droit communautaire prend aussi en considération l'effet d'une mesure sur les échanges entre les États membres de l'UE (qui regroupe, bien sûr, moins de pays que l'OMC).

29. Il convient de noter que l'interprétation par la Commission ou les instances juridiques européennes de la notion d'incidences sur les échanges entre les États membres ou de distorsion de la concurrence a évolué au fil du temps. Tout d'abord, le niveau des critères appliqués a changé. Avant l'arrêt du Tribunal de première instance des Communautés européennes (TPICE) dans l'affaire *Tubemeuse*[11], la Commission européenne a eu tendance à considérer que les conditions requises étaient nécessairement remplies dès qu'une aide était accordée et qu'il était donc inutile de procéder à une enquête spécifique. Dans le cadre de l'arrêt susmentionné, le TPICE a confirmé une décision de la Commission européenne

9 Affaire C-280/00 Altmark Trans GmbH et Regierungspräsidium Magdeburg contre Nahverkehrsgesellschaft Altmark GmbH [2003].

10 Affaire C-379/98 – PreussenElektra AG contre Schleswag AG, Rec. 2001, p. I-2099.

11 Affaire 102/87, Rec.1988, p. 4067.

interdisant une aide octroyée par le gouvernement belge bien que le bénéficiaire de celle-ci vendît surtout à l'extérieur de la CE. Il a soutenu que ni le volume des échanges intracommunautaires sur le marché concerné, ni l'ampleur de l'aide n'importaient pour conclure à l'existence d'un risque de distorsion ou de perturbation des échanges entre les États membres. Le TPICE a également affirmé que « *l'importance relativement faible d'une aide […] n'exclu[en]t pas a priori la possibilité que les échanges entres les États membres soient affectés* ». Le TPICE a donc estimé que la Commission européenne devait certes examiner en bonne et due forme les situations de distorsion de la concurrence et d'incidences sur les échanges, mais qu'elle était soumise à une très faible charge de preuve puisqu'il lui suffisait d'établir qu'une distorsion de la concurrence ou des incidences sur les échanges ne pouvaient être exclues *a priori*.

30. La décision *Wam*[12], prise récemment, constitue peut-être un tournant. Ce n'est pas la première décision à avoir annulé une interdiction de la Commission, mais elle l'a fait en fixant un critère qui semble plus contraignant que ceux qui avaient été appliqués jusque-là dans la plupart des cas. Le TPICE a estimé que le fait que le bénéficiaire de l'aide participe à des échanges intra-européens n'était en soi pas suffisant pour que la Commission conclue que cette aide affecterait les échanges entre États membres: « *le seul constat de la participation de Wam aux échanges intracommunautaires est insuffisant pour étayer une affectation desdits échanges ou une distorsion de concurrence et, dès lors, nécessite une analyse approfondie des effets des aides* ».[13]

31. Outre la question des critères appliqués, la façon dont ces notions de concurrence et d'incidences sur les échanges a été interprétée a également évolué au fil des ans. Dans l'affaire Philip Morris[14], le TPICE a soutenu que la distorsion de la concurrence correspondait à une modification de la position d'une entreprise par rapport à d'autres dans le contexte des échanges intracommunautaires. Mais dans « L'encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation », la Commission européenne mentionne aussi les délocalisations parmi les formes de distorsion possibles,[15] bien que celles-ci puissent se produire indépendamment de tout effet sur les concurrents (dans le cas, par exemple, de l'octroi d'une aide à un monopole non menacé par une entrée potentielle).

32. La position de la Commission a aussi progressivement évolué à l'égard des structures de marché favorisant davantage, selon elle, les distorsions de concurrence. Dans plusieurs affaires (Imepiel[16], Ramondin[17]), elle a estimé que le risque de distorsion était plus grand sur un marché fortement concurrentiel. Cela a même fait l'objet d'un point d'intérêt général dans les lignes directrices concernant les aides d'État dans le secteur automobile puisque la Commission a rappelé dans sa décision relative aux camions DAF: « *Au point concernant les aides à la modernisation et à l'innovation, l'encadrement prévoit que 'sur un véritable marché intérieur de l'automobile, la concurrence entre les constructeurs deviendra encore plus forte et les distorsions provoquées par les aides encore plus importantes. En conséquence, la Commission adoptera une attitude ferme à l'égard des aides à la modernisation et à l'innovation'*. »[18] Mais, dans les lignes directrices qu'elle a adoptées récemment pour les aides d'État à la recherche, au développement et à l'innovation, la Commission adopte un point de vue différent en affirmant que les aides

12 TPICE, 6 septembre 2006, Italie et Wam SpA contre Commission, affaire T 304/04.

13 Point 74 de l'arrêt.

14 Affaire 730/79, Rec. 1980, p. 2671.

15 Point 7.4 de l'Encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation.

16 J.O. L 172 du 27.06.1992, p. 76.

17 J.O. L 318 du 16.12.2000, p. 36.

18 J.O. L 015 du 20.01.1996, p. 37 à 45.

d'État risquent moins de fausser les mesures d'incitation dynamiques ou de créer des situations de pouvoir de marché sur des marchés très concurrentiels.[19]

33. Le contrôle des aides d'État dans l'Union européenne est progressivement passé d'une approche purement légaliste à une approche axée sur les effets. Cette évolution dans la juridiction qui a la plus longue expérience de ce contrôle confirme qu'il est nécessaire de mieux évaluer les conséquences économiques des aides et des subventions publiques dans les différents pays.

1.4 Le contrôle des aides et des organismes publics en dehors de l'UE

34. D'autres blocs commerciaux régionaux disposent aussi de règles spécifiques pour contrôler les aides publiques. Par exemple, l'Union économique et monétaire ouest-africaine (UEMOA), qui regroupe le Bénin, le Burkina Faso, la Côte d'Ivoire, la Guinée Bissau, le Mali, le Niger, le Sénégal et le Togo, a adopté, en 2002, des lignes directrices relatives à la concurrence qui interdisent les accords anticoncurrentiels, les abus de position dominante et « les aides publiques susceptibles de fausser la concurrence en favorisant certaines entreprises ou certaines productions ». Toutefois, d'après la contribution de l'UEMOA, ces règles ne sont pas encore suffisamment soutenues par les États membres pour être appliquées efficacement.

35. D'autres zones de libre-échange ont des règles qui limitent les subventions, comme la Communauté andine dont la décision 45725 vise à empêcher ou à corriger les distorsions de concurrence provoquées par les subventions dont bénéficient les produits importés d'autres États membres.[20]

36. Les aides d'État relèvent aussi, au moins théoriquement, de la compétence des autorités nationales de la concurrence dans certains pays extérieurs à l'UE. Par exemple, la législation russe de la concurrence, sur laquelle repose le contrôle des aides publiques en Russie, s'applique non seulement aux entreprises, mais aussi aux autorités exécutives de l'État. Aux termes des articles 7 et 8 de la loi antimonopole, les actions et les accords d'organes du pouvoir exécutif qui limitent l'indépendance économique des entreprises ou créent des conditions favorables ou discriminatoires pour certaines entreprises sont interdites. Une réforme législative récente a accordé à l'autorité antimonopole le pouvoir d'exercer un contrôle avant la prise de décisions par les organes du pouvoir exécutif. Les décisions relatives à l'octroi de privilèges à des entreprises particulières ou à des groupes d'entreprises doivent être approuvées par l'autorité antimonopole.

37. La loi antimonopole de la Chine, entrée en vigueur en 2008, comporte un chapitre incluant six dispositions distinctes qui interdisent certaines formes d'abus de pouvoir administratif qui ont pour effet d'empêcher ou de restreindre la concurrence. Ces interdictions mentionnent expressément certaines initiatives gouvernementales (par exemple, la fixation de normes d'inspection discriminatoires ou la réalisation, de façon discriminatoire, d'inspections répétées) qui peuvent aller plus loin que la définition européenne des aides d'État.

38. Les autorités de la concurrence de pays candidats à l'entrée dans l'UE, comme la Croatie et la Turquie, exercent aussi un certain contrôle sur les aides publiques. En outre, plusieurs pays (comme le Pakistan et le Pérou, entre autres) ont indiqué dans les documents qu'ils ont soumis pour cette table ronde du Forum mondial sur la concurrence que leur droit de la concurrence s'applique aux entreprises publiques, mais aussi plus généralement aux entités publiques.[21]

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19 Sections 7.4.1. et 7.4.2.

20 http://www.comunidadandina.org/normativa/dec/D457.htm

21 Voir http://www.oecd/org/competition/globalforum.

39. Enfin, de nombreux pays comme le Brésil, l'Australie, la Hongrie, le Pérou et la Norvège, disposent de lois soumettant les organismes et entreprises publics au « principe de neutralité concurrentielle »[22]. Celui-ci implique, d'une manière générale, que les entreprises publiques ne doivent pas bénéficier d'un avantage concurrentiel par rapport aux autres entreprises simplement parce qu'elles relèvent du secteur public.[23] Dans certains cas, les entreprises privées et les particuliers ont accès à des mécanismes de réclamation gérés par les organismes chargés de la concurrence.[24] Les autorités de la concurrence de nombreux pays sont en outre consultées sur des questions pouvant impliquer des aides publiques comme la conception d'appels d'offres publics ou de processus de privatisation.

1.5 Les points de rencontre entre les subventions et le droit de la concurrence: prix d'éviction et contrôle des fusions

40. En dehors des divers régimes visant directement les aides publiques que nous venons d'examiner, les autorités de la concurrence peuvent être amenées à s'occuper de ces aides, au moins indirectement, dans deux types de circonstances (même en l'absence d'instruments juridiques directement liés aux aides d'État) en mettant en œuvre la politique de la concurrence même sans sortir de ses limites « traditionnelles ».

41. Le premier type de circonstances, qui est aussi le plus fréquent, est celui de l'utilisation par des entreprises (publiques, le plus souvent) de subventions gouvernementales pour pratiquer des prix d'éviction ou se livrer à d'autres pratiques d'exclusion. Au sein de l'UE, l'affaire marquante qui illustre cette question est celle de la société *Deutsche Post*.[25]

42. Au moment où elle s'est livrée à ce type de pratiques (les années 90), la société *Deutsche Post* était une entreprise publique active sur deux marchés très différents. D'une part, elle gérait le monopole du courrier en Allemagne, à des prix administrés et en fournissant un service public réglementé. D'autre part, elle était active sur le marché de la livraison de colis qui était ouvert à la concurrence, notamment celle de United Parcel Service (UPS) et de Federal Express. UPS s'est plaint auprès de la Commission européenne du fait que la société *Deutsche Post* utilisait les recettes tirées du monopole de l'envoi de courrier pour financer des ventes à perte pour ses services de transport de colis. En mars 2001, la CE a conclu que pendant cinq ans la société *Deutsche Post* n'avait pas couvert ses coûts différentiels par sa tarification des services de transport de colis et qu'elle s'était donc rendue coupable d'abus de position dominante.

43. On peut penser, à première vue, que les cas de fixation de prix d'éviction ne manquent pas et que le fait que l'entreprise prédatrice soit une entreprise publique n'a rien de spécial. Cette impression est toutefois trompeuse en raison de deux particularités des entreprises publiques. Tout d'abord, la définition des coûts différentiels associés à l'activité exercée sur un marché concurrentiel dépend des coûts qui sont attribués au service public. La décision concernant la société *Deutsche Post* précise que tous les coûts qui sont nécessaires pour remplir la mission de service public doivent être entièrement imputés à cette mission même s'ils contribuent aussi aux activités exercées sur le marché concurrentiel. Une affaire similaire a

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22 Voir la documentation de l'OCDE d'octobre 2009 sur les entreprises publiques.

23 Voir, par exemple, l'accord sur les principes de la concurrence conclu, en Australie, entre l'État fédéral et les États et territoires fédérés.

24 L'accord susmentionné stipule aussi que chaque administration doit établir un mécanisme de réclamation. Dans le cas de l'État fédéral, c'est le Bureau des plaintes relatives à la neutralité concurrentielle de la Commission de la productivité et, dans le cas des administrations régionales, c'est, par exemple, l'autorité de la concurrence du Queensland, la Commission de la concurrence et de l'efficience de l'État de Victoria et la Commission indépendante de la concurrence et de la réglementation (ICRC) du Territoire de la capitale australienne (ACT).

25 Affaire COMP/35.141 (2001/354/CE).

concerné la société Telkom, l'ancien monopole sud-africain des télécommunications, qui a été accusée d'utiliser les profits qu'elle tirait de son monopole pour les services vocaux réglementés pour financer ses services Internet à large bande, ce qui se traduisait par des prix d'éviction pour cette catégorie de services. Le Pérou mentionne des affaires du même ordre dans sa communication: « *on dénombre jusqu'à présent six affaires (…) dans lesquelles les plaignants ont argué qu'un hôpital public fournissait aux patients des services médicaux qui seraient autrement offerts dans des hôpitaux privés*. »

44. L'application du critère fixé dans l'affaire *Deutsche Post* s'avère parfois complexe. Par exemple, dans le cadre d'une affaire récente portant sur le transport maritime entre une île française et le continent, dans laquelle un bateau coûteux (et fortement subventionné) était utilisé pour fournir un service public réglementé et subventionné (en hiver) et un service assuré dans des conditions concurrentielles (en été), le test visant à établir l'existence d'une pratique de prix prédateurs reposait sur la question suivante: le coût du bateau devait-il être intégralement imputé à la mission de service public ou devait-il être en partie inclus dans le coût différentiel de la prestation du service dans des conditions concurrentielles (en été) du fait qu'un bateau de plus petite taille aurait pu être utilisé pour assurer le service en hiver?[26] Ces exemples montrent que même pour l'application d'un concept « traditionnel » du droit de la concurrence, comme celui de la tarification prédatrice, les autorités de la concurrence peuvent être amenées à évaluer le coût de la fourniture d'un service public réglementé – ce qui n'est guère différent de ce que fait la Commission européenne lorsqu'elle cherche à déterminer si la rémunération, par les pouvoirs publics, de services d'intérêt économique général constitue une subvention.

45. Une deuxième différence entre les entreprises publiques et privées dans le cas des plaintes concernant des prix d'éviction ou des plaintes de nature plus générale portant sur des pratiques d'exclusion est que les entreprises publiques n'ont souvent pas comme objectif de maximiser leurs profits, mais plutôt de maximiser à la fois leurs profits et leur taille.[27] Cela implique que même dans des situations où des pratiques d'exclusion sont incompatibles avec la maximisation du flux escompté de profits à l'avenir (du fait, par exemple, qu'une récupération des pertes est peu probable après l'élimination d'un concurrent en l'absence de barrières à l'entrée), les entreprises publiques peuvent être tentées malgré tout de recourir à ces pratiques, alors que ce ne serait pas le cas pour des entreprises privées dans la même situation. Cette observation a poussé certains auteurs à soutenir que les abus visant à exclure la concurrence devraient être sanctionnés plus sévèrement lorsqu'ils sont le fait d'entreprises publiques et que l'application du critère de la « récupération » des pertes, auquel il est procédé dans le cadre de l'évaluation des plaintes portant sur des prix d'éviction aux États-Unis, conduirait à une sanction trop clémente.[28]

46. Un autre domaine dans lequel on observe un lien moins direct entre les subventions et la politique de la concurrence est celui des fusions. Les gouvernements désireux de décourager des fusions entre entreprises privées pour des raisons de « politique industrielle » ou de nationalisme économique peuvent, dans certains cas, menacer de réduire les subventions, ou d'une manière plus générale, de durcir les conditions des opérations commerciales effectuées avec les pouvoirs publics (dans le cas d'entreprises vendant à des entités publiques ou à des prix administrés, ou achetant des moyens de production à des entités publiques). Par exemple, il est parfois avancé que lorsque l'entreprise pharmaceutique suisse Novartis et l'entreprise pharmaceutique française Sanofi ont été en concurrence pour l'achat d'Aventis, le gouvernement français a fait peser son influence sur les négociations des prix des médicaments pour

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26 Autorité française de la concurrence, décision #04-D-79; arrêt du 17 juin 2008 de la Cour de cassation.

27 Voir, par exemple, W. Niskanen, 1971, *Bureaucracy and Representative Government*, Aldine Transaction; William Niskanen, 1975, Bureaucrats and Politicians, *Journal of Law and Economics*, vol. 18.

28 D. Sappington et G.Sidak, 2003, « Competition Law for State-Owned Enterprises ». *Antitrust Law Journal*, vol. 71 (2), 479-523 ; 2000, « Are Public Enterprises the Only Credible Predators? », *University of Chicago Law Review*, vol. 67 (1), pp. 271-292.

favoriser la fusion de deux entreprises françaises. Cela est dans le droit fil de l'observation empirique indiquant que les pays qui comptent un fort pourcentage d'entreprises étrangères ont aussi tendance à taxer assez fortement les entreprises.[29]

47. En dépit des interactions précédemment mentionnées entre le droit de la concurrence et les subventions, on constate dans l'ensemble que les aides publiques sont relativement peu contrôlées en dehors de l'Union européenne du fait que les règles de l'OMC ne couvrent que certaines catégories d'aide (à savoir celles qui peuvent porter préjudice aux autres pays et donner lieu à des plaintes soumises à l'organe de règlement des différends). Cela incite à examiner l'effet des aides publiques. Nous allons donc procéder maintenant à un examen des effets négatifs possibles de ces aides et des circonstances dans lesquelles leur utilisation peut se justifier.

2. L'effet négatif possible des aides publiques

2.1 Une donnée de base: le coût des fonds publics

48. Avant de considérer l'utilité éventuelle des aides publiques et des subventions, il est important de rappeler que la collecte des fonds publics entraîne des coûts directs (coûts administratifs) et indirects (en raison de l'effet de distorsion de l'imposition) et que l'octroi d'une aide se fait au détriment d'autres dépenses publiques qui auraient pu être très productives.

49. D'après des estimations empiriques, la collecte de 100 dollars pour l'administration centrale implique une perte sèche de 18 à 24 dollars: quand l'administration centrale collecte 100 dollars, d'autres agents économiques perdent non pas 100 dollars, mais entre 118 et 124 dollars.[30] Ces chiffres concernent les États-Unis, et on peut supposer que le coût des fonds publics est plus élevé dans les pays en développement.

50. Du côté des dépenses, Les subventions constituent une dépense si importante dans certains pays en développement que s'ils les réduisaient les gouvernements pourraient accroître considérablement les sommes qu'ils consacrent à la santé ou à l'éducation. Par exemple, en réorientant vers l'éducation de base les subventions d'exploitation qu'elles accordent aux entreprises publiques (qui ne représentent qu'une partie de l'ensemble des subventions qu'elles leur octroient), les administrations centrales du Mexique, de la Tanzanie, de la Tunisie et de l'Inde pourraient augmenter les dépenses qu'elles consacrent à l'éducation de 50, 74, 160 et 550 %, respectivement. De même, en réorientant vers les soins de santé les subventions accordées aux entreprises publiques, l'État sénégalais pourrait plus que doubler ses dépenses nationales de santé et les administrations centrales de la Turquie, du Mexique, de la Tunisie et de l'Inde pourraient, respectivement, tripler, quadrupler et quintupler leurs dépenses de santé.[31]

51. Ces chiffres sont importants parce qu'ils impliquent que le coût d'opportunité des aides publiques est très élevé. D'après les estimations existantes, le rendement social de l'investissement public dans

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29 H. Huizinga et G. Nicodème, 2006, « Foreign ownership and corporate income taxation: An empirical évaluation ». *European Economic Review*, pp.1223-1244.

30 C. Ballard, J. Shoven et J. Whalley, 1985, « General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States », *American Economic Review*, vol. 75 (1), p. 128-138; D. Jorgenson et K. Yun, 1990, « Tax Reform and US Economic Growth », *Journal of Political Economy*, vol. 98 (5) ; D. Jorgenson et K. Yun, 1991, « The Excess Burden of Taxation in the United States », *Journal of Accounting and Finance*, vol. 6 (4), p. 487.

31 D.A.C. Smith et M.J. Trebilcock, 2001, « State-owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies », *European Journal of Law and Economics* vol. 12 (3), pp. 217–252.

l'éducation est d'environ 8,5% dans les pays de l'OCDE, mais de plus de 20% dans les pays en développement.[32] Ces chiffres impliquent que les aides publiques devraient être évaluées par rapport à un critère solide. Les aides qui ne sont en fait que des transferts globaux représentent un énorme gaspillage de ressources (sauf si ces transferts contribuent à la réalisation d'un objectif distributif légitime et bien défini) du fait qu'elles utilisent des fonds publics qui sont coûteux à réunir et qui auraient pu être utilisés de façon plus productive s'ils avaient été alloués à la santé ou à l'éducation.

2.2 L'ampleur et le coût économique des courses aux subventions

52. On peut se demander pourquoi les gouvernements octroient des subventions quand ils pourraient utiliser plus efficacement les deniers de l'État.

53. Cela tient souvent à l'existence d'externalités négatives entre les juridictions, c'est-à-dire entre les pays ou entre les régions d'un pays. En bref, l'octroi d'une aide peut sembler judicieux du point de vue limité d'une administration locale ou nationale, mais lorsqu'il a pour effet de transférer l'activité économique d'une région vers une autre (ou d'un pays vers un autre), il est somme toute presque inutile et représente un gaspillage de ressources publiques.

54. Les pertes sèches liées à la fiscalité et le coût d'opportunité des fonds publics étant élevés, les aides publiques risquent d'être accordées en pure perte même lorsqu'elles ne sont pas directement à l'origine de distorsions (l'observation du fait que ces aides créent en outre souvent de graves distorsions qui sont préjudiciables à l'efficience économique et à l'environnement est examinée plus loin).

55. Le mécanisme qui joue derrière l'externalité est le suivant. La décision d'une entreprise d'établir, développer ou maintenir une usine dans un pays a souvent des effets positifs non négligeables pour ce pays ou la région concernée sous la forme des recettes fiscales perçues (directement auprès de l'entreprise ou indirectement par l'intermédiaire des salaires de ses employés), d'une baisse éventuelle du chômage et des coûts qui lui sont liés, de l'augmentation de la demande pour la production des entreprises locales, etc. Elle peut aussi se solder par un transfert de compétences au profit de la main-d'œuvre locale qui peut ensuite bénéficier plus largement à l'économie en cas de changement d'employeur. Toute administration nationale ou locale peut donc avoir intérêt à accorder des aides pour attirer des entreprises sur son territoire. La concurrence entre les administrations nationales ou locales désireuses d'attirer ou de retenir les mêmes entreprises risque de se traduire par l'octroi de gros volumes d'aide ayant pour effet de déplacer les activités des entreprises plutôt que d'en créer de nouvelles.

56. En théorie, les courses aux subventions pourraient avoir un effet positif, plutôt que négatif, sur le bien-être général. Ce pourrait être le cas si deux conditions étaient réunies: (i) un faible niveau des pertes sèches liées à la fiscalité et du coût d'opportunité des fonds publics, et (ii) une forte variation d'un endroit à l'autre des retombées positives de la présence d'une entreprise. Dans ce cas, les pays ou les régions dans lesquel(le)s la présence d'une entreprise aurait les plus fortes retombées favorables seraient disposé(e)s à « offrir » des montants plus importants que ceux ou celles dans lesquel(le)s ces retombées seraient moindres. Tout comme la concurrence par les prix, la concurrence internationale dans ce domaine révèlerait où les effets positifs externes sont les plus importants et cela inciterait les entreprises à s'implanter là où leur présence est le plus utile, ce qui serait souhaitable.[33]

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32 G. Psacharopoulos et H.A. Patrinos, 2004, « Returns to investment in education: a further update », *Education Economics*, vol. 12 (2), pp. 111-134.

33 W. Tiebout, 1956, « A pure theory of local expenditures », *Journal of Political Economy*, vol. 64 (5), p. 416; T. Besley et P. Seabright, 1999, « The Effects and Policy Implications of state aids to Industry: an Economic Analysis », *Economic Policy*, pp. 15-53.

57. Si, comme c'est généralement le cas (comme on l'a vu plus haut), les pertes sèches liées à la fiscalité et le coût d'opportunité des fonds publics sont importants et si les courses aux subventions n'orientent pas les investissements directs vers les régions dans lesquelles ils ont le plus fort effet positif externe, les courses aux subventions risquent d'être stériles.

58. Les publications disponibles sur les États-Unis, où les aides ne sont pas interdites, montrent que la concurrence que se font les États pour attirer les entreprises peut être coûteuse. Les États semblent se livrer une concurrence acharnée pour attirer sur leur territoire les activités établies chez leurs voisins, souvent sans que cela se traduise par la création de nouvelles activités.[34] Le simple déplacement d'une entreprise (par opposition à l'encouragement de la création d'une nouvelle activité) a peu de chances d'avoir des effets positifs nets sauf si le bilan coûts/avantages varie notablement entre les régions du pays concerné. Cette concurrence entre les États semble aussi s'être intensifiée récemment,[35] ce qui a incité certains auteurs américains à préconiser l'instauration d'un contrôle fédéral des aides publiques.[36]

59. Même dans l'Union européenne, où le contrôle des aides d'État est censé limiter le déclenchement de guerres des subventions stériles et où on pourrait s'attendre à ce que la concurrence par les subventions n'ait que des effets « vertueux » en réorientant les investissements vers les endroits où ils génèreront les plus fortes externalités positives, l'évaluation des aides existantes dans les publications n'est pas très positive. D'après une étude récente, si la politique régionale visant à attirer les entreprises vers les endroits défavorisés ou périphériques semble avoir atteint son objectif, son coût a été très élevé car la distorsion des choix d'emplacement des entreprises s'est traduite par un manque notable d'efficience.[37] Les arguments en faveur de l'utilisation des aides publiques pour réduire les inégalités régionales ne sont donc peut-être pas très convaincants et d'autres mesures, comme des transferts directs de revenu, pourraient s'avérer plus efficaces dans de nombreux cas.[38]

60. La situation est la même dans le monde en développement où les exemples de guerres des subventions, tout à fait stériles, abondent, les administrations régionales de grands pays fédéraux se livrant souvent, entre elles, à une surenchère pour attirer l'investissement.

61. Un exemple récent est celui de la concurrence qui a opposé plusieurs États indiens pour obtenir l'implantation sur leur territoire de l'usine que l'entreprise Tata Motors souhaitait construire pour la fabrication d'une nouvelle voiture à bas prix, destinée principalement au marché indien. Il a finalement été décidé d'établir cette usine dans l'État du Bengale occidental après que celui-ci eut offert un ensemble très intéressant de mesures d'incitation incluant l'octroi de prêts au taux préférentiel de 1%, des prix subventionnés pour l'électricité (se traduisant par une remise de plus de 25%) et les terrains, et des exonérations fiscales.

62. Cet exemple illustre surtout l'intensité de la concurrence entre les États indiens. Plus précisément, pendant la « guerre des enchères » qui les a opposés, le Bengale occidental s'est engagé à

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34 R. Tannenwald, 2002, « Are State and Local Revenue Systems becoming Obsolete? », *National Tax Journal*, vol. 55 (2), p. 467.

35 K. Chi et D. Leatherby, 1997, *State Business Incentives: Trends and Options for the Future*, Lexington, Kentucky: Council of State Governments.

36 P. Enrich, 1996, « Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business », *Harvard Law Review*, vol. 110 (2), p. 377.

37 K.-H. Midelfart-Knarvik et H.-G. Overman, 2002, « Delocation and European Integration: Is structural spending justified? », *Economic Policy*, vol. 35, pp. 322-359.

38 K.-H. Ulltveit-Moe, 2007, « Regional policy design: An analysis of relocation, efficiency and equity », *European Economic Review*, vol. 51, p. 1443-1467.

s'aligner sur les mesures d'incitation offertes par les deux autres États (Uttarakhand et Himachal Pradesh). Si, comme c'est probablement le cas, l'enjeu était le lieu d'implantation de l'usine plutôt que le principe de son existence en Inde, cette course aux subventions a sans doute été stérile sauf si le bilan coûts/avantages varie considérablement à l'intérieur du pays.

63. Cet exemple est loin d'être unique dans les pays en développement. Par exemple, à la fin des années 90, une intense guerre de subventions a opposé les États brésiliens qui tentaient d'attirer des usines de construction automobile.[39] En effet, en 1995 et 1996, l'État du Paraná et la municipalité de Sao Jose ont offert à Renault un ensemble de mesures avantageux comprenant une contribution financière d'environ 300 millions USD et des tarifs d'électricité subventionnés, lançant ainsi ce que l'on a appelé la « guerre fiscale » entre les États brésiliens.

64. Des guerres de subventions similaires ont aussi eu lieu en Asie de l'Est. En 1996, la Thaïlande et les Philippines se sont livré une bataille acharnée pour attirer sur leur territoire une usine automobile de General Motors. C'est finalement la Thaïlande qui l'a emporté en s'alignant sur l'offre des Philippines et en proposant, en outre, de rembourser intégralement les matières premières entrant dans les exportations d'automobiles et de verser une subvention de 15 millions USD pour la création d'un institut de formation General Motors. Il est intéressant de noter que, là encore, General Motors avait fait connaître son intention de construire une usine de construction automobile de 500 millions USD en Asie, quelles que soient les subventions accordées. Selon toute probabilité, les subventions consenties n'ont donc pas contribué à créer de nouvelles activités économiques et n'ont influé que sur le lieu d'implantation d'une usine qui aurait de toute façon été construite.

65. Ces guerres de subventions ne sont nullement limitées à l'industrie automobile. Depuis le milieu des années 90, plusieurs pays d'Asie de l'Est ont lancé divers dispositifs d'incitation incluant de très généreuses exonérations fiscales pour les investissements dans le secteur de la haute technologie.

66. On peut s'interroger sur la rationalité économique de ces courses aux subventions tant au niveau des pays ou des régions qui accordent ces subventions, qu'à un niveau plus général.

67. Au niveau des pays ou des régions, l'enjeu des courses aux subventions étant surtout d'attirer l'investissement étranger (mais pas uniquement, comme le montre l'exemple de Tata Motors), la question qu'il convient de se poser est celle de savoir si l'investissement étranger génère suffisamment d'externalités pour justifier l'octroi de subventions. On a des raisons de penser que l'investissement direct étranger a des effets positifs pour les autres entreprises du même secteur ou les entreprises qui lui sont liées verticalement (en amont ou en aval). Ces raisons sont, pour l'instant, plus nombreuses dans le cas des pays développés. Dans le cas de pays en développement ou en transition, on dispose aussi d'un ensemble d'observations (encore limité, certes) qui montre que la présence de sociétés affiliées à des entreprises étrangères a tendance à améliorer la productivité de leurs fournisseurs locaux, mais il a aussi été constaté que ces effets varient beaucoup d'un cas à l'autre.[40]

68. Ces observations impliquent que l'octroi d'importantes subventions par un pays ou une région pour attirer l'investissement étranger peut être rationnel. Il risque, toutefois, de ne pas l'être collectivement du fait qu'on est alors en présence d'un « dilemme du prisonnier ». En fin de compte, la plupart des

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39 Cet exemple et ceux qui suivent sont tirés de l'étude d'Andrew Charlon diffusée en 2003 sous le titre: « Incentive Bidding for Mobile Investment : Economic Consequences and Potential Responses », Centre de développement de l'OCDE, document de travail n° 203.

40 B. Javorcik, 2004, « Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages », *American Economic Review*, 2004, vol. 94(3).

investissements bénéficiant de subventions auraient de toute façon été effectués de sorte que les courses aux subventions ont principalement pour effet de gaspiller les deniers publics.

2.3 Les subventions stratégiques dans des secteurs oligopolistiques: surcapacités et introduction de concurrence

69. Sur un marché oligopolistique, une aide d'État peut aussi générer des externalités internationales en influant sur les décisions d'investissement des concurrents de celui à qui elle bénéficie. Le mécanisme sous-jacent à l'œuvre, qui a été étudié dans les modèles économiques de politiques commerciales stratégiques,[41] peut être résumé comme suit. Dans un oligopole, dans lequel les entreprises peuvent tirer des rentes de leur pouvoir de marché, le profit d'une entreprise augmente si ses concurrents réduisent leur investissement (compris au sens large, c'est-à-dire incluant la R-D, la publicité, les coûts d'installation dans un nouveau pays, etc.). Le gouvernement d'un pays peut donc avoir intérêt à inciter les concurrents étrangers de l'un de ses champions nationaux à revoir en baisse leurs investissements.[42] L'aide publique peut permettre d'obtenir ce résultat dans certains cas. Par exemple, si le pays A accorde une aide à l'investissement à une entreprise, ses concurrents dans le pays B peuvent s'attendre à une expansion du bénéficiaire de l'aide et donc à une réduction de la demande résiduelle à laquelle ils font face. Ils peuvent, de ce fait, être incités à réduire leur investissement. Tout cela se solde par le transfert d'une partie des rentes de l'oligopole vers le bénéficiaire de l'aide au détriment de ses concurrents.[43]

70. L'octroi de l'aide peut donc permettre à son bénéficiaire d'accaparer une partie de la demande qui, sans cette aide, aurait été satisfaite par des concurrents étrangers. Ce mécanisme implique une externalité négative entre les pays du fait que quand un pays accorde une aide, il ne tient pas compte du préjudice qu'il cause aux concurrents étrangers.

71. Cette logique opère probablement dans des secteurs comme celui de l'automobile. Comme on l'a rappelé plus haut, les gouvernements de tous les pays, qu'ils soient développés ou en développement, ont accordé des subventions massives à leur industrie automobile, le total de leurs engagements étant évalué à 48 milliards USD en 2008. Beaucoup de gouvernements justifient l'octroi d'une aide par la nécessité de rétablir l'équilibre concurrentiel et de compenser les subventions consenties par les gouvernements étrangers.

72. Théoriquement, l'effet que ces subventions ont sur le bien-être social est ambigu puisqu'elles peuvent générer une externalité positive entre les pays: si le bénéficiaire de l'aide accroît sa production ou ses investissements, cela peut être bénéfique pour les consommateurs non seulement du pays qui a octroyé l'aide, mais aussi des pays étrangers. Un gouvernement qui se préoccuperait uniquement du bien-être des agents économiques nationaux ne tiendrait pas compte de cet effet. Si cette externalité positive était plus importante que l'externalité négative mentionnée plus haut (celle affectant les producteurs étrangers), il se pourrait que, même en l'absence de contrôle des aides publiques, l'aide accordée par les gouvernements soit insuffisante plutôt qu'excessive! [44]

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41 J. Brander et B. Spencer, 1985, « Export Subsidies and International Market Share Rivalry », *Journal of International Economics*, vol. 18, p. 83.

42 Voir Forum mondial sur la concurrence 2009, Table ronde sur la politique de la concurrence, la politique industrielle et les champions nationaux (voir plus haut la note 6 de bas de page).

43 Dans certaines circonstances, le lien de cause à effet peut être inversé. Par exemple, une entreprise devant faire face à une diminution de sa demande résiduelle peut être davantage incitée à investir dans la R-D pour améliorer sa position sur le marché.

44 D. Collie, 1998, « State aid in the European Union: The prohibition of subsidies in an integrated market », *International Journal of Industrial Organization*, vol.18, pp. 867-884; D. Collie, 2002, « Prohibiting State

73. Abstraction faite de toute considération théorique, il est évident que ce type de subventions stratégiques est très coûteux pour l'économie mondiale, au moins dans le secteur automobile, du fait qu'il compromet l'équilibre tout à fait nécessaire entre les capacités de production et la demande globale.

74. Ce résultat n'est toutefois pas universel. Dans certains cas, surtout quand la subvention sert à instaurer un nouveau concurrent sur un marché où la concurrence fait défaut, elle peut améliorer le bien-être. L'externalité positive en jeu est l'effet sur le degré de concurrence. Par exemple, la création d'Airbus a eu des effets positifs non seulement sous la forme des bénéfices tirés de la vente des appareils, mais aussi de la baisse des prix (compte tenu de la qualité) des appareils de Boeing qui a transféré aux compagnies aériennes du monde entier (et à leurs clients) les rentes de monopole dont jouissaient les actionnaires américains. Il en va de même chose pour la création d'Embraer, le constructeur aéronautique brésilien. La principale conclusion à laquelle aboutissent les travaux de recherche empirique est que l'effet des subventions destinées à instaurer la concurrence est très complexe et pluridimensionnel. Il a, par exemple, été estimé que du fait de l'intensification de la concurrence dans le secteur aéronautique que la création d'Airbus a favorisée, les subventions correspondantes ont notablement amélioré le bien-être en Europe, mais diminué l'excédent économique mondial (une fois prises en compte les pertes subies par les constructeurs aéronautiques en place).[45]

2.4 Les distorsions provoquées par les subventions

75. La principale raison pour laquelle les subventions sont une source d'inefficience, en dehors du gaspillage qu'elles peuvent constituer (auquel cas l'inefficience découle du coût d'opportunité des fonds publics), est qu'elles altèrent les signaux du marché. Cela peut se traduire par deux types d'inefficience. *Les inefficiences allocatives* qui se produisent quand les quantités relatives produites et consommées de divers biens ne sont pas optimales et les *inefficiences techniques* que l'on observe quand, pour un niveau donné de production, les intrants nécessaires ne sont pas utilisés d'une façon permettant de réduire les coûts au minimum (y compris ceux pour l'environnement).

76. Cette interférence avec les signaux du marché peut revêtir deux principales formes. Lorsque les aides publiques représentent une subvention générale couvrant tous les intrants, l'inefficience résulte de l'écart entre les prix perçus par les agents économiques, qui sont affectés par la subvention, et les « vrais » prix, reposant sur les coûts.

77. Lorsque les aides publiques ciblent des entreprises particulières, elles modifient le mécanisme « darwinien » par lequel le capital est alloué aux entreprises les plus efficientes et qui a tendance à réduire au minimum les coûts totaux de production. Cet effet peut jouer à la fois au niveau intrasectoriel et au niveau intersectoriel. Dans le premier cas, les aides publiques peuvent diriger le capital et le travail vers des entreprises moins efficientes et générer ainsi des inefficiences productives. Dans le second, elles peuvent affecter la taille relative des divers secteurs et entraîner une surproduction dans les secteurs subventionnés et une sous-production dans d'autres.

78. Ces divers mécanismes sont mis en évidence ci-après à l'aide de quelques exemples. À des fins d'illustration, nous nous focalisons sur des exemples tirés de pays en développement et sur des distorsions ayant un impact sur l'environnement. Nous considérons aussi quelques exemples fournis par la crise financière récente et le renflouement des banques.

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aid in an Integrated Market', *Journal of Industry, Competition and Trade*, vol. 2 (3), p. 215; D. Collie, 2005, « State aid to Investment and R&D », *European Economy, Economic Papers*, vol. 231, p. 1.

45 D. Neven et P. Seabright, 1995, « European Industrial Policy: the Airbus Case », *Economic Policy*, vol. 21, pp. 313-358.

Distorsion des prix

79. L'exemple le plus frappant de distorsions coûteuses pour l'économie et l'environnement, créées par des subventions, nous est fourni par les subventions à l'énergie.

80. Ces subventions sont quantitativement importantes tant du côté de la consommation que de celui de la production, dans les pays en développement comme dans les pays développés. Les subventions de l'Iran aux combustibles s'élèvent à environ 55 milliards USD par an. Celles de l'Inde ont été estimées à un montant annuel d'au moins 15 milliards USD qui bénéficie à l'agriculture à hauteur de 90%. Il est assez intéressant de noter que ce sont les gros producteurs et exportateurs de combustibles fossiles qui ont le plus tendance à subventionner fortement la consommation d'énergie: en dehors du cas extrême de l'Iran, l'Arabie saoudite et le Venezuela, deux des plus gros producteurs mondiaux de pétrole, figurent aussi parmi les pays qui subventionnent le plus la consommation intérieure d'énergie (à hauteur de 26 et 17 milliards USD par an, respectivement)[46]. La raison en est probablement que les gouvernements concernés considèrent comme presque négligeable le coût de ces subventions. Celles-ci sont coûteuses quand le prix du marché du pétrole est élevé qui est aussi le moment où ces gouvernements tirent des recettes importantes des exportations pétrolières.

81. Même dans l'Union européenne, malgré l'existence de stricts mécanismes de contrôle des aides publiques, certains combustibles fossiles bénéficient de très importantes subventions à la production. Au cours de la décennie 1994-2005 des aides d'État en faveur de l'industrie charbonnière ont été approuvées pour un montant de plus de 80 milliards EUR. En Allemagne, les subventions d'exploitation équivalaient, en 2004, à plus de 86 EUR la tonne, ce qui laisse supposer que le coût de production du charbon y était plus de deux fois supérieur au prix du marché mondial. Du côté de la consommation, la persistance, en France, d'un dispositif complexe de réglementation des prix ayant pour effet de maintenir le prix de l'électricité en dessous du coût marginal réel de sa production, offre un autre exemple de brouillage des signaux que donnent les prix.[47]

82. Ce type de subvention crée des distorsions considérables. Du côté de la consommation, l'élasticité à long terme de la demande d'essence a été estimée à environ -0,7, c'est-à-dire qu'une baisse de 1% du prix de l'essence entraîne, à long terme, une augmentation de la demande de 0,7%.[48] Ce chiffre relativement élevé (en valeur absolue) implique que les subventions susmentionnées ont une incidence non négligeable sur la consommation de pétrole. D'un point de vue purement économique, elles ont tendance à décourager les efforts de conservation et à inciter les agents économiques à agir sans tenir compte des coûts marginaux réels de production des combustibles fossiles. Elles sont aussi préjudiciables à l'environnement du fait qu'elles contrecarrent les efforts de limitation des émissions.

83. Le cas des subventions énergétiques accordées aux agriculteurs indiens est particulièrement intéressant. La fourniture, depuis les années 70, d'énergie électrique à bas prix aux agriculteurs (qui constituaient, et constituent encore, la majorité de la population et sont extrêmement pauvres) était destinée à leur venir en aide et à les encourager à acheter et à utiliser des pompes pour irriguer leurs cultures. Du fait de cette subvention, les décisions prises en matière de production, même si elles étaient individuellement rationnelles, ont souvent été en fait destructrices de valeur sur la base des coûts réels de la production d'électricité. Cette politique a aussi été préjudiciable à l'environnement. Le coût du pompage

46 Agence internationale de l'énergie, 2008.

47 D. Spector, 2007, *Electricité: Faut-il désespérer du marché ?*, Editions Rue d'Ulm.

48 J. Hamilton, 2008, « Understanding Crude Oil Prices », NBER Working Paper #14492.

de l'eau étant artificiellement réduit, beaucoup d'agriculteurs ont cultivé des plantes consommant beaucoup d'eau, ce qui a eu pour effet d'épuiser les ressources en eau et d'aggraver la salinisation.[49]

84. Le cas des subventions européennes au charbon illustre les divers biais par lesquels les subventions peuvent être génératrices de distorsions. En principe, le niveau de ces subventions était calculé de manière à ne pas modifier l' « ordre de mérite » des différents types de combustibles, c'est-à-dire à ne pas rendre artificiellement les centrales au charbon plus économiques, disons que celles à gaz. C'est notamment en raison de cette restriction que la Commission européenne a accepté le programme de subventions. Toutefois, même sans elle, ce programme était voué à générer des distorsions du fait qu'il revenait à augmenter l'offre mondiale de charbon, c'est-à-dire à mettre sur le marché mondial une quantité artificiellement gonflée de charbon européen, provoquant ainsi une diminution du prix d'équilibre du marché et par là même, le remplacement d'autres sources d'énergie par le charbon.

85. L'eau est probablement après l'énergie, le produit de base qui est le plus subventionné dans le monde. On estime à environ 45 milliards USD par an les subventions dont elle bénéficie uniquement dans les pays en développement, ce qui se solde par une surconsommation et des investissements insuffisants dans les réseaux d'acheminement (pour réduire les fuites).

Inefficiences provoquées au niveau de la production et de l'environnement par une mauvaise affectation du capital

86. Une autre source importante d'inefficiences se trouve dans l'octroi sélectif de subventions à certaines entreprises et en particulier à des entreprises publiques. Ces subventions sont une source d'inefficiences parce que si elles sont destinées à des entreprises qui manquent d'efficience, elles déplacent la production vers les unités moins efficientes et augmentent ainsi les coûts totaux de production. Cela peut aussi entraîner des coûts importants pour l'environnement du fait que les entreprises inefficientes ont tendance à utiliser plus d'intrants par unité de production et sont, de ce fait, plus polluantes.

87. L'ordre de grandeur des subventions accordées aux entreprises publiques est considérable. Le fait que, dans certains pays, la quasi-totalité des subventions bénéficiait à des entreprises non rentables corrobore l'idée que ces aides n'étaient souvent pas octroyées sur la base d'un calcul coûts/avantages ou du fait de l'existence de déficiences du marché qui devaient être corrigées, mais uniquement pour maintenir à flot des unités de production inefficientes.

88. En dehors des aides gouvernementales directes, les entreprises publiques bénéficient aussi souvent d'un accès préférentiel au crédit accordé par des banques publiques.[50] Ces subventions directes et indirectes orientent les ressources vers des unités de production inefficientes, ce qui implique une perte sèche qui peut représenter un pourcentage non négligeable de la production industrielle.[51] L'estimation donnée dans l'étude précédemment citée est frappante parce qu'elle correspond à une moyenne calculée pour l'ensemble des entreprises publiques, dont certaines sont très efficientes, surtout après les réformes dont elles ont fait l'objet de la part des autorités chinoises qui les ont soumises à des règles de gouvernance comparables à celles appliquées dans le secteur privé.

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49 R. Tongia, 2007, « The Political Economy of Power Sector Reform in India », in *The Political Economy and Institutions of Power Sector Reform in the Developing World*, Victor, D. et Heller, T. (dir. pub.), Cambridge University Press, Cambridge.

50 L. Brandt et Z. Zhu, 2000, « Redistribution in a Decentralized Economy: Growth and Inflation in China Under Reform », *Journal of Political Economy*, vol. 108, pp.422–439.

51 S. Claro, 2005, « How Uncompetitive is the State-Owned Industrial Sector in China », Documento de Trabajo n° 305, Pontificia Universidad Catolica de Chile, Instituto de Economia.

89. Outre cette perte sèche de nature purement économique, l'octroi de subventions à des entreprises publiques qui ne sont pas efficientes entraîne des coûts non négligeables pour l'environnement. Toute une série de nouveaux travaux empiriques aboutit à la conclusion que les entreprises publiques respectent en général moins l'environnement que les entreprises privées. Certaines études[52] constatent que les premières peuvent émettre jusqu'à dix fois plus de polluants que les secondes, toutes choses égales par ailleurs. Cela semble tenir notamment au fait que les entreprises publiques sont moins surveillées que les entreprises privées pour le respect de l'environnement[53]. Mais cela s'explique aussi probablement par le fait que les subventions permettent de maintenir en activité des unités de production inefficientes qui utilisent en général davantage d'intrants pour un niveau donné de production et sont, en conséquence, également plus polluantes.

90. L'aide accordée récemment aux institutions financières par beaucoup de gouvernements dans le monde peut aussi avoir d'autres effets moins qu'optimaux. Ce soutien public a surtout bénéficié aux grandes banques, jugées essentielles pour assurer la stabilité du système. Celles-ci ont, de ce fait, eu plus facilement accès au crédit que les plus petits établissements, les créanciers estimant qu'elles bénéficiaient d'une garantie implicite des gouvernements. D'après une estimation récente, les banques dont les avoirs excèdent 100 milliards USD empruntent à des taux inférieurs de 0,34 point à ceux appliqués aux autres banques. Cela peut provoquer une contraction du secteur et renforcer encore la position des grandes banques au détriment de leurs concurrentes de plus petite taille. Il en résulte un manque d'efficience et c'est la taille même des plus grands établissements et l'idée qu'ils étaient « trop importants pour qu'on les laisse faire faillite » qui ont contribué au déclenchement de la crise financière.[54]

91. Dans les pays développés, le soutien des entreprises non rentables est moins répandu, mais il peut parfois être non négligeable lorsque les gouvernements viennent en aide aux « champions nationaux ». Par exemple, dans leur communication à la table ronde 2009 du Comité de la concurrence de l'OCDE sur les marchés financiers[55], les autorités antitrust des États-Unis citent les garanties d'emprunt accordées par le gouvernement à la Chrysler Corporation en 1980 comme un autre exemple de vaine tentative de sauvetage qui a peut-être eu des conséquences négatives pour la concurrence. D'après ce document américain, si Chrysler avait fait faillite, ses éléments d'actif auraient pu être transférés à un concurrent plus efficient, ce qui aurait pu améliorer la situation concurrentielle du secteur.[56] De même, d'après William Kovacic, commissaire de la Federal Trade Commission (FTC), la fourniture d'une assistance financière au constructeur aéronautique Lockheed, lorsqu'il était en difficulté au début des années 70, a généré d'importantes inefficiences au niveau de la production. Si on avait laissé Lockheed tomber en faillite, ses

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52 Voir, par exemple H. Wang et Y. Jin, 2002, « Industrial Ownership and Environmental Performance: Evidence from China », document de synthèse 2936, document de travail de la Banque mondiale consacré à la recherche sur les politiques; S. Pargal et D. Wheeler, 1996, « Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia », *Journal of Political Economy*, vol. 104, pp.1314–1327.

53 S. Gupta et S. Saksena, 2002, « Enforcement of Pollution Control Laws and Firm Level Compliance: A Study of Punjab, India », document présenté au deuxième congrès mondial des économistes de l'environnement et des ressources naturelles, Monterey, Californie; H. Wang, N. Mamingi, B. Laplante, et S. Dasgupta, 2002, « Incomplete Enforcement of Pollution Regulation: Bargaining Power of Chinese Factories », document de travail de la Banque mondiale.

54 D. Cho, « Banks 'Too Big to Fail' Have Grown Even Bigger », *Washington Post*, 28 août 2009.

55 Concurrence et marchés financiers, OCDE 2009: http://www.oecd.org/dataoecd/51/14/43139348.pdf

56 Note des États-Unis, Table ronde du Comité de la concurrence de l'OCDE sur la concurrence et les marchés financiers, DAF/COMP(2009)11ADD1, disponible en anglais aux pages 225 à 229, consultables en utilisant le lien suivant: http://www.oecd.org/dataoecd/45/16/43046091.pdf. Ce document cite aussi l'aide fédérale accordée à Penn Central comme un autre exemple d'échec de l'aide publique (p. 228, note 10).

éléments d'actif seraient allés à McDonnell Douglas, constructeur alors plus efficient, qui a produit le MD10. Le paysage d'aujourd'hui aurait pu s'en trouver considérablement modifié, d'après le Commissaire Kovacic, le marché comptant dans ce cas au moins trois grands constructeurs efficaces d'appareils long-courriers: Boeing, Airbus et McDonnell Douglas. [57]

2.5 Les autres coûts des subventions: la faible contrainte budgétaire et le coût de la recherche de rente

92. Les aides publiques peuvent aussi avoir des effets négatifs sur l'efficience économique par le biais de deux autres mécanismes. Le premier est celui dit de la « faible contrainte budgétaire ». La particularité frappante de ce mécanisme est que la source de l'inefficience n'est pas l'octroi de subventions lui-même, mais plutôt l'attente d'un renflouement possible des entreprises défaillantes et des subventions qui pourraient leur être accordées. S'il semble probable que les pouvoirs publics viendront au secours de celles qui défailliront, les entreprises peuvent être encouragées à procéder à des investissements risqués ou à manquer de rigueur dans leur gestion. D'une manière plus générale, une entreprise sera moins incitée à devenir plus efficiente pour réduire ses coûts, améliorer la qualité de sa production ou innover si elle s'attend à ce que l'avantage concurrentiel ainsi obtenu soit neutralisé par l'octroi d'une aide à ses concurrents plus négligents. Cette idée a été formulée par l'économiste Janos Kornai lorsqu'il a analysé les tentatives de libéralisation économique partielle des autorités hongroises: *« Les entreprises publiques avaient certes un intérêt moral et financier à maximiser leurs profits, mais on ne laissait jamais tomber en faillite celles qui étaient chroniquement déficitaires. Elles étaient toujours renflouées par des aides financières ou d'autres moyens. Les entreprises étaient assurées de survivre même après des pertes chroniques et cette attente a laissé une marque sur leur comportement »* .[58]

93. Ce type de mécanisme est difficile à mesurer parce qu'il n'implique pas un lien direct de cause à effet entre une aide donnée et un manque d'efficience mesurable. Une étude récente des performances des entreprises publiques coréennes corrobore toutefois l'idée que la faible contrainte budgétaire, c'est-à-dire l'attente d'un renflouement par les pouvoirs publics en cas de défaillance, a une forte incidence sur l'efficience de l'exploitation des entreprises. Cette étude[59] constate que les entreprises publiques coréennes ont amélioré l'efficience de leur exploitation et leur rentabilité entre 1998 et 2002, à un moment où elles étaient confrontées à la perspective d'une privatisation du fait d'un engagement pris à cet effet par le gouvernement. Si leur efficience s'est améliorée ce n'est donc pas en raison de la privatisation (qui n'a, en fait, pas eu lieu pour la plupart des entreprises considérées), mais simplement parce qu'elles ne pouvaient plus espérer être renflouées en cas de défaillance.

94. Le débat récent sur le renflouement d'Air India offre un autre exemple de ce mécanisme de faible contrainte budgétaire. Le gouvernement a fait savoir que c'était « la première et la dernière fois » qu'il renflouerait la compagnie aérienne. Comme dans n'importe quelle situation de ce type, rendre cet engagement crédible constituait un aspect important de la stratégie d'ensemble visant à obliger les gérants de la compagnie à prendre des décisions difficiles, mais nécessaires, comme celle de réduire les effectifs.

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57 W. Kovacic, participant à l' « Industrial Policy and Competition Law and Policy Roundtable » (« Industrial Policy Roundtable »), 2006 Fordham Comp. L. Inst. 239-40 (B. Hawk dir. pub. 2007).

58 J. Kornai, E. Maskin et G. Roland, 2003, « Understanding the Soft Budget Constraint », *Journal of Economic Literature*, vol. 41 (4), p. 1095. Voir aussi J. Kornai, 1986, « The Soft Budget Constraint », *Kyklos*, vol. 39 (1), p. 3.

59 J. Kim et H. Chung, 2008, « Empirical Study on the Performance of State-owned –enterprises and the Privatizing Pressure : The Case of Korea », document présenté à la conférence d'Utrecht sur la « re-réglementation » à la suite du néolibéralisme. Les conséquences de trois décennies de privatisation et de libéralisation des marchés, consultable à l'aide du lien: http://regulation.upf.edu/utrecht-08-papers/jkim.pdf.

Les observateurs extérieurs n'ont toutefois pas jugé cet engagement crédible du fait notamment que la compagnie Air India constituait, comme la plupart des transporteurs nationaux, un symbole trop important pour qu'on la laisse faire faillite, mais surtout parce que c'était une entreprise publique.[60] On peut trouver des exemples du même ordre dans de nombreux pays, y compris en Europe.

95. Dans un certain sens, la crise financière de 2008 constitue un exemple extrême du dommage causé par l'existence d'une faible contrainte budgétaire. Un facteur qui a contribué à une prise de risque excessive par les banques a été la garantie implicite des pouvoirs publics dont elles pensaient jouir (et dont elles jouissaient effectivement comme l'ont montré les coûteux plans de sauvetage adoptés en leur faveur). Là encore, le dommage causé par la prise de risque excessive n'a pas tenu à l'octroi de l'aide, mais à l'attente de cet octroi en cas de besoin. Cette remarque ne doit pas être interprétée comme signifiant que les plans de sauvetage des banques étaient inopportuns; même si on peut en contester certains détails, peu d'économistes nient le besoin d'une intervention gouvernementale. Cette observation met cependant en évidence les coûts économiques, peut-être importants, de l'attente d'une aide publique.

96. Il est frappant de constater que tous ces effets négatifs ont en commun de ne pas être provoqués par les subventions elles-mêmes, mais plutôt par l'attente de leur octroi possible à l'avenir. Ils ne peuvent donc pas être expliqués individuellement lorsqu'on évalue les avantages et les inconvénients d'une subvention donnée.

2.6 Les mécanismes politiques à l'œuvre derrière les subventions inefficientes

97. Les mécanismes précédemment décrits qui peuvent conduire à l'octroi de subventions inefficientes se répartissent entre deux grandes catégories: les externalités négatives entre juridictions et la propension intrinsèque des administrations à prendre des décisions inefficientes. Si les courses stériles aux subventions et la concurrence pour l'obtention de rentes sur des marchés oligopolistiques qui conduisent à un excès de capacités de production au niveau mondial peuvent s'expliquer par la présence d'externalités négatives entre des administrations (locales, régionales ou nationales) rationnelles cherchant à maximiser le bien-être, beaucoup d'autres mécanismes sont à l'œuvre qui expliquent pourquoi les administrations ont tendance à accorder des subventions qui n'ont guère de justification économique même de leur point de vue limité.

98. On peut trouver de nombreux exemples de subventions dont l'octroi ne se justifiait pas à l'évidence du point de vue de l'intérêt collectif, mais s'explique davantage par la recherche de rentes ou des motivations politiques: un cas extrême est celui de l'aide accordée, dans les années 90, par l'État du Michigan à diverses entreprises en vue de créer des emplois pour un coût de plus de 2 millions USD par emploi.[61] D'une manière plus générale, la capacité des groupes d'intérêt privés d'influencer la politique économique en leur faveur au détriment d'autres a fait l'objet de nombreuses publications,[62] tout comme l'incidence des liens politiques sur les résultats des entreprises, tant dans les pays développés que dans les pays en développement.[63] Par exemple, d'après des études existantes, le degré de protection douanière dont

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61 Voir R. Tannenwald, 2002, « Are State and Local Revenue Systems becoming Obsolete? », *National Tax Journal*, vol. 55 (2), septembre, p. 467.

62 T. Persson et G. Tabellini, 2000, *Political Economics: Explaining Economic Policy*, MIT Press.

63 B. Roberts, 1990, « A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits », *American Journal of Political Science*, vol. 34 (1), pp. 31–58 ; R. Fisman, 2001, « Estimating the Value of Political Connections », *American Economic Review*.

bénéficient diverses industries aux États-Unis est directement lié au niveau des dons aux partis politiques.[64] Il est aussi manifeste que la politique publique visant un secteur ou une entreprise en particulier (comme la politique commerciale) favorise en général des activités en déclin. C'est une situation que l'on constate très fréquemment. On peut l'observer aussi bien dans la politique commerciale des États-Unis[65] que dans la politique européenne en matière d'aides publiques: par exemple, de nombreux pays européens ont dépensé des milliards d'euros pour essayer de maintenir à flot leurs mines de charbon inefficientes avec pour seul résultat de retarder leur fermeture de quelques années.

99. Une étude économétrique des aides publiques en Europe[66] conclut que plus le système politique d'un pays rend politiquement rentables les aides ciblées (par exemple, pays où les circonscriptions électorales sont peu étendues, l'écart idéologique entre les partis est faible et l'unité au sein de chacun d'eux est limité), plus la part de ces aides aux entreprises (aides « sectorielles » dans la terminologie de l'UE) est élevée par rapport aux aides « horizontales ». Cela laisse supposer que l'octroi d'une aide à des secteurs spécifiques repose, jusqu'à un certain point, sur des considérations électorales, malgré le contrôle strict exercé par la Commission européenne.

100. Ces constatations impliquent deux choses. Premièrement, la recherche de rentes et les décisions à motivation politique peuvent affecter la nature et la destination des subventions, ce qui se solde souvent par une utilisation inefficace des fonds publics et par des inefficiences au niveau de la production et de l'affectation des ressources. En outre, plus l'octroi des subventions se prête à une captation par des intérêts privés, plus les entreprises risquent d'investir dans des activités de recherche de rentes, ce qui représente un gaspillage de ressources, le coût de ces activités étant très élevé d'après plusieurs estimations.[67]

101. La façon dont la crise financière récente a été gérée illustre bien notre propos. Certains observateurs estiment que le plan de renflouement adopté par les États-Unis était plus favorable aux actionnaires des banques qu'un plan potentiellement plus efficace qui aurait impliqué la nationalisation de banques insolvables.[68] De même, une analyse du vote, en octobre 2008, par les membres du Congrès des États-Unis, de la loi de stabilisation économique d'urgence (« EESA ») qui, d'après les auteurs de l'analyse, « effectue un transfert de richesse des contribuables vers le secteur des services financiers »

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64 P. Goldberg et G. Maggi, 1999, « Protection for Sale: An Empirical Investigation », *American Economic Review*, vol. 89 (5), p. 1135.

65 G. Hufbauer et H. Rosen, 1986, « Trade Policy for Troubled Industries », Policy Analyses in International Economics 15, Institute for International Economics, Washington, D.C.; G. Hufbauer, Gary, D. Berliner et K. Elliot, 1986, « Trade Protection in the United States: 31 Case Studies », Institute for International Economics, Washington, D.C. ; E. Ray, 1991, « Protection of manufactures in the US », in D. Green, *Global Protectionism: Is the US playing on a level field?* Macmillan, Londres.

66 U. Aydin, 2007, « Politics of state aid in the European Union: Subsidies as Distributive Politics », Université de Washington, Département des sciences politiques, document non publié.

67 Aux États-Unis, le total des dépenses consacrées aux activités de transfert a été estimé à 25% du PIB (D. Laband et J. Sophocleus, 1992, « An Estimate of Expenditures on Transfer Activity in the United States », *Quarterly Journal of Economics*, vol. 107(3), pp. 959-983). D'autres estimations, reposant sur des régressions du produit national brut par rapport au nombre relatif d'avocats (indicateur de l'ampleur des activités de recherche de rentes) et de médecins ou d'ingénieurs (indicateur du volume des activités productrices) font apparaître un coût similaire, voire plus élevé, pour les activités de recherche de rentes (S. Magee, W. Brock et L. Young, 1989, *Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium*, Cambridge University Press; K. Murphy, A. Shleifer et R. Vishny, 1991, « The Allocation of Talent: Implications for Growth », *Quarterly Journal of Economics*, vol. 106(2), pp.503-530.)

68 M. Richardson et N. Roubini, « Nationalize the Banks! We're all Swedes Now », *Washington Post*, 15 février 2009.

révèle que « la probabilité d'un vote en faveur de l'EESA augmente avec l'importance des contributions du secteur des services financiers aux campagnes électorales ».[69]

102. Les subventions créent parfois de nouveaux intérêts qui se livrent à des activités de recherche de rentes en s'efforçant, par exemple, d'obtenir la perpétuation de mesures de politique industrielle auxquelles il faudrait en fait mettre fin parce que les circonstances se sont modifiées. Le projet Concorde, financé par le Royaume-Uni et la France, illustre ce point.[70] Le lancement d'un avion supersonique se justifiait dans les années 60 lorsque le pétrole était bon marché, mais il n'avait plus de justification économique après le choc pétrolier de 1973. Le projet se trouvant toutefois déjà à un stade avancé, le groupe constitué par les nombreux fonctionnaires et hommes d'affaires qui étaient parties prenantes, avait tout intérêt à ce qu'il ne soit pas abandonné. Ce groupe l'a finalement emporté sur les signaux du marché et le projet a été poursuivi pour un coût considérable pour les deux pays.

103. Ce type de lien de causalité préjudiciable peut être observé dans diverses situations. Contrastant avec l'exemple du projet de haute technologie qu'a constitué le projet Concorde, la politique suivie par de nombreux États indiens qui ont subventionné l'électricité pour les agriculteurs afin de favoriser le pompage de l'eau et l'irrigation a eu un effet de verrouillage. L'électricité leur étant fournie à bas prix, de nombreux agriculteurs ont acheté des pompes et investi leur savoir-faire dans la culture de plantes ayant besoin de beaucoup d'eau. Cet investissement financier et humain a renforcé la demande d'électricité bon marché: l'idée est essentiellement que si l'on subventionne un bien (dans ce cas, l'électricité), celui à qui cela bénéficie est incité à investir dans un bien complémentaire (dans ce cas, les pompes électriques et le savoir-faire pour la culture de plantes consommant beaucoup d'eau), ce qui augmente la demande pour la subvention initiale. En fin de compte, la pression politique exercée pour que l'électricité continue d'être subventionnée est devenue la principale raison pour laquelle la mesure a été maintenue, bien après que les politiciens eurent pris conscience de son caractère pernicieux.

104. Les importantes subventions dont bénéficie l'agriculture dans beaucoup de pays nous offrent d'autres exemples à cet égard. Prenons celui de la politique agricole commune établie par l'Union européenne, au départ, pour favoriser l'efficience au moins de deux façons. Premièrement, elle devait encourager les agriculteurs européens à adopter des technologies plus efficientes, ce qui impliquait, dans certains cas, de procéder à des ajustements très difficiles, comme l'échange de parcelles de terrain entre agriculteurs pour que la configuration des exploitations se prête à l'utilisation des nouvelles techniques. Deuxièmement, elle devait permettre à l'Europe de couvrir ses besoins alimentaires, ce qui, dans les années 60, constituait un objectif valable puisque dans le contexte de la guerre froide, la notion de « sécurité alimentaire » avait un sens. Dans les années 90, toutefois, toutes ces justifications n'avaient pratiquement plus de raison d'être. On aurait pu penser qu'il serait facile de réduire le montant des subventions à l'agriculture, mais cela n'a pas été le cas parce que leurs bénéficiaires s'étaient mués en un groupe politique puissant. De même, les subventions visant à augmenter la production d'éthanol aux États-Unis, qui devaient permettre au départ de développer un produit susceptible de remplacer les combustibles fossiles, ont perdu leur justification économique quand, en 2007 et 2008, le prix du blé et de la canne à sucre (utilisés dans la production d'éthanol) a commencé à augmenter. De fortes pressions ont alors été exercées en faveur du maintien du statu quo du fait notamment que les subventions à l'éthanol avaient été capitalisées dans les prix des terrains, ce qui rendait difficile un changement de politique.

105. Une étude récente des décisions d'investissement prises par des fonds souverains confirme que plus les politiciens interviennent dans ces décisions, plus ces fonds servent à subventionner des entreprises

69 A. Mian, A. Sufi et F. Trebbi, 2009, « The Political Economy of the U.S. Mortgage Default Crisis », NBER Working Paper # 14468.

70 D. Myddlteon, 2007, *They Meant Well: Government Project Disasters*, Institute of Economic Affairs Monographs, Hobart Paper n°160.

nationales.[71] Cette étude constate, en effet, que les fonds qui sont davantage gérés par des politiciens ont tendance à investir plus dans les entreprises nationales (ce qui corrobore l'idée que ces fonds servent à récompenser des amis plutôt qu'à diversifier les avoirs nationaux) et, qui plus est, dans des entreprises à coefficients de capitalisation des résultats élevés qui, en moyenne, valent moins après l'investissement. Cette dernière observation suggère que les fonds souverains dans la gestion desquels les politiciens interviennent davantage ont tendance à subventionner les entreprises dans lesquels ils investissent en leur fournissant des capitaux à des conditions plus favorables que celles permettant d'obtenir des taux de rendement normaux.

106. La vague récente de renflouements d'entreprises en difficulté à laquelle on a assisté à la suite de la crise financière illustre le fait que les fonds publics ont tendance à être distribués sur la base de critères économiques quelque peu obscurs. Par exemple, en Russie, la banque publique de développement Vneshekonombnak (VEB) a fait connaître, en 2009, son intention de prêter quelque 50 milliards USD à des entreprises en difficulté avec la possibilité de convertir ces prêts en participation de l'État si ces entreprises se révélaient incapables de les rembourser. De nombreux observateurs, y compris en Russie, ont toutefois critiqué le fait que ni le choix des bénéficiaires, ni la nature de l'aide fournie (celle-ci étant notamment accordée sans condition) ne reposait sur des critères objectifs à tel point que certains ont pu affirmer qu' « en Russie, des mesures de renflouement d'un montant de 50 milliards USD bénéficient à ceux qui sont riches et bien introduits »[72]. Par exemple, le constructeur automobile Avtovaz a bénéficié, en 2009, d'un prêt sans intérêt de 730 millions USD, d'un prêt de 230 millions USD accordé à un taux favorable par des banques d'État et d'un engagement de banques publiques de l'aider à lever, en outre, 2,6 milliards USD auprès du système bancaire. Aucun engagement ne lui a été demandé, en contrepartie, au niveau de sa gestion qui est généralement considérée comme loin d'être efficiente. L'Union russe des industriels et des entrepreneurs a, en conséquence, demandé que des normes publiques transparentes soient établies pour l'octroi des aides financières, en mettant en garde contre les dangers du favoritisme. Le conseiller financier à l'origine de cette stratégie de renflouement a même critiqué « le gaspillage que constituait l'attribution des fonds à des entreprises inefficientes, bien introduites dans les milieux politiques ».[73]

107. Un autre mécanisme conduisant à des subventions inefficaces joue dans les pays qui tirent une large part des recettes publiques de l'exportation de matières premières comme le pétrole. L'opinion publique sachant que l'État engrange des recettes exceptionnelles lorsque les cours mondiaux s'envolent, elle exerce des pressions pour que celles-ci soient redistribuées et les gouvernements estiment souvent que la façon la moins risquée de le faire est de subventionner la matière première à l'origine de ces recettes. La raison en est que ce type de redistribution comporte un « stabilisateur budgétaire » automatique puisque son coût est directement proportionnel aux recettes exceptionnelles. C'est toutefois un mécanisme de redistribution très inefficient du fait qu'il fausse les signaux de prix, comme on l'a expliqué plus haut. Une solution envisageable est de créer des fonds de placement extraterritoriaux, comme ceux établis par la Norvège, le Koweït ou l'Azerbaïdjan, qui permettent aux gouvernements de « se lier les mains ».

108. D'après Rodrik (1995)[74], les subventions accordées aux industries naissantes dans les pays d'Asie de l'Est au cours des dernières décennies ont été relativement à l'abri de comportements de recherche de

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71 S. Bernstein, J. Lerner, A. Schoar, 2009, « The Investment Strategies of Sovereign Wealth Funds », Harvard Business School Working Paper 09-112.

72 *New York Times*, 31 octobre 2008.

73 A. Kramer, « Russian Auto Bailout Protects Jobs, Not Efficiency », 7 avril 2009; l'ISCIP Analyst, « An Analytical Review », vol. XV (4), 6 novembre 2008, et P. Pan, « Russian élite look to Kremlin for aid as wealth évaporâtes », *Washington Post*, 17 octobre 2008.

74 D. Rodrik, 1995, « Getting Interventions Right: How South Korea and Taiwan Grew Rich », *Economic Policy*, vol. 10(20).

rentes à la différence de ce qui a été observé dans la plupart des pays en développement et dans de nombreux pays développés. Comme Rodrik (2004)[75] le précise, l'observation de tels comportements ne permet pas à elle seule de se prononcer contre les subventions ciblées et les politiques industrielles de même que l'existence de ce type de comportement dans le secteur de l'éducation ne justifie pas de renoncer au service public de l'éducation. Ces constatations ne plaident toutefois pas en faveur des politiques qui dotent les gouvernements d'outils leur permettant de favoriser certaines entreprises de façon arbitraire. Des instruments de portée plus générale ou la fourniture, sur une base temporaire, d'une aide ciblée aux nouvelles entreprises et aux nouvelles activités, limiteraient probablement les possibilités de comportements de recherche de rentes.

109. Les gouvernements ont de bonnes raisons d'accorder des subventions aux entreprises dans certaines circonstances. Ces raisons (qui entrent souvent, mais pas exclusivement, dans le champ de la « politique industrielle ») ne justifient cependant pas la signature d'un chèque en blanc pour les subventions. Comme le montrent les exemples cités plus haut, la dynamique politique peut impliquer qu'une subvention économiquement pertinente au départ crée des intérêts établis qui rendent sa suppression très difficile même lorsqu'elle ne se justifie plus. De plus, comme on le verra ci-après, l'existence de justifications théoriques pour les subventions n'implique pas nécessairement que les gouvernements, même s'ils sont bienveillants et ne cèdent pas aux pressions d'intérêts spéciaux, peuvent facilement déterminer quelles subventions sont « appropriées » et quelles subventions seraient dépensées en pure perte.

3. Les justifications possibles des aides d'État et leurs limites

3.1 Rapide présentation des justifications les plus fréquemment invoquées pour les aides publiques et les subventions

110. La justification la plus fréquemment invoquée pour les aides publiques est qu'elles permettent aux gouvernements de remédier à diverses défaillances des marchés.

111. Par exemple, les marchés peuvent ne pas réussir à assurer une répartition des revenus jugée équitable ou politiquement souhaitable. En principe, l'outil approprié dans ce type de cas est la politique budgétaire plutôt que l'octroi de subventions. Cependant, dans certaines circonstances, surtout quand les autorités visent à soutenir le revenu d'une catégorie de la population qui est définie par son activité économique (agriculture, par exemple) plutôt que par ses revenus monétaires, elles décident de subventionner directement l'activité économique concernée.

112. Une autre justification souvent avancée pour l'octroi de subventions à des entreprises privées est la préservation de l'emploi quand les entreprises risquent la faillite ou sont « menacées » d'une prise de contrôle par des intérêts étrangers, jugée susceptible de mettre des emplois en péril.

113. Toutefois, la justification la plus fréquente des aides publiques et des subventions est la présence d'externalités positives créées par certaines activités, c'est-à-dire l'idée que la valeur sociale de certaines activités excède leur valeur privée. Si l'écart entre ces deux valeurs n'est pas comblé par des subventions, les agents privés ne sont pas suffisamment incités à se lancer dans une activité socialement utile. C'est sur cette idée que reposent les subventions incluses dans une « politique industrielle ».

114. Nous allons maintenant examiner les divers mécanismes qui peuvent justifier l'octroi de subventions en faisant ressortir les limites et les risques qui lui sont associés, même en présence de

[75] D. Rodrik, 2004, « Industrial Policy for the twenty-first century », Harvard Kennedy School Working Paper 04-047.

justifications objectives, puis nous montrerons comment la nouvelle approche économique mise en œuvre par la Commission européenne évalue les diverses justifications possibles des aides publiques.

3.2 Les subventions et le soutien des revenus

115. L'imposition et les transferts aux particuliers sont les deux moyens les plus naturels de redistribuer les revenus. Dans certains cas, toutefois, l'action politique de groupes d'intérêts pousse les gouvernements à redistribuer les revenus non pas sur la base de critères monétaires, mais pour d'autres raisons, comme venir en aide aux membres de certaines professions. Le soutien apporté au secteur agricole en est une parfaite illustration. Par exemple, le revenu moyen transféré à un agriculteur moyen en France, par le biais de la politique agricole commune, s'élevait à 17 000 EUR en 1999,[76] bien que les agriculteurs ne soient, dans l'ensemble, pas plus pauvres que la population moyenne.

116. Les subventions constituent, dans l'ensemble, une façon inefficiente de redistribuer les revenus parce qu'elles génèrent des distorsions de prix. Par exemple, la perte de bien-être provoquée par la politique agricole commune avant sa réforme (lancée en 2004) a été estimée à 0,9% du PIB européen, ce qui est beaucoup étant donné que l'agriculture ne contribue qu'à 2% de ce PIB.[77]

117. Cet exemple montre que les subventions ne constituent pas une façon efficiente de redistribuer les revenus. Elles créent des intérêts établis qui rendent difficile de les supprimer, voire simplement de les ajuster, et elles entraînent des coûts économiques non négligeables.

118. Un autre inconvénient de recourir aux subventions plutôt qu'à l'imposition directe pour redistribuer les revenus est que les subventions manquent souvent leurs objectifs du fait qu'elles peuvent finalement être accaparées par des agents auxquels elles n'étaient pas destinées. Là encore, l'aide à l'agriculture en est un bon exemple. Le facteur de production pour l'agriculture est la terre, dont l'offre est inélastique, plutôt que le travail. La théorie économique prédit, de ce fait, que les subventions ont plus de chances de se refléter dans le prix des terres agricoles que dans les revenus des ouvriers agricoles. Ce raisonnement a été confirmé par l'expérience: la Nouvelle-Zélande a réduit massivement ses subventions à l'agriculture à partir de 1983, en les divisant par 10. Les revenus des agriculteurs ont, de ce fait, fortement diminué pendant les deux années suivantes. Ils se sont ensuite, toutefois, nettement redressés quand les prix des terres ont fléchi pour finalement retrouver leur niveau initial. Cela souligne le fait que les subventions sont un outil de redistribution difficile à manier.[78]

119. Pour faire face à ce problème, de nombreux pays, comme les membres de l'Union européenne et les États-Unis, ont décidé de revoir leur politique agricole en abandonnant les subventions à la production au profit d'un soutien direct des revenus sous la forme de transferts forfaitaires dont le montant est calculé en fonction du montant des subventions qui étaient antérieurement perçues dans le cadre du système qui faussait les prix. Ce type d'aide semble moins inefficient en ce sens qu'il est supposé ne pas modifier les décisions de production. C'est la raison pour laquelle les accords de l'OMC (le GATT, alors) ont tendance à considérer favorablement ces subventions (c'est-à-dire que, techniquement, elles sont considérées comme des subventions de la « catégorie verte »). En pratique, toutefois, même ces subventions semblent être à l'origine de certaines distorsions, peut-être parce qu'elles manquent de crédibilité. Les agents ont tendance

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76 P. Messerlin, 2004, « Forging a deal on Agricultural Trade Reform », document présenté à la conférence intitulée: « Breaking the Deadlock in Agricultural Trade and Development », Oxford, juin 2004.

77 B. Borrell et L. Hubbard, 2000, « Global Economic Effects of the EU Common Agricultural Policy », *Economic Affairs: Reforming the CAP*, n° 20.

78 Gilles Saint-Paul, 2007, « Commentaire », dans P. Chalmin et D. Bureau, « Perspectives agricoles en France et en Europe », Conseil d'analyse économique.

à penser que l'activité passée donnant le droit à un transfert forfaitaire aujourd'hui, leur activité présente pourra leur donner droit à un transfert à l'avenir. Les études existantes de l'évolution des politiques agricoles dans le monde entier ont, de ce fait, tendance à mettre en garde contre l'idée que les transferts forfaitaires sont une panacée. Ils créent certes moins de distorsions que les subventions directes à la production, mais ils peuvent en créer quand même.[79]

3.3 Les subventions et les imperfections des marchés du crédit et des capitaux

120. Les imperfections du marché du crédit créent fréquemment un écart entre la valeur sociale et la valeur privée des activités économiques. La raison en est que les entreprises susceptibles de se lancer dans des activités productives peuvent être empêchées de le faire parce qu'elles n'ont pas suffisamment accès au crédit du fait d'asymétries au niveau de l'information entre prêteurs et emprunteurs. L'encadrement du crédit est devenu particulièrement rigoureux ces derniers temps sous l'effet de la crise financière. Étant donné que les gouvernements ne savent pas mieux que les banques quelles entreprises méritent de bénéficier d'un crédit, il n'est guère logique qu'ils subventionnent le crédit. Comme la théorie économique classique l'a montré, l'offre privée de crédit peut être inadaptée en cas d'asymétrie de l'information ce qui peut, en principe, justifier de subventionner le crédit même si les pouvoirs publics ne sont pas mieux informés que les prêteurs privés.

121. Le crédit est souvent directement ou indirectement subventionné dans de nombreux pays et en particulier dans ceux en développement. Par exemple, la législation indienne oblige les banques à consacrer au moins 40% de leurs crédits aux « secteurs prioritaires » qui incluent l'agriculture, la transformation des produits agricoles et la « petite industrie ». Un autre exemple important de crédit subventionné nous est fourni par les établissements de microfinancement des pays en développement qui accordent des prêts de faible montant avec le soutien, souvent, de subventions gouvernementales ou d'organismes d'aide.

122. Ce qui rend difficile de déterminer la pertinence du recours aux subventions pour pallier l'insuffisance du crédit est le risque que les prêts subventionnés par les pouvoirs publics évincent simplement les prêts privés au lieu d'augmenter le volume total des prêts et d'accroître la production et n'aient donc qu'un effet distributif.

123. Bien que les situations soient certainement variées, il est permis de penser que les prêts subventionnés ont, dans les pays en développement, un impact sur l'activité économique et l'aptitude des petites entreprises à investir. Une étude récente du programme de prêts orientés vers certains secteurs en Inde constate que le crédit subventionné ne se substitue pas au crédit privé, mais qu'il le complète. Il a, de fait, été observé que lorsque la modification des règles fixées augmentait l'accès de certaines entreprises au programme, le montant total de leur emprunt et le volume global de leur production augmentaient. Si cette étude n'offre pas une analyse coûts-avantages globale, elle montre que les subventions atteignent au moins l'objectif qu'elles visent d'améliorer les perspectives de production des petites entreprises.[80]

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79 A. Bouet, J.C. Bureau, Y. Decreux et S. Jean, 2004, « Multilateral Trade Liberalisation: The Contrasting Fortunes of Developing Countries in the Doha Round », Discussion Paper n°60, Institute of International Integration Studies, Trinity College, Dublin; E. O'Donoghue et J. Whitaker, 2006, « How distorting are direct payments? », document présenté à la conférence de 2006 de l'American Agricultural Economics Association.

80 A. Banerjee et E. Duflo, 2002, « Do Firms Want to Borrow More? Testing Credit Constraints Using a Directed Lending Program », MIT, Department of Economics, document de travail n° 02-25.

124. De même, une étude des établissements de microfinancement en Afrique du Sud a conclu que la bonification des taux d'intérêt avait un impact sur les taux de recours aux microcrédits des populations ciblées, à savoir les populations pauvres de pays en développement.[81]

125. L'encadrement du crédit n'est pas la seule forme d'imperfection que peuvent présenter les marchés de capitaux. D'une manière plus générale, ceux-ci peuvent ne pas être en mesure d'offrir des instruments qui permettent aux entreprises de redistribuer leurs risques de manière optimale. L'énergie nucléaire illustre bien l'écart entre la valeur sociale et la valeur privée de certains investissements. L'énergie nucléaire permet aux pays qui ne disposent pas de ressources en combustibles fossiles d'être moins exposés aux fluctuations des cours de ces combustibles. Le fait que le coût de l'électricité d'origine nucléaire est insensible à l'évolution de ces cours constitue, toutefois, un risque pour les entreprises privées puisque les tarifs de l'électricité dépendent principalement des prix des combustibles fossiles (étant donné qu'ils sont déterminés à tout instant par le coût marginal du moyen marginal de production qui est, presque toujours, une centrale thermique classique, même dans les pays à forte capacité de production nucléaire). La rentabilité des investissements dans une centrale nucléaire est donc sensible aux fluctuations des cours des combustibles fossiles à la différence de la rentabilité des investissements dans une centrale thermique classique. Si les marchés de capitaux étaient parfaits, les entreprises investissant dans le nucléaire pourraient émettre des obligations qui seraient indexées sur les cours des combustibles fossiles, et transférer ainsi le risque vers le marché. Des instruments financiers aussi perfectionnés n'existent cependant pas et l'écart entre la valeur sociale d'une limitation de l'exposition à l'instabilité des cours des combustibles fossiles et les incitations privées ne peut être comblé par les seuls mécanismes du marché. Ce raisonnement explique en partie pourquoi le gouvernement américain a décidé de subventionner l'investissement dans la production d'énergie nucléaire dans le cadre de sa loi sur la politique de l'énergie (« Energy Policy Act ») de 2005 en offrant des crédits d'impôt et une assurance contre les retards de construction.

3.4 Les subventions et les externalités liées aux processus de découverte et d'agglomération

126. La concentration d'entreprises actives dans le même secteur, dans une région donnée, est souvent considérée comme génératrice d'externalités locales positives. On peut distinguer trois types de mécanismes à l'œuvre sur la base des études empiriques existantes. Le premier est celui du partage des moyens de production: la concentration d'entreprises d'un même secteur dans une région donnée attire les fournisseurs des intrants nécessaires, ce qui fait baisser les coûts de l'ensemble des entreprises. Le deuxième mécanisme est celui de la création d'un gisement de main-d'œuvre: la concentration d'entreprises attire un vaste gisement de travailleurs dotés des qualifications requises pour le secteur concerné, ce qui permet de réduire les frais de recherche d'emploi pour les travailleurs et de recrutement pour les entreprises. Le troisième mécanisme qui joue est celui de la diffusion des connaissances: l'effort de R-D d'une entreprise peut bénéficier à d'autres entreprises du fait que les nouvelles connaissances qu'elle acquiert se propagent en dehors d'elle par le biais des interactions sociales et commerciales (par exemple, entre fournisseurs et clients) ou sous l'effet des mouvements de personnel entre entreprises. Une variante de cette argumentation, qui concerne plus particulièrement les pays en développement, implique les externalités informationnelles: chaque fois qu'une entreprise s'établit dans un nouveau secteur, d'autres agents observent ses performances et découvrent les possibilités qu'offre ce secteur. D'après Rodrik (2004)[82], ce processus de découverte génère des externalités informationnelles positives et justifie donc une intervention des pouvoirs publics visant à repérer les secteurs prometteurs et à encourager les entreprises à les pénétrer.

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81 D.S. Karlan et J. Zinman, 2008, « Credit Elasticities in Less-Developed Economies: Implications for Microfinance », *American Economic Review*, vol. 98(3), p. 1040–68.

82 D. Rodrik, 2004, « Industrial Policy for the twenty-first century », Harvard Kennedy School, Working Paper 04-047.

127. Les données empiriques mettent deux choses en lumière. D'une part, l'existence d'externalités d'agglomération positives est largement établie, ce qui rend raisonnable la justification théorique de la politique industrielle. D'autre part, les observations recueillies sur les tentatives faites par les pouvoirs publics de reproduire l'expérience de la Silicon Valley ou de faire décoller l'activité dans un nouveau secteur sont contrastées. Beaucoup de ces tentatives ont échoué et plusieurs réussites semblent devoir peu à l'intervention des pouvoirs publics. Dans certains cas, toutefois, surtout dans les pays en développement, cette intervention a joué un rôle essentiel dans le développement réussi de secteurs entièrement nouveaux, comme on le verra plus loin.

128. L'importance des effets d'agglomération et des économies d'échelle sectorielles a été établie dans une série d'études convergentes. Elle est sans doute assez considérable: par exemple, d'après une étude récente, le doublement de l'échelle régionale d'une industrie se traduit en moyenne, au Japon, par un accroissement de productivité de 4,5%[83]. À la différence des économies d'échelle internes aux entreprises, ces économies d'échelle intrasectorielles justifient théoriquement une intervention publique pour aider les industries à atteindre une échelle suffisante importante. Les divers mécanismes sous-jacents ont également été mesurés. L'hypothèse du partage des intrants a été confirmée par les observations: plus les entreprises sont concentrées dans une région, plus le recours à la sous-traitance est important, ce qui s'explique par la plus grande offre de moyens de production à l'extérieur des entreprises.[84] Le type d'externalités locales qui a été le plus étudié est celui de la diffusion des connaissances. Par exemple, Agrawal *et al* (2006) ont montré, en étudiant les citations de brevets, que les connaissances développées par un inventeur sont appliquées de façon disproportionnée là où celui-ci résidait antérieurement, ce qui ne peut s'expliquer que par l'importance des relations personnelles[85] tandis que et Audrestch et Feldman (1996) ont fait ressortir la concentration géographique des innovations.[86]

129. Il est manifeste que la spécialisation d'un grand nombre de pays en développement dans certaines activités tient davantage à l'expansion de secteurs déjà présents sur leur territoire, grâce aux externalités d'information et d'agglomération qu'à un réel avantage comparatif. En effet, comme le font observer Hausman et Rodrik (2003)[87], des pays dotés de presque les mêmes ressources au départ présentent des spécialisations très différentes: la Corée exporte des fours à micro-ondes, mais pas de bicyclettes, alors que Taiwan exporte des bicyclettes, mais presque pas de fours à micro-ondes, et le Bangladesh est l'un des principaux exportateurs mondiaux de chapeaux tandis que le Pakistan n'en exporte pratiquement pas. Ces constatations suggèrent que les spécialisations tiennent en grande partie à des évènements aléatoires qui se produisent pendant la phase initiale du développement, c'est-à-dire à des initiatives aléatoires d'entrepreneurs agissant isolément qui enclenchent ensuite une dynamique auto-entretenue. Si c'est bien le cas, les gouvernements seraient donc fondés à subventionner provisoirement les nouveaux secteurs.

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83 R. Nakamura, 2005, « Agglomeration economies in urban manufacturing industries: a case of Japanese cities », *Journal of Urban Economics*, vol.17, pp. 108-124.

84 T.J. Holmes, 1999, « Localization of Industry and Vertical Disintegration », *Review of Economics and Statistics*, vol. 81(2), pp. 314-25.

85 A. Agrawal, I. Cockburn et J. McHale, 2006, « Gone But Not Forgotten: Knowledge Flows, Labor Mobility, and Enduring Social Relationships », *Journal of Economic Geography*, vol. 6(5); voir aussi E. Moretti, 2004, « Workers' Education, Spillovers and Productivity: Evidence from Plant-Level Production Functions », *American Economic Review*, vol. 94(3).

86 D.B. Audretsch et M. Feldman, 1996, « R&D Spillovers and the geography of innovation and production », *American Economic Review*, vol. 86, pp. 630-664.

87 R. Hausman et D. Rodrik, 2003, « Economic Development as Self-Discovery », *Journal of Development Economics*, vol. 72.

130. Fait intéressant, un certain nombre d'observations portent à croire que les retombées locales positives locales (lorsque l'on tient compte de la taille des entreprises) sont moins importantes quand c'est une grande firme plutôt qu'une petite entreprise qui s'installe dans une région.[88] Cela tient probablement au fait que les grands établissements ont moins besoin d'interagir avec l'extérieur. D'autres observations ponctuelles tendent, toutefois, à prouver le contraire en faisant ressortir l'importance de grandes firmes dans le succès de pôles d'innovation (comme Nokia en Finlande).[89]

131. Alors que l'on dispose de nombreuses informations sur la nature et l'ampleur des externalités d'agglomération, l'évaluation des politiques publiques censées les favoriser donne des résultats contrastés. Les tentatives de nombreux gouvernements de reproduire le modèle de développement de la Silicon Valley n'ont pas été concluantes même aux États-Unis où l'on disposait d'informations détaillées de première main. Dans une étude exhaustive des pôles d'innovation, l'OCDE souligne la diversité des mécanismes qui expliquent le succès de certains d'entre eux et elle conclut que: (i) il est très difficile de mesurer la contribution de l'intervention des pouvoirs publics au succès de certains de ces pôles, et (ii) il n'existe pas de recette universelle. Il est révélateur que l'un des pôles technologiques les plus performants des pays en développement, celui de la région de Bangalore, soit apparemment l'aboutissement d'une série d'évènements fortuits (comme le refus d'IBM de céder aux actionnaires indiens 60% du capital de sa filiale en Inde qui a conduit l'entreprise à quitter le pays et contraint les informaticiens indiens à se tourner vers des plates-formes ouvertes, ce qui leur a permis d'acquérir des compétences qui se sont révélées très précieuses plus de dix ans plus tard).[90]

132. À l'inverse, Rodrik (2004)[91] soutient que certaines politiques industrielles suivies en Amérique latine et en Asie de l'Est ont réussi à prendre en compte les externalités informationnelles et à favoriser le développement de secteurs entièrement nouveaux. Par exemple, au Chili, l'organisme public *Fundación Chile* a commencé à subventionner l'élevage du saumon dans les années 70. Alors que cette activité n'existait pas auparavant dans le pays, le Chili est aujourd'hui l'un des principaux exportateurs de saumon. Rodrik fait également valoir que la production d'orchidées à Taiwan par des entreprises publiques, c'est-à-dire avec l'aide de fonds publics, a été un bon moyen de mettre en évidence la rentabilité de cette activité pour stimuler l'investissement privé et le développement d'un nouveau secteur. D'après Rodrik (1995), le cas du conglomérat coréen Hyundai illustre de façon frappante l'utilité d'une politique bien conduite, axée sur un champion national. D'une part, le soutien public apporté à la diversification a permis à Hyundai d'internaliser les externalités du marché du travail puisque les cadres qui avaient acquis des compétences dans l'industrie du ciment et de la construction ont pu les utiliser dans d'autres secteurs quand Hyundai a développé de nouvelles activités, comme la construction automobile et la construction navale. D'autre part, les subventions publiques directes et indirectes (y compris sous la forme de garanties d'achat implicites pour la division de la construction navale, comme on l'a vu plus haut) ont encouragé Hyundai à rattraper les entreprises étrangères en place en termes d'efficience.

133. Rodrik souligne cependant les limites de ces politiques. Si les subventions à l'investissement dans de nouveaux secteurs ne sont pas strictement limitées dans leur champ d'application (secteurs

88 Rosenthal, S. S. et W. C. Strange, 2003, « Geography, Industrial Organization, and Agglomeration », *Review of Economics and Statistics*, vol. 85 (2), pp. 377-393.

89 Voir le chapitre consacré à la Finlande dans l'étude de l'OCDE publiée en 2001 sous le titre: « Innovative Clusters ».

90 H. Pack et K. Saggi, 2006, « Is There a Case for Industrial Policy? A Critical Survey », The World Bank Research Observer, Banque mondiale, vol. 21(2).

91 D. Rodrik, 2004, « Industrial Policy for the twenty-first century », Harvard Kennedy School Working Paper 04-047.

vraiment nouveaux uniquement) et leur durée (phase de découverte seulement) et si elles ne sont pas subordonnées à un indicateur quelconque de résultat se référant au marché.

134. La conclusion générale que l'on peut tirer des études empiriques sur les effets d'agglomération est que ceux-ci sont importants, mais que les moyens d'action appropriés pour les exploiter sont complexes et ne sont pas encore bien compris. En particulier, si l'utilité d'une forme ou une autre de politique industrielle ne semble guère faire de doute, il y a apparemment de bonnes raisons d'axer celle-ci sur les petites entreprises qui se trouvent à un stade précoce de développement plutôt que sur les champions existants du fait que les diverses externalités mentionnées plus haut ont des chances d'être plus prononcées dans le cas des premières.

135. La possibilité d'utiliser des fonds publics pour favoriser le développement de pôles d'innovation a été reconnue dans l'Union européenne. Il est affirmé dans l'Encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation[92] que *« Les aides en faveur des pôles d'innovation sont destinées à remédier à la défaillance du marché liée aux problèmes de coordination qui entravent la création de pôles d'innovation ou qui limitent les interactions et les flux d'information à l'intérieur des pôles. Les aides d'État pourraient contribuer à régler ce problème de deux façons: d'abord en soutenant les investissements dans des infrastructures ouvertes et partagées pour les pôles d'innovation, ensuite en soutenant les activités d'animation des pôles, de façon à améliorer la coopération, la mise en réseau et l'apprentissage. »*

136. Les recommandations détaillées de l'Encadrement communautaire mettent en évidence la façon dont on peut réussir à subventionner des activités qui génèrent vraiment des externalités sans gaspiller les deniers publics. La Commission reconnaît les externalités positives que les pôles génèrent souvent et elle admet qu'elles peuvent justifier l'octroi de subventions, mais elle mentionne aussi deux mesures de sauvegarde. Premièrement, l'intensité maximale de l'aide autorisée est de 15% (avec des exceptions pour certaines régions sous-développées ou certains États membres). Deuxièmement, et surtout peut-être, l'aide doit être axée sur des dépenses directement liées aux externalités, c'est-à-dire des dépenses qui contribuent au fonctionnement du pôle sans que certaines entreprises s'en approprient directement les effets positifs. Ces dépenses incluent, par exemple, « les opérations de marketing pour attirer de nouvelles sociétés dans le pôle, la gestion des installations du pôle à accès ouvert et l'organisation de programmes de formation, d'ateliers et de conférences pour faciliter le transfert de connaissances et le travail en réseau entre les membres du pôle. »

3.5 Les subventions à la recherche, au développement et à l'innovation et la diffusion des connaissances

137. D'une manière plus générale, la recherche, le développement et l'innovation (RDI) sont souvent considérés comme générateurs d'externalités. Comme il est expliqué dans un commentaire récent sur le nouvel encadrement des aides à la recherche, au développement et à l'innovation, publié par la Commission européenne, des externalités positives peuvent exister pour les raisons suivantes: « les activités de RDI génèrent de nouvelles connaissances qui sont profitables à la société du fait qu'elles peuvent être utilisées par de nombreuses entreprises pour inventer ou améliorer des produits et des services. Du point de vue d'une entreprise, toutefois, seuls comptent les avantages qu'elle peut elle-même tirer de ses investissements dans la RDI. Il est de ce fait fréquent que les entreprises privées ne se lancent pas dans des activités de RDI parce qu'elles considèrent comme trop limités les avantages qu'elles peuvent en tirer alors que leurs effets positifs pourraient être importants pour la société grâce à la diffusion des connaissances qui en résulterait. Les activités de RDI génèrent de nouvelles connaissances qui ne peuvent

92 Encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:323:0001:0026:FR:PDF).

pas toujours être protégées (à l'aide de brevets, par exemple). Des entreprises privées peuvent donc s'abstenir d'investir dans la RDI de crainte que les résultats de leurs investissements soient utilisés par leurs concurrents et qu'elles ne puissent en conséquence en tirer le moindre profit. Imperfection et asymétrie de l'information: les activités de RDI sont particulièrement risquées et incertaines. Cela signifie qu'elles sont affectées par l'imperfection et l'asymétrie de l'information. De ce fait, trop peu de ressources humaines et financières sont investies dans des projets de RDI qui seraient cependant très utiles à la société. Problèmes au niveau de la coordination et des réseaux: les activités de RDI sont souvent incertaines et complexes et il n'est pas facile pour les entreprises privées de collaborer, de trouver des partenaires appropriés et de coordonner les projets de RDI. Du fait de ces problèmes, il est parfois renoncé à des projets de RDI qui auraient pu être menés conjointement par un groupe d'entreprises et qui auraient été profitables à l'ensemble de la société. »[93]

138. Malgré toutes les qualités dont on gratifie les aides à la RDI, certains inconvénients ne doivent pas être négligés. Certes, la RDI intègre les externalités (grâce à la diffusion des connaissances) et les asymétries informationnelles (qui peuvent conduire à un financement insuffisant), mais ces asymétries impliquent aussi que l'aide à la RDI peut donner lieu à des inefficiences.

139. L'une des principales raisons en est que la R-D subventionnée peut évincer la R-D financée par le secteur privé du fait que les entreprises peuvent exagérer le degré auquel leurs investissements dans la R-D sont sensibles à l'aide octroyée.[94] Cette difficulté est illustrée par certaines affaires récentes concernant les aides accordées par des États européens. Dans sa décision Quaero[95], la Commission a autorisé l'octroi de subventions à un programme de recherche conjoint des secteurs public et privé. Elle a fondé son raisonnement sur les deux aspects suivants. Premièrement, l'existence d'une externalité activée par les dépenses de R-D de l'entreprise privée, les résultats de cet effort devant être diffusés par ses partenaires (universitaires) publics au lieu que l'entreprise se les approprie. Deuxièmement, pour déterminer si l'aide était susceptible d'avoir une incidence sur l'investissement en R-D de l'entreprise privée, la Commission s'est fiée aux estimations internes que le bénéficiaire avait établies des ressources qu'il prévoyait de consacrer au projet de R-D selon le niveau d'aide accordée. Ce type d'évaluation est probablement le meilleur qui puisse être effectué. Il est, toutefois, extrêmement simple par rapport aux analyses économiques entreprises par les autorités de la concurrence lorsqu'elles examinent des fusions, par exemple, et on peut se demander s'il ne pourrait pas être facilement manipulé par des entreprises manœuvrant pour obtenir des fonds publics sans aucune justification réelle au titre de l'intérêt public.

3.6 Les subventions environnementales

140. Comme on l'a vu plus haut, de nombreuses subventions existantes ont des effets préjudiciables à l'environnement, ne serait-ce qu'en raison du transfert de production qu'elles entraînent d'entreprises efficientes vers des entreprises qui le sont moins et qui sont aussi souvent moins respectueuses de l'environnement.

141. Toutefois, beaucoup de subventions visent aussi le développement d'énergies renouvelables dans le cadre des efforts déployés au niveau mondial pour réduire les émissions de dioxyde de carbone. Dans l'Union européenne, ces « aides en faveur de l'environnement » représentent un quart de l'ensemble des aides accordées à l'industrie (environ 13 milliards USD en 2008) et la Commission a publié, en 2008, les Lignes directrices pour les aides d'État à la protection de l'environnement, qui permettent aux

93 T. Kleiner et R. Repplinger-Hach, 2007, « The new community framework for state aid for research and development and innovation », *Competition Policy Newsletter*, vol. 1.

94 P. David, B. Hall et A. Toole, 2000, « Is public R&D a complement or substitute for private R&D? A review of the econometric évidence », *Research Policy*, vol. 29(4-5), pp. 497-529.

95 Décision N 469/2007, http://ec.europa.eu/community_law/state_aids/comp-2007/n469-07.pdf

gouvernements nationaux de prendre diverses mesures allant de l'octroi de crédits bonifiés pour toutes sortes d'initiatives favorables à l'environnement (comme le remplacement d'équipements industriels polluants par des équipements qui le sont moins) à des tarifs de rachat, c'est-à-dire des prix auxquels l'État s'engage à acheter l'électricité produites à partir de ressources renouvelables, comme l'énergie éolienne et l'énergie solaire.

142. En conséquence, 18 pays de l'UE appliquaient des tarifs de rachat en 2007 comme il en existe, notamment, au Canada, en Chine, en Israël et dans plusieurs États australiens. À première vue, la raison d'être de ces subventions est évidente puisque les investissements favorables à l'environnement constituent un exemple parfait d'externalité positive. Leur rationalité est, en revanche, loin d'être évidente puisque la combinaison de plusieurs subventions environnementales s'avère souvent incohérente, chaque mécanisme assignant un prix différent aux émissions de dioxyde de carbone. Par exemple, le prix de rachat actuel de l'énergie solaire en France suppose un prix implicite d'environ 1 000 EUR la tonne de dioxyde de carbone. Ce chiffre est à rapprocher du prix actuellement inférieur à 20 EUR dans le cadre du système européen d'échange de quotas d'émissions et du niveau de 17 EUR actuellement envisagé par le gouvernement français pour la « taxe carbone ».

143. Comme l'a fait ressortir le rapport Stern[96], la façon la moins coûteuse de réduire les émissions est de donner un signal de prix uniforme (à l'aide d'une taxe ou d'un système de permis fondé sur le principe du plafonnement et de l'échange) incitant tous les agents économiques à prendre des décisions pour réduire les émissions, dont le coût ne doit pas dépasser un certain seuil, sans décider de façon arbitraire comment les émissions devraient être réduites. Subventionner directement certaines façons de réduire les émissions risque, au bout du compte, d'augmenter le coût de l'effort de réduction des émissions et de rendre cet effort moins efficace. On peut, toutefois, nuancer ce point de vue en faisant valoir que certaines technologies renouvelables, encore balbutiantes, méritent d'être spécifiquement soutenues, en raison même du type d'externalité informationnelle examiné plus haut dans le contexte de l'aide aux nouveaux secteurs.

4. Comment les aides publiques et les subventions devraient-elles être contrôlées?

4.1 Les limites de l'analyse économique: les problèmes de mesure

144. Dans un monde idéal, il serait attendu de gouvernements bienveillants qu'ils évaluent chaque subvention potentielle en fonction de ses qualités particulières en essayant d'établir l'existence d'une externalité positive et de la chiffrer éventuellement, en estimant l'effet incitatif de l'aide et en procédant à une analyse coûts-avantages globale.

145. Mais, ce type d'évaluation, qui reposerait sur une hypothèse neutre et considèrerait chaque mesure d'aide quant au fond uniquement n'est pas réaliste car nombre des conséquences positives et négatives des aides publiques, mentionnées plus haut, ne peuvent être mesurées.

146. L'évaluation des effets d'une aide présente des points communs avec celle des effets de fusions sur la concurrence. Dans les deux cas, l'objectif est de déterminer comment le marché sera affecté par un changement donné. Dans le cas des aides publiques, toutefois, cet exercice est beaucoup plus complexe que dans celui des fusions.

147. L'évaluation des effets unilatéraux, qui est au cœur du contrôle des fusions horizontales offre une comparaison utile. Son objectif, comparé à l'étendue des questions soulevées par l'analyse du contrôle des aides publiques, est relativement limité: elle ne s'intéresse qu'aux effets à court terme et considère la structure du marché comme une donnée (sauf pour les parties qui fusionnent, bien sûr). Elle se prête à la technique économétrique de la simulation de fusions qui permet d'obtenir des prédictions chiffrées

96 N. Stern, 2007, « The Economics of Climate Change: the Stern Review », Cambridge University Press.

reposant sur des demandes d'information limitées. Mais même dans ce cadre bien délimité, le contrôle des fusions est loin d'être totalement prévisible, surtout en ce qui concerne l'évaluation des efficiences.[97]

148. Les questions qu'il faut considérer pour évaluer une mesure d'aide publique sont à la fois plus nombreuses et souvent moins chiffrables que des effets unilatéraux.

149. Prenons l'exemple de l'aide à la R-D. L'une des principales raisons qui justifient l'octroi d'une aide à la R-D est l'existence d'une externalité positive due à la diffusion des connaissances. Mais comment peut-on prouver, dans un cas particulier, la probabilité de cette diffusion? Les recherches empiriques entreprises sur cette question n'ont presque jamais été effectuées en établissant l'existence d'une diffusion des connaissances dans des cas particuliers, mais plutôt en étudiant de grands ensembles de données et en déterminant à l'aide de techniques statistiques élaborées qu'en moyenne il y avait eu diffusion de connaissances. En outre, même cette approche n'aboutit pas à des résultats certains, les conclusions des diverses études variant considérablement. Dans le cas des fusions, l'étude de celles qui ont été effectuées dans le passé sur le même marché peut souvent permettre de prédire ce qui peut se produire à l'avenir. Mais dans le cas de la R-D, ce type de démarche est moins prometteur du fait qu'il est difficile de trouver des précédents pertinents, surtout quand le but est d'évaluer une innovation qui n'existe pas encore et dont la nature est, par définition, incertaine. Cette difficulté rappelle celle à laquelle sont confrontées les entreprises qui soutiennent que des gains d'efficience résulteront de la fusion qu'elles défendent. Ces affirmations sont souvent rejetées parce qu'elles ne sont pas vérifiables à l'aune des critères rigoureux des autorités de la concurrence. Le problème peut, toutefois, être même plus aigu pour le contrôle des aides publiques du fait que les innovations qui sont censées être encouragées sont plus radicales et donc plus incertaines et moins vérifiables que les améliorations progressives qui représentent la majorité des gains d'efficience allégués dans le cadre du contrôle des fusions. Si et quand la probabilité d'une diffusion de connaissances peut être démontré, il faut aussi déterminer si la quantité de R-D est sensible au volume de l'aide. Il faut, pour cela, connaître non seulement le coût des fonds dont dispose l'entreprise et les contraintes de crédit auxquelles elle peut devoir faire face, mais aussi les autres possibilités d'investissement existantes pour le bénéficiaire de l'aide, l'effet de l'effort de R-D sur les coûts de production de l'entreprise à l'avenir ainsi que le niveau estimé de la demande du marché et des coûts marginaux des concurrents pour calculer comment une réduction donnée des coûts éventuellement réalisée grâce à la R-D, affectera les profits. La question est souvent encore plus complexe parce que la R-D vise souvent à créer de nouveaux produits plutôt qu'à réduire le coût de production des produits existants. Pour calculer si l'aide a des chances d'influer sur le comportement de l'entreprise, il faut formuler des hypothèses sur la fonction de demande dans le monde après la R-D, c'est-à-dire, par exemple, sur l'élasticité de substitution entre les produits des concurrents et le nouveau produit hypothétique que la R-D subventionnée pourrait éventuellement faire naître.

150. Cette difficulté n'est aucunement limitée à la R-D comme on peut le constater en passant à la question des inefficiences dynamiques, qui est souvent, et probablement à juste titre, mentionnée pour justifier le contrôle des aides publiques. Il n'y a pas de façon simple de chiffrer en toute certitude dans quelle mesure l'octroi d'une aide modifiera à long terme les attentes des agents économiques et donc leur comportement en matière d'investissement et d'innovation. Pour répondre à cette question, il faudrait évaluer l'effet de toute aide sur les attentes des autres entreprises quant à leurs chances de bénéficier d'une aide publique à l'avenir dans différents types de circonstances et mesurer l'effet de la modification de ces attentes sur le comportement futur des entreprises (prise de risque excessive ou « inefficience X » résultant du renforcement de la contrainte budgétaire, détournement des ressources de l'activité productive au profit de la recherche de rentes, etc.).

97 D. Gifford et R. Kudrle, 2005, « Rhetoric and Reality in the Merger Standards of the United States, Canada and the European Union », Antitrust LawJournal, vol. 72, p. 423.

151. Enfin, pour évaluer quantitativement l'effet sur le bien-être d'une aide publique, il faut commencer par formuler une hypothèse quant au coût des fonds publics du fait que la perte subie par le contribuable entre généralement pour une large part dans le calcul de l'effet global d'une aide sur le bien-être. En fait, dans tous les modèles simples d'aides publiques génératrices de distorsions ainsi que dans les modèles simples de courses aux subventions, aucun effet préjudiciable n'est constaté sauf si cette perte sèche liée à la fiscalité est assez importante.

152. Ces observations semblent indiquer qu'il n'est peut-être pas justifié de supposer que les aides publiques ont un effet neutre sur la concurrence. Les données disponibles suggérant que la plupart des subventions ont un effet négatif sur elle, cela devrait conforter l'idée qu'il revient aux gouvernements qui octroient une aide de prouver que ses retombées bénéfiques l'emporteront sur ses effets négatifs sur la concurrence. Ce type d'approche mettrait en évidence les inquiétudes suscitées par une politique systématique d'octroi d'aides publiques tout en laissant la flexibilité nécessaire à une évaluation au cas par cas.

153. Si le recours à l'analyse économique ne devrait pas être considéré comme une panacée justifiant l'hypothèse a priori d'un effet neutre, il peut néanmoins être très utile pour déterminer si une mesure d'aide donnée a des chances d'avoir un effet positif sur le bien-être social. L'analyse économique peut notamment jouer un rôle crucial en permettant d'établir l'existence de défaillances du marché et de déterminer si une subvention envisagée a des chances d'y remédier sans créer de graves distorsions, en contrepartie.

4.2 Comment faire en sorte que « les aides d'État soient moins nombreuses et mieux ciblées »

154. Les considérations qui précèdent mettent globalement en évidence les dangers que présentent les aides publiques et les subventions. D'une part, même des autorités locales, régionales ou nationales bienveillantes peuvent, rationnellement, se lancer dans une course destructrice aux subventions pour un coût considérable pour les deniers publics. D'autre part, les aides publiques échappent très difficilement aux pressions d'intérêts particuliers et elles contribuent elles-mêmes à la création de groupes d'intérêts qui exercent des pressions pour qu'elles soient maintenues même après qu'elles ont perdu leur raison d'être initiale. Même au sein de l'Union européenne où elles sont strictement contrôlées, on constate que les aides ne sont souvent pas vraiment justifiées et ne témoignent pas d'une utilisation très efficiente des deniers publics.

155. Étant donné qu'il ne faut pas surestimer l'aptitude d'une administration ou d'un organisme spécialisé à évaluer une subvention éventuelle en fonction de ses qualités, il est logique d'envisager que les pays adoptent des règles qui rendent difficile l'octroi de subventions en général tout en laissant une certaine marge de manœuvre (une aide se justifiant parfois).

156. Beaucoup de pays ne disposent actuellement pas de règles permettant de contrôler strictement les aides publiques et là où des contrôles existent, ils n'empêchent pas l'octroi d'une aide importante.

157. Tout bien considéré, les mesures suivantes pourraient être prises par les gouvernements pour limiter l'octroi de vaines subventions et encourager les aides qui auront des effets économiques positifs à long terme.

158. Dans le cas des grands pays fédéraux, on pourrait envisager un contrôle fédéral sur les ensembles de mesures d'incitation qui peuvent être offerts aux entreprises au niveau infrafédéral.

159. Les lois sur les faillites devraient moins inciter les pouvoirs publics à renflouer des entreprises uniquement pour sauver des emplois. En d'autres termes, elles devraient permettre que le coût de la faillite d'une entreprise soit minimal pour l'emploi et l'activité.

160. Le développement de fonds extraterritoriaux devrait aider les gouvernements à résister à la tentation de subventionner les matières premières que leur pays exporte. De même, des améliorations du système fiscal et de la possibilité pour les pouvoirs publics de redistribuer directement les revenus peuvent réduire les pressions politiques s'exerçant en faveur de l'utilisation de subventions génératrices de distorsions à des fins redistributives.

161. Les autorités de la concurrence devraient appliquer les mêmes critères aux entreprises et aux organismes publics qu'aux entreprises privées pour lutter contre les comportements anticoncurrentiels. En particulier, l'improbabilité d'une compensation des pertes ne devrait pas être considérée comme une justification acceptable dans les cas de fixation de prix d'éviction et dans les cas impliquant d'autres types de comportement d'exclusion. On pourrait ajouter à cela les « règles de neutralité concurrentielle du secteur public » qui existent déjà dans beaucoup de pays.

162. Les pays ou les groupements régionaux qui n'ont pas encore adopté de règles concernant la concurrence pour les aides publiques et les subventions devraient envisager de le faire. Même en l'absence de telles règles, les autorités de la concurrence devraient utiliser les outils dont elles disposent (surtout en ce qui concerne la répression des comportements anticoncurrentiels unilatéraux) pour remédier le plus possible aux effets de distorsion de la concurrence des aides publiques. Les gouvernements pouvant accorder de nombreuses façons une aide sous le couvert de mesures de politique générale non ciblée, une action de sensibilisation de la part des autorités de la concurrence s'impose aussi dans le cadre des efforts déployés pour limiter l'octroi stérile de subventions.

163. Les autorités de la concurrence devraient donc être consultées avant la prise de décisions sur les aides publiques susceptibles d'avoir des effets notables sur les marchés d'un secteur donné. Enfin, une coopération entre les autorités de la concurrence et les ministères concernés ne peut que favoriser une meilleure évaluation des avantages et des inconvénients de subventions précises.

164. D'une manière plus générale, des critères inspirés de la récente révision de la politique européenne de contrôle des aides d'État pourraient probablement être adaptés aux lois nationales de la concurrence à condition de tenir compte des contextes institutionnels et culturels. Il faudrait notamment: (i) exiger que chaque subvention fasse l'objet d'une analyse économique précisant quelle défaillance du marché doit être corrigée et les chances qu'elle a de l'être par la mesure d'aide; (ii) imposer qu'une subvention ne soit accordée que s'il peut être prouvé que le même objectif ne peut être atteint par une mesure plus transparente et moins discriminatoire (adjudication publique, par exemple) ou moins coûteuse pour les deniers publics (octroi d'un prêt à long terme ou achat d'actions par l'État, par exemple); (iii) limiter réglementairement l'importance et la durée des aides et la possibilité que celles-ci soient accordées régulièrement aux mêmes bénéficiaires, et (iv) adopter une disposition impliquant que lorsque de grandes entreprises en difficulté reçoivent des subventions, elles doivent faire des concessions en contrepartie, comme renoncer à certaines activités ou s'engager à ne pas utiliser l'aide pour se livrer à des pratiques d'exclusion.

165. La transparence et l'existence de mécanismes d'évaluation a posteriori devraient aussi permettre de limiter la possibilité, pour des intérêts particuliers, d'obtenir des subventions dénuées de toute justification économique.

CALL FOR COUNTRY CONTRIBUTIONS

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Competition, State Aids and Subsidies

Global Forum on Competition (18-19 February 2010)

Session I

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable on Competition, State Aids and Subsidies on 18 February 2010. You are invited to make a written contribution by *4 January at the latest*.

The cornerstone of competition policy is the idea that competition on the merits encourages firms to be innovative and efficient, and that it fosters a permanent process of "creative destruction" by which more efficient firms displace inefficient ones, benefitting consumers and economic efficiency alike.

State aids to specific companies, in the form of subsidies, selective tax breaks, or whatever kind of advantage, are often likely to distort this process by altering the level playing field between firms. The ensuing disruption of competition is manifold. In the short run, state aids may shift production away from efficient firms to less efficient ones, thereby decreasing the total economic surplus. In the long run, state aids may induce firms to divert productive resources from investment toward rent-seeking expenditures. In addition, subsidy races across countries in order to retain or attract companies may prove very costly for public finances, for little aggregate benefit.

However, state aids are sometimes justified. In some circumstances, they allow governments to internalise the positive externalities generated by specific companies or specific activities, such as their impact on innovation, regional development or social cohesion. They can also palliate market failures, especially in the insurance and banking sector. Finally, state aids to nascent industries, especially in developing countries, can help jump-start new activities until they become self-sustaining.

The financial crisis has prompted many countries, in the developed and developing world, to resort to state aids. The public rescue of banks, meant to avoid a systemic crisis, has been widespread. More broadly, aids to industry have increased as companies suddenly saw the flow of credit dry up.

Since state aids are sometimes useful, while at the same time they run against the very logic of competition, one might expect competition policy to exert some control upon them, in order to ensure that competition distortions are kept minimal and that governments only grant genuinely useful state aids. However, there is no systematic control of state aids outside the European Union and a few other jurisdictions (aside from WTO disciplines on subsidies), except when competition authorities deal with possible anticompetitive behaviour by government-owned enterprises.

It is therefore of great interest to understand how GFC participants view the interplay between competition policy and state aids, on the basis of their own experiences. Written contributions including case studies would be particularly helpful.

To assist with the preparation of your contributions, a number of issues and questions are attached to guide your submissions.

This is not intended to be an exhaustive list. Participants are encouraged to address other issues based on their experiences. The questions are intended to provide a guide, recognising that they may not all be relevant nor readily answerable by some participants in some instances. A suggested bibliography is also attached.

Please advise the Secretariat **by 16 November** if you will be making a written contribution. Written contributions are due by **4 January at the latest (members and non members)**. Failure to meet that deadline could result in a contribution not being taken into account in the preparation of the scenario for the roundtable discussion. In addition, late contributions may not be distributed to participants in a timely fashion in advance of the meeting via the meeting website at http://www.oecd.org/competition/globalforum.

All communications regarding documentation for this roundtable should be sent to erica.agostinho@oecd.org, Tel. +33 1 45 24 89 73, Fax +33 1 45 24 96 95, with a copy to helene.chadzynska@oecd.org (GFC Programme Manager). Helene will be pleased to answer any substantive questions you may have about the roundtable and the GFC in general. Her phone number is: +33 1 45 24 91 05.

Questions for consideration

I. The use of state aids in your country

1. Does your country regularly engage into the following practices? If so, could you provide information about: (i) the affected sectors; (ii) an order of magnitude of the corresponding amounts, and (iii) the evolution over time? If possible, distinguish between government-owned and private firms.

    a. Direct subsidies to companies;

    b. Tax breaks to selected companies or selected sectors;

    c. The granting of government-owned inputs (such as land, bandwidth, government facilities) to companies at a price below market levels (possibly a regulated price);

    d. Government purchases at above-market prices;

    e. The granting of loans at below-market rates;

    f. The provision of loan guarantees at below-market rates.

2. To what extent have state aids in your country been motivated by the following goals? For each of them, please specify whether domestic and foreign firms have been treated differently.

    a. Protecting employment (in the case of aid to ailing firms);

    b. Fostering innovation and the development of new sectors;

    c. Attracting firms to economically distressed regions;

    d. Remedying competition distortions created by the granting of aid by foreign governments;

    e. Inducing firms to supply goods or services deemed to contribute to the general interest in cases when market incentives alone were insufficient to ensure that these goods or services would be provided;

    f. Palliating the undersupply of credit by the financial sector;

    g. Preventing strategic firms from being purchased by foreign companies.

3. What are your country's laws, and the actual practice, regarding the provision of government-owned or government-controlled inputs? In which circumstances is an auction process mandatory? In which circumstances does a non-discrimination clause apply? In practice, what is the prevalence of auctions? If possible, please provide information about the way in which the following inputs have been allocated.

    a. License to operate a mobile telephony network (with access to the corresponding bandwidth);

    b. License to operate a television network;

    c. Access to natural resources.

II. Aid to ailing companies, especially in the context of the financial crisis

1. In the context of the financial crisis, did your country provide emergency aid to some companies? If possible, please provide information on:
    a. Specific rescue measures for banks and other financial institutions;
    b. Aid to industrial firms (for instance in the car industry).
2. What are the criteria that have been used when delineating the beneficiaries of emergency aid, as well as the amount or nature or the aid?
3. Is aid to ailing companies in your country usually provided with conditions attached such as:
    a. Clauses imposing at least partial reimbursement in the event of a return to better fortunes?
    b. A cap on executive pay?
    c. Restructuring (for instance, the closing of unprofitable factories or branches)?
    d. Guarantees on total employment?
    e. Clauses prohibiting the use of government funds in order to engage in predatory strategies?
    f. An explicit commitment that the aid will be limited in time and will not be repeated?
    g. Commitments regarding the environmental impact of the recipient's activity?

    Please provide short information on each of these provisions and the standard conditions attached to them.
4. Does aid to ailing companies in your country sometimes take the form of temporary government ownership in return for capital injection? If so, are there examples where such policies allowed the government to turn a profit after the aided firm's situation improved?

III. Legal restrictions on state aids

1. Do competition authorities exert some control on state aids in your country? If so, has this control been weakened in the context of the financial crisis? Are there specific rules about aid to ailing firms, or aid to R&D? Please detail each, briefly.
2. Is the amount and nature of state aids limited by virtue of regional trade agreements to which your country participates (not taking into account WTO disciplines)? If so, is there a supranational control mechanism? Has it ever been used? In competition cases?
3. Did the competition authority in your country ever have to consider a case involving state aids? If possible, please distinguish the following (possibly overlapping) types of cases:
    a. A private company complaining about predatory strategies (or unfair practices) implemented by a public company or by a private company benefitting from public funds (for instance in the case of a firm providing a public service and using the corresponding revenues in order to compete aggressively on an other market);
    b. A company complaining about discriminatory treatment, in comparison to a competitor benefitting from state aids;
    c. Cases involving the existence of price regulation;
    d. Cases involving abuse of dominance or merger cases (for example, in the latter, would remedies be affected if the state aid were to be withdrawn?).

4. Are government-owned companies subject to competition law to the same extent as private companies in your country? Are there any specific mechanisms for their implementation?

5. To what extent are state aid issues addressed in your competition authority's advocacy activity? What is your competition authority's message on state aids? Is this message well understood and taken duly into account by other parts of the government? Please describe briefly the relevant institutional mechanism(s), if any.

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APPEL À CONTRIBUTIONS

A TOUS LES PARTICIPANTS AU FORUM MONDIAL SUR LA CONCURRENCE

OBJET : Concurrence, aides publiques et subventions

Forum mondial sur la concurrence (18-19 février 2010)

Session I

Chers Participants au Forum mondial sur la concurrence,

Le Forum mondial de l'OCDE sur la concurrence tiendra une table ronde intitulée Concurrence, aides publiques et subventions le 18 février 2010. Vous êtes invités à transmettre une contribution écrite d'ici le *4 janvier au plus tard*.

La pierre angulaire de la politique de la concurrence est l'idée que la concurrence par les mérites encourage les entreprises à innover et à être efficientes et qu'elle favorise un processus permanent de « destruction créatrice » par lequel les entreprises les plus efficientes éliminent celles qui sont inefficaces, ce qui est bénéfique pour les consommateurs comme pour l'efficience économique.

Les aides publiques à des entreprises spécifiques, sous la forme de subventions, d'allègements fiscaux sélectifs, ou de toutes sortes d'avantages, risquent souvent de fausser ce processus en modifiant les règles du jeu entre les entreprises. La distorsion de la concurrence qui en résulte prend des formes multiples. A court terme, les aides publiques peuvent détourner la production des entreprises efficientes vers celles qui le sont moins, réduisant ainsi le surplus économique total. A long terme, les aides publiques peuvent inciter les entreprises à détourner des ressources productives de l'investissement au profit de dépenses consacrées à la recherche de rentes. En outre, la course aux subventions entre pays de manière à retenir ou attirer des entreprises peut s'avérer très coûteuse pour les finances publiques, pour un avantage global limité.

Toutefois, les aides publiques sont parfois justifiées. Dans certains cas, elles permettent aux gouvernements d'internaliser les externalités positives générées par des entreprises ou des activités spécifiques, telles que le rôle qu'elles jouent dans l'innovation, le développement régional ou la cohésion sociale. Elles peuvent par ailleurs pallier les défaillances du marché, en particulier dans le secteur des assurances et de la banque. Enfin, les aides publiques aux industries naissantes, notamment dans les pays en développement, peuvent contribuer à favoriser le démarrage d'activités jusqu'à ce qu'elles deviennent autonomes.

La crise financière a amené de nombreux pays, industrialisés comme en développement, à recourir à des aides publiques. Le sauvetage public des banques, destiné à éviter une crise systémique, s'est largement développé. Plus généralement, les aides à l'industrie ont augmenté du fait que les sociétés ont vu soudainement s'assécher le flux de crédits.

Puisque les aides publiques sont parfois utiles, tout en étant contraires à la logique même de la concurrence, on peut s'attendre à ce que la politique de la concurrence exerce un certain contrôle sur elles afin de faire en sorte que les distorsions de concurrence se trouvent réduites au minimum et que les gouvernements n'accordent que des aides réellement utiles. Toutefois, il n'existe pas de contrôle systématique des aides publiques en dehors de l'Union européenne et de quelques autres juridictions (indépendamment des règles d'autodiscipline de l'OMC sur les subventions), sauf lorsque les autorités de la concurrence traitent d'un comportement anticoncurrentiel éventuel des entreprises publiques.

Il est donc particulièrement intéressant de comprendre comment les participants au Forum mondial sur la concurrence envisagent les interactions entre la politique de la concurrence et les aides publiques, sur la base de leurs propres expériences. Des contributions écrites comportant des études de cas seraient particulièrement utiles.

Pour faciliter la préparation de vos contributions, un certain nombre de thèmes et de questions sont joints afin de vous servir de guide.

Cette liste n'a pas pour but d'être exhaustive. Les participants sont invités à aborder d'autres questions sur la base de leurs expériences. Les questions ont pour objet de servir de guide, compte tenu du fait qu'elles ne sont peut-être pas toutes pertinentes et qu'il n'est peut-être pas possible à certains participants d'y répondre directement dans certains cas. Une bibliographie est également proposée.

Vous êtes priés d'informer le Secrétariat **d'ici le 16 novembre** si vous envisagez de transmettre une contribution écrite. Celles-ci devront être envoyées d'ici le **4 janvier au plus tard (membres et non-membres)**. Les contributions transmises après cette date limite risquent de n'être pas prises en compte dans l'établissement du scénario préparé pour la table ronde. En outre, les contributions tardives risquent de ne pas être mises en ligne avant la réunion sur le site Internet du GFC : http://www.oecd.org/competition/globalforum.

Toutes les communications concernant la documentation utilisée en vue de cette table ronde doivent être envoyées à erica.agostinho@oecd.org, tél. : +33 1 45 24 10 75, fax : +33 1 45 24 96 95, avec une copie à helene.chadzynska@oecd.org (Responsable du Programme du Forum mondial sur la concurrence). Hélène est à votre disposition pour répondre aux questions de fond que vous pourriez avoir sur la table ronde et sur le Forum mondial sur la concurrence en général. Son numéro de téléphone est le suivant : +33 1 45 24 91 05.

Questions à examiner

I. L'utilisation des aides publiques dans votre pays

1. Votre pays a-t-il recours régulièrement aux pratiques indiquées ci-dessous ? Dans l'affirmative, pouvez-vous donner des renseignements sur : (i) les secteurs concernés ; (ii) un ordre de grandeur des montants correspondants, et (iii) l'évolution au fil du temps ? Si possible, prière d'opérer une distinction entre les entreprises publiques et les entreprises privées.
    a. Subventions directes aux entreprises ;
    b. Allègements fiscaux à certaines entreprises ou à certains secteurs ;
    c. Mise à disposition de moyens de production appartenant à l'État (tels que des terrains, des bandes passantes, ou des bâtiments publics) à des sociétés à un prix inférieur au niveau du marché (éventuellement à un prix réglementé) ;
    d. Achats publics à des prix supérieurs au niveau du marché ;
    e. Octroi de prêts à des taux inférieurs au niveau du marché ;
    f. Octroi de garanties de prêts à des taux inférieurs au niveau du marché.

2. Dans quelle mesure les aides publiques accordées dans votre pays ont-elles été motivées par les objectifs indiqués ci-dessous ? Pour chacun d'entre eux, prière de préciser si les entreprises nationales et les entreprises étrangères ont été soumises à un régime différent.
    a. Préserver l'emploi (dans le cas des entreprises en difficulté) ;
    b. Favoriser l'innovation et le développement de nouveaux secteurs ;
    c. Attirer les entreprises vers les régions en difficultés économiques ;
    d. Remédier aux distorsions de concurrence résultant de l'octroi d'aides par des gouvernements étrangers ;
    e. Inciter les entreprises à fournir des biens ou services considérés comme contribuant à l'intérêt général dans les cas où les incitations offertes par le marché ne suffisent pas à elles seules à assurer que ces biens ou services soient fournis ;
    f. Pallier l'insuffisance de l'offre de crédit par le secteur financier ;
    g. Empêcher l'acquisition d'entreprises stratégiques par des sociétés étrangères.

3. Quelles sont la législation et les pratiques effectives de votre pays concernant l'offre de moyens de production appartenant à l'État ou contrôlé par lui ? Dans quelles circonstances une procédure d'adjudication est-elle obligatoire ? Dans quelles circonstances une clause de non discrimination s'applique-t-elle ? En pratique, quelle est la fréquence des adjudications ? Si possible, prière de donner des informations sur la manière dont les moyens de production suivants ont été attribués :
    a. Licence permettant d'exploiter un réseau de téléphonie mobile (avec accès à la bande passante correspondante) ;
    b. Licence permettant d'exploiter un réseau de télévision ;
    c. Accès aux ressources naturelles.

II. Aides aux entreprises en difficulté, notamment dans le contexte de la crise financière

1. Dans le contexte de la crise financière, votre pays accorde-t-il des aides d'urgence à certaines entreprises ? Si possible, prière de donner des renseignements sur les points suivants :
    a. Mesures spécifiques de secours pour les banques et autres institutions financières ;
    b. Aides aux entreprises industrielles (par exemple dans l'industrie automobile).
2. Quels sont les critères qui ont été utilisés pour déterminer les bénéficiaires d'aides d'urgence, ainsi que le montant ou la nature de l'aide ?
3. Dans votre pays, l'aide aux entreprises en difficulté est-elle généralement accordée sous réserve des conditions suivantes :
    a. Clauses imposant au moins un remboursement partiel en cas d'amélioration des résultats ?
    b. Plafonnement des rémunérations des dirigeants ?
    c. Restructuration (par exemple, fermeture d'usines ou de succursales non rentables) ?
    d. Garanties concernant l'effectif total des personnes employées ?
    e. Clauses interdisant l'utilisation de fonds publics pour mener des stratégies abusives ?
    f. Engagement explicite à limiter les aides dans le temps et à ne pas les renouveler ?
    g. Engagements concernant l'impact environnemental de l'activité du bénéficiaire de l'aide ?

    Prière de donner de brèves informations sur chacune de ces dispositions et sur les conditions auxquelles elles correspondent normalement.
4. Dans votre pays, l'aide aux entreprises en difficulté prend-elle parfois la forme de prises de participations temporaires de l'État en échange de l'injection de capitaux ? Dans l'affirmative, y a-t-il des exemples de cas dans lesquels de telles politiques ont permis à l'État de réaliser des bénéfices après l'amélioration de la situation des entreprises aidées ?

III. Restrictions juridiques aux aides publiques

1. Les autorités de la concurrence exercent-elles un contrôle sur les aides publiques dans votre pays ? Dans l'affirmative, ce contrôle s'est-il réduit dans le contexte de la crise financière ? Des règles spécifiques s'appliquent-elles à l'aide aux entreprises en difficulté ou à l'aide à la recherche-développement ? Prière de donner brièvement des détails sur chacune d'entre elles.
2. Le montant et la nature des aides publiques sont-ils limités en vertu d'accords commerciaux régionaux auxquels votre pays participe (sans tenir compte des règles de discipline volontaire de l'OMC) ? Dans l'affirmative, existe-t-il un mécanisme supranational de contrôle ? A-t-il jamais été utilisé ? Dans des affaires de concurrence ?
3. Les autorités de la concurrence de votre pays ont-elles déjà examiné une affaire mettant en cause des aides publiques ? Si possible, prière de distinguer les types de cas suivants (qui peuvent se chevaucher) :
    a. Plainte d'une société privée au sujet de stratégies abusives (ou de pratiques déloyales) de la part d'une entreprise publique ou d'une entreprise privée bénéficiant de capitaux publics (par exemple dans le cas d'une entreprise qui fournit un service public et qui utilise les recettes qu'elle en tire pour se livrer à une concurrence agressive sur un autre marché) ;
    b. Plainte d'une entreprise concernant un traitement discriminatoire par rapport à un concurrent qui bénéficie d'aides publiques ;

c. Affaires faisant intervenir l'existence d'une réglementation des prix ;

d. Affaires faisant intervenir des abus de position dominante ou des cas de fusions (par exemple, dans ce dernier cas, les mesures correctrices seraient-elles affectées si l'aide de l'État devait être retirée ?).

4. Les entreprises publiques sont-elles autant soumises au droit de la concurrence que les entreprises privées dans votre pays ? Y a-t-il des mécanismes spécifiques pour la mise en œuvre de ce droit ?

5. Dans quelle mesure les questions concernant les aides publiques sont-elles traitées dans le cadre des activités de sensibilisation de votre autorité de la concurrence ? Quel est le message de votre autorité de la concurrence sur les aides publiques ? Ce message est-il bien compris et dûment pris en compte par les autres secteurs de l'administration ? Prière de décrire brièvement le(les) mécanisme(s) institutionnel(s) éventuellement applicable(s).

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SUMMARY OF DISCUSSION

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By the Secretariat

Mr. Frédéric Jenny, Chairman of the Global Forum on Competition, thanked EU Competition Commissioner, Mr. Joaquim Almunia, for his thoughtful keynote speech on the policy of the EU Commission regarding state aids. Mr. Jenny then introduced the Chairman of the first session on *Competition Policy, State Aids and Subsidies*: Mr. Monkid Mestassi, Secretary General of the Ministry of Economics and General Affairs in Morocco.

Mr. Mestassi presented the three experts panellists: Mr. David Spector, Associate Professor at the Paris School of Economics (founder of MAPP, a consultancy specialised in competition economics); Mr. Amadou Dieng, Director for Competition of the West African Economic and Monetary Union Commission (WAEMU); and Mr. Michael Thöne, from the FIFO Institute, affiliated to Global Studies Initiative in Germany.

Mr. David Spector began his intervention by stressing the importance of the issue of state aids and subsidies. State aids still represent a large amount of public funds but control over state aid measures is quite limited outside the European Union. He described the great variety of instruments and recipients as well as the diversity of state aid control rules across countries.

Mr. Spector noted that Commissioner Almunia had largely dealt with the possible economic justifications for state aids. Mr. Spector thus focused his presentation mostly on the various possible harmful effects of state aids. He began by explaining that when assessing the efficiency of an aid, one should take into account the costs of raising public funds and the opportunity cost of state aid measures. The opportunity cost is likely to be high in developing countries, where the return to alternative uses of public funds (such as healthcare or education) is higher than in developed countries.

State aids can also have direct harmful effects. This is first the case for subsidy races which result from a lack of coordination between governments. Second, aids can interfere with market signals, thus creating distortions and entailing productive and allocative inefficiencies. Energy and water subsidies illustrate this phenomenon. Third, when the subsidies objective is merely to keep failing firms afloat, subsidies are likely to yield capital and labour misallocation. Finally, state aids alter firms' incentives because of the "soft budget constraint": firms expecting to be bailed out in case they encounter difficulties, or expecting that their less fortunate rivals will be bailed out if they do less well in the competitive process, have weak incentives to innovate, reduce costs or increase the quality and variety of their offering.

Mr. Spector concurred with Commissioner Almunia who had earlier praised the European Commission's evolution towards a more economic-based approach regarding state aids. Mr. Spector presented the main principles of this approach. It is necessary to identify the actual market failure behind each state aid measure, and to determine whether the aid measure is a proper instrument to correct it. One should also assess whether the aid is the least distortive correcting mechanism.

Mr. Spector concluded by making several recommendations about the future role of competition authorities. In addition to dealing with cases where government agencies engage in anticompetitive behaviour, competition authorities should have an active advisory and advocacy role. They should also throw light on the amounts of unjustified subsidies and on the identity of their recipients. The ensuing increase in transparency could be a powerful tool to make the granting of state aids and subsidies less frequent and better targeted.

The Chairman then gave the floor to the second panel expert, Mr. Amadou Dieng from WAEMU.

Mr. Amadou Dieng first stated that efficient control over state aids and subsidies was an essential instrument to consolidate the common market in the West African Economic and Monetary Union (comprising eight West African countries). Due to insufficient public savings, these countries are in a dire need of foreign investment and are thus encouraged to grant aids that often distort competition between the Member States.

Mr. Dieng then commented on an important case highlighting the difficulties that the WAEMU Commission had been encoutering in enforcing state aid rules. This illegal aid case was the first one dealt with by the Commission. It involved two cement manufacturers, SOCOCIM and the Ciments du Sahel. SOCOCIM had been operating in Senegal for 30 years, but the Senegalese government considered that the supply of cement remained insufficient. It had therefore granted tax exemptions to the Ciments du Sahel, which thereby gained a significant competitive advantage over SOCOCIM.

The Commission had prohibited the scheme because of the distortion of competition it entailed. Mr. Dieng stressed that this decision was an important achievement for the Commission. However, he would have wished the Commission being able to impose the recovery of the aid.

The Chairman then gave the floor to the third panellist, Mr. Michael Thöne, from FIFO and GSI, Germany.

Mr. Michael Thöne focused his intervention on present and upcoming challenges for state aid control. One of them was of course the economic and financial crisis: will subsidies be easily reduced once the crisis will be over? Second, globalisation intensifies competition between countries, especially for foreign investment. It could make the problem of subsidy races more acute, it could also in some cases result in a protectionist backlash, possibly inducing a growing use of subsidies.

The third and newest challenge was climate change and sustainable development. Mr. Thöne gave the examples of fossil fuels and biofuel subsidies. He raised the question of the compatibility between competition policy and sustainable development: while competition policy is traditionally focused on final goods and services, this focus might be questioned in the light of growing environmental concerns. For instance, how will the expenses for adaptation to climate change be dealt with? Do State aids have a role to play in this respect?

Mr. Thöne then discussed the question of subsidy control. At the national level, subsidy control mainly consists in assessing whether the purported justification for an aid measure is convincing, whether the subsidy addresses a true market failure and whether it is the best instrument to correct such market failure. Mr. Thöne regretted that the independence and resources of the bodies responsible for subsidy control were often rather limited for political reasons. Given this, he called for the development of in-depth and transparent evaluation of every subsidy measure. Such evaluations would be necessary to implement efficient state aid control systems. Mr. Thöne gave the examples of the EU and the WTO. He praised the EU system but pointed out the flaws of WTO rules. According to him, WTO subsidy rules were not effective because they were not deterrent enough.

The Chairman thanked Mr. Thöne and the other panellists for their thoughtful comments. He also thanked the country representatives for their very interesting written contributions. Then, the Chairman opened the general discussion by setting out its four main topics:

1. The current situation of state aids and subsidies, and their control;

2. Their possible adverse impact;

3. Their possible justifications and limits; and

4. The steps that could be taken to improve the assessment and the control of state aids and subsidies.

1. The current situation of state aids and subsidies, and their control

In relation to the first theme, the Chairman noted large disparities across countries as regards state aid control rules and that in some countries, such as Mongolia, there was no state aid control. The Chairman then asked the representative from Mongolia to explain Mongolian policy regarding state aids.

The representative from Mongolia explained that state aids and subsidies had been used as an instrument to pursue social and economic goals. In 2008 and 2009 they had been directed to agricultural, construction and educational sectors, as well as to petroleum production. Most of the subsidies were granted to help small and medium sized enterprises to overcome the financial crisis. The Mongolian representative also noted that the law prohibiting unfair competition contained a provision allowing for the control of subsidies restricting competition. However, the Mongolian Competition Authority has not yet dealt with any case involving state aids and subsidies. As regards petroleum price increases, the Competition Authority supported the government's decision to grant customs tax reduction for petroleum import because Rosneft, a Russian company, was a monopoly supplier of petroleum in Mongolia, and had steadily increased its prices.

The Chairman then noted that in Pakistan, the government grants state aids and subsidies on a case-by-case basis. He therefore asked the Pakistani Representative to set out the broad principles underlying the government's decisions.

The representative from Pakistan explained that the main reason why the Pakistani government granted state aids was to keep failing State-owned enterprises (SOEs) afloat. Very often, SOEs are also large employers. For instance, Pakistan International Airlines is the largest recipient of state aids, mainly because of its inefficiency (the employee-to-aircraft ratio is 418 to 1 compared to a worldwide average of 130 to 1). At first, the Pakistani government granted state aids to offset low levels of private investment. Afterwards, it kept cooperating with private firms. The Pakistani representative concluded his intervention by stressing that the Competition Commission had an important advisory role with regards to state aid measures, in particular by issuing policy notes that were taken into account by the government.

The Chairman then turned to the representative from the US Federal Trade Commission. He invited him to present the principles underlying the interventions of the FTC before courts. The US representative reminded that the better the FTC's empirical work, the greater its influence in judicial proceedings. FTC work relies on a combination of three elements. First, the FTC conducts frequent workshops on specific markets, especially new or evolving markets that could be the subject of future litigation. The FTC has been particularly concerned with the various distortions that have been affecting the development of the Internet as an alternative to traditional business distribution. Second, the FTC tries to gather empirical evidence in order to be able to provide courts with reliable accounts of the likely or actual economic effects

of the measures at stake. Third, the FTC attempts to promote internal cooperation, in particular between economics researchers, legal services, the Office of policy planning and the Bureau of competition.

The Chairman then turned to the second subtopic of the first theme of the roundtable. It focused on supranational state aid control. He asked the representative from WAEMU, Mr. Amadou Dieng, to take the floor again to explain in greater detail the intervention of the Commission in the SOCOCIM case.

Mr. Dieng explained that supranational principles were essential to foster regional integration, especially in developing countries. In most cases, firms complain before supranational authorities because of the absence of satisfactory solution at the national level. This explains why national governments were quite reluctant to conform to the Commission's rulings. The WAEMU representative then came back to the SOCOCIM case. The Commission eventually convinced the Senegalese authorities that the aid that had been granted to the Ciments du Sahel was likely to jeopardize the activities of SOCOCIM, an important firm with a market share of at least 60% and employing more than 700 persons. Furthermore, the Commission also confirmed that *ex post* assessment of state aid measures was an essential part of an efficient state aid control system. Indeed, in the case at hand, the Commission has been able to convince the Senegalese government that: (i) the Ciments du Sahel had taken advantage of the imperfect implementation of the aid scheme; and (ii) the aid had not benefited the economy as much as they had planned.

The Chairman then noted that the European Union had been fostering procedural simplification by implementing in 2008 a Simplified Procedure and a Best Practices Code. He asked the European Union representative to give a short overview of these measures. In particular, he asked him to look back at what had been achieved and to point out the eventual unexpected adverse effects of these procedural reforms.

The European Union representative highlighted that the European Commission tries to limit the review of state aid measures to cases that pose a threat to competition and trade between Member States. The procedural simplification that has taken place in the last two years aimed at limiting the administrative burden as much as possible for cases which were unlikely to constitute a big threat to competition and trade. He then described European state aid rules. He insisted on the fact that many state aid measures do not have to be notified to the Commission. Indeed, in 2006, the so-called *de minimis* threshold was raised. Under 200 000 € per company and per period of three years, state aid measures do not have to be notified at all. Second, the General Block Exemption Regulation was enlarged. The Block Exemption lists measures that do not have to be notified to the Commission *ex ante*. The vast majority of aid measures, such as aid to small and medium enterprises, or aid for training, employment, innovation, as well as environmental aid and regional aid, fall under the Block Exemption.

Furthermore, a simplification package has been implemented for the measures that still need to be notified. It consists in two blocks. The first block is the Simplification Procedure. It tackles straightforward cases and cases for which the Commission has much case experience. The idea is to have an accelerated time frame for these measures. The second block is the Best Practice Code. It concerns the cases that are too complex to be tackled under the Simplified Procedure. The objective is to rely on the partnership between the Commission and the Member State by developing pre-notification meetings. Since the simplification package only came into force on September 1, 2009, the European representative acknowledged that it was impossible yet to assess its efficiency. However, there were a growing number of cases notified under the Simplified Procedure and the Best Practice Code. This seems to have significantly reduced the duration of investigation for complex state aid cases. Another success worth mentioning was that the percentage of aid measures covered by the general Block Exemption had increased from 34% to 66% within the last 2 years.

2. The possible adverse impact of state aids and subsidies

The Chairman then introduced the second theme of this roundtable, i.e. the possible adverse impact of state aids and subsidies. He emphasised the quality of the Egyptian contribution, which pointed out the adverse impact on competition of high levels of under regulated state aids and subsidies. The Chairman called for comments from Egypt on the nature and magnitude of the anti-competitive effects resulting from government subsidies in Egypt.

The representative from Egypt first stated that Egypt, like many countries, did not have any specific regulation regarding state aids and subsidies. Furthermore, the Egyptian Competition Law does not prohibit state aids distorting competition. This explained why the Egyptian Competition Authority had not been involved in any state aid case yet. However, the Egyptian representative explained that the Competition Authority was aware of the importance of controlling state aids, all the more so that Egypt is supposed to put a state aid control system into force in order to comply with a trade agreement with the European Union. In addition to the usual instruments (direct financial transfers, tax breaks, granting government-owned inputs at a below-market rate…), state aids may also take the form of preferential regulations. The representative gave the example of the Egyptian Civil Aviation Law, which specifically mandates that "no airline can be licensed to operate on internal routes that compete with itineraries of currently operating Egyptian companies" although there is only one company operating in Egypt. He concluded by stressing that the Egyptian Competition Authority was considering the inclusion of provisions regarding state aids and subsidies in competition law.

The Chairman then asked the Polish representative to comment on the commitments that ailing firms seeking aid have had to make in order to limit the adverse impact of aids on competition. The representative from Poland explained that, when assessing the efficiency of compensatory measures, one must take into account the effects of these measures both on the benefiting company and on competition in the affected market. Compensatory measures tend to reduce the beneficiary's total production capacities. This in turns benefits its competitors. The European Commission further requires the beneficiary to provide periodic reports (every six months) so as to check that the compensatory measure has been effectively implemented. Most companies agree to implement compensatory measures for fear of a Commission decision obligating them to give back the aid. This is a good example of the efficiency of *ex post* control over state aids.

The Chairman then noted that the contribution from Chinese Taipei described an interesting state aid case under the form of subsidies granted to farmers for pesticide purchase. They had been subject to specific regulation because they were likely to impede competition. The representative from Chinese Taipei was invited to elaborate on this case. The representative explained that in Chinese Taipei, most state aids were directed to the promotion of R&D in specific sectors, such as high-technology industries as well as to the agricultural sector and to small and medium sized enterprises. He then commented on the case mentioned by the Chairman. In the late 1990s, the Council of Agriculture authorised the Farmers Association to select its pesticide suppliers by means of a public procurement and then to resell the pesticides to farmers at a lower price. In 1998, private retailers selling pesticide complained to the Fair Trade Commission, arguing that this scheme was making competition unfair. The Fair Trade Commission decided to prohibit the Farmers Associations from selling pesticides to its members at a price below the purchase price. Furthermore, it also prohibited any subsidies directed to farmers that were not justified by emergency needs.

The Chairman noted that adverse effects may also derive from the large costs that high levels of state aids and subsidies may represent for governments. He then gave the floor to the Indian representative whose contribution specifically dealt with the impact of high amounts of aids on the government budget.

The representative from India noted that in his country, the Competition Commission had only come into existence 11 months ago and that state aids and subsidies did not fall under its jurisdiction. He also explained that in India, subsidies are granted by state governments as well as by the central government. As regards measures undertaken by the central government, in 2002-2004, subsidies represented around 4% of GDP and accounted for approximately 80% of the fiscal deficit. This had been the subject of intense public debates. Many studies and committees stressed the urgency to reform the control over state aids and subsidies. According to the Indian representative, the central government seemed to agree on the need for a subsidy reform.

The Chairman asked India what share of the fiscal deficit was respectively due to aids directed to producers and to aids directed to customers. The Indian representative replied that the largest share of subsidies went to supporting food prices. There is, for instance, a minimum support price for rice and wheat. The scheme was designed in order to serve as a buffer when there is a shortage of grains. Similarly, there is a minimum price for fertilizers.

The Chairman then turned to Russia. He noted the amendments made in 2009 to the state aid provisions of the 2006 Russian Federal Law on Competition. He asked the representative from the Russian Federation to explain the rationale for such amendments.

The Russian representative explained that the 1991 competition legislation prohibited the provision of competitive advantages to specific economic entities. In order to ensure the existence of a pro-competitive and transparent state aid system, a provision relative to the granting of state or municipal aid has been added to the competition law in 2006. This law defines a number of policy objectives for which state aids are authorised, such as social or cultural goals. In October 2009, the terms “state and municipal aids” were replaced by the terms “state or municipal preferences”. State or municipal preferences are defined as the provision of advantages to specific economic entities, including by non-monetary means. This definition is broader and it better complies with the standards of the European competition law. From a procedural viewpoint, the provision of preferences requires the prior consent of the Federal Antimonopoly Service (“FAS”) of Russia. Moreover, the FAS has the power to bring a case to Court in order to obtain the recovery of illegal state aids.

3. The possible justifications and limits of state aids and subsidies

The Chairman then introduced the third part of the roundtable, dealing with the reasons justifying state aids in some circumstances. He noted that in his speech, EU Commissioner Almunia had pointed out various cases where state aids and subsidies could be justified. Mr. Frédéric Jenny then asked Romania to describe a specific state aid scheme, directed to small and medium sized enterprises in the context of the financial crisis.

The representative from Romania first stated that EU regulation was directly applicable to Romania. He insisted on the fact that no Romanian bank has encountered any financial difficulties in the context of the financial crisis. Thus, they did not need any specific state aid measure. In the real economy, several state aid schemes had been approved by the European Commission under the EC Temporary Framework. Among them, two state aid schemes had been designed to help companies weather the crisis. The first one consisted in state guarantees granted to SMEs and large companies in order to facilitate their access to credit. The second one was directed specifically to SMEs and took the form of subsidised loans and of loan guarantees at a reduced premium. Both schemes are allowed until the end of 2010. Only firms that had financial difficulties at the moment of the guarantee request can benefit from the schemes.

The Chairman turned to Argentina, noting that, according to the Argentinean contribution, the main justification for state aids and subsidies was the protection of employment. In particular, the contribution

discussed a case where General Motors was granted subsidies for developing a car in which a large share of all components had to be domestically produced. He wondered whether the aid was effective in promoting employment and whether it created competition problems

The Chairman then referred to the contribution from Morocco. It described the main policy trade-offs and argued that some state aids may be justified despite their anticompetitive effects. For instance, agricultural subsidies did not seem to be economically justified, but they have an important social dimension. The Chairman then asked the representative from Morocco to probe into this trade-off and to assess the sustainability of this policy on the long run.

Morocco first stated that the largest sectors in the Moroccan economy are the agricultural sector and the small and medium sized enterprises. Both sectors needed state intervention because of the intensity of international competition. State aids were thus an instrument to ensure social cohesion and maintain employment. State aids took various forms, and it was worth mentioning that direct subsidies had been forbidden in Morocco since 2000. The Moroccan government had taken several crisis-related measures, especially directed to exporting firms. However, the Moroccan representative stressed that these measures were non-discriminatory since every firm meeting predetermined objective criteria might benefit from the scheme. He underlined the important advisory role played by the Competition Authority as regards state aids measures. Moreover, he noted that Morocco had an obligation to prohibit subsidies distorting trade with the European Union in order to comply with several trade agreements.

4. The steps that could be taken to improve the assessment and the control of state aids and subsidies.

The Chairman presented the fourth discussion theme of the roundtable. As was shown when discussing the first topic, there was a lot of cross-country heterogeneity regarding the control over state aid, or lack thereof. This raised the question of how state aids and subsidies should be controlled. In this respect, some contributions provided interesting elements, regarding the *ex ante* or *ex post* treatment of state aids and subsidies. Ukraine, for instance, was currently constructing a state aid monitoring system complying with the Free Trade Area Agreement concluded with the European Union. With EU technical support, a workgroup had been developing a draft concept of the state aid system that should serve as a basis for the future legislation on state aids.

The Chairman asked the Ukrainian representative to review the achievements of this workgroup and to explain what is still necessary to implement an efficient state aid monitoring system. The representative first stressed the existing consensus in Ukraine on the necessity to implement a transparent state aid control system. On 13th January 2010, a draft has been adopted by the Parliament. It had been elaborated by the Antimonopoly Committee and supported by the government. It pursues five main goals: (i) the establishment of a state aid monitoring system; (ii) the inventory of every state aid measure that is granted in Ukraine; (iii) the drafting of general advice to help public authorities balance the positive and negative effects of a state aid measure; (iv) the submission of annual reports on volumes and forms of state aids and subsidies granted in Ukraine; and (v) the establishment of a control mechanism over state aids. This aims at minimising the negative impact of state aids and subsidies on competition. The Ministry of Finance will be responsible for the implementation of the first four goals while the Antimonopoly Committee will have to assess the impact of state aid measures on competition. The Ukrainian representative concluded his intervention by underlying that the adoption of this draft contributes to the fulfilment of Ukraine's international commitments.

The Chairman then turned to the Former Yugoslav Republic of Macedonia (FYROM). He noted that FYROM contribution emphasised the strict conditions attached to the granting of aid to ailing firms. These conditions regard for instance the repayment of special loans, and the contribution of the beneficiary to the

improvement of market conditions. He asked the FYROM representative to describe in greater detail how *ex post* control is implemented. In particular, what sanctions can be taken against the firms that do not abide by these conditions? Are there some recent cases worth mentioning?

The FYROM representative explained that the Commission for the Protection of Competition was the institution responsible for state aid control and that the state aid rules in force since 2004 perfectly comply with EU legislation. State aid measures must be notified to, and authorised by the Commission for the Protection of Competition before being implemented. The Commission can also impose the recovery of unlawful aid. So far the Commission has opened three formal investigation procedures upon doubts about the compatibility of state aids. In two of these cases, the aid provided was considered unlawful and had consequently been recovered. Both cases implied the selling of land owned by state enterprises at a below-market price. The recovery decision meant that in both cases, the beneficiary of the aid had to pay the full market price of the land. Both decisions of the Commission had been appealed in the administrative court and were now pending.

The Chairman turned to Spain, noting that Spanish aids must indeed comply with EU rules. However, *de minimis* state aids do not fall under the jurisdiction of the European Commission. For this kind of aids, the Spanish Competition Act provides the Competition Authority with an instrument for *ex post* control. The Chairman requested the Spanish representative to comment on the relevant provisions. In particular what loophole in EU state aid control did this act provide an answer to?

The Spanish representative explained that the 2007 Spanish Competition Act allows the National Competition Authority to analyse state aid schemes under its own initiative or at the request of public administrations. The goal was to evaluate the potential effects on competition of such schemes. If state measures that may constitute aid fall under the EU jurisdiction, the Competition Authority then recommends notifying the Commission. Two important and recent cases (concerning a proposal to support the coal mining sector and a law regarding the financing of a public broadcasting system) were thus notified. In cases falling below the *de minimis* threshold, the Competition Authority issues reports assessing the pros and cons of the measure at hand. Indeed, these reports warn public authorities on the adverse effects of their intended measures and try to identify less distortive alternatives. In addition, the Competition Authority has published its first annual report in 2009. This report was mainly methodological and intended to set up the economic criteria used for the assessment of state aid measures. Eventually, the Spanish representative explained that the Competition Authority has an instrument for *ex post* control. It has the power to bring actions before Courts against administrative initiatives hindering the maintenance of effective competition on the markets. So far this instrument has not been used but it has proved to be a powerful deterrence tool in the Competition Authority's interaction with public administrations.

The Chairman turned to Croatia. He noted that according to the Croatian contribution, several investigations had been opened following complaints about discriminatory treatment compared to competitors benefiting from state aids, in particular in the textile industry. The Chairman invited Croatia to briefly present one or two of such cases.

The representative from Croatia stated that the Croatian Competition Authority was responsible for the implementation of the state aid regulation. It had already opened several investigations which were all pending. In Croatia, the State Aid Act sets out general conditions and rules for authorisation, monitoring and recovery of state aids. State aids are defined as any actual or potential expenditure or decreased revenue of the State, granted in whatever form distorting or threatening to distort competition by favouring certain beneficiaries. Defined as such, state aid measures are forbidden by law. However, state aids can serve to compensate damage caused by exceptional natural disasters. In such case, they may be declared compatible with the law but they are subject to the prior authorisation of the competition agency. The Competition Authority monitors the implementation of state aids authorised at its own initiative or upon request of any entity having a legal interest. In cases where the Authority establishes that there have been

irregularities in monitoring the implementation of state aids, it can adopt a decision ordering the aid provider or the aid beneficiary to remedy the irregularities in question within three months.

The Chairman then invited the Business and Industry Advisory Committee (BIAC) to explain its views on the best way to conduct the efficient *ex ante* and *ex post* economic assessment of a state aid measure. The representative from BIAC stressed that the business community calls for the assessment, on a case-by-case basis, of the effects of subsidies on competition. He explained that national authorities alone cannot control state aids and subsidies because many of them involve international issues. However, as far as possible, they should promote the transparency of state aid. He also pointed out that the financial crisis had shed new light on the effect of subsidies. It shown that they can also have positive effects, since they can help correct market failures. According to BIAC, state aids allowed to save many efficient producers who may have otherwise faced bankruptcy when the flow of credit dried up.

As regards the *ex ante* assessment of state aid measures, BIAC welcomed the introduction of the Simplified Procedure by the European Commission because it accelerates the treatment of many cases. According to the BIAC representative, the difference between the EU and the WTO is that the EU's main objective was the common economic interest of the European community. On the contrary, the WTO did not look at the common good but was rather interested in whether there is an undue benefit to a specific competitor. Moreover, WTO rules only allowed for *ex post* control*,* which is efficient only if countervailing measures are applied in the market in which the harm has occurred. Nevertheless, as BIAC mentioned, countervailing measures often harm consumers by raising prices.

The Chairman turned to Peru. The representative from Peru indicated that Peru has not developed a full framework to analyse state aids yet. As regards government interventions through SOEs, there exists *ex ante* and *ex post* control. *Ex post,* companies can file complaints to the Competition Authority if they believe that an SOE's behaviour is unduly affecting them. *Ex ante*, the government is subject to a three-stage test when creating new SOEs: (i) State participation in the business activity should be authorised by a special law and must thus be approved by the Congress; (ii) State intervention should not foreclose the entry of new competitors in the market nor exclude incumbent competitors; and (iii) State participation in business activities is allowed only were it fosters public interest.

Finally, the Chairman asked the three experts panellists to present their concluding remarks.

Mr. Amadou Dieng first insisted on the difference between individual aids and general schemes. According to him, general schemes are economically justified most of the time. The important issue was the monitoring of the implementation of the aid. This monitoring must take place on a case-by-case basis. Indeed, most distortions do not come from the aid measure itself but derive from the way it is implemented. It is thus crucial to give to the Competition Authorities the control over the implementation of the aid. *Ex post* control is thus as necessary as *ex ante* control.

Mr. David Spector probed into the question of the standard of proof in state aid cases. He drew a comparison between merger and state aid cases. In both cases, competition authorities weigh the *pros* and the *cons*; the possible efficiencies on the one hand and the possible anticompetitive effects on the other. In doing so, they should, according to Mr. Spector, have a slightly negative *a priori* assumption: in principle, aids are prohibited unless some conditions are fulfilled. The reason is that some harmful effects of aids are very indirect and do not lend themselves easily to measurement. Rent-seeking and the harmful incentives resulting from the soft budget constraint are two examples of negative indirect effects of state aids that are not limited to the sector where the aid is granted. Similarly the harm resulting from the high opportunity cost of public funds is also an indirect effect of state aids and it is usually not accounted for when weighing the *pro* and *cons* of an aid measure. According to Mr. Spector, all these reasons pointed towards a negative presumption and called for a relatively high standard of proof before considering that a given aid measure was justified.

Mr. Michael Thöne made three comments about the discussions. First, he agreed that subsidy control was to be exerted on a case-by-case basis. However, he regretted that competition authorities focus too much on specific cases, and do not provide general assessments of the state aid policy pursued by governments. This could be very useful to improve transparency and deterrence. Second, Mr. Thöne encouraged competition authorities to adopt a broader view on state aid measures. They should not only balance the positive and negative effects of a given measure, but also determine whether the policy decision was justified or not in the first place. Finally, he commented on the Polish representative's intervention, saying that he found it very interesting to obligate the firms benefiting from a state aid measure to assess the negative impact that this measure could have on competitors.

The Chairman then asked BIAC to comment on cases of aids granted to SOEs. The BIAC representative expressed his concern about SOEs, and in particular, about their ability to predate as well as to discriminate upstream and downstream. However, he acknowledged that SOEs are not harmful in themselves and reaffirmed that it is harm to competition rather than harm to competitors that must be taken into account when assessing the effect of an aid measure.

The Chairman of the session, Mr. Mestassi, asked Mr. Frédéric Jenny to make some concluding remarks. Mr. Jenny outlined a few points that emerged from the discussion. First, he noted that on the issue of state aids, there was no divide between OECD members and non-members, developing and developed countries. As shown by Mr. Spector, this issue was important in all countries. Second, Mr. Jenny noted that there is no automatic prejudice against state aids. As explained by Commissioner. Almunia, there are good reasons to justify state aids in some circumstances, such as the need to correct market failures, or the promotion of investment generating positive externalities. Economists are quite familiar with these goals. Others are more political: they concern the promotion of social goals, which may be justified even if they are not entirely consistent with standard economic analysis, which tends to promote the use of direct, non-distortive transfers. Morocco, for example, explained very clearly that some social goals had to be weighed against efficiency considerations: the government at large is not only concerned with competition but also with broader issues. Third, Mr. Frédéric Jenny noted that the interventions and country contributions showed that almost all sectors of the economy benefit from state aids. However, a consensus emerged on the view that state aids tend to make the playing field uneven. This does not only concern competition between firms but also competition between nations. A large share of state aids may have an impact on international trade.

According to Mr. Jenny, this highlights the need for an efficient system of control of state aid. State aid control takes place at the national, regional and multilateral levels. The main features of state aid control should be the following: transparency, non-discrimination, and making sure that aid does not distort competition. This requires an assessment of the effects of the aids on a case-by-case basis. In each case, whether the aid measure at stake is the best way to achieve its purported goal should be examined in detail. The roundtable also made it clear that there was a plurality of ways in which competition authorities can intervene. For competition authorities that do not have a strict mandate to control state aids, policy notes, various types of advocacy, and interventions before Courts, can be ways to influence governments' decisions.

COMPTE RENDU DE LA DISCUSSION

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Par le Secrétariat

M. Frédéric Jenny, en qualité de Président du Forum mondial sur la concurrence, remercie le Commissaire européen chargé de la concurrence, M. Joaquim Almunia, pour l'intérêt de son discours sur la politique de la Commission européenne en matière d'aides publiques. M. Jenny présente ensuite le Président de la première session sur la Politique de la concurrence, les aides publiques et les subventions : M. Monkid Mestassi, Secrétaire Général du ministère de l'Économie et des Affaires générales du Maroc.

M. Mestassi présente les trois experts qui participent à cette session : M. David Spector, Professeur associé à l'École d'économie de Paris (fondateur de MAPP, un cabinet de conseil spécialisé dans l'économie de la concurrence); M. Amadou Dieng, Directeur de la concurrence au sein de la Commission de l'Union économique et monétaire ouest-africaine (UEMOA) ; et M. Michael Thöne, de l'Institut FIFO, qui participe à la *Global Studies Initiative* en Allemagne.

M. David Spector débute son intervention en soulignant l'importance de la question des aides publiques et des subventions. Les aides publiques représentent encore une large proportion des fonds publics, mais hors de l'Union européenne, elles ne sont soumises qu'à un contrôle très sommaire. M. Spector décrit la grande variété d'instruments et de bénéficiaires de ces aides, ainsi que la diversité des règles de contrôle existant à l'échelle nationale.

Il observe que le Commissaire Almunia a déjà amplement traité des arguments économiques pouvant justifier les aides publiques. M. Spector axe donc sa présentation sur les divers effets dommageables que peuvent avoir ces aides. Il explique, dans un premier temps, que pour évaluer l'efficience d'une aide, il convient de tenir compte du coût de la levée des fonds publics et du coût d'opportunité des aides publiques. Le coût d'opportunité semble devoir être élevé dans les pays en développement, où le rendement des utilisations alternatives des deniers publics (santé ou éducation, par exemple) est supérieur à celui observé dans les pays développés.

Les aides publiques peuvent aussi produire des effets dommageables directs. Premièrement, c'est le cas des courses aux subventions qui découlent d'un manque de coordination entre les gouvernements. Deuxièmement, les aides peuvent faire obstacle aux signaux émis par le marché, créant ainsi des distorsions, ainsi que des inefficiences dans la production et dans l'allocation des ressources. Les subventions versées dans les secteurs de l'énergie et de l'eau illustrent ce phénomène. Troisièmement, lorsqu'elles ont pour seul objectif de maintenir à flot des entreprises en difficulté, les subventions entraînent généralement une mauvaise allocation du capital et de la main-d'œuvre. Enfin, les aides publiques jouent sur les incitations auxquelles sont exposées les entreprises en raison d'un phénomène de « faible contrainte budgétaire » : les entreprises qui s'attendent à être renflouées en cas de difficultés ou à ce que leurs rivaux moins chanceux le soient en cas de perte de compétitivité sont moins incitées à innover, réduire les coûts ou accroître la qualité et la diversité de leur offre.

M. Spector s'associe au Commissaire Almunia qui a salué l'évolution de la Commission européenne vers une approche plus économique des aides publiques. M. Spector présente les grands principes de cette approche. Il y a lieu tout d'abord de cerner la défaillance réelle du marché à l'origine de chaque aide

publique, de déterminer si une aide publique convient pour y remédier, et si cette aide est bien le mécanisme de correction qui crée le moins de distorsions.

M. Spector conclut en formulant plusieurs recommandations sur le rôle futur des autorités de la concurrence. Outre le traitement des affaires de comportement anticoncurrentiel de la part des organismes publics, les autorités de la concurrence doivent jouer un rôle actif de conseil et de sensibilisation. Elles doivent faire la lumière sur le montant des subventions non justifiées et sur l'identité des bénéficiaires. Le surcroît de transparence qui en découlera permettra de diminuer considérablement la fréquence des aides publiques et des subventions et de mieux les cibler.

Le Président donne ensuite la parole au deuxième expert, M. Amadou Dieng, de l'UEMOA.

M. Amadou Dieng explique tout d'abord que l'exercice d'un contrôle efficient sur les aides publiques et les subventions a constitué un outil décisif de consolidation du marché commun de L'Union économique et monétaire ouest-africaine (l'UEMOA qui compte 8 pays d'Afrique de l'Ouest). L'épargne publique étant insuffisante, ces pays ont terriblement besoin de l'investissement étranger et ont donc intérêt à accorder des aides qui souvent faussent la concurrence entre les États membres.

Puis, M. Dieng commente une affaire importante qui met en lumière les difficultés rencontrées par la Commission de l'UEMOA pour faire respecter les règles applicables aux aides publiques. Cette affaire d'aide illicite a été la première dont s'est saisie la Commission. Elle mettait en présence deux producteurs de ciment, la SOCOCIM et les Ciments du Sahel. La SOCOCIM était implantée au Sénégal depuis 30 ans, mais le gouvernement sénégalais considérait que l'approvisionnement en ciment demeurait insuffisant. Il a donc accordé des exonérations d'impôt aux Ciments du Sahel, qui ont ainsi acquis un avantage concurrentiel certain par rapport à la SOCOCIM.

La Commission a interdit ce dispositif en raison de la distorsion de concurrence en résultant. M. Dieng souligne que cette décision a représenté une belle réussite pour la Commission. Il aurait souhaité, toutefois, que la Commission soit en mesure d'imposer le recouvrement des aides allouées.

Le Président donne ensuite la parole au troisième expert, M. Michael Thöne, de l'Institut FIFO et de GSI, en Allemagne.

M. Michael Thöne cible son intervention essentiellement sur les enjeux présents et à venir dans le domaine du contrôle des aides publiques. L'un d'eux est à l'évidence la crise économique et financière : pourra-t-on facilement diminuer les subventions une fois la crise passée ? Le second enjeu est celui de la mondialisation, qui avive la concurrence entre les pays, notamment en matière d'investissement étranger. On pourrait assister à une exacerbation du problème des courses aux subventions et, dans certains cas, à des réactions protectionnistes, voire à une intensification du recours aux subventions.

Le troisième enjeu, et le plus récent, correspond au changement climatique et au développement durable. M. Thöne cite les exemples des subventions aux combustibles fossiles et aux biocarburants. Il soulève la question de la compatibilité entre la politique de la concurrence et le développement durable : si la première est traditionnellement centrée sur les biens et services finaux, cette orientation pourrait être remise en question à la lumière des préoccupations environnementales croissantes. On peut se demander, par exemple, comment prendre en charge les dépenses occasionnées par l'adaptation au changement climatique ? Les aides publiques ont-elles un rôle à jouer à cet effet ?

M. Thöne examine ensuite la question du contrôle des subventions. À l'échelle nationale, le contrôle des subventions consiste pour l'essentiel à déterminer si l'argument censé justifier une aide est convaincant, si la subvention répond à une véritable défaillance du marché et si c'est l'instrument le plus indiqué pour y remédier. M. Thöne regrette que l'indépendance et les ressources des organes responsables

du contrôle des subventions soient fréquemment plutôt limitées pour des raisons politiques. Il en appelle donc à une évaluation en profondeur et transparente de chaque subvention. Ces évaluations seraient nécessaires à la mise en place de systèmes efficients de contrôle des aides publiques. M. Thöne cite les exemples de l'UE et de l'OMC. Il souligne les mérites du système de l'UE, mais relève les carences des règles de l'OMC. Selon lui, les règles de l'OMC applicables aux subventions ont manqué d'efficacité car elles n'étaient pas assez dissuasives.

Le Président remercie M. Thöne, ainsi que les autres experts pour leurs commentaires pertinents. Il remercie également les représentants des pays pour leurs très intéressantes contributions écrites. Puis il ouvre le débat général en présentant ses quatre thèmes principaux :

1. la situation actuelle et le contrôle des aides publiques et des subventions ;

2. leurs éventuelles répercussions négatives;

3. leurs justifications et leurs limites éventuelles ;

4. les mesures pouvant être appliquées pour améliorer l'évaluation et le contrôle des aides publiques et des subventions.

1. La situation actuelle et le contrôle des aides publiques et des subventions

En liaison avec le premier thème, le Président relève de fortes disparités entre les pays au regard des règles de contrôle des aides publiques, et il observe que certains, comme la Mongolie, n'exercent aucun contrôle en la matière. Il invite ensuite la représentante de ce pays à exposer la politique d'aides publiques qui y est menée.

La représentante de la Mongolie explique que les aides publiques et les subventions ont été utilisées pour poursuivre des objectifs sociaux et économiques. En 2008 et 2009, elles ont été affectées aux secteurs de l'agriculture, de la construction et de l'éducation, ainsi que de la production de pétrole. La majorité ont été accordées afin d'aider des PME à surmonter la crise financière. La représentante de la Mongolie fait également observer qu'une disposition de la loi interdisant la concurrence déloyale prévoit l'exercice d'un contrôle sur les subventions qui ont pour effet de restreindre la concurrence. Cela étant, l'Autorité mongole de la concurrence n'a traité à ce jour aucune affaire impliquant des aides publiques ou des subventions. En ce qui concerne les hausses du prix du pétrole, l'Autorité de la concurrence a soutenu la décision du gouvernement d'alléger les droits de douane sur les importations de pétrole, puisque la société russe Rosneft détenait le monopole de l'approvisionnement de la Mongolie en pétrole et qu'elle n'avait cessé de relever ses prix.

Le Président constate alors qu'au Pakistan le gouvernement octroie les aides publiques et subventions au cas par cas. Il demande donc au représentant de ce pays de présenter les grands principes qui président aux décisions du gouvernement.

Le représentant du Pakistan explique que le gouvernement a essentiellement accordé des aides publiques pour maintenir à flots les entreprises publiques en difficulté. Ces entreprises sont aussi bien souvent d'importants employeurs. Ainsi, Pakistan International Airlines est le premier bénéficiaire des aides publiques, en raison principalement de son inefficience (le ratio salarié-avion est de 418 pour 1, contre 130 pour 1 en moyenne à l'échelle mondiale). Le gouvernement pakistanais a octroyé des aides publiques tout d'abord pour compenser la faiblesse de l'investissement privé. Puis il a continué de coopérer avec des entreprises privées. Le représentant du Pakistan conclut son intervention en insistant sur l'importance du rôle consultatif joué par la Commission de la concurrence au regard des aides publiques, en particulier à travers la publication de notes d'orientation dont le gouvernement tient compte.

Le Président s'adresse ensuite au représentant de la Commission fédérale du commerce des États-Unis. Il l'invite à présenter les principes sur lesquels sont fondées les interventions de la Commission devant les tribunaux. Le représentant des États-Unis rappelle que plus les travaux empiriques de la Commission sont aboutis, plus elle est en mesure d'influer sur les procédures judiciaires. Les travaux de la Commission reposent sur trois éléments à la fois. Premièrement, la Commission organise fréquemment des ateliers sur des marchés précis, en particulier les marchés nouveaux ou en mutation qui sont susceptibles de faire l'objet de litiges ultérieurement. Elle s'est notamment inquiétée des différentes distorsions qui ont pesé sur le développement d'Internet en tant que canal de substitution à la distribution commerciale traditionnelle. Deuxièmement, elle s'efforce de recueillir des données d'observation pour pouvoir présenter aux tribunaux un exposé fiable des effets économiques probables ou réels des mesures en jeu. Troisièmement, la Commission s'emploie à promouvoir la coopération interne, notamment entre les chercheurs en économie, les services juridiques, le Bureau de planification des politiques et le Bureau de la concurrence.

Le Président passe ensuite au deuxième sous-thème du premier thème de la table ronde, consacré au contrôle supranational des aides publiques. Il demande alors au représentant de l'UEMOA, M. Amadou Dieng, de prendre de nouveau la parole afin d'expliquer plus en détail l'intervention de la Commission dans l'affaire de la SOCOCIM.

M. Dieng explique que l'élaboration de principes supranationaux est un aspect fondamental de la promotion de l'intégration régionale, en particulier dans les pays en développement. Dans la plupart des cas, les entreprises déposent plainte auprès des autorités supranationales du fait de l'absence de solution satisfaisante à l'échelle nationale, ce qui explique pourquoi les autorités nationales montrent fort peu d'empressement à se conformer aux décisions de la Commission. Le représentant de l'UEMOA revient ensuite sur l'affaire de la SOCOCIM. La Commission a fini par convaincre les autorités sénégalaises que l'aide accordée aux Ciments du Sahel risquait de mettre en péril les activités de la SOCOCIM, société importante détenant au moins 60 % du marché et employant plus de 700 personnes. De plus, la Commission a aussi confirmé que l'évaluation *ex post* des aides publiques concourait de façon déterminante à l'efficience du système de contrôle des aides publiques. Dans l'affaire en question, en effet, la Commission a pu convaincre le gouvernement sénégalais que : (i) les Ciments du Sahel avaient tiré profit de la mise en œuvre imparfaite du régime d'aide ; et (ii) l'aide n'avait pas bénéficié à l'économie autant qu'on le prévoyait.

Ensuite, le Président fait remarquer que l'Union européenne a favorisé une simplification des procédures en mettant en place en 2008 une Procédure simplifiée et un Code de bonnes pratiques. Il demande au représentant de l'Union européenne de présenter ces mesures dans leurs grandes lignes, et en particulier de revenir sur les réalisations accomplies et de mettre en exergue les effets dommageables inattendus et éventuellement produits par ces réformes procédurales.

Le représentant de l'Union européenne souligne que la Commission européenne s'efforce de limiter l'examen des aides publiques aux affaires qui risquent de compromettre la concurrence et les échanges entre les États membres. La simplification des procédures réalisée ces deux dernières années devrait permettre de limiter autant que possible la charge administrative pour les affaires qui selon toute probabilité ne présentent aucun danger pour la concurrence et les échanges. Il décrit ensuite les règles européennes qui encadrent les aides publiques. Il insiste sur le fait que, pour beaucoup, ces aides n'ont pas à être portées à la connaissance de la Commission. En 2006, en effet, le seuil dit *de minimis* a été relevé. En deçà de 200 000 EUR par entreprise et par période de trois ans, les aides publiques n'ont pas à être déclarées. Deuxièmement, le Règlement général d'exemption par catégorie a été élargi. Ce Règlement recense les mesures qui n'ont pas besoin d'être signalées à la Commission *ex ante*. La grande majorité des aides, comme celles destinées aux PME ou affectées à la formation, à l'emploi, à l'innovation, ainsi qu'à la protection de l'environnement et aux régions, entrent dans le cadre du Règlement général.

De surcroît, des mesures de simplification ont été adoptées pour les aides qui doivent encore faire l'objet d'une notification. La première est la Procédure simplifiée, qui s'applique aux affaires qui ne présentent pas de difficultés et à celles auxquelles la Commission est rompue. L'objectif est d'en accélérer le traitement. La seconde mesure, à savoir le Code de bonnes pratiques, concerne les affaires qui sont trop complexes pour être traitées selon la Procédure simplifiée. L'objectif consiste à s'appuyer sur un partenariat entre la Commission et l'État membre en organisant des réunions préalablement à la notification. Ce train de mesures n'étant entré en vigueur que le 1er septembre 2009, le représentant de l'Union européenne observe qu'il est encore impossible d'évaluer son efficacité. Néanmoins, un nombre croissant d'affaires ont été notifiées dans le cadre de la Procédure simplifiée et du Code de bonnes pratiques, ce qui semble avoir réduit sensiblement la durée des enquêtes dans les affaires complexes d'aides publiques. Autre succès qui mérite d'être mentionné : le pourcentage des aides couvertes par le Règlement général a grimpé de 34 % à 66 % au cours des deux dernières années.

2. Les éventuelles répercussions négatives des aides publiques et subventions

Le Président présente ensuite le deuxième thème de cette table ronde, les répercussions négatives que peuvent avoir les aides publiques et les subventions. Il insiste sur la qualité de la contribution de l'Égypte, qui a mis en évidence les conséquences néfastes, pour la concurrence, de l'octroi d'aides publiques et de subventions importantes insuffisamment réglementées. Le Président invite l'Égypte à formuler des commentaires sur la nature et l'ampleur des effets anticoncurrentiels produits par les subventions publiques dans son pays.

En premier lieu, la représentante de l'Égypte expose que son pays, à l'instar de bien d'autres, n'est doté d'aucune réglementation propre aux aides publiques et aux subventions. Qui plus est, la loi égyptienne sur la concurrence ne proscrit pas les aides publiques qui faussent la concurrence, ce qui explique pourquoi à ce jour, l'Autorité égyptienne de la concurrence n'a été saisie d'aucune affaire dans ce domaine. La représentante de l'Égypte explique cependant que l'Autorité de la concurrence est consciente qu'il importe de contrôler les aides publiques, d'autant que l'Égypte est censée mettre en place un système de contrôle de ces aides afin de respecter l'accord commercial conclu avec l'Union européenne. Outre les instruments usuels (transferts financiers directs, avantages fiscaux, cession d'intrants détenus par l'État à un prix inférieur au marché…), les aides publiques peuvent aussi prendre la forme d'une réglementation préférentielle. La représentante cite l'exemple de la loi égyptienne sur l'aviation civile, qui prévoit spécifiquement qu'« aucune compagnie aérienne ne peut se voir accorder de licence d'exploitation pour des lignes internes entrant en concurrence avec les itinéraires des compagnies égyptiennes en activité », même si on ne compte qu'une seule compagnie en activité dans le pays. Elle conclut en soulignant que l'Autorité égyptienne de la concurrence envisage d'introduire dans le droit de la concurrence des dispositions relatives aux aides publiques et aux subventions.

Le Président demande ensuite au représentant de la Pologne de commenter les engagements que les entreprises en difficulté ayant sollicité une aide ont dû prendre pour limiter les répercussions négatives des aides sur la concurrence. Le représentant de la Pologne explique que, pour évaluer l'efficience des mesures compensatoires, il faut prendre en compte les conséquences de ces mesures pour l'entreprise qui en bénéficie et pour la concurrence sur le marché concerné. Les mesures compensatoires ont tendance à diminuer les capacités de production totales du bénéficiaire, ce qui bénéficie ensuite à ses concurrents. La Commission européenne impose en outre au bénéficiaire de remettre des rapports régulièrement (tous les six mois) pour pouvoir vérifier que la mesure compensatoire a été efficacement mise en œuvre. La majeure partie des entreprises acceptent d'appliquer une telle mesure par crainte qu'une décision de la Commission ne les oblige à rendre l'aide perçue. C'est un bon exemple d'efficience de contrôle *ex post* des aides publiques.

Ensuite, le Président relève que la contribution du Taipei chinois décrit une intéressante affaire d'aides publiques accordées aux agriculteurs sous forme de subventions pour des achats de pesticides. Ces aides ont été soumises à une réglementation particulière car elles risquaient de brider la concurrence. Le représentant du Taipei chinois est invité à apporter des précisions sur cette affaire. Le représentant du Taipei chinois explique que, sur son territoire, la majorité des aides publiques ont été affectées à la promotion de la recherche et du développement dans des secteurs donnés, comme la haute technologie ou l'agriculture, ainsi qu'aux PME. Puis il commente l'affaire mentionnée par le Président. À la fin des années 90, le Conseil de l'agriculture a autorisé l'Association des agriculteurs à sélectionner des fournisseurs de pesticides par une procédure de marché public, puis à revendre ces pesticides aux agriculteurs à un prix inférieur. En 1998, les vendeurs privés de pesticides au détail ont déposé une plainte auprès de la Commission de contrôle des pratiques commerciales, estimant que ce dispositif était source de concurrence déloyale. La Commission a décidé d'interdire à l'Association des agriculteurs de vendre à ses membres des pesticides en-dessous du prix d'achat. Elle a également proscrit tout octroi de subventions aux agriculteurs qui ne soit pas justifié par une situation d'urgence.

Le Président constate que les effets dommageables peuvent également provenir des coûts élevés que peuvent occasionner, pour les autorités, des aides publiques et des subventions importantes. Il donne la parole au représentant de l'Inde dont la contribution traite précisément de l'impact des aides d'un montant élevé sur le budget de l'État.

Le représentant de l'Inde observe que, dans son pays, la Commission de la concurrence a vu le jour voilà 11 mois seulement et que les aides publiques et les subventions ne relèvent pas de ses attributions. Il explique également qu'en Inde les subventions sont accordées par les gouvernements des États ainsi que par l'administration centrale. Concernant les mesures prises par l'administration centrale, en 2002-2004, les subventions représentaient environ 4 % du PIB et approximativement 80 % du déficit budgétaire. Cela a fait l'objet d'un vif débat public. De nombreuses études et commissions ont souligné qu'une réforme du contrôle des aides publiques et des subventions s'imposait de toute urgence. Selon le représentant de l'Inde, l'administration centrale semble convenir de la nécessité de réformer les subventions.

Le Président demande à l'Inde quelle proportion du déficit budgétaire résulte, respectivement, des aides destinées aux producteurs et de celles accordées aux clients. Le représentant de l'Inde répond que la majeure patrie des subventions a servi à soutenir le prix des produits alimentaires. Il existe, par exemple, un prix de soutien minimum pour le riz et le blé. Ce dispositif était conçu pour servir de régulateur en cas de pénurie de céréales. De même, un prix minimum a été fixé pour les engrais.

Le Président s'adresse ensuite à la Russie. Il note les modifications apportées en 2009 aux dispositions de la Loi fédérale russe de 2006 relative à la concurrence en ce qui concerne les aides publiques. Il demande au représentant de la Fédération de Russie d'expliquer les raisons de ces changements.

Le représentant de la Fédération de Russie explique que la loi de 1991 sur la concurrence interdisait tout octroi d'avantages concurrentiels à certaines entités économiques. Pour s'assurer de l'existence d'un système d'aides publiques transparent et qui favorise la concurrence, une disposition sur l'octroi des aides d'État ou municipales a été introduite dans la loi sur la concurrence en 2006. Cette loi définit différents objectifs de l'action publique qui peuvent donner lieu à des aides publiques, comme les objectifs sociaux ou culturels. En octobre 2009, l'expression « aides d'État et municipales » a été remplacée par « préférences d'État ou municipales ». Ces préférences d'État ou municipales se définissent comme l'octroi d'avantages à certaines entités économiques, notamment par des moyens non pécuniaires. Cette définition est plus large et davantage conforme aux normes du droit européen de la concurrence. Du point de vue procédural, l'octroi de préférences nécessite l'accord préalable du Service fédéral de lutte contre les monopoles de la Russie. De plus, ce service est habilité à porter une affaire devant les tribunaux afin d'obtenir le recouvrement des aides publiques illicites.

3. Justifications et limites éventuelles des aides publiques et des subventions

Le Président présente ensuite la troisième partie de la table ronde, qui porte sur les raisons justifiant les aides publiques en certaines circonstances. Il relève que dans son discours le Commissaire européen, M. Almunia, a signalé différentes affaires dans lesquelles les aides publiques et les subventions pouvaient se justifier. M. Frédéric Jenny demande alors au représentant de la Roumanie de décrire un dispositif d'aides publiques particulier, qui s'adresse aux PME dans le contexte de la crise financière.

Le représentant de la Roumanie déclare tout d'abord que la réglementation de l'UE est directement applicable à la Roumanie. Il insiste sur le fait qu'aucune banque roumaine n'a rencontré de difficultés financières dans le contexte de la crise financière. Par conséquent, les banques n'ont nullement eu besoin d'aides publiques spécifiques. Dans l'économie réelle, plusieurs dispositifs d'aides publiques ont été approuvés par la Commission européenne en vertu du Cadre temporaire de la Commission européenne. Parmi eux, deux dispositifs d'aides publiques ont été conçus pour aider les entreprises à surmonter la crise. Le premier est composé de garanties accordées par l'État aux PME et aux grandes entreprises afin de leur faciliter l'accès au crédit. Le second s'adresse spécifiquement aux PME et prend la forme de prêts bonifiés et d'une réduction de la prime à verser pour les garanties de prêts. Ces deux dispositifs sont autorisés jusqu'à la fin 2010. Seules les entreprises en difficultés financières au moment de la demande de garantie peuvent en bénéficier.

Le Président s'adresse à l'Argentine et fait remarquer que, selon la contribution argentine, la principale raison d'être des aides publiques et des subventions est de protéger l'emploi. La contribution rend notamment compte d'une affaire dans laquelle l'entreprise General Motors s'est vue octroyer des subventions pour mettre au point un modèle dont une part importante des composants devait être fabriquée dans le pays. Le Président se demande si cette aide a permis de promouvoir l'emploi et si elle a créé des problèmes de concurrence.

Puis le Président fait allusion à la contribution du Maroc. Il décrit les principaux arbitrages auxquels ont procédé les responsables de l'action publique et fait valoir que certaines aides publiques peuvent se justifier en dépit de leurs effets anticoncurrentiels. Les subventions agricoles, par exemple, ne semblent pas fondées d'un point de vue économique, mais elles revêtent une importante dimension sociale. Le Président demande alors au représentant du Maroc d'analyser cet arbitrage et d'évaluer la viabilité de cette stratégie à long terme.

Le représentant du Maroc déclare dans un premier temps que les principaux secteurs de l'économie marocaine sont l'agriculture et les PME. Ces deux secteurs appellent une intervention de l'État en raison de l'intensité de la concurrence internationale. Les aides publiques sont donc un instrument de cohésion sociale et de maintien de l'emploi. Elles prennent différentes formes et il y a lieu de noter que les subventions directes sont interdites au Maroc depuis l'an 2000. Le gouvernement marocain a donc pris plusieurs mesures liées à la crise, notamment à l'attention des entreprises exportatrices. Le représentant du Maroc souligne néanmoins que ces mesures ne sont pas discriminatoires, car chaque entreprise répondant à des critères objectifs prédéfinis peut bénéficier de ce dispositif. Il insiste sur l'importance du rôle consultatif joué par l'Autorité de la concurrence. De plus, il observe qu'en vertu de plusieurs accords commerciaux, le Maroc est dans l'obligation de proscrire les subventions qui faussent les échanges avec l'Union européenne.

4. Les mesures pouvant être appliquées pour améliorer l'évaluation et le contrôle des aides publiques et des subventions

Le Président présente le quatrième thème des débats de la table ronde. Comme l'examen du premier thème l'a montré, la situation est des plus hétérogènes en ce qui concerne le contrôle exercé, ou non, par les différents pays sur les aides publiques. On peut donc se demander comment contrôler les aides

publiques et les subventions. Certaines contributions ont présenté des éléments intéressants à cet égard, concernant leur traitement *ex ante* ou *ex post*. L'Ukraine, par exemple, a entrepris de mettre en place un système de suivi des aides publiques conforme à l'accord de libre-échange conclu avec l'Union européenne. Un groupe de travail a élaboré, avec l'assistance technique de l'UE, un concept préliminaire de système d'aides publiques devant servir de base à la future législation sur les aides publiques.

Le Président demande au représentant de l'Ukraine d'exposer les réalisations de ce groupe de travail et d'expliquer les étapes qui restent à franchir pour mettre en œuvre un système de suivi des aides publiques qui soit efficient. Le représentant de l'Ukraine souligne tout d'abord que, dans son pays, il existe un consensus sur la nécessité de mettre en place un système transparent de contrôle des aides publiques. Le 13 janvier 2010, une proposition de loi a été adoptée à cette fin par le Parlement. Élaborée par la Commission de lutte contre les monopoles avec le soutien du gouvernement, elle poursuit cinq grands objectifs : (i) la création d'un système de suivi des aides publiques ; (ii) l'inventaire de toutes les aides publiques accordées en Ukraine ; (iii) la rédaction d'orientations générales visant à aider les autorités publiques à faire la part entre les effets positifs et les effets négatifs d'une aide publique ; (iv) la présentation de rapports annuels sur les volumes et les formes des aides publiques et des subventions octroyées en Ukraine ; et (v) l'établissement d'un mécanisme de contrôle des aides publiques. Ces mesures devraient permettre de minimiser les effets néfastes des aides publiques et des subventions sur la concurrence. Le ministère des Finances sera responsable de la mise en œuvre des quatre premiers objectifs, la Commission de lutte contre les monopoles étant chargée d'évaluer l'impact des aides publiques sur la concurrence. Le représentant de l'Ukraine conclut son intervention en relevant que l'adoption de cette proposition de loi a contribué à la réalisation des engagements internationaux de son pays.

Le Président s'adresse ensuite au représentant de l'Ancienne République Yougoslave de Macédoine (ARYM). Il constate que la contribution de l'ARYM met l'accent sur les conditions draconiennes attachées à l'octroi d'une aide aux entreprises en difficulté. Ces conditions portent par exemple sur le remboursement des prêts spéciaux et sur la contribution du bénéficiaire à l'amélioration des conditions de marché. Il demande au représentant de l'ARYM de décrire avec plus de détail les modalités du contrôle *ex post*. En particulier, quelles sont les sanctions qui peuvent être prises à l'encontre des entreprises qui ne satisfont pas à ces conditions ? Certaines affaires récentes méritent-elles d'être mentionnées ?

Le représentant de l'ARYM explique que la Commission de protection de la concurrence est l'institution responsable du contrôle des aides publiques et que les règles applicables à ces aides depuis 2004 sont parfaitement conformes à la législation de l'Union européenne. Avant d'être mises en œuvre, les aides publiques doivent être portées à la connaissance de la Commission de protection de la concurrence et recevoir son aval. La Commission peut également imposer le remboursement d'une aide illicite. Jusqu'à présent, elle a ouvert trois procédures d'enquête officielles pour soupçons d'incompatibilité des aides publiques. Dans deux de ces affaires, l'aide accordée a été jugée illicite et a donc dû être remboursée. Ces deux affaires portaient sur des cessions de terrains détenus par des entreprises publiques à un prix inférieur au marché. Suite à la décision de recouvrer l'aide allouée, le bénéficiaire a dû s'acquitter, dans chacune des affaires, de l'intégralité du prix du terrain pratiqué sur le marché. Les deux décisions de la Commission ont donné lieu à une procédure d'appel devant le tribunal administratif et sont aujourd'hui dans l'attente d'un jugement.

Le Président s'adresse à l'Espagne et constate que les aides espagnoles doivent de fait être conformes aux règles de l'UE. Toutefois, les aides publiques *de minimis* ne relèvent pas de la compétence de la Commission européenne. Pour ce type d'aides, la loi espagnole sur la concurrence a doté l'Autorité de la concurrence d'un instrument de contrôle *ex post.* Le Président demande au représentant de l'Espagne de commenter les dispositions intéressantes. En particulier, à quelles lacunes du contrôle des aides publiques exercé par l'UE cette loi a-t-elle remédié ?

Le représentant de l'Espagne explique que la Loi espagnole sur la concurrence de 2007 permet à l'Autorité nationale de la concurrence d'analyser les dispositifs d'aides publiques à sa propre initiative ou sur requête des administrations. L'objectif est d'évaluer les effets potentiels de ces mécanismes sur la concurrence. Si les mesures publiques susceptibles de constituer une aide entrent dans les attributions de l'UE, l'Autorité de la concurrence recommande ensuite leur notification à la Commission. Deux affaires récentes importantes (concernant une proposition de soutien à l'industrie houillère et une loi relative au financement de la télévision publique) ont donc été signalées à la Commission. Dans les cas où le seuil *de minimis* n'est pas franchi, l'Autorité de la concurrence publie des rapports évaluant les avantages et les inconvénients de la mesure considérée. Ces rapports mettent en garde les autorités publiques contre les répercussions négatives des mesures envisagées et s'emploient à proposer des solutions de substitution qui créent moins de distorsions. De plus, l'Autorité de la concurrence a publié son premier rapport annuel en 2009. Ce rapport était essentiellement méthodologique et destiné à établir les critères économiques utilisés pour évaluer les aides publiques. Par ailleurs, le représentant de l'Espagne explique que l'Autorité de la concurrence est pourvue d'un instrument de contrôle *ex post*. Elle est habilitée à intenter des actions en justice lorsqu'une initiative administrative entrave le maintien d'une concurrence efficace sur les marchés. Cet instrument n'a pas encore été utilisé, mais il est apparu comme un puissant outil de dissuasion dans les relations qu'entretient l'Autorité de la concurrence avec les administrations.

Le Président s'adresse ensuite au représentant de la Croatie. Il fait observer que, selon la contribution écrite de ce pays, plusieurs enquêtes ont été ouvertes à la suite de plaintes faisant état d'un traitement discriminatoire par rapport à des concurrents bénéficiant d'aides publiques, en particulier dans le secteur du textile. Le Président invite le représentant de la Croatie à présenter brièvement une ou deux affaires de ce type.

Le représentant de la Croatie explique que l'Autorité croate de la concurrence est responsable de la mise en œuvre de la réglementation sur les aides publiques. Elle a déjà ouvert plusieurs enquêtes qui sont toutes en instance. En Croatie, la loi sur les aides publiques établit les conditions et règles générales applicables à l'autorisation, au suivi et au recouvrement des aides publiques. Ces aides se définissent comme des dépenses ou de moindres recettes de l'État effectives ou potentielles, accordées sous quelque forme que ce soit, qui faussent ou risquent de fausser la concurrence en favorisant certains bénéficiaires. Les aides publiques qui correspondent à cette définition sont proscrites par la loi. Néanmoins, les aides publiques peuvent servir à indemniser les victimes de dommages causés par des catastrophes naturelles exceptionnelles ; elles peuvent alors être déclarées compatibles avec la loi, mais elles sont soumises à l'autorisation préalable de l'organisme en charge de la concurrence. L'Autorité de la concurrence supervise la mise en œuvre des aides publiques autorisées de sa propre initiative ou sur requête de toute entité ayant un droit sur ces aides. Lorsque l'Autorité établit que des irrégularités ont été commises dans le suivi de la mise en œuvre des aides publiques, elle peut prendre une décision enjoignant l'organisme qui octroie l'aide ou le bénéficiaire de cette aide de remédier aux irrégularités en question dans les trois mois.

Le Président demande ensuite au Comité consultatif économique et industriel auprès de l'OCDE (BIAC) d'exposer son point de vue sur la méthode la plus indiquée pour réaliser une évaluation économique efficiente *ex ante* et *ex post* d'une aide publique. Le représentant du BIAC souligne que les entreprises sont favorables à une évaluation, au cas par cas, des répercussions des subventions sur la concurrence. Il explique que les autorités nationales ne peuvent à elles seules contrôler les aides publiques et les subventions car bon nombre d'entre elles mettent en jeu des questions internationales. Elles doivent néanmoins promouvoir autant que possible la transparence des aides publiques. Il relève également que la crise financière a éclairé les effets des subventions sous un jour nouveau. Elle a montré qu'elles peuvent aussi avoir des retombées positives, car elles peuvent contribuer à corriger les défaillances du marché. Selon le représentant du BIAC, les aides publiques ont permis de sauver de nombreux producteurs efficients qui sans cela auraient fait faillite lorsque la source du crédit s'est tarie.

S'agissant de l'évaluation *ex ante* des aides publiques, le représentant du BIAC salue l'introduction par la Commission européenne de la Procédure simplifié qui accélère le traitement de nombreuses affaires. Pour le représentant du BIAC, la différence entre l'UE et l'OMC est que le principal objectif de l'UE aura été l'intérêt économique commun de la communauté européenne. À l'inverse, l'OMC ne s'est pas intéressée au bien commun, mais davantage à la question de savoir si un avantage indu a été octroyé à un concurrent donné. De plus, les règles de l'OMC prévoient uniquement un contrôle *ex post*, ce qui s'avère efficient uniquement si l'on applique des mesures compensatoires sur le marché où le dommage a été occasionné. Quoi qu'il en soit, ainsi que le précise le représentant du BIAC, de telles mesures nuisent souvent aux consommateurs car elles entraînent des hausses de prix.

Le Président s'adresse ensuite au Pérou. Le représentant du Pérou indique que son pays ne s'est pas encore doté d'un dispositif complet pour analyser les aides publiques. S'agissant des interventions menées par les pouvoirs publics par le biais des entreprises publiques, il existe des contrôles *ex ante* et *ex post. Ex post,* les entreprises peuvent déposer plainte auprès de l'Autorité de la concurrence si elles estiment que le comportement d'une entreprise publique leur porte indument atteinte. *Ex ante*, les pouvoirs publics sont soumis à un contrôle en trois étapes lorsqu'ils créent de nouvelles entreprises publiques : (i) la participation de l'État à l'activité de l'entreprise doit être autorisée par une loi spécifique et elle doit alors être approuvée par le Congrès ; (ii) l'intervention de l'État ne doit ni empêcher l'entrée de nouveaux concurrents sur le marché ni en exclure les concurrents en place ; et (iii) l'État n'est autorisé à participer aux activités d'une entreprise que lorsque cela sert l'intérêt public.

Enfin, le Président demande au trois experts qui participent à la table ronde de présenter leurs conclusions.

M. Amadou Dieng insiste tout d'abord sur la différence existant entre les aides isolées et les dispositifs généraux. Selon lui, ces dispositifs généraux se justifient d'un point de vue économique dans la majorité des cas. Le problème important est celui du suivi de la mise en œuvre de l'aide. Ce suivi doit s'effectuer au cas par cas. La plupart des distorsions, en effet, ne viennent pas de l'aide elle-même mais de sa mise en œuvre. Il importe ainsi de confier aux autorités de la concurrence le contrôle de la mise en œuvre de l'aide. Le contrôle *ex post* est donc tout autant nécessaire que le contrôle *ex ante*.

M. David Spector analyse la question du critère d'établissement de la preuve dans les affaires d'aides publiques. Il établit une comparaison entre les affaires de fusions et celles qui traitent des aides publiques. Dans les deux cas, les autorités de la concurrence évaluent les avantages et les inconvénients : les efficiences possibles d'une part et les effets anticoncurrentiels possibles de l'autre. Ce faisant, les autorités doivent, selon M. Spector, partir d'un point de vue *a priori* légèrement négatif : en principe, les aides devraient être proscrites à moins de remplir certaines conditions. La raison en est que certains de leurs effets dommageables sont très indirects et ne se prêtent que difficilement à une évaluation. La recherche d'une rente et les incitations négatives résultant d'une faible contrainte budgétaire illustrent les effets indirects néfastes des aides publiques qui ne se limitent pas au secteur où l'aide est accordée. De même, le dommage occasionné par le coût d'opportunité élevé des fonds publics est aussi un effet indirect des aides publiques et, en règle générale, il n'est pas pris en compte dans l'évaluation des avantages et des inconvénients d'une aide. Selon M. Spector, toutes ces raisons conduisent à adopter une présomption négative et appellent un critère d'établissement de la preuve relativement strict avant d'estimer qu'une aide est justifiée.

M. Michael Thöne formule trois commentaires au sujet des débats. Premièrement, il convient que le contrôle des subventions doit être exercé au cas par cas. Il regrette toutefois que les autorités de la concurrence se concentrent par trop sur des affaires spécifiques sans livrer d'évaluations générales de la politique menée par les pouvoirs publics en matière d'aides publiques. De telles évaluations pourraient être particulièrement utiles pour améliorer la transparence et la dissuasion. Deuxièmement, M. Thöne

encourage les autorités de la concurrence à considérer les aides publiques dans une perspective plus large. Elles doivent non seulement faire la part des effets positifs et des effets négatifs d'une mesure donnée, mais aussi déterminer si la décision correspondante était justifiée ou non de prime abord. Enfin, il déclare, au sujet de l'intervention du représentant de la Pologne, qu'il juge très intéressante l'idée de contraindre les entreprises bénéficiant d'une aide publique à évaluer l'impact négatif que cette aide pourrait avoir sur leurs concurrents.

Le Président demande alors au BIAC de commenter les affaires d'aides accordées aux entreprises publiques. Le représentant du BIAC déclare que les entreprises publiques sont pour lui un sujet de préoccupation, en particulier leur capacité d'éviction et de discrimination à l'encontre de leurs concurrents en amont et en aval. Il reconnaît cependant qu'elles ne sont pas nocives en elles-mêmes et il affirme que, pour évaluer les effets d'une aide, il faut tenir compte davantage des dommages occasionnés à la concurrence que de ceux subis par les concurrents.

Le Président de la session, M. Mestassi, demande à M. Frédéric Jenny de formuler ses conclusions. M. Jenny met en relief quelques points qui ont émergé du débat. Premièrement, il constate que, sur la question des aides publiques, les pays membres et non membres de l'OCDE, pays développés ou en développement ne sont pas divisés. Comme l'a montré M. Spector, cette question revêt une grande importance dans l'ensemble des pays. Deuxièmement, M. Jenny constate qu'il n'existe pas de préjugé systématique à l'encontre des aides publiques. Ainsi que l'a expliqué le Commissaire Almunia, on a de bonnes raisons de penser que les aides publiques se justifient dans certaines circonstances, notamment pour corriger les défaillances du marché, ou pour promouvoir des investissements qui génèrent des externalités positives. Les économistes sont parfaitement au fait de ces objectifs. D'autres raisons sont plus politiques : elles touchent à la promotion d'objectifs sociaux, qui peuvent être justifiés même s'ils ne sont pas totalement conformes à l'analyse économique classique, qui tend à privilégier le recours aux transferts directs sans effets de distorsion. Le Maroc, par exemple, a expliqué très clairement que certaines visées sociales doivent être appréciées au regard des considérations d'efficience : les pouvoirs publics dans leur ensemble ne sont pas uniquement attentifs à la concurrence, mais aussi à des enjeux plus vastes. Troisièmement, M. Frédéric Jenny constate que les interventions des représentants et les contributions des pays ont montré que la quasi-totalité des secteurs de l'économie bénéficient d'aides publiques. Cela étant, l'idée que les aides publiques ont tendance à avantager certains concurrents a fait l'unanimité. Cela concerne la concurrence entre les entreprises, mais aussi entre les nations. Une grande partie des aides publiques peuvent avoir des répercussions sur les échanges internationaux.

Selon M. Jenny, tout cela montre qu'il est impératif de mettre en place un système de contrôle des aides publiques qui soit efficient. Le contrôle des aides publiques s'exerce au niveau national, régional et multilatéral. Il doit se caractériser par les éléments suivants : transparence, non-discrimination et veiller à ce que les aides ne faussent pas la concurrence. Cela passe par une évaluation des répercussions des aides au cas par cas. Dans chaque circonstance, il convient de se demander, de façon approfondie, si l'aide en jeu est le moyen le plus indiqué pour atteindre l'objectif visé. Les débats font également ressortir que les autorités de la concurrence peuvent intervenir de bien des manières. Celles qui ne sont pas strictement chargées de contrôler les aides publiques peuvent tout de même influer sur les décisions des pouvoirs publics à l'aide de notes d'orientation, de différentes activités de sensibilisation et d'interventions auprès des tribunaux.

CONTRIBUTIONS

CONTRIBUTION FROM ARGENTINA

COMPETITION, STATE AIDS AND SUBSIDIES

-- Argentina --

I. The use of state aids in your country

1. Does your country regularly engage into the following practices? If so, could you provide information about: (i) the affected sectors; (ii) an order of magnitude of the corresponding amounts, and (iii) the evolution over time? If possible, distinguish between government-owned and private firms.

a. Direct subsidies to companies;

1. There have been some cases where the state gave direct subsidies to agriculture and diary industry, though the net subsidy had a debit balance because these sectors had to pay export taxes which were higher than the state aid itself.

b. Tax breaks to selected companies or selected sectors;

2. No.

c. The granting of government-owned inputs (such as land, bandwidth, government facilities) to companies at a price below market levels (possibly a regulated price);

3. No.

d. Government purchases at above-market prices;

4. No.

e. The granting of loans at below-market rates;

5. Yes. For example, there has been a specific case in the automotive industry, where the state granted General Motors a loan for developing a car in which the majority of components ought to be from national industry.

f. The provision of loan guarantees at below-market rates.

6. No.

2. To what extent have state aids in your country been motivated by the following goals? For each of them, please specify whether domestic and foreign firms have been treated differently.

a. Protecting employment (in the case of aid to ailing firms);

7. This has been the main goal the state had whenever granting aid to the private sector, requesting firms not to fire any employees.

b. Fostering innovation and the development of new sectors;

8. There are special funds for I+D though they are not very significant because of the amounts granted. It is almost addressed to small business.

c. Attracting firms to economically distressed regions;

9. There are some cases like the province of Tierra del Fuego where the electronic industry is entitled with tax exemptions, and San Juan, San Luis and Mendoza where the principle aim is to promote agricultural industries.

d. Remedying competition distortions created by the granting of aid by foreign governments;

10. Only under the regular procedures of antidumping remedies.

e. Inducing firms to supply goods or services deemed to contribute to the general interest in cases when market incentives alone were insufficient to ensure that these goods or services would be provided;

11. It happened in the dairy and meat industries, where the state had to intervene to ensure these products would be produced.

f. Palliating the undersupply of credit by the financial sector;

12. Yes.

g. Preventing strategic firms from being purchased by foreign companies.

13. There is a case in which a large and very important national diary company was into deep financial trouble. There was a proposal of purchase by a foreign company so the state mediated to help the local firm find the proper credit to solve its financial difficulties. The credit was granted by another country and it is being paid with products of the company.

3. What are your country's laws, and the actual practice, regarding the provision of government owned or government-controlled inputs? In which circumstances is an auction process mandatory? In which circumstances does a non-discrimination clause apply? In practice, what is the prevalence of auctions? If possible, please provide information about the way in which the following inputs have been allocated.

a. License to operate a mobile telephony network (with access to the corresponding bandwidth);

b. License to operate a television network;

c. Access to natural resources.

14. For answering all the previous questions, it is to say that the regulation so determines that auction process is mandatory.

15. All these cases have being allocated by auction process.

16. The non discrimination clause is the rule though there is a specific case in which it doesn't fully applies. This is the case of the "Compre Nacional" exemption, which is applicable for the provision of those inputs the state needs for the regular administrative function (The government should choose a national provider is his offer is no more higher that 10%).

17. The sole exemption of not use an auction process comes in the case of urgency of buying things under special cases (remedies in a natural disaster, etc.)

II. Aid to ailing companies, especially in the context of the financial crisis

1. In the context of the financial crisis, did your country provide emergency aid to some companies? If possible, please provide information on:

a. Specific rescue measures for banks and other financial institutions;

18. There were not "rescue measures" but a wider credit line from the Central Bank to the commercial banks.

b. Aid to industrial firms (for instance in the car industry).

19. The previously mentioned credit to General Motors.

2. What are the criteria that have been used when delineating the beneficiaries of emergency aid, as well as the amount or nature or the aid?

20. The specific needs from the taker, without discriminating between national or foreign firms but mainly regarding the maintenance of jobs.

3. Is aid to ailing companies in your country usually provided with conditions attached such as:

a. Clauses imposing at least partial reimbursement in the event of a return to better fortunes?

21. Banks already gave back the credits they've been granted with and in the case of the agriculture sector there is no reimbursement demand.

b. A cap on executive pay?

22. No.

c. Restructuring (for instance, the closing of unprofitable factories or branches)?

23. No.

d. Guarantees on total employment?

24. Yes.

e. Clauses prohibiting the use of government funds in order to engage in predatory strategies?

25. Not specified but predatory strategies are prohibiting by law.

f. An explicit commitment that the aid will be limited in time and will not be repeated?

26. No.

g. Commitments regarding the environmental impact of the recipient's activity?

27. No.

4. Does aid to ailing companies in your country sometimes take the form of temporary government ownership in return for capital injection? If so, are there examples where such policies allowed the government to turn a profit after the aided firm's situation improved?

28. There's been a recent situation with the national airline, afterwards privatised. As the owner was going through financial difficulties, the state bought the company. The owners were the same of Air Commet that recently falls dawn.

III. Legal restrictions on state aids

1. Do competition authorities exert some control on state aids in your country? If so, has this control been weakened in the context of the financial crisis? Are there specific rules about aid to ailing firms, or aid to R&D? Please detail each, briefly.

29. No.

2. Is the amount and nature of state aids limited by virtue of regional trade agreements to which your country participates (not taking into account WTO disciplines)? If so, is there a supranational control mechanism? Has it ever been used? In competition cases?

30. No, but there are bilateral negotiations when the imbalance starts affecting the local firms.

3. Did the competition authority in your country ever have to consider a case involving state aids? If possible, please distinguish the following (possibly overlapping) types of cases:

a. A private company complaining about predatory strategies (or unfair practices) implemented by a public company or by a private company benefitting from public funds (for instance in the case of a firm providing a public service and using the corresponding revenues in order to compete aggressively on an other market);

31. No.

b. A company complaining about discriminatory treatment, in comparison to a competitor benefitting from state aids;

32. No.

c. Cases involving the existence of price regulation;

33. No.

d. Cases involving abuse of dominance or merger cases (for example, in the latter, would remedies be affected if the state aid were to be withdrawn?).

34. No.

3. Are government-owned companies subject to competition law to the same extent as private companies in your country? Are there any specific mechanisms for their implementation?

35. Yes, as any other private company.

4. To what extent are state aid issues addressed in your competition authority's advocacy activity? What is your competition authority's message on state aids? Is this message well understood and taken duly into account by other parts of the government? Please describe briefly the relevant institutional mechanism(s), if any.

36. The National Commission for the Defense of Competence has given its opinion publicly, in several conferences, advising the limitation in time and amount of these state aids, in order to minimise market distortions.

37. These recommendations can be resumed as followed:

38. These measures have to be exceptional, only justified by an interest superior to competence.

39. They ought to be of the slightest intensity possible, in amount and in duration.

40. They must be very transparently granted.

41. As for the objective of their existence, they should be non discriminatory, directed to benefit the sector instead of the company, or at least directed to benefit the firm instead of the owner of it. Besides, the benefits should be published.

42. They should tend to benefit the domestic market, but always considering the regional and global context.

43. Finally, the measures should try to promote international competitive companies which could offer goods and services of the greatest aggregated value.

CONTRIBUTION FROM CROATIA

COMPETITION, STATE AIDS AND SUBSIDIES

-- Croatia --

1. Introduction

1. The scope of the State Aid Act of the Republic of Croatia (2005) is to set out general conditions and rules for authorisation, monitoring the implementation and recovery of state aid for the purpose of the implementation of the international commitments undertaken by the Republic of Croatia, arising under the Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (further: SAA), whereas, the state aid to agriculture and fisheries is not covered by the same Act.[1] The provider of state aid is the Republic of Croatia through its authorised legal entities and central public administration authorities, local and regional self-government units and any legal entity granting or administering state aid. The beneficiaries of state aid are legal and natural persons who perform an economic activity and thereby participate in the trade of goods and services and who receive some form of state aid.[2]

2. The Definition of State Aid

2. Within the meaning of the State Aid Act, state aid represents any actual and potential expenditures or decreased revenue of the state granted in any form whatsoever by the aid provider, which distorts or threatens to distort competition by favouring certain aid beneficiaries, insofar as it may affect the international commitments undertaken by the Republic of Croatia. Furthermore, the state aid scheme represents any legal document on the basis of which, without any additional implementing measures required, individual aid may be granted to ex ante unspecified aid beneficiaries, and any legal document on the basis of which state aid which is not linked to a particular project may be awarded to one or more aid beneficiaries for an indefinite period of time and/or in an indefinite amount. Finally, individual state aid represents any state aid which is not granted under the aid scheme, and any state aid granted under the aid scheme which is subject to additional authorisation from the side of the Croatian Competition Agency.[3]

3. General Prohibition and Exemptions from the General Prohibition

3. Based on the Croatian State Aid Act, state aid in any form whatsoever, which distorts or threatens to distort competition by favouring certain aid beneficiaries, insofar as it may affect the international commitments undertaken by the Republic of Croatia shall be incompatible with the Law.[4] However, state aid to mitigate or compensate the damage caused by natural disasters, exceptional or war occurrences may be declared as compatible with the Law, subject to prior authorisation of the Croatian Competition Agency, if the same does not affect the international obligations based on the Republic of Croatia's international

1. Art. 1. of the Act.

2. Art. 2. of the Act.

3. Art. 3. of the Act.

4. Art. 4. of the Act.

agreements with third countries. Therefore, the following kinds of state aid may be considered to be compatible with the State Aid Act: (i) state aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (ii) state aid to promote culture and heritage conservation; (iii) state aid to promote the execution of important international projects or to remedy a serious disturbance in the economy; (iv) state aid to facilitate the development of certain economic activities or of certain economic areas; (v) state aid to legal and natural persons which are in accordance with special rules entrusted with the operation of services of general economic interest or granted special rights to perform tasks assigned to them in the public interest, where in the case of absence of such aid these persons would be obstructed in the performance of the particular tasks assigned to them and provided that the aid in question exclusively covers the compensation for the performance and implementation of the tasks concerned.

4. Authority which holds Jurisdiction over the Assessment and Authorisation of the State Aids

4. The Croatian Competition Agency (hereinafter: the Agency) is the authority which holds jurisdiction over the assessment, authorisation, and monitoring of the implementation of state aid and is entitled to order the recovery of unlawfully granted state aid or aid used in contravention of the Law.[5] The Agency is entrusted with the following empowerments: (i) assessment and consideration of state aid proposals and aid schemes within annual and multi-annual state aid approval plans; (ii) monitoring of the implementation and effects of state aid granted and empowerment to order the recovery of unlawfully granted state aid or aid used in contravention of the Law; (iii) collecting, processing and registering the data in relation to the already granted state aid; (iv) collecting data on the use and effects of state aid granted; (vi) keeping the state aid register; (vii) cooperation with the authority responsible for state aid to agriculture and fisheries in the preparation of annual reports on state aid; (viii) cooperation in the budget preparation process with the authorities responsible for the preparation of the state budget and the budgets of regional and local self-government units; (ix) reporting on granted amounts of the state aid to the Croatian Parliament annually; (x) cooperation with international authorities, in compliance with the international commitments undertaken by the Republic of Croatia; (xi) participation in the preparation of draft proposals of the legislation concerning state aid, as well as promoting and encouraging improvements in the state aid system; (xii) performing other activities relating to the implementation of the State Aid Act.[6]

5. Proceedings in Front of the Agency

5. General: The Agency is empowered to request in writing all data and documents it deems necessary for the authorisation and assessment of the particular state aid case, from the aid provider and aid beneficiary, respectively.[7] Furthermore, the Agency issues Preliminary Binding Opinions on any draft proposals of laws which contain state aid before its submission to the Government of the Republic of Croatia, upon the request of the ministries and other public administration authorities, that grant the state aid to various beneficiaries.[8] The Preliminary Binding Opinion is usually submitted to the Government of the Republic of Croatia and Croatian Parliament along with draft proposals of laws and other regulations containing state aid. Ordinarily the Agency issues opinions within 30 days after the receipts of the proposals from the side of ministries and other authorities in charge. The Agency's authorisation of the state aid can follow a priori and/or ex post. Namely, before any legislative proposals, which contain state aid, would be submitted to the Government of the Republic of Croatia for its adoption, ministries and other

5. Art. 5. of the Act.

6. Art. 6. of the Act.

7. Art. 9. of the Act.

8. Art. 10. of the Act.

public administration authorities are obliged to notify the state aid proposals in question to the Agency for its authorisation (authorisation a priori).[9]

6. Recovery and ex post Authorisation of State Aid[10]: State aid which is granted without authorisation of the Agency is presumably illegal. In such cases, the Agency shall order recovery of the state aid used, increased by statutory interest on arrears payable from the date on which the unlawful aid was first used. However, without prejudice to that stated above, the Agency may in duly justified cases grant an ex post authorisation of state aid if it finds that the state aid in question is compatible with the state aid rules. The ex post authorisation of the Agency may lay down particular conditions and time limits subject to which the state aid in question may be implemented.

7. Monitoring the Implementation and Recovery of State Aid: The Agency shall monitor the implementation of authorised state aid ex officio or upon the proposal of aid beneficiaries, aid providers and any legal or natural person having a legal interest. In such cases where the Agency might establish any irregularities in monitoring the implementation of state aid, there can be adopted a decision ordering the aid provider and/or aid beneficiary to remedy the irregularities in question within no longer than 3 months[11]. In the case that the aid provider and/or aid beneficiary would not remedy the irregularities in question within the given time limit, the Agency shall order the aid provider and/or aid beneficiary recovery of the awarded state aid in the part in which irregularities have been established, increased by statutory interest on arrears payable from the date on which the established irregularities occurred. Furthermore, if the Agency would establish that a particular authorised aid scheme was no longer compatible with the international commitments undertaken by the Republic of Croatia, it shall issue a recommendation proposing to the aid provider concerned substantive amendment of the aid scheme or abolition of the aid scheme. Following the Agency's request, the aid provider concerned shall initiate the procedure for amending or abolishing the aid scheme in question within 90 days from being noticed, and then is obliged to inform the Agency about the measures taken without further delays.[12]

8. State Aid Data and State Aid Register: The Competition Council shall lay down the form and content of the notification and the method of data collection and keeping the State Aid register.[13]

9. Publication: Opinions and decisions of the Agency and judgments rendered by the court of competent jurisdiction which are based on the opinions and decisions concerned shall be published in the Official Gazette of the Republic of Croatia.[14] Regulations and bylaws necessary for the implementation of the State Aid Act are also published in the Official Gazette, and in many cases also available on the Agency's web site – www.aztn.hr.

9. Art. 11. of the Act.

10. Art. 14. of the Act.

11. Art. 15. of the Act.

12. Art. 16. of the Act.

13. Art. 17. of the Act.

14. Art. 18. of the Act.

6. Call for contributions by the OECD Secretariat for Session 1 on State Aids and Subsidies

I. The use of state aids in your country

1. Does your country regularly engage into the following practices? If so, could you provide information about: (i) the affected sectors; (ii) an order of magnitude of the corresponding amounts, and (iii) the evolution over time? If possible, distinguish between government-owned and private firms.

a. Direct subsidies to companies;

10. Yes

b. Tax breaks to selected companies or selected sectors;

11. Yes

c. The granting of government-owned inputs (such as land, bandwidth, government facilities) to companies at a price below market levels (possibly a regulated price);

12. No

d. Government purchases at above-market prices;

13. No

e. The granting of loans at below-market rates;

14. No

f. The provision of loan guarantees at below-market rates.

15. Yes

2. To what extent have state aids in your country been motivated by the following goals? For each of them, please specify whether domestic and foreign firms have been treated differently.

16. Domestic and foreign firms are equally treated

a. Protecting employment (in the case of aid to ailing firms);

17. Yes (through restructuring aids)

b. Fostering innovation and the development of new sectors;

18. Yes

c. Attracting firms to economically distressed regions;

19. Yes

d. Remedying competition distortions created by the granting of aid by foreign governments;

20. No

e. Inducing firms to supply goods or services deemed to contribute to the general interest in cases when market incentives alone were insufficient to ensure that these goods or services would be provided;

21. Yes, Services of General Interest (SGI's)

f. Palliating the undersupply of credit by the financial sector;

22. No

g. Preventing strategic firms from being purchased by foreign companies.

23. No

3. What are your country's laws, and the actual practice, regarding the provision of government-owned or government-controlled inputs? In which circumstances is an auction process mandatory? In which circumstances does a non-discrimination clause apply? In practice, what is the prevalence of auctions? If possible, please provide information about the way in which the following inputs have been allocated.

a. License to operate a mobile telephony network (with access to the corresponding bandwidth);

24. Not applicable under state aid statutes

b. License to operate a television network;

25. Not applicable under state aid statutes

c. Access to natural resources.

26. Not applicable under state aid statutes

II. Aid to ailing companies, especially in the context of the financial crisis

1. In the context of the financial crisis, did your country provide emergency aid to some companies? If possible, please provide information on:

27. Within the framework for combating the global financial crisis, the Croatian Government had created 4 programmes of aid through the Croatian Bank for Reconstruction and Development (HBOR) and 1 programme of aid through the Ministry of Economy and Labour.

a. Specific rescue measures for banks and other financial institutions;

28. No

b. Aid to industrial firms (for instance in the car industry).

29. Yes (except for the car industry)

2. What are the criteria that have been used when delineating the beneficiaries of emergency aid, as well as the amount or nature or the aid?

30. There have been used the criteria measured for the firms that have been in financial crisis.

3. Is aid to ailing companies in your country usually provided with conditions attached such as:

a. Clauses imposing at least partial reimbursement in the event of a return to better fortunes?

31. No

b. A cap on executive pay?

32. Yes

c. Restructuring (for instance, the closing of unprofitable factories or branches)?

33. Yes

d. Guarantees on total employment?

34. No

e. Clauses prohibiting the use of government funds in order to engage in predatory strategies?

35. No

f. An explicit commitment that the aid will be limited in time and will not be repeated?

36. Yes

g. Commitments regarding the environmental impact of the recipient's activity?

37. Yes

4. Does aid to ailing companies in your country sometimes take the form of temporary government ownership in return for capital injection? If so, are there examples where such policies allowed the government to turn a profit after the aided firm's situation improved?

38. Yes

III. Legal restrictions on state aids

1. Do competition authorities exert some control on state aids in your country? If so, has this control been weakened in the context of the financial crisis? Are there specific rules about aid to ailing firms, or aid to R&D? Please detail each, briefly.

39. Yes

2. Is the amount and nature of state aids limited by virtue of regional trade agreements to which your country participates (not taking into account WTO disciplines)? If so, is there a supranational control mechanism? Has it ever been used? In competition cases?

40. No

3. Did the competition authority in your country ever have to consider a case involving state aids? If possible, please distinguish the following (possibly overlapping) types of cases:

a. A private company complaining about predatory strategies (or unfair practices) implemented by a public company or by a private company benefiting from public funds (for instance in the case of a firm providing a public service and using the corresponding revenues in order to compete aggressively on another market);

41. So far the Croatian Competition Agency did not have such a case, but if we had it we would act upon the complaint.

b. A company complaining about discriminatory treatment, in comparison to a competitor benefiting from state aids;

42. Yes, we opened several investigations upon the complaint (sector of Textile Industry).

c. Cases involving the existence of price regulation;

43. No

d. Cases involving abuse of dominance or merger cases (for example, in the latter, would remedies be affected if the state aid were to be withdrawn?).

44. No

4. Are government-owned companies subject to competition law to the same extent as private companies in your country? Are there any specific mechanisms for their implementation?

45. Yes absolutely

5. To what extent are state aid issues addressed in your competition authority's advocacy activity? What is your competition authority's message on state aids? Is this message well understood and taken duly into account by other parts of the government? Please describe briefly the relevant institutional mechanism(s), if any.

46. State aid and competition advocacy are well done and prepared carefully; these are inevitable activities of the Croatian Competition Agency with a long tradition of implementation. The relevant institutional mechanisms are through the annual reports on state aids which are submitted to the Croatian Parliament.

CONTRIBUTION FROM EGYPT

COMPETITION, STATE AIDS AND SUBSIDIES

-- Egypt --

1. Introduction

1. State aid policy has a part to play in the transformation of a planned economy into an open market economy with free competition. However, a state aid policy is not a stand-alone regulatory too, it certainly has its impact on competition policy. The intensity of this impact depends on the level of the state intervention, the benefitting sector where the undertaking concerned is functioning and other factors. Reflections on the interface between state aid, competition law and policy have been drawn worldwide. Nonetheless, the awakening in this field of research has not been accompanied by much thinking in Egypt. Studies investigating into the consequences and impacts of state aid on the implementation of competition law in Egypt have lagged behind, and no single work can be mentioned. It is both because the literature on competition law and policy has taken little attention in Egypt; and the Egyptian competition law[1] in 2005 and its Executive Regulations do not contain prohibition on state aid, which distorts or may distort competition in the market. Moreover, the obligations on the government to adopt state aid policy that does not distort competition as mentioned in the Egypt-EU trade agreement[2] as well as its Action Plan,[3] were expected to be implemented on June 2009. Nothing materialised in this regard until today.

2. Egypt's state aid or subsidies policy has not been formulated in the general economic framework. In other words, there is no concrete definition of what qualifies a certain practice by the government as a state aid. No mechanism for identifying or controlling such practices exists. There are no laws that regulate or define state aid in Egypt.[4] Therefore the term employed in most of the literature on aid focussed on subsidies and not state aid.

3. Egypt has used subsidies as an active policy choice since the World War II. Subsidies and other artificial supports were a necessary part of industrial policy in Egypt, however, laws were neither promulgated to define such a policy nor to prohibit it when it is harmful to competition policy, as will be shown below.

2. Characteristics of Subsidies

4. The financial transfers and other forms of direct and indirect aid to entire sectors or individual enterprises were very frequently employed to boost economic development and to promote employment in

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1 Law No. 3 of 2005 promulgating the law on the protection of competition and the prohibition of monopolistic practices.

2 O.J L.345, 31/12/2003, paragraph 0115-0116. The Agreement is replacing the 1977 Co-operation agreement.

3 O.J.L 230/19, "Recommendation No.1/2007 of the EU-Egypt Association Council of 6 March 2007".

4 Only the law of the State Budget No. 87 of the year 2005 defines subsidies as the transfer from the government to support producers or consumers to enhance the standard of living.

the more backward regions of the country as well as for the achievement of industrial policy objectives.[5] The responsibility for supervising and monitoring the subsidies in Egypt is under the competence of the Ministry of Finance. The Ministry of Finance grants subsidies directly to firms where the value of the aid and the recipient are known, as it is recorded in the State Budget. It can also grant subsidies indirectly through other Ministries. For instance, it could allocate a certain fund from the State Budget to the Ministry for Trade and Industry, which in its turn transfers the fund to the Egyptian Export Promotion Centre to grant aid to a given company or a group of companies. In the latter case only the value of the aid is known, but not the recipient.

5. The aid could take the traditional forms such as direct financial transfers, tax breaks, granting of government-owned inputs below market prices, government purchases above market prices, or the provision of loans below market rates. The aid could also take another form such as preferential treatment including regulations or enforcements. For example, the Egyptian Civil Aviation Law and its Executive Regulations explicitly mandate that no airline can be licensed to operate on internal routes that compete with the itineraries of currently operating Egyptian companies.

6. The term used by the government for the transfer of public resources from the state to economic entities or the general public is "Subsidies, Grants, and Social Advantages". The official figures data are usually reported in Chapter 4 of the State Budget. Some items can also be traced in Chapter 7 of the State Budget. The subsidies in Egypt are divided into two forms. A substantial part of the subsidies granted by the government is explicitly stated in the State Budget. These subsidies are mainly a tool to achieve social objectives, e.g. helping consumers with low income, encouraging economic activity for a certain area, or preventing the decline of an industry. The other form of subsidies does not appear explicitly in the State Budget.[6] A good example is some transfer granted by the Ministry of Finance to settle debts of some public sectors banks including Bank of Alexandria in the year 2005/2006.[7] This transfer is estimated at 1.27 billion Euros. Another example of aid granted by the Minister of Finance after the Prime Minister's approval to banks to retain the government share of profits for provisioning and improving these banks' financial viability. These voluntary retained earnings are estimated at 127 million to 381 million Euros for the past three years. The beneficiaries of subsidies in Egypt could be government-owned enterprises or private firms. The latter could include foreign owned companies.

3. The Allocation of Subsidies

7. The main component of subsidies granted by the Egyptian government target food and petroleum sectors. The programme of food subsidies had its beginning in the effort to cope with inflation after World War II. Since then food subsidies have increasingly become a crucial element in state aid and an important means to ensure political stability. Since the 1952 Coup d'état the government took major steps to support an equitable distribution of food and income in Egypt.[8] Since the appointment of the new cabinet of 2004,

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5 It is worth noting that a study conducted by the World Bank in 2005 "*Egypt-Towards a More Effective Social Policy: Subsidies and Social Net*" notes that the public social safety net in Egypt does not follow the typical programmes in many countries. It is devoted to consumer subsidies on food; energy subsidies to producers and consumers, which serves as important state aid; income-generation programmes that provide financial credit and in-kind support to the disadvantaged to foster entrepreneurship and business development; social insurance reflected in the pension scheme; Social Fund of Development programmes; and social assistance cash transfer from The Ministry of Insurance and Social Affairs.

6 The value of such subsidies does not show explicitly in the State Budget, however, it is issued by ministerial decrees or Prime Minister decisions to target certain sectors or industries.

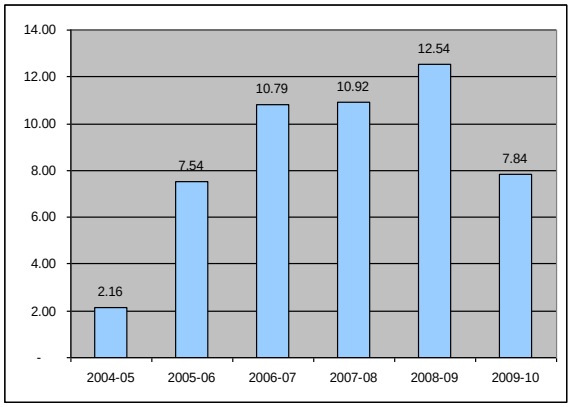
7 Minister of Finance, "the Fiscal Policy Statement" (2006) approved by the Parliament.

8 See above note 3, World Bank (2005), "*Egypt-Towards a More Effective Social Policy: Subsidies and Social Net*", 41.

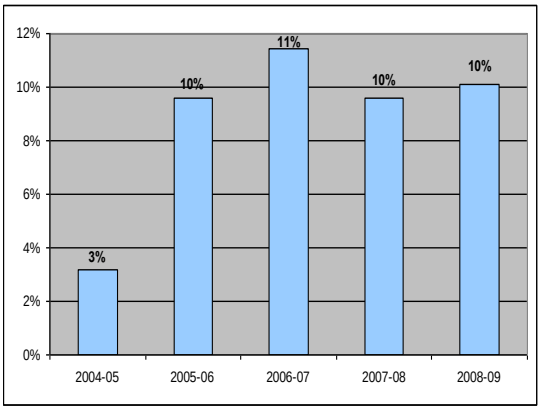
the government expanded food subsidies. In 2008-09 its financial cost reached 2.2 percent of the GDP. The same pattern can be witnessed in the energy subsidies, which increased dramatically in recent years. This was largely because of the growing gap between the rapidly increasing international prices and the slowly increase of domestic prices. The recent devaluation of the currency has further contributed to the increase in these subsidies. The petroleum subsidies are substantial with their economic cost reaching 6.4 percent of the GDP in 2008-09.

Table 1: Trend of Subsidies according to the State Budget from 2004 to 2009

A. Total Amount of subsidies in Billion Euros



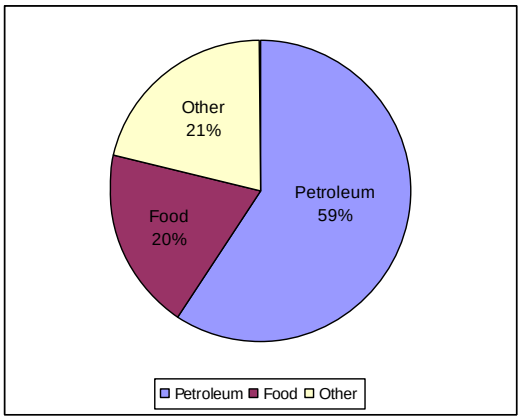
B. Percentage of the Subsidies to the GDP



Source: Ministry of Finance. The above figures are calculated as a percentage from the GDP from the State Budget years 2004 until 2009.

8. As shown in Table 1.A, the subsidies in Egypt reached its highest level in 2008-09 to be 12.5 billion Euros. This increase could be justified by the global financial crisis of 2008 to adjust its negative impact Table 1.B shows that the allocated subsidised in Egypt reached an average of 9 percent of the GDP from 2004 until 2009 (see Table 1.B above).

Figure 1: The Average of the Distribution of Subsidies by Sectors [years 2004 to 2009]



Source: Ministry of Finance' State Budget.

9. In addition, Figure 1 below illustrates that the gap between subsidies to the petroleum sector and the other sectors in the economy is quite large. Petroleum products receive 59 percent of the subsidies. Some of the aid to petroleum products is considered to serve energy-intensive industries (excluding the food and textile industries) but includes industries such as cement, steel, chemicals, fertilisers, aluminium.

As shown the food subsidies represent 20 percent. The remaining 21 percent of annual subsidies is directed to soft loans, employee training, and subsidies for farmers.

4. Interplay between State Aid and Competition Law and Policy

10. Although the introduction of competition law and policy in Egypt is without a doubt a significant economic phenomenon, it does not prohibit state aid, which distorts or may distort competition in the market. Therefore, the Egyptian competition authority (ECA) has not been involved in any occasions since its establishment with complaints from enterprises denouncing competition distortion effects of state subsidies being granted to the complainants' competitors. Saying that, Article 1 of the competition law sets the main objective as follows: "Economics activities shall be undertaken in a manner that does not prevent, restrict or harm competition in accordance with the provisions of the law." The broad sweep claimed by Article 1 in relation to the goal of the law begs the question on why subsidies or aids that have anticompetitive effects occurring in the market, or in other contiguous or unrelated markets through cross subsidisation practices, are not prohibited by the law.

11. Since the ECA started its activities in 2006, the ECA has conducted studies covering various sectors, food (e.g. sugar, meat, dairy products and edible oil), construction sector (e.g. cement, glass and steel), and chemicals (e.g. fertilisers). By reviewing these studies, the dynamics of different markets in Egypt, as well as the issue of setting forth the concept of subsidies and distortion of competition, the following issues seem to deserve further consideration.

12. First, subsidies are usually associated with the government intervention by fixing prices of the subsidised goods. This intervention creates a segment of the market that does not fall under the jurisdiction of the Egyptian competition law. As a consequence, the ECA investigates only the segment of the market that is free from government's regulations and subsidies. In the edible oil market study, the ECA only investigated 22 percent of such a market as the remaining 78 percent was subsidised. In this case as well as in other similar cases, the narrow analysis of the market may not reflect its real dynamics. Even worse, it could mislead the decisions on anticompetitive practices, and/or impede the implementation and enforcement of the law.

13. Second, the Egyptian economy is characterised by a high level of concentration. This concentration was revealed in the cement industry, where only three firms held more than 63 percent of such a market. Another example is the fertiliser market, where two companies control more than 90 percent. Garcia and Neven demonstrate that the significance of competition distortion resulting from a state aid is likely to increase in the presence of market concentration.[9] Thus, sustaining the current high level of subsidies in Egypt could greatly weaken the level of competition in the market. Moreover, it may reduce the attractiveness of the market to investors and hinder the growth of emerging sectors.[10]

14. Third, informal sector is considerably large in Egypt. This can be exemplified by the high ratio of the informal enterprises to the total small and medium enterprises, which approximately amounts to 82 percent. However, it is worth noting that some Egyptian firms operate simultaneously in both the formal and informal sector (by having underground activities). In that sense, these firms could reap all the benefits of operating formally such as subsidies. Busato, Chiarini, and De Angelis noted that subsidising such

9 J. Garcia and D. Neven, "*State Aid and Distortion of Competition: a Benchmark Model*", 6 HEI Working Paper (2005), Graduate Institute of International Studies.

10 For example, subsidising petroleum products could adversely provide people with no incentive to buy more fuel-efficient cars or switch to cleaner fuels.

enterprises may encourage them to increase their underground activities, as they will have less incentive to increase their reported capital and risk a reduction in the level of aid received.[11]

15. From the above one can deduce that subsidy policy, which is often reflected in public intervention as a tool to correct market failure and/or to achieve social objectives, is far from being a sufficient condition. It is hence required on policy grounds, at the national level, to show when the subsidy is not distorting competition and when it is necessary and proportionate to its objectives.

16. Finally, besides the requirements of defining and preventing state aid that distort competition at the national level, there is the requirements of the Egypt-EU association agreement signed in 2004 of the adoption of a clear definition of state aid and a national mechanism for collecting information on state aid in order to ensure the implementation of the competition Article (34.3) of the agreement. The reason is to ensure the prohibition of state aid that distorts competition according to Article 34. As stated in the EU-Egypt Action Plan, this mechanism for collecting information on state aid should be realised by exchanging with the EU an annual report on the total amount and distribution of state aid, as well as exchange of knowhow and experience in regard to state aid control regime. [12] Furthermore, the adoption of a state aid control regime and legislation was one of the requirements of the EU in the context of the approximation of Egyptian national law to that of the EU *acquis*, including a system of an *ex-ante* control of state aids, which distorts trade between the EU and Egypt.[13] This is to prepare Egypt's participation in the EU internal market.

5. A Step Ahead for Harmful State Aid and Distortion of Competition

17. This is the first encounter for Egypt with the subject of state aid and distortion of competition. As has been discussed, too much attention has sometimes been paid in the past to aid, and as seen the ratio of subsidies in Egypt to GDP has roughly tripled. Two main obstacles may result from this high state aid ratio and the lack of rules to regulate it in order to prevent aid that may distort competition. The first relates to bolstering vested interest by some producers to unproductive subsidy. The second obstacle is reducing the competitive playing field to favour firms in certain sectors that receive state aid whether directly or indirectly.

18. The law and its Executive Regulations are very much a work in progress and will, in all likelihood, be amended several times down the road, which will necessitate a reform in order to establish a precise definition of what constitutes state aid. This in turn will necessitate that the ECA should be equipped to investigate and control the aid that may be considered distorting competition and hence infringing the law. Therefore, the authority should take the appropriate measures regarding this issue one of which is the training of its employees for such aid rules. Therefore, more can be done at the competition authority level, such as developing competition scrutiny of state aid in order to reform the law to have provisions on this issue. This is to effectively deter and prevent the aid that is likely to distort competition. Criteria for intervention within competition policy against competition-distorting subsidies need to be developed and wider policy ground principles of good subsidy design need to be created. Moreover, the ECA should consider studying empirical evidence from other developing countries such as the Central and Eastern countries when preparing for their accession to the EU, to draw the relevant lessons in regard to the adoption of provisions on state aid that are in full convergence with the EU *acquis*.

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11 F Busato, B. Chiarini and P. De Angelis "*State Aid Policies and Underground Activities*", Discussion Paper (2007), Department of Economic studies, University of Naples, Parthenope, Italy.

12 O.J.L 230/19, "Recommendation No.1/2007 of the EU-Egypt Association Council of 6 March 2007".

13 Ibid.

19. At the government level, new state aid mechanism has to substantially be initiated. The old policy towards state aid from the government has to be sharpened further by including competition aspects inside the remit of such a policy. This is to ensure dynamism, productivity and competiveness. In order to apply this, greater transparency about state aid and creating rules and processes that apply to it are needed. This is not to say that all subsidies to firms are bad but those that distort competition certainly are.

20. It remains to be seen whether the Ministry of Finance of Egypt would be entrusted with the supervision of state aid or should it be dealt with in the ECA, which, unlike the Ministry of finance, does not provide aid and as such is fully independent in its decision-making.

CONTRIBUTION FROM THE EUROPEAN UNION

STATE AID AND SUBSIDIES

-- European Union --

1. Introduction: The rationale for European State aid control

1. The existing mechanisms and objectives of EU State aid control were laid down as early as 1957, in the original Treaty of Rome establishing the European Community. State aid control is an integral part of EU competition policy and a necessary safeguard to preserve effective competition and free trade in the single market.

2. When granting State aid, for instance by subsidising certain types of business activity (e.g. R&D), Member States aim to foster the economic or social development in their territories. State aid may contribute to creating or maintaining employment, lead to higher tax revenues or to additional economic growth for the Member State concerned. Likewise, State aid granted by national governments can influence firms' choices of production methods so that they become more environmentally friendly or more responsive to social needs.

3. However, when considering State aid measures, national governments may disregard possible negative spill-over effects on other countries. Member States may have incentives to use State aid strategically to promote national economic interests and develop activities on their territory, even though it may undermine the internal market and the common European interest. If State aid diverts similar activities elsewhere, it may be to the detriment of other Member States, and in particular to the detriment of less prosperous ones. Aid with such cross-border effects may trigger reactions by other Member States who might be tempted to retaliate by granting subsidies too. Such a subsidy race could lead to excessive amounts of aid, at the taxpayers' expense, and could seriously damage the internal market.

4. The Treaty on the Functioning of the EU thus establishes the principle that State aid which distorts or threatens to distort competition is prohibited in so far as it affects trade between Member States (Article 107 (1) of the Treaty on the Functioning of the EU, ex Article 87(1) EC).[1] However, State aid, which contributes to well-defined objectives of common European interest without unduly distorting competition between undertakings and trade between Member States, may be considered compatible with the common market (under Article 107(3) TFEU, ex Article 87(3) EC). The Commission assesses a wide range of aid targeted by Member States at objectives of common interest of economic and social development.

2. State aid procedures: Block exemption and notification

5. Before granting State aid, Member States need to obtain the authorisation from the Commission.[2] However, the majority of State aid measures are exempted from prior formal notification to the

1. In addition, subsidies granted by EU Member States may also be subject to international agreements, such as the WTO subsidies agreement.

2. Aid amounts below € 200.000 over three years to a single undertaking are not considered to be State aid and thus need no authorisation by the European Commission, c.f. Commission Regulation (EC) No

Commission. This mainly flows from the General Block Exemption Regulation which aims at the most obvious market failures and allows Member States – without prior notification – to take measures which with all probability would lead to limited distortions and for which the assessment criteria can be clearly articulated and implemented.[3]

6. Furthermore a lot of individual aid measures can be implemented under aid schemes: Once the terms and conditions of an aid scheme are approved by the Commission, individual aid measures falling under this scheme do not have to be notified any longer.

7. By this, the Commission can focus its assessment on large State aid cases coming with a high risk of competition and trade distortions. In terms of reported aid volumes (financial crisis measures excluded), such individual aid accounted in 2008 for only 5% of total aid to industry and services, with 75% being granted under approved schemes and 20% under block exemptions. In terms of the number cases, out of a total of 1000 Member State decisions in 2008 on schemes and ad-hoc cases, around 66% fell under the block exemptions (therefore had not to be notified), while 34% had to be notified to the Commission. This has reversed the ratio of two years before (40% vs. 66%).

8. A time limit of two months is set for the examination of notified individual aid or notified aid schemes after the receipt of all relevant information (preliminary investigation). If the Commission has doubts as to the compatibility of the aid project, it opens a formal investigation procedure so as to gather Member States' and interested parties' comments in an open and transparent way. However, the vast majority (92%) of all state aid cases are currently approved at the end of the preliminary investigation procedure without opening the formal investigation procedure.

9. In order to further streamline procedures, the Commission has just adopted a "simplification package", consisting of a Simplified Procedure and a Best Practices Code:

- The *Simplified Procedure*[4] aims at improving the Commission's treatment of straightforward cases, like those clearly in line with existing Guidelines or established Commission decision-making practice. The Commission wants to ensure aid measures which are clearly compatible are approved within one month from a complete notification by a Member State. This procedure requires important adaptations to the working methods of both the Commission and Member States, the prerequisites for which (templates, standard decisions etc.) have been put in place. A transparency provision also ensures that third parties can provide input.

- The *Best Practices Code*[5] details how all other State aids procedures should be carried out in practice. It includes a certain number of voluntary arrangements between the Commission and Member States to achieve more streamlined and predictable procedures, at each step of a State aid investigation. With better co-operation, the Commission hopes to be able to deliver State aid decisions within more business relevant deadlines.

10. Companies and consumers are also important players who may trigger investigations by lodging complaints with the Commission. Since 2002, DG COMP receives around 200 complaints annually. Complaints constitute an important source of information for the detection of unlawful aid.

1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, Official Journal L 379 of 28.12.2006.

3. Official Journal, L 214, 9.8.2008, p.3.

4. Official Journal C136, 16.06.2009, p. 3-12.

5. Official Journal C 136, 16.06.2009, p. 13-20.

11. When a negative decision is taken in cases of unlawful State aid, the Commission shall decide that the Member State must take all necessary measures to recover the aid from the beneficiary. It has to be underlined that recovery has not to be conceived as a penalty, but as a means to restore the situation previous to the granting of the illegal and unlawful aid. This objective is obtained once the aid (plus compound interests) is repaid by the recipient who enjoyed an advantage over its competitors on the market.

12. A Member State is deemed to comply with the recovery decision when the aid (plus compound interests) has been fully reimbursed within the prescribed time limit or, in the case of an insolvent beneficiary, when the company is liquidated under market conditions. Where the Member State concerned has not complied with the recovery decision, and where it has not been able to demonstrate the existence of absolute impossibility, the Commission may initiate infringement proceedings before the European Court of Justice.

3. The compatibility assessment: basic principles and guidelines

3.1. The balancing test

13. When designing general State aid rules for cases that need to be notified, the Commission balances the negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of well-defined objectives of common interest. Balancing these effects takes into account the impact of the aid on the social welfare of the EU. For that purpose, the Commission has established a "balancing test" which consists of the following elements:

(1) Is the aid measure aimed at a well-defined objective of common interest? (for example, growth, employment, regional cohesion, environment, energy security).

(2) Is the aid well designed to deliver the objective of common interest that is to say, does the proposed aid address the market failure or other objective?

(a) Is State aid an appropriate policy instrument?

(b) Is there an incentive effect, namely does the aid change the behaviour of undertakings?

(c) Is the aid measure proportional, namely could the same change in behaviour be obtained with less aid?

(3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

14. The first two questions address the positive effects of a State aid measure, whereas the third question refers to its negative effects on competition and trade and compares the positive and negative effects of the aid.

15. As regards the first question, the Treaty on the Functioning of the EU only provides for some exceptions to the general prohibition of State aid. It is thus necessary to first assess whether the objective pursued by the aid is indeed one that can be regarded as being in the common interest, and to assess the acceptability of that objective. Applying concepts developed in the economic theory, whether a measure contributes to an objective of common interest can be understood either in terms of its contribution to overall welfare and efficiency (does the State aid allow to remedy to a market failure) or in terms of equity (i.e. how is welfare distributed). All objectives of common interest can thus be described as contributing to efficiency and/or equity.

16. The second step is then to assess whether the aid is properly designed to reach the well-defined objective of common interest. More specifically, even if it addresses a well-defined objective, a particular State aid may not be an appropriate instrument. This would be the case where the State aid fails to deliver the desired objective or where other less distortive instruments achieve the same results. Further, the aid must actually induce the recipient to change its behaviour in such a way that the objective can be achieved. This condition would not be fulfilled in cases where the aid is not necessary because the beneficiary would achieve the objective even in the absence of aid. Finally, the aid amount should not exceed the amount necessary to achieve the objective.

17. The last question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, an aid given to a particular undertaking or economic sector may lead to an unacceptable degree of distortion of competition and of trade between Member States. The overall balancing requires not only to trace the effects of the aid on producers and on consumers in the Member States, but also to evaluate their magnitudes and to compare them subsequently. This implies for instance that negative effects of a considerable magnitude need to be offset by a corresponding high level of positive effects.

3.2. Horizontal guidelines

18. The general analytical principles of the balancing test as outlined above have been translated into a number of guidelines for specific aid categories, where the test has been adapted in the light of the specific policy and technical context. These rules explain in more detail under what conditions (e.g. eligible costs, intensity of aid, and nature of the beneficiaries) a Member State can grant aid to its undertakings. The rules cover a wide range of categories of aid: for example aid to research, innovation, environmental protection, regional development, development of SMEs, training, employment, risk capital, rescue and restructuring of firms in difficulty.

BOX 1: Overview of most important non-sectoral State aid rules[6]

- Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), Official Journal L 214, 9.8.2008, p. 3.
- Community Framework for State aid for Research and Development and Innovation, Official Journal C 323 of 30.12.2006, p.1.
- Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises, Official Journal C 194, 18.8.2006, p. 2.
- Community guidelines on State aid for environmental protection, Official Journal C 82, 1.4.2008, p. 1.
- Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid, Official Journal L 302, 1.11.2006, p. 29
- Guidelines on national regional aid for 2007-2013, Official Journal C 54, 4.3.2006, p. 13.
- Criteria for the compatibility analysis of training state aid cases subject to individual notification, Official Journal C 188 of 11.8.2009, p.1.
- Criteria for the compatibility analysis of state aid to disadvantaged and disabled workers subject to individual notification, Official Journal C 188 of 11.8.2009, p.6.
- Community guidelines on State aid for rescuing and restructuring firms in difficulty, Official Journal C 244, 1.10.2004, p. 2.

6. These rules are available at http://ec.europa.eu/competition/state_aid/legislation/legislation.html.

19. Most of these guidelines and frameworks focus on areas where State aid alleviates market failures and helps to meet the challenge of sustainable growth (i.e. aid in the fields of research, training and risk capital or environmental aid). Other types of aid are rather aimed at equity issues (i.e. regional aid, aid to disadvantaged and disabled worker).

20. Aid for rescuing and restructuring firms has a particular role to play and rescue and restructuring operations have given rise to some of the most controversial State aid cases in the past and are among the most distortive types of aid. The main provisions of the Rescue and Restructuring guidelines ("R&R guidelines") will therefore be presented in more detail below.

3.3. The Rescue and Restructuring guidelines: strict conditions

21. The EU attaches strict rules regarding aid for rescue and restructuring for firms in difficulty. Aid to such firms may, however, be justified in exceptional circumstance, if there are countervailing benefits. Such benefits can be seen in the restoration of the long term viability of a firm in difficulty which may be desirable for employment or social considerations.

22. To assess a given rescue or restructuring aid measure the Commission developed the rescue and restructuring guidelines[7] containing precise conditions to be respected by Member States when granting R&R aid. The guidelines ensure that the recourse to rescue and restructuring aid is linked to strict eligibility criteria, the most important of which is that the aid beneficiary has to be in difficulty.

23. There is no Community definition of what constitutes a firm in difficulty. However, for the purpose of the R&R guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owners/shareholders or creditors, to stem losses which will almost certainly condemn it to going out of business in the short or medium term without outside intervention by the public authorities. The guidelines spell out some specific objective criteria[8]: A firm is regarded as being in difficulty if more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months. In the case of a company where at least some members have unlimited liability for the debt of the company, the same criterion is applied to its capital as shown in the company accounts. Whatever the type of company concerned, a firm is considered as being in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

24. Even when none of the circumstances set out in paragraph 10 of the R&R guidelines are present, a firm may still be considered to be in difficulties, where the usual indicators of a firm being in difficulty are present. The guidelines[9] mention a number of such indicators. They include qualitative criteria such as increasing losses, diminishing turnover, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

25. Legally, the R&R guidelines lay down the application of Article 107 (3)(c) TFEU, ex Article 87(3)(c) EC, in the particular case of firms in difficulty. On the basis of the Guidelines, State support for such firms may be found compatible with the EC Treaty.

7. See Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

8. See paragraph 10 of the guidelines.

9. See paragraph 11 of the guidelines.

26. This concerns first rescue aid in so far as the ailing firm is provided with ad hoc short term liquidity support to overcome acute financial shortcomings or restructuring aid in form of longer term support in order to redirect the company's operations. In the case of SMEs, rescue and restructuring aid may also be granted on the basis of schemes.

- Rescue aid can be provided for a period of six months to help the company cover its immediate liquidity needs and undertake other urgent structural measures. It is limited to temporary support to enable the ailing company to come up with a restructuring plan.

- Restructuring aid can be provided on the basis of a comprehensive restructuring plan with the aim to restore long term viability. The plan must define the restructuring period and the restructuring costs as well as the measures necessary to turn around the company. Such measures should imply operative, industrial and financial restructuring. The implementation of a sound restructuring plan is to ensure that the positive effects of the aid also materialise in the long term, as insufficient restructuring would just delay problems by a few years.

27. A further condition for the granting of restructuring aid is that the aid must be limited to the minimum necessary. To this end, a predetermined minimum threshold for private co-financing of the restructuring is introduced (the so called significant own contribution). As this own contribution normally requires the involvement of external financing it also ensures that the capital markets believe in the restructuring project's ability to restore long term viability. Limiting the aid to the minimum necessary avoids providing the company with surplus cash which could be used for aggressive behaviour in the market which is unrelated to the restructuring process.

28. In order to compensate for the distortion of competition caused by the aid, compensatory measures (e.g. divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned) must normally be taken.

29. Finally, the "one-time, last-time" principle ensures in cases of both rescue and restructuring aid that a firm that has received already rescue and restructuring aid in the last ten years is no longer eligible for any further aid. A firm has thus only one chance to restructure itself with the help of aid and the principle ensures that unviable firms are kept afloat through repeated injection of state aid.

30. The R&R guidelines were to expire on 9 October 2009. However, the economic crisis had created a difficult and unstable economic environment. Having regard to the need to ensure continuity and legal certainty in the treatment of State aid to enterprises in financial difficulty, the Commission decided to extend the validity of these guidelines until October 2012.[10]

4. The financial crisis: State aid control is part of the solution

31. Since October 2008, the financial and real economy crisis has been a major challenge for the field of State aid and has had a significant impact on the activity of the State aid network in terms of the number of cases that had to be assessed by the Commission: The scale and intensity of the crisis in the financial markets and its potential impact on the overall economy of Member States put governments throughout the EU under huge pressure to provide a wide range of support measures to assist vulnerable financial institutions in order to safeguard the stability of the financial system and to assist companies in the real economy.

10. Official Journal C 156 of 9.7.2009, p.3.

32. In view of the exceptional circumstances, there had even been calls for the Commission to considerably "relax" or even "suspend" EU disciplines in the area of State aid , at least as long as the financial crisis lasts. This has, however, never been an option. On the contrary, EU competition policy proved to be an integral part of the solution to the problems stemming from the crisis. Abandoning EU competition discipline at this time of crisis would have risked a disintegration of the European Single Market. Rather than abandoning competition rules, the Commission has found that State aid rules have enabled it to support solutions for stabilising European banks, while at the same time guaranteeing the common European interest.

4.1. Commission response to the financial sector crisis

33. Following the deepening of the financial crisis in the autumn of 2008, the Commission swiftly provided guidance in the form of Communications on the design and implementation of State aid in favour of banks.[11] In these Communications, the Commission recognised that the severity of the crisis justified the grant of aid on the basis of Article 107(3)(b) TFEU[12], ex Article 87(3)(b) EC, and set out a co-ordinated framework for the provision by Member States of public guarantees, recapitalisation measures and impaired asset relief, whether to individual banks or as part of a national scheme. The primary rationale of the guidance in these Communications was to ensure that emergency measures for reasons of financial stability guarantee a level playing-field between banks located in different Member States as well as between banks who receive public support and those who do not. On the basis of this guidance, the Commission has since October 2008 approved on a temporary basis a large number of schemes under State aid rules.[13]

34. The Commission also had (and still has) to deal with a large number of individual cases of bank restructuring, which follow from bank rescue aid measures approved on the condition that a restructuring plan would be submitted within six months. In order to foster transparency, predictability and equality of treatment between Member States, the Commission issued guidelines to clarify its approach, the criteria it will base its assessment upon and the type of information required to guide this assessment.[14] These guidelines are based on Article 107(3)(b) TFEU, ex Article 87(3)(b) of the EC Treaty. They will be temporary and apply until the end of 2010. After that date, the normal rules on rescue and restructuring, based on Article 107(3)(c) of the Treaty should resume (see point 3.3. of this paper).

11. See Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8 ("the Banking Communication"); Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.01.2009, p. 2 ("the Recapitalisation Communication"); Communication from the Commission on the Treatment of Impaired assets in the Community Banking Sector, OJ 72, 26.03.2009 ("the Impaired Assets Communication").

12. Article 107(3)(b) allows aid "to remedy a serious disturbance in the economy of a Member State".

13. On 7 August 2009 DG Competition has published a review of the existing national guarantee and recapitalisation schemes: see DG Competition's review of guarantee and recapitalisation schemes in the financial sector in the current crisis ("Review paper") published on http://ec.europa.eu/competition/state_aid/legislation/review_of_schemes_en.pdf.

14. Commission communication on the return to viability and the assessment of restructuring in the financial sector in the current crisis under State aid rules, OJ C 195, 19.08.2009, p.9 ("the Restructuring Communication").

4.2. Commission response to the real economy crisis

35. As a consequence of the crisis in financial markets, banks had become much more risk averse than in previous years, and as a result much less willing to provide financing to the real economy. This credit squeeze not only affected weak companies, but also healthy companies which found themselves facing a sudden shortage or even unavailability of private funding, whether loans or risk capital.

36. Therefore, in addition to the communications on State aid to financial institutions in response to the financial crisis, in December 2008 the Commission also adopted a "Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis" in response to the growing effects of the crisis on the real economy.[15]

37. The Temporary Framework provides for a number of new measures that can be applied by Member States for a limited period of time, until the end of 2010, as well as a number of limited temporary derogations from existing State aid rules. It should be noted that the Temporary Framework in principle of general application to all types of firms. However, a significant exception is that it is not applicable to firms that were in difficulties before 1 July 2008. Companies whose difficulties date from before the credit crunch must address their structural problems exclusively on the basis of the general rules regarding rescue and restructuring aid, as described in point 3.3 of this paper. The rule acknowledges that a number of companies may find themselves cut off from financing due to the drying up of the lending market, although they have a sound business plan. The Temporary Framework is therefore applicable to relieve their temporary financial difficulties. If the aid provided under the framework is not sufficient to address these difficulties, it can mean that the company has more structural problems, in which case the normal rules of rescue and restructuring aid will have to be applied. This set of rules regarding firms in difficulties is precisely devised to ensure that over-protective aid measures devised by the Member States would not revitalise structurally failing firms to the detriment of competition and healthier firms.

4.3. Exit and the return to a "pre-crisis" scenario

38. As a matter of fact, the new rules were to be seen as a temporary adaptation of existing State aid rules that target the specificities and the expected temporary nature of the credit squeeze while fully respecting the general principles and philosophy of the balancing test. Furthermore it needs to be stressed that the existing State aid tool box already provides a good basis for the Member States' response to the crisis along the lines in the European recovery plan, in particular as regards the focus on smart investments.

39. A key challenge will now be to secure the return to viability of the financial sector and the phasing out of State support in the context of an overall coordinated exit strategy. In this context, it will be crucial to develop a coordinated approach, which takes account of financial stability and individual Member States' circumstances and provides adequate incentives for financial institutions to cease to depend on public financial support.

5. Some statistics

40. Total State Aid granted by Member States[16] stood at € 279.6 billion in 2008 or 2.2 % of the EU Gross Domestic Product (GDP). Aid measures implemented by Member States in response to the financial crisis ("crisis aid") amounted to € 212.2 billion or 1.7% of GDP.

15. Official Journal C 16, 22.1.2009, p. 1.

16. The total covers aid to manufacturing, services, coal, agriculture, fisheries and part of the transport sector but excludes aid to the railway sector, aid for compensation for services of general economic interest due to

41. When excluding crisis aid, total State aid amounted to € 67 billion in 2008 or 0.54% of GDP. Almost € 53 billion or 0.42 % of GDP were directed towards industry and services (of which € 2.7 billion to the coal sector), while aid to agriculture amounted to about € 11.8 billion, aid to transport (with the exception of railways[17]) to € 2.4 billion and aid to fisheries to € 0.34 billion.

42. During the more favourable economic climate, there was a downward trend of State aid for industry and services from € 55 billion (or 0.5 % of GDP) in the period 2002-2004 to € 50 billion (or 0.4 % of GDP) in the period 2005 – 2007, a marked decrease from rates of around 2% in the 1980s and 1% in the 1990s. In 2008, it slightly increased by 0.04%.

43. The overall EU share of aid earmarked for horizontal objectives of common interest increased from 74 % in 2003-2005 to 85 % in 2006-2008. Taken together, the three most frequently used horizontal objectives in 2008 were: regional development € 14 billion) environmental aid (€ 13 billion), aid for R&D (€ 9 billion) account for 66% of total aid to industry and services. In comparison, aid for rescue and restructuring accounted in 2008 for about 2 % (0.6billion) of total State aid to industry and services.

6. Conclusion

44. The EU State aid control policy has played an essential role in the preservation of competition and free trade within the single market and in the promotion of the competitiveness of the EU economy.

45. Of course, the effectiveness of the European Commission's control of State aid granted by Member States is made easier by the supranational nature of the European Union: EU law has superiority over national law, and Commission's decisions are binding on Member States. In addition, the European Commission is independent from the national governments, and as a result, it does not hesitate to order recovery of unlawfully granted State aid.

46. This, however, does not mean that State aid control should be the monopoly of institutions like the European Commission. There are examples which show that such a control can be exercised at a horizontal level, within a national framework. Thus, the candidate countries that aspire to become members of the EU must set up some form of State aid control a few years before they join the Union. As a result, they entrust an authority, usually their competition agencies, with the task of reviewing the aid granted by the different levels of their public authorities. This system is generally effective and ensures that these countries' companies are already used to the application of the strict EU State aid rules before they become

47. Therefore, and to conclude, State aid control is an option which can usefully and realistically be considered by other States, outside the EU.

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the lack of comparable data. See Autumn Scoreboard 2009 update: COM(2009) 661, 07.12.2009 and Commission Staff working document "Facts and figures on State aid in the EU Member States", SEC (2009) 1683, 07.12.2009.

17. A large amount of public financing for railways is not notified to the Commission, either because the financing, due to the lack of liberalisation of the sector, is not deemed by Member States to constitute State aid within the meaning of Article 87(1) of the EC Treaty, or because it is exempted from notification in accordance with Regulations 1191/69 and 1192/69. Member States are however required to report to the Commission overall public expenditure to this sector.

CONTRIBUTION FROM FYROM

COMPETITION, STATE AID AND SUBSIDIES

-- Former Yugoslav Republic of Macedonia --

I. The Use of State Aid in the Republic of Macedonia

1. In the Republic of Macedonia there is no particular sector affected by the grants or tax breaks. Tax breaks have been given several times, but to all companies as general measure of the Government, so it could not be defined as State aid according to the Law on State Aid.

2. Selling of land owned by the State at a price below market level on 2 occasions has been treated by the Commission for Protection of Competition (CPC) as an unlawful aid, and as such asked with decision to be recovered.

3. Due to scarcity of sources of the State, very small difference between normal market rate and below-market rate, as well as harsh procedure to obtain soft loans, the granting of loans at below-market rates supposes to be so called de *minimis* aid (up to Euro 100.000 per undertaking in three consecutive years in existing Law on State Aid).

4. Attracting firms to economically distressed regions in a form of investment aid is primary goal of the Government as major State aid provider. The Government established scheme for providing regional aid on the basis of the Law on Technological Industrial Zones, and notified it to the CPC.

5. There have been also cases of support to companies that are performing services of general economic interest. Most of these cases have been regularly notified to the CPC. In this field, Macedonian State aid legislation is fully aligned with the legislation of the European Union (*acquis communitaire*).

6. Macedonian legislation and practice treat equally domestic and foreign companies.

7. So far, there have not been cases of remedying competition distortion created by the granting of aid by foreign governments, nor preventing strategic firms from being purchased by foreign companies. Moreover, the intention to attract more foreign investors pushes the aid in rather opposite direction.

8. Until the crisis, but also beyond it, companies had not suffered undersupply of credit by the financial sector. But the relative high market rate of the loan and crisis in real sector, forced the Government to help companies with loans which are at slightly lower rate than normal market rate.

9. The Macedonian Law on Public Procurement is fundamentally aligned with the *acquis*. A unified nomenclature for public tenders above certain thresholds is obligatory for all State institutions and all public companies. Standard tender documentation and user-friendly manuals are available on the website of the Public Procurement Bureau. There is also an established remedies system through the State Appeals Commission. Contracting authorities increasingly are using the e-procurement system.

10. Licenses to operate a mobile telephony network have been provided by the Agency for Electronic Communications. There are 3 mobile operators in Macedonia. It has provided also 2 licenses for 3G and

for radio frequencies for broadband wireless internet access. Agency for Electronic Communications fully cooperates with CPC in order to prevent distortion of competition on this market.

11. Licenses to operate a television network are provided by the Broadcasting Council. Competition on the electronic communications markets increased as a result of the liberalisation process, to the benefit of consumers.

12. Access to natural resources is regulated by the Law on Concessions and other Types of Public-Private Partnership of 2008. Responsible institution for licenses for concessions is the Ministry of Economy.

II. Aid to ailing companies, especially in the context of the financial crisis

13. Aid to ailing companies in Macedonian State aid legislation is regulated in the Regulation on Establishing Conditions and Procedure for Granting Aid for Rescue and Restructuring of Firms in Difficulties; (Official Gazette of Macedonia No. 81/03 and 83/07)

14. This Regulation is aligned with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (2004 OJ C 244/2).

15. Financial crisis has not affected Macedonian financial sector, so no specific rescue measures have been undertaken for banks and other financial institutions.

16. Also, there has not been aid to industrial firms, nor to particular industry.

17. A firm qualifies to use this kind of aid, if it is unable to meet its obligations through its own resources with the funds it is able to obtain from of its owner/shareholders or creditors to stern losses which, without outside intervention by the public authority will almost certainly condemn it to go out of business in the short and medium term. Rescue aid and restructuring aid can be provided only as a loan or loan guarantee on "one time last time principle" which means that one company can only once in 10 years receive rescue aid. In case of loan, the loan shall be repaid over a period of not more than 6 months following the last instalment paid to the firm.

18. The provider of the aid should inform the CPC for a restructuring or liquidation plan of the firm not later than 6 months after the rescue measure has been authorised or proof that the loan has been reimbursed in full, and/or the guarantee has been terminated.

19. The aid is restricted to the amount needed to keep the firm in business for at the period during which the aid is authorised (covering, e.g. wage and salary costs and routine supplies).

20. Compensatory measures should be taken as a rule to mitigate any adverse effects of the aid on competitors. These measures usually consist in restrictions on the presence of the firm on its market(s) during and after the period of restructuring, and:

- shall be implemented through the restructuring plan and conditions attached to it
- must make a contribution (in proportion to the amount of aid received and its impact on that market) to the improvement of market conditions
- above mentioned measures shall not be requested for small and medium-sized enterprises, except in case otherwise stipulated by the State aid rules for certain sector.

21. Restructuring aid should normally only be used to restore the firm's viability but not enable the firm to extend its production capacity during the implementation of the restructuring plan, except in cases when such extension is essential for restoring viability an undue distortion to competition.

22. It is requested that the aid beneficiary makes a significant contribution to the restructuring plan from its own resources, including sailing a property which is not essential for the surviving of the company, or by financing from other sources under market conditions. This contribution must be realistic and to exclude expected profit as a cash flow and it should be higher as possible. It is considered that fallowing contribution rates are appropriate: at least 25% in the case of small companies, at least 40% in the case of medium-sized companies and at least 50% in the case of large companies.

23. Sometimes the aid to ailing companies takes the form of temporary government ownership. So far, cases of such changing of ownership have been done on the market principles. There are not examples where government turns a profit after the aided firm's situation improved.

24. Until now, no rescue and restructuring aid has been provided in the meaning of the Law and the Regulation.

III. Legal restrictions on State aid

25. By definition in the existing Law on State aid, any State aid, irrespectively whether it is granted under an aid scheme or as an individual aid award, which distorts or threatens to distort competition by favouring certain undertakings or certain products, is incompatible with the Law insofar as it may affect trade between the Republic of Macedonia and the European Community, which means, that, by virtue, State aid is forbidden.

26. Besides of the Law on State Aid, Macedonian State aid legislation consists of 4 Regulations. One of these Regulations is Regulation on Establishing Conditions and Procedure for Granting Horizontal Aid. (Official Gazette of Macedonia No. 105/07)

27. This Regulation regulates, inter alia, aid for the activities of researching, development and innovation. It may be considered compatible if it refers to one or more of the following categories of research:

- fundamental research (aid intensity 100% from eligible costs)
- industrial research (aid intensity 50% from eligible costs)
- experimental research (aid intensity 25% from eligible costs)

28. This kind of aid may be granted only if before the beginning of the project application has been made from the beneficiary to the aid provider. In all cases, providers of aid must before the CPC demonstrate incentive effect from the measures by preceding evaluation for increasing activities for researching, development and innovation. But for SME's and where the amount of aid is below Euro 3.75 million per enterprise, for industrial property rights costs for SME's, for young innovative enterprises, for advisory services, innovation support services and for loan of highly qualified personnel these determinations do not apply.

29. The Republic of Macedonia is Member State of CEFTA. The provisions of CEFTA Agreement in the field of competition and State aid are actually transposed from Articles 101, 102 and 107 of TFEU. So far, supranational control mechanism foreseen in CEFTA Agreement in the field of competition has not been used.

30. One of the tasks of the CPC is to monitor all State aid provided in the Republic of Macedonia, except State aid granted in the sector of agriculture and fisheries.

31. Until now, there is no reported case when private company complained about predatory strategies or unfair practices implemented by either public or private company benefitting from public funds.

32. There has been one case when company complained about discriminatory treatment, in comparison to a competitor benefiting from State aid in the form of purchasing of State owned land below market price. The CPC assessed this aid as unlawful and asked for recovery, i.e. full market price of the land to be paid by the aid beneficiary.

33. In the price regulated sectors, the CPC deals according to its authorisation and according to signed Memoranda of Understanding with regulators. However, there has not been reported case involving State aid in regulated sectors.

34. So far, the CPC have not had any case of abuse of dominance or merger affected from the State aid.

35. In Macedonian Constitution, public and private ownership are equal. So, there is no such discrimination in Macedonian competition legislation.

36. According to its Stabilisation and Association Agreement with the European Union, and its Interim Agreement of 2001, Macedonia committed to implement competition and State aid legislation until 2006. By adopting and implementing both legislations, the Republic of Macedonia fulfilled its obligation and now has functional competition and State aid legislation.

37. The Republic of Macedonia has State aid legislation since 2003. It is aligned with the State aid legislation of the European Union. However, despite clearly defined obligations for State aid providers, results of the implementation of the legislation in the first three years (2003-2006) could be defined as modest and without rising of any public awareness for existing of this kind of legislation.

38. With the amendments of the Law in 2006, monitoring of aid, as well as power to issue decisions on compatibility of State aid, transferred to the Commission for Protection of Competition (in further text CPC).

39. In last three years, monitoring of aid became more comprehensive, mostly as a result of much better cooperation of the CPC with the State aid providers. Every major State aid provider appointed person in charge to notify State aid provided by the corresponding provider. Since 2007, the Manual of the Government foresees obligation for all governmental institutions by submitting documents to the Government to declare if there is State aid in submitted document, and in the case of positive answer, to provide decision or opinion of the CPC.

40. It can be concluded that permanent advocacy on State aid among governmental bodies contributed to much better understanding of the notion of State aid among State aid providers. There is no doubt that proper implementation of the State aid rules, together with the competition rules, makes use of public funds more efficient in order to remedy eventual distortion of competition, but also to intensify economic activities where appropriate.

CONTRIBUTION FROM INDIA

COMPETITION, STATE AIDS AND SUBSIDIES

-- India --

1. State-Aid and Subsidies are the policy instruments which Sovereign Governments consider as vital development tools available with them to achieve various national goals. Although they may lead to certain unintended economic effects and inefficient allocation of resources in a competitive market and may fundamentally act against the functioning of open markets and liberalisation of international trade, State aid and Subsidies may also contribute to the correction of market failures or market imperfections. They often produce externalities[1] which may sufficiently achieve the objectives of prevention of distortion of competition; factors that ought to be considered in determining the compatibility of state aid measures and subsidies with the market.

2. This paper discusses subsidies as part of state-aid measures which have been undertaken in India in the recent years.

3. Generally, subsidy is considered as financial contribution that is paid by a government or an organisation to reduce the cost of services or cost of producing goods so that their prices can be kept low. On an international level, unfair trade practices such as subsidies were identified as a threat to open markets as early as 1947, when the first GATT agreement was signed. In framework of WTO, *Agreement on Subsidies and Countervailing measures has defined subsidy as*:

a) A financial contribution by a government or public body within the territory of the country where:

   - There is a direct transfer of funds (e.g. grants, loans and equity infusion) and potential of funds or liabilities (e.g. loan guarantees);

   - Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits, income tax exemptions etc);

   - When a government provides goods and services at a preferential price other than general infrastructure;

   - A government makes payments to a funding mechanism, or entrusts or directs a private body to carry out, one or more of the type of functions which would normally be vested in the government.

b) Any form of income or price support;

[1] Employment aid, environmental aid, aid for research and development, regional aid are some of the instruments which may be taken as positive externalities.

c) Any benefit given by a government to an exporter that provides an unfair advantage to the exporter in international markets.

4. Thus for a subsidy to exist there must be a financial contribution by the government and a benefit be conferred thereby.

5. Subsidies may have different forms. The various alternative modes of administering a subsidy may include grant of subsidy to producers and consumers, subsidy to producers of inputs, production/sales through public enterprises, cross-subsidisation etc. A cash payment to producers/ consumers is an easily recognisable form of a subsidy. However, it also has many invisible forms like reduced tax-liability, low interest government loans or government equity participation. Subsidies are implied if the government procures goods, such as food grains, at higher than market prices or if it sells as lower than market prices.

1. Subsidies in India and Competition Act, 2002

6. Although there is no specific mention of state aid measures or subsidies and their treatment under the competition law in India, the Competition Act, 2002, defines enterprise to include Govt. Departments except when engaged in the discharge of sovereign functions. Subsidies have proliferated in India due to several factors like spread of governmental activities, relatively weak determination of government to recover costs from the respective users etc. It has been recognised[2] that market mechanism often results in under consumption of goods and services by the vulnerable sections of essential commodities, either because of their high prices or because of the competing claims of other goods and services on their incomes and by reducing the price of the identified goods for identified sections of the society, subsidies increase affordability, improve access and correct the under consumption of these goods with positive externalities.

7. Studies[3] have shown that central government subsidies were at 4.25% of GDP in 2002-03 and 4.18% of GDP in 2003-04 accounting for 72.32% and 87.68% of fiscal deficit, respectively. Bulk of the Central Govt.'s subsidies in India arise on account of the provision of economic services with very low recovery rates with subsidies on non-merit goods exceeding those on merit goods. The most important explicit subsidies administered through the Central Government budget are food and fertiliser subsidies. In states, one-third of total subsidies are directed towards merit goods. Subsidies in social services and economic services constitute bulk of the total subsidies and the proportion of merit subsidies is much higher in social services vis-à-vis economic services. Subsidies to States' public enterprises are large but recovery in the form of interests and dividends is extremely low indicating general trend towards low recovery.

8. In the context of their economic effects, subsidies have been subjected to an intense debate in India in recent years. Apart from issues like magnitude and incidence of subsidies- both explicit and implicit, their burden on government finances, target group of such subsidies and their injurious effect on general economic growth of sectors have also been in the realm of discussion.

2. Recent Trends

9. The total Central Govt. expenditure on subsidies increased from Rs.47,522 crore in 2005-06 to Rs. 1,29,243 crore in 2008-09 as per revised estimates. Out of this, expenditure on major subsidies accounted for Rs. 44,480 crore in 2005-06 which has gone up to Rs.1,22,728 crore in 2008-09 as per

[2] The Economic Survey, Ministry of Finance ,Govt. of India, Year 2008-09 , pp. 45-46.

[3] Analysis provided by the Finance Ministry in its Report prepared with assistance from the National Institute of Public Finance and Policy ("Central government subsidies in India: A report", December 2004).

revised estimates and has been budgeted at Rs.1,06,004 crore in 2009-10. *Among the major subsidies, Food subsidy* is provided to meet the difference between economic cost of food grains and their sales realisation at Central Issue Prices fixed for Targeted Public Distribution System (TPDS) and other welfare schemes. In addition, the Central Government also procures food grains for meeting the requirements of buffer stock. Hence, part of the food subsidy also goes towards meeting the carrying cost of buffer stock. A retention price scheme for indigenous fertilisers is in operation since 1977. Under Indigenous (Urea) Fertiliser subsidy scheme it is intended to make fertilisers available to the farmers at reasonable prices and to give producers of fertilisers a reasonable return on their investment. The difference between the concession price so fixed, less distribution margin and the statutorily controlled consumers' price is allowed as subsidy. As indigenous production is not adequate to meet the demand for fertilisers, imports are arranged to make up the shortfall. Mainly three varieties of fertilisers, viz. Urea, Di-ammonium phosphate (DAP) and Muriate of Potash are imported. As only Nitrogenous fertilisers are under price control, the estimates of subsidy under imported subsidy are based on the likely imports of urea during the year. The provision of 'sale of decontrolled fertilisers with concession to farmers' relates to payments to manufacturers/importers of fertilisers/agencies. The scheme was introduced after the prices of phosphatic and potassic fertilisers were decontrolled, with a view to enable farmers to maintain a healthy N:P:K ratio and contain prices of fertilisers.

10. Interest on loans sanctioned by the Government is normally payable at the rates prescribed from time to time. In specific cases where a concession is allowed in the rate of interest or where exemption is given from payment of interest on the loans, subsidies are paid and an amount equal to the subsidy is taken as interest receipt of the Government.

11. Subsidies are also paid towards other items like support for Market Intervention/Price Support Scheme for agricultural produce, maintenance of buffer stock of Sugar (for meeting outstanding claims of sugar mills for maintenance of buffer stock of sugar), reimbursement of internal transport charges to sugar factories on export shipment of sugar, extending financial assistance to Sugar Undertakings, import of edible oils, import of Pulses, payment to Shipyards etc.

Table 1. Subsidy payments[4] during 2005-06 to 2008-09 at a glance are given as under

Details of subsidies	In Rs.crore				
	2005-06	2006-07	2007-08	2008-09 (RE)	2009-10 (BE)
A. Major subsidies	44480	53495	67498	122728	106004
1. Food	23077	24014	31328	43627	52490
2. Indigenous(Urea)Fertiliser	10653	12650	12950	16517	9780
3. Imported (Urea) Fertiliser	1211	3274	6606	10981	5948
4. Sale of decontrolled fertiliser with concession to farmers	6596	10298	12934	48351	34252
Total Fertiliser Subsidy	**18460**	**26222**	**32490**	**75849**	**49980**
5. Petroleum subsidy	2683	2699	2820	2877	3109
6. Grants to NAFED for MIS/PPS	260	560	860	375	425
B. Other Subsidies	3042	3630	3428	6515	5272
7. Import/Export of sugar Edible Oils etc.				540	200
8. Interest Subsidies	2177	2809	2311	4063	2601
9. Other Subsidies	865	821	1117	1912	2471
Total-Subsidies	**47522**	**57125**	**70926**	**129243**	**111276**

[4] Budget Documents, Ministry of Finance, 2009-10.

3. Tax Concessions[5]

12. Subsidies to preferred taxpayers are given as tax preferences in budget. Such implicit payments are referred to as "tax expenditures".

13. The table given below gives details of revenue foregone for the year 2007-08 and 2008-09.

Table 2. Revenue Foregone in financial year 2007-08 and 2008-09 (in Rs. crore)

	Revenue Foregone in 2007-08	Revenue foregone as a percentage of Aggregate Tax Collection in 2007-08	Revenue Foregone in 2008-09	Revenue foregone as a per cent of Aggregate Tax Collection in 2008-09
Corporate Income-tax	62199	10.5	68914	11.36
Personal Income-tax	38057	6.43	39553	6.52
Excise Duty	87468	14.77	128293	21.16
Customs Duty	153593	25.95	225752	37.23
Total	341317	57.67	462512	76.28
Less export credit related	56265	9.5	44417	7.32
Grand Total	285052	48.16	418095	68.95

14. Revenue Foregone on account of Export Promotion Concessions was estimated to the tune of Rs. Rs. 44417 crore in the year 2008 -09 as against 56265 crore in the year 2007-08.

15. Subsidies have the potential to lead to perverse economic effects which would result in inefficient resource allocation where market imperfections do not justify a subsidy, by diverting economic resources away from areas where their marginal productivity would be higher. The unfair competition between subsidised goods of one country and similar non-subsidised goods of another country could arise in any of the markets; (i) the market of the subsidising country; (ii) market of the country importing the subsidised product; or (iii) a third country market. The WTO agreement covers within it framework mechanism to take action against such subsidies.

16. Subsidies are used to promote a wide variety of government policies and address a range of market failures. An unintended consequence of subsidies is that these can distort competition between firms undertaking similar activities, particularly when subsidies are large and only available to a select group of the firms that compete with each other. Efficient competitive markets are created by a process of rivalry and competition between firms. Competition, through efficient markets, delivers lower prices, greater choice and more popular products to consumers. The provision of subsidies to a recipient will impact on the recipient's costs and so will affect its decisions concerning what, how much and how to produce, and what to charge for it. If a subsidy recipient's actions are affected, competing firms may also adjust their behaviour. Giving some firms an advantage over their competitors may give rise to abusive behaviour since as a result of the subsidy the recipient increases its market share to a level at which it has power to behave independently of competitive pressures.

17. Subsidies that are closely targeted at the particular policy objective would be less likely to have a significant effect on competition. Characteristics like size of subsidy, target of subsidies, effects on costs, market concentration, level of product differentiation, barriers to entry and exit, effects on input markets are some of the factors that will enable the assessment of subsidy from the point of view of competition.

[5] Statement on tax expenditure or revenue foregone was first laid before the Parliament during Budget 2006-07.

18. Concerns have also been raised about the widespread use of subsidies particularly domestic farm subsidies by developed countries. Farm subsidies distort the production structure of a country by raising crop prices in a country's internal market. Overproduction and stagnant demand for agricultural goods lead to surpluses in these countries which squeeze out imports in the already restricted domestic markets. The surplus is also dumped in the international market at a cheaper rate causing price suppression of that commodity in the international market. Export subsidies are eventually used to cover the price difference between high domestic prices and lower international prices.

19. Subsidies are an important policy tool that can bring about improvements in welfare. In particular, subsidies that address market failures can bring about economic growth. However, subsidies also place costs on the economy. Competition among firms helps markets to function effectively, rewarding efficient firms that direct resources to the use most valued by consumers. Changes in market outcomes could affect allocative efficiency since resources may not be employed in the most efficient way possible. It may affect productive efficiency since goods may not be produced as efficiently as they could be and finally it may also impact dynamic efficiency affecting innovations.

20. Competition, through efficient markets, delivers lower prices, wider choice and more popular products to consumers. In competitive markets, firms seek to bring products to market which are more valued by consumers than those of their competitors at a lower cost. Firms that consistently fail to deliver products that consumers want and at prices they are willing to pay, will be forced out of the market to be replaced by more proficient firms. In this way, competition encourages the economy to be efficient and to produce the goods most valued by consumers using the least possible resources.

21. Most of the Indian manufacturing sector depended on "subsidies" of a different kind for several decades up to the early 1990s. High tariffs and import controls protected manufacturing units from cheaper imports and the Indian consumer paid the subsidy through inflated prices for domestic manufactures. As trade protection was gradually and systematically reduced, these subsidies disappeared. Indian industry also reacted positively by becoming more efficient, resilient and dynamic.

22. The macroeconomic costs of unjustified subsidies are reflected at present in large fiscal deficits in India. Justification for overall cutbacks in subsidies, regardless of their effects on the poor and needy has been recognised as an important fiscal policy agenda. Realising this Economic Survey for the year 2008-09 brought out by the Ministry of Finance, Govt. of India has underlined the need for reforms in subsidies. Any agenda discussion on subsidy in India must focus at placing systems for periodic review of existing subsidies, setting clear limits on duration of any new subsidy schemes and ultimately reducing the overall scale of subsidies considering that it is competition in the market which will ensure survival of more efficient firms, delivering benefits to the consumers and ushering economic efficiencies in the markets place.

CONTRIBUTION FROM JORDAN

COMPETITION, STATE AIDS AND SUBSIDIES

-- Jordan --

1. Introduction

1. In the context of global economic shifts, and to be able to face the challenges arising there from and keep up with rapid changes, the Hashemite Kingdom of Jordan joined some global economic communities and applied economic corrective programmes, which collectively led to the liberalisation of the markets, the removal of trade barriers and the activation of the private sector's role.

2. In order to keep pace with these challenges, the policies that seek to establish economic freedoms and support market mechanisms had to be implemented.

3. Attaining a comprehensive policy to regulate competition is considered an effective instrument to protect the economic activities in Jordan, and is a cornerstone for a sustainable economic development and growth, and for ensuring transparency and integrity in all active institutions in the Market. The Competition policy and regulations can enhance the competition among institutions to allocate resources effectively, and to increase the community's economic welfare by the provision of the necessary goods to consumers at reasonable prices and high quality.

4. Activating market competition will contribute to the stability of goods' prices, guarantees a balanced market, and enhances the economic performance. Maintaining a high level of competition in the domestic market would raise the economic performance, and improve the competitiveness of the local institutions on the international level. Conversely, the anti-competitive practices performed by monopolist institutions will minimise the economic efficiency, disperse the resources, deepen the economic deformities, and decrease the motivations to creativity and innovation.

5. Accordingly, Jordan has become the first Arab State in the Middle East to adopt a national law to regulate the competition. The Competition Law no. (33) of 2004 was enacted as a permanent law on September 2004.

6. To ensure a successful execution of the competition policy and Law, and believing that there should be a special regulation to control competition in the modern economic regulations scheme to protect the investors from the negative impacts of the control of the dominant institutions, and to eliminate the restricting practices that minimise the freedom of economic activity. Thereupon, the Ministry of Industry and Trade established the Competition Directorate and incorporated it in the Ministry's organisational structure, supporting it with specialised cadres. The Directorate organised several awareness campaigns that aim to promote the competition culture and introduce the provisions of the Competition Law and its areas of application. In addition, the competencies responsible for implementing the Competition Law were qualified through a number of in-house and abroad specialised courses on competition.

2. Jordan’s International Commitments:

- The Euro-Jordanian Association Agreement (article 53);

- A free trade area with the US;
- The Pan-Arab Market (The Arab Competition Regulations);
- Accession to Greater Arab Free Trade Area;
- The World Trade Organisation Treaty.

7. The law is based on free determination of prices in accordance with market mechanisms and principles of free competition, except for:

- Prices of basic commodities such as bread and fuel that are regulated by other laws;
- Temporarily price controls set by the government to cope with exceptional circumstances.

8. The law seeks to further free economic activities:

- Freedom to enter a market (entry barriers);
- Freedom to exit a market (exit barriers).

3. Competition Directorate

9. For the purpose of implementing the Competition Law, the Competition Directorate was established by the end of 2002 as a part of the Ministry of Industry and Trade, and it was the entrusted authority with implementing the Competition Law.

- The Competition Directorate tasks are:
  - Spreading the Competition Culture;
  - Setting Jordan's Competition Policy;
  - Conduct the necessary investigations of practices that may contravene competition;
  - Receive complaints and requests for economic concentration activities and exemptions and following them up;
  - Co-operate with similar entities outside the Kingdom for the purpose of exchanging information and data and in relation to the execution of competition rules to the extent permitted by international treaties;
  - Issue clarifying opinions in competition matters.

4. WTO and EU Commitments

- Jordan Accession to the WTO was on February 24th 2000 and Jordan became officially the 136th WTO Member on April 11th 2000.

- As a result of joining WTO, Jordan liberalised its services sectors providing market access to foreign investors and service providers of WTO Members in accordance with Jordanian laws and regulations.

- The Association Agreement, which entered into force on 1st June 2002, aims to create a free trade area between EU and Jordan by the year 2010, as well as to establish a comprehensive framework for political, trade, economic and financial co-operation.

5. EU-Jordan Association Agreement / Chapter 2 Competition and Other Economic Matters

- Article (53);

- Provision (1) the following are incompatible with the proper functioning of the agreement in so far they may affect trade between the community and Jordan:

- Provision (1)
  Subparagraph any public aid which distort or threaten to distort competition by favouring certain undertaking or the production of certain goods;

- Provision (4)
  Subparagraph (b): Each party shall ensure transparency in the area of public aid inter alia by reporting annually to the other party on the total amount and the distribution of the aid given and by providing upon request information on aid schemes upon request by one party the other party shall provide information on particular individual cases of public party.

6. Competition Law of Jordan and State Aid

- Competition Law of Jordan has no provisions on state aid;

- Due to Jordanian government budget financial challenges, the state aid is not significant;

- Jordan reduced its total domestic subsidies offered by the government to local agricultural producers by 13.3% out of JDs (1,539,199) over a period of seven years as of date of joining WTO;

- The ceiling of agriculture exports subsidies has been fixed at 0%;

- Export subsidies in the industrial sector which are considered prohibited under WTO agreements, a special programme by the Central Bank of Jordan to subsidise exports loans' interests was cancelled by December 31st, 2002;

- Due to Jordan's commitments under the WTO, the exemption of profits resulting from exports from income tax ended by the end of the year 2007.

7. State Aid Programmes in Jordan

10. In light of global economic developments, the challenges that are facing the industrial and services sectors and especially those related to technology transfer and capacity building. These called on the government and through Jordan Upgrading & Modernisation Programme (JUMP) and Jordan Services Modernisation Programme (JSMP) to support industrial and services companies to enable them to

overcome the challenges arising from the global financial crisis, and consequently boost their competitiveness and ability to penetrate new markets.

7.1 Jordan Upgrading & Modernisation Programme (JUMP)

11. JUMP is managed by a steering committee headed by H.E. Minister of Industry and Trade and is equally comprised of representatives from both the public and private sectors. The programme is managed by experienced national staff assisted by the best local and international expertise. This programme works to transform, integrate and bridge the Jordanian industry within the global economy. Moreover, this programme is looking forward to improve and sustain the competitiveness of Jordanian enterprises by enhancing their managerial capabilities and productive capacities.

12. Consequently, a total number of 636 companies have received this support to date.

13. By which the programme objectives are:

- Enhance productivity, improve product's quality, and reduce unit cost;
- Benchmark and adopt best international business practices;
- Develop strategic direction driven by market needs;
- Enhance capabilities of human resources;
- Substitute imported production inputs by local products.

7.2 Jordan Services Modernisation Programme (JSMP)

14. The Jordan Services Modernisation Programme (JSMP) is an EU funded programme focusing on the development and modernisation of the Services sector. Its duration is 3 years (2009-2011) with a total budget of €16 million. Beneficiaries of the programme are private service sector enterprises - Small and Medium size Enterprises (SMEs) - relevant business associations and public sector bodies.

15. The main objective of JSMP is to assist Jordan to fully benefit from the opportunities of trade liberalisation of services in the context of the General Agreement on Trade and Services (GATS) and the economic integration objectives of the Istanbul Protocol signed in July 2004.

16. A total of 43 service companies and organisations benefited last year from the Jordan Service Modernisation Programme (JSMP), according to Jordan Enterprise Development Corporation (JEDCO).

17. The JSMP initiative, which seeks to increase exports of service companies, enabled beneficiaries to overcome the impact of the global downturn through its grants.

18. The JSMP will support companies in the services sector through participating in trade fairs, upgrading their exports capabilities, supporting societies and organisations, assistance in obtaining quality certificates and providing support for newly established service companies.

19. The importance of the Programme emanates from the fact that the services sector represents around 62 % of the gross domestic product and that the local added value in this sector is the highest among other sectors which is between 50 % and 60 %.

CONTRIBUTION FROM LITHUANIA

NEW FUNCTIONS OF THE COMPETITION COUNCIL OF LITHUANIA AND OVERVIEW OF STATE AID PROVIDED IN LITHUANIA

-- Lithuania --

1. New functions of the Competition Council

1. After Lithuania's accession to the EU the Competition Council faced the task to adapt its activities to the essentially new environment in the area of state aid monitoring. The material changes in the aforementioned area introduced certain basic changes in the functions performed by the Competition Council in this respect. Upon the accession amendments to the Law on Competition providing for the new functions of the Competition Council in State aid area became effective. The amendments to the Law establish the role of the Competition Council as a coordinating authority in the field of State aid. Acting in accordance with the European Commission legal acts governing State aid and exercising its functions set forth in the Article 48 of the Law on Competition the Competition Council has been maintaining its closest relations with the European Commission and public authorities of the Republic of Lithuania for the purpose of discussion State aid issues, submitting its comments and proposals to the draft regulations of the European Commission, preparing responses to a number of questionnaires submitted by the European Commission. To make the measures provided for in the State aid action plan on the application of more efficient and simplified procedures operational it is of utmost importance to ensure an enhanced liability of Member States for the proper application of legal provisions. An event of profound importance in this respect was the adoption of the Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty. The enactment of this Regulation as well as other legal acts governing State aid markedly enhanced the role of the Competition Council as authority coordinating the provision of State aid.

2. In accordance with the amended national Law on Competition the Competition Council performs the following functions:

- participates in the submission of the notifications and annual reports (other information) on State aid to the European Commission,
- provides consultations concerning the application of the State aid acquis to the State aid providers,
- accumulates information on State aid provided in Lithuania (including the de minimis aid),
- performs the education and public awareness, as well as other coordination activities, i.e., acts as a moderator between the European Commission and Lithuania, participates in the activities of the Advisory Committee on State Aid established by the European Commission, etc.

1.1 Participation in the submission of information to the European Commission:

3. A very important area of activity of the Competition Council is the submission of notifications on State aid and the annual State aid reports to the European Commission. The procedure for the submission of the notifications has been defined by the Resolution of the Government of the Republic of Lithuania of

2004. The Resolution of the Government stipulates that State aid providers are obligated, in advance, to notify the Competition Council of all State aid proposals subject to the requirement to be notified to the European Commission as defined by the EU regulations. Prior to passing the decision to grant State aid subject to block exemption provisions State aid providers also submit the information to the Competition Council on such State aid. The State aid providers submit such information by completing the notification forms established by relevant EU regulations.

4. Furthermore, the above Resolution of the Government stipulates that State aid providers shall submit to the Competition Council annual reports on the provided State aid by schemes of State aid approved by the European Commission (i.e., - annual reports on existing State aid). The annual reports on provided State aid under bock exemption regulations have to be submitted to the Competition Council not later than one month preceding the expiry of the time limit for the submission of annual reports to the European Commission.

5. The Competition Council forward all the received information to the European Commission. As defined in the Resolution of the Government, upon receipt of the notification on State aid the Competition Council examine whether the notification has been properly completed, i.e., whether the submitted notification forms and annexes thereto are complete and all the supporting documents have been attached. The correctly completed notification the Competition Council by electronic form submit to the European Commission. In the event the notification has not been adequately completed the Competition Council notify the State aid provider thereof with an instruction to correct (supplement) the State aid notification, and indicating in writing the faults of the State aid notification.

1.2 Provision of consultations

6. Another important area of activity of the Competition Council after Lithuania's accession to the EU is the provision of consultations on issues related to State aid. The authority provides consultations and advice to State aid providers on all issues related to completing the State aid notification forms. The Competition Council analyses State aid projects submitted by State aid providers and assess the compliance of such projects with the requirements of the relevant EU legislation, draws up appropriate conclusions concerning such notifications and provides proposals. As set forth in the relevant Resolution of the Government concerning the submission of the notification to the European Commission, upon the request of State aid providers, prior to forwarding the notification to the European Commission the Competition Council shall perform the expert examination of the notification and furnish to the State aid providers its conclusions and recommendations concerning the compliance of the intended State aid to the requirements of the relevant EU regulations. The expert examination of the intended State aid notified to the Competition Council may also be performed in cases where no such requests have been filed by the State aid provider; however, the Competition Council has sufficient grounds to question the compatibility of the intended State aid with the requirements of the relevant EU regulations. It should be noted that in such cases, provided no objections are raised by the State aid provider, the State aid notification shall be forwarded to the European Commission only following such expert examination of the notification. State aid provides are entitled, at any stage of the expert examination of the notification performed by the Competition Council, request the Competition Council to submit the notification to the European Commission. In such event the expert examination of the notification shall be suspended and the notification shall be forwarded to the European Commission in an established order. In this case the State aid provider shall apply to the Competition Council with a request to suspend the expert examination of the State aid project and request that the notification be forwarded to the European Commission. As stipulated in the relevant Resolution of the Government the time limit for the submission of conclusions and recommendations concerning the compliance of the State aid to the EU requirements shall not be longer than 2 months from the date of the submission of the request of the State aid provider to the Competition Council to perform the expert examination of the Stat aid project, or the beginning of such examination in

cases where the expert examination is performed without having received the respective request from the State aid provider. Such ex ante assessment of the intended State aid by the Competition Council is expected to help avoid difficulties and problems arising in relation to the provision of aid in contravention of the relevant EU requirements. The properly developed national programs and experts adequately trained to implement such programs constitute an extremely important precondition for the successful absorption of resources made available by the European Union Structural and Cohesion Funds.

7. Alongside it must be noted that in accordance with the provisions of the European Community law only the EU institutions (the European Commission included) are authorised to assess the compatibility of State aid with the Common market. Therefore the conclusions drawn up by the Competition Council concerning the compatibility of the State aid projects may only be of advisory nature.

1.3 Accumulation of information on State aid

8. All information on State aid provided in Lithuania is accumulated in the State aid Register. The Central State aid Register was established in the year 2005. The Register includes not only the data on State aid meeting the criteria set forth in Art. 87(1) of the Treaty, but also the data on *de minimis* aid.

1.4 Representation of the Lithuania's position

9. Another important area of the activity of the Competition Council is the representation of the position of Lithuania in relation to State aid issues, i.e.:

1) representation of the position of Lithuania in dealing with various issues related to State aid (in particular issues defined in Regulation (EC) No. 659/1999);

2) representation of Lithuania in the Advisory Committee on State Aid set up within the European Commission in accordance with the above regulation;

3) participation in the meetings convened by the European Commission considering the State aid issues.

1.5 Activity aimed at enhancing the public awareness:

10. Activity aiming at enhancing public awareness on State aid issues has always been and will remain an extremely important area of activity and the function of the Competition Council. All measures has to be taken to educate State aid providers and business community on issues related to State aid and the measures envisaged by the European Commission within the framework of the new State aid policy.

2. Volumes of state aid

11. According to the data available to the CC, the value of State aid granted in Lithuania during 2007 amounted to LTL 612.17m (EUR 177.3 m). The rate of the national State aid in relation to the GDP (at current prices) in 2007 accounted for 0.63 percent, in 2006 – 0.54 percent. For comparison: the EU-25 average in 2006 was 0.6 percent, in 2007 – 0.5 percent, the EU-15 average in 2006 and 2007 – 0.5 percent, and that of 12 new EU Member States in 2006 and 2007 – 0.8 percent. The average national State aid per working person in 2007 was LTL 399.01 (EUR 115.56), in 2006 – LTL 295.21 (EUR 85.57). The tables and graphs presented in the "Statistics" section show that in 2007, the volume of granted State aid was significantly higher than in 2006 (EUR 128.27 m), and in 2005 (EUR 119.16 m). According to the data available to the CC, the volumes of aid to agriculture increased by LTL 167.77 m (EUR 48.58 m). The increase is accounted for the support of LTL 127.05 m to entities engaged in agricultural activities who have sustained damage due to the fact that their agricultural plans had perished or suffered because of

severe meteorological phenomena in 2006. State aid to industry and services in 2007 was only marginally larger than in 2006, accounting to LTL 186.13 m (EUR 53.91 m), in 2006 – LTL 184.85 m (EUR 53.54 m). In 2007, as compared to the period 2004-2006, higher volumes of the State aid were allocated to environmental protection, implementation of the employment programmes, professional development. This readjustment of State aid structure comes in compliance with the objectives defined by the European Council to provide less but more targeted State aid, with higher volumes of aid resources channelled to horizontal general purpose objectives, i.e. regional development, small and medium-sized enterprises, research, development and innovations, and the implementation of employment programmes. Notably, the volumes of State aid as presented here do not include the funds received from the EU structural funds. The breakdown data of State aid:

Table 1: Total National State Aid in Lithuania in 2007[1]

Aid forms Sector	A1	A2	B1	C1	C2	D1	Total (LTLm)	Total (MEUR)
1.1. Agriculture	249.57	173.64	0.27				423.48	122.65
1.2. Fisheries	2.56						2.56	0.74
2. Industry/services	**91.72**	**94.41**					**186.13**	**53.91**
2.1.Horizontal aid	**77.75**	**63.74**					**141.49**	**40.98**
2.1.1. Research, development and innovations								
2.1.2. Environmental protection	6.60	56.44					63.04	18.26
2.1.3. SMEs	8.59						8.59	2.49
2.1.4. Trade								
2.1.5. Energy efficiency								
2.1.6. Investments								
2.1.7. Employment programs	13.90						13.90	4.03
2.1.8. Professional development	48.66						48.66	14.09
2.1.9. Privatisation								
2.1.10. Rescue/restructuring		7.30					7.30	2.11
2.2. Sectoral aid		**11.95**					**11.95**	**3.46**
2.2.1. Steel industry								
2.2.2. Ship-building								
2.2.3. Transport		11.95					11.95	3.46
2.2.4. Coal industry								
2.2.5. Synthetic fibre								
2.2.6. Other sectors								
2.3. Regional aid	**13.97**	**18.72**					**32.69**	**9.47**
Total:	**343.85**	**268.05**	**0.27**				**612.17**	**177.30**
Manufacturing and services:	**91.72**	**82.46**					**174.18**	**50.45**

Explanations of symbolic markings:

A1 – not recovered aid: grants, subsidies

A2 – tax exemptions, tax relief, write-off of late interest and penalties, other exemptions

B1 – different types of increase of the state-owned equity of enterprise or increase of its value

C1 – soft loans

C2 – tax deferrals

D1 – State guarantees

1. Compensations for the provision of the services of general economic interest are not included.

Table 2: Total National State Aid in Lithuania in 2000-2007 (MEUR)

Year Indicators	2000	2001	2002	2003	2004	2005	2006	2007
Total national State aid	**68.70**	**39.73**	**74.96**	**40.67**	**120.38**	**119.16**	**128.27**	**177.30**
Of which:								
- manufacturing and services	42.07	17.26	44.03	25.56	25.34	25.66	53.54	50.45
- agriculture and fishery	0.43	0.82	1.43	0.74	89.63	93.50	74.73	123.39
- transport	26.20	21.65	29.50	14.37	5.41	-	-	3.46

Table 3: Total National State Aid in Lithuania in 2000-2007

Year Indicators	2000	2001	2002	2003	2004	2005	2006	2007
MEUR	68.70	39.73	74.96	40.67	120.38	119.16	128.27	177.30
EUR per employee	43.32	26.11	53.31	28.28	83.81	80.85	85.57	115.56
% of GDP (at current prices)	0.57	0.29	0.51	0.25	0.66	0.58	0.53	0.62
% of national budget expenditures	2.81	1.36	2.22	1.12	2.85	2.41	2.46	2.91
% of national budget deficit	66.50	13.21	23.50	12.42	55.73	71.77	119.27	50.60
Average population (m)	3.50	3.48	3.47	3.45	3.43	3.41	3.39	3.37

Table 4: Methods of Granted National State Aid in 2000-2007

	A1	A2	B1	C1	C2	D1	Total (LTL m)	Total (MEUR)
State aid 2000	225.55	7.45	0.06	0.01	0.07	22.48	255.62	68.70
State aid 2001	87.99	24.50	0.00	0.07	27.54	0.00	140.10	39.73
State aid 2002	93.09	127.19			38.45	0.07	258.8	74.96
State aid 2003	50.03	46.22	11.62	0.34	32.13	0.00	140.34	40.67
State aid 2004	202.79	183.33	13.40	0.03	15.69	0.40	415.64	120.38
State aid 2005	205.30	205.80	0.35				411.45	119.16
State aid 2006	243.88	198.86	0.12				442.86	128.27
State aid 2007	343.85	268.05	0.27				612.17	177.30

Explanations of symbolic markings:

A1 – not recovered aid: grants, subsidies

A2 – tax exemptions, tax relief, write-off of late interest and penalties, other exemptions

B1 – different types of increase of the state-owned equity of enterprise or increase of its value

C1 – soft loans

C2 – tax deferrals

D1 – state guarantees

Table 5: State Aid Assessed by Resolutions of the European Commission in 2008

State aid notification registration in the EC	Title of the aid	Beneficiary sector	Purpose of the aid	Duration of the aid scheme	Decision of the Commission	Decision date
28-07-2007	No. 497/2007 Creation of broadband data transfer network in Lazdijai and Alytus municipalities	Telecommu-nications	Creation of broadband communications infrastructure		Approved	16-07-2008
19-10-2007	No. 666/2007 Aid for reimbursement of insurance premiums	Agriculture	To promote voluntary insurance from the damage caused by diseases of animals and plants, natural disasters and unfavourable weather conditions	Until 31-12-2013	Approved	13-02-2008
14-11-2007	No. 737/2007 Aid for reimbursement of guarantee payments	Agriculture	To reimburse the guarantee payment in respect of loans from credit institutions	Until 31-12-2013	Approved	13-02-2008
11-21-2007	No. 682/2007 Partial compensation for costs of insurance undertakings resulting from the payment of insurance payments for losses caused by drought	Agriculture	Partial compensation for costs of insurance undertakings resulting from the payment of insurance payments for losses caused by drought	Until 31-12-2013	Approved	03-06-2008
21-11-2007	No. 683/2007 Compensation of losses caused by transmittable animal diseases	Agriculture	Compensate losses for animal breeders in relation to the liquidation of the outbreaks of transmittable animal diseases	Until 31-12-2013	Approved	22-07-2008
17-12-2007	No. 755/ 2007 Aid for reimbursement of credit interest (except the purchase of land)	Agriculture	To reimburse the credit interest paid for the credits from credit institutions to implement investment projects	Until 31-12-2013	Approved	30-04-2008
19-12-2007	No. 764/2007 Aid to the Lithuanian Power Station	Energy	Construction of a 400MW Combined Cycle Gas Turbine		Not State aid within the meaning of Art. 87(1) of the EC Treaty	13-02-2008
15-04-2008	No. 197/2008 Regional aid for energy sector	Energy	Regional development	Until 31-12-2013	Approved	06-17-2008
19-11-2008	No. 587/2008 Aid for reimbursement of credit interest (except the purchase of land)	Agriculture	To reimburse the credit interest paid for the credit from credit institutions to implement investment projects	Until 31-12-2013	Approved	12-17-2008

CONTRIBUTION FROM MONGOLIA

STATE AIDS AND SUBSIDIES

-- Mongolia --

1. Our country, Mongolia, has been implementing state intervention by providing aids and subsidies as other countries have, and these activities have been contributing to the economic and social aspects of our country. In regard to state aids and subsidies in 2008 and 2009, the largest proportions of state aids and subsidies were given to social, agriculture and education sectors. For instance, in 2008, 76% of total state aids and subsidies, namely about 273 billion tugrug were distributed to the social sector while 6%, approximately 17 billion tugrug, was provided to the agriculture sector. In 2009, 61% of total state aids and subsidies, namely about 167.25 billion tugrug, were distributed to social sector while 16%, approximately 43.6 billion tugrug, was provided to the agriculture sector. Please see the detailed information in Figure 1 and Figure 2.

Figure 1. State Aid and Subsidies by Sector 2008

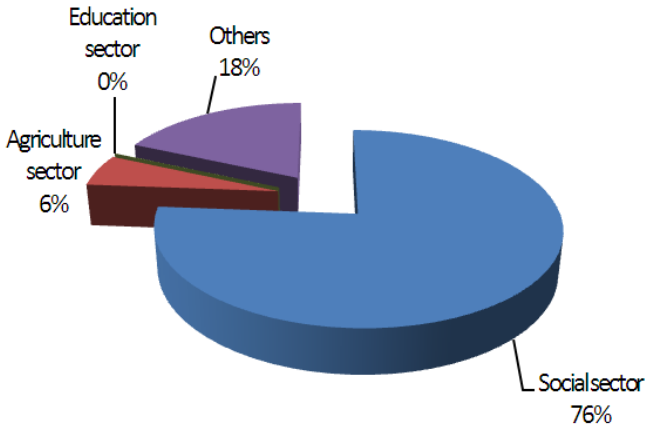
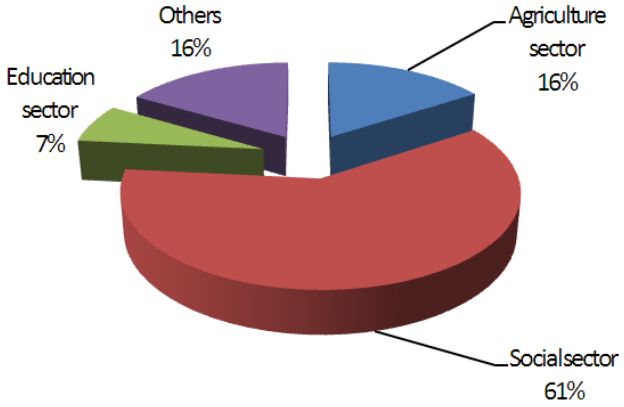


Figure 2. State Aid and Subsidies by Sector 2009



Remark: The amount of tax break and reduction is not included in the above mentioned state aids and subsidies.

2. The largest portion of the above mentioned state aids and subsidies consisted of aids, subsidies and interest rate reductions for overcoming the financial crisis and promoting small and medium sized enterprises. Moreover, as seen from the statistics, a large portion of state aids and subsidies was distributed into the agriculture sector.

1. The Agricultural Sector

3. In our country, as results of the successful implementation of “Campaigns for reclaiming the virgin lands under cultivation-1, 2” in 1959 and 1976, the independent husbandry sector was built and expanded. The area for cultivation reached 1.2 million hectares and the amount of production increased. It brought a range of important and valuable benefits, not only in public welfare, but also in the overall development of our country.

4. However, due to various reasons such as climate change in the world, the deterioration of the financial situation and also decrease in qualified, experienced specialists, just 30% of the area is harvested, only 24.9% of seeds are being harvested, 47.0% of vegetables and 86.0 percent of potatoes are harvested in the whole country.

5. Therefore, since 2008, "The 3rd Campaign for Reclaiming Virgin Lands'' has been organised under Government resolution. In the framework of this campaign the Government is providing state aids and subsidies in this sector to a considerable degree. Particularly, in 2008 in order to support the floating capital for the business entities and individuals, Government provided a trust loan (a loan without a required deposit) in the amount of 1.0-2.0 billion tugrugs to some provinces. In addition, 10.2 billion tugrugs were distributed to the 103 projects which had applied for 30.2 billion tugrug to be involved in the credit on easy term from state.

6. Government imported 6.0 tons of seeds from outside by 6.4 billion tugrugs for the spring harvest and lowered the prices by 50 percent which costs 470 thousand tugrugs. Government has also sold the domestic seeds at 400 thousand tugrugs and granted 10758 ton seeds to the 300 entities and individuals at 20% prepayment for harvest.

7. In the scope of this campaign, Government invested petroleum to the 1044 entities and individuals. It cost 3.7 billion tugrugs to support them, and as result of this, 256.4 thousand hectares were harvested in 2009.

8. In 2008, when the National program of agriculture development 'Campaign for Reclaiming Virgin Lands' was launched, a total amount of 205.8 thousand tons of seeds, 142.1 thousand ton of potatoes, 80.6 thousand tons of vegetables and 15.7 thousand ton of hay were harvested in Mongolia.

9. Compared with same period of the 2007, the volume of seeds increased by 91.2 thousand tons, potatoes by 28.5 thousand tons and vegetable by 1.5 thousand tons. This satisfied 50% of the annual need seeds, 100% of the annual need of potatoes as well as 49% of the annual need of vegetables from domestic harvest.

10. In the scope of the 'Campaign for Reclaiming Virgin Lands' 32.7 billion tugrugs were spent in 2008.

11. In order to enhance the fruit production in Mongolia, 835 million tugrugs were lent to the selected projects of 30 entities and 13 individuals from 18 provinces.

12. In 2009, 30 billion tugrugs were allocated in budget amendment to provinces for promoting small and medium sized enterprises, 850 million tugrugs were also placed in funding for the development of small and medium sized enterprises.

2. The Petroleum Product Sector

13. Our country provides for the consumption of petroleum products totally by import and 90% of it has been providing by only a Russian company named "Rus-neft". In other words, that company is a monopoly supplier for Mongolia. Increasing the petroleum product price year-by-year and month-by-month has had adverse effects on the normal activities of enterprises (importers) and also to the cost of living. Therefore, the Government of Mongolia has decided to provide custom tax and excise duty reductions for petroleum product importers in order to prevent price increase. This could be a good decision for preventing excessive price increase and stabilisation. This provides fair chances to private and state-owned companies, and international and domestic companies could not restrict competition and raised any unfair competition.

3. The Construction Sector, by the plan of 2010

14. In our construction sector, financial difficulties have been raised and some companies face the problem that they cannot pay the interest rate for banks. This would lead to difficulties for the construction sector and commercial banks. So, our government is planning to provide apartment mortgage loans for civil servants in a way of selling Government bonds of 180 billion tugrugs in order to solve financial difficulties in construction sector and to improve the liquidity of commercial banks.

15. In the competition law of Mongolia, which is called "The law on prohibiting unfair competition", there are no specific regulations on state aids and subsidies. However, in chapter 11 of this law, there is a group of regulations which are focused on prohibiting the decision of state authorities on restricting competition. In the scope of this group of regulations, it is possible to prohibit distributing state aids and subsidies unfairly and restricting competition.

16. Nowadays, we, the Authority for Fair Competition and Consumer Protection, have no cases which are about state aids and subsidies leading to restricted competition.

17. We will focus on controlling on state aids and subsidies in view of competition.

CONTRIBUTION FROM MOROCCO

COMPETITION, STATE AIDS AND SUBSIDIES

-- Competition Council of Morocco --

1. Introduction

1. Competition, a fundamental pillar of the market economy, has been the cornerstone of the capitalist system and one of the determining factors in trade relations for modern world economies ever since the industrial revolution first took root.

2. Yet, one should point out that the supporters of the capitalist system are divided between the proponents of orthodox liberalism, who consider the market to be self-regulating and the interventionists, who hold that the capitalist system - and therefore the market and competition – has to be regulated on an on-going basis if growth, prosperity and social progress are to be ensured.

3. Moreover, since the end of the 19th century, the two schools of thought have succeeded each other in public management and, as far as some elements of each are concerned, even exist alongside each other. In fact, compliance with competition regulations by controlling such well-known practices as cartels, the abuse of dominant position and concentrations does not always explicitly cover state aid. The latter seems to be more the province of industrial policy. To put it another way, the competition balance and the economic balance do not always add up.

4. The issue then is as follows: competition, based on the idea of merit and the continuous process of creative destruction, encourages firms to be innovative and efficient.

5. With regard to state aids, although in some ways they are of no harm to competition, in others they can distort competition and generate distorted rents thereby decreasing the economic surplus since it can divert production and investment towards the least efficient units.

6. Apparently, then, state aid, in some ways, should be the fourth component of anti-competitive practices. However, it is not always treated as such, because it is supposed to serve a different purpose. The problem is, then, that aid can sometimes be justified; firstly, when it comes to investments which do not hinder competition and which are of benefit to all involved - such as infrastructural spending. Aid can also be justified when it comes to exemption from competition regulations, either on the grounds of social cohesion or on economic grounds relating to support for innovation, aid for start-up industries, regional development, or even for the purpose of strengthening the operation of the market itself and, hence, the competitive process in the developing countries.

7. In short, for many thinkers and players on the ground, competition and state aid, despite their apparent contradictions, are policies that somehow have to be reconciled. Moreover, the experience of the developing countries shows that some degree of priority has often been given to industrial policy and state aid.

8. Given the foregoing, and acknowledging that state aid policy may not always be in line with competition policy, in what domains can it be useful without making a travesty of the culture of market economy and competition that economic efficiency so sorely needs?

9. Taking Morocco and its experience in this area since its independence in 1956, as a case in point, there are three phases that are very relevant to this issue:

- The phase when state aid took precedence over competition (1956-1982);
- The phase of structural adjustment of the Moroccan economy, accompanied by liberalisation with the market economy and competition to the fore (1983-1998);
- Lastly, the phase of seeking a balance between an outline competition policy, considered as the cornerstone of the system, and state aid to support the imperatives of an emerging economy.

10. Let us try to look first of all at the first two of these stages, which could be qualified broadly as a period of extremes in state aid and competition that prevailed until the end of the nineties, before going on to look at the current decade, which is committed to seeking some sort of balance between competition policy and state aid.

2. The Phase of Extremes: From Seeking Accelerated Development through State Aid to Structural Adjustment with Competition Taking Precedence

11. We will successively review state aid policy which prevailed in the first 25 years following independence, then the period of liberalisation, starting with the structural adjustment policy in 1983 and lasting until the end of the 1990s.

2.1 Predominance of state aids from 1956 to 1982

12. When we look at the development of economic policy in Morocco over the quarter-of-a-century since independence, it has to be said that despite the fact that it had always opted for a market economy, unlike most third-world countries of the period, the size of its public sector economy in the widest sense of the term - with all its administrative, quasi-administrative and entrepreneurial machinery and state aid granted to both public and private sector enterprise - remained disproportionate, accounting as it did for 65 to 70 per cent of the size of the country's economy.

13. Turning specifically to state aid, this was delivered chiefly within the framework of a number of investment codes, the most important of which were the agricultural investment code and the tourism and industry investment codes. These codes were intended partly to encourage the private sector to take the place of intervention by the state, which remained the biggest economic player of the period, partly to promote more balanced regional development. Public resources allocated to economic development saw a very sharp increase (of about 800 per cent), rising from MAD 2.2 billion just after independence (approximately USD 300 million in today's terms) to MAD 17.9 billion (approximately USD 2.3 billion) in 1980.

14. In addition to this state aid, state intervention - other than in the social sector, which received moderate support – came in the form of fiscal incentives to the private sector up to and including total exemption from tax for agriculture.

15. Unfortunately, this interventionism was not matched by any degree of efficiency in public management. The outcome was conclusive neither on the social or the economic level.

16. As for the human development dimension, the fact of the matter is that Morocco had reached an extremely difficult situation whether in terms of standard of living, the inadequacy of its education system, the persistence of high illiteracy or the difficulties in accessing health and housing services. On an economic level, the results were also inconsistent and disappointing since, despite all of the government's interventions, the average rate of growth from 1972 to 1982 was no higher than 4.9 per cent (6.7 per cent from 1973 to 1977; 3.2 per cent from 1978 to 1982) while the average rate of inflation hovered around 9.5 per cent. The public account deficit hit around 12 per cent in 1982. Lastly, the external deficit (running at an average 12.3 per cent) was so high that import invoices could no longer be honoured on time.

17. Towards the end of the 1980s, Morocco was on the verge of defaulting on payments. This situation would justify the intervention of the IMF and endorse its injunctions through the implementation of a neo-liberal-based structural adjustment policy as of 1983. Moreover, this change in Morocco's circumstances coincided with the new wave of liberalism that was sweeping over every continent at the time.

2.2 Structural adjustment policy: 1983-1998

18. Morocco had very definitely set out on a new course, directed towards a more liberal policy. Economic efficiency was now being sought through competition rather than through state aid, although the public resources allocated to investment continued to increase (MAD 70.38 billion in 1990 as opposed to MAD 17.32 billion in 1978). This policy, based on fiscal restraint and structural reform, primarily through privatisation, produced a marked improvement in Morocco's macro-economic equilibrium. The budget deficit during the 1990s was seldom higher than 3 percent of GDP; the same was true for the rate of inflation. As for the external balance, although the trade deficit was persistent, it was more than offset by tourism revenues, transfers from Moroccan residents abroad and foreign investment. It is notable that from that point on, overseas reserves could cover six months of exports. The average growth rate was around 3 per cent.

19. At the sight of these results, we can be pleased in some regards, primarily with the macro-economic equilibrium; however, there are two major problems that must be highlighted. The first of these is the mass impoverishment of Moroccans. The explanation is that while adjustment and reform of the public finances enabled us to re-establish the macro-economic equilibrium, they inevitably exacerbated inequalities and increased poverty. The second point is that the average rate of growth, albeit positive, has remained relatively low as a result of the reduction in public finances and the impact of erratic weather patterns. In any case, this rate of growth does nothing to help make up lags or allow for the pressures of demographic growth, although the latter has declined somewhat.

20. These results, somewhat mixed when all is said and done, are not due simply to the structural adjustment policy and the choice of liberalisation. The fact is that, although the size of the state in the economy shrank slightly, the economy as a whole was still hampered by the problems of an administration that was unable to keep pace with follow-up and support for the new liberal strategy, by a justice system that was not up to the development of business or activities and by a climate of rampant corruption. This situation would lead, from the end of the 1990s, to a new approach to the problem of competition and state aid. It must be added that this period experienced a calm change of politics with regards to the country's political situation, and in particular a change of ruling with King Mohamed VI coming to power.

3. The Dawn of the Third Millennium and the Balance between Competition Policy and State Aid Policy

21. The 2000s would see a significant improvement on some sticking points. The liberal road map is now in place; privatisations are proceeding under better conditions, comparatively speaking; political governance looks to be relatively calm; the administration seems to be working somewhat better; which means that state efforts in terms of investment are now more evident in some areas, particularly infrastructure.

22. Morocco seems, perhaps, to be steering a course which, while wishing to make more room for competition policy, is trying to use state aid as leverage to promote the emergence of the market economy and cope with some of the pressures arising from the social situation and the development goal in general. Let us state that aid, subsidies, fiscal and other incentives still account for a major share of GDP. At the end of 2007, they amounted to around USD 8 billion (of which 45 per cent fiscal expenditure) or approximately 12 per cent of GDP.

23. However, let us again state that the goal of competition is the backbone of the new road map; as a result, there is a tendency to be clearer about the considerations on which the new State aid policy is based. There are five main challenges that can be identified:

- Supporting the various sectoral development plans implemented by the government, such as the « *Plan Azur* » for tourism, the *Plan emergence* for industry, the *Plan verte* for agriculture and the *Plan bleu* for fisheries;

- Modernising a certain number of firms in order to engage them in the competitive approach and ensure that a genuine market emerges;

- Developing foreign investment and underpinning our external balance by encouraging exports and foreign investment as well as tourism and revenue transfers by Moroccans residing abroad;

- Helping job-generating firms that find themselves in difficulty;

- Helping the social strata that are unable to bear real-cost pricing as a result of the operation of the market.

24. Overall, analysing the situation from the standpoint of the Moroccan economy, which I've had occasion to observe more closely, one can identify potential pockets of State aid on a social level as well as in the domestic economy and international relations.

3.1 The Social Dimension of State Aid

25. State aids take two major forms. They reside primarily in social investment expenditure, which in no way hinders competition, but rather creates the conditions for a genuine market economy. It may well include investment allowing rural areas and peripheral cities access to electricity and drinking water. We can also say that awareness of social issues and poverty has never been so delicate. The latter form of state aid is in effect an exemption from competition rules - an exemption due to certain peculiarities of Moroccan society. The main difference is that even with a fully operational market, the best resulting price may be higher than the level of income of certain strata of the population. It then becomes necessary to subsidise certain consumer staples. That is what Morocco does through its « Caisse de Compensation ».

26. Aid provided by this means amounted to around MAD 30 billion in 2008 and the forecast for 2009 puts it in the region of MAD 14 billion, chiefly as a result of the fall in energy prices. We are currently in the process of debating this issue: Should we continue to subsidise products that benefit all, or institute free-market pricing and grant state aid in the form of direct revenue distributed to the economically vulnerable?

27. Needless to say that in addition to this type of structural support, Morocco's experience shows that action in the form of cyclical support may sometimes be needed as a result of global developments in the price of certain consumer staples or of the fluctuating agricultural cycle in Morocco or following the last global crisis.

3.2 The Economic Dimension of State Aid

28. On the economic level, too, there are state aids that do not inhibit competition and a number of exemptions of a structural nature to the principle of competition.

29. Regarding the first form of intervention, it regards fundamentally expenditure on infrastructure and economic reorganisation affecting both administration, education, the legal system and the upgrading of sectors of economic activity through the "Emergence" - "Azur" - "Green" and "Blue" plans... It also concerns the actions which constitute exemptions from competition policy. It may well include subsidies that affect agriculture, other priority sectoral plans, the informal sector, national champions and SMEs.

30. Turning first to agriculture, it has to be said that Moroccan agriculture, which covers 9 million hectares of land, of which 12 per cent are irrigated, suffers as much from the preponderance of small farms, three-quarters of them under 5 hectares, as from the erratic climate. The problem lies in very poor efficiency and the fact that although agriculture only accounts for 15 per cent of Morocco's GDP, it employs more than 45 per cent of the population. It easy to see why state aid is needed at times, although it flies in the face of all economic sense and the principle of competition. The aid provided includes both factors of production and the total tax exemption of the sector. A tentative solution to such a problem would entail far-reaching reforms based on land consolidation and the emergence of viable farms, which would be a socially difficult and politically very demanding task.

31. Let us add that the other sectoral plans (for industry, tourism and fisheries, etc.) also benefit, chiefly in terms of investment, from tax concessions and major state-owned inputs.

32. As for the informal sector, it plays a very large role in the Moroccan economy; according to the latest survey by the High Commission for Planning (*Haut Commissariat au Plan)*, unregulated SMEs number around 1.55 million, increasing by around 350 000 units per year from 1999 to 2007. This sector is a major actor in trade (57.4 per cent), services (20 per cent), industry (20 per cent) and the construction industry (5.4 per cent). It reportedly employs some 2.2 million people and accounts for 14.3 per cent of GDP. The informal sector includes firms which evade taxes and social security regulations and firms which engage in contraband activities. The problem, apart from the fact that certain practices are not within the remit of the competition authorities, is the trade-off between employment and fair competition. What should one do in a case like this? The question as yet remains unanswered.

33. Furthermore, similar problems arise even with legitimate SMEs; the latter play a key part in fostering employment and spreading innovation. Their development sometimes requires incentives, whether in the form of state aid or tolerance of certain anti-competitive practices, such as certain levels or types of cartel agreement. How far should this type of practice be tolerated?

34. The same question also arises with national champions: some of them spur on the economy through research, innovation and competition.

35. This raises a number of questions: how does one aid research and competitiveness yet make the right trade-off between the latter and barrier-free competition? How does one avoid the slippery slope towards preferential treatment for influential members of economic organisations under the guise of aid for innovation and exports?

36. Lastly, alongside these structural situations, circumstances arising from the economic cycle – as was the case with the latest crisis – may justify regulations that curb or restrain competition principles. This was why a comprehensive aid plan for the textile sector was implemented in Morocco. The question in this case is the following: how is one to ensure that the crisis is not used as a pretext to return to permanent protectionist practices?

3.3 Competition, Regulation and International Economic Relations

37. Let us point out that since the WTO agreements, we have been witnessing an unprecedented liberalisation of trade. Liberalisation has been reinforced by numerous multilateral and bilateral agreements. The problem that this poses touches on a number of issues that are causing significant difficulties for international trade relations and North-South relations. The three main such issues are: agricultural subsidies, exports and social dumping and the positioning of cartels and certain major multinationals.

38. First, agricultural subsidies, which concern both Morocco and its partners: It should be noted that under "advanced status" arrangements, Morocco secured a grace period of 10 years to upgrade its agri-food and fatstock production since these activities essentially concern Morocco's large and poor peasant-farmer population. In contrast, modern agriculture as it is termed - basically citrus fruit and vegetable production - is efficient, but is more affected by Europe's common agricultural policy, which poses problems - despite the fact that quotas were raised some time ago – with barriers to entry and the subsidy mechanisms for its own agriculture.

39. This is a major socially and politically sensitive issue for all countries. In actual fact, under the free-trade agreements signed with the North, these subsidies seem to handicap, first and foremost, certain countries of the South. It has to be said that while the subsidies that developing countries resort often have a social or survival component, the state aid provided for agriculture in the countries of the North makes competition just as hard for the production of the countries of the South. The main issue that arises with this aid are the limits of this transition period.

40. The second problem concerns the promotion of exports and social dumping; let us add that promoting exports in countries that do not yet have a culture of competitiveness sometimes requires a degree of support, chiefly incentive support. How far can one tolerate such practices?

41. As regards social dumping, more specifically, the practices concerned are low wages and non-compliance with social security requirements. Clearly, this causes unfair competition at the expense of certain countries. Nevertheless, let us be clear that while such practices exist in certain sectors, they cannot be lumped together with objective situations where low wages are a factor in competitive production. Otherwise, why not call into question the technological lead of the industrialised countries?

42. Moreover, in the case of Morocco, for instance, the guaranteed minimum wage level (SMIG) compared with the French SMIG is perhaps rather more to the advantage of French exports since the ratio is approximately 1:5 while the ratio for per capita GDP is about 1:9.

43. Lastly, one might mention the case of cartels and large multinational firms; this is a major transnational problem which works to the disadvantage of the countries of the South. Some cartels and large multinational enterprises make use of certain State aids and their subsidiaries to carve up the markets of developing countries between them, taking advantage of their well-known lack of competition regulation. What should one do, in this case? And at what level?

4. Conclusion

44. In conclusion, despite the objective difficulties arising from all of these issues, it can be said that Morocco's economic and social policy during the decade now coming to an end has been more prudent as regards seeking a balance between competition policy and state aid policy, growth policy, social welfare policy and the fight against poverty. It has preserved the fundamentals; the average growth rate is around 5.5 per cent; the budget deficit is being kept within acceptable limits; the trade deficit, with the exception of some difficulties arising from the latest crisis, is offset by tourist revenues and transfers from Moroccans

abroad as well as by foreign investment. All of this is being achieved against a background of major inland and maritime construction projects as well as major industrial and tourism projects. It can also be noted that the number of social action projects is increasing. Is that to say that the choices being made are totally cohesive and that there are no large projects still to be implemented? It seems to me that among Morocco's technocrats there is still a prevailing culture that favours state aid, with all that entails such as efficiency difficulties, over competition policy; likewise, despite all the efforts made on an economic and social level, there are still serious problems with the trade balance deficit, the education system, administrative management, the justice system, the persistence of certain isolated areas of poverty, and escalating corruption, which - although it spares some circles at senior levels of the administration - seems to be affecting broad swathes of society.

45. Hence, we are at the end of a process of major managerial achievements taking account of both competition policy and state aid policy. The coming decade, along the same lines, will probably be the period that sees major structural reforms.

CONTRIBUTION DU MAROC

CONCURRENCE, AIDES PUBLIQUES ET SUBVENTIONS

-- Conseil de la Concurrence du Maroc --

1. Préambule

1. La concurrence, pilier fondamental de l'économie de marché, a toujours constitué, depuis l'émergence et l'affirmation de la révolution industrielle, l'ancrage du système capitaliste et l'une des composantes déterminantes des rapports d'échange des économies du monde moderne.

2. Précisons tout de même que parmi les partisans du système capitaliste, s'opposent les tenants du libéralisme orthodoxe qui considèrent que le marché s'autorégule spontanément et les interventionnistes qui pensent que le système capitaliste, et donc le marché et la concurrence, doivent être régulés de façon continue afin d'assurer croissance, prospérité et progrès social.

3. D'ailleurs, depuis la fin du 19ème siècle, les deux écoles se sont succédées à la gestion des affaires publiques, voire même coexistent par certaines de leurs composantes. En effet, le respect des règles de la concurrence à travers le contrôle des pratiques bien connues que sont les ententes, les abus de position dominante et les concentrations ne couvre pas toujours de façon explicite les aides d'État. Celles-ci paraissent plutôt relever de la logique de la politique industrielle. Autrement dit, bilan concurrentiel et bilan économique ne fusionnent pas toujours.

4. La problématique est dès lors la suivante : la concurrence, de par l'idée du mérite et le processus permanent de destructions créatrices, stimule l'innovation et l'efficience des entreprises.

5. Quant aux aides publiques, si de par certains aspects, elles peuvent ne pas gêner le jeu de la concurrence, elles peuvent également fausser le principe d'émulation et générer des distorsions rentières et de baisse du surplus économique dans la mesure où la production et l'investissement peuvent être détournées vers les unités les moins productives.

6. Apparemment donc, les aides d'État, de par certains aspects, devraient constituer la quatrième composante des pratiques anticoncurrentielles. Elles ne sont cependant pas toujours traitées en tant que telles parce que réputées relever d'une autre logique. Le problème réside ainsi dans le fait qu'elles peuvent parfois être justifiées ; elles peuvent l'être d'abord lorsqu'il s'agit d'investissements qui n'entravent pas le jeu de la concurrence et bénéficient à tous les acteurs comme les dépenses d'infrastructure. Elles le sont également lorsqu'il s'agit d'exemptions aux règles de la concurrence soit pour des considérations de cohésion sociale, soit pour des raisons économiques liées au soutien de l'innovation, à l'aide des industries naissantes, au développement régional, voire même à la volonté de renforcer le fonctionnement du marché et donc du processus concurrentiel dans les pays en développement.

7. Bref, pour beaucoup de penseurs et d'acteurs du terrain, concurrence et aides d'État sont, malgré leurs contradictions apparentes, des politiques dont la conciliation s'impose quelque part. Bien plus, l'expérience des pays en développement démontre qu'une certaine priorité a souvent été donnée à la politique industrielle et aux aides d'État.

8. Partant de là, tout en admettant que la politique des aides d'État peut ne pas être toujours en phase avec celle de la concurrence, dans quels domaines peut-elle être utile sans travestir l'esprit de l'économie de marché et de la concurrence, tant nécessaires pour l'efficience économique ?

9. Si nous prenons le cas du Maroc et son expérience en la matière depuis son indépendance en 1956, on peut déceler trois phases importantes par rapport à cette problématique :

- La phase de la primauté des aides d'État au détriment de la concurrence (1956-1982) ;
- La phase d'ajustement structurel de l'économie marocaine via la libéralisation et la mise en évidence de l'économie de marché et de la concurrence (1983-1998) ;
- Enfin, la phase de recherche d'un équilibre entre l'esquisse d'une politique de la concurrence, considérée comme le fondement du système, et les aides d'État accompagnant les impératifs de l'émergence économique.

10. Essayons de nous pencher d'abord sur les deux premières phases qu'on peut qualifier globalement de période des extrêmes en matière d'aides d'État et de concurrence, période qui a prévalu jusqu'à la fin des années quatre-vingt-dix, avant de nous pencher sur la décennie actuelle qui consacre la recherche d' un certain équilibre entre politique de la concurrence et aides d'État.

2 La phase des extrêmes : de la recherche du développement accéléré par les aides d'État à l'ajustement structurel et la primauté de la concurrence

11. Examinons successivement la politique des aides d'État qui a prévalu durant le premier quart de siècle qui a succédé à l'indépendance avant de nous pencher sur la période de libéralisation qui a démarré avec la politique d'ajustement structurel en 1983 et duré jusqu'à la fin des années quatre-vingt-dix.

2.1 La prédominance des aides d'État durant la période allant de 1956 à 1982

12. Lorsqu'on se penche sur l'évolution de la politique économique du Maroc durant le quart de siècle qui a suivi l'indépendance, force est de constater que malgré le fait qu'il ait toujours opté pour l'économie de marché, contrairement à la majorité des pays du tiers monde de l'époque, le poids de l'économie publique au sens large du terme, avec ses composantes administrative, para-administrative et entrepreneuriale ainsi qu'avec les aides d'État accordées aussi bien aux entreprises publiques que privées, est resté prépondérant, représentant ainsi 65 à 70% du poids économique du pays.

13. Si nous nous attachons particulièrement aux aides d'État, elles se sont fondamentalement exprimées dans le cadre d'un certain nombre de codes des investissements dont les plus importants sont le code des investissements agricoles et ceux du tourisme et de l'industrie. Ces codes ont été conçus, d'une part dans la logique d'amener le secteur privé à relayer l'action de l'État qui restait le plus grand acteur économique de l'époque, d'autre part à promouvoir un développement régional plus équilibré. Les ressources publiques affectées ainsi au développement économique ont connu une très forte augmentation (environ 800%) passant ainsi d'environ 2,2 milliards de DH au lendemain de l'indépendance (approximativement 300 millions de $ en valeur d'aujourd'hui) à 17,9 milliards de DH (environ 2,3 milliards de $) en 1980.

14. En plus de ces aides d'État, l'activisme public s'est manifesté, outre le domaine social qui a été soutenu moyennement, par des incitations fiscales au secteur privé allant jusqu'à la défiscalisation totale de l'agriculture.

15. Malheureusement, ce volontarisme n'a pas été accompagné d'une certaine efficience au niveau de la gestion des affaires publiques. Le résultat n'a pas été probant aussi bien sur le plan social que sur le plan économique.

16. Concernant la dimension du développement humain, force est de constater que le Maroc avait atteint des situations extrêmement difficiles aussi bien en termes de niveau de vie, qu'en ce qui concerne l'inefficience du système éducatif, la persistance du taux d'analphabétisme, les difficultés d'accès aux services de santé et au logement. Sur le plan économique, les résultats étaient aussi inconséquents et décevants puisque malgré tout l'activisme public, le taux de croissance moyen de 1972 à 1982 n'a pas dépassé 4,9% (6,7% entre 1973 et 1977 ; 3,2% entre 1978 et 1982) alors que le taux d'inflation moyen se situait autour de 9,5%. Quant au déficit du trésor public, il a atteint environ 12% en 1982. Enfin, le déficit extérieur (12,3% en moyenne) était tellement important qu'on n'arrivait plus à honorer à temps les factures d'importation.

17. Vers le début des années 80, le Maroc était alors pratiquement en cessation de paiement. Ce qui va justifier l'intervention du FMI et autoriser ses injonctions par la mise en œuvre, à compter de 1983, d'une politique d'ajustement structurel d'inspiration néolibérale. Cette nouvelle donne a d'ailleurs coïncidé avec le nouveau souffle libéral qui a essaimé sur tous les continents.

2.2 La politique d'ajustement structurelle : 1983-1998

18. Un nouveau cap, orienté vers une politique plus libérale, est décidément franchi. On recherche plus l'efficience économique par la concurrence que par les aides d'État même si les ressources publiques destinées à l'investissement ont continué à augmenter (70,38 milliards de DH en 1990 contre 17,32 milliard en 1978). Cette politique, fondée sur la rigueur budgétaire et la réforme structurelle, notamment par la privatisation, a permis un redressement certain au niveau des équilibres macro-économiques du Maroc. Le déficit budgétaire durant la décennie quatre-vingt-dix n'a que rarement dépassé les 3% du PIB ; il en est de même pour le taux d'inflation. Quant à la balance extérieure, si le déficit commercial est persistant, il est surcompensé par les recettes touristiques, les transferts des résidents marocains à l'étranger et par l'investissement étranger. Il est à noter que depuis cette époque, les réserves extérieures permettent de couvrir environ six mois d'exportation. Quant au taux moyen de croissance, il s'est situé autour de 3%.

19. Lorsqu'on observe ces résultats, on peut s'en réjouir par certains aspects, notamment par rapport aux équilibres macro-économiques ; et pourtant, deux problématiques majeures sont à mettre en évidence. On peut d'abord invoquer la paupérisation massive des marocains. C'est que la politique d'ajustement et d'assainissement relatif des finances publiques a permis de rétablir les équilibres macro-économiques, mais elle a inéluctablement approfondi les inégalités et développé la pauvreté. Le deuxième constat a trait au fait que le taux de croissance moyen, bien que positif, est resté relativement modeste du fait du recul des soutiens publics et de l'impact des aléas climatiques. En tout état de cause, ce taux de croissance ne permet nullement de rattraper les retards et de tenir compte de la pression de la croissance démographique, bien que cette dernière ait enregistré un certain recul.

20. Ces résultats, somme toute assez mitigés, ne sont pas dus uniquement à la politique d'ajustement structurel et au choix en faveur de la libéralisation. C'est que, si le poids économique de l'État a légèrement reculé, le monde économique souffrait toujours des problèmes d'une administration en retard de phase de suivi et d'accompagnement par rapport à la nouvelle logique libérale, d'une justice non adéquate au développement des activités et des affaires et d'un climat galopant de corruption. Cette situation allait déboucher à partir de la fin des années quatre-vingt-dix sur une nouvelle approche concernant la problématique de la concurrence et des aides d'État. Il faut préciser que cette période à connu une alternance politique apaisante pour le jeu politique dans le pays et surtout un changement de règne avec l'accession au Trône du Roi Mohamed VI.

3. L'aube du Troisième Millénaire et l'équilibre entre la politique de la concurrence et la politique des aides d'État

21. Les années deux mille vont connaître un redressement sérieux par rapport à un certain nombre de données bloquantes. La feuille de route libérale est toujours là ; les privatisations se font relativement dans de meilleures conditions ; la gouvernance politique est relativement apaisée ; l'Administration semble quelque peu mieux fonctionner ; ce qui fait que les efforts publics en matière d'investissement et d'aides sont plus palpables dans certains domaines, particulièrement au niveau des infrastructures.

22. On semble peut-être prendre une orientation qui, tout en voulant accorder une place plus grande à la politique de la concurrence, essaie de faire jouer le levier des aides publiques pour favoriser l'émergence de l'économie de marché et faire face à certaines contraintes ayant trait à la situation sociale et à l'objectif de développement d'une façon générale. Précisons que ces aides, subventions, incitations fiscales et autres, représentent encore une part importante du PIB. Elles ont atteint, à fin 2007, environ 8 milliards de $ (dont 45% de dépenses fiscales), soit approximativement 12% du PIB.

23. Reprécisons cependant que l'objectif de concurrence constitue l'ossature de la nouvelle feuille de route ; de ce fait, on a tendance à mieux préciser les considérants à la base de la nouvelle politique d'aide d'État. On peut relever cinq défis essentiels :

- Accompagner les différents plans à développement sectoriel mis en œuvre par le gouvernement comme le plan Azur pour le tourisme, le plan émergence pour l'industrie, le plan vert pour l'agriculture et le plan bleu pour la pêche ;

- Mettre à niveau un certain nombre d'entreprises pour les amener à la logique concurrentielle et faire émerger un véritable marché ;

- Développer les investissements étrangers et renforcer notre balance extérieure par l'encouragement des exportations et des investissements étrangers ainsi que par l'encouragement du tourisme et des transferts de revenus des marocains à l'étranger ;

- Aider les entreprises en difficulté et génératrices d'emploi ;

- Aider les couches sociales qui ne peuvent pas supporter la vérité des prix résultant de fonctionnement du marché.

24. Globalement et à l'examen de la situation au niveau de l'économie marocaine que j'ai eu à mieux observer, on peut déceler des ilots d'aides d'État possibles aussi bien au niveau social, qu'au niveau économique interne et des relations internationales.

3.1 La dimension sociale des aides d'État

25. Les aides de l'État prennent deux formes importantes. Elles résident d'abord dans dépenses d'investissement social qui ne gênent en rien la concurrence, mais créent plutôt les conditions d'une véritable économie de marché. On peut ainsi citer les investissements permettant l'accès du monde rural et périphérique des villes à l'électricité et l'eau potable. On peut également dire que jamais la sensibilisation aux questions sociales et de la pauvreté n'ont été aussi sensibles. La dernière forme d'aide d'État constitue en fait une exemption par rapport aux règles de la concurrence ; exemption due à certaines particularités de la société marocaine. La principale spécificité concerne le fait que même lorsque le jeu concurrentiel fonctionne pleinement, le meilleur prix qui en découle peut se situer au-delà des niveaux de revenus de

certaines couches de la population. S'impose alors la nécessité de subventionner certains produits de consommation de base. C'est ce que nous faisons au Maroc à travers la Caisse de Compensation.

26. Les aides accordées par ce biais ont atteint environ 30 milliards de DH en 2008 et les prévisions pour 2009 se situent autour de 14 milliards à cause du recul du prix de l'énergie, notamment. Nous vivons actuellement un débat sur la question : Faut-il continuer à subventionner des produits qui bénéficient à tout le monde, ou instaurer la liberté des prix et accorder des aides d'État sous forme de revenus directs, distribués aux économiquement faibles.

27. Précisons enfin qu'en plus de cette situation de type structurel, l'expérience marocaine démontre que des actions de soutien de type conjoncturel s'imposent parfois du fait de l'évolution conjoncturelle mondiale concernant les prix de certains produits de consommation de base ou en raison du cycle agricole versatile de l'agriculture marocaine ou suite enfin à la dernière crise mondiale.

3.2 La dimension économique des aides d'État

28. On retrouve également à ce niveau, les aides d'État qui n'entravent pas le jeu de la concurrence et un certain nombre d'exemptions au principe concurrentiel de type structurel.

29. Concernant la première forme d'intervention, il s'agit fondamentalement des dépenses d'infrastructure et de réorganisation économique touchant aussi bien l'administration, le système éducatif, la justice et la mise à niveau des secteurs d'activité économique à travers les plans « Emergence » - « Azur » - « Vert » et « Bleu »… Il s'agit également des actions qui constituent des exemptions à la politique de la concurrence. On peut ainsi citer les subventions qui concernent l'agriculture, les autres plans sectoriels prioritaires, le secteur informel, les champions nationaux et les PME.

30. Concernant d'abord l'agriculture, force est de constater que l'agriculture marocaine qui couvre 9 millions d'hectares dont 12% irrigués, souffre autant de la prépondérance des petites exploitations dont les trois quarts ont moins de 5 hectares que des conditions climatiques aléatoires. Le problème réside dans sa très faible efficience et dans le fait que tout en ne procurant que 15% du PIB marocain, elle emploie plus de 45% de la population. On comprend aisément que des aides d'État s'imposent parfois à l'encontre de toute logique économique et concurrentielle. Ces aides concernent aussi bien les facteurs de production que la défiscalisation totale du secteur. L'esquisse d'une résolution d'une pareille problématique suppose une réforme profonde du foncier fondée sur le remembrement des terres et l'émergence d'exploitations viables, ce qui est difficile socialement et fort laborieux politiquement.

31. Précisons par ailleurs que les autres plans sectoriels (émergence, azur, bleu…) bénéficient également, notamment en ce qui concerne l'investissement, d'avantages fiscaux et de moyens de production importants appartenant à l' État.

32. Concernant le secteur informel, il occupe une place prépondérante dans l'économie marocaine ; d'après une dernière enquête du Haut Commissariat au Plan, les PME non organisées représentent environ 1,55 millions d'Unités et ont connu une augmentation d'environ 350 mille unités par an entre 1999 et 2007. Ce secteur est prépondérant dans le commerce (57,4%), les services (20%), l'industrie (20%) et les BTP (5,4%). Il utiliserait quelques 2,2 millions de personnes et représente 14,3% du PIB. Il couvre aussi bien les entreprises qui échappent au fisc et aux réglementations sociales que les activités de contrebande. Le dilemme, c'est qu'en dehors du fait que certaines pratiques ne relèvent pas de la compétence des autorités de la concurrence, c'est l'arbitrage entre l'emploi et la concurrence loyale qui est en cause. Comment faire alors ? La question reste posée.

33. Par ailleurs, des problèmes du même genre concernent même les PME travaillant dans la transparence ; celles-ci ont un rôle déterminant dans la promotion de l'emploi et la diffusion de

l'innovation. Leur développement nécessite parfois des incitations, soit sous forme d'aides d'État, soit à travers la tolérance de certaines pratiques anticoncurrentielles comme certains niveaux et formes d'ententes. Jusqu'à quel niveau peut-on tolérer ce type de pratiques ?

34. La même question se pose aussi pour les champions nationaux : Certains d'entre eux tirent l'économie nationale vers le haut par la recherche, l'innovation et la compétitivité.

35. Dès lors, un certain nombre de questions se posent : Comment aider la recherche et la compétitivité en faisant un juste arbitrage entre celle-ci et la concurrence libre de toute entrave ? Comment, sous couvert d'aide à l'innovation et aux exportations, ne pas glisser vers des privilèges octroyés aux membres influents des organisations économiques ?

36. Enfin, à côté de ces données d'ordre structurel, certaines circonstances relevant de la conjoncture économique, comme c'est le cas de la dernière crise, peuvent justifier des régulations qui entravent ou freinent la logique concurrentielle. C'est ainsi qu'un plan global d'aide au secteur textile a été mis en œuvre. La question qui se pose est la suivante : Comment faire en sorte qu'on n'utilise pas la crise comme alibi pour revenir vers des pratiques protectionnistes permanentes ?

3.3 Concurrence, régulation et relations économiques internationales

37. Rappelons que depuis les accords de l'OMC, nous assistons à une libéralisation sans précédent des échanges. Celle-ci a été renforcée par de nombreux accords multilatéraux et bilatéraux. Le problème qui se pose concerne un certain nombre de dossiers qui soulèvent des difficultés certaines au niveau des relations commerciales internationales et des rapports Nord-Sud. Il s'agit principalement de trois dossiers : Les subventions agricoles, les exportations et le dumping social, le positionnement des cartels et de certaines grandes entreprises multinationales.

38. Concernant d'abord les subventions agricoles, elles concernent aussi bien le Maroc que ses partenaires. Il est à rappeler que dans le cadre du statut avancé, le Maroc a obtenu un délai de dix ans pour la mise à niveau de son agriculture vivrière et d'embouche sachant que ces activités concernent essentiellement le large et pauvre paysannat marocain. Par contre, l'agriculture dite moderne, essentiellement agrumicole et maraichère, est performante, mais souffre plutôt de la politique agricole européenne commune qui pose des problèmes, malgré le relèvement des quotas il y a quelque temps, de barrières à l'entrée et des mécanismes de subvention de sa propre agriculture.

39. C'est une question majeure et sensible sur le plan sociopolitique pour tous les pays. En fait, ces subventions semblent handicaper en premier lieu certains pays du Sud dans le cadre des accords de libre échange signés avec le Nord. Il faut reconnaître qu'autant les subventions auxquelles ont recours les PED ont souvent un caractère social ou de survie, autant les aides d'État fournies à l'agriculture dans les pays du Nord occasionnent une concurrence dure à l'égard des productions des pays du Sud. La principale question qui se pose concernant ces aides a trait aux limites de cette transition.

40. La deuxième problématique concerne la promotion des exportations et le dumping social ; précisons que la promotion des exportations dans des pays n'ayant pas encore une culture de compétitivité, nécessite parfois un certain accompagnement, notamment par des incitations. Jusqu'à quel niveau peut-on tolérer de telles pratiques ?

41. Concernant plus particulièrement le dumping social, il s'agit de pratiques de bas salaires et surtout de non respect de la couverture sociale. Ceci cause évidemment une concurrence déloyale au dépend de certains pays. Précisons cependant que si de telles pratiques existent dans certains secteurs, on ne peut faire l'amalgame entre ces pratiques et la situation objective de bas salaire comme facteur de

production compétitif. Sinon, pourquoi ne remettrait-on pas en cause l'avance technologique des pays industrialisés ?

42. De plus, concernant le cas du Maroc par exemple, on constate que le niveau relatif du SMIG marocain par rapport au SMIG français est peut-être relativement plus favorable aux exportations françaises puisqu'il est dans un rapport approximatif de 1 à 5 alors que le rapport des PIB/habitant est à peu près de 1 à 9.

43. On peut enfin invoquer le cas des cartels et des grandes entreprises multinationales ; il s'agit là d'un grand problème transnational qui s'opère au détriment des pays du Sud. En effet, certains cartels et grandes entreprises multinationales, à travers certaines aides d'État et à travers le jeu de leurs filiales, se partagent les marchés des pays en développement en tirant profit notamment de leurs carences notoires en matière de régulation de la concurrence. Que faire alors ? Et à quel niveau ?

4. Conclusion

44. En conclusion, malgré les difficultés objectives liées à toutes ces questions, on peut dire que la politique économique et sociale du Maroc durant cette décennie qui s'achève a été plus judicieuse quant à la recherche d'un équilibre entre politique de la concurrence et politique d'aides d'État, politique de croissance et politique d'action sociale et de lutte contre la pauvreté. Les équilibres fondamentaux sont préservés ; le taux de croissance moyen se situe autour de 5,5% ; le déficit budgétaire est maintenu dans des limites acceptables ; le déficit commercial, à l'exception de quelques difficultés résultant de la dernière crise, est compensé par les recettes touristiques et les transferts des marocains de l'étranger ainsi que par les investissements de l'extérieur. Tout ceci se réalise dans une ambiance de grands chantiers au niveau des infrastructures terrestres et maritimes ainsi qu'en ce qui concerne de grands projets industriels et touristiques. Précisons également que les chantiers d'action sociale se multiplient. Est-ce à dire que les choix se font en toute cohérence et qu'il ne subsiste pas de larges chantiers à mettre en œuvre ? Il me semble qu'il y a encore une culture régnante au niveau de la technostructure marocaine qui privilégie la politique d'aides d'État avec tout ce que cela entraîne comme difficultés d'efficience au détriment de la politique de la concurrence ; de même que, malgré tous les efforts entrepris sur les plans économique et social, se posent encore de sérieux problèmes au niveau du déficit de la balance commerciale, du système éducatif, de la gestion administrative, de la justice, de la persistance de certains ilots de pauvreté et de la montée de la corruption qui, si elle épargne certains milieux de la haute administration, semble toucher de larges franges de la société.

45. On est donc à la fin d'un processus de grands acquis managériaux tenant compte aussi bien de la politique de la concurrence que de la politique d'aides d'État. La prochaine décennie sera probablement, dans la même logique, la période des grandes réformes de structures.

CONTRIBUTION FROM PAKISTAN

COMPETITION, STATE AIDS AND SUBSIDIES

-- Pakistan --

I. The use of state aids in your country

1. Does your country regularly engage into the following practices? If so, could you provide information about: (i) the affected sectors; (ii) an order of magnitude of the corresponding amounts, and (iii) the evolution over time? If possible, distinguish between government-owned and private firms.

a. Direct subsidies to companies;

b. Tax breaks to selected companies or selected sectors;

c. The granting of government-owned inputs (such as land, bandwidth, government facilities) to companies at a price below market levels (possibly a regulated price);

d. Government purchases at above-market prices;

e. The granting of loans at below-market rates;

f. The provision of loan guarantees at below-market rates.

1. Direct subsidies have been provided to:

2. Pakistan International Airlines (PIA), a state-owned company, received around PKR 1 billion (USD 11.8 million[1]) from the government for mark-up reimbursement during 2008-09.[2]

3. Sugar sector – The government provided a subsidy of one billion rupees on sugar to ensure its availability at PKR 38 (USD 0.45) per kilogram at all Utility Stores Corporation outlets.[3] In the budget for FY 2009-10, subsidy for sugar import would be reduced to PKR 4 billion (USD 47.3 million) against PKR 6.3 billion (USD 74.5 million) in FY 2008-09.[4]

4. Fertilisers – In the Federal Budget for FY 2009-10, Fauji-Jordan Fertiliser Corporation, a private fertiliser manufacturing company, was allocated PKR 210 million (USD 2.49 million) as subsidy compared to PKR 231 million (USD 2.73 million) allocated in FY2008-09.[5]

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1. US Dollar equivalents calculated using exchange rate (1USD = PKR 84.50) on 1 January 2010 - adapted from http://www.forex.pk/open-rates.php.

2. http://pakobserver.net/200906/13/Articles03.asp.

3. http://www.thenews.com.pk/daily_detail.asp?id=208426.

4. http://www.brecorder.com/latestindex.php?latest_id=10336&cindex=29&current_page=2.

5. *Id.*

2. To what extent have state aids in your country been motivated by the following goals? For each of them, please specify whether domestic and foreign firms have been treated differently.

a. Protecting employment (in the case of aid to ailing firms);

b. Fostering innovation and the development of new sectors;

c. Attracting firms to economically distressed regions;

d. Remedying competition distortions created by the granting of aid by foreign governments;

e. Inducing firms to supply goods or services deemed to contribute to the general interest in cases when market incentives alone were insufficient to ensure that these goods or services would be provided;

f. Palliating the undersupply of credit by the financial sector;

g. Preventing strategic firms from being purchased by foreign companies.

5. State aid is extended to the national air carrier, Pakistan International Airlines (PIA) to overcome its financial liabilities. The employee to aircraft ratio of PIA is 1:418 while generally for an airline, the employee to aircraft ratio is between 1:130 - 1:170.[6] This indicates that extending state aid in such a scenario is making an ailing situation worse.

6. State aid is often extended to help the end-consumer in case of vital commodities such as sugar, wheat and rice. Farmers can also purchase fertiliser at subsidised rates. However, in the case of powerful state-run players in a market, state aid is sometimes used to support otherwise failing or ailing organisations. Hence, the contribution of state aid towards innovation and development of state-run organisations is often limited, other than prolonging their inefficiencies.

7. N/A.

8. No.

9. Yes.

10. Yes.

11. No.

3. What are your country's laws, and the actual practice, regarding the provision of government-owned or government-controlled inputs? In which circumstances is an auction process mandatory? In which circumstances does a non-discrimination clause apply? In practice, what is the prevalence of auctions? If possible, please provide information about the way in which the following inputs have been allocated.

a. License to operate a mobile telephony network (with access to the corresponding bandwidth);

b. License to operate a television network;

c. Access to natural resources.

6. http://www.dailytimes.com.pk/default.asp?page=2008%5C12%5C28%5Cstory_28-12-2008_pg5_13.

12. License fees for Cellular Mobile Telephony Services (CMTS) are awarded through open bidding.[7] The license fees, in fact, cover the fee for spectrum allocation for 15 years.

13. The fee structure for Satellite Television Licenses is as follows[8]:

Sr. No.	Category	Tariff
1	News / Current Affairs	License Fee: PKR 5.0 million (USD 59,172) Annual Renewal: PKR 1.0 million (USD 11,834) Other Charges: 5% of annual gross revenue as per audited accounts.
2.	Sports	License Fee: PKR 1.5 million (USD 17,751) Annual Renewal: PKR 0.7 million (USD 8284) Other Charges: 7.5% of annual gross revenue as per audited accounts.
3	Regional languages.	License Fee: PKR1 .0 million (USD 11,834) Annual Renewal: PKR 0. 5 million (USD 5,917) Other Charges: 5% of annual gross revenue as per audited accounts.
4.	Health/ Agro	License Fee: PKR 0.5 million (USD 5,917) Annual Renewal: PKR 0.3 million (USD 3550) Other Charges: 5% of annual gross revenue as per audited accounts
5.	Education	License Fee: PKR 0.5 million (USD 5,917) Annual Renewal: PKR 0.3 million (USD 3,550) Other Charges: 5% of annual gross revenue as per audited accounts.
6.	Entertainment	License Fee: PKR 1.5 million (USD 17,751) Annual Renewal: PKR 0.7 million (USD 8,284) Other Charges: 7.5% of annual gross revenue as per audited accounts.

14. Access to natural resources is provided under particular legislation and rules by the Ministry of Petroleum and Natural Resources for prospecting for gas and oil in the country. Any company, whether incorporated in Pakistan or abroad, may apply for a petroleum right - a reconnaissance permit, exploration license or development and production lease - in accordance with the Pakistan Petroleum (Exploration and Production) Rules 2009[9]. The Rules also state that "for grant of petroleum rights after the expiry of the lease period, the Authority (Director General Petroleum Concessions (DGPC) or any officer or authority appointed by the Authority to exercise the powers and perform the functions of the DGPC) shall invite bids one year before the end of the lease period from the companies participating in the lease area".[10]

7. http://www.pta.gov.pk/index.php?option=com_content&task=view&id=303&Itemid=131.

8. http://www.pemra.gov.pk/pdf/Revision%20of%20tariff-STV%20new.pdf.

9. http://202.83.164.26/wps/wcm/connect/?MOD=PDMProxy&TYPE=personalization&ID=NONE&KEY=NONE&LIBRARY=%2FcontentRoot%2Ficm%3Alibraries%5B127%5D&FOLDER=%2FMinistry+of+Petroleum+and+Natural+Resources%2FDGPC%2F&DOC_NAME=%2FcontentRoot%2Ficm%3Alibraries%5B127%5D%2FMinistry+of+Petroleum+and+Natural+Resources%2FDGPC%2FRules+2009.pdf&VERSION_NAME=NONE&VERSION_DATE=NONE&IGNORE_CACHE=false&CONVERT=NONE&MUST_CONVERT=false.

10. *Id.*

II. Aid to ailing companies, especially in the context of the financial crisis

1. In the context of the financial crisis, did your country provide emergency aid to some companies? If possible, please provide information on:

a. Specific rescue measures for banks and other financial institutions;

b. Aid to industrial firms (for instance in the car industry).

15. No aid was given to banks.

16. Aid was granted to the national air carrier, Pakistan International Airlines.

2. What are the criteria that have been used when delineating the beneficiaries of emergency aid, as well as the amount or nature or the aid?

17. No specific criteria.

3. Is aid to ailing companies in your country usually provided with conditions attached such as:

a. Clauses imposing at least partial reimbursement in the event of a return to better fortunes?

b. A cap on executive pay?

c. Restructuring (for instance, the closing of unprofitable factories or branches)?

d. Guarantees on total employment?

e. Clauses prohibiting the use of government funds in order to engage in predatory strategies?

f. An explicit commitment that the aid will be limited in time and will not be repeated?

g. Commitments regarding the environmental impact of the recipient's activity?

Please provide short information on each of these provisions and the standard conditions attached to them.

18. Generally, ailing companies do not receive help that includes such conditions. There are however, a few notable exceptions such as Pakistan International Airlines, which has approximately PKR 20 billion (USD 237 million) in debts.

4. Does aid to ailing companies in your country sometimes take the form of temporary government ownership in return for capital injection? If so, are there examples where such policies allowed the government to turn a profit after the aided firm's situation improved?

19. No companies have been taken into partial or complete government ownership.

III. Legal restrictions on state aids

1. Do competition authorities exert some control on state aids in your country? If so, has this control been weakened in the context of the financial crisis? Are there specific rules about aid to ailing firms, or aid to R&D? Please detail each, briefly.

20. There are no legal restrictions as such. The Government decides the extent of state aids on a case by case basis. The Textile sector in Pakistan had been allocated PKR 4 billion (USD 47.3 million) as the Research and Development (R&D) facility for this sector in FY2008-09. In the FY2009-10 budget, this R&D facility was withdrawn by the government. The three percent mark-up subsidy (to assess the impact of interest rate) to the spinning sector has now also been reduced to PKR 500 million (USD 5.92 million) from PKR 810 million (USD 9.59 million) in FY2008-09. In order to help the textile and other export industry, PKR 40 billion (USD 473 million) export investment fund is proposed to be established, from which around PKR 27 billion would go to cotton and textiles while the remaining PKR 13 billion (USD 153 million) would go to other export sectors to boost export earnings.[11]

21. R&D support of 6% was allowed on the export of readymade textile garments from Export Processing Zone units with effect from April 14, 2006 as per rules and regulations.[12]

2. Is the amount and nature of state aids limited by virtue of regional trade agreements to which your country participates (not taking into account WTO disciplines)? If so, is there a supranational control mechanism? Has it ever been used? In competition cases?

22. No.

3. Did the competition authority in your country ever have to consider a case involving state aids? If possible, please distinguish the following (possibly overlapping) types of cases:

a. A private company complaining about predatory strategies (or unfair practices) implemented by a public company or by a private company benefiting from public funds (for instance in the case of a firm providing a public service and using the corresponding revenues in order to compete aggressively on another market);

b. A company complaining about discriminatory treatment, in comparison to a competitor benefiting from state aids;

c. Cases involving the existence of price regulation;

d. Cases involving abuse of dominance or merger cases (for example, in the latter, would remedies be affected if the state aid were to be withdrawn?).

23. No

4. Are government-owned companies subject to competition law to the same extent as private companies in your country? Are there any specific mechanisms for their implementation?

24. Government-owned companies in Pakistan are subject to competition law to the same extent as private companies in the country. Section 2(p) of the Competition Ordinance, 2009 ("the Ordinance") defines an undertaking in the following words: "any natural or legal person, governmental body including

11. http://www.brecorder.com/latestindex.php?latest_id=10336&cindex=29&current_page=2.

12. http://www.sbp.org.pk/EPD/2006/FECL24.htm.

a regulatory authority, body corporate, partnership, association; trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings". These undertakings are required to observe the laws stated in the Ordinance.

5. To what extent are state aid issues addressed in your competition authority's advocacy activity? What is your competition authority's message on state aids? Is this message well understood and taken duly into account by other parts of the government? Please describe briefly the relevant institutional mechanism(s), if any.

25. In case a state aid plan with anticompetitive effects is being implemented by the government, the Competition Commission of Pakistan can intervene by holding public hearings and issuing policy recommendations on how the government should proceed to protect competition in the market and safeguard interests of the consumers. However, since competition law is relatively new in the country, the basic focus of advocacy activities is making the foundation principles of competition law known to the businesses and the public.

CONTRIBUTION FROM PERU

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COMPETITION, STATE AIDS AND SUBSIDIES: THE CASE OF PERU

Economics Research Unit
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COMPETITION, STATE AIDS AND SUBSIDIES: THE CASE OF PERU

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INTRODUCTION

This paper presents an overview of the uses, justifications and legal restrictions on State Aids in Peru. It has been written to be presented as a country contribution to Session I of the IX Global Forum on Competition, organized by the OECD Competition Commission.

State Aids are an important part of the policy tools used by Governments elsewhere to achieve different goals such as inducing firms to innovate or to export, alleviate economic deprive regions or palliate market failures. In the context of the current financial crisis, the use of State Aids have been multiplied as Governments have faced the need to rescue financial institutions and other industrial firms through direct transfers and even taking the temporary ownership of these distressed firms.

While the goals of State Aids are varied and perhaps justified in certain circumstances, it is widely recognized that State Aids could also distort competition. The EU rules on State Aids and The World Trade Organization rules on Government subsidies are clear examples of these concerns at an international level. At a national level, there is less evidence regarding the existence of legal restrictions on State Aids.

Through various State Aid examples, this paper shows the different uses and justifications for State Aids in Peru. It also analyses the legal restrictions currently in place for controlling the use of State Aids, in particular when the Government proposes to develop business activities either directly or indirectly. However, it is worth stressing that this paper does not intend to provide an exhaustive list of the different State Aids currently in practice or a judgment about their benefits or their impact on competition. Following the suggested questions provided by the OECD Competition Committee, the paper has been structured as follows:

- Section 1, presents an overview of the types of State Aids currently used in Peru as well as the goals that support the introduction of these aids;
- Section 2 describes the current types of State Aids used for palliating the effect of the international financial crisis, and;
- Section 3 presents an analysis of the legal restrictions currently in place for controlling State Aids and their impact on competition. The final section summarizes the paper and presents our conclusions.

1. THE USE OF STATE AIDS IN PERU

1.1. Overview of State Aids used in Peru

Since the nineties, Peru has undertaken several market reforms with the aim of levelling the playing field for the development of private businesses, reducing the State's role as a business agent and reserving the Government participation only to specific areas such as health, education, promotion of employment, national security, utilities and infrastructure.

The Peruvian Political Constitution of 1993 recognizes the principle of free private enterprise within a social market economy. Legislative Decrees 668 and 757 further approved measures to guarantee the freedom of foreign and domestic trade, eliminated monopoly practices in the production or selling of goods and services, established that the State guarantees the freedom of private initiatives based on free competition and access to economic activities and abolished any exclusivity rights granted to the State for the development of economic activities, stressing that private and state-owned firms would receive the same legal treatment.

Although overall it is possible to sustain that, compared to previous decades, the use of State Aids in Peru has declined since the nineties; there are various forms of State Aids (especially tax breaks) still functioning in Peru.

Tax breaks

In the case of tax breaks, a report for the Ministry of Economy and Finance by Apoyo Consultoría (2003) detected up to 193 tax breaks. According to Apoyo Consultoria (2003), most of the tax breaks were concentrated in two taxes: the general sales tax (35,5%) and the income tax on legal persons (33,5%). The study also showed that tax breaks were common for taxes that applied to all the economy (21,2%), as well as for the financial industry (17,2%), businesses located in the jungle (11,3%), education (11,3%) and agriculture (6,4%). Table 1 summarizes the tax breaks situation up to year 2003 taking into account the name of the tax, the type of benefit and the economic sector involved. It is worth noting that the study concluded that the access to tax breaks was independent of the investment level and, in some cases, they did not promote the increase in value added of the sector or region benefited. [1]

[1] Apoyo Consultoría (2003). *Análisis de las exoneraciones e Incentivos Tributarios y Propuesta de Estrategia para su Eliminación*. Document prepared for the Ministry of Economy and Finance. Available in:

Table 1
Tax Breaks in Peru up to 2003
(number of benefits by tax, type and sector)

Tax	Type / Sector	General application	Agricultural	Jungle	CETICOS	Construction	Education	Energy	Financial	Hydrocarbons	Industrial	Mining	Other Sectors	Transport	Tourism	Total
Solidarity tax for Helpless Children	Exemptions	3														3
Ad Valorem Customs Duties	Exemptions				1					1						2
	Temporary Importation									1					1	2
	Unaffected	4	1		1		2						1			9
	Other Tax Expenses		1													1
	Special or Reduced Rates	1														1
Income Tax on Legal Persons	Credits			1			1									2
	Deductions	2	1	1			1			1		1				7
	Deferments		1			2			2	4		2	1		3	15
	Exemptions	4		1	2		4		13							24
	Unaffected	5					1									6
	Simplified Regime	1														1
	Reduced Rates		1	7												8
Income Tax on Natural Persons	Deductions	1		1			1									3
	Exemptions						2		9							11
	Unaffected	6														6
Special Solidarity Tax	Exemptions		1	1	1											3
	Unaffected	1					1									2
	Differential Rates					1										1
General Sales Tax	Credits			1												1
	Deductions					1										1
	Returns	3	1	2						2		2	3		3	16
	Exemptions	2	2	4	2	1	3		9	1	2	2	1	3		32
	Temporary Importation									1					1	2
	Unaffected	4			2		4		2	1			1		2	16
	Other Tax Expenses	2	1													3
Excise Tax	Returns			1									1			2
	Exemptions			3	3			1								7
	Temporary Importation														1	1
	Unaffected	1								1						2
	Reduced Rates				1								1			2
Other taxes	Other Tax Expenses	1														1
Total		**41**	**10**	**23**	**13**	**5**	**20**	**1**	**35**	**13**	**2**	**7**	**9**	**3**	**11**	**193**

Source: Apoyo Consultoría (2003).

http://www.mef.gob.pe/INFECO/documentos/DOCUMENTO_FINAL_JUNIO03.pdf (Last visited: 3 January 2010).

Direct subsidies

Direct subsidies are used in social programs for the poor and are focused to the target population. To our knowledge, no direct subsidies are currently granted to state-owned and/or to private companies. Moreover, the Ministry of Economy and Finance is implementing a budget for results for the national budget, which will further contribute to make any direct subsidy transparent and linked to a performance measure.

Government purchases

Government purchases are ruled by the State Procurement Law (Legislative Decree Nº 1017) and its Regulations (Supreme Decree Nº 184-2008-EF). According to these laws, all public procurement contracts must consider criteria of speed, economy and efficacy, thereby ruling out the possibility of the Government purchasing at above market price to benefit certain sector or companies.

Notwithstanding this, there are some other forms of State Aids in Government purchases aimed to help small enterprises. For example, according to the State Procurement Law, winning bidders must give to the contracting authority a Guarantee of Faithful Compliance equivalent to ten percent (10%) of the original contract amount before signing the contract. However, in the case of regular supply of goods or services, as well as in consulting contracts and public works, small enterprises can ask the contracting authority to retain ten percent from the contract payment, in practice waiving the need of presenting the Guarantee of Faithful Performance in advance of signing the contract.

The granting of Government-owned inputs

Government-owned inputs such as land and bandwidth are granted to private companies through concession processes, some of which involve auctions. PROINVERSION is the Peruvian investment promotion agency in charge of promoting private initiatives that involve government-owned inputs. In addition to PROINVERSION, other sector specific laws rule the concession of other natural resources such as forest lands, oil and gas, fisheries, etc. For instance, in the case of forest lands, the main objective of the concessions is to ensure the sustainable management and conservation of forest resources.[2] Forest concessions are given to

[2] Law N°27308, Forest and Wildlife Law.

private parties for the preferential use of wood through a public auction or a public tender for a renewable period of up to 40 years.[3]

When the concession process involve the setting of a regulated price, this is not normally set below market prices. However, it is worth mentioning the concession of a landmark natural gas project in the late nineties, where the Government established a price for the natural gas which is lower for electricity generators than for other gas users (petrochemical, industrial and commercial users).

The granting of loans

Regarding the granting of loans, the Peruvian government does not grant loans at below-market rates and it does not provide loan guarantees at below-market rates. It does, however, intervene in the financial market mainly through four institutions: Banco de la Nación, COFIDE, Agrobanco and Mivivienda.

- Banco de la Nación[4] is a government owned bank which manages the accounts of the Treasury and the Central Government in order to provide banking services for the administration of public funds. Through this bank, the State grants loans to both firms (MSEs) and citizens. Loans are provided at market-rates, which depend on the type of loan and are not necessarily are the lowest in the market.
- COFIDE (Corporación Financiera para el Desarrollo)[5] is a second-tier development bank that is partially owned by the government (98,7%)[6] and channels resources from multilateral agencies, government agencies, commercial banks and local capital market to intermediary financial institutions. COFIDE does not require guarantees and it does not set the interest rates that are charged to the final beneficiaries of the loans, since these are responsibilities of the first-tier banks, which are also responsible for the risk of the credit transactions.
- AGROBANCO (or Banco Agropecuario) is a bank that grants direct and indirect loans to firms devoted to agriculture, livestock, aquaculture and the processing and marketing of products of agriculture and aquaculture. Direct loans are granted to small producers who are organized in supply chains and receive supervision, technical assistance programs and agricultural insurance in order to achieve economies of scale, reduce costs, maximize profits and promote the existence of better credit subjects. Indirect loans are granted through special financing programs with financial intermediaries (such as banks, multiple banks, rural banks, local banks and EDPYMES[7]).
- Finally, Fondo Mivivienda is a mortgage fund for the promotion of housing. Its objective is to engage in the promotion and financing of the acquisition, improvement and construction of housing, especially in cases of social interest. It also aims at organizing activities related to

[3] The Surveillance Agency of Forest Resources and Wildlife (http://www.osinfor.gob.pe/) is the entity responsible for the management and administration of forest resources and wildlife nationwide.
[4] http://www.bn.com.pe/
[5] http://www.cofide.com.pe/
[6] The remaining 1,3% belongs to Corporación Andina de Fomento (CAF), a multilateral financial institution that mobilizes resources from international markets to Latin America, in order to provide multiple banking services to both public and private clients of its shareholder countries.
[7] EDPYMES are financial firms that are dedicated to granting loans to small and medium enterprises.

enhancing the flow of capital to the housing finance market, participating in the primary and secondary market of mortgage loans and helping the development of the mortgage market.[8]

1.2. Goals pursued by State Aids in Peru

There are several goals that are usually pursued by governments when providing State Aids. As it will become clear from the following selected examples, in Peru the granting of State Aid have followed different purposes.

Attracting firms to economically distressed regions

With the objective of promoting investments in the Peruvian jungle, Law Nº 27037 "Law on Investment Promotion in the Amazon", establishes tax exemptions to firms that are located in the Amazon[9] and perform the following economic activities: agriculture, aquaculture, fisheries, tourism and manufacturing activities related to processing, transformation and commercialization of primary products from the above activities, provided that such activities are performed in the area.

This law provides four types of tax breaks:

- The income tax is reduced to 10%, 5% and 0%, depending on the province and the economic activity.
- The sales tax is not charged in the following cases: (i) the sale of goods that are produced in the same region, (ii) the services provided in the region, and (iii) the construction contracts or the first sale of properties that were built by the builders in that area. For all the other activities named above, there is a special tax credit for the determination of the sales tax that applies to the sale of goods outside this area.
- The sales tax and the excise tax on oil, natural gas and its derivatives is not charged to firms that are located in the departments of Loreto, Ucayali and Madre de Dios.
- Firms that are located in the jungle are exempted from the Extraordinary Solidarity Tax and Special Tax on Net Assets.

[8] http://www.mivivienda.com.pe/

[9] The law is applied in the following regions:

a) The departments of Loreto, Madre de Dios, Ucayali, Amazonas and San Martín.
b) In the department of Ayacucho: the districts of Sivia and Ayahuanco in the province of Huanta, and the districts of Ayna , San Miguel and Santa Rosa in the province of La Mar.
c) In the department of Cajamarca: the provinces of Jaén and San Ignacio.
d) In the department of Cusco: the district of Yanatile in the province of Calca; the province of La Convención; the district of Kosñipata in the province of Paucartambo, and the districts of Camanti and Marcapata in the province of Quispicanchis.
e) In the department of Huánuco: the provinces of Leoncio Prado, Puerto Inca, Marañón and Pachitea; the district of Monzón in the province of Huamalíes; the districts of Churubamba, Santa María del Valle, Chinchao, Huánuco and Amarilis in the province of Huánuco, and the districts of Conchamarca, Tomayquichua and Ambo in the province of Ambo.

The Law on Investment Promotion in the Amazon was first enacted on December 30th 1998 and, even though it was attempt to terminate the tax breaks benefits in March 2007, the Law returned into force on 1 October 2009.

Another recent example of the use of tax breaks as a mean for attracting firms to economically distressed regions is Law Nº 29482 enacted on December 18th 2009 to promote the development of productive activities in the Highlands of Peru. This law establishes an exemption from three types of taxes to all micro and small enterprises, cooperatives, community and multicommunity enterprises that are located 2 500 meters above sea level and higher, as well as to all firms that are located 3 200 meters above sea level and higher. The taxes that are exempted are:

- The income tax on the third-income category.[10]
- Tariff rates on the import of capital goods.
- The sales tax on the import of capital goods.

Inducing firms to supply goods or services deemed to contribute to the general interest in cases when market incentives alone were insufficient to ensure that these goods or services would be provided.

The Political Constitution of 1993 allows the participation of the State in the provision of goods and services in cases where market incentives alone are insufficient to ensure that these goods or services would be provided, as long as the State intervention is authorized by means of a special law, the Government activity is "subsidiary" and there is an overriding "public interest" or "manifest national benefit" supporting the State intervention.

A recent example of the use of this type of justification for granting the State participation in business activities is a proposed law, currently debated in the Congress, for creating a commercial airline through a public-private partnership, where the State will end up having a control stake in the airline. The aim of the proposed law is to create an airline that could provide trips to destinations currently not covered by private airlines. In addition, the proposed law also aims at reducing the fares currently charged by the private airlines in other destinations served by private airlines.

[10] The third category income includes: (i) the income from commerce, industry and mining, as well as from the exploitation of natural resources, services and any other regular businesses of production or sales; (ii) the income from activities of intermediary trade agents, auctioneers and all other similar activities; (iii) the income from Notaries.

Remedying competition distortions created by the granting of aid by foreign governments.

The Anti-Dumping and Countervailing Duties Commission of the National Institute for Defense of Competition and Protection of Intellectual Property (INDECOPI) is in charge of enforcing the rules addressed at preventing and correcting competition distortions generated by the goods imports that are either subsidized or imported with a dumping price, according to the rules and procedures as stipulated in the World Trade Organization agreements and Supreme Decrees Nº 006-2003-PCM and 133-91-EF.[11]

Under these laws, national producers who consider that they have been damaged or threatened by the import of similar products which are subsidized by foreign governments can submit a request to the Commission for the opening of an investigation to determine the existence of the alleged practice, as well as the damage caused to national production as a result of such import. The Commission can impose countervailing duties to the subsidized imports as a remedy.

The Commission started its activities in 1992 and since then it has conducted nine investigations about subsidies, three of which are still under investigation.[12] Furthermore, countervailing duties were imposed in three cases: candies from Argentina; vegetable oils, refined and packaged, from Argentina and olive oil from the European Union.

Other goals

Other goals typically pursued by governments when extending State Aids are the protection of employment, preventing strategic firms from being purchased by foreign companies and fostering innovation and the development of new sectors.

Regarding these other types of State Aids, it is worth mentioning a State Aid program recently created as a result of the Free Trade Agreement signed with the United States. This State Aid programs aims to increase the competitiveness of small and medium agricultural producers, fomenting the adoption of new technologies. The program has duration of five years and consists of transfers to incentive the association of small and

[11] http://www.indecopi.gob.pe/0/modulos/JER/JER_Interna.aspx?ARE=0&PFL=1&JER=852
[12] The second and administrative instance of INDECOPI (Defense of Competition Chamber Nº 1) is reviewing one of these investigations.

medium producers, the adoption of best management practices and the implementation of new technologies.[13]

[13] This program, called “Programa de Compensaciones para la Competitividad” was created by Law Decree 1077.

2. AID TO AILING COMPANIES IN THE CONTEXT OF THE FINANCIAL CRISIS

The financial crisis certainly affected the Peruvian economy; however, according to several sources, Peru was one of the least affected countries in Latin America[14]. In fact, it was because of its ability to withstand external shocks that Moody's Investors Services recently raised the credit rating of Peru to investment grade, following other credit ratings agencies.[15] Taking this into account, there was no need to provide transfers to banks or any other financial institution or firm, as it have been the case elsewhere due the financial turmoil. In contrast, the measures adopted by the Peruvian government in order to face the financial crisis were a mix of fiscal and monetary stimulus plus programs targeted to small and medium exporting and agricultural firms.

One of these programs was the creation of Fondo AGROPERU[16], a PEN 200 million fund destined to give a guarantee for farmers that intend to invest in planting new crops. The fund is managed by AGROBANCO and aims at reducing the negative impact of financial crisis in agriculture, enhancing technological change and modernizing fields in order to increase the supply of exportable agricultural products to international markets.

Another example of State Aid in the context of financial crisis was the Business Guarantee Fund (*Fondo de Garantías Empresariales* – FOGEM) amounting a total of PEN 300 million in order to ensure that the national financial system grants credit for micro and small enterprises devoted to services and trade, and for median enterprises which are engaged in the production of goods or services within non-traditional exports chains.[17] This is a temporary fund which is supposed to last only two years and since its creation it has been guaranteeing up to 50% of loans for working capital or fixed asset acquisition, taken by micro, small and medium enterprises, whose direct or indirect sales abroad exceeding 30% of their annual income. Nonetheless, because of the relatively low impact of the crisis on the Peruvian economy, the demand for guarantees has been low.[18]

[14] For instance, see: http://www.globalviewc.com.ar/files/article/file/30.pdf.
[15] See: http://semanaeconomica.com/articulos/47923-moody-s-otorga-grado-de-inversion-al-peru-por-su-capacidad-para-resistir-shocks-externos
[16] The fund was created by means of the Emergency Decree 027-2009, which was published on 23 February 2009.
[17] Emergency Decree Nº 024-2009, published on 20 February 2009.
[18] See: http://gestion.pe/impresa/noticia/crisis-no-golpea-mucho-empresas-lo-que-banca-no-pide-mas-garantias/2009-09-15/8936

3. LEGAL RESTRICTIONS ON STATE AIDS

State Aid is defined in the European Union (EU) legislation as "any aid granted by a Member State, or through State resources, which distorts or threatens to distort competition by favoring certain firms or the production of certain goods".[19] State Aids are controlled in the EU to ensure that government interventions do not distort competition and trade inside the union, however recognizing that, in some circumstances, government interventions is necessary for a well-functioning and equitable economy.[20]

Unlike the EU, where the impact on competition is crucial on assessing the granting of a State Aid, in Peru there is no specific legislation that requires considering the impact on competition when granting a State Aid. Instead, the Peruvian Constitution requires the State to follow three criteria for assessing its participation (directly or indirectly) in business activities.[21]

- First, the State participation in business activities should be authorized by a special law;
- Second, the State participation in business activities should be **subsidiary** to private businesses; i.e., the State intervention should not foreclose private businesses from the market.
- Third, State participation in business activities can only by allowed for reasons of overriding **public interest** or manifest **national benefit**.

In contrast to the EU State Aid rules, the above criteria as applied in Peru does not specifically addresses competition concerns, although some sort of competition advocacy analysis should be involved in analyzing whether the State intervention is foreclosing private businesses or not. The **subsidiary** criterion is also less broad than the EU State Aid concept, as it is only applied to situations where the Peruvian State develops entrepreneurial activities; i.e., it does not cover other types of State Aids.

In mid 2008, a new Law regulating unfair competition acts as well as infringements to rules that regulate commercial advertising was enacted (Legislative Decree No. 1044 - Law on Overseeing of Unfair Competition). Under this Law, The Overseeing of Unfair Competition Commission of INDECOPI is in charge of analyzing the subsidiary role of State agencies or firms.

To date, there have been six cases brought to this Commission under the new Legislative Decree Nº. 1044, in which the plaintiffs claimed that a State-owned hospital was providing medical services to patients which otherwise will be attended in private hospitals.

[19] Article 87 EC.
[20] http://ec.europa.eu/competition/state_aid/overview/index_en.html
[21] Article 60 of Peru Constitution:
"The government recognizes economic pluralism. The national economy is based on the coexistence of several forms of ownership and enterprise.
Authorized solely by an express law, the government may subsidiarily engage in business activities. directly or indirectly, for reasons of overriding public interest or manifest national benefit.
Business activity receives the same legal treatment, whether public or private."

Other cases involved the participation of a State-owned company in a concession process for developing a new power plant and a State-owned university which operated a restaurant outside the campus, competing with similar restaurants in the area. In all these cases the Commission supported the plaintiff´s claims because the State-owned entities failed to meet the first criteria of having a special law enabling the defendants to develop private businesses. Therefore in all these cases it was not necessary for the Commission to analyze whether the services provided by the State-owned entities were **subsidiary** and in the **public interest.**

Before Legislative Decree Nº 1044 was enacted, INDECOPI was required by FONAFE (a holding of state-owned firms) to assess whether 13 state-owned companies[22] meet the above three criteria. In seven cases it was concluded that at least one of the activities developed by these firms could be offered by the private sector without the need of these state-owned firms. Only two of these companies are currently not operating: TANS (a former state-owned airline) and CONEMINSA (a multiservice firm). According to INDECOPI´s analysis, some of the activities of these firms could be partially covered by the private sector in the case of TANS and fully covered by the private sector in the case of CONEMINSA.[23]

It is worth mentioning that the Peruvian Defense of Free Competition Commission (also part of INDECOPI) has no specific powers for exerting control over State Aids in Peru. Notwithstanding this, the powers of this Commission for detecting and sanctioning anticompetitive conducts are applicable to private as well as state-owned firms.

At an international level, as member of the Andean Community Peru must comply with The Andean Community Regulations, which include both a Decision concerning the protection and promotion of free competition (Decision 608[24]) and a Decision which aims at preventing or correcting the distortions in competition generated by subsidies in imports that are produced in Member States (Decision 457[25]). None of these decisions directly limit the amount and nature of State Aids. There is, however, a provision in the first one according to which Member States should not impede, hinder or distort competition in the regional market (see Article 36), but to date there has not been any case relating to the matter of State Aids.

[22] Servicios Postales del Perú – SERPOST S.A., Transportes Aéreos Nacionales de la Selva – TANS S.A., Editora Perú S.A., Servicios Industriales de la Marina - SIMA Perú S.A., Servicios Industriales de la Marina - SIMA Iquitos S.R.L., Inmobiliaria Milenia S.A., Empresa de Administración de Infraestructura Eléctrica – ADINELSA S.A., Empresa Nacional de la Coca – ENACO S.A., Perupetro, Corporación Financiera de Desarrollo – COFIDE S.A., Compañía de Negociaciones Mobiliarias e Inmobiliarias - CONEMINSA, Banco de la Nación S.A. and Banco de Materiales S.A.C.

[23] A overview of the methodology followed to determine the subsidiary role of these State-owned companies is provided in the Appendix.

[24] http://www.comunidadandina.org/normativa/dec/D608.htm

[25] http://www.comunidadandina.org/normativa/dec/D457.htm

CONCLUSIONS

This paper presents an overview of the State Aids uses in Peru. It has been showed, based on various State Aid examples, that the uses of State Aids in Peru are varied and, although overall, the number of State Aids appears to be reduced compared to previous decades, there are still in place many forms of State Aids, in particular tax breaks.

The many uses of State Aids in Peru are supported by different goals; these are mainly related to the promotion of economic activities in specific regions (such as the highlands and the jungle) and/or for specific sectors (agricultural firms or small-medium exporters). Very limited use State Aids.

State Aids in the form of Government-owned inputs granted at below-market levels or loans and loan-guarantees granted at below-market rates are less commonly used in Peru. It has been shown that in the case of Government-owned inputs, these are normally transferred to private operators through a concession process and, depending on the scarcity of the input, through an auction. In the case of loan and loan-guarantees, the Government intervenes directly through first and second-tier state-owned banks; however the rates charged are not below market rates.

In the context of the current financial turmoil, State Aids in the form of specific rescue measures to financial institutions and other industrial firms have not been used in Peru. Instead, the Government has focused its strategy on a mix of fiscal and monetary policy, combined with target aids to agricultural and small exporters firms, through special funds: The Business Guarantee Fund (*Fondo de Garantías Empresariales* – FOGEM) and Fondo AGROPERU.

Finally, at a national or international level, there is no legal restriction imposed on the Peruvian Government on the use of State Aids (aside for the case where the State Aid is in the form of a subsidy that affects a third country under the rules of the Word Trade Organisation).

Although there is no legal binding to the use of State Aids, the Government has restrictions on the developing of business activities. According to the Peruvian Constitution, the Government have to follow three criteria for assessing its participation (directly or indirectly) in business activities.[26]

- First, the State participation in business activities should be authorized by a special law;

[26] Article 60 of Peru Constitution:
"The government recognizes economic pluralism. The national economy is based on the coexistence of several forms of ownership and enterprise.
Authorized solely by an express law, the government may subsidiarily engage in business activities. directly or indirectly, for reasons of overriding public interest or manifest national benefit.
Business activity receives the same legal treatment, whether public or private."

- Second, the State participation in business activities should be **subsidiary** to private businesses; i.e., the State intervention should not foreclose private businesses from the market.
- Third, State participation in business activities can only by allowed for reasons of overriding **public interest** or manifest **national benefit**.

In contrast to the EU State Aid rules, the above criteria as applied in Peru does not specifically addresses competition concerns, although some sort of competition advocacy analysis should be involved in analyzing whether the State intervention is foreclosing private businesses or not. The **subsidiary** criterion is also less broad than the EU State Aid concept, as it is only applied to situations where the Peruvian State develops entrepreneurial activities; ie, it does not cover other types of State Aids.

APPENDIX: METHODOLOGY FOR THE ANALYSIS OF THE SUBSIDARY ROLE OF GOVERNMENT BUSINESS ACTIVITIES

The analysis included three steps: analysis of competition conditions, analysis of the availability of supply by private firms and analysis of possible results if the state-owned firms ceased to operate (scenario analysis) .

1. Analysis of Competition Conditions

The analysis of the competition conditions starts with the identification of the main physical and technical characteristics of the product or service supplied by the state-owned firm, as well as its final uses. This first step aims at determining if there are private firms competing with the State-owned company. Afterwards, two aspects are assessed:

a) *Characteristics of the market and current market conditions.*
- Size and trends in demand, that is, if the demand is increasing or decreasing given that this influences the number of potential or actual participants in the market.
- Dynamics of entry and exit of competitors in the market in order to characterize the firms in the market, market power and the importance of potential competition.
- Specific demand characteristics (existence of seasonality, regular or occasional purchases, market segmentation, exclusive supply contracts, etc.) that may influence the competition conditions and the definition of markets.

b) *Existence of barriers to entry and exit*.
- Legal and/or administrative barriers.
- Structural barriers: absolute cost advantages, economies of scale and scope, existence of essential facilities, network externalities, sunk costs.
- Strategic or behavioral barriers: strategic behavior aimed at deterring entry by potential competitors (price limit, over-investment in capacity, product differentiation, integration and vertical restraints) and barriers aimed at excluding competitors and market place (increase in costs of rivals, predatory pricing).

2. Analysis of supply conditions of private firms

Two alternative methods are used in order to assess the supply of private firms:

a) *Comparing the available private supply (APS)*[27] *against the total market demand*. Three cases can be identified:

[27] The available private supply is defined as the maximum supply of private firms currently participating in the market, given their installed capacity:

$$APS = \sum_{i=1}^{n} IC_i$$

APS	>	Maximum demand	→	No subsidiary role	→	End of the analysis
APS	> Average demand < Maximum demand		→	Supply capacity of private firms is not proved	→	The analysis continues
APS	<	Average demand	→	Supply capacity of private firms is not	→	The analysis continues

b) *Evaluating whether private companies can meet the demand of the state-owned firm, if the latter cease to operate in the market*: In this case the capacity of private firms to cover the market demand is determined by taking into account the margin between installed capacity and capacity utilization of each company; that is, between the maximum potential supply and the current supply of private companies involved in the industry.[28] Afterwards, the absorption capacity is compared with the demand covered by the state-owned firm (which would have to be covered by private firms in case the state-owned firm left the market) in order to determine if the company is playing a subsidiary role or not.

3. Analysis of scenarios

Depending on the number of private firms participating in the market, the analysis is performed in four different scenarios:

a) *Scenario 1*: Only the state-owned firm provided the good or service.
b) *Scenario 2*: A state-owned firm and a private firm provided the good or service.
c) *Scenario 3*: A state-owned firm and two private firms (which are not part of the same economic group) provided the good or service.
d) *Scenario 4*: A state-owned firm and three or more private firms provide the good or service.

The existence of enough private supply to cover the market demand is presumed when two or more private companies operate in the market, that is, in Scenarios 3 and 4.[29] However, if in Scenarios 3 and 4 there is a reasonable doubt about the ability of private firms to supply the market, then the analysis continues in order to find evidence as to whether the business activity of the State plays a subsidiary role to private initiative or not. Figures 1 and 2 show the analysis performed by INDECOPI in each scenario.

Where: APS = available private supply
IC_i = installed capacity of firm i

[28] The absorption capacity of private firms was calculated in the following manner:

$$AC = \sum_{i=1}^{n} (IC_i - UC_i)$$

Where: AC = absorption capacity of private firms
ICi = installed capacity of firm i
UCi = used capacity of firm i

[29] This assumption was derived from See Supreme Decree N° 034-2001-PCM.

Figure 1

Analysis of the subsidiary role of state-owned firms in Scenario 1

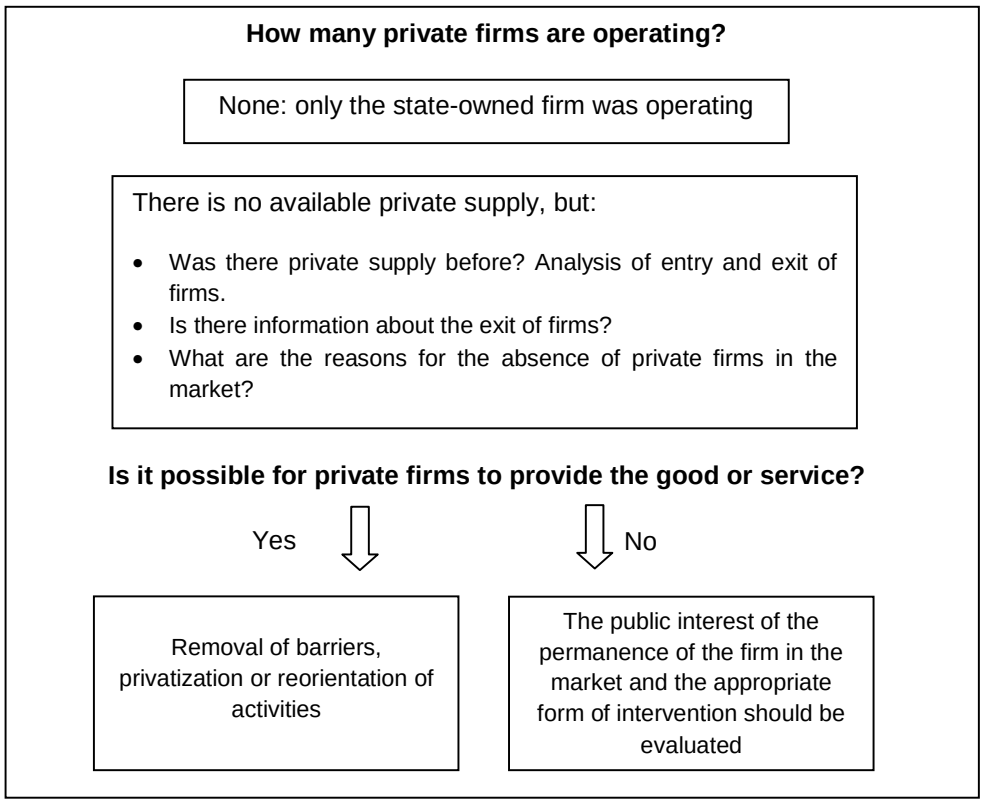
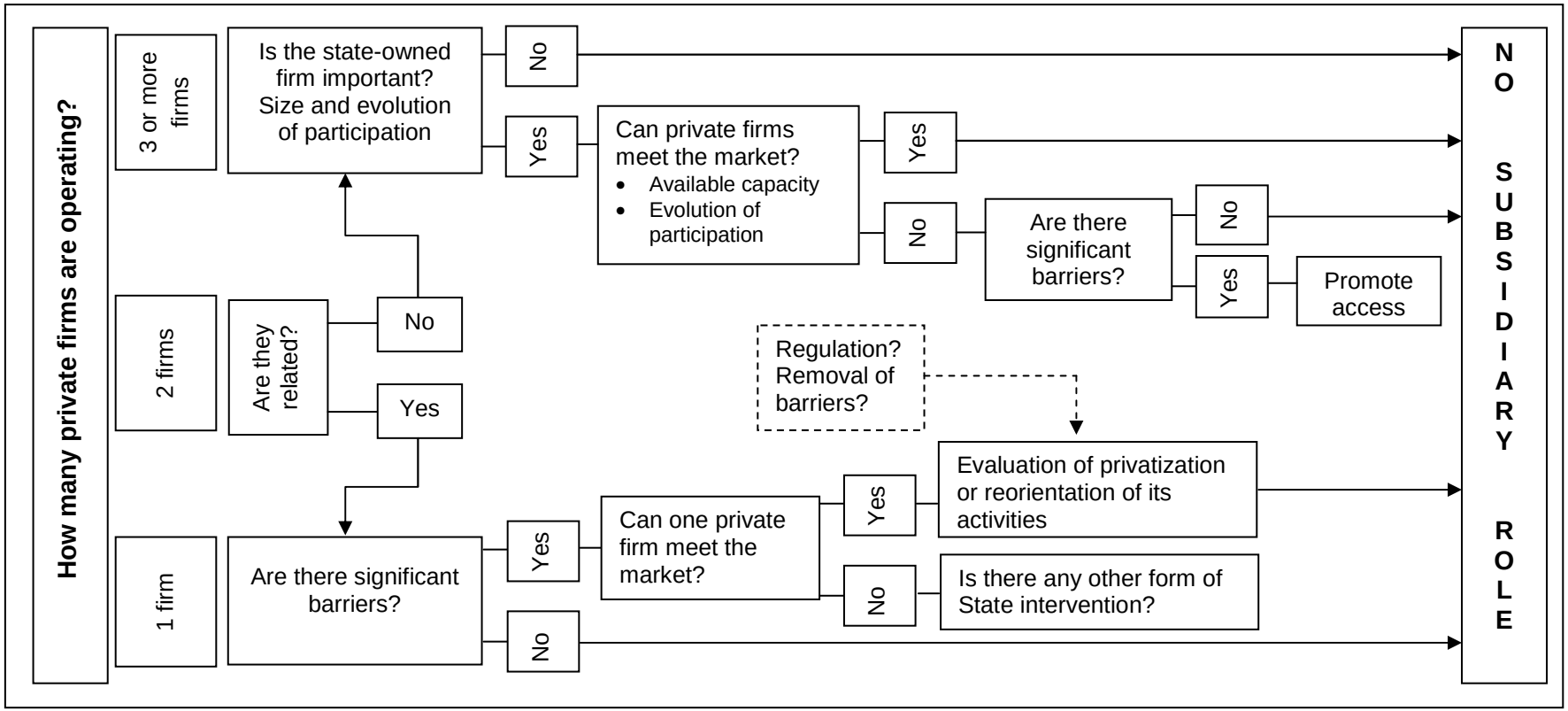


Figure 2

Analysis of the subsidiary role of state-owned firms in Scenarios 2, 3 and 4



CONTRIBUTION FROM POLAND

COMPETITION STATE AIDS AND SUBSIDIES

-- Poland --

1. Introduction

1. It is to be said at the outset that law on state aid in Poland is that of the European Union law. There is no Polish state aid law as such, and the way, as well as the extent to which state aid may be granted in Poland, is decided by the European Commission which is the only body in the European Union empowered to authorise granting it. It is also the case with regard to aid granted in Poland.

2. When it comes to granting state aid in Poland it may be delivered as:

- Aid granted under an aid scheme;
- Individual aid;
- Aid granted under block exemption regulation;[1]
- *De minimis* aid.[2]

3. In general, the first two indents refer to aid which require winning the authorisation from the European Commission before it is granted. The main difference between them is that in order to obtain the European Commission's consent for an individual aid each instance of it needs to be notified to the European Commission separately, while in the case of an aid granted under an aid scheme only that scheme needs to be notified and the Commission's authorisation secured for the whole scheme. As long as the planned aid meets the conditions established in that scheme, Member States are free to decide whether to grant the aid or not. Member States do not have to notify such an aid to the Commission and it is granted under a scheme previously authorised by the Commission.

4. The third indent refers to aid which can be granted without notifying the aid to the Commission, as long as the aid does not exceed a ceiling set, and administrative bodies and state agencies which decide on granting that aid has the power to decide on their own whether to grant the aid sought or not. The EU rules do not determine form in which this kind of aid may be granted, so it can take any form.

5. The same rule applies to the *de minimis* aid which does not require any authorisation from the Commission. This aid, which should not exceed the ceiling of 200 000 Euros over any period of three

[1] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) – OJ L 214 of 9.8.2008.

[2] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379 of 28.12.2006).

years (and 100 000 Euros with regard to undertakings operating in road transport sector) is regarded as not affecting trade between Member States and not distorting or threatening to distort competition. It is possible for administrative bodies to grant that aid without bothering the Commission and seeking its authorisation. In most cases *de minimis* aid takes the form of rescheduling tax payments.

2. Goals Underlying Granting of State Aid in Poland

6. Any granting of state aid in Poland must take into account the underlying paradigm that it should facilitate reaching some important goals, goals whose importance exceeds the mere interests of a firm seeking the aid. So, even if firms seeking aid very often claim that they need state aid in order to protect employment level, and even if this is taken into account during the examination of the application (which is often the case), this will not help the firm to persuade the aid granting agency to grant the aid if it comes to the conclusion that such an aid will not serve the purpose it should.

7. Because of the above reasons, it is much easier to persuade an authority to grant an aid for firms operating in economically distressed regions. Such an aid facilitates economic and social development of these regions as well as helps people find new jobs in areas where any job is scarce. These aids benefit the whole communities and their importance exceeds the interests of firms receiving the aid.

8. Another goal which Poland, as also other states, wishes to obtain by granting aid is to foster innovation and development of new technologies. In order to reach that goal, local or regional authorities and agencies strive to attract new investments to their areas offering investors economic incentives in turn for those investors making new investments in their regions. In most cases incentives offered to those investors take the form of grants and tax waivers. Generally, this aid must be notified to the Commission and its consent must be secured before the aid is granted. Apart from the above requirement in order to obtain the aid sought investors must make the necessary investments, financing them with money not coming from an aid.

9. Protecting the environment is another goal which has been taken into consideration by Poland. As an example the scheme of state aid for bio fuels is worth mentioning. Because using bio fuels in transport instead of oil and gasoline can help reduce the carbon dioxide emissions into the atmosphere, it has great support from Polish government. However, the oil and gasoline are still much cheaper and much more available for an ordinary vehicle operator, so in order to induce car drivers to buy bio fuels their price needs to be comparable with that of oil and gasoline.

3. The Use of State Aid in Poland

10. Generally, granting of state aid in Poland is not dependent on sectors to which it is directed or whether the supported firm is a private one or government - owned (controlled). It does not matter either whether the aid seeking firm has Polish or foreign owners as long as the firm is established in Poland and pays its taxes there (otherwise polish tax authorities would not be able to grant the aid i.e. rescheduling or waving tax payments).

4. Aid to Ailing Companies, Especially in the Context of the Financial Crisis

11. In general, granting of aid for ailing firms can take any form but in most cases it takes the form of tax waivers, rescheduling their payment and granting of loans at below-market rates to selected firms, in

which instances the aid is granted under Community guidelines on state aid for rescuing and restructuring firms in difficulty.[3]

12. In order to obtain that aid the firm seeking it diagnoses the roots of its difficulties and sets up steps necessary to recover its ability to operate efficiently on the market. In most cases such firms claim that aid is necessary to protect employment in affected regions but in general these claims are not taken for granted without examination and in many instances, in order to recover from difficulties, firms need to make some concessions (i.e. laying off some employees). Such firms always, and this is the basic precondition imposed by the European Commission along with the requirement that restructuring process must be successful, have to make commitments concerning compensatory measures limiting the impact of that aid on competitors. This can be called "the aid price" and in many instances it takes the form of limiting the firm's presence on the market (selling or closing a firm's branch, imposing a cap on firm's production volume, or limiting the amount of goods that firm is allowed to sell on the market, and so on).

13. Although some would say that Poland regularly engages into this kind of aid, due to the bothersome requirements imposed by the European Union legislature and the time needed to clarify all the Commission's questions (in many instances it may take between a year or two), in fact this kind of aid has marginal significance.

14. These rules have not been changed in the financial crises apart from financial sector to which Poland is allowed to grant aid under two aid schemes (N 208/09 and N 302/09) authorised by the Commission. Although these schemes allow Poland to grant aid to financial institutions in the form of guarantees (N 208/09) and in the form of recapitalisation of financial institution's assets (N 302/09), they have not been used so far by these institutions.

5. Conclusions

15. The rules under which aid is granted in Poland do not differ in substance from that which applies to other parts of the EU. This is because they are set at the EU level and the control mechanisms are uniform for the whole EU. The basics requirement underlying any grant of state aid is that while it should allow to reach goals which that aid aims to facilitate (economic, social and other) it must not make possible to affect trade between Member States, distort or threatening to distort competition.

16. The financial crises has not in substance changed these rules and even if Poland has the instruments for providing financial support for financial institutions, these programmes have not been so far used and there was not a necessity form these institutions to seek that aid from State.

[3] Communication from the Commission - Community guidelines on state aid for rescuing and restructuring firms in difficulty *(*OJ C 244, of 1.10.2004).

CONTRIBUTION FROM ROMANIA

COMPETITION, STATE AID AND SUBSIDIES

-- Contribution by Romania --

1. State aid matters are regulated at the European Union level, and such regulations are directly applicable to Romania as a EU Member State.

1. State Aid Concept

2. State aid is defined as an advantage in any form whatsoever conferred on a selective basis to "undertakings" by national public authorities. Because a company that receives government support obtains an advantage over its competitors, the Treaty of the European Communities (the "EC Treaty") generally prohibits state aid unless it is justified by reasons of general economic development. To ensure that this prohibition is maintained and that the exemptions are applied equally across the EU, the European Commission monitors the compliance of state aid granted at the national level with EU rules.

3. It needs to be pointed out that the EU State Aid regulations do not apply to state aid provided to the agriculture and fishery sectors.

2. Legal Restrictions on State Aids

4. After receiving the notification, the European Commission qualifies any support measure as state aid only if it displays all of the following characteristics:

- There has been an intervention by the state or through state resources which can take a variety of forms (e.g. grants, interest and tax relief, guarantees, government holdings of all or part of a company, or the provision of goods and services on preferential terms, etc.);
- The intervention confers an advantage to the recipient on a selective basis, for example to specific companies or sectors of the industry, or to companies located in specific regions;
- Competition has been or may be distorted;
- The intervention is likely to affect trade between and among the EU Member States.

5. By contrast, general measures are not regarded as state aid because they are not selective and apply to all companies regardless of their size, location or sector, as, for instance, general taxation measures or employment legislation.

6. In accordance with EU regulations, the following types of aid are considered as compatible with the EU common market:

- Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

- Aid in order to repair the damage caused by natural disasters.

7. Additionally, the following types of support may be considered compatible with the common market:

- Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

- Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

- Aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest of the European Communities;

- Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

8. Generally, state aid becomes more acceptable if it aims at the increase of the innovative capacity and the development of small and medium enterprises, or is intended for the development of human capital (training, job creation etc.).

3. Specific legal provisions in Romania

9. Government Emergency Ordinance No. 117/2006, as approved by Law 137/2007 ("GEO 117"), is the normative act that regulates the national procedures in the field of state aid. GEO 117 provides, among other things, for the obligations of the Romanian authorities that may grant state aid and the beneficiaries of such state aid schemes, as well as the applicable sanctions in the event of a breach of these obligations.

10. Based on GEO 117, the power to authorise state aid plans was transferred from the Competition Council to the European Commission. The Competition Council now basically represents the national contact authority in the relations between the European Commission and public authorities and institutions that are state aid grantors, and beneficiaries involved in the state aid procedures.

11. Therefore, after Romania's accession to the EU, the Competition Council became not only the national contact authority for the European Commission in this field, but it also plays the role of advisor for state aid grantors, co-ordinating the notification to the European Commission of the state aid measures that the various state-related institutions intend to grant and ensuring the elaboration of high quality state aid notifications and the fulfilment of the commitments assumed by Romania in this field as a member of the European Union.

12. As far as the monitoring of state aid granted in Romania is concerned, the Ordinance underlines the importance of the role played by the grantor in assuming the responsibility of obeying the rules in the area. The state aid grantors have the obligation to verify the way public money is being spent. Thus, the grantor is responsible for checking periodically if the state aid beneficiary is fulfilling the conditions assumed when receiving the state aid. If the beneficiary does not fulfil those obligations, the state aid grantor must act in order to eliminate the incompatibilities with the law in force.

13. On an annual basis, the grantors have to submit to the Competition Council reports on state aid granted in Romania. Also, at the Competition Council's request, the grantors have to submit any other data needed to fulfil the obligation assumed by Romania as a Member State. The state grantors are responsible for the accuracy of the data and information submitted to the Competition Council during the notification / informing or monitoring activity.

14. The Competition Council's role in monitoring activity is to elaborate, based on the grantors' reports, the state aid inventory, the annual report on the state aid granted in Romania and other necessary reports in view of fulfilling the obligations set for Romania as a EU Member State.

4. The Use of State Aids in Romania

15. Subsidies and grants, tax exemptions, tax reductions and deferrals, write-off of default interest and penalties, soft loans, state guarantees, capital injections in the undertakings are usually the most widely used forms of state intervention.

16. According to the latest annual inventory on state aids granted in Romania issued by the Romanian Competition Council, covering data for the period 2006-2008, the largest recipients of state aid from the view point of the state aid nature were the following sectors (excluding fishery and agriculture): transport, services of general economic interest, the coal industry, research and development as well as environmental protection, support to investments and employment; a smaller portion of public funds was directed for rescuing and restructuring industrial companies as compared to the previous periods.

17. As it results from the table below that compiles information excerpted from the annual inventory on the evolution of state aids according to their nature over the period 2006-2008, state aid granted in Romania has taken mainly the form of direct subsidies, grants, government holdings of all or part of a company, which represented a share of 96.6% in total state aid (excepting agriculture, fishery, transportation, services of general economic interest and de minimis aid) in 2008 in the disadvantage of tax breaks, tax reductions and deferrals, write off of default interest and penalties or state guarantees which represented only 3.4%.

Table 1. Figures in thousand Euros

	2006	2007	2008
State aid measures classified by their nature (excluding agriculture, fishery and de minimis aid)			
1. Direct Subsidies to companies (subsidies, grants, non-refundable funds)			
TOTAL	**1,305,200.49**	**1,084,932.41**	**1,093,774.08**
Out of which:			
a) Transport sector	560,663.52	462,366.44	513,343.43
- Railroad transport	421,998.64	312,542.98	330,595.76
- Air transport	26,818.64	26,034.58	23,494.51
b) Coal	85,942.93	112,306.36	92,029.73
c) Services of general economic interest	413,335.20	424,628.53	348,877.75
d) Research and development	22,435.78	42,840.87	64,716.59
e) Regional development	4,725.37	11,536.84	38,292.57
f) Other subsidies (granted for protecting the environment, SME-s, rescuing-restructuring, employment, media and culture, other granting objectives)	218,097.69	31,253.38	36,514.01
2. Tax breaks to selected companies or selected sectors (exemptions/allowances from paying budgetary obligations)			

TOTAL	**87,204.81**	**28,598.89**	**5,142.56**
Out of which:			
a) Regional development	23,879.22	8,713.61	3,585.84
- Areas for which national regional development programmes have been elaborated	3,604.62	1,827.29	1,337.83
- Deprived Areas	20,274.59	6,886.32	2,248.02
b) Rescuing-restructuring (several manufacturing sectors)	41,758.67	17,654.89	1,183.50
c) Research and development	155.71	1,766.28	0.00
d) Services of general economic interest	73.96	346.56	373.22
e) Coal	15,624.28	0.00	0.00
f) Other exemptions/allowances from paying budgetary obligations (for tourism sector, media and culture, other objectives)	5,712.97	117.54	0.00
3. Granting of government-owned inputs (such as land, bandwidth, government facilities) to companies at a price below market levels	Not granted	Not granted	Not granted
4. Government purchases at above market prices	Not granted	Not granted	Not granted
5. Granting of loans at below-market rates	Not granted	Not granted	
6. Provision of loan guarantees at below-market rates	Not granted	Not granted	

18. As to the objective of better targeted aid, Romania awarded 61,1% of total aid granted in 2008 for horizontal objectives of common interest such as research & development, regional aid, environmental protection, SMEs, rescue and restructuring, support to employment and training (excepting agriculture, fishery, transportation, services of general economic interest and de minimis state aid), which reveals an ascending trend of the provision of state aid for horizontal objectives (including regional aid) over the period 2006-2008. The largest proportion of horizontal aid granted in Romania in 2008 has been allocated for research and development (25.15% of total aid) followed by regional aid (16.28% of total aid).

19. The apparent growing trend of provision of state aid towards the development of regions can also be attributed to the national development programmes targeting the backward regions of Romania. It deserves to be mentioned that aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment is consistent with the article 107(3)(a) of the EC Treaty that establishes the criteria for qualifying as assisted area.

20. The state aid scoreboard issued by EC in the autumn of 2009 confirms that Romania followed over the last years the ascending trend of the EU vis-à-vis the provision of state aid for horizontal objectives.

21. With respect to the sectoral aid granted in Romania (not considering their regional destination or the nature of the state aid), the inventory shows a downward trend of their share in total state aid (excluding agriculture, fishery, transportation, services of general economic interest and de minimis aid) in 2008 (38.90%) in comparison with 2007 (46.91%). Actually, this decrease is in line with the standards set by the EC in its 2005 State Aid Action Plan. The largest proportion of the sectoral state aid was allocated both in 2008 and 2007 to the coal industry, the other sectors ceasing from benefiting from state aid. The state aid granted by the local public authorities with a view to compensate the public services of general economic interest represented the largest share in total state aid (excepting agriculture, fishery and transportation), respectively 55.71% in 2008 and 60.33% in 2007.

22. The latest inventory on state aid granted in Romania within 2006-2008 reveals as well that Romania allocated in 2008, 0.19% of its GDP for state aids (excluding agriculture, fishery, transportation,

services of general economic interest and de minimis aid), which represents a downward trend in comparison with 2006, when Romania allocated 0.51% of its GDP for state aids.

23. In terms of the magnitude, the same inventory shows that the state aid provided in Romania during the period 2006-2008 has been rapidly decreasing; whereas in 2006, state aid accounted to 496,433,400 Euros, in 2008, it accounted to 257,274,060 Euros (excluding agriculture, fishery, transportation, services of general economic interest and de minimis aid).

5. The Provision of Government-Owned or Government Controlled Inputs

24. Law no. 213/1998, amended and completed, on public property and its juridical regime stipulates that public properties may be awarded only in administration to central or local public authorities, in concession or rent. It also stipulates that the renting and concession may be done only by auction, under the law provisions. Goods, activities or public services which are regulated by specific authorities may be awarded through license/authorisation only by the sector regulators to operators in order to activate on the respective markets.

25. For instance, radio-electric frequencies and numbering resources are scarce resources under the public property of the state. The administration and management of the radio-electric frequencies and of the numbering resources are carried out in accordance with the principles of objectivity, transparency, non-discrimination, and proportionality by ANCOM (National Authority in the electronic communications field).

26. According to the primary legislation in this field, i.e. EGO no. 79/2002 that regulates the basic activities related to electronic communications networks and services, in particular with respect to oversight and competition, the licenses for the use of radio-electric frequencies are granted through an open, transparent, and non-discriminatory procedure, within at most 6 weeks after receipt of a duly filled in application in this respect, accompanied by all the documents required, except for the licenses granted through a competitive or comparative selection procedure, for which the term is at most 8 months. In order to ensure that this process does not drive to restricting, hindering or distorting competition, the legislation stipulates that the right of use is awarded to the winner of a tender, following the offer of the largest amount for the license fee, while ensuring compliance with certain short listing technical, administrative and/or financial criteria.

27. In general, Romanian authorities address the Romanian Competition Council when they have doubts that the allocation of public goods and/or the award of public services would entail state aid. As per the community legislation and practice in this field, the Romanian Competition Council in its capacity of state aid advisor explains Romanian authorities involved the terms under which such procurement transactions may qualify as state aid and the legal options of making such operations compatible with community state aid rules.

28. In principle, when procurement transactions are conducted following the observance of an open, transparent and non-discriminatory procedure or an expert evaluation, the level of market sector support can be regarded as representing the market price corresponding to the respective procurement transactions and consequently, it is presumed that no state aid is involved.

6. Aid to Ailing Companies, Especially in the Context of the Financial Crisis

29. Under the framework of the current economic and financial crisis, the Member States of the EU can grant state aids either in the context of the existing rules and regulations or by enforcing the temporary steps that the EC has put into place to address the current situation in the real economy and the financial sector.

30. Accordingly, aid to ailing companies can only be authorised as temporary rescue aid or as restructuring aid in the context of a restructuring plan. Both types of aid are subject to strict conditions. For example, rescue aid can only be granted in the form of a guarantee or loan for the time needed to develop a restructuring plan. It has to be reimbursed if no plan is presented within six months. Conditions for authorising restructuring aid are, for example, the presentation of a credible plan allowing the company to become viable again, respect of the one time last time principle, counterparts offered by the company in terms of capacity reductions etc.

31. In the financial sector, the European Commission approved under current exceptional circumstances the aid plans to bail out the banks through capitalisation, state guarantees, rescue and restructuring packages and other measures put in place by several Member States, but for Romania who did not face any difficulties in the banking sector (see State Aid Scoreboard, Autumn 2009 Update, Brussels, COM (2009)).

32. As per the norms provided by the EC's temporary framework for state aid measures and the conditions regarding the compatible limited amount of aid for the real economy, the following state aid measures have been proposed and implemented by Romanian authorities following EC approval, with a view to counter negative effects of the global financial-economic crisis over the Romanian economy:

6.1 State aid scheme in the form of state guarantees granted to SMEs and large enterprises elaborated by EximBank enabling access to loans in the period of economic and financial crisis

33. By implementing the scheme, the Romanian authorities expect to help SMEs counter the crisis, relieve their access to credits and ensure the continuity in their activity.

34. The scheme targets Romanian legal persons who were not in difficulty on 01.07.2008, but who entered into financial difficulty at the moment of the guarantee request, as a result of the present world economic – financial events. The beneficiaries can activate in all activity sectors, but for the production of armament, gambling, production of alcohol and tobacco, real estate transactions and acquisition of means of transport for persons with a capacity of up to 8 persons. The estimated number of beneficiaries within the scheme is of 180.

35. Through this scheme, EximBank guarantees on the name and on behalf of the Romanian State, maximum 90% from the value of a new credit granted by a commercial bank for investments and/or working capital.

36. The applicants may benefit from a reduction of the guarantee bonus for a maximum period of 2 years from the date when the guarantee was granted. A 25 % reduction is applicable to the SMEs while a 15% reduction is applicable to the large enterprises.

37. The maximum value of the credit subject to the guarantee shall not exceed the company's total costs with wages in 2008.

38. The lifetime of the state aid scheme is 2 years, namely 2009–2010. The guarantees fund amounts to 450 million RON for the two years. The total budget of the scheme for the implementing period is 20.34 million RON, out of which 11.30 million RON are allocated for 2009.

6.2 The temporary national state aid scheme supporting Romanian enterprises affected by the present financial and economic crisis (maximum 500.000 Euros)

39. In full compliance with the norms provided by EC's Temporary framework for state aid measures and the conditions regarding the compatible limited amount of aid, Romania elaborated a supporting

scheme to grant, without notification of individual cases, subsidised loans, loan guarantees at a reduced premium, risk capital for SMEs and direct aids of up to 500,000 Euros. These aids are allowed until the end of 2010 and may be granted to firms which were not in difficulty on 1st of July 2008, but entered into difficulty thereafter. The estimated number of beneficiaries within the scheme is above 1000 and the total budget of the scheme for the implementing period is of approximately 220 million Euros.

40. This state aid scheme is supposed to contribute to alleviating the difficulties faced by Romanian companies without a significant distortion of the market.

6.3 State Aid for Ford Romania (Car Industry)

41. The financial aid consists in an 80% state guarantee provided by Romania to enable Ford Romania SA to access a 400 million Euros loan from the European Investment Bank. The aid supports the investment project envisaged by Ford at Craiova plant for the period 2008-2012.

42. The development project of Ford at the Craiova plant is part of a joint European venture to develop low CO2 emission engines and cars, assuming total costs of approximately 1.69 billion Euros over a 5-year period.

43. The entire project requires investments not only in Romania but also in Germany where low CO2 emission engines and cars are planned to be developed.

44. The European Investment Bank lends a total of 600 million Euros to Ford Europe for the development project, out of which 200 million Euros goes to Ford Werke GmbH in Germany and 400 million Euros to Ford Romania.

45. The 80% guarantee to be provided by Romania was considered by the EC as compatible with Article 107(3)(b) of the EC Treaty, which permits aid to remedy a serious disturbance in the economy of a Member State. In particular, Ford Romania would pay a premium for the guarantee and provide sufficient securities in case the guarantee would be drawn.

46. Apart from these measures, in 2009, in Romania, other state aid schemes have been elaborated in compliance with the existing community rules on state aid. The total budget of these schemes amounts to 6 billion Euros and represent national and community funds. It is estimated that more than 60,000 enterprises would benefit from these schemes in the following years depending on the implementation period. The larger part of the state aid measures envisages regional development aiming at creating and maintaining jobs as well as professional training.

7. Advocacy Institutional mechanisms

47. The awareness of state aid in Romania is gradually increasing, thanks to the intense competition advocacy activities (publication of various guides, monthly bulletins, case law and legislative syntheses, other informational materials and organisation of seminars, roundtables and conferences throughout the country) performed by the Romanian Competition Council not only before accession to the EU but also thereafter. In this way, the authorities, other state aid grantors and the beneficiaries got acquainted to the requirements that need to be satisfied for the state aid to be compatible with EC regulations.

48. Also, a very important role in raising awareness on state aid rules among all the stakeholders involved after Romania's accession to the EU was played by the pre-consultation mechanism with the EC experts in the privatisation field set up at the Romanian Competition Council's request in June 2008. Within this mechanism, more than 50 information sheets on companies intended to be privatised by the Authority for State Assets Recovery (hereinafter AVAS) have been transmitted to the EC. Actually, the

technical consultations that took place with the EC under the umbrella of the pre-consultation mechanism initiated in the privatisation process aimed at preventing the existence of any incompatible state aid elements within the privatisation processes.

49. As a result of the setting up of the pre-consultation mechanism in the privatisation field, the Romanian authorities have ordered adequate measures aimed at ensuring compliance with state aid community rules, such as: the amendment of the privatisation legislation in the mining and R&D sectors, respectively the elimination of the certain tender conditions attached to the privatisation process that created premises for state sales at a price below market level and consequently to doubts that the privatisation process entailed state aid, the cancellation of privatisation procedures for certain companies acting in these sectors, as well as the revision of the privatisation strategies of certain companies, aiming to ensure that the tender itself as a method of privatisation was open, transparent and non-discriminatory so that the potential investors would not have been disadvantaged at an early stage and deterred from submitting a bid.

50. The role of adviser to all state aid grantors in drawing up of notifications, information sheets and in monitoring activities, or in the allegation of the notification before the EC safeguarded by Romanian Competition Council also after Romania's accession to EU complemented by the advocacy power of Romanian Competition Council to issue binding advisory opinions on draft normative acts that may have an anticompetitive impact and to propose amendments definitely increased the profile of the Romanian competition authority among all stakeholders involved in Romania.

51. Moreover, the Romanian Competition Council performs its activities in a transparent manner. As a proof, driven by the desire to improve the informal co-operation between the parties involved in the state aid field, the Romanian Competition Council put the foundation in the second part of 2008 of the Romanian State Aid Network, a portal created on a multi-annual base which aims at creating a cluster of state aid experts from the Romanian Competition Council and from the state aid granting institutions in order to strengthen their cooperation and a swifter implementation of the support measures, be it state aid or not, in compliance with the community provisions in the field, having as a final objective the support of the business environment and of the Romanian economy in general.

52. At the same time, through this portal, Romanian Competition Council ensures nowadays a smooth access to all the relevant information in the state aid field, so that the beneficiaries, the practitioners and the theoreticians have the necessary instruments to be informed on the trends in the state aid field both at national and at the community level. Finally, thanks to Romanian Competition Council's initiative, all the interested parties are now able to find on the website of the Network (http://www.ajutordestat.ro/?pag=146), the state aid schemes implemented in Romania, the applicable legislation and articles on state aid, projects to be performed within the Network, etc.

CONTRIBUTION FROM THE RUSSIAN FEDERATION

COMPETITION, STATE AIDS AND SUBSIDIES

-- Russia --

1. In order to ensure pro-competitive, transparent and efficient mechanism of state aid granting and control of its use, a special Chapter 5 devoted to the Provision of state or municipal aid was incorporated in the competition legislation with the adoption of the Federal Law no. 135-FZ of 26.07.2006 "On Protection of Competition". This Law defined for the first time the term "state aid" as provision by the state authorities of advantages ensuring to some economic entities more favourable conditions of activity in the relevant market in comparison with the other market participants by means of disposal of property and (or) other objects of civil rights, the right of priority access to information. In general, granting of state or municipal aid is prohibited because as a matter of fact government interventions distort competition. However there is left a room for a number of policy objectives for which state aid can be considered compatible. The Law provides for a number of such objectives that are typically socially and culturally oriented. The Law also contains a detailed procedure of state or municipal aid granting with a number of measures taken in case of misuse of this aid or revealed violation during granting of this aid.

2. Earlier, granting of state or municipal aid was controlled by the Russian antimonopoly authority within the frameworks of control over state authorities provided for in the Federal Law no.948-1 of 22.03.1991 "On competition and restriction of monopolistic activity on commodity markets". It prohibited provision of privileges to the specific economic entity or several economic entities that provides them with preferred position in relation to the positions of other economic entities operating on the same commodity market.

3. The FAS Russia established a special Department on Control over State Authorities to ensure smooth and efficient application of the relevant provisions of control and monitor of the state aid granting.

4. In October 2009 the Federal Law 164-FZ of 17.07.2009 "On introducing of Amendments to the Federal Law on Protection of Competition and Some Legislative Acts of the Russian Federation" introduced some changes to the state aid provisions. The term "state or municipal aid" was replaced by the term "state or municipal preferences" in order to ensure that provision of property advantages is considered as granting of state or municipal preferences (for example: tax, property or rent relief). State or municipal preference is defined as the provision by a state or municipal body or by a body or organisation exercising their functions of advantages to specific economic entities which provides them with better conditions for their activity by means of the transfer of state or municipal property or objects of civil-law rights or by means of the provision of privileges having a property or monetary value. This definition is broader and better complies with the standards of the European competition legislation compared to the definition of "state aid" given before. Moreover, with the purpose of competition advocacy the word "preference" has a more negative perception than "aid".

5. Amendments to the regulation of the procedure of granting of state or municipal preference are aimed at ensuring that there will be no optional enforcement with this regard that may lead to corruption.

6. The provision of preference requires the prior consent of the FAS Russia on the basis of a written notification submitted by the state authorities intending to grant state or municipal preference. Preference

may not be provided for purposes that are not consistent with those stated in the notification for consent. Prior consent is not required for preferences that are provided on the basis of federal, regional or local laws on the budget that define (or specify a procedure for defining) the amount of the preference and those to whom it is to be provided.

7. Numbers of matters addressed under certain Articles of the Law regulating provision of state preferences have been growing steadily since 2007. In 2007, the FAS Russia reviewed 33 notifications on state aid, opened a total of 149 formal cases concerning possible violations (most of these on its own initiative), found a total of 66 violations and issued 59 orders for correction. In 2008, these numbers more than doubled to a total of 89 notifications and a total of 343 formal cases opened, with violations found in 192 instances and 131 orders issued. For 2009 the numbers appear on track to double again, with 178 notifications, 236 formal cases, 171 violations and 142 orders reported for the first half of the year.

8. As a result of financial downturn a number of sectors of economy faced considerable challenges. Governments worldwide elaborated special national support programmes, including state aid granting to recover the mostly damaged sectors. The role of the competition authorities here is to ensure that this support is provided with the less negative effect on competition.

9. In particular, in the first half of 2009 the production in the car industry in Russia decreased for about 60%, sales – for 51% in comparison with January-July 2008. Liquidity shortage, huge debts, temporary stopping of production lines, necessity to reduce the number of employees and a reduction in the demand were the reasons to take certain steps to rescue the sector. These conditions were the reasons for the Government of the Russian Federation to undertake certain actions to rescue this sector (i.e. state preference programmes, concessional lending programme).

10. In order to ensure that state preferences are not granted to one certain company and it does not harm competition in the automobile industry, the FAS Russia succeeded in securing pro-competitive principles that would lead to industry stabilisation. The FAS Russia contributed to extending the list of criteria that allow referring certain cars to the state preferences programmes. As a result, the foreign companies that enter the Russian car industry and build their plants on the Russian territory are also able to participate in the state preferences programme.

11. Besides, the FAS Russia contributed to the considerable extension of the list of cars for concessional lending programme, including increase of the maximum price for cars that can be included into the list.

12. So, there was ensured a level-playing field for all market players that is likely to lead to stabilisation of situation in the car industry and to exert positive influence on the development of national and foreign producers of vehicles.

CONTRIBUTION FROM SENEGAL

COMPETITION, STATE AIDS AND SUBSIDIES

-- Contribution from the Senegalese National Competition Commission --

1. Freedom of competition or free competition between enterprises supplying products or services tending to meet identical or similar needs in a given market must be guaranteed by the State in which public power is invested.

2. The State, however, has a variety of missions, one of which is to ensure the economic and social well-being of its population through the various policies which, in principle, it is free to choose.

3. Accordingly, in its role in allocating and redistributing resources, the State may well find itself providing different types of aid to economic actors.

4. These State aids or aid from State resources may take a number of forms: soft loans, tax breaks, exemptions, etc. They may consist in a subsidy, which should be treated as the financial contribution or "sum paid by the public authority to an economic unit or group of units (region, branch, sector, etc.) for a social or economic purpose".

5. In themselves, these State aids may not be a bad thing and may be justified by a positive economic balance. They may even appear to be the best or sole choice possible or may even be a "necessary evil", as demonstrated by the massive intervention by governments during the recent international financial crisis to keep their banks afloat or to relaunch the economy.

6. However, these State aids or subsidies may also have a downside, namely distortion of the free play of competition through the preference of "an enterprise, sector of production of goods or service" over its competitors. They may also be seen as unfair, discriminatory measures that are equally damaging to both the national economy and to the regional, community or international trade it is accused of impeding.

7. For all the above reasons, we feel that, provided that account of taken of the interests of developing countries, and particularly the LDCs, State aids and other State subsidies should be subject to competition law.

8. Moreover, such regulations already exist in regional economic union. The World Trade Organisation, for its part, prohibits specific subsidies.

9. In the case of West African States, these regulations are taken into account in the community legislation on competition of the West African Economic and Monetary Union (UEMOA-WAEMU) and the Economic Community of West African States (CDEAO or ECOWAS) composed of sixteen States, eight of which are members of WAEMU.

10. In the following paragraphs we shall briefly discuss State aids or subsidies in the UEMOA – CDEAO area (1), some of the issues that certain subsidies raise in the WTO (2) and, despite everything, in conclusion the need to regulate State aids and subsidies while taking account of the particular situation of LDCs (3).

1. Practices regarding State aids and subsidies and the account taken of such aid in community competition law of the WAEMU and ECOWAS

1.1 Practices regarding State aids and subsidies

11. All States make use, depending upon their circumstances, of subsidies and State aids.

12. West African countries are no exception to this rule. They intervene in the economy to help certain enterprises in a variety of way, in particular through tax exemptions to attract investors and in the event of increases in global commodity prices (flour, rice, etc.).

13. Without wishing to restrict the discussion to Senegal, Article 18 of Act number 2204-06 of the Senegalese investment code offers a good example of such aid. It provides for an exemption from the lump-sum employer's contribution for up to 5 to 10 years. Special facilities are also granted with regard to corporation taxes.

14. In reality, the idea uppermost in the minds of the various national economic operators in our young States is that national enterprises need to be protected from foreign competition and also require government support in the form of subsidies (formerly customs duties that gave national enterprises an advantage over imports in one major West African country).

15. Criticism was thus levelled within WAEMU against the tax exemptions some States granted their hauliers for "truck purchases" and the "credit lines" they allegedly extended to them, which had an adverse impact on competition. Such exemptions apparently exist in the telecommunications sector for new operators entering the market.

16. At the strictly national level, two complaints against States deserve mention.

- The first is that brought by a private press group which owns a radio station and a television station and which accuses the State of awarding exclusive television broadcasting rights, bought out of public funds, to matches from the 25th African Cup of Nations (Ghana 2008) to the sole publicly owned broadcasting channel.

- The second relates to a guarantee of over a billion francs which the State apparently gave to a peanut marketing company, to the detriment of its competitor.

17. This case has been referred to the WAEMU Commission. As we shall see, both WAEMU and ECOWAS have issued regulations regarding State aids and subsidies.

1.2 Account taken of State aids and subsidies in WAEMU and ECOWAS community competition law

18. As in other regions of the world, national legislation makes no provision for State aids, even though the national Commission has been asked to give an opinion on an application for a subsidy addressed to the Senegalese government[1]. This vacuum has been filled by community regulations on competition, such as those drawn up by WAEMU and ECOWAS.

[1] In its opinion No. 05-A-08 of 27 November 2008, the national competition commission of Senegal recalled that the State is obliged to respect the equality of treatment of enterprises that find themselves in similar circumstances and that if it wishes to accede to the application that has been made the State must first notify "the WAEMU Commission of the planned award of aid".

19. Article 8 of Additional Act A/SA-1/12/08 regarding the adoption of community regulations on competition and procedures for their application within ECOWAS has the same content as Article 2-1 of Regulation No. 04/2002/CM/UEMOA regarding State aids within WAEMU and the procedures for applying Article 88 (c) of the Treaty.

20. These two pieces of legislation enshrine the principle of the incompatibility of public aids (WAEMU text) or aids granted by States or provided from State resources (ECOWAS text) when such aids are liable to distort competition by favouring certain enterprises or types of production.

21. However, they also consider the case (Article 3 of the WAEMU regulation, Article 8 of the ECOWAS Additional Act) of public aids which would be compatible with the WAEMU or ECOWAS Common Markets (e.g. aids designed to promote a major project of interest to the community or to remedy serious disruption in the economy of a Member State).

22. Nonetheless, the ECOWAS Additional Act does not appear to be as comprehensive as the ECOWAS regulation with regard to aid.

23. By way of example, there is no provision in the ECOWAS Additional Act comparable to that made by the WAEMU, based on the subsidies banned by the WTO, whereby public aid in the form of subsidies that are "conditional … on the export performance to other Member States … or on the use of domestic products in preference to products imported from other Member States" (Article 4 of WAEMU Regulation 4) is banned *ipso jure* with no possibility of repayment.

24. The sanctions for offences are specified more clearly in the WAEMU legislation, which provides for the suspension or recovery of illegally awarded aid, than in ECOWAS legislation. .

25. Article 10 of the ECOWAS text on measures by the Authority[2] with regard to public aids and anticompetitive practices attributable to public enterprises states simply that: "any person or Member State who has suffered losses due to a prohibited anticompetitive practice in accordance with the provisions of the Additional Act regarding the adoption of community rules on competition pay subject a request for compensation to the Authority and the Authority may, if it is convinced that, in the event, it is justified by the facts, order the offender or offenders to pay compensation to the plaintiff."

26. This sanction may seem woefully inadequate and doubtless ECOWAS community legislation on competition will have to be supplemented and improved in order to, at the very least, ease the difficulties that State aids and subsidies cause or will inevitably cause. This is the purpose of the following paragraph in which a number of issues relating to the WTO will also be discussed.

2. The issue of subsidies in WAEMU and ECOWAS legislation and in the WTO

2.1 The problem with the implementation of State aids and subsidies within the framework of the WAEMU and ECOWAS

27. Article 5.2 of Directive 02/2002/CM/UEMOA regarding co-operation between the WAEMU Commission and national competition structures recalls that the WAEMU Commission has sole competence to know about State aids.

28. ECOWAS considers that this competence is the prerogative of the "Competition authority directed by an Executive Director assisted by two Deputies and the staff the authority needs to function"

[2] This is the ECOWAS Competition Authority.

(Article 2 of Additional Act A/SA.2/12/08 on the creation, powers and functioning of the ECOWAS Regional Competition Authority.

29. The issue of the uniformity of the definitions and prohibitions set out in the two sets of legislation should be avoided.

30. The existence of two competition authorities could give rise to disputes over jurisdiction between the two bodies or problems relating to the perception or conception that each body might have of the role and relations to maintain with national competition authorities or structures.

31. At present, unlike the current situation in the European Union, there is very little disagreement over State aids, despite the fact that, as noted earlier, such aids do exist.

32. In fact, the ECOWAS Commission has already had experience of such disagreements. By way of example, in a case in which "Soccocim Industries" complained of distortion in the operation of the cement market due to a difference in treatment by the State in favour of "Ciments du Sahel", which benefited from tax and customs advantages under a mining agreement, the ECOWAS Commission asked the Senegalese government to cease granting exemptions for clinker imports and stated that "since any failure to comply with this ban amounts to the granting of public aid, it would be examined in accordance with Regulation No. 04/2002/CM/UEMOA of 23 May 2003 on public aids (Decision No. 003/2005/COM/UEMOA).

33. In another case known as the "RUFSAC" affair, the ECOWAS Commission apparently held that exemptions granted to cement manufacturers important paper packaging was responsible for distorting competition at the expense of locally manufactured packaging.

34. However, in our opinion, the main issue should be the efficiency of sanctions imposed on States and the will of the latter to comply with such sanctions.

35. The regulation of subsidies and application of legislation governing subsidies also raises issues in the WTO.

2.2 The issue of subsidies in the WTO

36. Manufacturing subsidies, which are tolerated by the WTO, and export subsidies, which are banned by that organisation, both have an impact on competition.

37. As everyone knows, export subsidies, which countries are committed to reduce in the agricultural sectors, seriously damage the interests of poor countries and are responsible for them losing substantial amounts of export earnings.

38. It has already been argued that European subsidies combined with direct aids allow European countries to practice dumping in world markets.

39. Even now, the losses observed in cotton production in certain African countries are apparently due to cotton support policies in the United States.

40. And yet nothing appears to be able to stop State aids or subsidies. Direct or indirect aids are given to car manufacturers. A few months ago the European Union apparently announced new export subsidies for butter, cheese and powdered milk.

41. Apparently, WTO regulations and the way in which they are applied are not sufficient to settle all the issues regarding State aids and subsidies. Admittedly a body does exist to settle disputes which can

secure the withdrawal of a subsidy or eliminate the adverse effects of a subsidy. However, it is also known that the cost to poor countries of initiating that organisation's procedures is prohibitively high, not to mention the ambiguity and difficulty in interpreting its regulations and, according to some commentators, the inconsistency of the latter.

3. Conclusion

42. These observations do not cast doubt on the usefulness of the WTO, which has in the past ruled against developed countries. What needs to be recognised is that the issue of State aids and subsidies is a complex one. Regardless of whether or not such aids are justified from an economic standpoint, they can always be justified by all countries in terms of policy. Given that they can distort competition and disrupt world trade, they need to be regulated in order to avoid the antagonism and fierce rivalries of the past. World peace demands this. In our opinion, the issue of State aids and subsidies can only be resolved within the framework of the new world governance made necessary and desirable by the international financial crisis.

43. This new world governance, within whose framework different competition policies will be co-ordinated, will combine a series of economic, legal and other rules in which ethics, equity and justice will play a major role. Above all, this new governance of State aids and subsidies in a more global framework of world governance must necessarily take account of the imperatives of development and the situation of permanent crisis in which certain developing countries and LDCs currently find themselves.

CONTRIBUTION DU SÉNÉGAL

CONCURRENCE, AIDES PUBLIQUES ET SUBVENTIONS

-- Contribution de la Commission Nationale de la Concurrence du Sénégal --

1. La liberté de la concurrence ou la libre compétition des entreprises qui offrent, sur un marché déterminé, des produits ou services tendant à satisfaire des besoins identiques ou similaires, doit être garantie par l'État, détenteur de la puissance publique.

2. Or, l'État a différentes missions parmi lesquelles celle d'assurer le bien-être économique et social de ses populations au travers de diverses politiques dont, en principe, il a le libre choix.

3. Ainsi, dans son rôle d'allocation ou de redistribution des ressources, il peut advenir qu'il fournisse différentes aides à des acteurs économiques.

4. Ces aides d'État ou aides accordées au moyen de ressources d'État peuvent revêtir plusieurs formes : prêts à taux préférentiel, allégements fiscaux, exonérations diverses… Elles peuvent consister en une subvention, celle-ci devant être considérée comme la contribution financière ou « la somme versée par la puissance publique à une unité économique ou à un groupement d'unités (région, branche, secteur, etc.) dans un but social ou économique ».

5. En soi, ces aides d'État peuvent ne pas être mauvaises et être justifiées par un bilan économique positif. Elles peuvent même apparaître comme le meilleur ou le seul choix possible ou même constituer un « mal nécessaire ». La récente crise financière internationale l'a démontré avec l'intervention massive des États pour renflouer les banques ou relancer l'économie.

6. Mais ces aides ou subventions peuvent aussi avoir leur travers, celui de fausser le libre jeu de la concurrence dans la mesure où elles viennent favoriser « une entreprise, un secteur de production de biens ou de services » au détriment de leurs concurrents. Elles peuvent ainsi apparaître comme des mesures injustes, discriminatoires et nuiraient aussi bien à l'économie nationale qu'au commerce régional, communautaire ou international qu'elles entraveraient.

7. Pour toutes ces raisons, nous pensons que, sous réserve de tenir compte des intérêts des pays en développement, surtout des PMA, les aides d'État et autres subventions publiques devraient être encadrées par le droit de la concurrence.

8. Du reste, cette réglementation existe dans le cadre d'unions régionales économiques. De son côté, l'organisation mondiale proscrit les subventions spécifiques.

9. En ce qui concerne les États de l'Afrique de l'Ouest, cette réglementation est prise en compte par la législation communautaire sur la concurrence de l'Union Economique et Monétaire Ouest Afrique (UEMOA-WAEMU) et par celle de la communauté des États de l'Afrique de l'Ouest (CDEAO ou ECOWAS) composée de seize États dont huit sont membres de l'UEMOA.

10. Dans les paragraphes suivants, nous traiterons brièvement des aides d'État et subventions dans la zone UEMOA – CDEAO (1), de quelques questions que peuvent poser certaines subventions au sein de

l'OMC (2) et, malgré tout, en conclusion, de la nécessité de la régulation des aides et subventions d'État en tenant compte de la situation particulière des PMA (3).

1. La pratique des aides d'État et subventions et leur prise en compte par les droits communautaires sur la concurrence de l'UEMOA et de la CDEAO

1.1 La pratique des aides d'État et subventions

11. Tous les États recourent, selon les circonstances, aux subventions et aides d'État.

12. Les pays de l'Afrique de l'Ouest n'échappent pas à la règle. Ils interviennent sur l'économie au profit de certaines entreprises par divers moyens, notamment par des exonérations fiscales pour attirer les investisseurs et lors des hausses des cours du marché mondial (farine, riz, etc.).

13. Sans que cela soit spécifique au Sénégal, l'article 19 de la loi numéro 2004-06 de son code des investissements peut être cité en exemple. Il prévoit une exonération de la contribution forfaitaire à la charge des employeurs pouvant aller de 5 à 10 ans. Des avantages particuliers sur l'impôt sur les bénéfices sont aussi accordés.

14. En réalité, l'idée dominante partagée par les divers opérateurs économiques nationaux de nos jeunes États est que les entreprises nationales ont besoin d'être protégées de la concurrence étrangère et de l'appui des États par le biais des subventions (ex-taxation douanière avantageant les entreprises nationales face aux importations dans un grand pays de l'Afrique de l'Ouest).

15. Ainsi, est-il aussi déploré, au sein de l'UEMOA, des exonérations fiscales que certains États feraient en faveur de leurs transporteurs pour « l'achat de camion » et « les lignes de crédits qu'ils leur apporteraient » au détriment de la concurrence dans l'Union. De telles exonérations existeraient dans le secteur des télécommunications en faveur de nouveaux opérateurs entrant dans ce marché.

16. Au plan strictement national, deux griefs faits à l'État peuvent être signalés.

- Le premier est celui d'un groupe de presse privé disposant d'une radio et d'une télévision qui lui reproche d'avoir concédé, à la seul chaîne publique, les droits de diffusion et de télévision, obtenus sur des ressources publiques, des matchs de la 25ème édition de la Coupe africaine des nations (Ghana 2008).

- Le second tient à la garantie de plus d'un milliard de francs qu'il aurait donnée à une société de commercialisation de l'arachide aux dépens de sa concurrente.

17. La commission de l'UEMOA a été saisie de cette affaire. En effet, comme on va le voir, l'UEMOA comme la CDEAO ont réglementé les subventions et aides d'État.

1.2 La prise en compte des aides d'État et subventions par les droits communautaires de la concurrence de l'UEMOA et de la CDEAO

18. Comme dans d'autres régions du monde, les législations nationales ne prévoient aucune disposition sur les aides d'État même si la Commission nationale a eu à donner un avis sur une demande de

subvention adressée à l'État du Sénégal[1]. Ce vide est comblé par les dispositions communautaires sur la concurrence, celles de l'UEMOA comme celles de la CDEAO.

19. L'article 8 de l'Acte Additionnel A/SA-1/12/08 portant adoption des règles communautaires de la concurrence et de leurs modalités d'application au sein de la CDEAO est de la même teneur que l'article 2-1 du Règlement n° 04/2002/CM/UEMOA relatif aux aides d'État à l'intérieur de l'UEMOA et aux modalités d'application de l'article 88 (c) du Traité.

20. Ces deux textes posent le principe de l'incompatibilité des aides publiques (texte de l'UEMOA) ou des aides accordées par les États ou au moyen de ressources d'État (texte de la CDEAO) lorsqu'elles sont susceptibles de fausser la concurrence en favorisant certaines entreprises ou certaines productions.

21. Mais ils envisagent aussi (article 3 du règlement de l'UEMOA, article 8 de l'Acte Additionnel de la CDEAO) les aides publiques qui seraient compatibles avec le Marché Commun de l'UEMOA ou avec le marché commun de la CDEAO (ex. aides destinées à promouvoir la réalisation d'un projet important d'intérêt communautaire ou à remédier à une perturbation grave de l'économie d'un État membre).

22. Cependant, l'Acte Additionnel de la CDEAO ne semble pas aussi complet que le Règlement de l'UEMOA sur les aides.

23. A titre d'exemple, ne figure pas dans l'Acte Additionnel de la CDEAO, cette disposition de l'UEMOA, inspirée des subventions prohibées de l'OMC, selon laquelle : sont interdites de plein droit, sans aucune faculté de rachat, les aides publiques sous formes de subventions « subordonnées…aux résultats à l'exportation vers les autres États Membres…ou à l'utilisation de produits nationaux de préférence à des produits importés des autres États Membres » (article 4 du Règlement n° 04 de l'UEMOA).

24. Les sanctions prévues sont mieux définies dans la législation UEMOA, qui prévoit jusqu'à la suspension ou la récupération de l'aide illégalement octroyée, que dans celle de la CDEAO.

25. L'article 10 du texte de la CDEAO sur les mesures de l'Autorité[2] relatives aux aides publiques et aux pratiques anticoncurrentielles imputables aux entreprises publiques dispose seulement : « toute personne ou État Membre ayant subi des pertes en raison d'une pratique anticoncurrentielle prohibée en application de l'Acte Additionnel portant adoption des règles communautaires de la concurrence, peut introduire une demande d'indemnisation auprès de l'Autorité, et l'Autorité peut, si elle est convaincue qu'en l'occurrence, les faits le justifient, ordonner au contrevenant ou aux contrevenants de verser une indemnité au demandeur ».

26. Cette sanction parait bien insuffisante et certainement la législation communautaire sur la Concurrence de la CDEAO devra être complétée et améliorée pour, au moins, amoindrir les difficultés que posent ou ne manqueront pas de poser les aides d'État et subventions. C'est l'objet du paragraphe suivant où seront également abordées certaines questions relatives à l'OMC.

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1 Dans son avis n° 05-A-08 du 27 novembre 2008, la commission nationale de la concurrence du Sénégal a rappelé que l'État a l'obligation de respecter l'égalité de traitement entre entreprises se trouvant dans des conditions similaires et que s'il veut satisfaire à la demande qui lui est faite, l'État doit, au préalable, notifier « le projet d'octroi d'aide à la Commission de l'UEMOA. »

2 Il s'agit de l'Autorité de la Concurrence de la CDEAO.

2. Le problème des subventions dans les législations de l'UEMOA et de la CDEAO et au sein de l'OMC

2.1 Le problème de la mise en œuvre des aides d'État et subventions dans le cadre de l'UEMOA et de la CDEAO

27. L'article 5.2 de la Directive n° 02/2002/CM/UEMOA relative à la coopération entre la Commission de l'UEMOA et les structures nationales de concurrence rappelle que la Commission de l'UEMOA a compétence exclusive pour connaître des aides d'État.

28. Pour la CDEAO, cette compétence est dévolue à « l'Autorité de la concurrence dirigée par un Directeur Exécutif assisté de deux Adjoints et du personnel nécessaire à son bon fonctionnement » (art. 2 de l'Acte Additionnel A/SA.2/12/08 portant création, attributions et fonctionnement de l'Autorité Régionale de la concurrence de la CDEAO).

29. Le problème de l'homogénéité des définitions et interdictions des deux législations communautaires devrait être évité.

30. L'existence de deux autorités de la concurrence pourrait être à l'origine de conflits de compétence entre les deux instances ou de difficultés liées à la perception ou à la conception que chacune d'elle aurait du rôle et des relations à entretenir avec les autorités ou structures nationales de la concurrence.

31. Aujourd'hui, à l'inverse de ce qui passe dans l'Union européenne, le contentieux sur les aides d'État est faible. Pourtant, ces aides existent ainsi qu'il a été dit plus haut.

32. De fait, la Commission de l'UEMOA en a déjà connu. A titre d'exemple, dans une affaire ou la « Sococim Industries » se plaignait de distorsions dans le fonctionnement du marché du ciment en raison d'une différence de traitement de l'État en faveur des « Ciments du Sahel », bénéficiaire d'avantages fiscaux et douaniers en vertu d'une convention minière, la Commission de l'UEMOA a invité l'État du Sénégal à cesser d'accorder des exonérations sur les importations de clinker et a dit que « tout manquement à cette interdiction étant constitutif d'octroi d'aides publiques, sera examiné en application des dispositions du Règlement n° 04/2002/CM/UEMOA du 23 mai 2003 sur les aides publiques (Décision n° 003/2005/COM/UEMOA).

33. Dans une autre affaire dite « RUFSAC », la Commission de l'UEMOA aurait considéré que les exonérations accordées à des cimenteries importatrices d'emballages en papier seraient à l'origine de distorsions de concurrence au détriment des emballages fabriqués localement.

34. Mais, à notre avis, le grand problème devrait porter sur l'efficacité des sanctions prononcées contre les États et la volonté de ceux-ci de les respecter.

35. La réglementation des subventions et l'application des textes qui les régissent suscitent aussi des questions au sein de l'OMC.

2.2 Le problème des subventions au sein de l'OMC

36. Les subventions à la production, tolérées par l'OMC, et les subventions à l'exportation, prohibées par l'organisme mondial, ont des incidences sur la concurrence.

37. Comme tout le monde le sait, les subventions à l'exportation, qui font l'objet d'engagements de réduction en matière agricole, nuisent gravement aux intérêts des pays pauvres et leur occasionnent des pertes considérables en termes de recettes d'exportation.

38. Il a été déjà soutenu que les subventions européennes conjuguées aux aides directes permettent de faire du dumping sur les marchés mondiaux.

39. Aujourd'hui encore, les déficits notés dans la production du coton dans certains pays africains s'expliqueraient par les politiques de soutien au coton des États-Unis.

40. Pourtant, rien ne semble arrêter les aides d'État ou subventions. Des aides directes ou indirectes sont fournis aux constructeurs d'automobiles. L'Union européenne aurait annoncé, il y'a quelques mois, de nouvelles aides à l'exportation pour le beurre, le fromage et le lait en poudre.

41. Apparemment, la réglementation de l'OMC et l'application qui en est faite ne permet pas de régler toutes les questions relatives aux aides d'État et subventions. Certes, il existe un organe de règlement des conflits pouvant permettre d'obtenir le retrait d'une subvention ou la suppression de ses effets négatifs. Mais on sait aussi le coût prohibitif pour les pays pauvres des procédures de l'organisme mondial sans compter l'ambiguïté, la difficulté d'interprétation et, selon certains, l'incohérence de ses textes. Le citoyen d'un PMA ne peut pas aussi ne pas s'interroger sur la réelle valeur dissuasive des « contre – mesures appropriées » et des « mesures compensatoires ».

3. Conclusion

42. Ces interrogations ne sauraient remettre en cause l'existence de l'OMC qui, du reste, a rendu des décisions contre des pays développés. Ce qu'il faut reconnaître, c'est que la question des subventions et des aides d'État est complexe. Justifiées ou non économiquement, elles peuvent toujours l'être sur le plan politique pour tous les pays. Comme elles peuvent fausser la concurrence et perturber le commerce mondial, elles ont besoin d'être régulées pour éviter les antagonismes et les féroces rivalités d'antan. La paix du monde l'exige. A notre avis, le problème des aides et subventions d'État ne peut trouver une solution que dans le cadre de la nouvelle gouvernance mondiale rendue nécessaire et souhaitable par la crise financière internationale.

43. Cette nouvelle gouvernance mondiale dans le cadre de laquelle seront coordonnées les différentes politiques de concurrence (au besoin par la mise en place d'un organe suprême) combinera un ensemble de règles d'ordre économique, juridique et autres... L'éthique, l'équité, la justice y auront une grande place. Surtout, cette nouvelle gouvernance des aides d'État et des subventions dans un cadre plus global de gouvernance mondiale devra nécessairement tenir compte des impératifs de développement et de la situation de crise permanente dans laquelle se trouvent certains pays en développement et les PMA.

CONTRIBUTION FROM SPAIN

COMPETITION, STATE AIDS AND SUBSIDIES

-- Spain --

1. State Aids in Spain

1.1 State Aids in Spain: Order of Magnitude, Goals and Affected Sectors

1. In Spain, State aids are granted regardless of the nationality of the recipient; both Spanish and foreign companies meeting the specified requirements are equally able to benefit from State aids provided they are either resident or located in Spain.

2. The CNC *Annual report on public aid awarded in Spain* of June 2009 shows the most significant State aid figures disaggregated according to diverse criteria. In the report, *State aid* is defined as any public expenditure which may constitute an economic advantage to a company. The figures in the report correspond to State aids notified to, and authorised by, the European Commission (EC) and to State aids exempted from prior notification but subject to communication to the EC. Unfortunately, it is difficult to obtain data corresponding to State aids falling below the *de minimis* thresholds.

3. In absolute terms, State aid granted in Spain in 2008 - notified or exempted from prior notification, including crisis aid and excluding public financing for railways[1] - amounted to €6.2 billion,[2] representing 0.56% of Spain's GDP (€5.3 billion, 0.51% of GDP, in 2007). The period 2003 to 2008 revealed a decrease in State aid in the first year and an upward trend in subsequent years, which is expected to be confirmed in 2009 as a result of the measures implemented to tackle the international financial crisis.

4. The vast majority of State aid is concentrated in the industrial and services sectors, followed far behind by agriculture-fisheries and transport. In 2008 the bulk of State aid was allocated to industry and services (0.48% of GDP compared to 0.41% in 2007), whilst State aid allocated to agriculture-fisheries and transport has remained stable in relative terms over the past recent years (0.06-0.08% of GDP in agriculture-fisheries, and 0.01- 0.02% of GDP in transport).

5. In the process of allocating State aid, horizontal objectives (78.9% of State aid in 2008) are more and more preferred to sector objectives (21.1% of State aid in 2008). Horizontal objectives relate to regional development (39% of State aid in 2008), research and development (18.8%), environment (11.7%), SME (3.4%), training (1.4%) and employment (0.8%). Sector objectives include assistance to coal mining (18.5% of State aid in 2008) and, far behind, assistance to the financial sector, to shipbuilding, to ailing companies and to certain other manufacturing activities and services.

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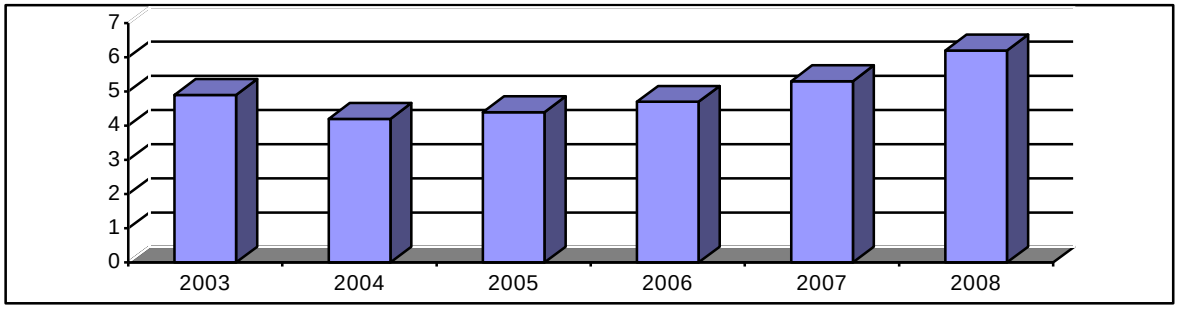
1 A large amount of public financing for railways does not need to be notified to the Commission, either because it does not constitute State aid within the meaning of Article 87 of the EC Treaty or because it is exempted from notification in accordance with Regulations 1191/69 and 1192/69.

2 1 billion = 1,000 million.

Figure 1. State Aid Time History in Spain 2003-2008 (in billion EUR)



Source: State Aid Scoreboard Autumn 2009

6. State aids are most commonly granted through full transfer to the beneficiary, mainly through direct subsidies, although aids in the form of guarantees have been climbing in recent years.

1.2 Access to Government-Owned or Government-Controlled Inputs in Spain

7. The Spanish legislative framework establishes free competition mechanisms for access to the use of government-owned or controlled inputs.[3]

8. In Spain, Public Administrations manage two kinds of government-controlled inputs: goods of public domain and patrimonial goods.[4] There three possible types of use for goods of public domain: common, special and exclusive use. Both special and exclusive use are subject to obtaining an empowering title which may consist on either an authorisation or a concession:

- *Authorisations* are granted directly to petitioners who are eligible. If the number of authorisations is limited, then a free competition scheme is applied where appropriate -otherwise authorisations are granted by drawing lots-. Their length is limited to 4 years maximum;

- *Concessions* must be granted under a free competition scheme, but it is possible to directly grant the award under exceptional circumstances –e.g. if a previous auction or contest had been unsuccessful, if the acquirer is either another public administration or a public-utility non-profit organisation-, which must be duly justified. Their length is limited to 75 years maximum.

9. Notwithstanding the peculiarities established by the sector regulation -the case of telecommunications and natural resources, for instance-, of preferential application, arguably the above mentioned general principles are applicable to all sectors.

[3] Ley 33/2003, de 3 de noviembre, de Patrimonio de las Administraciones Públicas.

[4] Patrimonial goods –such as real property-, may be exploited by contracts which will normally be awarded under a free competition scheme. Only if the goods are peculiar, demand is limited or exploitation is urgent, contracts may be directly awarded. The maximum length of the contracts is 20 years.

2. Aid to Ailing Companies, Especially in the Context of the Financial Crisis

2.1 EC Competencies to Control the State Aids Granted by the Member States

10. The EC exercises supervisory powers over State aids -above certain thresholds- granted by the member States. This, of course, also applies to public aids granted in Spain. Thus, in order to be authorised by the EC, Spanish public aids must comply with EU rules on State aids.

11. Following the deepening of the financial crisis in the autumn of 2008, the EC provided guidance in the form of Communications on the design and implementation of State aid in the crisis context.[5]

2.2 Spanish State Aids in the Context of the Financial Crisis

12. The following paragraphs summarise the main Spanish State aid schemes designed in the context of the financial global crisis that have been notified to the EC and have subsequently been authorised.

- In the financial sector:

  – *State aid NN 54/A/2008 Fund for the Acquisition of Financial Assets*.[6] Its objective is to provide credit institutions with liquidity and to encourage them to grant more credit to businesses and households. The Fund, financed by the State Treasury with €30 billion (expandable to €50 billion), purchases high quality assets from volunteer credit institutions at market prices in order to provide them with additional liquidity. The financial instruments for the investment must be selected taking into consideration the principles of objectivity, security, transparency, efficiency, profitability and diversification;

  – *State Aid NN 54/B/2008 Spanish Guarantee Scheme*.[7] The State guarantee would cover, against remuneration, the issuance of notes, bonds and obligations admitted to the official secondary market in Spain. The maturity of the financial instruments covered is in principle between three months and three years (up to five years in exceptional circumstances). The scheme's overall budget is set at €100 billion, which may be increased to €200 billion depending on the market conditions. Only solvent banks have access to the guarantee scheme. It covers a period of six months following which it must fade or extended prior notification to the EC. The scheme contains elements of State aid but foresees various safeguards aimed at ensuring that the State intervention is proportionate, limited to what is necessary and set through adequate instruments.

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5 See Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8 ("the Banking Communication"); Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C10, 15.01.2009, p. 2 ("the Recapitalisation Communication"); Communication on the treatment of Impaired assets in the Community Banking Sector, OJ 72, 26.03.2009 ("the Impaired Assets Communication"); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009; Communication on the temporary framework for State aid measures to support access to finance in the current financial and economic crisis, adopted on 17 December 2008; OJ C 16, 22.1.2009, p.1; consolidated version OJ C83 of 07.04.2009.

6 Real Decreto-ley 6/2008, de 10 de octubre, de ceración del Fondo de Adquisición de Activos Financieros.

7 Real Decreto-ley 7/2008, de 13 de octubre, de Medidas Urgentes en Materia Económico-Financiera en relación con el Plan de Acción Concertada de los Países de la Zona Euro.

13. Besides, the *Fondo de Reestructuración Ordenada Bancaria (FROB)*,[8] which has just been notified to the EC, includes a series of measures aiming at a triple objective: finance restructuring processes of institutions with insolvency problems, strengthen the resources of institutions experiencing short term difficulties but with good prospects of long-term viability, and maintain confidence in the system by increasing its strength and solvency so that surviving institutions can remain strong and provide credit normally. In connection with the restructuring processes, three phases can be distinguished: (i) the search for a private solution by the credit institution, (ii) the adoption of measures to address weaknesses that may affect the institutions' viability -through the participation of the *Fondos de Garantía de Depósitos* (Deposit Guarantee Funds) in such credit institutions- and (iii) restructuring with support of the FROB. The FROB will have a budget of €9 billion, of which €2.25 billion will come from the Deposit Guarantee Funds and €6.75 billion from the State Budget.

14. It is worth noting that the regulation creating the FROB fosters private solutions first -minimising the cost to the taxpayer whenever the use of public funds is necessary, avoiding generalised recapitalisation aimed at preserving non-viable institutions, and encouraging the assumption of responsibility by shareholders and managers. On the other hand, under such regulation the FROB may temporarily[9] acquire securities of financial institutions that need, and apply for, aid in order to reinforce their own resources in view of integration processes.

- In the real economy:

15. Additionally, for undertakings operating in sectors other than financial, the following aid scheme was notified to the EC: *State aid N 307/2009 Temporary aid scheme for granting limited amounts of compatible aid*. The aim of the scheme is to grant temporary aid to undertakings that have been affected by a sudden shortage or unavailability of credit as a result of the global financial and economic crisis. The scheme provides limited amounts of compatible aid to undertakings until the end of 2010. The aid volume available is estimated €1.400 billion. No aid will be granted to firms that were in difficulty on 1 July 2008, in the meaning of the EU guidelines.

16. The following State aid scheme aiming at the automobile sector is also worth mentioning: State aid N 140/2009 Competitiveness plan of the automotive sector – Realisation of investments aimed at the manufacturing of more environment-friendly products. The aid will be granted in the form of an interest rate subsidy for investment loans for production of green products, i.e. green cars and car components which contribute to the realisation of green cars. The aid is granted only for projects involving early adaptation to, or going beyond, future EU product standards aiming at increasing the level of environmental protection. The scheme applies to companies of all sizes and its overall budget is €690 million.

3. CNC Advocacy and Enforcement in the Field of State Aid

3.1 The Role of the Spanish Competition Authority Regarding State Aid

17. The Spanish Competition Act (CA) -Act 15/2007, of July 3-, without prejudice of the EC's competences regarding control of EU member States public aid, establishes that the CNC, ex officio or at the request of the Public Administrations, may analyse State aid award criteria with the aim to analyse the possible effects of State aid on competition in the markets. The CNC may either issue reports on State aid regimes or individual aids or present proposals to the Public Administrations.

8 Real Decreto-ley 9/2009, de 26 de junio, sobre reestructuración bancaria y reforzamiento de los recursos propios de las entidades de crédito.

9 There is a need for a commitment by the institution to repurchase when capable.

18. As examples, two recently published reports, one on the Draft Royal Decree establishing measures to support the coal mining sector,[10] and the other on the Proposed Draft Act on Audiovisual Communications,[11] which discusses considerations regarding the possible existence of State aid elements in the new system for financing the public broadcasting service. Both reports analyse whether the foreseen measures could constitute State aids, recommending, where appropriate, their notification to the EC.

19. The CNC acts independently of the Administrations responsible for granting the aid under consideration, and has insisted that such Administrations should adopt a precautionary approach to State aids since an appropriate design will, in many cases, prevent possible harmful effects on competition, which, once produced, are often irreversible.

20. Furthermore, the CA requires the CNC to issue an *annual report on State aids awarded in Spain*; the first one of which was made public in July 2009.[12]

21. The report devotes a specific section to the description of the *economic criteria that should guide the evaluation of State aids*. The section emphasises the need to take into account the balance between the presumed benefits of the aids and the harm caused by them -to see whether the first outweigh the second-, not only for the recipient companies, but also for the affected markets and the economy as a whole.

22. The idea is to raise awareness among the Public Administrations in charge of designing State aids about the need to perform a cost-benefit analysis to make sure that the benefits of the planned State aid compensate the potential distortion of competition trade it may cause. Such analysis should focus on the following aspects:

- The State aid must be justified (solution for a market failure / other common interest goals);
- The instrument used must be proportional, i.e. the same results cannot be achieved through other less intrusive mechanisms and the aid must have a real incentive effect (to be effective);
- The damage caused to competition in the affected markets.

23. This approach is in line with the so called "new economic approach to State aids", which the EC is planning to adopt and promote in the EU.

24. Furthermore, the CA provides the CNC with an instrument for State aids *ex-post* control. It empowers the CNC to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived. This mechanism can be particularly useful in the case of *de minimis* State aids -not controlled by the EC- likely to hinder effective competition in the affected markets.

3.2 Examples of Complaints Received by the CNC on the Subject of State Aids

25. The CNC has received various queries and complaints regarding the advantages that certain public entities would be enjoying by virtue of their privileged access to public contracts. Indeed, these "own means of management and technical services of the Public Administrations" can be directly awarded

[10] IPN 33/09 Real decreto de procedimiento de resolución de restricciones por garantía de suministro.

[11] IPN 11/09, Anteproyecto de Ley de la comunicación audiovisual.

[12] http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=30675&Command=Core_Download&Method=attachment.

contracts for the provision of goods and services to the Public Administrations which would otherwise require a public tender.

26. Extensive use of this figure could, then, eliminate competition in cases where it is desirable and thus, the CNC has advised a very restrictive use of it by the Public Administrations.

27. Other complaints and reports have referred to alleged predatory strategies by public bodies due to their funding advantages, which allow for cross-subsidisation between public interest activities and free market activities.

28. An example in the insurance sector is case ASPA/ASEPEYO (Proceedings R 734/08, Decision of 30 October 2008), where an association of insurance companies filed a complaint against some Social Security mutual insurance companies on grounds that they were subsidising activities subject to free competition with the Social Security funds received in payment for protected activities.[13] In cases *Centros Deportivos Benicarló* and *Centros Deportivos Castellón*, local authorities were accused of offering sport services in public premises at predatory prices.[14]

3.3 Competition Law and State-Owned Companies

29. The CA applies to both public and private undertakings without distinction, as did the previous Competition Act of 1989. The CA defines an undertaking, subject to competition law, as any person or entity carrying out an economic activity, regardless of its legal form and the manner in which it is financed. Thus, the recipient of the prohibitions of articles 1 to 3 of the CA -prohibiting anticompetitive agreements, the abuse of dominant positions and the acts of unfair competition which affect the public interest through distortion of free competition- is any entity involved in an economic activity, i.e. any natural or legal person who independently participates in the production or distribution of goods and services, regardless of its legal status, financing and corporate form, and their public or private nature.[15]

30. When establishing the Competition Authority's competence to assess Public Administrations' conducts, the key is to identify whether, at the time, they were acting as regulators (in the broadest sense, including when they were acting in the exercise of any public prerogatives) within the scope of their responsibilities, or just as economic operators. Only in the second case the conduct of the Public

13 The Council did not think that the accusation had been proven.

14 Decisions of 10 March 2006. In these cases no abuse was found. The prices offered had been in line with costs in compliance with the rules governing local finance departments and the classes offered had not been intended to eliminate other competitors from the market but to achieve objectives such as promoting exercise and sports among its citizens. Neither did the Competition Authority find a serious distortion of competition in the market nor an impact on the public interest.

15 The prohibitions of articles 1 to 3 do not apply to conducts harboured by Law, as stated in article 4 of the Competition Act, regardless of the public or private nature of the concerned undertakings. By contrast, the anticompetitive conducts by firms that emerge from the exercise of other administrative powers or caused by the action of public authorities or entities without this legal protection are not exempted. Even if the law allows anticompetitive conducts that cannot be prosecuted by the Competition Authority, the law itself could be breaching article 86 of the European Treaty. In respect of public undertakings, undertakings granted with special or exclusive rights and undertakings that operate services of general economic interest, this article establishes that member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular the rules on competition.

Administration would be subject to competition rules. This criterion emanates from the doctrine of the Spanish Competition Authority, upheld by the revision Courts.[16]

31. The Competition Authority has prosecuted and fined several public undertakings. Some examples are hereby presented:

- For participating in anticompetitive agreements: In 1997, *La Lactaria Española S.A.*, a public enterprise attached to the Ministry of Agriculture, was sanctioned with a fine of €1.01 million for leading a cartel of industrial dairy firms that agreed on the basic prices, quality bonuses and discounts for raw milk. Total fines reached € 6.61 million;[17]

- For abusing a dominant position: *La Sociedad Estatal Correos y Telégrafos*, the State postal service, a 100% State-owned public limited company has been fined several times for abuse of dominance. In 2003 and 2004 the sanctions rose up to €5.4 million[18] and €15 million[19] respectively. In both cases, the enterprise had taken advantage of its dominant position in the market in which it held a monopoly to prevent new entrants in a connected liberalised market;

- Commitments: In the context of case 2458/03 CORREOS/ASEMPRE. The State postal service committed to implement prices above costs.

32. In case Ports of Andalusia,[20] no sanction followed as the abuse of dominance could not be proven, but the CNC warned that the fact that the public enterprise was acting as regulator and as an economic operator in the same market could cause severe distortions on competition due to asymmetric information problems and biased incentives in the drafting and implementation of the regulation.

16 As an example, case r 267/97 Tragsa 3, case r 409/00 Seguridad marítima, case r 447/00 Piñas Andalucía, case r 621/06 CST/ AENA, case r 572/03 Servicios Deportivos Logroño, case 2779/07 Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlucar.

17 Case 352/94, Industrias lácteas.

18 Case 542/02, Suresa-Correos.

19 Case 568/03, ASEMPRE/Correos.

20 Case R 718/07, Puertos de Andalucía.

CONTRIBUTION FROM
CHINESE TAIPEI

COMPETITION, STATE AIDS AND SUBSIDIES

-- Chinese Taipei --

1. Introduction

1. There is no general state aids policy in Chinese Taipei. However, competent authorities set regulations for various government subsidies. The majority of government subsidies are for the promotion of agriculture and fisheries, the development of mass transportation, industry, outlying islands or remote areas, and trading business, or the protection of the victims of national disasters.

2. In preparing the present submission, the Fair Trade Commission (hereinafter "the FTC") consulted with various government agencies responsible for government subsidies, including the Bureau of Energy, the Industrial Development Bureau, and the State-Owned Enterprise Commission which are under the Ministry of the Economic Affairs, as well as the Council of Agriculture. This submission will focus on issues related to the use of government subsidies and legal restrictions, as well as outline some cases of subsidies handled by the FTC for illustration.

2. The use of government subsidies in Chinese Taipei

3. Since Chinese Taipei joined the WTO in 2002, measures for related industrial subsidies have complied with the WTO regulations and the WTO has been regularly notified pursuant to the WTO Agreement on Subsidies and Countervailing Measures. A number of examples of the subsidy measures, preferential loans, and tax exemptions for agriculture, fisheries, and industry in Chinese Taipei are explained as follows.

2.1 Agriculture: Companies in the Pingtung agricultural biotechnology park

4. Biotechnology companies moving into the Pingtung Agricultural Biotechnology Park may apply for subsidies to offset the costs of the following activities:

- The planning or development of technology that may be vital, innovative, integrative, common, or fundamental to the agricultural biotechnology industry;

- The planning, development, or establishment of a service platform, system, or model that helps the marketing, distribution, application, or value-added service of the agricultural biotechnology industry;

- The planning, development, or establishment of innovative business models or procedures that promote knowledge creation, circulation, or value-added to the technological development of the agricultural biotechnology industry; and

- Other research or development activities that create specific knowledge capital, redefine the value of the agricultural biotechnology industry, or improve the industrial capacity for innovation.

5. The subsidy to be granted is not to exceed 50 percent of the budget for research and development in the applicant's proposal. In addition, the total subsidy allocated for each proposal is not to exceed one million New Taiwan Dollars (NTD).

6. Preferential loans at below-market rates: Companies moving into the agricultural biotechnology park may apply for preferential loans with an annual interest rate of 2%. Since January 15, 2009, the interest rate has been reduced to 1.5%. A total of NTD 146.03 million in loans has been approved. The amount of the interest subsidies is NTD 2.19 million (based on the interest rate level of 3% in financial markets).

2.2 Fisheries

2.2.1 Fishing vessels buy-back

7. Due to severe overfishing worldwide, the UN has been urgently calling on nations to reduce their fishing capacities. Chinese Taipei implements a "fishing vessels buy-back programme" to alleviate pressures on the dwindling fishery resources and ensure their sustainability. The beneficiaries are owners of all varieties of fishing vessels with valid fishing licenses, including recreational fishing vessels.

8. Funds expended on buying back 90 fishing vessels and 262 fishing rafts in 2007 totalled NTD 485.53 million; funds spent on buying back 127 fishing vessels and 333 fishing rafts in 2008 totalled NTD 741.314 million.

2.2.2 Fishing vessels marine insurance grants

9. To insure fishing vessels against marine disasters, Chinese Taipei provides grants to cover part of the costs of insurance for fishing vessels in case of damage at sea. The budget for this part totalled NTD 78.4 million in 2007 and NTD 83.5 million in 2008.

2.2.3 Fishing vessels reduction programme

10. Due to severe overfishing worldwide, the UN has been urgently calling on nations to reduce their fishing capacities. Chinese Taipei implements a "government compensation for fishing vessels reduction programme" to alleviate pressures on the dwindling fishery resources and ensure their sustainability.

11. The beneficiaries are owners of big-eye tuna long-line fishing vessels with valid fishing licenses and ultra-low temperature freezing equipment. They have been compensated with NTD 30,000 for each gross ton. Funds spent on reducing 23 fishing vessels in 2007 totalled NTD 451.26 million.

2.3 Industry

2.3.1 Tax credit for investment in a disadvantaged region

12. With the overall objective of achieving balanced economic growth within Chinese Taipei, the aim of the tax credit programme is to encourage investment in disadvantaged geographical regions.

13. Any company incorporated under the Company Law, which makes an investment in a region with scant natural resources or with slow development, may gain credits of up to 20 percent of the total amount of its investment against the corporate income tax levied in the then current year, provided it meets the threshold of capital or the threshold number of employees. If the amount of corporate income tax levied in that year is less than the tax credit, the balance of the tax credit may be applied against the corporate income tax levied in the ensuing four years.

14. The threshold capital refers to the total amount used in procuring brand-new machinery, equipment and buildings which adds up to NTD 25 million. The term "minimum number of employees" refers to the monthly average of the number of newly-employed employees in a full year, amounting to fifty persons or more.

2.3.2 Specific and urgent financing and loans intended for working capital needed during periods of economic crisis and recession, and for recovery plans from damage caused by major natural disasters

15. According to Article 2 of the "Standards for Identifying a Small and Medium-Sized Enterprise", an SME is a company or commercial enterprise registered in accordance with the law with capital or operating revenue below the following thresholds:

- For enterprises engaged in manufacturing, construction, mining or excavating, a paid-in capital of less than NTD 80 million;

- For enterprises engaged in other economic activities such as agriculture, logging, fishing, the raising of livestock, utilities, commerce, transport, warehousing, communications, finance, insurance, real estate, commercial, social or individual services, an annual operating revenue of less than NTD 100 million.

16. Qualified SMEs in circumstances meeting the following conditions are entitled to apply for financing and loans:

- Urgent financing is provided for the provision of working capital during periods of significant financial crisis, recession and major natural disasters;

- The loans are provided for helping enterprises restructure during periods of economic crisis and recession, replacing machinery and purchasing new automated equipment.

2.3.3 Duty and tax exemptions for high-technology industries

17. In order to stimulate the research and innovation of industrial technology and to promote the development of advanced technology in Chinese Taipei, the "Science-based Industrial Park" (the Park) has been established by introducing sophisticated industries and personnel with advanced technological backgrounds into a designated zone.

18. A park enterprise refers to a science-based industry and to an enterprise approved and established in the Park that is able to provide services in respect of operational, management or technical support to science-based industries.

19. All Park enterprises are entitled to the following exemptions:

- Customs duties, commodity tax, and business tax on imported machinery and equipment, raw materials, commodities, fuel, and semi-finished products; and

- Commodity tax and business tax on exported goods or labour services.

20. According to Section 2, paragraph 1, Article 3 of the Commodity Tax Statute and Article 7 of the Value-added and Non Value-added Law, exports can be exempted from commodity tax and the business tax rate on exported goods is zero. These tax treatments are not specific to enterprises located in the Park, as they are generally available for exported goods, regardless of whether or not the manufacturers

are located in the Park. The total amount of business tax exemptions for all imports was NTD 42,298 million and NTD 34,045 million in 2007 and 2008, respectively.

2.3.4 Subsidies for the establishment and operation of petroleum facilities in mountain and offshore areas

21. According to Article 36 of the Petroleum Administration Act, the Petroleum Fund will be used for some purposes, such as subsidising the setting up of petroleum facilities in mountain and offshore areas as well as transportation outlays, and offering price subsidies. The policy objective is to maintain oil supplies from reserves located in mountain and offshore island areas.

22. Building contractors and/or operators of petroleum facilities in mountain and offshore island areas are entitled to apply for the following subsidies:

- Subsidy for the establishment of petroleum facilities in mountain and offshore island areas;
- Subsidy for the cost of maintaining petroleum facilities in mountain and offshore island areas;
- Subsidy to offset the cost of shipping petroleum or Liquefied Petroleum Gas to mountain and offshore island areas;
- Subsidy for extra personnel costs in the operation of petroleum facilities in mountain or offshore island areas.

23. The total amount of such subsidies was NTD 199 million and NTD 245 million in 2007 and 2008, respectively.

2.4 Fund granted for promoting the development of industrial technology

24. According to the Regulations of Subsidisation for Encouraging Enterprise R&D Activities, any company established according to the Company Law with sound financial standing and a Research and Development Department that has made significant achievements in the past, and which is currently staffed by competent specialists, may apply for this fund to offset the costs of the following activities:

- The planning or development of industrial technologies that may be aptly characterised as vital, innovative or integrative;
- Development of innovative or integrative manufacturing technology by small and medium-sized businesses;
- Development of innovative IT application systems;
- Development of innovative business models based on strategic services-oriented research;
- Cooperation with major national technology-related policies and the creation of an environment conducive to the development of technology and industry within civilian business enterprises.

25. The assistance funds to be granted shall not exceed 50 percent of the total amount of the following expenses:

- Costs incurred for full-time and/or part-time research personnel;

- Costs of consumable instruments and raw materials;
- Costs for the use and maintenance of R&D equipment;
- Costs for technology transfer; and
- Domestic and overseas travel expenses.

26. The total amount of the grants in the fiscal year 2007-2008 was NTD 6,571 million.

3. Legal restrictions and subsidies

27. The FTC does not exert control on state aids in Chinese Taipei. In case a government agent grants subsidies for necessary policy consideration, the nature of the subsidies can be a public law matter or a private economic activity. However, the FTC will properly intervene if relevant trading activities derived from subsidies affect market competition in violation of the provisions of the Fair Trade Act.

28. Cases concerning farmers associations and consumption cooperatives that have required the FTC's enforcement are described as follows:

3.1 The farmers association subsidising farmers on pesticides

29. Pursuant to Articles 4 and 40 of the Farmers Association Act, the farmers association provides farmers with subsidies on pesticide purchase, and a fund was obtained from the profits of a farmers association allocated for agricultural extension (62% of the profits). Since the conduct for subsidies on pesticide purchases provided by the farmers association was likely to impede the fair competition with pesticide wholesalers and retailers, the FTC organised a meeting entitled "The feasible scheme for subsidies on pesticides by the farmers association and other issues related to the agricultural policy involving the Fair Trade Act" to exchange views with the Council of Agriculture in November 2000. Some of the outcomes are described as follows:

- Relevant authorities will supervise the farmers associations so that they do not to sell pesticides to members at a price lower than the purchasing price;
- If the farmers association, under the statutory requirement of the Farmers Association Act, uses profits to subsidise certain materials for agricultural production, (1) in addition to pesticides, other materials may also be subsidised; (2) the beneficiaries of subsidies on pesticides are agricultural factories and plants under the Taiwan Provincial Farmers' Association, and (3) the subsidies on pesticides are mainly for pest control, not for general purposes;
- When the farmers association sells pesticides which are not produced by agricultural factories and plants under the Taiwan Provincial Farmers' Association, the selling price may not be lower than the purchasing price. Individual cases involving unfair competition will be handled by the FTC according to the Fair Trade Act;
- Regarding the ad hoc government subsidy programmes on pesticide purchase for farmers in the production-and-marketing groups, the township farmers associations shall inform the production-and-marketing group of the following: pesticides can be purchased from either the farmers association or pesticide retailers;

- The application for government subsidies by the township farmers association for pest control projects shall be strictly reviewed. Subsidies will not be granted if they are not to meet an emergency or for specific needs.

3.2 Tax exemptions are specific to consumption cooperatives, and not applicable to general retailers

30. Paragraph 2, Article 3-1 of the Cooperatives Act provides that "A cooperative other than prescribed in the above paragraph shall be restricted by the following provisions unless it is entrusted by the government or a public welfare association: … 3. Supply cooperatives and consumption cooperatives may not provide or sell goods to anyone other than members…" Hence, cooperatives may not trade with non-members. Article 7 of the same Act states, "cooperatives may be exempted from income tax and business tax." As a result, pursuant to Subparagraph 10, Paragraph 1, Article 8 of the Value-added and Non value-added Business Tax Act and Subparagraph 14, Paragraph 1, Article 4 of the Income Tax Act, cooperatives are entitled to tax exemptions when selling goods to members.

31. In 2000, the FTC consulted with the Ministry of the Interior and Ministry of Finance in order to facilitate fair competition between general retailers and consumption cooperatives and advise those agencies to abolish the provisions regarding income and business tax exemptions for consumption cooperatives. In the initial result, there is no consensus on this issue.

32. The position of the Ministry of the Interior responsible for the Cooperatives Act is as follows:

33. Cooperatives refer to the associations organised based on the principle of equality and mutual aid. Cooperatives are public legal entities pursuing improvement of the economic benefits and living standards of members by means of joint operations. Cooperatives and private companies are different in nature. The latter seek to pursue profits, while the former seek to encourage the self-reliance of disadvantaged groups and alleviate the government's burden in providing assistance. Article 145 of the Constitution stipulates that cooperative enterprises shall receive encouragement and assistance from the State.

34. The deal between cooperatives and its members is an internal affair rather than an external profit-making activity; therefore, consumption cooperatives can be exempted from income tax and business tax. In addition, cooperative enterprises are beneficial to their members and can stabilise the prices of commodities, and thus the provisions for tax exemptions for cooperative enterprises shall be retained.

35. The position of the Ministry of Finance is that the provisions for such tax exemptions will be abolished and amended after the Ministry of the Interior deletes relevant regulations.

36. Recently, in response to the deregulation policy in Chinese Taipei, the Ministry of the Interior started to amend the Cooperatives Act. The objective of the draft amendments to the Cooperatives Act is to improve the competitiveness of the cooperative enterprises in the relevant markets and encourage the development of the cooperative enterprises. In taking into consideration the above items with a view to establishing the cooperatives, the amendments to the Cooperative Act did not delete the provisions of the tax exemptions, and the tax exemptions will thus even apply to non-members. As no consensus could be reached over the controversy which followed with regard to the purpose and principles of the Cooperative Act, a draft amendment for Parliamentary review was returned to the competent authority in October 2009 for redrafting. The draft amendment did not, however, adopt the FTC's suggestions as mentioned above, and the FTC will continuously make efforts to advocate competition and will closely watch future developments concerning draft amendments to the Cooperative Act.

CONTRIBUTION FROM UKRAINE

ESTABLISHMENT OF THE STATE AID SYSTEM IN UKRAINE

-- Ukraine --

1. Establishment of the state aid system is gaining a great importance under the conditions of market reorganisation and Ukraine's active integration into the international community.

2. Governments of many countries apply state aid instruments for achieving a wide range of economic, social and political goals, including the improvement of competitive ability of national manufacturers at international and national markets.

3. The assignment of the state aid system consists not in restricting the state entitlement to render economic aid or to narrow down the scope of such aid, but in ensuring the provision of such type of aid so that it would not bring about any negative consequences for competition.

4. State aid in Ukraine is provided by central and local agencies of public authorities, local government agencies and their authorised establishments at the expense of the state and local budgets. State aid is annually granted to thousands of business entities. All these elements constitute the expanded and comprehensive system of state aid that requires monitoring and control for the avoidance of adverse effect for competition.

5. Ukrainian state aid related laws are characterised as fragmentary and incomplete. Certain provisions of state aid control are contained in the Economic Code, The Economic Competition Protecting Law of Ukraine, The Concept of State Subsidies Restructuring (approved by the Cabinet of Ministers Resolution No. 182-p dated March 31, 2003).

6. The provisions for granting regional aid are determined by The Regional Development Incentives Law of Ukraine. Supporting activities in certain industries are provided for by several laws: The Concept of State Industry Policies (approved by the President of Ukraine Decree No.102/2003 dated February, 12 2003), The State Industry Development Program for 2003-2011 (approved by the Cabinet of Ministers Resolution No. 1174 dated July 28, 2003).

7. Furthermore, The Fiscal Code of Ukraine provides the possibility of granting subsidies to enterprises at the expense of budgetary funds via financing the support programs on priority branches of economy in accordance with the general national programs, and reducing budgetary incomes on account of granting tax benefits. The Taxation System Law of Ukraine provides incentives for enterprise production activity and active investments by introducing the taxation-related benefits on the profits (incomes) aimed at production development.

8. International obligations of Ukraine in the sphere of control of the state aid provision and use are determined by Article 49 of The Partnership and Cooperation Agreement of Ukraine, European Communities and their member-countries which provides the Parties abstaining from granting any state aid to certain enterprises or to production of commodities, or from rendering the services that impair or threaten to impair competition on condition of their affecting the trading process between Ukraine and the

Community. The information exchange procedure on request of the Parties to the Agreement and proper advising are also provided with regard to certain cases of state aid granting.

9. Signing the Free Trade Area Agreement with the EU will provide the prohibition of the state aid that impairs competition, if such support adversely affects trading between Ukraine and the EU. Ukraine will be obligated to ensure legal, institutional and organisational principles of the state aid system, and non-fulfilment of these obligations entails applying a dispute settlement mechanism including certain compensatory procedures.

10. The issue of state aid granting is only partially regulated by the economic competition protecting laws of Ukraine - with regard to prohibiting the authorities and the local government agencies to grant benefits and other preferences to individual business entities that place them on a privileged footing in relation to competitors which brings about or may bring about non-admission, removal, restriction and impairment of competition. But nevertheless, the concept of "benefits or other preferences" is not fully compliant with the notion of "state aid" present in the EU laws. Besides, the law provides no grounds for reimbursing the state aid that impairs competition. The most important disadvantage is the fact that Ukraine does not still have a consistently formed state aid monitoring system which serves as a prerequisite for any control.

11. Over the last five years, by order of the Government, the Anti-Monopoly Committee of Ukraine had been attempting to conduct integrated lawmaking in that sphere via the Supreme Council of Ukraine or to apply amendments to the current competition laws with the purpose of performing state aid control functions. Both bills were rejected by the Supreme Council of Ukraine.

12. One of the main reasons for rejecting the bills mentioned above was a lack of common attitude toward the institutional principles of the state aid control system, first of all, as to determining the authority that would be responsible for performing the control functions of the kind.

13. The issue of evaluating the effect the state aid makes on competition is only one of the aspects of the state aid institute. The issues of state aid monitoring and preparing reports on granted state aid that shall be obligatory elements of the control system are not in power of the Anti-Monopoly Committee of Ukraine. Nowadays certain elements of these authorities have been conferred to the Ministry of Finance, the Ministry of Economy and branch ministries; however each of these agencies is solely responsible for a certain sphere of social relations. There is no unified agency that would be authorised to perform the whole set of functions provided by the state aid control system.

14. In view of the aforesaid, pursuant to the Order of the Ukrainian Government, an interagency workgroup specialised on drafting the Concept of the state aid system forming was set up in July 2008.

15. Allowing for the complexity and diversity of the issue related to state aid granting and using, the Anti-Monopoly Committee of Ukraine initiated receiving technical support from the EU for resolving this problem. As of today there has commenced implementation of the EU technical support project named "Adjusting the competition protecting system and the state purchase system of Ukraine in accordance with the EU standards", one of the components of which is "State aid". The draft concept of the state aid system forming has been developed on the basis of the results of the interagency workgroup activities and is currently being agreed on by the executive branch authorities.

16. As determined in the draft Concept, the state aid system forming shall be ensured by the fulfilment of the following key tasks:

1) To form the state aid monitoring system on the national level;

2) To make up the state aid register containing generalised data on the support granted in Ukraine;

3) To create a state aid map for keeping balanced regional development;

4) To prepare regular (annual) reports on the scope and forms of state aid in compliance with international standards;

5) To introduce surveillance of how the granted state aid influences competition.

17. Efficient implementation of the tasks mentioned above will allow the forming of two main components of the state aid system in Ukraine – the state aid monitoring system and the state aid control system.

18. Fulfilment of the first five tasks will form the state aid monitoring system while the implementation of function five will turn it into the state aid control system.

19. Under the conditions of the difficulties existing in Ukraine when it comes to promoting laws in the sphere of state aid, it is advisable to make use of the experience of Poland and a few other countries of Central Europe that started resolving the problem of state aid control by creating the state aid monitoring system which was forming based on the EU standards.

20. Forming the state aid monitoring and reporting systems shall be launched on the basis of the Government's resolution and go through stage-by-stage implementation:

- Stage I – organising a pilot monitoring project on state aid granting with the central authorities involved in, creating the registering and reporting models of state aid;

- Stage II – organising the state aid monitoring system on the national level,

- Stage III – setting up the state aid register on the national level using monitoring results, preparing overall reports of state aid on the basis of this register and creating the regional map of state aid.

21. Expert training related to the monitoring procedure, register opening and report preparations shall be provided for the authorised agency and also for the central and local authorities – state aid granters - at all the stages of monitoring and reporting.

22. In order to carry out the state aid monitoring procedures, to keep records of state aid and to prepare reports an authorised agency shall be as fully informed as possible about types and schemes of state aid, have financial monitoring skills and ensure liaising with a broad spectrum of government authorities.

23. As determined in the draft Concept, the optimal institutional model related to solving the issue of forming the state aid system in Ukraine is the allocation of authorities based on fulfilling certain tasks of the state aid system between two government authorities, specifically, vesting the Ministry of Finance of Ukraine with the authorities of monitoring and report preparation as regards state aid using and granting, and the Anti-Monopoly Committee of Ukraine – with those of controlling the state aid influence on competition and international trade. Allocating authorities this way will ensure the possibility of employing staff and information resources, already available in these government authorities.

24. Resolving the issue stage-by-stage with its complexity and diversity taken into consideration will ensure the possibility of following a more balanced and reasonable approach to resolving all the issues and of amending certain approaches if necessary.

25. Evaluating an as-is state in the sphere of state aid due to the made-up register and the monitoring activities preceding the law adoption will be conducive to developing adequate and balanced state aid related laws.

26. Developing a legislative system in the sphere of state aid shall be conducted on a stage-by-stage basis as well and concurrently with implementing state aid monitoring activities:

- Stage I deals with developing the regulatory documents that will determine the procedure of state aid monitoring, and recommended practice of report preparation with EU standards taken into account;

- Stage II deals with developing and adopting a special law of state aid based on monitoring results, that will determine legal, institutional and organisational principles of state aid system functioning;

- Stage III deals with developing secondary laws that shall ensure state aid system functioning to the full extent.

27. Ensuring the interaction and information exchange for authorised agencies in the sphere of state aid and implementing the mechanisms of preliminary and follow-up control over the state aid influence on competition and international trade shall commence upon the completion of monitoring stage I, particularly, on the basis of the data obtained during the monitoring activities and after adopting the frame law of state aid.

28. All the stages of implementing the state aid system shall be accompanied by the activities aimed at the extension of public awareness of the state aid system functions and advantages.

29. The developed draft Concept is currently being reworked by ministries and establishments and agreed upon with all the co-executors. Consulting experts on the technical support project "Adjusting the competition system and the state purchase system of Ukraine in accordance with EU" is continued.

30. The choice of a certain optimal model of forming a state aid system and its stage-by-stage implementation shall be further based on the most efficient option the decision as to which shall be rendered by the Cabinet of Ministers of Ukraine.

CONTRIBUTION FROM
THE UNITED STATES (FTC)

STATE AIDS AND SUBSIDIES

-- U.S. Federal Trade Commission --

1. Introduction

1. The United States does not have a system for the direct regulation of government financial aid to firms. In some extraordinary instances, the U.S. Government has provided assistance to industries and firms to address specific exigencies, for example, to protect critical infrastructure, employment, national defence, and the integrity of the banking and financial system.[1] In its recent rescue measures, the U.S. Government has taken steps to limit the possible negative effects of such interventions by restricting the duration and depth of its intervention. U.S. states may provide certain assistance to firms but, under the "dormant Commerce Clause" of the U.S. Constitution, their actions may not discriminate against other states or hinder interstate commerce.

2. State and Local Level Aids and Subsidies

2. The United States does not have a regulatory regime governing state and local aids and subsidies. However, courts have found certain state assistance to violate the Commerce Clause of the U.S. Constitution.[2] The Supreme Court has held that there is a "dormant" or "negative" aspect of the Commerce Clause that implicitly limits the states' right to tax or otherwise regulate interstate commerce:

> *It has been long accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. … This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition.… Thus, State statutes that clearly discriminate against interstate commerce are routinely struck down, […] unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.…*[3]

3. Thus, measures that either discriminate against interstate commerce, because they favour in-state interests, or measures that burden interstate commerce, because (even if they are non-discriminatory) they

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1 This paper does not cover government measures that may indirectly benefit firms, such as those involving infrastructure, research and development, public services, and taxation.

2 United States Constitution, Art. I, sec. 8, cl. 3. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981). In *Maryland v. Louisiana*, the Supreme Court held that a Louisiana statute imposing a first-use tax on natural gas extracted from the continental shelf in an amount equivalent to the severance tax imposed on natural gas extracted in Louisiana unquestionably discriminated against interstate commerce in favour of a local interest and violated the Commerce Clause. *See also*, *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994), *Cuno*, 386 F.3rd 738, 743 (6th Cir. 2004), *rev'd in part on other grounds sub nom. DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), and *Granholm v. Heald*, 125 S. Ct. 1885, 1892 (2005), as discussed below.

3 *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988).

make it cumbersome for a company to do business in the state, are equally offensive under the dormant Commerce Clause.[4]

4. States and local authorities regularly provide tax breaks and other incentives to attract new investors.[5] Generally speaking, a challenged credit or exemption will not survive Commerce Clause scrutiny if it discriminates on its face or if, on the basis of a "sensitive, case-by-case analysis of purposes and effects," the provision "will in its practical operation work discrimination against interstate commerce,"[6] by "providing a direct commercial advantage to local business."[7] Discrimination means different treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter.[8] A state tax that discriminates against interstate commerce is invalid unless "it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives."[9]

5. In *Cuno v. DaimlerChrysler, Inc.*,[10] the U.S. Court of Appeals for the Sixth Circuit struck down Ohio's income tax credit for new in-state investment on the grounds that it violated the Commerce Clause, stating that the income tax credit discriminated against interstate economic activity "by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state."[11]

6. In *Granholm v. Heald*,[12] the U.S. Supreme Court invalidated laws in Michigan and New York that prevented or deterred out-of-state wineries from selling directly to in-state consumers yet allowed in-state wineries to do so. In finding that the regulations discriminated against interstate commerce in

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4 *See* Diane P. Wood, "Cuno v. Daimler Chrysler, Inc.: State 'Aids' from an American Perspective," European State Aid Law, 1/2007, at 7.

5 *E.g.*, in 1994, Indiana passed a law ("Economic Development for a Growing Economy" or "EDGE") to provide income tax credits for companies that make major job-producing investments in the state. *See* Economic Development for a Growing Economy Tax Credit, Indiana Code 6-3.1-13, *available at* http://www.ai.org/legislative/ic/code/title6/ar3.1/ch13.html. South Carolina offered Haier, a Chinese appliance manufacturer, tax credits and other incentives for the construction of a new factory in the state. *See* "Against the Grain: A Chinese appliance maker has placed its bet on a counterintuitive strategy: It's bringing jobs to the US," *The Wall Street Journal*, Sept. 27, 2004, at R6. Georgia state and local authorities provided Kia, the South Korean automobile manufacturer, $410 million in state and local tax credits and other assistance to build a plant employing 2,500 workers in Georgia. *See* "Kia joins Toyota in opening U.S. plants," *The New York Times*, March 14, 2006, *available at* http://www.nytimes.com/2006/03/14/business/worldbusiness/14iht-cars.html. In January 2010, the Michigan Economic Development Corporation approved a $22 million state tax credit to Tata Consultancy Services to establish a centre in Michigan that will involve an investment of $125 million and create up to 750 jobs. *See* "Gov. Granholm Announces Over 5,200 New, Retained Jobs for Michigan," U.S. FED. NEWS (Jan. 20, 2010).

6 *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). In this case, a Massachusetts law imposed a tax on milk dealers for all in-state sales of milk, whether or not the milk had been produced in Massachusetts. The state then distributed the money from the tax only to operators of in-state daily farms. The Court found that it effectively gave Massachusetts producers a tax rebate that was indistinguishable from a discriminatory tax exemption.

7 *Bacchus Imports, LTD. v. Dias*, 460 U.S. 263, 272 (1984).

8 *Oregon Waste Sys., Inc. v. Dep't of Envt'l. Quality*, 511 U.S. 93, 99 (1994).

9 *Id.*, at 101.

10 *Cuno*, 386 F.3rd 738, 743 (6th Cir. 2004), *rev'd in part on other grounds sub nom. DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006) (plaintiffs lacked standing to sue in federal court).

11 *Id.*

12 *Granholm v. Heald*, 125 S. Ct. 1885, 1892 (2005).

violation of the Commerce Clause, the Court heavily relied on the FTC's 2003 Wine Report.[13] Citing the FTC report, the Court concluded that the regulations were not the least restrictive alternative for regulating interstate wine sales to minors and facilitating tax collection. The Court said the regulations were "the product of an ongoing, low-level trade war"[14] among the states, and added that it was "evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders."[15]

3. Federal Government Assistance to Ailing Companies and Industries

3.1 History

7. The U.S. government's first extensive aid programmes occurred in the 1970s. Penn Central Railroad, on the verge of bankruptcy in 1970, appealed to the Federal Reserve for aid on the grounds that it provided critical infrastructure and transportation services that would otherwise be lost. In 1971, Congress provided Penn Central with $673 million in loan guarantees. In 1974, Congress approved a package of loans, loan guarantees, and grants for Penn Central and five other railroad companies that were facing bankruptcy. In 1976, Congress established Conrail, a publicly created quasi-private company, to consolidate the freight rail system. The government spent approximately $7 billion to keep Conrail operating. Conrail started to earn a profit in 1981[16] and the federal government sold its ownership interest in 1987.[17]

8. Lockheed Aircraft Corporation received government aid in the early 1970s. In 1971, Lockheed experienced severe financial troubles. As a result of an appeal by the company's management to the federal authorities, Congress passed the Emergency Loan Guarantee Act in 1971, granting up to $250 million in loan guarantees.[18] The aid was motivated by the approximately 60,000 jobs at risk between Lockheed and its suppliers, the potential significant loss in GDP,[19] and the implications for national defence given that Lockheed was a major defence contractor. The Treasury's aid enabled Lockheed to gradually recover from its financial crisis and win back its creditors' trust. Lockheed eventually paid off its loans and gave up the government's guarantee in 1977.

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13 Staff of the U.S. Federal Trade Commission, "Possible Anticompetitive Barriers to E-Commerce: Wine" (July 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf. The Report explores the ways in which various state governments restrict competition in U.S. wine markets by making it difficult or impossible for out-of-state wine producers to sell wine directly to consumers in other states. After analysing these laws and the justifications given for them, comparing conditions among states with different laws, and conducting an empirical study, the FTC Staff concluded that state bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine and recommended that states allow direct shipping from out-of-state wineries and retailers, as well as from in-state suppliers. *Id.*, at 3 and 40.

14 *Supra* note 11, at 1896.

15 *Id.*, at 1892.

16 An important step towards Conrail's financial turnaround was the passage in 1980 of the Staggers Act, which allowed railroads to set their own rates according to market conditions.

17 "85% U.S. Stake in Conrail Sold for 1.6 Billion," *The New York Times*, March 27, 1987, *available at* http://www.nytimes.com/1987/03/27/business/85-us-stake-in-conrail-sold-for-1.6-billion.html?pagewanted=1.

18 "The Lockheed Bailout Battle," *Time Magazine* (Aug. 9, 1971).

19 The potential loss in GNP from a Lockheed bankruptcy was estimated between $120 and $475 million.

9. The U.S. government's assistance to Chrysler Corporation in 1980 was probably the best-known example of government aid to a troubled company in U.S. economic history. Under the 1980 Chrysler Loan Guarantee Act, Chrysler, which was on the brink of bankruptcy, received $1.2 billion in federal loan guarantees. Treasury Secretary G. William Miller stated, "There is a public interest in sustaining [its] jobs and maintaining a strong and competitive national automotive industry."[20] Chrysler paid back the loan in 1983.

10. The last federal assistance programme prior to the recent rescue measures in response to the 2008 financial crisis took place in the airline industry in 2001. Following the September 11, 2001, attacks, the grounding of airplanes hit an already financially troubled industry very hard. To assure the functioning of airlines and air transportation facilities during the crisis, Congress enacted a $15 billion financial aid package.[21]

3.2 Rescue Measures for Banks and Car Makers in the Recent Financial Crisis

11. As a result of the international financial crisis that erupted in late 2008, the U.S. Government established the "Troubled Assets Relief Programme" ("TARP") pursuant to the Emergency Economic Stabilisation Act ("EESA"). TARP's goal is to maintain the functioning and integrity of the banking and financial markets and thereby, the broader economy.

12. EESA authorised $700 billion of Treasury investments under TARP. Pursuant to TARP's Capital Purchase Programme, the U.S. Treasury Department and the Federal Reserve Board have invested in 707 U.S. banks.[22] TARP's Targeted Investment Programme invested $20 billion each in Citigroup Inc. and Bank of America Corp.[23] As of January 2010, approximately $545 billion has been programmed, although not necessarily disbursed, under various TARP initiatives. The U.S. Government is unlikely to utilise the full $700 billion in budgetary authority allowed for TARP pursuant to the EESA. TARP has helped U.S. banks to stabilise and several banks that received TARP assistance have started to pay back these loans. As of January 2010, total TARP repayments were over $165 billion, or two-thirds of total TARP investments in U.S. banks.[24]

13. The federal government also provided TARP aid for the automobile industry to "facilitate the restructuring of our domestic auto industry, prevent disorderly bankruptcies during a time of economic

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20 "Chrysler's Crisis Bailout," *Time Magazine* (Aug. 20, 1979).

21 Air Transportation Safety and System Stabilisation Act of 2001, 49 USC 4010 note.

22 TARP's Capital Purchase Programme invested $205 billion in U.S. banks. *See* Report of the Special Inspector General for TARP, *available at* http://www.sigtarp.gov/reports/congress/2009/July2009_Quarterly_Report_to_Congress.pdf, and Office of Financial Stability, Dep't of Treasury, Troubled Asset Relief Programme Transactions Report (January 13, 2010). *See* also figure 4 in dep't of treasury, troubled asset relief programme monthly 105(a) report – December 2009 6 (January 11, 2010) and Office of Financial Stability, Dep't of Treasury, warrant disposition report 1 (2010).

23 Office of Financial Stability, Dep't of Treasury, Troubled Asset Relief Programme Transactions Report 17 (January 13, 2010).

24 *Id. See* also Figure 4 in Dep't of Treasury, Troubled Asset Relief Programme Monthly 105(a) Report – December 2009 6 (January 11, 2010). This consists mainly of over $122 billion repaid under the Capital Purchase Programme and $40 billion repaid under the Targeted Investment Programme. *See* Office of Financial Stability, Dep't of Treasury, Warrant Disposition Report 1 (2010) and Dep't of Treasury "Treasury Receives $45 Billion in Repayments from Wells Fargo and Citigroup – TARP Repayments Now Total $164 Billion," Press Release (December 22, 2009), *available at* http://www.financialstability.gov/latest/pr_12232009b.html.

difficulty, and protect the taxpayer by ensuring that only financially viable firms receive assistance."[25] The companies were required to make fundamental changes in their management and products as conditions for assistance.

14. In December 2008, Congress enacted the Automotive Industry Financing and Restructuring Act, which provided $14 billion in short-term bridge loans to GM and Chrysler.[26] Because the recipients did not present viable restructuring measures, the government announced new initiatives to provide assistance to the industry in the framework of the Auto Industry Financing Programme (2009). The initiatives included programmes that ensured payments to the car makers' largest suppliers, established a warranty commitment programme to cover the possible deterrent effect of bankruptcy, and initiated programmes to respond to job losses and community effects to ease a possible transition process for workers in areas dependent on the automobile industry. The cost of government assistance, including loans, assistance to finance companies, the supplier support programme, and the warranty commitment initiative, totalled $36.4 billion.

15. The government's intervention in Chrysler resulted in another auto company's taking substantial ownership of Chrysler and managing its remaining assets. Fiat obtained a 35 percent stake in the new Chrysler, while the U.S. government retained 8 percent following the company's reorganisation. The government pursued a different strategy regarding GM. GM was required to cut about one-third of its work-force, sell half of its brands, make substantial wage concessions, revise health and insurance benefits, and replace its senior management and board of directors. The plan transformed GM into a majority publicly-owned company, with the U.S. government owning 60 percent of the company.

16. To limit potentially negative ramifications of these rescue measures, the U.S. government has taken steps to ensure that the assistance is transitory and limited to taking ownership stakes that do not compromise the independent direction and management of the company. President Obama recently described this policy in the context of General Motors, but the principles are applicable to other situations as well: "[W]e are acting as reluctant shareholders . . . The federal government will refrain from exercising its rights as a shareholder in all but the most fundamental corporate decisions. . . . In short, our goal is to get GM back on its feet, take a hands-off approach, and get out quickly."[27]

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25 The White House, "Fact Sheet: Financing Assistance to Facilitate the Restructuring of Auto Manufacturers to Attain Financial Viability," Dec. 19, 2008, *available at* http://www.whitehouse.gov/news/releases/2008/12/20081219-6.html.

26 As Ford made a series of significant financial targets in 2006, it allowed the company to cover its own losses and remain independent.

27 Remarks by President Obama on General Motors Restructuring (June 1, 2009), *available at* http://www.whitehouse.gov/the_press_office_Remarks-by-the-President-on-General-Motors-Restructuring/. The policy of limited assertion of ownership has been similar in the banking industry. *See* Remarks of President Obama on the Economy (Georgetown University, Apr. 14, 2009) ("we believe that pre-emptive government takeovers are likely to end up costing taxpayers even more in the end, and because it's more likely to undermine than create confidence"), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-Economy/.

CONTRIBUTION FROM BIAC

COMPETITION, STATE AIDS AND SUBSIDIES

-- BIAC --

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition on "Competition, State Aids and Subsidies."

I. Overview

2. State aids and subsidies have played a significant role in the economy over the past 18 months. From bailouts in the banking and insurance sector to investments in the automotive sector to the funding of major infrastructure projects and technology , these aids and subsidies have significantly helped to mitigate the worst adverse effects of the world financial and economic crisis. The problems of the financial sector undoubtedly necessitated some of these measures, without which major global businesses faced potential disaster and economies may have suffered in ways that would have taken many years to cure. It would be easy, therefore, to suggest that subsidies and state aids should be viewed solely in a positive light if only as a "necessary evil". But the remedial benefits of state aids can also present a significant risk to competition that must not be overlooked. Subsidisation, in whatever form, can tilt the competitive playing field, squelch potential innovation and deter investments by rival firms in ways that can impede the competitive process and lead to both short and long-term harm to consumers. These competing concerns must be reconciled through effective governmental oversight, with the unifying theme being the protection and promotion of consumer welfare.

3. Idealistically, subsidies and state aids would not feature prominently as a tool of industrial policy as these mechanisms can have the capacity to create distortions in the competitive landscape. Given the economic realities of the times that have lead to significant market failures, and the promotion of overriding governmental policy objectives to cure these failures, some level of subsidies and State aids can be seen as necessary to ensure that short term distortions in corporate financial stability do not result in long term elimination of efficient firms that happen to be caught up in turmoil created by constriction in the financial markets. For example, in mid-2008 firms typically could gain access to a long-term financing facility (debt or equity) at reasonable rates and thereby secure the capital required to allow the business to grow and invest for a period of 3-5 years. Six months later, by the beginning of 2009, it was extremely difficult for firms to access capital at any rate and doing so often meant sacrificing or putting at risk substantial assets of the firm even to gain short-term operating capital. The ***timing*** of a firms' need for re-negotiating long-term capital had nothing whatever to do with the firms' competitiveness, efficiency, innovation or any other competitive metric; it was purely a question of chance. To punish such firms and allow them to go bankrupt in such blameless circumstances could have resulted in perverse competitive results. At such moments, it is appropriate for governments to make public policy decisions that will help firms get past the period of market illiquidity and regain equal footing with the firms that were more fortunate in securing financing prior to the economic crisis. Thus, in BIAC's view, there is an important role for subsidies and State aids that is consistent with the promotion of competition, efficiency, innovation and net consumer welfare that does not require the sacrifice of sound competition principles.

4. Improperly designed and implemented, however, subsidies and state aids may threaten free competition and consumer welfare. Companies that receive State aids can enjoy some competitive advantage over their rivals that can thwart the competitive process and result in harm to consumers. The McKinsey Global Institute's twelve-year study to determine why some nations remain wealthy and others remain poor despite years of international aid found that "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."[1] To avoid such a result, clear and non-discriminatory rules, and their effective implementation, are necessary to ensure a level-playing field for companies and to limit the potentially harmful effects of subsidies.

5. There are three main parties in the subsidies constellation: the State, the beneficiary and its competitors. All three players have their own motivations and goals. The goals of the state may reflect social policy objectives, for example to attract foreign direct investment, maintain employment, increase tax revenues or stimulate growth in a particular economic sector. At the same time, the objectives of the state decision makers may reflect political objectives that are not as focused on long-term consumer benefits. Indeed, for example, it is a well-known international phenomenon that subsidies increase in election years. Thus, not all State aids should be viewed through the same lens of positive social policy and, accordingly, the impact of State aids on competition should be scrutinised as to each individual case.

6. A beneficiary of the state aid rarely is concerned about the potential harmful effects on the competitive process. For a recipient company at risk, it can be argued that State aids maintain a competitor that otherwise would not exist and, therefore, competition is enhanced. But in the face of decreasing relative demand (i.e., static demand coupled with increased capacity or declining demand coupled with static capacity), the elimination of one or more competitors from the marketplace may be inevitable. In this case, consumers are best served by witnessing the demise of the least efficient competitor rather than the competitor with the lowest degree of state subsidisation.

7. In general, companies tend to see the short-term advantages of receiving State subsidies: subsidies reduce companies´ costs; they allow investments that would otherwise not have been possible; they can avoid painful restructuring and unrest of their labour force; and they may receive a competitive advantage over their competitors that can be used to achieve a better market position. At the same time, companies often tend to ignore the risks of State subsidies for their future, such as a delay in necessary cost cuts, improvements in efficiency and a focus on innovation.

8. Such a focus can lead to perverse results, with even competitively efficient competitor companies becoming incentivised to employ, invest and spend in ways that are less efficient. To this end, one may question the substantial subsidies doled out nearly all global automotive companies at the height of the economic crisis.

9. In sum subsidies have the ability to distort competition and negatively impact consumer welfare because they can lead to inefficient allocations of taxpayers´ money and company resources and because they reduce incentives to reduce costs and create efficiencies On the other hand, in some cases, subsidies may improve overall welfare, in particular if they correct for market failures unrelated to intrinsic elements of corporate competitiveness or facilitate necessary additional investment in research and development. Given the potential benefits and harms of State aids and subsidies, the consideration and control of such

[1] Deborah Platt Majoras, Chairman, U.S. Federal Trade Comm'n, "National Champions: I Don't Even Think it Sounds Good," Remarks before the International Competition Conference/EU Competition Day, Mar. 26, 2007, available at http://www.ftc.gov/speeches/majoras/070326munich.pdf (citing William Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability (2004), at 103).

measures can be viewed as a crucial part of an integrated governmental competition policy. We agree with the EC's fundamental policy that "State aid control is an essential component of competition policy and a necessary safeguard to preserve effective competition and free trade in the single market."[2]

II. Objectives of Subsidy and State Aid Control

10. State aid and subsidies rules should have two main goals. First, they should be implemented in a way that facilitates a level playing field for competition, both on the national and on the international level. Second, they should create a balance between the need to limit the distortion of competition created by subsidies while at the same time preserving legitimate social policy goals of State aids that can help to cure market failures and benefit consumers. We believe that such rules must be based on an economic assessment of the net effect of subsidies.

11. Such rules could have a national, supranational or international basis. In fact, many rules in different countries, in particular budgetary rules, limit the use of subsidies, even though they are not designed to protect competition or markets. These rules often are intended to prevent domestic abuses in doling out subsidies based on sub-optimal government investments. Purely national regimes, however, are not likely to preserve competition particularly when the scope of effective competition transcends national borders, as is the case in an ever-expanding number of relevant product markets. National governments tend to disregard negative spill-over effects on other countries and prioritise national economic interests over international ones.[3]

12. A supranational or international regime is the most effective way to attempt to eliminate the potentially distortive effects of subsidies. Such a supranational State aid regime exists in the European Union. This system relies on an independent regulator and a set of rules that prohibit subsidies that fall outside specified parameters and have not been approved by the regulator. It can be enforced by national and European courts. State aid law has existed in the European Union since the early 1950s. In the last 50 years, the European Commission and the European courts have developed an extensive practice and decision precedent base respect to various questions of State aid law. The Member States of the European Union also developed considerable expertise dealing with these rules and have adapted their behaviour to these rules. The European Commission also has advanced beyond other systems in integrating subsidy and state aid considerations into their competition regime. Yet the impact of the EC system of State aids is limited to the boundaries of the European Union.

13. The international system of the WTO is rather different from the European system. It does not directly regulate or prohibit subsidies and has no regulator that has to approve subsidies. Rather, the system relies on the ability of States to petition for counter measures to neutralise subsidies granted by other States and to restore a level playing field. These counter-measures, however, are often applied as to products or economic sectors other than the one in which the subsidies were granted, so while the net benefits may theoretically be eliminated, the potential distortive effect is not avoided (and arguably is multiplied). Still, the system imposes a beneficial chilling effect on the granting of subsidies.

III. Forms of Subsidies and State Aids

14. The most obvious form of subsidisation is direct government grants. Other less obvious forms of subsidies, however, warrant similar treatment when they have a similar impact to direct grants. Under European law, the concept of "State aids" thus covers all economic advantages granted by the State

2 Common Principles for an Economic Assessment of the Compatibility of State Aid Under Article 87.3 at 1, available at http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf.

3 *Id.*

through State resources that grant a specific economic advantage on one or more undertakings or specific industry sectors. Because cash is a fungible good (indeed, that is its sole purpose), subsidies have a direct impact on operational aspects of a firm, regardless of whether those funds are "earmarked" in a particular manner. Subsidy funds can improve a firm's cash flow, enhance the balance sheet, and build assets that allow a firm to raise additional debt financing or equity capital.

15. In those cases where all companies receive the same economic advantage from a State, such as uniform tax treatment, action typically is not warranted. These measures do not threaten the equality between companies within the State and do not confer any competitive advantage on one or more of the undertakings compared to their competitors. While such measures may only benefit those firms operating within the state, the state is presumably pursuing legitimate social policy objectives by imposing taxes uniformly on all businesses within the state and is not attempting to tilt the competitive playing field. Moreover, firms should not be penalised merely for operating within a state that has preferential tax regulations as compared to other states as this is a component of long term cost and therefore impacts efficiency, albeit not in an operational sense.

16. Besides direct grants, governments sometimes rely on industry- or firm-specific tax measures such as tax deferrals, lower tax rates or the decision not to collect taxes from a company, guarantees and loans. Governments often prefer tax measures because they allow them to give companies additional economic benefits without having to finance them out of the State budget. The government may also hand out loans to companies at interest rates or against collaterals or securitisation that would not be acceptable to a normal bank; or it may provide guarantees for a company so that it can receive a bank loan that it would normally not have received. The State can also actively get involved in the economy by investing equity into companies. All of these measures should be considered on a par with direct grants and their impact should be evaluated.

17. At times, this behaviour can resemble or substitute for the actions of a private market participant. For example, the State can grant a loan at market rates against collaterals that are in line with market requirements. Or a State can invest equity in a public undertaking, in particular if the State is already engaged in this undertaking. The State can grant guarantees, for public or private undertakings, if the guarantee would also have been granted on the same conditions, by a private investor. In European Law, the different forms of this behaviour are assessed under a number of closely related tests, the "private investor test", the "private creditor test", and the "private vendor test", each referring to the particular situation in which the State acts like a market participant under unusual conditions.

18. The private investor test raises the question why the State intervenes in the economy if – by definition – a private investor could have done the same. While these actions can be viewed with some scepticism, they do not always imply subsidisation for two reasons. First, the state may be attempting to remedy a market failure that has prevented a private actor from taking the action. Second, the fact that the state, rather than a private party, has taken such action does not imply harmful effects on competition or consumer welfare.

IV. Distortion of Competition

19. Subsidies can result in three types of competitive distortions as outlined by the European Commission in its framework for assessing economic effects of State aids: "First, State aid, by interfering with the allocation of rents through markets, may have long-term dynamic effects on the incentive to invest and compete. Second, at a more specific level, State aids may affect competition in the product market and

trigger different responses by competitors depending on the circumstances. Third, State aid may affect competition in the input markets and in particular the location of investment."[4]

20. Long term incentives can be adversely impacted because firms may conclude that the availability of State aids can supplant the need for their own investments while still ensuring an adequate rate of return. This can reduce innovation and lead to stagnation. Competitive responses might also be muted as rivals conclude that their investments are not likely to result in a competitive advantage. Input markets can also be impacted as the subsidy may favour one form of input (often labour) over others (such as mechanisation).

21. The Commission states that in evaluating the distortive effects of State aids, it will principally consider the effect that the recipient's change of behaviour will have on competitors and input suppliers. It notes that it will also consider the impact on consumers. In our view, that prioritisation is skewed: the impact on consumers should be the principal concern of the Commission in implementing its State aid policies, with impacts on competitors and input suppliers a secondary component of that consideration.

22. The most obvious case of distorted competition concerns the rescue of an inefficient firm in financial difficulties. Keeping such a firm afloat promotes inefficiencies and might harm more efficient competitors, particularly when not linked to a thorough restructuring of the firm. State subsidies can have the effect of reinforcing the very behaviour that the competitive process is designed to discourage. State subsidies risk decreasing pressure on companies to reduce costs, to invest in research, development and innovation and to simply become more efficient. Firms that feel protected may not make the necessary effort to remain competitive without State subsidies. Viable business may become threatened because subsidised and inefficient competitors are able to undercut their prices. Efficient companies may be forced to leave the market or may require State aid themselves to stay in business.

23. At the same moment, one of the least distortive uses of subsidies is to remedy a failure in the financial markets that artificially restricts the availability of investment or operational capital for firms that are efficient and have the potential to enhance consumer welfare. Distinguishing between market failures and favouritism is a challenging task, but a necessary one if consumer welfare is to be maximised.

V. Designing State Aid rules

24. Clear rules and a uniform and non-discriminatory application of these rules are important to maintain or restore a level playing field for businesses around the world. States should not be allowed to provide competitive advantages to companies without clear justification and transparency.

25. Standalone national rules cannot be considered a viable enforcement mechanism to limit subsidies and to ensure that subsidies rules are applied in a non-discriminatory way. Moreover, a national agency cannot be expected to effectively police the actions of the government from which it derives its own authority. Particularly in times of economic crisis when decisions on State aids are being made at the executive level, governmental agencies tasked with monitoring subsidies and competition enforcement have had only a minimal role to play and, at times, have been completely disregarded. Therefore, a supranational authority such as the European Commission or an international organisation such as the WTO is necessary to discipline the incentive to grant subsidies to their own undertakings absent compelling social policy objectives.

26. Rules governing State aids and subsidies should identify legitimate objectives of subsidies including both efficiency, technology and equity objectives, outline the competitive distortions that can

4 *Id*. at 5.

result from subsidies, and seek to clearly indicate the way in which the positive and negative effects of subsidies will be considered. The rules should provide for transparency and disclosure of State aids and a means for challenging the grant of any economic benefit conferred upon a firm. Adequate investigative and remedial powers should be granted to the responsible authority to ensure that individual abuses can be remedied and to deter abuses from occurring.

VI. Financial and economic crisis

27. During the recent financial and economic crisis many banks and companies could only survive with the help of massive State subsidies in different forms. This was an extraordinary situation: in a normal economy, firms in difficulties should not or only in limited circumstances be rescued through State subsidies. The reasoning behind this is that such firms are usually in difficulties because they are inefficient and it would be beneficial for competition and welfare if inefficient firms that are unable to increase their efficiency have to leave the market. However, this reasoning did not apply in the crisis: banks and companies were in difficulties because of the crisis, not necessarily because of their being inefficient.

28. Refraining from help in this situation would have had serious and unwanted consequences. There was the real danger that the whole financial system would break down, with unknown but certainly disastrous consequences. Furthermore, excluding State subsidies in the crisis would force efficient and inefficient companies alike to exit the market. It would lead to a strong post-crisis concentration in several if not all sectors of the economy, creating oligopolies or monopolies and increasing the likelihood of collusion and cartels. All these consequences would in the medium- and long-run lead to a loss of consumer welfare and a decrease of competition. An aggressive enforcement of subsidies bans would also have put into danger the very existence of State aid rules, given the strong political and economic reasons for granting aid.

29. We therefore welcome the fact that the European Union, have decided to apply the State aid rules in a way that has helped to overcome the banking crisis while maintaining the principles of the law, in particular insofar as the grants have been accompanied by measures designed to limit market distortions.

30. Post-crisis rules should reflect the return to a limitation of State aid and should take into account that the potential distortions of competition entailed by the crisis aid need to be cleaned up post-crisis. In fact, the European Commission is currently closely monitoring the restructuring plans of a number of banks that have received subsidies during the crisis.

VII. Conclusion

31. Subsidies and State aids present a challenge for governments seeking to promote optimal competitive outcomes. Properly utilised, subsidies can preserve and enhance a competitive marketplace by correcting critical market failures and help efficient firms to survive and thrive. Improperly used, they can tip the balance of competition toward inefficient firms in order to promote nationalistic and political objectives at the expense of efficiency and innovation. Maximising consumer welfare demands that these competing objectives be closely scrutinised and that distortive practices be remedied.

CONTRIBUTION FROM ASEAN

REGIONAL CO-OPERATION IN COMPETITION POLICY IN ASEAN[1]

-- Ms. Thitapha Wattanapruttipaisan (ASEAN) --

1. Imperatives and Impulses in Co-operation

1. A historic milestone in regional integration within the ten-member Association of South East Asian Nations (ASEAN) is the "ASEAN Vision 2020" adopted at the ASEAN Summit in Kuala Lumpur, Malaysia, in December 1997. The vision foreshadowed the formation of "a stable, prosperous and highly competitive ASEAN economic region".

2. This region was subsequently defined as the ASEAN Economic Community (AEC) at the ASEAN Summit in Bali, Indonesia, in October 2003. The AEC, together with the ASEAN Political-Security Community and the ASEAN Socio-Cultural Community, constitutes the three-pillar ASEAN Community which is to be established in 2020.

3. The target year for ASEAN Community formation, however, was sped up to 2015 at the ASEAN Summit in Cebu, Philippines, in January 2007, and subsequently a Blueprint for AEC formation was adopted at the ASEAN Summit in Singapore in November 2007. When established, the AEC will transform ten separate economies into a single market and seamless production base, thus enhancing further ASEAN's role as an efficient and dependable player in the regional and global supply chains. As such, competition policy plays a critical role in the realisation of one key aspect of the AEC, namely a highly competitive economic region.

4. Meanwhile, globalisation has also opened up new ways and means for ASEAN to engage in intra- as well as extra-regional co-operation in competition policy. There is currently no multilateral treaty on competition although this was one of the four "Singapore issues" raised at the first Ministerial Conference of the World Trade Organisation (WTO) in December 1996.[2]

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1 This short paper was prepared by (Ms) Thitapha Wattanapruttipaisan, Head of the Division on Competition, Consumer Protection and Intellectual Property Rights, Market Integration Directorate, ASEAN Economic Community Department, ASEAN Secretariat, Jakarta, Indonesia. The views expressed in this paper do not necessarily represent those of the ASEAN Secretariat or ASEAN Member States. The author can be contacted at <thitapha@asean.org>.

2 The fourth WTO Ministerial Conference launched multilateral trade negotiation on the Doha Development Agenda (DDA) in November 2001. This agenda includes negotiations on the core principles for a multilateral framework on competition policy, the modalities for voluntary co-operation, and support for the development of competition policy in developing countries. However, the Doha Conference decided that a decision on how to proceed with the four "Singapore issues" (namely investment, competition policy, government procurement, and trade facilitation) would be made at the fifth WTO Ministerial Conference in Cancun, Mexico, in September 2003. The Cancun trade talks broke down, mainly over the resistance by many developing countries to engaging in negotiation on the four Singapore issues. Subsequently, the WTO General Council Meeting agreed in July 2004 that trade facilitation would be on the agenda for DDA negotiation. But the remaining three issues would be referred to various WTO Working Groups and would remain outside the DDA negotiation mandate. A WTO Working Group focusing on the interaction between trade and competition has since been set up at the WTO.

5. However, competition obligations are variously specified within the WTO framework of agreements.[3] Nine ASEAN Member States (AMSs) are WTO members (except the Lao People's Democratic Republic). In addition, ASEAN has entered into free trade agreements (FTAs) with six dialogue partners and one of these FTAs have provisions on competition policy.

2. ASEAN Approach and Focus in Intra-regional Co-operation

6. The nature and patterns of ASEAN co-operation at the intra- and extra-regional levels are generally conditioned by the diverse stages of development within ASEAN,[4] and by the varying amounts of expertise and other resources available for policy design and implementation among AMSs. In particular, only Indonesia, Singapore, Thailand and Viet Nam have at present economy-wide competition policy and competition regulatory bodies (CRBs).

7. Cambodia, the Lao PDR and Malaysia intend to introduce nation-wide competition policy and CRBs soon. In the mean time, these three AMSs and the other AMSs (namely Brunei Darussalam, Myanmar and the Philippines) will rely or continue to rely on sector-level policies, regulations and administrative procedures to achieve competition policy objectives in various domestic factor and product markets.

8. Several AMSs have received considerable technical assistance relating to competition policy from the United States and the European Union Member States, among other sources. Such collaborative assistance provided an impetus for the formation in 2004 of the non-official ASEAN Consultative Forum for Competition. This Forum served as a co-operative network for the exchange of policy experiences, best practices and institutional norms relating to competition policy and CRBs among and between competition-related agencies within and outside ASEAN.

9. ASEAN co-operation then evolved in August 2007 into the official establishment of the ASEAN Experts Group on Competition (AEGC), which first met in March 2008. This intergovernmental body facilitates the development of competition policy that would meet the needs of AMSs at different stages of economic and institutional development. The AEGC also fosters collaboration and networking among and between agencies concerned with competition both inside and outside ASEAN. AEGC work programmes will evolve in parallel with the wider and deeper development and socialisation of competition policy and CRBs in ASEAN.

10. The AEGC has agreed to focus, for the next three to five years, on building up competition-related policy and institutional capabilities, and best practices in AMSs. In addition, the AEGC has been developing the "ASEAN Regional Guidelines on Competition Policy" and the "Handbook on Competition Policies and Laws in ASEAN for Businesses". Both the Guidelines and the Handbook are pioneering activities in this part of the world, and are scheduled for adoption and launching by AMSs in 2010.

11. Specifically, a series of competition-related capacity building and policy dialogue programmes, with the participation of eminent regional and international professionals and practitioners, have been carried out by the AEGC in close co-operation with ASEAN's dialogue partners and donors. These

[3] Such obligations are contained, for example, in Articles VIII and IX of General Agreement on Trade in Services; Articles 8 and 40 of the Agreement on Trade-Related Aspects of Intellectual property Rights; Article 11.1 and 11.3 of the Agreement on Safeguards; Article VI of the Agreement on Anti-dumping, and Article XVII (on state trading enterprises) of the General Agreement on Tariffs and Trade, all dated April 2004.

[4] In 2008, for example, gross domestic product per head of population was in the range of US$ 35,000-38,000 in Brunei Darussalam and Singapore, US$8,000-4,000 in Malaysia and Thailand, US$ 2,000 in Indonesia and the Philippines, and US$ 500-1,000 in Cambodia, Lao PDR, Myanmar and Viet Nam.

programmes focus on investigative, enforcement, outreach and advocacy aspects (including anti-competitive horizontal agreements such as price fixing, bid rigging, market division or customer allocation, etc.); on the priorities, organisation and management of newly established CRBs; and on the design and introduction of, and socialisation to mobilise stakeholders' support for, competition policy and CRBs.

12. The Guidelines are a targeted delivery under the AEC Blueprint. It is to serve as a common (but non-binding) reference guide for AMSs as they endeavour to introduce, develop and implement competition policy and law which are customised to the specific legal and economic context of each country. The Guidelines also help to chart the paths for future co-operation to enhance the competitive process in the AMSs.

13. The Handbook, also a targeted AEC Blueprint delivery, aims to inform and raise awareness of the business community and domestic and external investors on competition-related approaches, practices and procedures in AMSs. As such, it would facilitate the development of a competition culture in the business community as well as create a favourable environment for the introduction and enforcement of competition policy in individual AMSs and regionally.

14. ASEAN and the AEGC have received significant donors' collaboration and support, both technical and financial, in all those efforts at capacity building, information dissemination and socialisation, and formation of intra- and extra regional linkages. A multi-year regional programme, for instance, has been developed and implemented with support from Germany through InWEnt (Capacity Building International), and another multi-year programme is currently under design for implementation with support from Germany through German Technical Co-operation (GTZ).

15. Other sources of technical assistance on a regional basis include the Asian Development Bank Institute, ASEAN-Australia Development Co-operation Programme, the European Commission, Japan (Fair Trade Commission), OECD, and the United States (Department of Justice and the Federal Trade Commission).

3. ASEAN Approach and Focus in Extra-regional Co-operation

16. Compared to other regional economic groupings, ASEAN is a late comer to FTAs. Thus far, ASEAN has signed FTAs with Australia and New Zealand, China, India, Japan and Republic of Korea. ASEAN and the European Union have been negotiating an FTA since May 2007 although progress to date has been much slower than expected.

17. The approach and architecture of ASEAN FTAs have some innovative features. Firstly, ASEAN FTAs with East and South Asian dialogue partners are governed by the respective bilateral Framework Agreements signed with China in November 2002, India in October 2003, Japan in October 2003, and Republic of Korea in December 2005. There are no provisions in these Framework Agreements for FTAs in competition policy or government procurement. Instead, competition policy is one of the areas reserved for mutual co-operation and facilitation between ASEAN and India and Japan.

18. Two, the Framework Agreements with East Asian countries have been completed sequentially FTA by FTA. ASEAN and China signed an FTA on goods in November 2004, services in January 2007 and investment in August 2009. Likewise, FTAs in goods (December 2005), services (November 2007), and investment (June 2009) were signed by ASEAN and Republic of Korea. The ASEAN-Japan FTA (signed in April 2008) is comprehensive in scope but the large bulk of this agreement concerns trade in goods. To date, however, ASEAN and India has signed only an FTA on goods (August 2009).

19. Three, the FTA between ASEAN and Australia plus New Zealand (ANZ), signed in February 2009, follows a different approach. It is comprehensive in scope and was concluded as a "single undertaking" (and not sequentially building brick by building brick). In addition, there is chapter 14 on

"Competition", with four provisions, although government procurement is not within the scope of the ASEAN-ANZ FTA. This chapter, however, does not contain any substantive provisions on competition policy.

20. Specifically, Article 1.1 reaffirms the promotion of competition, economic efficiency and consumer welfare, and the curtailment of anti-competitive practices, as one of the basic principles of competition policy. However, it is also recognised that partner countries have different capacities in competition policy (Article 1.2), and they are free to develop, set, administer and enforce their own competition laws and policies (Article 1.3). Equally important, partner countries are free to develop measures to address anticompetitive practices or to adopt their own policies, for example, to promote domestic economic development (Article 1.4).

21. The remaining three articles in chapter 14 of the ASEAN-ANZ FTA relate to a range of measures for technical co-operation and facilitation between the FTA partners in various competition-related matters.[5] Notably in addition, Article 4 of this chapter specifies that Chapter 17 on "Consultations and Dispute Settlement" does not apply to any matter arising under chapter 14 on "Competition"

4. Going Forward: Challenges and Opportunities Ahead

22. Business competition and consumer interests have been significantly impacted by the increasingly dynamic, an innovative and interlinked global economy, and by the changing operational models in technology, commerce and industry across the value chain. A case in point is the on-going business consolidation and integration for more secured supplies and market access, and for greater scale economies, productivity and competitiveness.

23. As such, the design, implementation, review and re-prioritising of competition policy as well as the roles and functions of CRBs have become much more complicated and multi-dimensional in nature. A compounding factor is that government everywhere has worn several hats, and policy tensions and conflicts are inevitable at the interface between different policy domains (e.g., competition policy and intellectual property rights, and consumer protection, and industrial development policy, etc.).[6]

24. Clearly, the early movers have gained a variety of useful and proven lessons and insights. These apply not just to the design and development competition policy and CRBs, and the resolution of policy interface difficulties and problems. There are also highly pertinent lessons and insights in ensuring the balanced and effective implementation, functioning and (self) evaluation of competition policy and CRBs for gainful, dynamic, equitable and inclusive change in different technological and industrial contexts.

25. Equally clearly, many of those lessons and perspectives are of critical relevance to virtually all AMSs which, with an exception or two, are new comers to the fields of competition policy and consumer protection. The ASEAN Secretariat thus stands ready to collaborate and network with donors of competition-related technical assistance and with CRBs regarding policy dialogues and information exchange on policy matters of mutual focus and concern.

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5 Such mutual collaboration covers programmes and activities for capacity building, awareness promotion and advocacy and for the mutual exchange of policy experience and information (Article 2). The designation of focal points for technical co-operation and information exchange is covered in Article 3.

6 Public action includes the regulation of strategic sectors and industries; reform through privatisation, liberalisation and deregulation; the provision of subsidies to business undertakings of national priority; and commercially significant procurement and selling activities. Moreover, governments have to engage often in negotiation of international, plurilateral and bilateral commitments and obligations for compliance by business and industry.

CONTRIBUTION FROM WAEMU

THE EXPERIENCE OF OVERSIGHT OF STATE AID IN WAEMU

-- Contribution by Mr. Amadou Dieng (UEMOA) --

1. The same Article 88 of the Treaty of the West African Economic and Monetary Union (WAEMU/UEMOA) prohibits cartels, abuse of dominant position and state aid that may distort competition in the common market.

2. This shows that the oversight of state aid occupies a significant place in WAEMU's competition policy.

3. It is clear that this oversight can play an important role in regional construction in the light of the many imbalances that public intervention generates within the Union.

4. In this regard, it should be recalled that the WAEMU rose from the ashes of the West African Economic Community (WEAC/CEAO), which in its last days was marked by a strong trend towards reintroducing tariffs and implementing domestic policies heavily geared towards protecting domestic industries that received considerable tax and financial benefits.

5. It was also during this period that investment codes were introduced and free industrial zones were created in order to promote foreign investment as a solution to the inadequate level of domestic savings.

6. The inconclusive results of these choices were among the reasons for the new directions taken and for reactivating a project to build a common market between the member states of the West African Economic and Monetary Union (WAEMU), strongly characterised by its supranational dimension, with its corollary of a transfer of sovereignty.

7. Regarding the application of a competition code, three major principles have been established by the Union's authorities:

- To ensure that Community interests and rules take precedence over all other considerations.
- To develop the solidarity of national economies.
- To make the system credible both inside and outside the common market, in particular to foreign investors who may be interested in the WAEMU market.

8. In this perspective, two categories of public intervention are targeted by the Union's regulations:

- Anti-competitive practices engaged in by states (the fact that these are defined in the regulations on competition is an original feature of the WAEMU system); these regulation target public measures that restrict free competition, even if they are not of a financial nature (setting of quotas in intra-Community trade, granting special rights to national companies, adopting restrictive standards, imposing discriminatory administrative formalities, etc.);

- "State aid which might distort free competition by favouring certain companies or the production of certain goods".

9. For this last category, a review procedure has been established by Regulation 04/2002/CM/UEMOA on the oversight of state aid, which distinguishes between existing aid and new aid, which is the same classification found in the regulations of the European Union.

10. One of the most significant lessons learned in the brief experience of applying these rules is that, at the current stage, much of state aid is of a structural nature and calling it into question constitutes a major shift to which the national authorities and the benefitting companies find it difficult to adapt.

11. This is because the oversight system established requires the states to reassess all the financial benefits that they have granted to companies under their national investment codes, mining codes and special establishment agreements.

1. An Overview of the Regulations

12. Regulation 04/2002/CM of 23 May 2002 on the oversight of state aid defines this aid as follows: "any measure that (1) generates a direct or indirect cost, or a decrease in revenues for the state, its departments or for any public or private body that the state establishes or designates to manage the aid and (2) thereby gives an advantage to certain companies or to the production of certain goods".

13. A procedure to examine any of the different kinds of state aid can be initiated in three circumstances:

- When the notification of aid is filed with the Commission, which is mandatory for all categories of aid.

- When the periodic review of authorised aid is conducted, at the initiative of the Commission.

- When a company or a state files a complaint regarding an illegal form of aid, i.e. one implemented without prior notification of the Commission.

14. Regulation 04/2002/CM of 23 May 2002 gives a list of the types of aid automatically recognised as being compatible with the common market, without there being any need to examine them, namely:

- Aid of a social nature granted to individual consumers, provided that it is granted without discrimination regarding the origin of the products.

- Aid intended to remedy the damage caused by natural catastrophes or other exceptional occurrences.

- Aid intended to promote the carrying out of an important project of common interest or to remedy a serious disturbance in the economy of a member state.

- Aid connected with research activities conducted by companies or higher education or research institutions that have signed contracts with private companies.

- Aid aimed at promoting the adaptation of existing facilities to new environmental requirements imposed by legislation that lead to greater constraints and a larger financial burden for companies.

- Aid aimed at promoting a country's culture and the preservation of its heritage, when it does not restrict competition in a significant part of the common market.

15. Similarly, Regulation 04/2002/CM CM of 23 May 2002 gives a list of the types of aid automatically recognised as being incompatible with the common market, without there being any need to examine them, namely:

- Aid that is contingent, in law or in fact, whether solely or as one of several other conditions, upon exporting to other member states.

- Aid that is contingent, whether solely or as one of several other conditions, upon the use of domestic goods over goods imported from other member states.

16. Notified aid may only be granted following a decision by the Commission authorising it or following expiration of the deadline after which this authorisation shall be deemed to have been granted.

17. If the aid is illegal, the Commission may order the suspension of its payment and the provisional recovery of the aid.

2. Examples of Cases Handled in WAEMU

18. Since the competition regulations entered into force, the Commission has more frequently examined cases involving public intervention that could cause market distortions than those involving cartels and abuse of dominant position.

2.1 In the Cement Sector, the Following Three Cases have been or are currently being Addressed by the WAEMU Commission or the Court of Justice.

2.1.1 The case of Ciments du TOGO SA vs. the Commission (September 2000):

19. On 15 June 2000, the Company CIMENTS du TOGO filed a complaint with the Commission denouncing the preferential treatment that the State of Togo was giving to its competitor, the company WACEM based in the free industrial zone, which was marketing a product within the Union that was not subject to the required customs taxation.

20. A substantive decision was not made on this case because the Commission held that it did not have jurisdiction to examine the complaint, and the Court of Justice, to which the case was referred, dismissed the case on procedural grounds.

21. However, the interest of this case lies less in the decision reached than in the substance of the dispute.

22. In fact, in this case it was entire philosophy of the free industrial zones as they function in the WAEMU that the Community authorities were asked to examine.

23. The principle of a free industrial zone is that the authorised companies have extraterritorial status that allows them to import, free from duties and taxes, their inputs and capital goods. They are also exempted from a substantial share of their domestic taxes.

24. In return, the products manufactured in the free zone must be made for export to third countries.

25. This type of system should not create difficulties regarding the functioning of competition in the domestic market as long as the totality of production is exported.

26. However, by derogation, the member states that have free zones have allowed 20% of this production to be sold on the domestic market after the duties and taxes applicable to similar products from third countries have been paid.

27. In this situation, the following problems need to be solved:

- How to correct the imbalances between the production costs of goods manufactured in a free zone and the production costs of goods manufactured under normal conditions, since the former have received exemptions on inputs, manufacturing equipment and certain domestic taxes?

- What are the market shares of the 20% of production in a free zone authorised for sale on the domestic market?

- What reliable mechanism can be used to monitor compliance with the authorised percentages to avoid exceeding the quantities authorised for sale on the domestic market?

28. The WAEMU Commission may not have been able to answer these questions at the time of this case since Regulation 04/2002/CM/UEMOA of 23 May on the oversight of public aid had not yet been adopted.

29. Nevertheless, the fact remains that this case called for defining a fundamental position, as it clearly involved a distortion of competition as a result of public aid.

2.1.2 The Case of SOCOCIM vs. the State of Senegal and CIMENTS du Sahel (April 2003)

30. The company SOCOCIM INDUSTRIES filed a complaint with the Commission regarding dysfunctions in the cement market related to the implementation of a mining agreement between the State of Senegal and the company "LES CIMENTS DU SAHEL", its competitor.

31. The Commission's investigation of this complaint showed that tax exemptions had been granted to the company CIMENTS du SAHEL, which thereby gained a significant competitive advantage over SOCOCIM.

32. In his comments, the Minister for Economic and Financial Affairs of Senegal argued that the agreement strictly applied the provisions of the WAEMU Community Mining Code, which upholds the validity of all the mining agreements currently in force in the member states during a transitional period.

33. Even though this was a strong legal argument, the difference in the treatment of the two cement companies was so great that the Commission did not follow it.

34. In the cement sector, a distinction is made between complete and incomplete cement companies.

35. A complete cement company is one whose activities range from the extraction of limestone and its processing into clinker to the packaging of the finished cement in bags. The most important stage in the chain ends with the production of clinker, which accounts for approximately 80% of the value added in the overall process.

36. In incomplete cement companies, the chain extends from the grinding of the clinker to the packaging of the finished cement in bags.

37. In the case examined by the Commission, the competing companies, although they both theoretically had identical production systems, were not governed by the same types of agreements with the government.

38. Thus, the company "les Ciments du Sahel", under the guise of a mining agreement, received exemptions on all of its imports of entrants, capital goods and operating equipment, while SOCOCIM only received a tax reduction on a portion of these components, since it had a less favourable agreement both in terms of its duration and the scope of the benefits.

39. This gave the company "les CIMENTS du Sahel", during its start-up phase, the opportunity to import tax-exempt limestone, gypsum and fuel in order to manufacture cement as an incomplete cement producer. The difference in its costs enabled it to market a less expensive product.

40. Despite the potential beneficial effects on the market, such as greater supply and lower consumer prices, the Commission prohibited the continued granting of the exemptions for the following reasons:

- The competitor receiving the benefits, CIMENTS du SAHEL, could not show that it had attained the same levels of investment as SOCOCIM, which had preceded it in this sector by at least 30 years; this seriously jeopardised the current balance of the market;

- The exemptions on clinker were more favourable to competing imports, to the detriment of production originating within the Union;

- The activities of SOCOCIM, which had a market share of at least 60%, might be abnormally affected due to the unfair competition generated by the State of Senegal.

41. The conclusions that can be drawn from the Commission's position are, *inter alia*, the following:

- Absolute priority was given to the rules of competition in this case, since the Commission ruled against the application of the Community Mining Code, which had been established by a text on a par with and subsequent to Regulation 04/2002/CM/UEMOA on oversight of public aid;

- The solution chosen is significant in a field in which the agreements signed between countries and mining companies can last 15 to 20 years or longer, with clauses that can lead to the market being closed to new investors who might bring technological improvements in the sectors involved;

- The adverse effect on intra-Community trade was not focused on particularly as a criterion for analysing the prohibited state aid, but the Commission could also have referred to it since the cement manufactured in Senegal is sold in certain countries of the WAEMU zone, where it is competing with other cements produced in the zone;

- The Commission did not decide that the aid should be recovered, even though very large amounts were involved;

- As this was the first case of illegal aid examined by the Commission, this decision is understandable, as it was meant to be instructive.

2.1.3 The Case of RUFSAC vs. the State of Senegal

42. A third case in the cement sector is currently being dealt with by the Commission, which must decide regarding the effects of mining agreements signed with Senegal's cement companies on the market for kraft paper bags used to package cement.

43. In this case, the competition is between bags manufactured locally by an industrial unit specialised in this field, RUFSAC, and bags imported by cement factories.

44. These imports, which are subject to little or no taxation, are less expensive for cement companies, which therefore tend to stop purchasing their supplies from the local manufacturer.

45. The Commission will have to answer at least two questions:

- In which category should these exemptions be placed, given that not all manufacturers of kraft paper bags are established within the territory of the Union?

- If the Commission were to define these exemptions as state aid, who would be required to return the funds to be recovered?

2.2. The case of West Africa Gas Pipeline Co. (WAPCO) (April 2004)

46. On 19 April 2004, the states of Benin and Togo notified the Commission about the special taxation scheme that they were planning to apply to the West African Gas Pipeline Company Project.

47. This project aimed primarily at transporting and distributing gas produced by the companies Chevron, Texaco, Royal Dutch Shell and the Nigeria National Petroleum Company (NNPC), all operating within Nigeria, is being financed by two sources: 79.7% by the multinationals belonging to the consortium and 20.3% by public entities of Ghana, Benin and Togo.

48. The arguments used by the notifiers to justify the taxation measures were essentially the following:

- The major benefits that the states participating in the project might reap in terms of the regular supply of gas for industrial use;

- The Community interest of the project, which will ensure greater energy independence for two WAEMU member states by providing a regular supply of gas;

- The high costs of the project, which none of the member states could finance alone;

- Uncertainty about the profitability of the project, particularly in its start-up phase, which implies the need to reduce the operating costs of the companies responsible for operating the pipeline.

49. After consulting with all the member states, the Commission decided that it had no objection to implementation of the special taxation notified.

50. However, it did not agree with the applicants regarding the duration of the authorisation requested, specifying that it should be reviewed in 5 rather than 20 years, as the consortium members had requested.

Comment:

1) In this case, all the conditions were met to enable the Commission to give a favourable opinion, in particular the benefits that the Community as a whole could derive from the project. In fact, at the time when the project was initiated, both Benin and Togo had a very high energy deficit that it was vital to correct. Similarly, the prospects for extending the pipeline to Ivory Coast were also a significant factor in the analysis.

2) In general, in the field of public-private partnership for building infrastructure or other projects requiring large amounts of capital, as in the field of privatisations, the Commission will monitor the agreements signed among member states and concession holders, since these agreements may generate more public aid than is required or create rent-seeking situations that hinder competition.

Conclusion

51. The different cases presented have not concerned economic contingency measures, but this does not mean that the member states have not taken steps to address situations such as the rise in prices caused by the crisis.

52. The support provided to companies has been short-term in most cases and has not raised any particular difficulties regarding competition, except for the flour and food oil sectors, in which complaints have just been filed with the Commission.

53. However, it should be noted in this regard that the member states have not complied with the requirement to notify the Commission of the measures that they have taken.

54. This tendency is not limited only to the current economic situation, but is characteristic of the application of the rules for monitoring public intervention within our states, where the culture of supranational governance has not yet sufficiently taken hold. This explains the efforts being made by Commission to conduct an annual census of the existing aid.

55. Nevertheless, the initiatives taken by private companies, which are increasingly willing to file complaints with the Commission so that it can examine public measures that they consider contrary to Community rules, are doing much to strengthen the regional framework. And it is no exaggeration to say that the work of monitoring state aid is playing a key role in the construction of the WAEMU common market, given the barriers to intra-Community trade that it can help to eliminate.

CONTRIBUTION DE L'UEMOA

EXPÉRIENCE DU CONTRÔLE DES AIDES PUBLIQUES AU SEIN DE L'UEMOA

-- Contribution de M. Amadou Dieng --

1. Le même article 88 du Traité de l'Union Économique et Monétaire Ouest Africaine prévoit les interdictions concernant les ententes, les abus de position dominante ainsi que les aides publiques susceptibles de fausser la concurrence au sein du Marché commun.

2. C'est dire que le contrôle des aides publiques occupe une place significative dans la politique de concurrence de l'UEMOA.

3. On peut comprendre le rôle important qu'il peut jouer dans la construction régionale, au regard des nombreux déséquilibres qu'engendrent les interventions publiques au sein de l'Union.

4. En effet, l'UEMOA est née des cendres de la Communauté Économique de l'Afrique de l'Ouest (CEAO) dont les derniers moments ont été marqués par un fort courant de réarmement tarifaire et la mise en œuvre de politiques intérieures résolument tournées vers la protection d'industries nationales bénéficiant d'avantages fiscaux et financiers considérables .

5. Durant cette période également se sont signalés les codes d'investissements et la création de zones franches industrielles destinés à promouvoir l'investissement étranger, comme remède à l'insuffisance de l'épargne intérieure.

6. Les résultats peu concluants de ces choix ont été parmi les motivations des nouvelles orientations prises, pour la relance d'un projet de construction d'un marché commun entre les États membres de l'Union Économique et Monétaire Ouest Africaine (UEMOA) marquée par une forte affirmation de la supranationalité, avec son corollaire le transfert de souveraineté.

7. Concernant l'application d'un code de concurrence trois principes majeurs sont fixés par les autorités de l'Union :

- Faire prévaloir les intérêts et règles communautaires sur toutes autres considérations.
- Développer la solidarité des économies nationales.
- Rendre crédible le dispositif aussi bien au niveau interne que vis-à-vis de l'extérieur, en particulier des investisseurs étrangers susceptibles de s'intéresser au marché de l'UEMOA.

8. Dans ces perspectives deux catégories d'interventions publiques sont visées par la règlementation de l'Union :

  – les pratiques anticoncurrentielles imputables aux États dont la définition dans le cadre de la réglementation sur la concurrence est une originalité du dispositif de l'UEMOA ; elles visent les mesures publiques entravant la libre concurrence, sans pour autant avoir un caractère financier (fixation de quotas dans les échanges intracommunautaires, octroi de droits

spéciaux à des entreprises nationales, adoption de normes restrictives, imposition de formalités administratives discriminatoires etc.) ;

– "les aides publiques susceptibles de fausser la libre concurrence, en favorisant certaines entreprises ou certaines productions".

9. Pour cette dernière catégorie, une procédure d'examen est instituée par le Règlement 04/2002/CM/UEMOA relatif au contrôle des aides publiques qui distingue les aides existantes et les aides nouvelles, comme on peut retrouver cette classification dans la règlementation de l'Union Européenne.

10. L'un des enseignements les plus significatifs de la courte expérience de l'application de ces règles est qu'au stade actuel, les aides publiques sont en bonne partie d'ordre structurel et que leur remise en cause constitue un bouleversement auquel les autorités nationales et les entreprises bénéficiaires s'adaptent difficilement .

11. En effet, le système de contrôle mis en place impose aux États de reconsidérer tous les avantages financiers qu'ils ont accordés à des entreprises, en application de leurs codes nationaux d'investissement, de codes miniers ou des conventions spéciales d'établissement.

1. Aperçu sur la Réglementation

12. Le Règlement 04/2002/CM du 23 mai 2002 relatif au contrôle des aides publiques en donne la définition suivante : « toute mesure qui (1) entraine un coût direct ou indirect, une diminution des recettes, pour l'État, ses démembrements ou pour tout organisme public ou privé que l'État institue ou désigne en vue de gérer l'aide et (2) confère ainsi un avantage sur certaines entreprises ou productions »

13. Trois circonstances peuvent déclencher une procédure examen des différentes aides publiques :

- La notification des aides à la Commission qui est obligatoire pour toutes les catégories d'aides.
- La revue périodique des aides autorisées, à l'initiative de la Commission.
- La plainte d'une entreprise ou d'un État contre une aide illégale, c'est-à-dire mise en œuvre sans notification préalable à la Commission.

14. Le Règlement 04/2002/CM du 23 mai 2002 donne une liste d'aides reconnues d'office compatibles avec le marché commun, sans qu'il soit besoin de les examiner, à savoir :

- Les aides à caractère social octroyées aux consommateurs individuels, à condition qu'elles soient octroyées sans discrimination liée à l'origine des produits.
- Les aides destinées à remédier aux dommages causés par les calamités naturelles ou d'autres évènements extraordinaires.
- Les aides destinées à promouvoir la réalisation d'un projet important d'intérêt communautaire ou à remédier à une perturbation grave de l'économie d'un État membre.
- Les aides liées à des activités de recherche menées par des entreprises ou par des établissements d'enseignement supérieur ou de recherche ayant signé des contrats avec des entreprises privées.

- Les aides visant à promouvoir l'adaptation d'installations existantes à de nouvelles prescriptions environnementales imposées par la législation qui se traduisent pour les entreprises par des contraintes plus importantes et une charge financière plus lourde.

- Les aides destinées à promouvoir la culture et la conservation du patrimoine, quand elles ne restreignent pas la concurrence dans une partie significative du Marché commun.

15. De la même manière, le Règlement 04/2002/CM du 23 mai 2002 donne une liste d'aides reconnues d'office incompatibles avec le Marché commun, sans qu'il soit besoin des les examiner :

- Les aides subordonnées, en droit ou en fait, soit exclusivement, soit parmi d'autres conditions aux résultats à l'exportation vers les autres États membres.

- Les aides subordonnées soit exclusivement, soit parmi d'autres conditions à l'utilisation de produits nationaux de préférence à des produits importés des autres États membres.

16. Une aide notifiée ne peut être exécutée qu'après une décision de la Commission l'autorisant ou à l'expiration du délai au bout duquel cette autorisation est réputée être donnée.

17. Dans le cas d'une aide illégale, la Commission peut ordonner la suspension de son versement et à titre provisoire sa récupération.

2. Exemples de cas traités dans l'UEMOA

18. Depuis l'entrée en vigueur des textes sur la concurrence, les affaires examinées par la Commission qui se rapportent à des interventions publiques susceptibles d'occasionner des distorsions sur le marché sont plus fréquentes que celles portant sur les ententes et les abus de position dominante

2.1 Dans le secteur du ciment les trois cas suivants ont été traités ou en cours de traitement par la Commission de l'UEMOA ou la Cour de Justice.

2.1.1 L'affaire les Ciments du TOGO SA contre la Commission (septembre 2000) :

19. Le 15 juin 2000, la Société les CIMENTS du TOGO a introduit une demande auprès de la Commission dénonçant le traitement de faveur accordé par l'État du Togo à sa concurrente, l'entreprise WACEM installée dans la Zone franche industrielle qui met sur le marché de l'Union un produit ne supportant pas la fiscalité douanière requise.

20. Une décision sur le fond n'a pas été rendue dans cette affaire puisque la Commission s'était déclarée incompétente, pour examiner la demande et la Cour de Justice saisie a rejeté le recours pour vice de forme.

21. Toutefois, l'intérêt de cette affaire réside moins dans la décision issue de la procédure que dans le fond du litige.

22. En effet c'est toute la philosophie des zones franches industrielles telles qu'elles fonctionnent dans la zone UEMOA que les autorités communautaires étaient invitées à examiner.

23. Le principe de la zone franche industrielle est que les entreprises qui y sont agréées bénéficient d'un statut d'extraterritorialité leur permettant d'importer, en franchise des droits et taxes, leurs intrants et leurs biens d'équipement. Une bonne partie des impôts intérieurs leur sont également dispensés.

24. En contrepartie, les produits fabriqués en zone franche doivent être destinés à l'exportation vers des pays tiers.

25. Le système ainsi conçu ne devrait pas poser de difficultés sur le fonctionnement de la concurrence au sein du marché intérieur tant que l'intégralité de la production réalisée est exportée.

26. Or par dérogation, les États membres abritant des zones franches, ont admis que 20% de cette production puisse être vendue sur le marché intérieur, après avoir acquitté les droits et taxes applicables aux produits similaires venant de pays tiers.

27. A partir de ce moment, il s'agit de résoudre les problèmes suivants :

- comment corriger les déséquilibres entre les coûts de production des marchandises fabriquées en Zone franche et les coûts de production des marchandises fabriquées en régime normal, les premières ayant bénéficié d'exonérations sur les intrants, le matériel de fabrication et certains impôts intérieurs ;

- quelles parts de marché peuvent représenter les 20% de la production réalisée en zone franche et admise à être vendue sur le marché intérieur ;

- par quel mécanisme fiable sera contrôlé le respect des pourcentages autorisés, pour éviter un dépassement des quantités autorisées à être mises sur le marché intérieur.

28. Peut être que la Commission de l'UEMOA n'a pas pu donner de réponse à ces questions au moment où elle a été saisie, du fait que le Règlement 04/2002/CM/UEMOA du 23 mai relatif au contrôle des aides publiques n'était pas encore adopté.

29. Cependant, il reste constant qu'une position de principe était nécessaire dans cette affaire, car il y a manifestement distorsion de concurrence due à des aides publiques.

2.1.2 Affaire SOCOCIM contre État du Sénégal et CIMENTS du Sahel (Avril 2003)

30. Se plaignant de dysfonctionnements dans le marché du ciment, liés à la mise en œuvre d'une convention minière entre l'État du Sénégal et la Société "LES CIMENTS DU SAHEL" sa concurrente, la Société SOCOCIM INDUSTRIES en a saisi la Commission.

31. L'enquête menée par la Commission suite à cette saisine a fait ressortir l'application d'exonérations fiscales accordées à l'entreprise les CIMENTS du SAHEL qui bénéficie ainsi d'un avantage concurrentiel important sur la SOCOCIM.

32. Dans ses observations, le Ministre de l'Économie et des Finances du Sénégal a fait valoir l'application stricte des dispositions du Code minier communautaire de l'UEMOA qui, à titre transitoire, maintient en vigueur toutes les conventions minières en cours dans les États membres.

33. Bien que cet argument de droit ait été fort, l'ampleur du déséquilibre dans le traitement réservé aux deux cimenteries était tellement importante que la Commission ne l'a pas suivi.

34. Dans le secteur du ciment, on distingue les cimenteries complètes et les cimenteries incomplètes.

35. La cimenterie complète est celle qui incorpore les activités allant de d'extraction du calcaire, de sa transformation en clinker jusqu'à la mise en sac du ciment fini. L'étape la plus importante dans la chaîne

s'arrête à la production de clinker qui absorbe environ 80% de la valeur ajoutée dans l'ensemble du processus.

36. Dans les cimenteries incomplètes, la chaîne part du broyage du clinker jusqu' à l'ensachage du ciment fini.

37. Dans le cas examiné par la Commission les entreprises en compétition, bien que présentant théoriquement toutes les deux des schémas de production identique, n'étaient pas régies par les mêmes types de conventions avec l'État.

38. Ainsi la Société « les Ciments du Sahel », sous le couvert d'une convention minière, bénéficiait d'exonérations sur l'ensemble de ses importations d'intrants, des biens d'équipement et du matériel d'exploitation, tandis que la SOCOCIM ne pouvait prétendre qu'à une fiscalité réduite sur une partie de ces éléments, étant dans le régime d'une convention moins favorable en durée et en champ de couverture des avantages.

39. Cela s'est traduit par la possibilité qui a été offerte à l'entreprise « les CIMENTS du Sahel », durant sa phase de démarrage, d'importer du calcaire, du gypse et du fuel exonérés pour faire du ciment, en mode cimenterie incomplète. La différence des coûts supportés lui permettait ainsi de proposer un produit moins cher.

40. Bien que cela ait pu avoir des effets bénéfiques sur le marché, notamment l'augmentation de l'offre et la baisse des prix à la consommation, la Commission a interdit la poursuite de l'application des exonérations en cause pour les raisons suivantes :

- le concurrent avantagé, les CIMENTS du SAHEL, ne justifiait pas avoir atteint les mêmes niveaux d'investissement que la SOCOCIM qui l'a précédé dans le secteur d'au moins trente ans. Ce qui rendait très aléatoire les équilibres du marché affichés ;

- les exonérations sur le clinker favorisaient davantage les importations concurrentes au détriment de la production originaire de l'Union ;

- les activités de la SOCOCIM qui occupait au moins 60% de part de marché risquaient d'être anormalement affectées du fait d'une mauvaise concurrence entretenue par l'État du Sénégal.

41. Les enseignements à tirer de la position de la Commission, entre autres, sont les suivants :

- La primauté accordée aux règles de concurrence a été absolue dans cette affaire, pour que la Commission puisse écarter l'application du Code Minier Communautaire qui a été institué par un texte de même rang et postérieur au Règlement 04/2002/CM/UEMOA relatif au contrôle des aides publiques.

- La solution retenue est d'importance dans un domaine où les conventions signées entre les États et les entreprises minières peuvent avoir des durées de 15 à 20 ans ou plus avec des clauses pouvant entrainer la fermeture du marché à de nouveaux investisseurs susceptibles d'apporter des améliorations technologiques dans les secteurs concernés.

- L'affectation des échanges intracommunautaires n'a pas été particulièrement retenue comme critère d'analyse des aides publiques interdites, mais pouvait également être évoqué par la Commission dans la mesure où le ciment fabriqué au Sénégal est vendu dans certains pays de la zone UEMOA ou il fait concurrence à d'autres ciments produits dans la zone.

- La Commission ne s'est pas non plus prononcée sur la récupération de l'aide qui pourtant se chiffrait à des montants très élevés.

- S'agissant de la première affaire d'aide illégale examinée par la Commission, on peut comprendre ce choix qui se veut pédagogique.

2.1.3 Affaire RUFSAC contre État du Sénégal

42. Une troisième affaire dans le secteur du ciment est en cours de traitement par la Commission qui doit se prononcer sur les effets de l'application des conventions minières signées avec les cimenteries du Sénégal sur le marché des sacs en papier kraft destinés à l'emballage du ciment.

43. Dans ce cas-ci, la concurrence se déroule entre la production locale de sacs fabriqués par une unité industrielle spécialisée dans ce domaine, la RUFSAC, et les importations faites par les usines de ciments.

44. En effet, ces importations, bénéficiant d'une taxation nulle ou réduite, coûtent moins cher aux cimenteries qui de ce fait ont tendance à renoncer à s'approvisionner auprès du fabricant local.

45. La Commission devra répondre au moins à deux questions :

- Dans quelle catégorie faudrait-t-il loger les exonérations en cause sachant que les fabricants de sacs en papier kraft ne sont pas tous installés sur le territoire de l'Union.

- Si la Commission devait retenir la qualification d'aides publiques auprès de qui la récupération de cette aide pourrait être exigée.

2.2. Affaire GAZODUC de l'AFRIQUE de l'Ouest (WAPCO) (Avril 2004)

46. Le 19 avril 2004, les États du Bénin et du Togo avaient adressé des notifications à la Commission concernant le projet de fiscalité spéciale qu'ils prévoyaient d'appliquer aux activités du Projet GAZODUC de l'Afrique de l'Ouest (Western African Gas Pipeline Company)

47. Le financement de ce projet essentiellement centré sur le transport et la distribution de gaz produit par les sociétés Chevron Texaco, Royal Dutch Shell et Nigeria National Petroleum Company (NNPC), opérant toutes en territoire nigérian, est assuré par deux sources : 79,7% par les multinationales membres du consortium et 20,3% par des entités de droit public du Ghana, du Bénin et du Togo.

48. Les arguments développés par les notifiant pour justifier l'application d'une fiscalité sont essentiellement les suivants :

- Les avantages importants que pouvaient tirer les États parties au projet en termes de régularité de l'approvisionnement en gaz à usage industriel.

- L'intérêt communautaire du projet qui va assurer à deux États membres de l'UEMOA une plus grande indépendance énergétique par un approvisionnement régulier en gaz.

- Les coûts élevés du projet qu'aucun des États membres ne pouvait financer seul.

- L'incertitude de la rentabilité du projet, en particulier dans sa phase de démarrage qui implique la nécessité d'alléger les charges de fonctionnement des entreprises chargées de l'exploitation du gazoduc.

49. Après consultation de tous les États membres, la Commission a émis une décision de non objection à la mise en œuvre de la fiscalité spéciale notifiée.

50. Cependant, elle n'a pas suivi les demandeurs sur la durée de l'autorisation sollicitée qu'elle a assortie d'une période de réexamen de 5ans au lieu de 20 ans, tel que demandé par les membres du consortium.

Remarque:

1) Dans cette affaire toutes les conditions étaient réunies pour permettre à la Commission de donner un avis favorable, en particulier les avantages que l'ensemble de la Communauté pouvait tirer du projet. En effet, au moment où le projet était initié, aussi bien le Bénin que le Togo souffraient d'un déficit énergétique très élevé qu'il était vital de résorber. De même les perspectives d'extension du gazoduc vers la Côte d'Ivoire étaient également un facteur significatif dans l'analyse.

2) De façon générale, dans le domaine du partenariat public/privé pour la réalisation d'infrastructures ou d'autres projets mobilisant des capitaux élevés, tout comme dans le domaine des privatisations, la Commission sera amenée à surveiller les conventions signées entre les États membres et les concessionnaires. En effet, ces conventions sont susceptibles d'engendrer des aides publiques au-delà du nécessaire et créer des rentes de situation entravant la concurrence.

Conclusion

51. Les différentes affaires exposées n'ont pas concerné des mesures conjoncturelles mais cela ne signifie pas que les États membres n'aient pas été amenés à intervenir pour faire face à des situations telles que le renchérissement des prix du fait de la crise.

52. Seulement, les soutiens apportés aux entreprises ont été de courte durée dans la plupart des cas et n'ont pas soulevé de difficultés particulières concernant la concurrence, sauf en ce qui concerne le secteur de la farine et celui de l'huile alimentaire pour lesquels des saisines viennent de parvenir à la Commission.

53. Cependant, il y a à noter, à ce niveau que la notification obligatoire à la Commission des mesures qu'ils ont prises n'a pas été observée par les États membres.

54. Et ceci, au-delà de la conjoncture, est caractéristique de l'application des règles de contrôle des interventions publiques dans nos États où la culture de la supranationalité n'est pas encore suffisamment ancrée. D'ou les efforts fournis par la Commission pour procéder à un recensement annuel des aides.

55. Toutefois, les initiatives des entreprises privées qui, de plus en plus n'hésitent pas à saisir la Commission pour faire examiner les mesures publiques qu'elles estiment contraires aux règles communautaires, contribuent beaucoup au renforcement du cadre régional. Et il n'est pas exagéré d'affirmer que le chantier du contrôle des aides publiques est au cœur de la construction du marché commun de l'UEMOA, au regard des obstacles aux échanges intracommunautaires qu'il peut aider à lever.

PRESENTATION DE M. AMADOU DIENG

Expérience du contrôle des aides publiques au sein de l'UEMOA

18/02/2010

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Un marché régional avec un tarif extérieur commun, les mêmes règles d'origine, une fiscalité intérieure harmonisée et un code communautaire de la concurrence

➢Le contrôle des aides publiques occupe une place significative dans la politique de concurrence de l'UEMOA, car il peut jouer un rôle important dans la construction régionale, au regard des nombreux déséquilibres qu'engendrent les interventions publiques au sein de l'Union.

➢ Les conventions spéciales, les codes d'investissements et les zones franches industrielles destinés à promouvoir l'investissement , pour palier l'insuffisance de l'épargne intérieure, constituent des sources de traitement inégal des entreprises au sein du même marché,

Deux catégories d'interventions publiques sont visées par la règlementation de l'Union :

➢les pratiques anticoncurrentielles imputables aux Etats dont la définition dans le cadre de la réglementation sur la concurrence est une originalité du dispositif de l'UEMOA ; elles visent les mesures publiques entravant la libre concurrence, sans pour autant avoir un caractère financier (fixation de quotas dans les échanges intracommunautaires, octroi de droits spéciaux à des entreprises nationales, adoption de normes restrictives, imposition de formalités administratives discriminatoires etc.),

➢ les aides publiques susceptibles de fausser la libre concurrence, en favorisant certaines entreprises ou certaines productions, et pour lesquelles, une procédure d'examen est instituée par le Règlement 04/2002/CM/UEMOA qui distingue les aides existantes et les aides nouvelles, comme on peut retrouver cette classification dans la règlementation de l'Union Européenne

➢L'un des enseignements importants de l' expérience de l'application du contrôle des aides publiques au sein de l'UEMOA est que celles-ci sont souvent d'ordre structurel et leur remise en cause constitue un bouleversement auquel les autorités nationales et les entreprises bénéficiaires s'adaptent difficilement.

➢Les trois cas suivants, traités ou en cours de traitement par la Commission de l'UEMOA ou la Cour de Justice dans le secteur du ciment, illustrent bien ce propos.
Il en est ainsi aussi du cas du projet de Gazoduc de l'Afrique de l'Ouest,

➢Des aides publiques destinées à faire face à des situations conjoncturelles spécifiques ont été examinées. Seulement aucune décision formelle n'a été retenue les concernant.

L'affaire les Ciments du TOGO SA contre la Commission
(septembre 2000

➢L'entreprise WACEM installée en zone franche industrielle, bénéficiant d'un statut d'extraterritorialité, arrive à importer, en franchise des droits et taxes, ses intrants et ses biens d'équipement. Une bonne partie des impôts intérieurs lui sont également dispensés.

➢Sa concurrente les Ciments du TOGO, se plaint des distorsions de concurrence engendrées par le fonctionnement du système qui met en compétition des produits ne bénéficiant pas des mêmes avantages.

➢ Le fonctionnement des zones franches ne devrait pas poser de difficultés sur le fonctionnement de la concurrence au sein du marché intérieur tant que l'intégralité de la production réalisée est exportée. Or par dérogation, il est admis que 20% de cette production puisse être vendue sur le marché intérieur, après avoir acquitté les droits et taxes applicables aux produits similaires venant de pays tiers.

Affaire SOCOCIM contre Etat du Sénégal et CIMENTS du Sahel(Avril 2003)

- **Dysfonctionnements dans le marché du ciment, liés à la mise en œuvre d'une convention minière entre l'Etat du Sénégal et la Société "LES CIMENTS DU SAHEL" sa concurrente, au détriment de la Société SOCOCIM INDUSTRIES.**

- **L'examen de l'affaire a révélé que la Société « les Ciments du Sahel », sous le couvert d'une convention minière, bénéficiait d'exonérations sur l'ensemble de ses importations d'intrants, des biens d'équipement et du matériel d'exploitation, tandis que la SOCOCIM ne pouvait prétendre qu'à une fiscalité réduite sur une partie de ces éléments, étant dans le régime d'une convention moins favorable.**

Les prix du ciment au Sénégal bien qu'ayant baissé dans un premier temps, la Commission a interdit la poursuite de l'application des exonérations en cause pour les raisons suivantes :

- **le concurrent avantagé, les CIMENTS du SAHEL, ne justifiait pas avoir atteint les mêmes niveaux d'investissement que la SOCOCIM qui l'a précédé dans le secteur d'au moins trente ans. Ce qui rendait très aléatoire les équilibres du marché affichés,**

- **les exonérations sur le clinker favorisaient davantage les importations concurrentes au détriment de la production originaire de l'Union,**

- **les activités de la SOCOCIM qui occupait au moins 60% de part de marché risquaient d'être anormalement affectées du fait d'une mauvaise concurrence entretenue par l'Etat du Sénégal.**

Les enseignements à tirer de la position de la Commission, entre autres, sont les suivants :

➢La primauté accordée aux règles de concurrence a été absolue dans cette affaire, pour que la Commission puisse écarter l'application du Code Minier Communautaire.

➢ La solution retenue est d'importance dans un domaine où les conventions signées entre les Etats et les entreprises minières peuvent avoir des durées de 15 à 20 ans.

➢L'affectation des échanges intracommunautaires n'a pas été particulièrement retenue comme critère d'analyse des aides publiques interdites.

➢La Commission ne s'est pas non plus prononcée sur la récupération de l'aide qui pourtant se chiffrait à des montants très élevés.

Affaire RUFSAC contre Etat du Sénégal (en cours de traitement)

➢Distorsions de concurrence entre la production locale de sacs fabriqués par une unité industrielle spécialisée dans ce domaine, la RUFSAC, et les importations faites par les usines de ciments qui bénéficient d'une taxation nulle ou réduite et coûtent ainsi moins cher.

➢Deux questions se posent à la Commission :

•Dans quelle catégorie faudrait-t-il loger les exonérations en cause, sachant que les fabricants de sacs en papier kraft ne sont pas tous installés sur le territoire de l'Union?

•Si la Commission devait retenir la qualification d'aides publiques auprès de qui la récupération de cette aide pourrait elle être exigée?

Affaire GAZODUC de l'AFRIQUE de l'Ouest (WAPCO) (Avril 2004)

➢**Notification à la Commission par le Bénin et le Togo d'une fiscalité spéciale qu'ils prévoyaient d'appliquer aux activités du Projet GAZODUC de l'Afrique de l'Ouest (Western African Gas Pipeline Company)**

➢**Le financement du Gazoduc est assuré par deux sources: les sociétés multinationales Chevron Texaco, Royal Dutçh Shell et Nigeria National Petroleum Company (NNPC), opérant toutes en territoire nigérian pour 79,7% et par des entités de droit public du Ghana, du Bénin et du Togo pour 20,3%.**

➢ **Se basant sur les arguments suivants développés par les notifiant, la commission a émis un avis de non objection :**

•les avantages importants que pouvaient tirer les Etats parties au projet en termes de régularité de l'approvisionnement en gaz à usage industriel,

•l'intérêt communautaire du projet qui va assurer à deux Etats membres de l'UEMOA une plus grande indépendance énergétique par un approvisionnement régulier en gaz,

•les coûts élevés du projet qu'aucun des Etats membres ne pouvait financer seul,

•l'incertitude de la rentabilité du projet, en particulier dans sa phase de démarrage qui implique la nécessité d'alléger les charges de fonctionnement des entreprises chargées de l'exploitation du gazoduc,

➢**La Commission n'a pas suivi les demandeurs sur la durée de l'autorisation sollicitée qu'elle a assortie d'une période de réexamen de 5ans au lieu de 20 ans, tel que demandé par les membres du consortium.**

CONCLUSION

➢**Les différentes affaires exposées n'ont pas concerné des mesures conjoncturelles mais cela ne signifie pas que les Etats membres n'aient pas été amenés à intervenir pour faire face à des situations telles que le renchérissement des prix du fait de la crise.Seulement, les soutiens apportés aux entreprises ont été de courte durée dans la plupart des cas et n'ont pas soulevé de difficultés particulières concernant la concurrence, sauf en ce qui concerne le secteur de la farine et celui de l'huile alimentaire pour lesquels des saisines viennent de parvenir à la Commission.**

➢**L'absence de notification systématique des projets d'aides publiques par les Etats montre que la culture de la supranationalité n'est pas encore suffisamment ancrée.**

➢ **Des efforts sont fournis par la Commission pour procéder à un recensement annuel des aides.**

PRESENTATION BY MR. MICHAEL THÖNE

Subsidy Control for the 21st Century

Achieving Sustainable Competition in the Post-Crisis World

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9th Global Forum on Competition
Session 1: Roundtable on Competition, State Aids and Subsidies
OECD Headquarters

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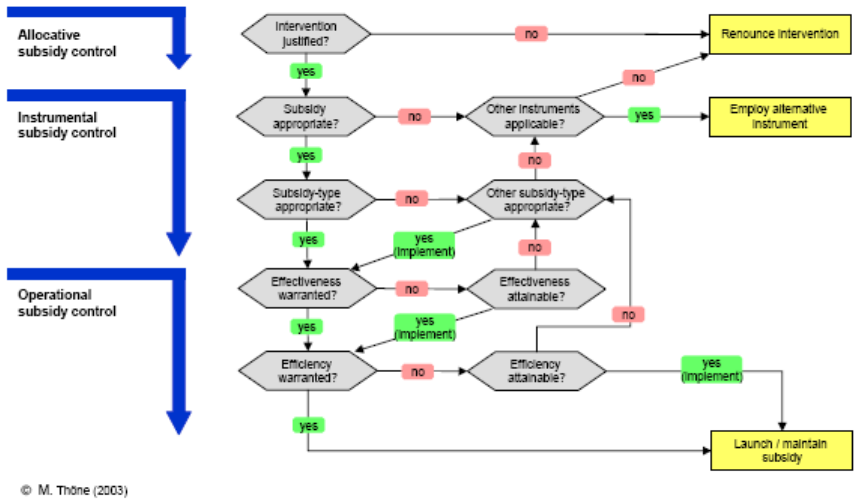
Present and upcoming challenges

- Economic and financial crisis
  - Gave rise to many new subsidies…
  - …and problems to reduce them afterwards (the "ratchet effect")
- Global Integration of production and markets
  - Increasing competition for investment / FDI → More Subsidies
  - Increasing political incentive for protectionism → More Subsidies
- Climate change and sustainable development
  - New factors surface which were not considered a problem previously
    - → Subsidization of fossil fuels (→ G20 Initiative)
    - → Subsidization of biofuels
    - → In the future: Expenses for adaptation to climate change e.g.
  - → Ultimately: Which competition is to be protected?
    - → Traditional competition (focused on *final* goods and services)?
    - → *Sustainable competition*?
    - → I.e. fair competition compatible with sustainable development.
    - → Is that the "Opening of Pandora's Box"?

Subsidy control on the national level

- National subsidy control has multiple goals. Mainly, it is an evaluation whether
  - Policy goals are justified;
  - Instruments are well-designed;
  - Negative impacts minimized;
  - Subsidies are implemented effectively and efficiently (see next slide).
- Protection of competition only to a limited extent – in two dimensions:
  - Spatial bias: By its very nature, focus on competition on the sub-national or national level, not the international level.
  - Power bias: More often than not, independence and/or resources of the body responsible for subsidy control are rather limited.
- Anyhow, very good practice in some countries:
  - Transparency: Switzerland, Germany. Australia (esp. for Tax Expenditures)
  - Across-The-Board Subsidy Audit: Swiss Subsidy Law
  - Systematic In-Depth Evaluation: UK, Germany (esp. for Tax Expenditures)

Exemplary Scheme of Subsidy Control



Recently applied to 85 per cent of the volume of German tax expenditures; i.e. to 18 bn. Euros. (Thöne et al., 2009)

Subsidy control for the transnational level

- Competition turns increasingly regional and global.
- Protection of competition should follow.
  - → Institutional subsidy control on the transnational level (EU Art. 87-88, WTO ASCM)
  - → Virtual transnational subsidy control: Granting foreign firm the unrestricted power to sue against subsidies in national courts
- Strong mandate needed (*effectively* strong)
  - Successful example: EU State Aid Control (…but it took decades)
  - Unsuccessful example: WTO Agreement on Subsidies and Countervailing Measures (good in theory, insufficient power)
- Factors of Success for regional systems of subsidy control:
  - Strong conviction concerning the mid- and long-term gains from fair competition among homogenous economies.
  - Broad definition of subsidies (advice: start with WTO definition)
  - Permanent delegation of power to the transnational institution
  - Inconsequential willingness to compensate the important losers.

Challenges / Open Questions

- Stronger subsidy control produces "sophisticated subsidies"
  - Pressure on direct subsidies increases tax expenditures
  - "Make one private party subsidize the other": e.g. Feed-in laws
  - Subsidization is pushed into regulation (or the deferral of regulation)
  - → These dynamics reinforce the need for a broad and robust mandate.
  - → But they also give rise to a new, unsolved problem:
- Successful transnational subsidy control can interfere with other *national* policy objectives:
  - Example: The Austrian energy excise (CoJ, of 8. 11. 2001 - C-143/ 99)
  - Distortion of *international* competition is asserted whenever *national* law is not implemented uniformly. Even when the objective circumstances of competition on the relevant market point into the opposite direction.
  - This problem becomes *really* pressing in global context.
  - Solution? → Establishment of rules of sustainable competition?

SESSION II

PEER REVIEW OF COMPETITION LAW AND POLICY IN BRAZIL

COMPETITION LAW AND POLICY IN BRAZIL

ENGLISH VERSION

Competition Law and Policy in Brazil

A Peer Review

OECD

2010

IDB

COMPETITION LAW AND POLICY IN BRAZIL

A Peer Review

-- 2010 --

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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Foreword

The Brazilian Competition Policy System (BCPS) was peer reviewed at the 2010 Global Forum on Competition (GFC), held in Paris on 18-19 February. The GFC, a gathering of competition leaders from close to 80 jurisdictions around the world, is a major source of best practices for competition officials.

Peer review is a core element of OECD work. It is founded upon the willingness of a country to submit its laws and policies to substantive reviews by other members of the international community. The process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all.

Peer review is also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

This is the second peer review of the BCPS and comes at an important moment when strengthening and streamlining the system is before the Brazilian Congress. The analysis and recommendations of this peer review will hopefully prove useful to this reform process. The first review was held in 2005 in the IDB/OECD Latin American Competition Forum.

The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Brazil for volunteering to be peer reviewed. We would also like to thank Mr. John Clark, the author of the report, the Examiners (Enrique Vergara, Chile; Mona Yassine, Egypt; and William Kovacic, United States) and the many competition officials whose active participation in the peer review contributed to its success.

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Executive Summary

Brazil's modern era in competition policy began with the competition law of 1994, which created the three bodies that form the Brazilian Competition Policy System – BCPS. Improvements since 2003 eliminated overlapping functions, so SDE concentrated on anticompetitive agreements and abuse of dominance while SEAE concentrated on merger analysis.

Cartel investigations were aided by powers to conduct dawn raids and to create a leniency programme. Criminal prosecution of cartels is conducted by federal and state prosecutors, in co-operation with the BCPS.

Merger review was improved by a "fast track" process, so mergers that do not present competitive problems are reviewed and approved quickly. Merger review continues to suffer from the lack of pre-merger notification, though.

Competition advocacy to other parts of government and to regulators is particularly important, and effective, because it is performed principally by SEAE, whose position as part of the powerful Ministry of Finance affords it access to many other government bodies.

The most serious problem confronting the BCPS continues to be its lack of resources, which is compounded by a high rate of employee turnover. CADE had no permanent professional staff. SDE is also chronically understaffed, leading to a large backlog of investigations. Another ongoing problem is judicial review. Appeals to the courts from CADE's decisions are common. Cases take years to make their way through the Brazilian judicial system. The result may be effectively to frustrate the enforcement of CADE's orders during this long appeals process.

Proposals to amend the defects in the 1994 competition law have been made for years, without success. But prospects for reform look more promising now. As of mid-January 2010, legislation to consolidate the BCPS into one agency, impose pre-merger notification and provide the agency with a significant number of new, permanent positions had been approved by one house of the Congress and was under consideration in the second. Still, it had not been accomplished, and there was urgent need to complete the process in the first half of the year, lest other important events, including particularly a national election scheduled for later in the year, push it aside.

…/

/…

This report offers several recommendations for improvement. The most important by far is that the proposed legislation in Congress be enacted. Other recommendations relate to: reducing the backlog in conduct investigations; increasing the use of settlement procedures in both conduct and merger cases, thereby both enhancing efficiency and reducing the number of appeals to the courts; increasing the use of structural remedies in merger cases; strengthening the co-operation between the competition agency and federal and state prosecutors in criminal cases initiated by the prosecutors; enacting proposed legislation that would extend to the competition agency the power to review bank mergers, which is currently in question; developing a stronger competition advocacy capability in CADE and co-ordinating it with SEAE; and continuing to strive for a more effective litigation programme in court.

Introduction

Competition policy in Brazil has a rich and interesting history. The modern era in competition policy began in the mid-1990s, coincident with the country's transition to a market based economy. The newly active competition law enforcement system quickly gained a reputation for professionalism and hard work; its decisions reflected an understanding of competition policy and analysis. It was confronted with several problems, however, many of them rooted in the competition law, which had been enacted in 1994. The competition policy system was made up of three separate agencies, which co-ordinated their activities inefficiently. Investigations proceeded slowly; too many resources were devoted to the review of mergers, the great majority of which posed no threat to competition; little attention was paid to prosecuting hard core cartels, widely understood to be the most harmful of all types of anticompetitive conduct. Perhaps most debilitating, the agencies suffered from inadequate resources and excessive rates of staff turnover.

The defects in the competition law became apparent fairly quickly. There were proposals to amend it as early as 2000, but most were not enacted. Nevertheless, the competition policy system has made steady, even remarkable, progress. It has become more efficient, especially in merger review, permitting it to refocus its priorities toward prosecuting cartels. Its anti-cartel programme is now widely respected in Brazil and abroad. Further progress, however, depends on making changes in the competition law. At the publication of this report it seemed that this important step was about to happen. The legislation, which is discussed in detail in Section 4 below, had been passed by one house of the Congress and was being debated in the second.

This is the second report on competition policy in Brazil prepared as a part of the OECD peer review process. The first was published in 2005 ("2005 Report").[1] The Report contained several recommendations for further improving competition policy in the country, many of which required amendments to the competition law. Those amendments may now finally be enacted. The 2005 Report also made other recommendations that did not depend on new legislation, most of which were adopted. Finally, the report suggested changes to improve the legislation that was then pending in the Congress, and many of those were also accepted.

This report is in the traditional format employed by the OECD in its competition policy peer reviews. It concentrates in particular on anti-cartel enforcement, merger review (substance and procedure) and judicial review of competition cases.

1. Competition policy in Brazil: foundations and context

Brazil's economic policies after World War II were characterised by pervasive government intervention in market operations. Most of the country's largest industrial, transportation, and financial enterprises were state owned. The state controlled prices, and indeed this was done in close co-operation with the private sector; trade associations of enterprises consulted regularly with the government body that controlled prices.[2] A competition law was enacted in 1962 (Law 4137/62), creating the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica – CADE). CADE was charged with, among other things, preventing "...the abuse of economic power manifested by means of... the complete or partial elimination of competition.[3] Because of the pervasive control of the economy by the government, however, the law had little effect.

An economic liberalisation process began in 1990, when the country's President initiated a series of reforms, featuring privatisation, price liberalisation and deregulation. In 1994, in response to a period of hyperinflation, the "Real Plan" was implemented. Its principal features were the introduction of a new currency, which was then pegged to the U.S. dollar (it is no longer so, having been allowed to float in 1999), and tight fiscal and credit policies. As a part of the 1994 reforms, a new competition law was enacted, law 8884/94. The new law invigorated CADE, making it an independent agency, and introduced merger control. Privatisation of state-owned enterprises continued throughout the 1990s. New, independent regulatory agencies for telecommunications, electricity, petroleum and natural gas, surface transportation and air transport were created. Privatisation is not complete, however. The government remains active in some sectors, notably in oil and gas through its control of Petrobras, the dominant firm in that sector, in electricity generation and transmission and in banking.

2. Substantive issues: content and application of the competition law

Competition policy has its foundation in the 1988 Brazilian constitution. Article 173 §4 provides that "[t]he law shall repress the abuse of economic power that aims at the dominance of markets, the elimination of competition, and the arbitrary increase of profits." Article 170 contemplates that the "economic order" of Brazil shall be "founded on the appreciation of the value of human work and on free enterprise," and shall operate with "due regard" for certain principles, including "free competition," "the social role of property," "consumer protection," and "private property." Article 1 of the competition law reflects these constitutional principles. It states that the law

"sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power."

Law 8884, enacted in 1994, remains as Brazil's competition law. It vests decision making powers in CADE, an independent agency.[4] CADE consists of a President and six Council members, or commissioners. The President and commissioners are appointed by the President of the Republic and approved by the national Senate for terms of two years. They may be reappointed for one additional term.[5] The law also assigned important enforcement responsibilities to two other government agencies, the Secretariat of Economic Law of the Ministry of Justice (Secretaria de Direito Econômico – SDE), and the Secretariat for Economic Monitoring of the Ministry of Finance (Secretaria de Acompanhamento Econômico – SEAE). SDE initiates all conduct investigations (anticompetitive agreements and abuse of dominance) and submits reports and recommendations to CADE for decision. SEAE also has investigative powers in conduct investigations begun by SDE, and both it and SDE analyse and submit reports to CADE on proposed mergers. CADE can complement investigations conducted by SDE and SEAE in either conduct or merger cases. Collectively the three agencies – CADE, SDE and SEAE – compose the Brazilian Competition Policy System (BCPS).

The law has been amended three times: in 1999, imposing a merger notification fee, in 2000, giving the BCPS important new powers in conduct investigations, notably powers to conduct dawn raids and to institute a leniency programme, and in 2007, clarifying the procedures for settling conduct cases and authorising settlement in cartel cases. Pending in the Congress is comprehensive legislation that would change the structure of the BCPS and alter its procedures in several ways. Most of the functions conducted by three agencies that now make up the system would be consolidated into CADE. The terms of CADE's commissioners would be extended from two to four years, without the possibility for reappointment. A new office would be created within CADE to perform the investigative functions now carried out by SDE and SEAE. Premerger notification, requiring the parties to a proposed merger to delay the consummation of their transaction until the completion of CADE's review, would be instituted. Importantly, CADE's resources would be augmented by the creation of 200 new, permanent positions in the agency. This legislation is described in greater detail in Section 4 below.

2.1. Conduct

Articles 20 and 21 of law 8884 deal with all types of anticompetitive conduct other than mergers. Unlike the laws of many other countries, Brazil's law does not contain separate provisions dealing with anticompetitive agreements and single firm abusive conduct.[6] Article 20, the general provision, proscribes

> *...any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved ...*
>
> *I. to limit, restrain or in any way injure open competition or free enterprise;*
>
> *II. to control a relevant market of a certain product of service;*
>
> *III. to increase profits on a discretionary basis; and*
>
> *IV. to abuse one's market control.*

The article specifically excludes from the violation in item II, however, the achievement of market control by means of "competitive efficiency." The article further provides that a dominant position is presumed when "a company or group of companies" controls 20% of a relevant market; the article provides that CADE may change that 20% threshold "for specific sectors of the economy," but CADE has not done so formally to date.

Article 21 contains a lengthy list of acts that are considered violations of Article 20 if they produce the effects enumerated in Article 20, though the list is not exclusive. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Cartels are clearly prohibited. Specifically listed are agreements to fix prices or terms of sale, divide markets, rig bids and limit research and development. Enumerated vertical practices (they could be abusive if imposed unilaterally) include resale price maintenance and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices include various actions to exclude or disadvantage new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels, "unreasonably sell[ing] products below cost" and charging "abusive prices, or unreasonably increas[ing] the price of a product or service."[7]

In addition to these practices, which are commonly considered competition law violations in other countries, Article 21 lists several others that, as described, are less familiar. Some of these are: "to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;" "to retain production or consumer goods, except for ensuring recovery of production costs;" "to abandon or

cause abandonment or destruction of crops or harvests, without ... good cause;" and "to partially or fully discontinue the company's activities without ... good cause." These provisions create the potential for inappropriate application of the law, but this has not happened. CADE's decisions are regularly based upon antitrust concepts now employed in many countries.

The competition law applies to corporations, associations of corporations and individuals.[8] Businesses are subject to fines of between 1 and 30 per cent of their pre-tax total turnover in the year prior to the beginning of the investigation, but no less than the amount of the unlawful gain from the conduct. Managers of companies in violation may be fined between 10 and 50 per cent of their company's fine. Note that the fine is to be calculated as a percentage of the respondent's total revenues, not just those that it derives from the affected or relevant market.[9] Other individuals and organisations not engaged in commerce (such as trade associations), and therefore not generating revenues upon which a fine can be calculated, may be fined between approximately BRL 6,000 and 6,000,000 (currently about USD 3,500 – 3,500,000).

CADE also has other sanctions at its disposal, including powers to prevent a company from participating in public tenders for a period of up to five years, to require the dissolution of a firm or a partial divestiture of assets and to issue remedial orders for the purpose of preventing recurring violations.[10] It can also impose fines for failure to observe one of its orders and for obstruction of an investigation by various means.[11]

Guidelines for the analysis of "restrictive trade practices" are set out in annexes to CADE Resolution 20, issued in 1999. Annex I to the resolution contains definitions and classifications relating to anticompetitive practices. It differentiates between "cartels" and "other [horizontal] agreements." It does not specifically apply a "*per se* rule" to the former, but it implies that a stricter standard applies to cartel conduct. The annex notes that non-cartel agreements may have beneficial, pro-competitive effects, which requires "a more judicious application of the rule of reason." The annex defines "predatory pricing" as "deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels." This definition specifically requires that conditions exist that would permit the recovery of the initial losses after a successful exclusion of competitors from the market. The annex also defines vertical restrictive trade practices, noting that their principal anticompetitive effects can be to exclude rivals or to facilitate downstream or upstream collusion, but also that such practices can benefit competition in certain instances, thus requiring the application of the rule of

reason. It notes that "vertical restrictive practices presume, in general, the existence of market power in the relevant market of origin…"

Annex II outlines "basic criteria for the analysis of restrictive trade practices." It describes a series of steps that are to be followed. They include: definition of the relevant market in both product and geographic dimensions, applying considerations of actual or potential substitution by buyers; developing market shares and measures of concentration, using either or both of the CRx and HHI indices; analysis of barriers to entry; analysis of the competitive effects of the practice; analysis of the economic efficiencies likely to result from the practice; and balancing the efficiencies against the competitive harm from the practice, if necessary.

2.1.1. Cartels

By 2000 the BCPS was beginning to focus on prosecuting cartel conduct. It had completed in 1999 what many considered its first true cartel case, that in the steel industry.[12] In 2000 an amendment to the competition law gave the BCPS two important new powers, the ability to conduct dawn raids and to create a leniency programme.[13] For a few years these new powers were underutilised, however. The BCPS was hobbled by what had been a highly inefficient merger review process. Merger review was slow, even for cases that obviously posed no significant threat to competition, and it occupied too many resources – up to 70% according to some estimates. The BCPS did not have sufficient resources to undertake a vigorous anti-cartel programme, and it also lacked the experience that it needed to use its new investigative tools effectively.

The situation began to change in 2003. The BCPS adopted new procedures that made the merger review process more efficient, freeing resources for anti-cartel work. In that year SDE conducted its first dawn raids and the first leniency agreement was reached. SDE has reconfigured itself to become primarily an anti-cartel unit. In 2007 it established a special group to concentrate on bid rigging and to promote competition in public procurement. In 2009 it created its own computer forensics unit, run by an IT expert and operating sophisticated hardware and software, for the purpose of analysing electronic information obtained in dawn raids and by other means.

In recent years, especially beginning in 2006, the BCPS' anti-cartel programme has grown steadily (see Table 1).

Table 1. The anti-cartel effort: 2003-2009

	2003	2004	2005	2006	2007	2008	2009*
Cartel cases opened**	N/A	N/A	5	4	5	3	14
Dawn raids***	7	4	0	19	84	93	24
Sanctions imposed	5	8	10	5	8	6	3
Fines assessed (USD millions)	418	1 833	0	1	2 495	60 485	61 199

* January through September.
** These numbers represent full investigations, or "administrative proceedings," begun. An administrative proceeding is the third stage in the investigation process at SDE, after "proceedings docketed" and "preliminary investigations."
*** Warrants issued.

2.1.1.1. The leniency programme

Brazil has an active leniency programme, which is generating applications and cases[14]. Its structure resembles those that exist in several other countries. Article 35B of the competition law is the enabling legal authority for leniency agreements. It provides that SDE can enter into agreements with individuals and corporations participating in a cartel that can, depending on the circumstances, either completely excuse the applicant from sanctions or reduce them by one- to two-thirds. The applicant must satisfy the following conditions:

> *(i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully co-operate with the investigation; (v) the co-operation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.*[15]

The degree to which the applicant is excused from sanctions for its cartel activity depends on whether SDE was previously aware of the alleged cartel. Full immunity is available if SDE had no knowledge of the illegal activity; partial leniency of up to two-thirds of the possible fine is available if SDE did have such knowledge. If a fine is imposed, however, it may not

be greater than the lowest fine imposed on any other cartel participant in the case. An agreement with a corporation can be extended to its officers and employees if they also sign the agreement and observe the other conditions described above. A grant of leniency under this programme also excuses the applicant from criminal prosecution for the same conduct under the Federal Economic Crimes Law.[16] It does not address other criminal laws, such as racketeering and fraud, that might apply to this conduct, however, nor does it excuse the applicant from possible liability for damages in a private lawsuit.[17]

Article 35 also provides for "leniency plus," which also is a part of leniency programmes in other countries. An applicant who does not qualify for leniency in one cartel but who discloses to SDE the existence of a second is eligible to receive full leniency for the second cartel and a reduction of up to one-third of the applicable penalty in the first. Finally, while SDE, the principal investigating body in conduct cases within the BCPS, has authority to enter into a leniency agreement on its own, it is up to CADE to make the final decision on the sanction, either excusing the applicant from all sanctions or reducing the amount of the fine, depending on whether SDE had prior knowledge of the conduct.

The BCPS continues to update its leniency programme. Brazil's programme, like that of some other countries, offers leniency only to the first participant in a cartel to come forward. This can have a strong destabilising effect on a cartel, creating an incentive among the participants to be the first to apply, especially in situations in which there is a new-found fear that the cartel may be discovered. An applicant may not have sufficient information to fully qualify for leniency at the time it first comes forward, however. In 2006 the BCPS created a "marker system", again like that found in other countries, pursuant to which an applicant can assure its place in the leniency queue simply by making an initial, informal application to SDE, supplying certain basic information.[18] It must perfect its application by supplying more detailed information within 30 days, and it must negotiate a final leniency agreement within six months.[19] In 2008 SDE published a *Model Annotated Leniency Agreement* and *Leniency Policy Interpretation Guidelines* and the BCPS published a full colour booklet for public consumption, *Fighting Cartels: Brazil's Leniency Programme*.[20]

Between 2003 and 2009 SDE entered into 15 leniency agreements, and others were being negotiated. Approximately 60% of these agreements were with parties to international cartels, in situations in which the participants had entered into leniency agreements in other countries. Still, there were also some prosecutions of domestic cartels resulting from leniency agreements. Perhaps the most notable of these was a cartel of providers of security guard services, described below. SDE has been especially proactive

in promoting the leniency programme. It sent a letter to 1,000 businesses in Brazil informing them of the programme, which caused several companies to come forward to discuss their eligibility. It also conducted a "roadshow," in which it held meetings with international law firms with offices in Washington and Brussels informing them of the liability, including possible criminal prosecution, facing foreign executives who engage in cartel conduct that affects Brazilian commerce.

2.1.1.2. Settlement of cartel cases

Article 53 of the competition law permits CADE to reach settlement agreements with respondents in conduct cases, but cartel cases had been specifically excluded by law from those procedures. That changed with a 2007 amendment to the competition law.[21] A respondent can propose a settlement at any time in the process, whether the investigation is in SDE or at CADE. CADE has sole responsibility for settlement negotiations, however, but SDE can make recommendations to CADE on settlement terms. In 2009 CADE created a special unit whose members handle all settlement negotiations.[22] In a case with multiple respondents, a single respondent can settle, while the case continues against the others.

Respondents have only one opportunity to settle. Agreement must be reached within 30 days of initiation of negotiations, with the opportunity for one extension of 30 days. Settlements can be reached either with an admission of guilt or without (*nolo contendere)*, at CADE's discretion, but if the case was initiated through a leniency agreement the respondent must admit guilt. The agreement will contain the amount of the monetary penalty, which must not be lower than the minimum fine fixed by the competition law (1% of the respondent company's total revenues for the prior year). The agreement may also require other actions by the respondent, such as necessary steps to end the alleged violation or a compliance programme. A settlement extends only to administrative liability. A non-leniency respondent must deal with federal and state prosecutors on a case-by-case basis.

To date, settlement agreements have been reached in five cartel cases. Three were recent, one involving an international cartel in marine hoses, a second in an international cartel in compressors and a third involving driving schools. In 2007 CADE settled with two companies, also operating internationally, in separate cases in the cement and beef industries.

2.1.1.3. Criminal prosecution of cartel conduct

In a few short years Brazil has developed a programme for criminally prosecuting cartels that places it as one of the most active of all countries in this area. Violation of the competition law is an administrative offence, but cartel conduct is also a violation of the federal Economic Crimes Law.[23] Article 4 II of that law prohibits as a crime: "agreements among competitors designed to fix prices or quantities, divide markets, or control supply or distribution channels."[24] The law applies only to individuals and not to corporations. Violations are punishable by a fine and imprisonment of two to five years. The BCPS does not have authority to enforce the Economic Crimes Law. That falls to federal and state prosecutors (there are 26 states and a Federal District in Brazil). While the Economic Crimes Law is a federal statute, state prosecutors also have jurisdiction to enforce it.

Data on criminal prosecutions of cartels are unfortunately incomplete. The BCPS reports, however, that since the initiative began 34 individuals have been criminally convicted. Most of these were participants in local or regional conspiracies, including particularly retail fuel cartels. Of these, ten received jail sentences, but none of those sentences have been served to date, as all of the cases are on appeal. The BCPS also states that as of late 2009, approximately 100 executives were formally charged with a crime or were under investigation for criminal cartel activity.

The BCPS and federal and state law enforcement officials enjoy close working relationships. A 2002 law allows federal police to assist the BCPS in cartel investigations when the conduct has interstate or international effects.[25] SDE and the Department of Federal Police have entered into a formal co-operation agreement, most recently renewed in 2008. The agreement provides for an exchange of information and technical assistance. It creates a Working Group comprising two representatives from each party, whose responsibilities are: "(i) co-ordinating the exchange of information, documents and expertise between the Parties and (ii) setting up a Cartel Investigation Centre which shall use the synergies of the work done regarding anticompetitive conduct..." The police actively assist SDE in its cartel investigations, particularly in conducting dawn raids.

One interesting effect of this co-operation results from the fact that Brazilian criminal law authorises the temporary jailing of individuals (for up to five days, with the possibility for a five day extension) at the time of a search or dawn raid of their premises, for the purpose of preventing the destruction of or tampering with evidence. The BCPS reports that in 2007 30 individuals were jailed in cartel investigations under this provision and the number rose to 53 in 2008. In one case in 2007, involving a suspected retail fuel cartel in Belo Horizonte, Brazil's third largest metropolitan area,

250 police and BCPS officers participated in dawn raids on 42 companies. Twenty-three individuals were temporarily detained. This power is exercised pursuant to court orders sought by the prosecutor. SDE can suggest that the prosecutor seek such orders, but SDE seldom does so in its investigations. It is more likely to be employed by prosecutors in cases that they initiate independently, described below.

SDE and federal and state prosecutors co-operate closely. When SDE initiates a cartel investigation it routinely asks prosecutors to begin a parallel criminal investigation. Prosecutors are also invited to sign leniency agreements, thereby ensuring that the applicant will not be subject to parallel criminal prosecution. In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the SDE in joint criminal and administrative investigations. This arrangement became a template for co-operation between SDE and other state prosecutors. There are now agreements between SDE and state prosecutors in 23 states. These arrangements culminated in the "National Anti-cartel Strategy (Estratégia Nacional de Combate a Cartéis – ENACC)," adopted in October 2009 as a part of the second national Anti-Cartel Enforcement Day. Two hundred prosecutors and police officers from different Brazilian states gathered to discuss to the implementation of the country's criminal anti-cartel laws. At the end of the event the principal authorities signed the "Brasilia Declaration," dedicated to re-affirming and enhancing the co-operation among these authorities in the anti-cartel programme.

Federal and state prosecutors can initiate competition cases under the Economic Crimes Law independently of the BCPS. While data describing these cases are not readily available, it seems that this practice is fairly common. Prosecutors are not required to notify the BCPS when they begin such cases, but there are increasing efforts to enhance co-ordination between the agencies in these cases through ENACC, described above.

2.1.1.4. Competition advocacy in cartels

The BCPS has been especially active in creating public awareness of its anti-cartel programme. In addition to the full colour booklet published on the leniency programme, noted above, SDE published similar booklets in 2008 and 2009 on "Fighting Bid-rigging," "Fighting Cartels in Trade Associations" and "Fighting Cartels in the Fuel Retail Sector." It commissioned a comic book for children, featuring the characters from the country's most popular comic book series, telling the story of a cartel among lemonade stands.

Box 1. Recent Significant Cartel Cases

2009: Compressors used in refrigeration[26]

This recent case, which involves an alleged international cartel, was initiated as the result of a leniency agreement with SDE. Thereafter there were simultaneous dawn raids conducted in Brazil, the United States and Europe of suspected cartel participants. More than 60 officers from SDE, the federal police, and federal prosecutors conducted the operation in Brazil. Observers considered the case a milestone in the Brazilian anti-cartel effort. One Brazilian commentator noted: "It was the first time Brazilian antitrust authorities played a major role in an international cartel investigation and possibly the dawn of a new era in global anti-cartel enforcement, but it was also the culmination of a process of steady evolution of antitrust enforcement in the country."[27]

Three Brazilian subsidiaries of the U.S. appliance maker Whirlpool reached a settlement agreement with CADE under which the company would pay a fine of BRL 100 million (about USD 58.7 million) and six executives would pay fines totalling BRL 3 million (USD 1.8 million). These were the largest fines assessed and paid to date in a cartel case. While the respondents admitted guilt as a result of the agreement, the settlement did not require them to further co-operate in the investigation, a fact that drew criticism from some quarters.[28] CADE responds that the BCPS was already in possession of a great deal of evidence concerning the cartel and therefore the possible additional co-operation by the respondents was considered marginal. It opted instead to seek to maximise the fine, for its deterrent effect. The case against other respondents continues.

2008: Sand for construction[29]

CADE found that four companies engaged in the mining of sand used in construction in the State of Rio Grande do Sul had engaged in a price fixing cartel. Together they had hired a consulting firm to conduct comparative studies on pricing by the parties. It analysed such factors as the distances between the companies' mines and their warehouses (transportation being an important component of the cost of this bulk product), and then recommended prices for each that would minimise the migration of customers among them. Evidence of agreement among the respondents was provided by internal documents, telephone records and oral testimony.

CADE imposed fines of between 10% and 22.5% of 2005 revenues on the four companies, including the consulting firm.

2007: Security guard services[30]

CADE concluded that 16 corporations, three trade associations and 18 individuals had participated in a long-running bid rigging scheme in the market for provision of security guard services in the state of Rio Grande do Sul. This prosecution resulted from the first leniency agreement entered into by SDE. The evidence of wrongdoing included that supplied by the leniency applicant as well as audio records of telephone conversations and documents collected in dawn raids. The evidence showed that since 1990 the companies had engaged in concerted practices, dividing contracts among themselves and adopting predatory pricing schemes to punish firms that deviated from the cartel rules.

The parties held regular meetings at a trade association's headquarters, in restaurants and even at barbecue parties in order to organise the outcomes of bids for public tenders. The bid-rigging participants attempted to manipulate the requirements that a company had to meet in order to qualify to participate in public tenders. The trade associations and the security guards' labour union collaborated by notifying government officials of labour irregularities in companies that were not part of the cartel.

CADE imposed a fine of 15% of the companies' gross revenues for the year 2002 plus an increase of 5% for the leaders. The managers were fined 15% to 20% of their company's penalty. The fines totalled BRL 40 million (USD 23 million). In addition, the companies were prohibited from participating in government tenders and from engaging in contracts with official financial institutions for a period of five years. This was the first case in which that sanction was imposed.

2005: Crushed rock [31]

This case involved an alleged cartel involving crushed rock, an essential raw material used in civil construction. The respondents included a trade association and 21 member companies, which together controlled about 70% of the crushed rock produced in the State of Sao Paulo. Pursuant to an anonymous tip, SDE carried out a dawn raid of the premises of the trade association in 2003, which was its first under the 2000 amendments to the competition law. The raid was highly productive. It produced documents showing that the respondents regularly met at the association's office, where they maintained pricing data and daily sales data on a computer; in their meetings they set prices, allocated customers, rigged bids on public tenders and created sophisticated enforcement mechanisms that punished members who deviated from the agreement.

The language in some of the documents was especially colourful. The members of the association called themselves "The Group." The Group established a formal mission, part of which was to "organise the market." The participants agreed to "respect [one another's] customers." The Group articulated its "values," which were "integrity, trust, respect and harmony." The cartel set forth specific pricing targets, which were achieved. Prices had steadily declined in the late 1990s until the cartel was formed in 1999. An analysis of prices by SDE showed that by 2001 they had risen by about one-third.

Upon the conclusion of the investigation SDE recommended to CADE that it find the trade association and 18 companies guilty of collusion. CADE did so, fining the companies between 15 to 20% of their total 2001 revenues. There was close co-operation between the BCPS and public prosecutors throughout the case, which led to the institution of criminal proceedings against some individuals. The criminal cases were all settled with the payment of fines.

Some of the respondents in the BCPS proceeding appealed CADE's decision to the courts. CADE's decision has so far been upheld in the lower courts, but the appeals process has still not been concluded.

SDE also created, in March 2008, an e-tool called "Click here to report a violation," permitting Brazilians to provide confidential tips on suspected cartel activity on SDE's website. More than 300 tips were received through September 2009, about 70% of which were cartel related. In 2008, a Presidential Decree created an Anti-Cartel Enforcement Day in Brazil to be celebrated on October 8th, the day on which the first leniency agreement was executed in 2003. On that day a campaign was conducted in seven major airports of the country, where 450,000 brochures and other materials were distributed. The second Anti-Cartel Enforcement Day was attended by several senior officials from the Brazilian government, including the President and Vice President, and senior enforcement officials from the United States, the European Commission and Portugal, and featured the gathering of federal and state prosecutors described above.

In July 2009 SDE and the OECD collaborated in a programme called Fighting Bid Rigging in Public Procurement, which took place in five cities. In each city there were two training sessions on detecting and prosecuting bid rigging, one for procurement officials and another for criminal investigators. More than 600 trainees attended. As a part of the bid rigging initiative SDE released its Guidelines for the Analysis of Complaints Involving Public Procurement,[32] describing SDE's methodology for analysing bid rigging and related conduct. SDE has signed co-operation agreements with three other government agencies – the Brazilian Federal Court of Auditors and the Office of the Comptroller General, which conduct audits of government contracts, and the Public Expense Observatory, which focuses on fraud and corruption in government – for the purpose of expanding the anti-bid rigging programme. Finally, at SDE's behest the Brazilian Ministry of Planning issued in September 2009 a regulation requiring participants in federal public tenders to present a Certificate of Independent Bid Determination (CIBD), stating that they have not engaged in bid rigging. The CIBD was based on a model produced by SDE with assistance from the OECD[33].

2.1.1.5. The anti-cartel programme and the business community

The BCPS' new emphasis on prosecuting cartels has gained the attention of the business community, especially larger businesses and the corporate bar. Business executives are aware of their potential liability for criminal sanctions, including jail, if they participate in cartels. The potential for large fines for businesses is a driving force in the growing number of leniency applications. Another is the possibility that a contractor could be prohibited from doing business with the government if convicted of cartel conduct.

SDE is praised for its aggressiveness, though some practitioners feel that on occasion it is too aggressive. Practitioners are critical of the use of temporary imprisonment at the beginning of an investigation, described above, but as noted above this remedy is rarely used in SDE investigations. There is criticism of the delays between the opening of a case at SDE, often by conducting dawn raids, and its conclusion. SDE, it is sometimes said, is better at beginning cases than concluding them. SDE is addressing the problem, as discussed below in Section 3.2. It is recognised by all that fundamentally the problem is one of lack of resources at SDE.

Litigation initiated by businesses themselves is another important source of delay, however. In recent years, subjects of investigations have increasingly sought to block investigations in court, on procedural grounds. Businesses also understand that they can delay for a significant time the final imposition of sanctions in a cartel case by appealing CADE's decision to the courts. As discussed in Section 3.7 below, many of the fines assessed by CADE have not been paid because the cases are on appeal. Still, businesses, especially those operating internationally, are increasingly willing to discuss settlement with CADE, principally in order to resolve a case completely and to remove uncertainty. It is said that individuals are still reluctant to consider settlement with CADE, however, because of the potential criminal liability that they face. As noted above, there seems to be increasing co-ordination between SDE and prosecutors for the purpose of removing this uncertainty, at least in the leniency programme.

2.1.2. Non-cartel horizontal agreements

The BCPS has considered relatively few non-cartel horizontal agreements. This is due in part to the fact that it classifies as cartels some cases that might be considered as non-cartel cases. As noted above, the *per se* rule is not applicable in Brazil. Thus, in all cases some degree of market power must be shown to exist, though in true cartel cases it seems that only a minimal showing is required.

The BCPS has long been active in health care, where there is an active private sector that supplements the public health service. In 2006 CADE considered four cases involving the issuance of suggested price schedules by associations of health care professionals. One of these was effectively a cartel. A group of anaesthesiologists in the State of Bahia published a schedule that effectively raised their fees to insurers. When an insurer protested, two co-operatives simultaneously cancelled their existing agreements by means of identical letters prepared on the same typewriter. CADE fined the co-operatives a total of USD 94,000.[34]

SDE has been investigating the use of exclusive arrangements between Visa and its processing network. Originally the major banks maintained their own credit card networks, which eventually evolved into two separate but exclusive networks, one each for Visa and MasterCard. Banks are effectively required to belong to both, as are merchants. As a part of the BCPS' competition advocacy mandate SEAE and SDE, along with the Central Bank, had submitted proposals for reform in the industry, which included eliminating the exclusivity requirements. Recently MasterCard did so, and in December 2009, CADE reached a settlement agreement with Visa in which Visa agreed to lift its exclusivity constraints.

2.1.3. Vertical agreements

The BCPS prosecutes very few vertical restraints that are not also considered abuses of dominance. One of these, however, decided in 2008, involved exclusivity agreements between Odebrecht, a construction company, and four major suppliers of hydroelectric turbines, General Electric, Alsthom, Siemens and Voith Madeira, that prohibited the turbine companies from participating with other consortia in bidding on a BRL 20 billion hydroelectric concession agreement. After an investigation SDE entered an interim order suspending these arrangements. Odebrecht challenged the order in court, but before a decision was reached it negotiated a settlement with CADE that resulted in the cancellation of the exclusivity agreements. Odebrecht ultimately won the auction, but because CADE's order permitted other bidders to participate, the contract price was significantly lower than it would otherwise have been. The final price was substantially lower than the reserve price, and it was estimated that the total savings for Brazilian consumers over the 30-year life of the concession were approximately BRL 16.4 billion (USD 9.4 billion).

2.1.4. Abuse of dominance

The BCPS regularly considers complaints of abuse of dominance complaints lodged by private parties. A significant number of these are ultimately dismissed as non-meritorious. SDE also regularly initiates dominance investigations *ex officio*. The data in the following table relate to cases that reach the full investigation stage.

Several of BCPS' dominance cases have involved Unimed, a physicians' co-op and one of the largest health insurance companies in Brazil. There are Unimed affiliates in almost every city or district in the country. The affiliates, which act independently, contract with local physicians and hospitals for the provision of health care services, and often

these arrangements are exclusive, that is, the providers are not permitted to affiliate with any other plan. It is common that more than 50% of the physicians in a community affiliate with Unimed. The BCPS analyses these arrangements on a city-by-city basis, and where the market share is high CADE forbids the exclusivity arrangements. Between 1994 and 2008 CADE had considered more than 60 of these cases. A second type of dominance case that is fairly common involves sham litigation – the institution of allegedly frivolous lawsuits for the purpose of excluding competitors. In the period 2005-08 SDE initiated a total of nine such investigations in various sectors, including pharmaceuticals and auto parts. All are still under consideration within the BCPS.

Table 2. Abuse of dominance cases

	2005	2006	2007	2008	2009*
Cases opened**	18	13	11	15	22
Violations found	19	3	17	11	7
Fines imposed (USD millions)	0	0	0	0	***205.6

* January through September.
** Administrative proceedings.
*** In one case, AmBev, described below (see Box 2).

Abusive or excessive pricing is considered an abuse of dominance and a violation of Article 20 of the competition law. A special provision of Article 30 of the competition law requires SDE to begin an administrative proceeding (bypassing the preliminary inquiry stage) whenever it is requested to do so by either house of Congress. Congress has regularly made such requests involving possible abusive pricing of pharmaceuticals. Early in the decade SDE opened dozens of these investigations, but they languished in SDE for some time. SDE has made a concerted effort to eliminate this backlog, with the result that in the period 2005-08 CADE considered 55 administrative proceedings of this nature (not shown in the table above). SDE and CADE emphasise applying an economic approach to these cases, and in none of them has CADE found a violation. Indeed, CADE has never found conduct to be an abuse of dominance on the basis of abusive pricing.

In recent years CADE has decided two cases that involved "radius clauses" imposed by large shopping centres on their tenants forbidding the tenant from locating a store within a specified distance from the shopping centre. In both cases the restraint was held to be unlawful and the respondent was required to terminate the clause. The cases tended to turn on market definition, as do many dominance cases. Thus, in one, the relevant market

was determined to be "high luxury regional shopping centres" in certain sectors of Sao Paulo. CADE's decisions in both cases were appeal to the courts. Lower level courts have upheld CADE, but the appeals continue.[35]

Box 2. AmBev

The BCPS has a long and interesting history with AmBev, the country's largest beer producer. AmBev is the product of a merger in 2000 of what were then Brazil's two largest brewers, Brahma and Antarctica, which controlled approximately 50% and 25%, respectively, of the sales of beer nationally. The merger attracted a great deal of interest. The transaction clearly presented significant competitive problems. There were disagreements within the BCPS on the appropriate remedy. CADE ultimately decided to require the divestiture of one of the lesser brands controlled by the two firms, together with other behavioural remedies designed to promote new entry or expansion by smaller brands. There was some entry, and follow-up studies after the merger suggested that prices did indeed decline, at least in the short run, but AmBev continues to control about 70% of the Brazilian beer market. In recent years AmBev affiliated by merger with several other international brewers (including the largest brewer in Argentina), and today it is a subsidiary of Anheuser-Busch InBev, headquartered in Belgium, the largest brewer in the world.

In 2004 SDE initiated administrative proceedings against AmBev relating to a loyalty programme that it had instituted. The programme awarded points to retail establishments based upon their purchases of AmBev beers, which could be exchanged for gifts. On its face the programme was not exclusionary, but the investigation, which included an inspection that produced important documentary evidence, revealed that in practice AmBev was effectively requiring the retailers to purchase its beers exclusively in order to participate in the programme. In 2009 CADE determined that the conduct was an abuse of dominance; it ordered AmBev to terminate the programme and fined the company 2% of its total 2002 revenues in Brazil. The fine, approximately BRL 353 million (USD 206 million), was the largest ever imposed by CADE.

CADE is currently considering a second case against AmBev. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have been a standard size (600 ML), allowing the country's brewers to co-ordinate their recycling (for re-use) programmes. AmBev recently introduced a 630ML bottle, which its smaller competitors claim will raise their costs of recycling. SDE issued an interim order prohibiting AmBev from introducing the new bottle while the case continued. AmBev appealed that order to CADE, which is permissible under the competition law (see Section 3.2 below). CADE partially lifted the order, restricting the geographic area within which AmBev can introduce the bottle and requiring it to create a temporary exchange programme under which AmBev will absorb most of the additional costs. A final decision in the case has not yet been made.

CADE decided four cases in some part of the telecommunications sector in the 2005-09 period. One involved an arrangement between Telemar, a provider of fixed line services, and a telephone directory publishing company. The complainant was an independent directory publisher that had previously enjoyed the same contractual relationship with Telemar. CADE concluded that the new arrangement was simply the result of competition for the market and was not itself anticompetitive. CADE worried that a continuation of the arrangement could result in domination by the new entrant, however, and recommended to SDE that it study in a broader way the relationship between telephone service suppliers and directory publishers.

In two other cases involving Telesp, a fixed line provider in the State of Sao Paulo, CADE found that Telesp had discriminated against an Internet provider and a long distance provider in the terms of access to its network, and ordered that it provide access on a non-discriminatory basis. The fourth telecommunications case involved Globosat, a television programming provider, which had exclusive arrangements with the most attractive sporting events, the most significant of which were football championships. Globosat is affiliated with Globo Group, the largest media group in Brazil, which provides broadcasting, cable and satellite television services. CADE found that the arrangements harmed competition in the market for sports network broadcasting (the upstream market) and in the provision of retail satellite television (the downstream market). Under the settlement with CADE, Globosat was required to relinquish its exclusive rights to some of the events, including the football championships, for a period of three years and to end its exclusive arrangements with the Sport TV channel, the most important sports channel in Brazil.

2.2. Mergers

2.2.1. Substantive rules

The controlling provision in law 8884 relating to mergers is in Article 54:

> *Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.*

This language would appear to include all agreements, not just mergers. In 2001 SEAE and SDE jointly issued a set of merger guidelines, which by their terms apply only to horizontal mergers. The guidelines confirm, however, that Article 54 "also applies to the control of other transactions that may limit or otherwise harm free competition, or result in the

domination of relevant goods and services markets, such as horizontal agreements among competitors." The very great majority of notifications submitted, however, have involved mergers.

Article 54 does not contain language specifically setting forth the substantive standard to be employed in reviewing mergers. Paragraph 1 of the article, however, provides that a merger that has the four following attributes may be approved:

1. the transaction "increase[s] productivity; improve[s] the quality of a product or service; [and] cause[s] an increased efficiency, as well as foster[s] technological or economical development;"
2. the resulting benefits of the transaction are "ratably [equitably] allocated" between the merging parties and consumers;
3. the transaction does not eliminate competition in "a substantial portion of the relevant market for a product or service;"
4. the transaction is limited to acts that are necessary to obtain these beneficial effects.

This language could be interpreted to place the burden on the merging parties of showing that their transaction is economically beneficial. In practice, however, CADE has not imposed such a requirement, intervening only when it concludes that on balance there would be a significant lessening of competition. This paragraph is considered to provide an efficiencies defence, to be applied only in the case of mergers that are otherwise anticompetitive.

Paragraph 2 of Article 54 contains a special provision that permits mergers to be approved that satisfy only three of the four attributes enumerated in Paragraph 1 and that are "in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers." Such a provision is found in some form in the merger control laws of several countries, permitting the approval of otherwise anticompetitive mergers that present issues of overriding national interest. To date, however, no merger in Brazil has been approved specifically under this provision.

The SEAE/SDE merger guidelines employ traditional merger analysis. They describe five steps in the process: (1) defining the relevant product and geographic markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.

The first step, market definition, uses methodology for defining the relevant product and geographic markets that is mostly based on substitution by consumers in response to hypothetical changes in price.[36] In step two the guidelines describe threshold levels of market concentration that raise concerns about the possible exercise of market power in either of two ways: by a single firm unilaterally, when that firm has a market share of at least 20%; or through co-ordination of firms in a market in which the four-firm concentration ratio is at least 75% and the resulting firm has a market share of at least 10%. If the market concentration exceeds either of those levels, SEAE will proceed to step three, consideration of market conditions relating to the likely exercise of market power. These conditions include the opportunity for increased imports, conditions of entry, and other factors that may affect rivalry. If after completing step three SEAE continues to have concerns about the competitive effects of a transaction, the analysis proceeds to the consideration of efficiencies that the merger may generate, and ultimately to an evaluation of the net economic effect of the transaction.

The guidelines do not explicitly employ the Herfindahl-Hirschman Index (HHI) as a measure of concentration. CADE and SEAE state that they do use it, however, as a matter of course. The guidelines also do not refer to the failing firm defence, but CADE has also considered it in a few cases, usually rejecting it. Finally, while CADE has not formally adopted the SEAE/SDE guidelines, it treats them as non-binding guidance, and their provisions are often cited in CADE's decisions. Two new sets of guidelines, for horizontal and vertical mergers, are under discussion in the BCPS, and they are expected to be approved in 2010.

2.2.2. Notification

Proposed mergers that meet certain minimum size thresholds must be notified to the BCPS. Applicants must also pay a notification fee of BRL 45,000 (USD 26,000). The fees are shared equally between CADE, SDE and SEAE.

Paragraph 3 of Article 54 sets out the notification thresholds. Mergers must be notified that satisfy either of two tests: the resulting company or group of companies "accounts for twenty per cent (20%) of a relevant market," or the transaction "results in gross revenue of BRL 400,000,000" (USD 232 million).[37] These criteria have been subject to three criticisms: (1) the revenue threshold seemed to apply to worldwide turnover, giving rise to the possibility that a merger having minimal impact on Brazilian markets would have to be notified. (2) Since it was only necessary that the resulting firm have the requisite market share or total revenues, even very small acquisitions by large firms that already met one of those criteria would have to be notified. (3) The 20% market share

test introduces a subjective element into the notification obligation: market definition. The parties and CADE could disagree in good faith about the definition of the relevant market for this purpose, giving rise to uncertainty about whether a transaction must be notified.

In 2005 CADE effectively eliminated the first problem, decreeing that the 400 million threshold would apply only to revenues derived in Brazil.[38] It is still the case that a small acquisition by a firm with revenues already above 400 million must be notified, but these transactions are usually subject to the BCPS' "fast track" procedures, described below, which result in quick approval. The applicability of the market share criterion also has been administratively modified by CADE, which has decreed that it applies only if the transaction causes the share of the resulting firm to exceed 20% or if both parties to a merger operate in the same market and one of them has a 20% share of that market. The third criticism, that the market share test is too subjective, remains, but this effect too has been blunted over time. The number of notifications in which the market share test is met but not the revenue test are few. CADE seldom initiates an enforcement action for failure to notify under the market share criterion.

An important and, many say, notorious feature of the merger notification regime in Brazil is that the notification, while mandatory, need not be made premerger; that is, the parties are not forbidden from consummating their transaction before or during the review of the transaction by the BCPS. (As described fully in Section 4 below, the pending legislation in Congress would impose premerger notification and it would remedy the notification threshold problems described above.) Paragraph 4 of Article 54 requires that the notification must be made "no later than fifteen business days after the occurrence [of the transaction] (emphasis added)." CADE's internal rules[39] further define the date on which the 15 day period begins to run as the date on which "the first binding document [is] settled by the Applicants".

This lack of premerger notification has important ramifications for both the procedure and substance of merger review in Brazil. A procedural effect is to lengthen the review process. The BCPS is subject to no formal deadline by which its decision must be made. Also, because the merging parties are permitted to consummate their transaction before the review is completed (absent a preliminary order, discussed below), they lack incentive to speed the process. One result of that is that the parties may be less responsive to requests from the BCPS for information. SEAE, which conducts the principal investigation of notified mergers, complains of this sluggishness in some cases.

Substantively, consummation of the transaction may affect the remedies that are available to CADE should it find the merger unlawful. Specifically,

CADE's ability to prohibit a transaction entirely is complicated by having to undo a consummated merger, a notoriously difficult task. Since 2004, a total of three mergers have been completely disapproved by CADE. CADE does not point to the lack of premerger notification as the primary reason for the small number of disapprovals, however. It says that where possible it prefers to fashion remedies that would permit the underlying transaction to go forward, preserving the efficiencies and scale economies that it says are important to Brazil's economy.

In any case, these infirmities have been at least partially resolved by CADE's use of preliminary orders requiring the parties to adopt certain measures to preserve CADE's ability to order effective relief if the merger turns out to be unlawful. CADE has the power to issue a "precautionary order" for this purpose, authorised in CADE Resolution 45.[40] The procedures relating to the issuance of these orders are essentially adversarial, however, and CADE's order can be appealed to the courts. In the period 2005-09 it issued 11 preliminary orders in mergers.

CADE can also enter into consent orders to the same effect, which it is using more frequently. Resolution 45 created a mechanism termed "Agreement to Preserve Reversibility of Transaction" ("Acordo de Preservação de Reversibilidade da Operação" or APRO). In the years 2007-09 CADE issued 10 APROs. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company's freedom to integrate activities, close stores or plants, dismiss workers, terminate brands or product lines, alter marketing, investment, or research plans, or liquidate assets. Both preventive orders and APROs include provisions that specify fines for failure to comply with the restrictions imposed.

The lack of premerger notification has had one other effect on the BCPS merger regime. Because a merger may be consummated before CADE's review is complete, it is in CADE's interest to learn of the transaction as quickly as possible, both to minimise the anticompetitive effects if the merger is harmful and to preserve CADE's ability to order effective relief, should it be necessary. As noted above, CADE's rules define the date that begins the 15 day period within which a merger must be notified, known as the "trigger date." In years past CADE had aggressively interpreted this definition of the trigger date and had instituted a large number of cases seeking fines for failure to make timely notification. (Article 54(5) provides that CADE may levy fines of between BRL 6,000 and 6,000,000 for failure to make a timely merger notification.)[41] That number has dropped since the late 1990s, as both the BCPS and the private sector gain experience in interpreting these provisions.[42] Still, the number of these cases is high by most standards, as reflected in Table 3 below.

Table 3. Mergers between 2004 and 2009

	2004	2005	2006	2007	2008	2009*
Mergers notified	516	386	411	591	616	306
Approved	574	345	352	490	550	364
Cleared with restraints	43	37	20	37	58	19
Denied	1	0	0	0	1	1
Settled	0	3	1	4	8	3
% of total requiring remedies	7.2	9.7	5.4	7.0	9.7	5.2
Non-timely notification cases opened	18	8	13	24	20	13

* January to September

2.2.3. The merger caseload in the BCPS

These data show a decline in the number of mergers notified in 2005 and 2006 from the 2004 level. Much of this decline was due to the decision by CADE to apply the 400 million revenue threshold to Brazilian revenues only. In 2007 CADE issued other rulings that clarified the need to notify in certain specific situations.[43] The number of notifications rose again in 2007 and 2008, however. The increase is ascribed to a strengthening of the Brazilian economy in those years and to currency fluctuations that favoured merger activity involving Brazilian firms. The drop in 2009 reflects economic reversals in Brazil and worldwide.

The proportion of notified transactions that require some remedy ranges between 5 and 10 per cent, generally within the range experienced in most countries. Still, the number in some years seems high – as many as 58. A principal reason for this is the relatively high number of mergers that involve non-compete clauses – arrangements in partial acquisitions in which the selling party agrees not to compete with the acquirer in the affected market for a period of time. The BCPS regularly finds these clauses to be too restrictive and orders them to be eliminated or scaled back. Transactions involving non-compete clauses accounted from 40% to 78% of the total in which remedies were imposed.[44]

Another feature of merger review by the BCPS is the relatively high number of transactions in which behavioural remedies – orders requiring the merged entity to provide access to its distribution network, or requiring transparency in pricing, for example – are imposed, as opposed to structural remedies – divestitures of assets or, less frequently, outright denial of the transaction. Table 4 shows the distribution of these two types of remedies for 2007 and 2008. These data do not include orders involving non-compete clauses. Also, it should be noted that in some cases both types of remedies were imposed; those cases are represented twice.

Table 4. Distribution of behavioural and structural remedies, 2007-2008

	2007	2008	Total
Behavioural	8	10	18
Structural	4	8	12

It seems inevitable that behavioural remedies are one result of the BCPS' having to deal with mergers *ex post*. CADE says that it has a preference for structural remedies, but that it is also conscious of the need to preserve the efficiencies that a merger generates, which might not be possible with a structural remedy. In a recent railroad merger, for example, the parties' systems did not directly overlap, but CADE concluded that the transaction would eliminate competition in the transportation of soya, one of Brazil's principal agricultural exports, from western Brazil to alternative ports in Sao Paulo and Santa Catarina. Moreover, one of the merging parties was vertically integrated into soy production, and the transaction could have led to discrimination by the merged company against non-integrated producers. CADE also identified significant efficiencies resulting from the merger, however, that could significantly reduce shippers' costs. CADE and the parties entered into a consent agreement that did not require any asset divestitures but did impose behavioural remedies forbidding discrimination by the merged entity and including certain pricing and service constraints for the purpose of ensuring that the benefits would be passed on to consumers.[45]

Also notable is the use of a mechanism for settling merger cases. Article 58 of the competition law authorises CADE to enter into "Performance Agreements" (TCD), which are agreements with parties on remedies in mergers considered to be anticompetitive. TCDs may contain both structural and behavioural remedies. They have required such actions as divestitures of physical assets or of intellectual property, such as brand names, compliance with performance and / or investment targets, the provision or supply of goods or services to customers or other parties for a specified period, elimination of exclusivity agreements and maintenance of employment levels. CADE's use of TCDs was common in the late 1990s but dropped off between 2000 and 2004. It has picked up again since 2005, as shown above in Table 3.

Box 3. Recent significant merger cases

2009: Ready to drink tea[46]

Coca-Cola agreed with Leão Junior SA, a Brazilian company, to acquire the latter's business in the manufacture and sale of ready-to-drink tea ("mate") and iced tea. Coca-Cola already sold these products in Brazil under the Nestea brand pursuant to a joint venture with Nestle, the owner of the brand. CADE and Coca-Cola negotiated an APRO requiring Coca-Cola to preserve the assets and management of the acquired company while the investigation continued. The transaction was opposed by Coca-Cola's rival, Pepsi-Cola, which also sold these products under its Lipton brand, and by the Brazilian Association of Soft Drink Producers. The case turned on the definition of the relevant product market. Coca-Cola argued that there was a market consisting of virtually all non-alcoholic drinks, including mate, in which Leão was strongest, but not including iced tea, in which Coca-Cola was strongest.

SEAE requested econometric studies from both Coca-Cola and Pepsi-Cola on the substitutability of mate and iced tea. The studies produced conflicting results. Also at issue was whether a tea made from guaraná, a Brazilian berry that is used to make locally popular soft drinks, was also in the relevant product market. It was argued that mate and the guaraná tea were substitutable on both the demand and supply sides. There was some persuasive evidence of supply side substitutability between these two products.

In the end, however, after considering both quantitative and qualitative evidence on the issue CADE determined that the relevant market consisted of the two types of tea and that the merger would be anticompetitive. It permitted the acquisition subject to a requirement that Coca-Cola divest its Nestea operations.

2009: Magazine distribution[47]

The relevant market in this case involved the national distribution of magazines. Some magazine publishers distributed their publications directly to consumers ("direct distribution"). Others used intermediary distributors, who dealt with retail establishments ("indirect distribution"). The merger did not create a problem in direct distribution, but in the national market for indirect distribution it created a monopoly. One of the parties, Abril, was the country's largest magazine publisher, controlling about 60% of that sector, and was integrated vertically into distribution through its distributor DGB, whose share of the indirect distribution market was 70%. The other party engaged in distribution only, in which it held a 30% share.

The analysis of the case turned on the likelihood of entry. SEAE and CADE determined that entry was difficult. A successful national distributor must have sufficient scale and scope; specifically, it must have an adequate mix of publications that would be attractive both to its upstream publishers and its downstream retailers. An important factor in this regard was the vertical relationship between Abril and DGB, which ensured that up to 60% of the country's

magazines would not be available to a new entrant. The BCPS considered a scenario in which the remaining 40% would contract with a new entrant, but it found that this would not be likely, for various reasons. New entry was further complicated by the fact that the arrangements between publishers and distributors had been exclusive and by the need to incur significant sunk costs to achieve entry.

SEAE recommended to CADE that the merger be denied. In one of the few instances in which CADE did not agree with SEAE's recommendation, CADE entered in to a settlement agreement with the parties (a TCD, described above). Among other things, the agreement required actions that would facilitate new entry. DGB was required to divest its physical assets used in distribution in Sao Paulo and Rio de Janeiro, Brazil's two largest markets, and to eliminate the exclusivity provisions in its distribution contracts for a period of ten years. Also there were behavioural provisions in the TCD intended to preserve the autonomous structure of the Abril group's distribution business.

2008: Fibreglass reinforcements[48]

This case involved the acquisition by Owens Corning of the glass fibre reinforcements and composite fabric assets of Saint-Gobain, which had effects in several markets worldwide.[49]

The two firms were the only firms manufacturing fibreglass reinforcements in Brazil. The key issue in the case was the definition of the relevant geographic market. The merging parties contended that it was worldwide, which included manufacturers of these products in China. Both the merging parties and SEAE conducted econometric studies of price movements, comparing movements in Brazil to those in other regions. An interested third party also submitted an econometric study.

CADE concluded that none of the studies was conclusive. It turned to qualitative evidence developed by SEAE. Third party buyers were asked about the viability of China as a source of supply, and they stated that it was not a sufficient alternative for them for reasons of quality and the transit time required. CADE concluded that the merger was unlawful and required the divestiture of Saint Gobain's plant in Brazil.

2005: Iron ore and rail transportation[50]

Vale S.A., (formerly known as Companhia Vale do Rio Doce – CVRD) is the world's second largest mining company, with operations in several countries worldwide, and is the world's largest exporter of iron ore. Vale was formed in 1942 as a state-owned enterprise and privatised in 1997. In Brazil it also controls several railway freight lines and harbour terminal facilities. Since its privatisation Vale has continued to acquire mining assets, both in Brazil and abroad. In the early 2000s it acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil and a large steel producer, CSN, which also controlled a large iron ore mine.

In the course of the investigation SDE concluded that the acquisitions would have adverse effects in certain iron ore and rail markets and issued a preliminary order imposing certain restrictions on Vale until CADE reached its decision. In 2005 CADE agreed that the transactions were competitively harmful. It approved them on the condition that Vale either divest acquired mining company Ferteco, which before Vale's acquisition was Brazil's third-largest mining company, or renounce its exclusive right of buying the mining production of CSN. The case is notable for the vigorous legal challenges that Vale then mounted. It appealed CADE's decision on procedural grounds, and the case was the first competition case to reach Brazil's Supreme Court. In 2007 the court ruled in CADE's favour, and Vale then launched a second legal challenge, which was also rejected by an appeals court[51].

2.3. Unfair competition and consumer protection

"Unfair competition" that injures individual competing firms is not addressed in Law 8884, but in another statute that provides a basis for both criminal prosecution and private civil suits. The Industrial Property Law (No. 9279/96) defines the crime of unfair competition to include commercial disparagement, false branding, fraudulent diversion of trade, advertising designed to cause brand confusion, violation of trademark rights, commercial bribery, illegitimate appropriation or disclosure of trade secrets, and false patent claims (Art. 195). Public prosecutors may bring criminal charges under the statute and victims of unfair competition may also invoke the law as the basis for seeking damages and injunctive relief in a civil suit.

Brazil's Consumer Defence Code (Law 8078), adopted in 1990, regulates such marketing practices as deceptive advertising, false warranties, door to door sales, telemarketing, and abusive price increases, as well as consumer contracts generally. There are three components to what is called the "National Consumer Defence System": (1) a federal agency, the Consumer Protection and Defence Department ("DPDC"), which is part of SDE, (2) state and local consumer protection agencies, (called "Procons") and (3) non-governmental consumer organisations (NGCOs). DPDC is responsible for overall co-ordination of the system and has various specific responsibilities under the law.

The Procons, located in all 26 Brazilian states, in the Federal District (Brasilia), and in many municipalities, provide specific services to consumers and engage in consumer class action litigation. The NGCOs include several national, state and regional organisations in Brazil. They are active in consumer class action litigation, and also publish consumer magazines, undertake consumer education functions, and conduct other activities (such as comparative product testing).

The Consumer Defence Code provides that consumer complaints seeking damages may be filed in court by an individual consumer, or by a group of individuals asserting a common claim. In the case of class injury, suits may be also filed by Procons or prosecutors' offices, and NGCOs may likewise commence legal actions in their own name on behalf of a victim class. Besides authorising suits for damages, the law provides for criminal and civil enforcement proceedings. Criminal actions, which may lead to fines and imprisonment, can be filed by government prosecutors in both federal and local courts. Federal and local civil enforcement suits, which may lead to injunctive orders and monetary consumer redress awards, can be filed by prosecuting attorneys, NGCOs, and (depending on the court involved) by either DPDC or the Procons.

DPDC also has a consumer education function, which it implements by maintaining a web site, conducting training for NGCO personnel, issuing consumer brochures, and developing educational materials for school curricula. Because DPDC is the sister agency to SDE's antitrust department, there are opportunities for synergy between the competition promotion and consumer education functions. The two departments also exchange case referrals and consult on competition advocacy issues that have a consumer protection component.

3. Institutional issues: structures and practices

3.1. The BCPS institutions

Three separate institutions make up the BCPS: SDE, SEAE and CADE. SDE, a part of the Ministry of Justice, is headed by a Secretary and is divided into two Departments, one with responsibility for enforcing the competition law (the Department of Economic Protection and Defence, or DPDE), the other responsible for the consumer protection law (the Department of Consumer Protection and Defence, or DPDC). As of October 2009 there were 32 professionals and 27 administrative personnel employed in DPDE.

SEAE, headed by a Secretary appointed by the Minister of Finance, has three principal responsibilities: (1) performing certain investigative and advisory functions under the competition law, (2) providing economic analysis for economic regulatory programmes (including analysis of prices), and (3) monitoring market conditions in Brazil. As of October 2009 there were 78 professionals and 72 support staff employed at SEAE. SEAE's competition advocacy work is carried out from its offices in Brasilia. Its merger analysis unit has been located in Rio de Janeiro since 2004.

The competition law (Art. 3) establishes CADE as "an independent federal agency," associated with the Ministry of Justice for budgetary purposes. Its governing body is a Council consisting of a President and six commissioners. The President and commissioners are appointed by the President of Brazil and confirmed by the Senate for a term of two years, and can be reappointed for one additional term. Council members may not be removed except for certain criminal offenses or other malfeasance as specified by law.[52] As of October 2009 there were 49 professionals and 137 support staff employed at CADE.

In October 2008 CADE underwent an internal restructuring. It created four technical groups, augmenting the regular case decision infrastructure: (a) regulated markets, (b) economics, (c) international affairs, and (d) settlement (plea agreements) negotiations. Each group is supervised by one or more commissioners. The Technical Group on Negotiations is responsible for developing expertise in negotiations. The Group is composed of ten members, all recruited among CADE's technical and legal staff, and is supervised by one of CADE's commissioners. Ad hoc committees of three members, which usually include one or more members of the Technical Group, are selected to negotiate settlements and plea agreements. By November 2009 two agreements had been completed using this process and three more were in negotiation.

The International Affairs Group, as the name indicates, is responsible for representing CADE in its many relationships with international organisations and foreign governments. The Technical Group on Regulated Markets has an ambitious agenda. It is recognised that many of CADE's cases arise in regulated sectors, where specialised knowledge of the relevant markets is essential. It will fall to this group to acquire expertise in these sectors and to assist CADE in its cases when necessary. To this end the group is charged with, among other things, conducting studies of regulated markets, especially as the regulation affects competition within a sector, building relationships with sector regulators and participating in inter-agency discussions in matters of regulation and competition. It is not clear how this new group will interact with SEAE, which already has substantial expertise in these areas.

In September 2009 CADE created the Department of Economic Studies (DEE), into which the Technical Group in Economics, created in 2008, will be integrated. By the end of 2009 DEE was expected to have on its staff four full-time economists, two of whom hold PhD degrees from United States universities. DEE's principal responsibility will be to provide economic assistance to the commissioners. For this purpose it, together with the Technical Group on Economics, has engaged in a variety of activities, including conducting internal training sessions, participating in international

forums on antitrust economics and in bi-lateral consultations with expert economists from other jurisdictions, evaluating reports by economic consultants, engaging in econometric exercises and the preparation of technical papers on various topics in the field. It has an ambitious agenda for 2010, which includes conducting studies of exclusionary practices, calculation of damages and detection of cartels.

There are two independent legal officers with CADE. One is the CADE Attorney General (authorised by Article 10 of the competition law), who is appointed by the Minister of Justice and commissioned by the President of the Republic after Senate approval. The Attorney General serves under the same conditions as apply to Commissioners with respect to term of office, qualifications, re-appointment, and removal (Art. 11), and thus is not subject to removal by the Council. The Attorney General represents CADE in court. He or she also may render opinions in cases pending in CADE. In 2009 there were a total of 20 people assigned to the Attorney General's office, including eight professionals. In 2009 the Attorney General was given the task of monitoring CADE's decisions for compliance.

The second legal officer is the Public Prosecutor, a representative of the Federal Prosecutor General. Article 12 of the competition law provides that the Prosecutor General shall appoint a member of the Public Prosecutor's Office "to handle" cases submitted to CADE for review. The Article adds that CADE may request the Prosecutor General to enforce CADE's decisions in court and take other judicial action in furtherance of the Prosecutor's statutory duty to protect the economic order. It seems that the role of the Public Prosecutor is principally that of an independent voice within the agency, representing the public interest. The office (there are currently two professionals in this unit) can prepare written opinions on cases before CADE. If it concludes that a decision or action by CADE is legally defective it can challenge the action in federal court. On occasion it has done so, but not in recent years.

3.2. Procedures in conduct cases

SDE can initiate a "preliminary investigation" into a possible violation either *ex officio* or upon a complaint or request of an interested party. SDE has powers to require the subjects of the investigation and other private and public entities to provide information during this phase. On or before the conclusion of 60 days (which may be extended by requests for information), SDE can decide to close the investigation, which must be approved by CADE, or to commence administrative proceedings, which are a more formal stage in the investigative process. The respondent or subject of the investigation is formally informed of the nature of the alleged violation and

is asked to submit a defence thereto. SDE may conduct further discovery and has full information gathering powers at this stage, including the power to obtain the testimony of witnesses. At the close of this phase, SDE will issue a written report containing its findings and recommendations and forward it and the case file to CADE.

SDE can, either *ex officio* or upon the request of the CADE Attorney General, enter a "cease and desist order" (preliminary injunction) at the administrative proceeding stage when it concludes that there are "sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective."[53] The order can be appealed to CADE.

SDE is required to notify SEAE of the commencement of an administrative proceeding, and SEAE may elect to provide an opinion to SDE on the matter.[54] Further, a separate law provides SEAE with powers to investigate possible violations of the competition law.[55] Accordingly, SEAE may separately or in co-operation with SDE conduct such preliminary investigations. As described below, however, SEAE has sharply curtailed its participation in conduct cases. SEAE has no adjudicatory or enforcement functions under the competition law.

Upon receipt by CADE of the SDE report in a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner, and to the CADE Attorney General. The law requires that the Attorney General provide an opinion on the case within 20 days;[56] the Attorney General's opinion generally focuses on the legal aspects of the matter, but it can extend to substantive issues as well. The Reporting Commissioner must decide whether to institute a supplementary investigation within 60 days of receiving the case. CADE is provided with the same powers as SDE to acquire information. It is rare that a supplemental investigation is begun, however. On occasion, CADE has sent the matter back to SDE for more information. Like the SDE Secretary, the Reporting Commissioner has the power to invoke Article 52 to issue a cease and desist order for the purpose of preventing immediate and irreparable harm. The order is effective immediately but can be appealed to the CADE Plenary and then to the courts.

Upon completion of the 60 day period or the supplemental investigation the case is placed on the CADE trial docket "to be judged as soon as possible."[57] The Reporting Commissioner must prepare a written report and a recommended resolution of the case. The Commissioner must provide that report to the other commissioners and the parties not less than five days before the judgment session. The decision of the Council is rendered at a

public meeting, during which the CADE Attorney General and the respondent are accorded an opportunity to participate. SDE and SEAE may also participate and explain their technical opinions in these hearings. The required quorum for the Council is five members and a decision is taken by a majority of those participating. The President is one of the seven voting members and, in the event of a tie, may cast an additional vote.

A strength of this review process is its transparency. Private practitioners voice no due process complaints. Respondents are adequately informed of the charges they face and have sufficient opportunity throughout the process to make their defence. CADE's decisions are made in a public hearing; the proceedings can be followed live, in audio on the Internet. Its decisions are presented in writing and are made public.

There had been complaints from the private bar about the treatment of confidential information. CADE has attempted to address this through its Regulation No. 45, which is a comprehensive formulation of official procedures in the agency relating to the protection of confidential information. The regulation provides that upon a motion by an interested party the Reporting Commissioner or the President may declare information confidential and not available to the public. The regulation lists the types of information that may be classified as confidential, such as revenue, cost and profit and loss information, trade secrets and industrial processes and customer and supplier information. It also lists types of information that may not be considered confidential, such as information that is otherwise public, corporate and ownership structure and lines of business. The proponent of confidentiality has the burden of showing that the information should be protected.

The BCPS is criticised for the time that it takes to resolve a conduct case. It has taken steps to ameliorate the problem that are beginning to bear fruit. An obvious structural problem created by the competition law is the overlap in responsibilities among the three agencies, especially as between SDE and SEAE. Beginning in 2003 those two agencies began to rationalise their work; SDE would concentrate on conduct matters, especially cartels, while SEAE would focus on mergers. The two entered into a formal agreement in 2006 that articulated joint investigation procedures for both merger and conduct cases.[58] Today the division of responsibilities is almost complete. While the law requires that SDE issue an opinion on notified mergers, it relies heavily on SEAE's analysis for this purpose. SEAE, on the other hand, no longer becomes involved in conduct cases.

The following Tables 5-7 describe the workload at SDE.

Table 5. Complaints

	2004	2005	2006	2007	2008	2009*
Received	163	154	172	120	181	146
Concluded	60	128	131	126	186	143

Table 6. Preliminary investigations

	2004	2005	2006	2007	2008	2009*
Opened	33	32	10	19	76	85
Concluded	15	29	11	50	76	41

Table 7. Administrative proceedings

	2004	2005	2006	2007	2008	2009*
Opened	36	18	17	16	18	36
Concluded	29	37	8	34	58	19

* Through September

For years there has been a backlog of matters in SDE, and it had been growing. In recent years SDE has made a concentrated effort to address it. Note that until 2007 in each of the three investigative stages above, there were usually more matters begun than concluded. That trend was reversed in 2007 (see Table 8). While it seems to have resumed in the first three quarters of 2009, SDE has made progress in reducing its backlog.

Table 8. Matters sent to CADE and backlogs, 2006-2008

	2006	2007	2008
Matters sent to CADE*	21	90	134
Backlog*	396	341	300

* Includes both preliminary investigations and administrative proceedings

Data on the length of time that it takes to conclude a matter in SDE are not fully available and could be somewhat misleading. The average total time in SDE for investigations that reach the administrative proceeding stage has varied between two and six years. Moreover, the average has been increasing in the past few years. One reason is that respondents are resorting more to litigation over procedural matters. In addition, the increase may be the result, at least in part, of SDE's effort to reduce its backlog. As it resolves some of the oldest cases on its books the effect is to raise the average for all cases in that year. Still, some matters remain in SDE for years. One possible obstacle in this regard is the requirement in the law,

described above, that CADE approve decisions by SDE to close preliminary investigations and administrative proceedings without taking further action. Those of course are the results in a substantial majority of matters. This procedure consumes resources both in SDE, which must prepare a report, and in CADE, which must formally approve each decision to close. In any case, it seems that the fundamental reason for this persistent backlog at SDE is a shortage of personnel, which is discussed further below. Of the three agencies, it appears that the resource problem is most acute at SDE.

CADE has also focused on reducing the time required to complete its cases, with positive results.

Table 9. Average time for cases in CADE (in days)

2005	2006	2007	2008	2009
453	426	261	268	409

CADE concludes that the increase in 2009 resulted from SDE having sent more cases, and of higher complexity, to CADE that year in SDE's effort to reduce its backlog. In any case, it can be seen that conduct cases can take up to a year or more to be finally decided in CADE.

The following table shows the total elapsed time in SDE and CADE for four of the five conduct cases, three cartels and one dominance case, described above in Boxes 2 and 3. The fifth case, the compressors case described in Box 2, is still ongoing. One party entered into a settlement agreement with CADE. The agreement was reached approximately seven months after the case was opened at SDE.

Table 10. Time lapse for cases dealt by SDE and CADE

	Time at SDE (in days)	Time at CADE (in days)	Total
Sand for construction	479	359	838
Security guard services	1 066	355	1 421
Crushed rock	493	230	723
AmBev (loyalty programme)	1 031	861	1 892

3.3. Procedures in merger cases

Article 54 of the competition law sets forth the procedures for the review of notified mergers. The notification is to be made to SDE, which promptly supplies copies to SEAE and CADE. SEAE must within 30 days provide a technical report to SDE, which must, within 30 days of receipt of

the SEAE report, provide a recommendation to CADE. The SEAE and SDE recommendations are made public, with confidential information redacted. At that point the files are transferred to CADE, which must render a decision within 60 days. CADE is not in any way bound by the recommendations of SEAE and SDE. If SEAE and SDE fail to meet their statutory 30 day deadlines there are no legal consequences. If CADE does not issue a decision within its 60 day period, however, the merger is deemed to be approved. Thus, the maximum statutory period for merger review under Article 54 is 120 days. Each of the three agencies, however, also has the power to issue one or more requests for additional information, and the running of the statutory periods is suspended from the time of the request until the information is supplied.

Resolution 15, the implementing merger regulation, was adopted in 1998. The resolution introduced a "two stage" process involving an initial notification form (attached as Exhibit I to the resolution) and a second form (Exhibit II), requiring substantially more information if it is determined that a supplementary investigation is required.[59] As practice has developed, however, if a merger is sufficiently complex to warrant a "second request" for information, SEAE will prepare questions addressed specially to the transaction under review. Likewise, if CADE decides that a merger presented by SDE and SEAE requires yet more information, the supplemental inquiry will be conducted by the Reporting Commissioner and will focus on the particular issues identified for examination.

An early criticism of the BCPS merger review process was that it took too long, especially as to mergers that on their face presented little or no reason for concern under the law. This was, at least in part, an inevitable consequence of the fact that premerger notification is not required, as discussed in Section 2.2.2 above. Nevertheless, an important achievement of the BCPS in recent years has been the implementation of a "fast track" procedure for these "easy" mergers. It began in 2002, when SEAE and SDE informally adopted a streamlined procedure for simple cases, in which each would prepare a simplified short form report within 15 days. The procedure was formalised in 2003 by means of a joint ordinance[60] that set forth criteria for the selection of mergers for the fast track procedure. In 2004 the two agencies began considering notified mergers simultaneously and sending a joint report to CADE. For its part, CADE streamlined its procedures; more frequently it adopted the SEAE/SDE report as its own, instead of creating a new one.

In 2006 SEAE and SDE issued Joint Ordinance No. 33, which further institutionalised the co-operation between the two agencies and shifted more of the investigative work to SEAE. Most recently, in March 2009 the BCPS made further refinements to its fast track procedure in a formal agreement

among the three agencies and the Attorney General. The reports in such cases had averaged five to seven pages in length. An electronic report form was created, resulting in reports that now are as short as two pages. SDE now usually adopts the SEAE report as its own. In CADE the Attorney General's office had regularly provided its own recommendation in cases, including mergers. The 2009 agreement provided that the Attorney General would make such reports only in limited circumstances, usually when some legal or procedural question arose. At CADE the commissioners now cast their votes on all fast track mergers before them at the same time; if there is no disagreement, all are approved at once.

The result has been steadily decreasing periods required for review of these transactions. It is not uncommon for fast track mergers to be approved in 30 days or less.

These reductions in fast track merger periods, coupled with some reductions in processing time under "ordinary" procedures have brought about substantial declines in the average time of analysis for all mergers.

Table 11. Fast track mergers in BCPS

	2005	2006	2007	2008	2009*
Fast track as % of total	n/a	68%	68%	65%	63%
Days in SEAE	n/a	17	15	20	21
Days in CADE	56	45	43	42	35

* Through September

Table 12. Average time of review - All mergers

	2005	2006	2007	2008	2009*
Days in SEAE/SDE	161	120	105	104	135
Days in CADE	81	64	48	50	45
Total	242	184	153	154	180

* Through October

3.3.1. The business community and the BCPS merger process

Private practitioners uniformly praise the BCPS for its new fast track procedures. There are some complaints that investigations of non-fast track mergers still take too long. Of course, as noted above, merging parties lack the incentives to speed the process that they would have in a premerger notification regime. For its part, SEAE complains that sometimes the parties do not fully disclose their analysis until after SEAE presents its report to CADE.

As with conduct investigations, practitioners have no due process complaints; they consider the process sufficiently transparent. There are some complaints, however, that the settlement process is not sufficiently flexible. Settlements will become increasingly important, especially if premerger notification is adopted. CADE has taken steps to regularise its negotiation procedures, as discussed above. Finally, practitioners respect the merger analysis conducted in SEAE and CADE as competent and professional, though it is also said that the quality of the work at CADE is adversely affected by the high rate of turnover there, both at the Council and staff levels.

3.4. Agency resources

3.4.1. Personnel

A notable feature of Brazil's federal personnel system is that a significant number of its employees are hired on a contract basis, and thus are considered to be temporary employees. The number of contract employees is especially high in non-professional support positions. Brazil also has a permanent civil service, however. Some of these employees are qualified in particular careers, which include a classification known as "*gestores*" (Specialists in Public Policy and Management) and another titled Analysts of Finance and Control (AFCs), who are assigned to the Ministry of Finance.[61] These professionals must take and pass a rigorous examination. They can, and often do, transfer among the many ministries and offices in the government. The most capable ones are in demand throughout the government, and offices compete for their services in various ways.

Overlaying this permanent/temporary structure is the "DAS" system. DAS is an acronym for "Direção e Assessoramento Superior," which translates as "high level management and advising." DAS authority comes in seven grade levels and was originally designed as a mechanism for hiring non-permanent contract employees to serve as managers. Over the years, the lower DAS grades have come to be used not only to hire non-permanent staff personnel but to supplement the salaries of permanent employees as well. Permanent employees who hold a DAS position receive, in addition to the salary associated with their civil service position, a portion (in most cases 60 per cent) of the salary associated with their DAS grade. Agencies covet DAS authority because the higher grades can be used to hire senior managers and the lower grades can be used as supplemental compensation to attract and keep junior-level permanent staff. The Ministry of Planning controls the number of permanent and contract positions available to an agency, as well as the number and grade level of DAS positions. DAS

contract employees are subject to termination when the political administration changes, although such changeovers normally affect only the most senior officers.

All three of the BCPS agencies suffer from a shortage of qualified professional staff and high turnover. At CADE the turnover problem has been especially acute. The 1994 competition law provided for the creation of a permanent staff at CADE, but it was never done. Until 2006 CADE had no permanent positions assigned to it. All of its professionals were either DAS contract employees or were permanently employed at other government agencies and assigned to work at CADE. Staff turnover was high. The turnover was exacerbated by the fact that many of the professionals were assigned to a specific commissioner. The commissioners' term of office was, and continues to be, short – only two years with the possibility for one re-appointment. When a commissioner left office his or her staff usually departed too. The average tenure of a CADE professional has been about three years. This has obvious detrimental effects on the "institutional memory" at the organisation. The legislation pending in Congress, described in Section 4 below, directly addresses these problems.

In 2006 CADE received authority for 27 permanent positions (in late 2009 25 of these positions were filled).[62] While these positions accounted for less than half of CADE's total civil service employees, the situation there has improved. In years past, many of the professionals who worked there had no special interest in the field, and were ready to move on if an opportunity presented itself. Today, those who occupy CADE's permanent positions have affirmatively selected CADE. They say they enjoy the work, and the prestige that accompanies it. This trend is instructive of what could happen at the agency if the legislation before Congress, which would authorise 200 permanent positions at CADE, is enacted, as discussed below.

SDE, as noted above, has a chronic backlog in investigations, and the perception is that it still takes too long to complete complex investigations. In recent years the agency has focused on reducing its backlog, but it seems that real progress can be made only by augmenting its staff. SDE is making a concentrated effort to attract and retain competent *gestores*. It does so, in part, by complementing their civil service salaries with DAS contracts. One result of this programme is to hold down the total number of employees, as better qualified ones are paid more, but the agency has determined that in the long run it will benefit from having a motivated, permanent staff. Equally, SDE is stressing the qualitative aspects of the work there, as at CADE. In Brazil as in all countries, competition agency professionals find anti-cartel work interesting, even exciting. SDE has remade itself into an anti-cartel unit, one result of which will be to improve its ability to attract and retain good employees.

Table 13 shows employment data for the three agencies (in person years).

Table 13. Employment data for CADE, SDE and SEAE

CADE					
	2005	2006	2007	2008	2009
Professional	51	54	51	48	49
Support	127	111	113	138	137
SDE					
	2005	2006	2007	2008	2009
Professional	35	37	34	28	32
Support	32	35	35	48	27
SEAE					
	2005	2006	2007	2008	2009
Professional	67	80	78	77	78
Support	101	85	77	67	72

Unlike CADE and SDE, whose professional staffs have remained constant in size in recent years, SEAE enjoyed a 16% increase between 2005 and 2009. More of these were civil service employees, as opposed to DAS, and more were specifically assigned to SEAE, as opposed to being temporarily assigned from another government agency. As noted above, SEAE has made great gains in efficiency in its merger review programme.[63] Its substantive analysis in mergers is also considered to be competent. The agency reports that for the past three years 99% of its recommendations have been accepted by CADE. Still, staff turnover at SEAE is high. SEAE reports that in 2008 alone it lost 35% of its professional staff (27 of 77), who had to be replaced. SEAE attributes this to the fact that the staff positions have not been created specifically for the agency, that is, requiring qualifications that correspond more closely to the mission of the agency. (The same is true at CADE and SDE.) Most of the professionals at SEAE are qualified either as experts in public policy and governmental management or financial analysts. As such, they are more ready to consider positions at other government agencies when they become available.

The positions shown for SDE are all devoted to its competition policy function. Many in the positions shown for SEAE work in some aspect of its comprehensive advocacy function, described in Section 6 below, and not in competition law enforcement. In any case, the total of 339 people working in competition policy in the three agencies is small for a country of Brazil's size.

3.4.2. Budget

CADE's budget structure differs from those of SDE and SEAE because CADE is an independent body, while the others are part of government ministries. As an independent agency CADE is responsible for some expenses that the others are not because it must pay for building rent, telephone service and other support services that are centrally administered in the ministries. CADE's budget comes from merger notification fees and government allocation. SDE and SEAE also share the notification revenues. SDE is mostly dependent on this revenue, while SEAE also receives a budget allocation from the Ministry of Finance as well as the proceeds of a fee paid by applicants for authorisation to conduct promotional lotteries. Because most of CADE's professional employees are assigned from other government agencies, CADE is not accountable for their salaries in its budget. As noted above, some permanent staff are now directly assigned to CADE, which pays their salaries and also the salaries of contract personnel. In contrast, personnel expenses are not part of the budgets of SDE and SEAE, with the exception of some temporary support personnel at SEAE.

Table 14 shows the budgets for the three agencies (in BRL millions). The data for CADE include some salary expenses, but not all, as explained above, while the SDE and SEAE data do not include salaries. The SDE data are for the Competition Division only. SDE's numbers may be somewhat understated, however, as the Competition Division also has some access to other parts of SDE's overall budget, and some of its functions, such as information technology and press services, are financed at the Ministry level.

Table 14. Budget for CADE, SDE and SEAE (in BRL millions)

	2005	2006	2007	2008	2009
CADE	13.5	10.4	10.3	11.9	13.5
SDE	4.2	2.4	1.8	2.0	1.7
SEAE	8.4	8.4	11.4	12.7	7.3

CADE's budget is also supplemented by grants from the World Bank. The grants, which are part of an umbrella agreement between Brazil and the World Bank, are for special projects, such as the creation of an electronic system for monitoring work flow. The grants are not insubstantial, and have amounted to as much as 20 per cent of CADE's total funding.

3.5. International aspects of enforcement

Article 2 of the competition law explicitly incorporates the "extraterritorial effects" test into Brazilian competition law. In this regard, the decision in 2005 by CADE to interpret the BRL 400 million merger notification threshold as applying to revenues derived in Brazil only made the law more consistent with that test. Before that change, it was necessary to notify mergers that had almost no effect in the country. In other respects, in BCPS proceedings foreign firms are treated no differently than domestic firms. The BCPS routinely takes into account in its analyses the impact of international trade. In its merger cases it regularly considers imports or the possibility of them when deciding on market definition, market shares and competitive effects.

The BCPS has entered into bi-lateral co-operation agreements with the United States (2003), Argentina (2003), Portugal (2005), Canada (2008), Chile (2008), Russia (2009) and the European Commission (2009), It entered into a new agreement with Portugal in 2010. The agreement with the European Commission was signed during Brazil's Anti-cartel Enforcement Day in October 2009, described above in Section 2.1.1.4. That agreement was preceded by a conference on trade and competition involving representatives from the two jurisdictions, held in May 2009. In 2009 the BCPS entered into two memoranda of understanding providing for technical co-operation within MERCOSUR. The BCPS regularly engages in bi-lateral training and consultations with competition officials from other countries. In November 2008 three representatives from the USFTC and DOJ came to CADE to provide a course on premerger notification procedures and in September 2009 two economists from USFTC presented a course on econometrics, with the participation of CADE's Department of Economic Studies.

BCPS professionals have participated in courses given by experts from the United Kingdom, by the Spanish competition authority, in a course on conducting negotiations at Harvard University for members of the Technical Group on Negotiations in CADE, in a course on regulation at George Washington University in the U.S. and in traineeships abroad at USDOJ and FTC, at DG Comp and at the Canadian Competition Authority. CADE also provides partial funding for language courses for its staff. These co-operative arrangements have borne real fruit. Recently, as described above in Section 2.1.1.3, Brazil, the United States and the European Commission participated in simultaneous dawn raids in those jurisdictions, leading to the successful prosecution in the compressors case.

The BCPS is not only a recipient of technical assistance, however; it is also a provider. In 2006, SDE and CADE consulted with El Salvador, which

had just enacted its first competition law, on anti-cartel techniques. It has also shared its anti-cartel expertise with Chile and Argentina. It assisted Chile's competition agency, the Fiscalía Nacional Económica (FNE), in its effort to convince legislators to enact a leniency programme. In June 2009 two of CADE's commissioners accepted invitations to visit Paraguay to participate in a series of public discussions on a draft competition bill currently in Paraguay's Congress, which would be Paraguay's first. The BCPS is also working with UNCTAD in providing technical assistance to other competition authorities in Latin America. Finally, the BCPS is working with the government of Angola on an informal co-operation arrangement in which the BCPS would assist that country in drafting its competition law and in capacity building.

Also in 2009 the three BCPS agencies created a trainee programme for enforcement officials from Latin American countries, in which professionals spend a month at one of the agencies. The programme takes place twice yearly. The first of these was in July 2009, when CADE, SDE and SEAE hosted representatives from the competition agencies of Chile, Argentina, Peru and El Salvador. The second, in which representatives from eight Latin American countries participated, was held in January 2010. The BCPS was successful in obtaining funding for the travel and subsistence expenses of its foreign trainees from the Brazilian Co-operation Agency (ABC). It is currently in negotiations with the ABC on a memorandum of understanding that would regularise this arrangement.

Brazil is also active in various international forums. It is an observer in the OECD Competition Committee, where it participates actively in all meetings and discussions open to non-members, and participates actively in the annual OECD Global Forum on Competition as well. It and Chile were the first to participate in the OECD's programme to reduce bid rigging in Latin America, described above in Section 2.1.1.4. The BCPS is also active in the ICN. CADE is co-chair of the ICN Steering Group and is also co-chair of the Agency Effectiveness Working Group. It is also a lecturer in the ICN Support System which is currently providing support to the Vietnam Competition Authority. SDE, in turn, is co-chair of the ICN Cartel Working Group Sub-group 1. The BCPS will participate in the WIPO Project on Intellectual Property and Competition, scheduled for the years 2010-2011, and will host the first regional conference organised under the Project, for Latin American countries and the Caribbean, in 2010 in Rio de Janeiro. The BCPS also participates in UNCTAD (the BCPS will host a 2010 UNCTAD seminar), the IDB/OECD Latin American Competition Forum, the Ibero-American Competition Forum, the BRIC (Brazil, Russia, India and China) International Conference, the International Bar Association, the American Bar Association, the annual Fordham conference and the Global Competition Review.

Finally, the BCPS, mostly through SEAE, plays an active role in Brazilian trade proceedings. SEAE participates in discussions in the Chamber of Foreign Trade (Câmara de Comércio Exterior – CAMEX). CADE also participates in CAMEX as an observer. CAMEX is part of the Government Council of the Presidency of the Republic of Brazil, and its mission is to co-ordinate activities and policies relating to foreign trade, including tourism. CAMEX is chaired by the Minister of Development, Industry and Foreign Trade and includes as its members the Ministries of Finance, Civil Matters, External Relations, Agriculture and Planning. SEAE is invited to most of the technical discussions in CAMEX, including those involving tariffs. CAMEX is the forum where the interaction between trade and competition takes place.

SEAE also has an advisory role in antidumping and unfair import competition proceedings. Complaints from private parties alleging unfair imports are investigated by a department in the Ministry of Development, Industry and Foreign Trade, which, after receiving comments from interested parties and other government agencies, transmits its recommendation to CAMEX for decision. SEAE participates with another secretariat in the Ministry of Finance in formulating the ministry's recommendation in these cases. SEAE's role in this regard is to address the competitive effects from the imposition of trade policy duties, which is a topic not ordinarily considered by the investigating agency. SEAE has had some notable successes in such cases. In 2005, for example, it persuaded CAMEX to terminate antidumping measures affecting the Brazilian insulin market, after investigating a merger that had occurred in that market. It also persuaded CAMEX to suspend certain antidumping measures in cement as a means of promoting competition in cement in the north of Brazil. Also, CADE and SDE have, on occasion, made recommendations to CAMEX on trade matters.

3.6. Enforcement by the states and private parties

Brazil's states do not have their own civil competition laws and no federal or state government agencies other than the BCPS have authority to enforce Law 8884. With respect to private antitrust enforcement, a complaining party dissatisfied with CADE's decision in a case has neither a right to appeal within the BCPS nor standing to obtain judicial review. Under Article 29 of the competition law, however, private parties may file their own suits in court for damages arising from anti-competitive conduct. There are no comprehensive data available on the number and frequency of private antitrust actions in Brazil. SEAE conducted one unofficial study, however, that showed a significant increase in such cases between 2005, when about 30 such cases were recorded, and 2008, when there were

about 150. These were cases only in the federal and state courts of appeal, and they tended to be concentrated in certain geographic areas and in the financial services and retail fuel sectors. Also, they were not limited to cases filed pursuant to Article 29 of the competition law, but included others, for example filed under the Consumer Protection Code.

There are two possible types of private collective actions. One is a "public civil action," which may be initiated by consumer organisations, public prosecutors, unions or other public bodies. Its purpose is to remedy collective or diffuse interests of the public. Plaintiffs may not obtain money damages, but defendants may be ordered to pay damages to a public fund as redress.[64] A second type of collective action is one for defence of "homogeneous individual rights." These are class actions to obtain injunctive relief and money damages. As with public civil actions, several types of public and private entities have standing to bring such cases. Such a case was successfully brought by a public prosecutor in the state of Rio Grande do Sul in 2007. After completing a criminal proceeding involving a cartel in the retail fuel market in which five defendants were sentenced to jail terms of 2 ½ years, the prosecutor recovered money damages on behalf of consumers harmed by the cartel.

3.7. Judicial review

The BCPS increasingly recognises that Brazilian courts are a critical part of the competition law enforcement process. In competition cases respondents are increasingly willing to challenge the BCPS in court, both with interlocutory motions while an investigation or case is pending and with appeals after a final decision by CADE. The principal effect of this propensity to litigate in competition cases has been delay. Until recently, the great majority of CADE's orders in conduct cases had not been enforced because of judicial appeals. Moreover, cases of all kinds progress slowly through the Brazilian court system. It is not uncommon for a case to take ten years or more. In 2006 the BCPS confronted the problem, and it has achieved some success, described below, but the underlying problems remain.

Petitions by private parties for review of government agency actions are heard by the federal courts of first instance. By law, challenges to actions of the BCPS agencies must be filed before the court located in Brasilia. The first instance judge has authority to adjudicate most claims, and may also conduct evidentiary proceedings to supplement the factual record. The second level of appeal in the federal system is the Court of Appeals for the geographic region in which the initial judicial decision was rendered. Appeals from the regional courts of appeal go to the Superior Court of

Justice (STJ). Cases involving claims of unconstitutional statutory application may be appealed beyond the Superior Court of Justice to the Supreme Federal Court (STF), an 11 judge body that addresses only constitutional questions.

In Brazil the principal of *stare decisis* – the doctrine in common law systems that gives precedential effect – in some cases binding – to prior decisions in the same or higher court – is not formally applicable. Formerly judges were theoretically completely independent and could virtually ignore higher court decisions. That has changed to some degree. Higher court decisions have some precedential effect, especially on constitutional issues. Also, Brazilian courts have traditionally declined to review the merits of decisions by specialised tribunals such as CADE, on the theory that courts of general jurisdiction are not qualified to do so.

Nevertheless it seems that courts are increasingly willing to consider the merits of CADE's decisions and those of other specialised tribunals, sometimes under a theory of abuse of power, or when it is determined that a tribunal's decision is fundamentally at odds with the purpose or goals of the underlying statute. In any case, respondents in BCPS cases regularly challenge the BCPS in court on due process and constitutional grounds.

CADE has achieved notable success in the past few years in one aspect of its activity in court – the collection of fines. In 2006 the CADE Attorney General undertook a review of the status of the fines that had been imposed in conduct cases and it determined that few had been paid. CADE invoked a procedure under Brazilian law that provides for unpaid fines to be converted into "federal collectible debt," which can then be collected in court. The effort produced immediate results.

Table 15. Status of the collection programme and fines collected

	2005	2006	2007	2008	2009*
Fines placed in collection programme (in USD millions)	0.8	50.0	280.6	63.0	15.1
No. of debtors placed in collection programme	14	92	101	95	35
Fines collected (USD millions)	1.4	6.2	16.0	37.1	21.9

* Through September

The number of fines and debtors placed in the collection programme declined in 2009 because the backlog had been mostly eliminated (see Table 15). In part, the much higher amount of fines collected in 2008

resulted from the fact that two cases were settled, each involving significant fines. Fines are paid by the parties to the Federal Fund for the Defence of Collective Rights, managed by an inter-ministerial commission (in which SDE, SEAE and CADE participate), and are applied to various public projects, including those for consumer, environmental and cultural purposes.

A second part of the Attorney General's more aggressive stance on fines had to do with the fact that when respondents had appealed CADE's decisions to the court of first instance they were often successful in obtaining an injunction against the enforcement of CADE's order. The fines remained unpaid while the case wound its way through the courts, in spite of specific provisions in Articles 65 and 66 of the competition law requiring appellants to deposit their fine with the court or to post a bond guaranteeing payment if they were ultimately required to do so. The Attorney General began successfully arguing to the court that such a deposit was necessary. This has the salutary effect of reducing the incentives for respondents to appeal, if only to avoid paying their fines.

In other respects, the BCPS has a significant caseload in court. Sometimes respondents pose legal challenges during the investigation phase. It is not uncommon, for example, for respondents in dawn raids to seek a judicial order suppressing the evidence on grounds that the search was unlawfully conducted. SDE lawyers have responded quickly and forcefully in these suits. Their rate of success has been high. As a result of SDE's efforts to counter these tactics, the number of these suits has declined substantially; indeed, in early 2010, none were outstanding.

Table 16 shows CADE's litigation case load, which is very heavy indeed.

Table 16. Judicial cases instituted per year

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009*
93	111	186	180	162	193	240	480	338	132

* Through September

CADE attributes some of the increases in 2006-08 to its pro-active effort to collect unpaid fines. The number of those lawsuits declined in 2009, as explained above, and CADE also concludes that part of the 2009 decline can be attributed to its success in persuading courts to require respondents to deposit their fines or to post a payment bond, which has reduced incentives to appeal.

CADE has enjoyed a good rate of success in court, as shown in Table 17.

Table 17. Court decisions output, 2005-2009

	2005	2006	2007	2008	2009	Total
Favourable decisions	8	31	54	49	10	152
Unfavourable decisions	6	14	10	9	5	44
Per cent favourable	57%	69%	84%	84%	67%	78%

Still, CADE understands that it faces formidable challenges in its litigation programme. It has undertaken a re-organisation of the Attorney General's office for the purpose of making it both more efficient and more effective. Formerly, different attorneys had responsibility for a case at different stages; one might handle the case in the administrative stage, another might be responsible for the rejoinder, another for the appeal, and so forth. Now the same attorney or attorneys handle a case at all stages. A better case monitoring system has also been implemented. At the same time CADE intends to become more proactive with judges, making an effort to familiarise them with competition cases through lectures and seminars. Because of its very large caseload, CADE attorneys were not always present in court when their case, or some aspect of it, was being heard. The agency is making more of an effort in this regard; on occasion a member of the Council, including the President, has appeared in court as well.

BCPS attorneys are respected, both by the courts and by the private bar. They are considered to be professional and hard working.

4. The pending legislation

For several years there has been pending in the Brazilian Congress comprehensive legislation that would overhaul the BCPS and remedy many of the problems that have plagued it for so long. The legislation had been stalled many times, but as noted above, at the time of this report there was strong impetus toward its enactment. The country's President had strongly endorsed it; the business community, which had had reservations about some aspects of it in the past, especially about premerger notification, professed support for it. The bill had effective sponsorship in both houses of Congress and the sponsors were optimistic about its eventual passage. Still, manoeuvring in Congress continued; there was urgency to complete the effort within the first half of 2010, otherwise the national election scheduled for later in the year would again put the bill on the back burner. The legislation had been approved in the House of Representatives and was being debated in the Senate. Some changes had been offered in that chamber, which if accepted would require the House of Representatives to take it up again.

Below is a description of what are understood to be the principal provisions of the bill as approved by the House of Representatives.

4.1. The BCPS structure

CADE remains as an independent body, now called an "administrative tribunal" and not a "council." The terms of its commissioners will be for four years (non-renewable), up from two, and their terms are staggered, to avoid simultaneous vacancies and the possibility that a quorum could not be convened. The appointment process for commissioners is modified slightly, so that the President of the Republic's nominee for CADE President will be recommended jointly by the Ministers of Finance and Justice, and the nominees for the commissioner positions will be recommended alternately by those two ministers. Senate approval of the nominations is still required. In the past, a commissioner's post was sometimes vacant for a significant period while the President and the Senate considered nominations. The bill permits CADE's President to appoint a temporary commissioner until the permanent person is confirmed. CADE's Attorney General and the Chief Economist, both also appointed by the President with Senate approval, will also serve for four year terms. The minimum quorum for the Tribunal is reduced from five to four.

The most dramatic institutional changes in the bill affect SDE and SEAE. SDE's Department of Economic Protection and Defence (DPDE) is abolished and its investigative and preliminary enforcement responsibilities in competition cases are transferred to a new CADE Superintendency General (SG), composed of a Superintendent General and two deputy Superintendents. The Superintendent General, appointed by the President of the Republic upon the joint recommendation of the Ministers of Finance and Justice and approved by the Senate, serves for a two year term, with the opportunity for one additional re-appointment. SEAE's role as an advisor in conduct and merger investigations is effectively terminated. Its responsibilities for competition advocacy will continue, however.

An important element in the bill is the provision for 200 permanent positions in CADE. These positions would not require qualifications specific to CADE's mission, however, but rather their occupants would be drawn from other specialties in the federal civil service.

4.2. Procedures in conduct cases

The CADE Superintendency General, as the successor to DPDE, is made responsible for monitoring markets, identifying possible violations and conducting investigations. The bill creates three stages of proceedings

within the SG, the "preparatory proceeding", the "administrative investigation" and the "administrative procedure," with time limits applying to each. The first stage is initiated by the SG to assess whether a conduct falls within the competence of the BCPS. The second is the formal investigation stage, while the third is the stage at which a formal record is to be prepared for submission to the Tribunal. Currently there are effectively only two investigative stages in SDE, after a formal complaint is lodged with the agency. A decision by the SG to terminate an investigation in the second stage can be reviewed by the Tribunal. Once the case is before the Tribunal, the only change from current procedures is that the Superintendent General or the Reporting Commissioner may permit participation in the case by any third party who will be affected by the Tribunal's decision or who has standing to represent the interests of an affected class.

Currently CADE can impose a maximum fine of 30% of a respondent corporation's total gross revenues. The bill reduces that maximum to 30% of the enterprise's revenues in the relevant or affected market, but as is true under the current law, the fine may be no less than the amount of harm resulting from the conduct.

The bill makes some changes in the leniency programme. The current rule that leniency is not available to a "leader" of the cartel is eliminated, for two reasons: first, because it is difficult to determine which of the cartel participants was a leader, and second, denying leniency to a leader has the effect of precluding access (at least at the outset) to a party that probably has the most information about the cartel. Further, as noted above in Section 2.1.1.1, a grant of leniency currently extends to criminal liability under the Federal Economic Crimes Act but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The bill broadens the leniency grant to extend to these crimes as well.

4.3. Merger review

The current law lacks an explicit substantive standard for reviewing mergers, though the standards actually employed by the BCPS are the same as employed in many other countries. The bill articulates a standard that is based upon that in the European Commission's Merger Regulation. Another substantive change in the bill relates to efficiencies. Article 54 currently requires that, if an otherwise anticompetitive merger is to be approved because the efficiencies that it generates outweigh the harm, the efficiencies must be "equitably allocated," presumably meaning equally allocated, between the merging parties and consumers. The bill requires merely that consumers "share" in the efficiency gains.

There are significant changes affecting merger review procedures. Premerger notification is introduced: merging parties may not consummate their transaction until after CADE has approved it or the expiration of the statutory time period has occurred. Whereas the current Article 54 applies by its terms to agreements that are not formal mergers, the bill applies only to "mergers," which are defined as transactions in which (1) two companies merge, (2) one company acquires control of the stock or assets of another, or (3) a joint venture is undertaken that entails formation of an independent economic entity. Notification thresholds have also been changed. The bill provides for minimum size thresholds, expressed in total revenues derived in Brazil, for two merging parties. One party must have revenues of at least BRL 400 million and the other BRL 30 million. Currently there is no minimum size for the second party. The 20 per cent market share test in the current law is eliminated in the bill. The BRL 45,000 notification fee is retained, to be allocated entirely to CADE.

As noted above, under the bill SEAE has no formal role in merger review. Upon receipt of a notification the Superintendency General must, within five business days, publish a summary notice of the proposed transaction. (All time periods in the bill are expressed in terms of business days, and unless otherwise noted, all begin on the date of the notification.) [65] Within 20 days after notification the SG must either approve the merger or request further information. In the case of approval by the DG, CADE has 15 days from the SG's decision to review the approval, but it is not required to do so. Also, an interested third party may within 15 days appeal to CADE the SG's decision to approve. If there is neither a third party appeal nor a determination by CADE to review the SG's decision the merger is automatically approved after the expiration of the 15 days. This process is the equivalent of today's "fast track" procedure.

If the SG decides to request supplemental information the Superintendent has a period of 60 days from the date of notification to decide whether to approve the merger or to recommend to CADE that it be rejected or modified. If the SG approves, the same 15 day procedure described above relating to fast track mergers is applicable. Importantly, the issuance of the supplementary request for information does not suspend the running of the 60 day period. This is a potential flaw in the bill, as it presents the obvious opportunity for the applicants to delay their submission of the supplemental information for most or all of the 60 days. One obvious response by the SG in that event would be to recommend denial of the application to CADE. There is another, perhaps more likely option, however, which would be for the SG to declare the merger "complex."

The legislation provides a separate, and in some ways parallel, procedure for mergers declared by the SG to be "complex." The SG, must,

in its discretion, make that determination within 50 days of the filing of the notification. The use of this procedure would be another way for the SG to deal with a situation in which the parties have not complied with a 20-day request for information by the 50th day. Of course, the SG could make the "complex" decision within the first 20 days, thereby avoiding the need to issue two supplemental requests.

If the SG declares a merger to be complex it must issue its request for supplementary information within the prescribed 50 day period. The information must be provided within a 90 day period beginning on the date of notification. Upon the expiration of the 90 days the SG has 10 days to decide whether to approve the merger or to recommend denial or approval with restrictions. If the former, the same 15-day procedure described above applies.

If the SG recommends denial or modification of the transaction under either process described above the following procedure applies in the Tribunal. Within 48 hours the case is assigned to a Reporting Commissioner on a random basis. Within 20 days from the SG's decision not to approve the merger the Reporting Commissioner must either order the case to be scheduled for trial or, if more information is deemed necessary, order the SG to issue another request for information. If more information is requested, the Reporting Commissioner must schedule the case for trial within 30 days of the receipt of the information. There is no prescribed period for the trial, but the bill does set out a deadline within which a final decision in the case must be made, which is 240 days from the date of notification. These 240 days can be extended in two circumstances: (1) if the applicants request a 60 day extension, or (2) if the Tribunal orders a 90 day extension. Thus, every merger case must be decided by CADE within a maximum period of 330 days from the date of notification.

The right of a third party to appeal against a decision by the Superintendency General to approve a merger is new. The appeal is lodged first with the SG, who has five days either to reverse his decision or forward the appeal to the Tribunal. If forwarded, the Reporting Commissioner makes a determination (subject to review by the Tribunal) whether to "admit" the appeal. If admitted, the appellant then takes the role that the Superintendency General would otherwise play. The SG, however, retains authority to participate as a party to defend its position. If an appeal by a private party is admitted but ultimately rejected, the Tribunal must impose a fine on the party ranging from BRL 5000 to BRL 5 million (USD 2815 to USD 2.8 million). The amount assessed is to be determined by considering the economic condition of the appellant, its performance in the proceedings, its good faith, and the effect of the delay on the transaction.

The bill also provides a formal mechanism for resolving merger cases by settlement. The Superintendency General is empowered to negotiate a settlement agreement for a notified merger at any time before the matter is lodged with the Tribunal as a contested transaction. Once negotiated, the agreement must be published for at least 10 days of public comment, after which the SG may choose to re-negotiate the proposal before transmitting it to the Tribunal for final disposition.

5. Limits of competition policy: exemptions and special regulatory regimes

The competition law, by its terms, applies to "individuals, public and private companies, [and] to individual and corporate associations," however organised, "notwithstanding the exercise of activities regarded as a legal monopoly (Article 15)." The BCPS takes the position that the law is applicable to the federal government and its agencies, although there has never been a case testing this proposition. In fact, the BCPS interacts with the federal government on competition issues by means of competition advocacy. State governments and their agencies are considered outside the ambit of the law for reasons of federalism. The law applies to all private entities economy-wide and thus to companies operating in regulated sectors. The only exception to this principle has arisen in the banking sector, described below. Commercial enterprises owned by federal or state governments are clearly covered. Described below are the regulatory regimes and the interaction between competition law enforcement and regulation in selected sectors.

5.1. Telecommunications

This sector was liberalised in 1997. State-owned firms were privatised and the National Telecommunications Act enacted in that year created a new sector regulator, the National Telecommunications Agency (ANATEL). Unlike the situation in most other regulated sectors, the Telecommunications Act was specific about the relationship between regulation and the competition law. The Act provided for the application of the competition law to that sector, and authorised both ANATEL and CADE to enforce it. Article 7 of the Act provides that "the general rules governing the protection of the economic order [which include law 8884] shall apply to the telecommunications industry whenever they do not conflict with the provisions of the Act." Further, Article 19 provides that ANATEL "shall have the legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the

powers vested in ...[CADE].” Thus, conduct and merger cases may be considered by either ANATEL or CADE, or both. The Telecommunications Act created a special regime for mergers. Prior notice of telecommunications mergers must be filed with ANATEL, the only circumstance currently in Brazil in which there is premerger control.

CADE and ANATEL have developed a co-operative working arrangement under which ANATEL assumes the role of SDE and SEAE in merger cases involving telecommunications services. Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE renders the final judgment. ANATEL states that it follows the merger analytical process employed by the BCPS. While the BCPS would welcome input from ANATEL on any merger in that sector, it concludes that the process would be more efficient if the investigation were conducted solely by the BCPS, which is the case in all other regulated sectors. This issue was the subject of debate within the Congress as it considered the new legislation, but by early 2010 it had not been resolved.

With respect to conduct cases, ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three of those agencies may perform investigative functions and present recommendations to CADE. CADE regularly considers both merger and conduct cases in the telecommunications sector, some of which are described above in Section 2.1.4. The two agencies have operated under a series of co-operation agreements, which are time limited. The two do not work together particularly closely, but they have collaborated in such areas as cable and pay television and have jointly developed rules relating to methodology for competition analysis.

5.2. Oil and gas

The Hydrocarbons Law of 1997 created a new regulatory agency to oversee the natural gas and petroleum markets, the National Petroleum Agency – ANP. This law also explicitly referred to the interaction between the regulator and the BCPS. ANP is required to notify both SDE and CADE if it becomes aware of evidence suggesting a violation of the competition law. CADE, in turn, is required to notify ANP of any sanctions it applies to firms in the sector, so that ANP may adopt any appropriate legal measures of its own (such as cancellation of licenses).[66]

The sector continues to be dominated by Petrobras, which held a legal monopoly until 1997 and which is still controlled by the government. It accounts for by far the greatest share of exploration, production, transportation, refining and distribution of oil and refined products in the country.[67] Its dominance in natural gas (which accounts for a relatively

small part of Brazil's energy consumption) is even greater. It controls over 90 per cent of the country's gas reserves and operates the country's interstate gas pipeline system.[68] ANP exerts its regulatory authority in various parts of the oil and gas sector, notably exploration and transportation. Retail prices of oil and gas derivatives are no longer controlled.

CADE regularly considers conduct cases in the oil and gas sectors, though none have directly involved Petrobras' dominant position in the past several years. CADE has prosecuted cartel cases in retail automotive fuel, noted above. It prosecuted local cartels in liquid petroleum gas in 2008 and 2004 and a cartel in diesel fuel in 2004. It has also evaluated mergers in these sectors from time to time. One of these involved a joint venture between Petrobras and a firm called White Martins for the production of liquefied natural gas (LNG). Petrobras was a monopolist in natural gas transportation, as noted above, and it also was dominant in the production of liquid petroleum gas (LPG), an alternative to LNG for many applications. Petrobras did not produce LNG, however, nor had White Martins, which was a leader in the production of non-energy industrial gases (such as oxygen and nitrogen.). CADE identified vertical concerns in the transaction stemming from Petrobras' control of natural gas, the necessary input. The parties argued that the joint venture would generate significant efficiencies, however, which CADE accepted. It permitted the transaction but imposed a remedial order requiring the parties to make their prices and contracts transparent, thereby making it easier to identify and prosecute future unlawful conduct.[69] More recently CADE approved without conditions a merger between two distributors of LPG.[70]

5.3. Electricity

The regulator for this sector, the National Agency for Electrical Energy (ANEEL), was also created in 1997, and its law also requires that effect be given to competition principles where possible. The bulk of the country's electrical generation capacity is hydroelectric, but hydro's share has fallen from 83% in 2001 to 72% in 2009, in favour of thermal generation. There are also small nuclear and wind components. About 70% of total generation capacity is publicly-owned, by both federal and state governments. The former state-owned monopoly, Electrobras, continues to control about 40%. There is competition at the generation level through an auction process. Transmission assets are mostly controlled by federal and state governments. About two-thirds of distribution assets are privately operated; there are more than 60 distribution companies.

ANEEL and CADE have a formal co-operation agreement, and in recent years the two agencies have developed a close working relationship. Their representatives meet regularly and exchange a variety of information. CADE regularly considers mergers in the sector, which may involve mergers of distributors or acquisitions of small producers. CADE consults with ANEEL on these transactions, virtually all of which it has approved without restrictions. Recently CADE considered the creation of a consortium of three thermal generation plants that successfully bid in an ANEEL auction to supply power to the grid. ANEEL had approved the formation of the consortium, and the parties argued that this deprived CADE of jurisdiction in the matter. In its decision CADE rejected this argument, but it nevertheless approved the transactions, while imposing a fine for failure to file timely merger notifications.[71]

5.4. Surface transportation

The National Agency for Surface Transportation (ANTT) was created in 2002[72] and vested with responsibility for regulating railway and road services. There is little passenger rail service in Brazil except for that within urban areas, which, because it does not involve interstate service, is regulated by the states.[73] ANTT regulates network access and freight tariffs by means of a price cap system. In the late 1990s the poor condition of some of Brazil's roads prompted the government to enter into concession agreements with private contractors, who would build and maintain sections of the interstate highway system in exchange for the right to charge tolls, the level of which would be regulated. A second concessioning stage was completed in 2007. As discussed below, SEAE had an important advisory role in designing these second stage concessions.

ANTT also regulates interstate passenger bus transportation. In some countries long distance bus transportation is lightly regulated, if at all, but in Brazil this service is important to many citizens, and as such may be subject to a constitutional requirement for oversight of "public services." ANTT grants licenses to operate certain routes by means of a bidding process, the terms of which include tariffs and frequency of service. The agency regularly faces the problem of unauthorised providers operating on more popular routes. Changes in tariffs are subject to ANTT review, although operators are free to offer "promotional" fares as long as they are not predatory (especially difficult to determine in this industry) or otherwise involving an "infringement of the economic order."

Both CADE and SEAE have co-operation agreements with ANTT. SEAE often interacts with transportation regulators, as described below, CADE much less so. CADE occasionally considers cases in the rail sector.

The Vale/CSN merger described in Section 2.2.3 above was one of its most important merger cases in recent years. The ALL case also described in Section 2.2.3 was another merger in the sector.

5.5. Civil air transport

Until recently civil aviation in Brazil was under the control of the Department of Civil Aviation (DAC), which was within the Brazilian Ministry of Defence. The Director of DAC and some of its employees were military personnel. The stated rationale for the relationship between civilian and military aviation was that both sectors share some facilities, including airports and the air traffic control system. In 2006, however, the National Civil Aviation Agency (ANAC) was created as an independent regulator for the sector. It is responsible for regulating safety and security matters, personnel licensing, operations and airports. Prices and entry have been deregulated, which brought about significant restructuring within the industry. Currently the sector is highly concentrated, featuring only two major carriers controlling about 90% of the market, but two other firms have recently entered and are gaining market share.

Not long after ANAC was created it faced what was called the "aviation crisis," which was triggered by Brazil's most deadly aviation accident. The air traffic control system and the fact that 67 of the country's largest airports are operated by INFRAERO, a state-owned company, came under heavy criticism. While ANAC announced a series of corrective measures, the various issues generated by the crisis are still under debate.

One entry barrier in Brazil, as in some other countries, is the need for landing and take-off slots at the country's busiest airports, notably the downtown airports in Sao Paulo and Rio. In 2008, CADE considered the proposed acquisition by GOL, one of the two largest airlines in the country, of VARIG, which was once Brazil's leading international airline but whose fortunes had declined precipitously since deregulation and was then near bankruptcy. The competition issue most closely examined by CADE was the transfer to GOL of VARIG's slots at Congonhas Airport in Sao Paulo. It ultimately decided to approve the transaction, however.[74] Until the recent emphasis on cartel prosecution by the BCPS a 2004 case against four airlines (the case was instituted in 1999) for fixing prices on the Rio–Sao Paulo route was one of CADE's most important cartel cases. There was only circumstantial evidence of an agreement, consisting of simultaneous and identical changes in prices by the respondents. CADE nevertheless found that an agreement had existed, and fined the respondents the statutory minimum, 1% of their 1999 revenues on the Rio – Sao Paulo route.[75]

5.6. Health

Brazil has a public health service, as noted above, but there is a large and growing private health insurance sector, to which as many as 42 million Brazilians subscribe. Until 2000 this sector was mostly unregulated, but in that year a law created the National Supplementary Health Agency (ANS), giving it some authority over prices.[76] There are two basic types of health insurance: collective – that which is provided to a group, usually by employers – and individual.

The initial prices of insurers entering the market (and those that existed at the inception of regulation) are not controlled, though ANS determines, on an actuarial basis, that they are sufficient for the financial stability of the entrant. Subsequent increases in individual policy prices (but not collective ones) are subject to regulation by ANS. There are as many as 1,400 insurers providing private health insurance of some kind, but 48 of them account for about half of the market.

Beginning in 2000 the prices of pharmaceuticals were also regulated. Since 2003 they have been subject to price cap regulation conducted by the Drugs Market Regulation Chamber (CMED), which is an inter-ministerial body on which the ministries of Health, Finance, Justice, Development, Industry and Foreign Trade are represented. As noted above in Section 2.1.4, at about the same time that pharmaceutical prices came under regulation the Congress referred to SDE several instances of possible abusive pricing by drug companies. To date none of these have resulted in a finding of illegality, however.

The competition law applies fully to the health sector, in which the BCPS has regularly considered both conduct and merger cases, as described above.

5.7. Banking

There are about 161 banks, including commercial banks and savings banks, in Brazil.[77] The sector is concentrated. The ten largest banks account for about 90% of total assets and the CR4 is about 68%. There continue to exist both federal and state owned banks, though the number is gradually declining. Publicly owned or controlled banks currently account for about 36% of the market. Bank of Brazil, the largest in the system, is federally controlled, though its shares are publicly traded. In the early 2000s there was entry by some large foreign banks, though many of them subsequently departed. Recently there has been something of a bank merger wave in Brazil. In 2007 ABN Real was acquired by Spain's Santander, marking the first time that a foreign player directly challenged the local leaders. In 2008,

Itaú, the second largest Brazilian bank, acquired Unibanco, vaulting it to number one. Bank of Brazil responded by acquiring savings and loan institutions, including two that had been owned by important states (São Paulo and Santa Catarina), thus regaining the top position.

Banking is the one regulated sector in which the competition law has not been fully applicable. The Central Bank – BACEN – had long maintained that it should have sole jurisdiction in this sector for "prudential" reasons – the security of the financial system. In particular, the Bank has asserted exclusive control over bank mergers on the grounds that it must assure the proper disposition of "problem banks" and enforce constitutional limits on entry by foreign banking institutions. In 2001, the Federal Attorney General's Office issued a legal opinion concluding that the specificity of Brazil's banking law took precedence over the more general language in the competition law, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes.

CADE has never acceded to that opinion, taking the position that the competition law (which was enacted after the banking law) is applicable by its terms to all commercial enterprises, and that CADE, as an autonomous agency, is not bound by a legal opinion issued by the Executive Branch. The issue came before the courts in an appeal from a CADE decision fining two banks, Bradesco and BCN, for not notifying their merger to CADE. The court of first instance and the appeals court ruled in CADE's favour, but the case is on appeal in the Superior Court of Justice.

Nevertheless, in 2005 CADE and BACEN entered into a co-operation agreement providing for the exchange of information. The two collaborated on a set of merger guidelines for the banking sector, which were based on the SEAE/SDE merger guidelines. A bill resolving the jurisdictional dispute was sent to Congress in 2003, approved by the Senate in 2007 and now is pending before the House of Representatives. The bill provides that the Central Bank shall have exclusive competency for reviewing mergers that involve a risk to the overall stability of the financial system (an issue that would be determined by BACEN). CADE and BACEN would share authority to review all other merger cases. Authority for handling conduct cases in the banking sector would remain exclusively with the BCPS.

In 2008 CADE and BACEN reached agreement providing for joint review of bank mergers and also providing that both agencies would work toward enactment of the legislation described above. (That agreement led the Superior Court of Justice to postpone the hearing that had been set in the Bradesco/BCN case described above.) Pursuant to the agreement, bank mergers are notified to both agencies. The Unibanco/Itaú merger, described above, was one. It was approved by BACEN but the case continues in

CADE. BACEN has never formally disapproved a proposed merger, usually upholding them on the grounds that they create efficiencies and benefit competition.

5.8. The omnibus bill for sector regulatory agencies

In 2003 a bill was introduced in Congress that would, among other things, standardise the relationships between sector regulators and the BCPS. (Under sectoral laws, regulators are already required to promote competition in the sectors subject to their oversight,) Regulators would be required to monitor their industries for compliance with the competition law, report suspected violations and provide technical reports on request to CADE for use in enforcement proceedings. CADE is required to notify the relevant agency of decisions rendered in conduct and mergers cases, so that the agency may adopt any necessary legal measures. The bill also revises procedures for comment by SEAE on proposed regulations. Regulatory agencies are required to request an opinion from SEAE 15 days before proposed norms and regulations are posted for general public comment. SEAE is required to file within 30 days thereafter a public opinion on the competitive implications of the proposal.[78] The bill remains in the House of Representatives, and there does not seem to be much momentum for its passage.

6. Competition advocacy

Competition advocacy has two dimensions. The first reflects the competition agency's role as consultant to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as proponent for increased public understanding and acceptance of competition principles.

SEAE is very active as competition advocate to other parts of government and to regulators. There are historical and structural reasons for SEAE's prominence in this field. As described above, until the mid-90s there was heavy regulation of the economy and the Ministry of Finance, of which SEAE is a part, was a central player in that scheme. SEAE was what might be called the national think tank in matters of this kind. When economic liberalisation began in 1994, but before sector regulators were created, the Ministry of Finance had the responsibility for monitoring "public service prices." A 1995 law implementing the Real Plan provided:

> *As of July 1, 1994, increases and reviews of public sector prices and public service tariffs will be determined ...according to acts, rules and criteria to be defined by the Ministry of Finance.*[79]

A subsequent decree vested SEAE (recall that its full name is Secretariat of Economic Monitoring) with important tasks in this oversight, including conducting technical analysis of price changes, "expressing its opinion" on regulatory decisions and privatisation of state-owned companies, "monitoring the development of sectors and programmes," "represent[ing] the Ministry of Finance in interministerial activities," and "fostering co-ordination with public sector entities, the private sector and nongovernmental organisations" that are also involved in these tasks.[80]

A structural feature that fosters SEAE's prominence as intra-governmental competition advocate is the fact that policymaking in several parts of the economy is in the hands of a council or committee on which sit representatives of various ministries. Such councils exist in surface transportation, health, civil aviation and energy, for example. The Ministry of Finance participates in virtually all of them, and SEAE, by virtue of the law cited above, is the ministry's representative. It must be pointed out, however, that SEAE's strength – being part of a powerful government ministry – is also a potential weakness. Its advocacy in various matters could be more susceptible to political influence than would that of an independent agency. SEAE states, however, that since at least 2004 it has not been subject to any political influence in its competition advocacy function. It considers itself to be able to operate independently in this sphere.

It is not possible to list SEAE's extensive contributions in this advocacy role in detail. Below is a general description of its activity in recent years in some sectors:

- Land transportation: SEAE participates in meetings of the Brazilian Growth Acceleration Programme, a Presidential initiative, that has an active role in the formulation of transportation policy. SEAE reviews rail transportation tariffs and comments on the regulatory structure (price caps). It has advised ANTT on its process for the tendering of road concessions, described above. Its recommendations had a prominent role in the lowering of prices as much as 46% below the base price. It has also advised ANTT on the structure of its formulas for passenger bus tariffs.

- Ports: SEAE participated in a task force charged with developing efficient contracting procedures for dredging. In 2008 it prepared a study on regulation and competition in ports employing international experience in the sector. In the same year it and SDE participated in the development of a decree, known as the Port Decree, that set out policies and guidelines for the development of Brazil's maritime sector.

- Civil air transport: SEAE participated in deliberations resulting in the creation in 2006 of ANAC, the new regulator for the sector. It provided recommendations on the process for allocating slots at congested airports, which received widespread public attention, though not all of them were ultimately adopted. SEAE sits on various technical committees that formulate policy in the sector. It responded to the aviation crisis, described above, with several recommendations, all designed to introduce more competition in the sector.

- Telecommunications: SEAE has made several contributions in public consultations sponsored by ANATEL, the telecommunications regulator. Among them were comments on: (i) changing the methodology used to account for productivity gains in fixed line services in regulated tariffs; (ii) efficient use of the radio frequency spectrum for the purpose of reserving parts of it to new entrants; (iii) a General Plan for the Update of the Telecommunications Regulation (PGR); (iv) proposed revisions to the delegated areas for fixed local voice services, facilitating entry by providers operating in other areas. SEAE also participated in the creation of legislation now in Congress that would alter the pay TV market. The legislation would establish technological neutrality in this service, improving competition and allowing new entry, especially by telephone companies.

- Health: As noted above, part of the private health insurance market is subject to price regulation by ANS, the sector regulator. The applicable law requires that annual adjustments to insurance premiums be submitted to SEAE for approval before becoming effective. To date SEAE has not disapproved any such changes. Prices for pharmaceuticals are also regulated (by means of price caps) by a separate inter-ministerial agency, on which sits the Ministry of Finance, represented by SEAE.

- Banking: In 2006 SEAE, SDE and the Central Bank formalised a co-operation agreement leading to a detailed study of the credit card market in Brazil, which was completed in 2009 and published. It contained several recommendations and, among other things, led to the decision by Visa and MasterCard to abandon the exclusive arrangements that they had with their respective processing networks, described above in Section 2.1.2. In 2007 the Central Bank and the Ministry of Finance, including SEAE, worked together to develop a series of rules issued by the Bank governing bank service charges.

- Urban transportation: Urban mass transit is regulated at the state and local levels. The role of the federal government, established in the constitution, is that of elaborating guidelines for these services. SEAE participated in drafting a set of rules for this purpose. In 2007 a bill was introduced in Congress that would permit municipalities to adhere to this programme; the legislation is pending.

- Other markets: SEAE participates in the General Co-ordination for Competition Defence (COGDC), which has oversight responsibilities in various regulated markets, including some that are regulated at state and local levels. SEAE has participated in studies of taxi services, driving schools and funeral homes. In driving schools, for example, a price fixing investigation revealed that some state traffic departments had issued instructions setting maximum and minimum prices for this service. They had done so for the purpose of ensuring sufficient quality of service, but SEAE convinced them that that goal could be met by means other than setting prices, and the practice was ended.

- Review of legislation: An amendment to the Consumer Defence Code was proposed that would require a supplier of goods and services "of a continuous nature" to "extend the conditions offered for adhesion of new consumers to contracts already in effect." SEAE concluded that while the bill articulated a valid concern, that of providing equal treatment to consumers, it could harm consumers in other ways, for example by discouraging promotions that could ultimately benefit all buyers in the market. SEAE recommended that the bill not be enacted.

- Trade: SEAE participates actively in the formulation of trade policy and has an advisory role in trade cases, as described in Section 3.5 above.

CADE and SDE also participate in various ways in intra-governmental competition advocacy. As noted above in Section 3.1, in a recent reorganisation CADE created a Technical Group on Regulated Markets, whose purpose is both to better inform the Council in matters in regulated industries and to develop relations with sector regulators. The Group has conducted a series of meetings with ANEEL, the electricity regulator, and is working on co-operation agreements with ANEEL, ANP (oil and gas), ANATEL (telecommunications) and ANAC (aviation). An agreement between CADE and ANTT (surface transportation) was signed in 2006. SDE has also participated in inter-agency projects, notably the credit card study, described above. It also participates as the representative of the Justice Ministry in CMED, the pharmaceutical price regulator. CADE and

SDE joined with SEAE in signing a co-operation agreement in 2009 with ANS (health) for the purpose of studying competition in the private health insurance market.

All three agencies are active in the second aspect of competition advocacy, promoting public awareness and support for competition policy. SDE's extensive activity in the anti-cartel area is documented above in Section 2.1.1.4. CADE publishes its *Competition Law Journal* containing papers in the field. The journal is in its 33rd volume. CADE also publishes a *Practical Guide on Competition Defence in Brazil*, which is a bilingual publication with information on relevant legislation and major decisions by CADE. The 3rd edition was issued in 2007. CADE has entered into agreements with various educational institutions in Brazil for the purpose of promoting the study of competition policy.

The three agencies have academic exchange programmes. Twice each year university students spend about one month at the agencies, where they have an opportunity to work with academics and experts in the field. At the end of the programme they may submit a final paper which is monitored by a professional. The programme has proved to be a useful recruiting tool. Several of its participants later came to work at the agencies. In 2006 SEAE, in partnership with a Brazilian university and the World Bank, created a cash award for monographs on competition and regulation. In the first competition 154 papers were presented. CADE has a similar programme.

Representatives of the three agencies regularly participate in conferences and seminars on competition policy. The three agencies each maintain informative web sites.[81] SEAE's and SDE's include sections in English, and CADE intends to create sections in both Spanish and English in 2010.

7. Conclusions and recommendations

7.1. Strengths and weaknesses

The 2005 Report[82] detailed the progress that the BCPS had made since the beginning of the decade, and the system has continued to build on those achievements. Of its several accomplishments two stand out. The BCPS anti-cartel programme, almost non-existent in 2000, is now both active and effective. Particularly notable is the criminal enforcement component. Brazil is like most countries in which cartel conduct can be prosecuted criminally, in that separate criminal laws apply to the conduct apart from the competition law. These laws are enforced by government prosecutors, not

the competition agency. If a criminal programme is to be successful there must be close co-operation between the prosecutors and the competition agency. Brazil has made significant progress in this regard. Also, the BCPS, notably SDE, has made great strides in developing its cartel investigatory skills; it makes full use of the tools available to it – dawn raids, the leniency programme, inspections (visits to business offices with notice) and computer forensic techniques. In Latin America Brazil is widely considered the leader in prosecuting cartels, and its neighbours regularly consult with it in this area. SDE's advocacy programme in cartels is innovative and successful.

The BCPS' second signal achievement is its implementation of the fast track merger review process. The system had been bogged down by inefficient merger review procedures, which consumed up to 70% of the system's resources and caused undue delays. The fast track programme now applies to as many as 70% of the mergers notified to the BCPS, freeing resources for other work, notably the anti-cartel programme, and benefiting the business community by speeding the approval of their transactions. The fast track process has another beneficial effect, that of paving the way for premerger notification. Most of the business community is on record as supporting premerger notification (with the important caveat that the BCPS be given sufficient additional resources to operate it efficiently), but this support probably would not exist if the BCPS had not shown that it can process mergers quickly. In other respects the BCPS has administratively improved the merger notification process by interpreting the BRL 400 million size threshold as applying only to Brazilian revenues, by limiting the application of the 20% market share threshold and by clarifying, to some extent, the definition of the trigger date that begins the running of the 15 day notification period.

SEAE continues to have significant access within the government and with sector regulators as competition advocate. In other respects the BCPS is an effective advocate for competition in the public arena, and it is an active participant in the international competition community in various ways. The BCPS is respected in other parts of government, by the courts and by the business community.

The BCPS continues to confront several problems, however. Foremost among them is the high rate of staff turnover in all three agencies. At CADE the problem has been particularly acute. There were at least two reasons for it: the short length of the commissioners' term – two years – and the fact that until recently all professionals working there were either contract employees or permanently assigned to other government agencies. The turnover problem is exacerbated by the fact that the agencies are understaffed to begin with. This is especially true at CADE and SDE. One

result of this resource problem is the continuing backlog in conduct investigations at SDE and the length of time that it takes for the average conduct case to be resolved. While there have been substantial improvements in the merger review process it continues to suffer from the lack of premerger notification. The result is longer review times for non-fast track mergers and greater obstacles to the imposition of structural remedies by CADE when mergers are found to be anticompetitive.

Judicial review of competition cases has emerged as an important issue for the BCPS. Many of CADE's decisions imposing sanctions or remedies have been appealed to the courts. Courts have issued injunctions suspending the implementation of CADE's orders, and because a typical court case can take ten years or more if appealed to the highest level, the effect is effectively to frustrate the enforcement process. CADE has been more proactive in court in recent years with some success, especially in collecting fines, but there are limits to what the BCPS can do on its own.

7.2. Recommendations calling for legislation

7.2.1. Enact the legislation in Congress to amend the competition law.

The following recommendations are addressed in the proposed legislation, described in Section 4 above. They were also made in the 2005 Report.

7.2.1.1. Consolidate the investigative, prosecutorial, and adjudicative functions of the BCPS into one autonomous agency.

The BCPS has made the best out of what once was a highly inefficient system. The duplication of effort between SDE and SEAE has been eliminated. Both have become proficient in their areas of responsibility, conduct investigation at SDE and merger review and competition advocacy at SEAE. Still, there are inefficiencies stemming from the three being in separate agencies, and sometimes there is a lack of communication. The 2005 Report points out that the single-agency model has proved successful in many jurisdictions, and given the proper resources there is no reason to think that it could not work in Brazil.

The legislation would transfer SDE's investigative responsibilities to a new CADE Superintendency General. SEAE's merger review function would also be transferred to the Superintendency General, while SEAE would retain its competition advocacy mandate. Such a restructuring is not

without its challenges, however. It will be important to preserve the proficiency that has developed in SDE and SEAE, while improving efficiency.

7.2.1.2. Create CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff.

This is critical. The 2005 Report identified inadequate staffing and high turnover as the number one problem in the BCPS, and so it continues today. Among other things, business support for premerger notification is contingent upon there being sufficient resources in the agency to administer it efficiently.

The bill provides for 200 permanent career positions at CADE. It is understood that these positions would not be "competition" career positions, that is, created for CADE, requiring qualifications specific to its mission, but rather they would be permanent positions assigned to the agency that would be filled by federal civil servants. The former is preferable, as likely to result in an even more qualified cadre of professionals as well as reducing turnover, but the creation of a permanent staff of this size is nevertheless highly important.

7.2.1.3. Extend the terms of the commissioners and other politically appointed senior officers, including the Superintendent General, to at least four years and make the terms non-coincident.

The short two year term for CADE commissioners with the possibility for one reappointment contributes to the high rate of turnover in the agency and it adversely affects its institutional memory. It also enhances the opportunity for the exercise of political influence through the appointment process. The government has the ability to completely remake the Council in as little as two years. It also creates an incentive for sitting commissioners to adjust their decisions in order to win re-appointment, if they desire it. The 2005 Report recommended that the length of the term be a minimum of four years and expressed a preference for five years, thereby making it impossible for the national President, whose own term is four years, to completely replace the Tribunal in one term.

The bill does extend the terms of the commissioners to four years, non-renewable, and it staggers their beginning and ending dates, thereby lessening the danger of there being so many vacancies on the Tribunal that a quorum cannot be constituted, which happened as recently as 2008. It also provides for four year terms for the Attorney General and the Chief

Economist. Presently, however, the term of the Superintendent General as provided in the bill is two years, with the possibility for reappointment for one term. This is a highly important post; the Superintendent controls the agency's investigative agenda. That term too should be extended to four years.

7.2.1.4. Fix the required quorum for CADE's Tribunal quorum at four rather than five whenever the number of commissioners available to vote on a case is reduced to four by vacancies or recusals.

This was another recommendation designed to avoid a lack of a quorum on the Council. It would seem to be less important if the other steps affecting the commissioners' terms described above are taken. Further, the proposed legislation apparently also gives the President of the Tribunal the power to appoint a temporary commissioner in the event a vacancy is not filled for a period of time. In any case, the bill does reduce the necessary quorum to four.

7.2.1.5. Modify the merger notification and review process to

- Establish a pre-merger notification system.
- Eliminate the present market share notification threshold and adopt thresholds based on the domestic turnover of both the larger and the smaller parties to the transaction.
- Eliminate notification of non-merger transactions.

These are well-documented shortcomings in the merger notification process, which are discussed fully in Section 2.2.2. The proposed legislation corrects these problems as recommended.

7.2.1.6. Provide for expedited review and clearance of merger transactions that do not raise competitive concerns.

As discussed above, the BCPS has largely succeeded in doing so by administrative means. The proposed legislation institutionalises the process, as described in Section 4.3 above.

7.2.1.7. Establish formal settlement procedures for merger cases.

Again, in recent years the BPCS has more frequently negotiated merger settlements under the powers given it in Article 58 of the current law. The proposed legislation changes those procedures somewhat, vesting settlement

powers with the new Superintendent General and providing for a formal comment period and final approval by the Tribunal.

7.2.1.8. Adopt an explicit standard for the review of the competitive effects of a merger.

The current law lacks an explicit substantive standard for reviewing mergers, though the standards actually applied by the BCPS are commonly employed elsewhere. The bill articulates a standard that is based upon that in the European Commission's Merger Regulation.

7.2.1.9. Modify the leniency programme to eliminate exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law.

The BCPS leniency programme is proving to be quite successful, having generated several applications. The programme provides that individuals who receive leniency also receive immunity from criminal prosecution under the Economic Crimes Law. Currently they do not receive immunity from prosecution under other criminal laws that may apply to the conduct, however. This may inhibit some from coming forward to apply for leniency. The bill remedies this problem by extending the immunity to those other laws.

The following recommendations do not depend upon enactment of the bill in Congress, but their implementation will be affected by whether it is enacted.

7.2.2. Enact the bill providing for enforcement of the competition law in the banking sector.

There had been a dispute between CADE and the Central Bank over which agency had the power to review bank mergers. The bill, which both agencies support, would vest exclusive authority in the Central Bank to review mergers that involve a risk to the overall stability of the financial system, while the two agencies would share jurisdiction in all other bank mergers.

7.3. Other recommendations

7.3.1. Reduce the backlog of conduct investigations and cases within the BCPS and shorten the time required for the final disposition of an investigation or case.

While there has been some progress in recent years in this area the problem is still significant. The new resources provided in the proposed legislation will make a substantial contribution toward solving it, but the BCPS, whether or not the bill passes, should examine its procedures for possible efficiencies. Just as merger review was made more efficient by creating the fast track procedure for mergers that could quickly be identified as non-problematic, a similar process might be established for conduct investigations. A complicating factor might be that under the current law CADE must approve SDE's decision to close a preliminary investigation, which generates the need for a report by SDE and a formal decision by CADE. The BCPS should look for ways to streamline this process, consistent with due process requirements for interested parties under Brazilian law.

Consolidating the process in CADE, as the bill would do, should help in this regard. The Superintendent General would make the final determination on whether to close an investigation in the preliminary stages. On its face the bill also causes some concern, however, because it seems to create a new, third formal stage in the investigation process (see Section 4.2 above). To the extent that formal procedures within the Superintendency General are considered necessary for the progression of an investigation through these stages it could slow the process down. The process should be made as efficient and non-bureaucratic as possible, again consistent with due process requirements.

7.3.2. In merger cases, strive to impose structural remedies as opposed to behavioural ones, where possible.

CADE has regularly imposed behavioural remedies in merger cases. It might be useful to conduct a study of the efficacy of the remedies in some of these cases. Experience in other countries, however, has shown structural remedies to be more effective than behavioural ones and easier to administer. If the bill passes, premerger notification will enhance CADE's ability to require structural remedies, which it should do when it is possible.

7.3.3. Continue efforts to enhance communication and co-ordination between the BCPS and federal and state prosecutors, especially in cases and investigations initiated by the prosecutors.

Criminal prosecution is an important component of Brazil's anti-cartel programme. These cases are conducted by federal and state prosecutors, not by the BCPS. The BCPS and the prosecutors have developed good working relationships, especially in investigations initiated by SDE. Prosecutors have the power to initiate cases independently of the BCPS, however, and it is not uncommon that they do so. Prosecutors often consult the BCPS in cases that they initiate, but they are not required to do so. It would be useful to implement a programme requiring prosecutors at least to consult with the BCPS before bringing a case that also involves a violation of the competition law. Such co-ordination would help to prevent the institution of inappropriate cases, including those that may not be appropriate for criminal prosecution or those that may not be sustainable under relevant competition principles.

One benefit of enhanced co-ordination of this kind would be to develop better data on criminal cases, including the number of convictions and the number and length of jail sentences imposed. Such information is of more than academic interest. When compiled and publicised it contributes to the strong deterrent effect that criminal prosecution provides.

7.3.4. Develop a competition advocacy capacity in CADE, but importantly, avoid duplication with SEAE in this field.

SEAE's contributions in competition advocacy are significant (see Section 6 above). Nevertheless, CADE has rightly decided to enhance its capacity in economics, one purpose of which is to develop a competition advocacy function. It will have to communicate with sector regulators when it has cases in their sectors. Its cases may generate proposals for regulatory actions that should be communicated to the regulator. On occasion, hopefully rare, CADE and SEAE may disagree about an important advocacy position. The importance of developing some regulatory expertise will likely be greater if the bill is enacted, a result of which will be to completely divorce SEAE from competition law enforcement. At the same time, CADE must not duplicate SEAE's advocacy function; the two agencies should co-ordinate their work in this field. They could work together in a matter if it is efficient to do so.

7.3.5. Continue to strive for a more effective litigation programme in court. In the longer run, consider proposals for changes in the judicial system that could help to expedite competition cases.

The BCPS now understands that this is one of its most important challenges. Indeed, if the bill is enacted, correcting the several problems enumerated above, this will likely be its biggest. It has begun to focus on the issue, giving more emphasis to enforcing CADE's orders in court, reorganising its case handling procedures, strengthening its litigation skills and reaching out to judges in order to acquaint them with competition cases and the special issues that they present. These efforts should continue and to them should be added, if the bill is enacted, more resources.

Unfortunately the underlying problem, inherent delays in court cases, is mostly beyond the BCPS' control. The BCPS and other interested parties could begin to think about changes in the system that could speed the review of competition cases. The 2005 Report recommended that there be consideration of designating specialised judges and appellate panels to resolve competition law issues. To a follow-up question the BCPS responded that CADE had been in contact with the Federal Judges Association in order to assess the feasibility of this proposal. One response from the judges was that the number of competition cases is too small to justify specialised judges. It should also be noted that since all appeals from CADE decisions are made to the court of first instance in the Federal District, that court over time will become more comfortable with these cases.

In any case, the problem of inordinate delay would remain. A solution might be to create special rules that apply to appeals from specialised tribunals like CADE, for example, bypassing the court of first instance and lodging the appeal directly in a second level appeals court. There might be others that Brazilian legal experts could devise.

7.3.6. Take advantage of procedures for settling both conduct and merger cases, thereby promoting efficiency and avoiding costly and lengthy judicial appeals.

Procedures for settling both conduct and merger cases exist, and CADE has begun to use them more often. It recognises the importance of the settlement tool and has created a unit that will specialise in settlement negotiations. If the bill passes and premerger notification is established the incentives for merging parties to settle problematic mergers will change; they will be more willing to settle in order to be able to consummate their transaction quickly. If respondents in conduct cases perceive that they can

unreasonably delay the imposition of CADE's sanctions by appealing to the courts they may still prefer that alternative. CADE is making the right response by vigorously asserting its right to require respondents to deposit their fine with the court or post a bond guaranteeing payment. Either alternative can be expensive over time. In any case, CADE is encountering a willingness on the part of participants in international cartel cases to settle, if only to eliminate uncertainty.

A strong caveat in any settlement endeavour is that the agency must not settle too cheaply. In the long run that practice will have a pronounced negative impact on enforcement.

Notes

1. OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), available on the OECD/Competition web site at www.oecd.org/competition. The OECD first studied the Brazilian competition policy system in 2000, which also resulted in a report on the topic, published as *Competition Law and Policy Developments in Brazil*, OECD Journal of Competition Law and Policy, October 2000, vol. 2, No. 3.
2. See, Competition Policy International, *Trustbusters, Competition Policy Authorities Speak Out*, 38-42 (2009).
3. Section 2.
4. Article 3.
5. Article 4.
6. Interestingly, however, the laws of two of Brazil's neighbors, Argentina and Chile, also combine these different forms of anticompetitive conduct in a single statutory provision.
7. Article 21 further elaborates on the methodology for evaluating possible abusive pricing: "For the purpose of characterising an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances: (I) the price of a product or service, or any increase therein, vis-à-vis any changes in the cost of their respective input or with quality improvements; (II) the price of a product previously

manufactured, as compared to its market replacement without substantial changes; (III) the price for a similar product or service, or any improvement thereof, in like competitive markets; and (IV) the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs."

8. Article 15.

9. On a few occasions CADE has calculated a fine based solely on the affected market, however, for purposes of fairness and proportionality (for example, when one respondent in a cartel case had total revenues that were much larger than those of its co-conspirators).

10. Article 24. If a firm has been subject to a final administrative decision of abuse of economic power, inscription in the SISCOMEX registry of importers and exporters can be denied, pursuant to an ordinance of the Ministry of Foreign Trade; however, this power has not yet been used in competition cases.

11. Article 25.

12. Three manufacturers of flat rolled steel products raised their prices simultaneously after having informed SEAE that they intended to do so. Their reason for notifying SEAE was that until 1992 steel prices were controlled, and SEAE had responsibility for monitoring them. SEAE promptly responded to the producers that it was now unlawful to agree to raise prices, but shortly thereafter the prices were increased. The producers denied that they had reached agreement to do so, and there was no direct evidence of agreement. Still, CADE concluded that the agreement could be inferred from the totality of the evidence, and fined the producers the minimum permitted by the law, 1% of the previous year's gross turnover of each firm, which amounted to about BRL51 million, plus fines of BRL5 million for supplying false information. The respondents appealed the decision to the courts, and the case remains unresolved on appeal.

13. Law 10149/00.

14. For a detailed presentation of this programme, see Brazil's contribution to the Latin American Competition Forum (Chile, September 2009) at: http://www.oecd.org/dataoecd/33/48/43536874.pdf, also available on Olis as DAF/COMP/LACF(2009)7. Contributions from other Latin American countries can also be found at www.oecd.org/competition/latinamerica.

15. Ministry of Justice, Secretariat of Economic Law, *Brazil's Leniency Programme*, 2008, available on the SDE website at www.mj.gov/sde in Portuguese and English.

16. Law 8137/90.

17. It seems that the likelihood of prosecution for one of these other crimes in cases in which there is a leniency agreement is small. As described below in section 2.1.1.3 the BCPS works closely with federal and state prosecutors, who would institute such cases, with the result that they seldom if ever work at cross purposes.
18. Ministry of Justice Ordinance No. 04/2006.
19. This six month period can be extended for an additional six months if there is no other candidate for leniency in the investigation.
20. All are available on the SDE website, *supra*, n.15.
21. Law 11482/07.
22. CADE Ordinance No. 51 (2009).
23. Law 8137/90.
24. The same article also prohibits other types of anticompetitive conduct, including "abuse of economic power," "exploitation of monopoly power by increasing prices without justification," "sales below cost to hinder competition," and certain forms of price discrimination. To date, criminal prosecution for these other types of conduct has been rare or nonexistent.
25. Law 10446/02.
26. Whirlpool, S.A., et al. (2009).
27. Peixoto, Brazil: Cartels and Leniency, in Global Competition Review, Antitrust Review of the Americas 2010, available on the GCR website at www.globalcompetitionreview.com.
28. In another settlement involving an international cartel in marine hoses three respondents did agree to provide co-operation.
29. Sociedade dos Mineradores do Rio Jacuí Ltda. (Smarja) (2008).
30. Rota-Sul Empresa de Vigilancia Ltda., (2007).
31. SINDIPEDRAS, *et al.* (2005).
32. SDE Ordinance 51, 2009.
33. For further information on the subject, see the OECD Guidelines for fighting bid rigging available at www.oecd.org/competition/bidrigging.
34. Coopanest-GPA (2006).
35. Shopping Iguatemi (2007); Center Norte S/A (2007).
36. Supply side substitutability is also sometimes considered at this stage. (In some other countries supply side substitutability is considered when identifying the firms competing in the relevant market.)

37. "Gross revenues" means the total pre-tax revenues of the parties in all markets.

38. CADE S*úmula* (precedent) No. 01 (2005) issued pursuant to CADE Resolution No. 39 (2005).

39. Approved in Resolution No. 45.

40. The power was first authorised by Resolution 28, adopted in 2002, which was superseded by Resolution 45, issued in 2007.

41. In 2007 CADE issued Ordinance No. 44, which provided guidelines on calculation of these fines. Relevant criteria include the size of the transaction and of the parties, whether the merger was ultimately subject to a remedial order or disapproval by CADE and whether the parties did provide notification spontaneously, if late. The fine is doubled in repeated offences.

42. In a recent judicial decision CADE's concept of the trigger date was challenged by a party who contended that under the law only a complete consummation of the transaction would begin the running of the 15 days. The Supreme Court sided with CADE's definition. Sonaeimo vs. CADE (2009).

43. Súmula No. 2 defined the circumstances in which the notification of an acquisition of minority shareholdings by existing majority shareholders is not mandatory. Súmula No. 3 applied to situations in which the sole objective of an agreement is to take part in a public procurement procedure for the grant of a concession.

44. CADE challenges these transactions when the non-compete clause exceeds five years; this period has been settled in the Brazilian Civil Code as the default period. CADE has accepted longer periods in some cases, however, mainly in the case of joint ventures or when involving R&D activity.

45. América Latina Logística S.A. ("ALL"), Brasil Ferrovias S.A. ("BF"); Novoeste Brasil S.A. ("NV"), No. 08012.005747/2006-21 (2006). In a recent merger involving vertical restraints in the retail fuel sector, Petrobras /Ipiranga (2009). CADE chose to require the elimination of exclusivity arrangements between fuel wholesalers and retailers rather than to require divestitures of retail outlets, which it had done in an earlier, similar case.

46. Coca Cola/ Leão Junior SA (2009).

47. DBG/Chinaglia (2009).

48. Saint-Gobain/Owens Corning (2008).

49. The transaction was challenged in the United States by the Federal Trade Commission and settled by a consent order requiring Owens Corning to divest its North American continuous filament mat (CFM) business. See, USFTC press release, October 26, 2007, available on the USFTC web site at www.ftc.gov.

50. CVRD, et al. (2005).

51. CADE was represented in court by its Attorney General, who in 2008 was appointed President of CADE. His confirmation as President by the Senate was slowed (but ultimately approved), reportedly because of opposition by certain business interests. Among them, it was said, was Vale. See, Global Competition Review, *The Prizefighter*, available on the GCR website at www.globalcompetitionreview.com.

52. Article 5.

53. Law 8.884, Article 52.

54. Article 38.

55. Law 9021.

56. Article 42.

57. CADE Resolution 45.

58. SDE/SEAE Joint Ordinance No. 33/2006.

59. Resolution 15 has been superseded by Resolution 45, but the two annexes continue to be in effect. Also, in 2007 the BCPS undertook to create a system for electronic notification of mergers. The project has proved to be technically difficult, however, and the BCPS is now in the process of identifying outside IT contractors who might be able to complete it.

60. SEAE/SDE Joint Ordinance No. 1.

61. Lawyers assigned to the Attorney General are another career position.

62. Again, however, these are not positions requiring qualifications specific to CADE's mission.

63. SEAE's professional staff shown in Table 13 includes all who work in merger review, regulation and competition advocacy. The number who work in mergers is relatively small compared to the total. In 2009, for example, 17 of 78 professionals conducted merger review.

64. See, Peixoto, *Brazil: Cartels and Leniency*, in The Antitrust Review of the Americas, 2010 (2009).

65. The Superintendency General may determine that the notification is deficient in some respect and return it to the parties for amendment. The

parties have 10 days to do so. If they do not correct the deficiencies the merger is not reviewed. One effect of the SG's decision to require an amendment is to extend subsequent periods, as set out in the law, by 15 days – the five day period for the SG to decide if the notification is complete and the ten day period for the parties to amend.

66. Law 9478/97, Art. 10.

67. Brazil has become one of the largest producers of biofuel (ethanol) in the world, and is the world's largest exporter of the product. Petrobras is active in this market as well. See, United States Energy Information Administration, *Brazil Country Analysis Brief* (2009), available at http://www.eia.doe.gov/emeu/cabs/Brazil/pdf.

68. In 2009 a long anticipated Gas Law was passed in Brazil, a central purpose of which is to facilitate competition in the sector.

69. White Martins/Petroleum Brasileiro (2006).

70. Ultragaz/Shell Gas (2008).

71. Petróleo Brasileiro S.A., et al. (2008).

72. Regulation was previously in the hands of the Transportation Ministry.

73. There is a proposal for high-speed rail service between Sao Paulo and Rio de Janeiro. Studies are underway, but there is no timetable for completion.

74. GOL, et al. (2008).

75. Viação Aérea Rio-Grandense, et al. (2004).

76. Law 9,961/2000.

77. According to data as of September 2009 published by the Brazilian Central Bank, at www.bacen.gov.br.

78. Compliance with this 30 day deadline does not affect whether the proposal goes forward.

79. Law 9,069/1995, Art. 70.

80 . Decree No. 1849/1996, now Decree No. 6531/2008, Art. 12.

81. CADE: www.cade.gov.br/; SDE: www.mj.gov.br/sde; SEAE: www.seae.fazenda.gov.br/.

82. See endnote 1.

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DROIT ET POLITIQUE DE LA CONCURRENCE AU BRÉSIL : EXAMEN PAR LES PAIRS

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DROIT ET POLITIQUE DE LA CONCURRENCE AU BRÉSIL : EXAMEN PAR LES PAIRS

RÉSUMÉ

La loi de 1994 a marqué l'entrée de la politique de la concurrence du Brésil dans l'ère moderne, en créant les trois organismes qui composent le Système brésilien de défense de la concurrence (SBDC). Les améliorations apportées depuis 2003 ont supprimé les chevauchements, de sorte que le SDE se concentre sur les accords anticoncurrentiels et les abus de position dominante, tandis que le SEAE est chargé d'analyser les fusions.

Les enquêtes dans les affaires d'entente ont été facilitées par le pouvoir de mener des perquisitions surprises et de créer un programme de clémence. Les poursuites pénales dans les affaires d'entente sont instruites par les procureurs fédéraux et des États, en coopération avec le SBDC.

L'introduction d'un processus accéléré a permis d'améliorer le contrôle des fusions ; celles qui ne présentent pas de problèmes au regard de la concurrence sont examinées et approuvées rapidement. Néanmoins, l'absence de notification préalable continue de pénaliser l'examen des fusions.

Les activités de promotion de la concurrence envers d'autres entités publiques et autorités de contrôle sont particulièrement importantes et efficaces parce qu'elles sont menées principalement par le SEAE qui, de par son appartenance au puissant ministère des Finances, est en contact avec de nombreux autres organismes publics.

Le manque de ressources reste le principal écueil que rencontre le SBDC, aggravé par le taux de rotation élevé de son personnel. Le CADE ne dispose pas de professionnels permanents. Le SDE est en sous-effectifs chroniques, ce qui entraîne des retards considérables dans les enquêtes. L'examen judiciaire constitue un autre problème. Il n'est pas rare que les décisions du CADE fassent l'objet d'appels devant les tribunaux. Dans le système judiciaire brésilien, des années s'écoulent avant qu'une décision soit prise dans une affaire, avec pour conséquence possible d'empêcher la mise en œuvre des décisions du CADE pendant toute la durée du recours.

Des propositions visant à remédier aux lacunes de la loi sur la concurrence de 1994 ont été formulées pendant des années, sans succès. Néanmoins, les perspectives de réforme semblent aujourd'hui plus prometteuses. À la mi-janvier 2010, un projet de loi visant à fusionner le SBDC en un seul organisme, à imposer la notification préalable aux fusions et à doter l'organisme d'un nombre significatif de nouveaux postes permanents a été approuvé par une Chambre du Congrès et était en cours d'examen par la deuxième Chambre. Toutefois, le projet n'est pas encore définitivement adopté, et il est urgent d'achever le processus au cours du premier semestre de 2010, de crainte que d'autres événements importants, notamment une élection nationale prévue en fin d'année, ne le relèguent au second plan.

Ce rapport formule plusieurs recommandations d'amélioration. La principale est sans doute l'adoption du projet de loi par le Congrès. D'autres recommandations portent sur les aspects suivants : résorber le retard accumulé dans les enquêtes sur les comportements ; accroître le recours aux procédures de règlement amiable à la fois dans les affaires de fusion et de comportement, ce qui permettrait d'augmenter l'efficience et de réduire le nombre d'appels formés devant les tribunaux ; faire un usage plus systématique des mesures correctrices de nature structurelle dans les affaires de fusion ; renforcer la coopération entre l'autorité de la concurrence et les procureurs fédéraux et des États dans les affaires pénales engagées à l'initiative des procureurs ; adopter le projet de loi qui accorderait à l'autorité de la concurrence le pouvoir d'examiner les fusions dans le secteur bancaire, actuellement débattu ; renforcer les capacités de promotion de la concurrence au sein du CADE et les coordonner avec le SEAE ; et poursuivre les efforts pour agir plus efficacement en justice.

Introduction

1. L'histoire de la politique de la concurrence au Brésil est riche et intéressante. L'entrée de la politique brésilienne de la concurrence dans l'ère moderne remonte au milieu des années 1990 et coïncide avec la transition du pays vers une économie de marché. Le nouveau système d'application du droit de la concurrence a rapidement bénéficié d'une bonne réputation en raison de son professionnalisme et de son travail remarquable : ses décisions témoignaient de sa compréhension et de son analyse de la politique de la concurrence. Il a néanmoins été confronté à divers problèmes, dus pour la plupart à la loi sur la concurrence adoptée en 1994. Le système de défense de la concurrence reposait en effet sur trois organismes distincts dont les activités étaient coordonnées de manière peu efficiente. Les enquêtes progressaient lentement, des ressources excessives étaient affectées au contrôle des fusions, dont la grande majorité ne représentait aucune menace pour la concurrence, tandis que les ententes injustifiables étaient quelque peu laissées de côté, alors qu'il est reconnu de tous que ces dernières sont le plus préjudiciable de tous les comportements anticoncurrentiels. Mais les plus lourds handicaps de ces organismes étaient probablement leur manque de ressources adéquates et le taux de rotation excessivement élevé de leur personnel.

2. Assez vite, les lacunes de la loi sur la concurrence sont devenues patentes. Des propositions de modification ont été présentées dès 2000, mais la plupart sont restées sans suite. Quoi qu'il en soit, le système de défense de la concurrence a enregistré des progrès constants, et même considérables. Il est devenu plus efficient, notamment en matière de contrôle des fusions, ce qui lui a permis de recentrer ses priorités sur la poursuite des ententes. Son programme de lutte contre les ententes jouit désormais de la considération générale, au Brésil comme à l'étranger. Mais de nouveaux progrès ne seront possibles que si certains changements sont apportés à la loi sur la concurrence. À la publication de ce rapport, cette étape importante semblait imminente : la nouvelle législation, examinée en détail à la section 4 ci-après, avait déjà été approuvée par l'une des deux Chambres du Congrès et elle était en cours d'examen par la deuxième.

3. Le présent rapport est le deuxième élaboré dans le cadre du processus d'examen par les pairs de l'OCDE de la politique de la concurrence au Brésil. Le premier a été publié en 2005 (« Rapport 2005 »)[1]. Ce rapport comportait plusieurs recommandations visant à poursuivre l'amélioration de la politique de la concurrence dans le pays, et bon nombre de ces dernières appelaient à une modification de la loi sur la concurrence. Il se pourrait que ces modifications soient enfin adoptées. Le Rapport 2005 formulait aussi d'autres recommandations qui ne nécessitaient pas une nouvelle législation et dont la plupart ont été suivies. Enfin, le rapport suggérait quelques améliorations de la législation en attente au Congrès, qui ont également été en grande partie acceptées.

4. Ce rapport a été élaboré dans le format traditionnel employé par l'OCDE pour ses examens par les pairs des politiques de la concurrence. Il se concentre essentiellement sur l'application du droit des ententes, le contrôle des fusions (sur le fond et au plan de la procédure) et l'examen judiciaire des affaires de concurrence.

1. Politique de la concurrence au Brésil : fondements et contexte

5. Les politiques économiques mises en œuvre au Brésil après la Deuxième Guerre mondiale se sont caractérisées par une intervention omniprésente des pouvoirs publics dans le fonctionnement du marché. La plupart des plus grandes entreprises du pays dans les secteurs industriel, des transports et des finances

[1] OCDE, *Competition Law and Policy in Brazil: A Peer Review* (2005), consultable à la rubrique concurrence du site Internet de l'OCDE, à l'adresse www.oecd.org/competition. L'OCDE a étudié le système brésilien de défense de la concurrence pour la première fois en 2000, et a également publié un rapport à ce sujet sous le titre *Évolution du droit et de la politique de la concurrence au Brésil*, Revue de l'OCDE sur le droit et la politique de la concurrence, Volume II, N° 3 (2000).

appartenaient à l'État. Celui-ci exerçait un contrôle des prix en étroite coopération avec le secteur privé. Les associations professionnelles consultaient ainsi régulièrement l'organisme public chargé de contrôler les prix[2]. Une loi sur la concurrence avait été adoptée en 1962 (loi 4137/62) et prévoyait la création du Conseil administratif de défense économique (Conselho Administrativo de Defesa Econômica – CADE). Le CADE était chargé, entre autres choses, d'empêcher « l'abus de pouvoir économique ayant pour effet […] l'élimination totale ou partielle de la concurrence »[3]. L'impact de cette loi est néanmoins resté limité en raison du contrôle systématique de l'État sur l'économie.

6. Un processus de libéralisation économique a commencé en 1990 avec le lancement par le président brésilien d'un train de réformes prévoyant privatisation, libéralisation des prix et déréglementation. En 1994, dans un contexte d'hyperinflation, le « Real Plan » a été mis en œuvre. Il consistait principalement à introduire une nouvelle devise alors accrochée au dollar étatsunien (depuis 1999, elle est autorisée à flotter librement en 1999), accompagnée de politiques budgétaires restrictives et de politiques de resserrement du crédit. Dans le cadre de ces réformes de 1994, une nouvelle loi sur la concurrence, la loi 8884/94, a été adoptée. Cette nouvelle loi a renforcé le CADE, qui est devenu un organisme indépendant, et a introduit le contrôle des fusions. La privatisation des entreprises d'État s'est poursuivie au cours des années 1990. De nouvelles autorités de réglementation indépendantes ont été créées pour les télécommunications, l'électricité, le pétrole et le gaz naturel, le transport de surface et le transport aérien. Le processus de privatisation n'est cependant pas terminé. Les pouvoirs publics restent en effet présents dans certains secteurs, et notamment dans le pétrole et le gaz, grâce à la participation de contrôle de l'État dans Petrobras, entreprise dominante de ce secteur, dans la production et le transport de l'électricité, ainsi que dans la banque.

2. Questions de fond : contenu et application du droit de la concurrence

7. C'est dans la constitution brésilienne de 1988 que l'on trouve les bases de la politique de la concurrence. L'article 173 §4 dispose que « la loi doit réprimer l'abus de la puissance économique ayant pour objectif la domination des marchés, l'élimination de la concurrence et l'accroissement arbitraire des bénéfices ». L'article 170 prévoit que « l'ordre économique » du Brésil doit être « fondé sur la reconnaissance de la valeur du travail humain et sur la liberté d'entreprise », et doit s'appliquer en « tenant compte » de certains principes tels que la « libre concurrence », le « rôle social de la propriété », la « protection des consommateurs » et la « propriété privée ». L'article 1 de la loi sur la concurrence reprend ces principes énoncés dans la constitution. Il précise que la loi « prévoit des mesures de lutte contre les ententes tout en respectant les principes constitutionnels tels que la liberté d'entreprise et la libre concurrence, le rôle social de la propriété, la protection des consommateurs et la répression des abus de puissance économique ».

8. La loi 8884, adoptée en 1994, reste aujourd'hui encore la loi sur la concurrence du Brésil. Elle confère des pouvoirs de décision à un organisme indépendant, le CADE[4]. Ce dernier se compose d'un président et de six membres du conseil ou commissaires. Le président et les commissaires sont nommés par le président de la République et leur nomination est soumise à l'approbation du Sénat national pour des mandats de deux années, renouvelables une fois[5]. La loi confie également d'importantes responsabilités à deux autres organismes qui dépendent directement du gouvernement, à savoir le Secrétariat pour la législation économique, rattaché au ministère de la Justice (Secretaria de Direito Econômico – SDE), et le Secrétariat pour le suivi économique, qui relève du ministère des Finances (Secretaria de

2 Voir Competition Policy International, *Trustbusters, Competition Policy Authorities Speak Out*, 38-42 (2009).

3 Section 2.

4 Article 3.

5 Article 4.

Acompanhamento Econômico – SEAE). Le SDE ouvre toutes les enquêtes qui ont trait aux comportements (accords anticoncurrentiels et abus de position dominante) et soumet des rapports et des recommandations au CADE, auquel il revient de statuer. Le SEAE est lui-même investi de pouvoirs d'investigation dans les enquêtes de comportement ouvertes par le SDE. Par ailleurs, le SEAE et le SDE analysent des rapports qu'ils soumettent au CADE concernant des projets de fusion. Le CADE peut lui-même compléter les travaux d'investigation menés par le SDE et le SEAE dans les affaires de comportement ou de fusion. L'ensemble de ces trois autorités – le CADE, le SDE et le SEAE – forme le Système brésilien de défense de la concurrence (SBDC).

9. La loi 8884 a été modifiée à trois reprises : en 1999, pour introduire des frais de notification de fusion, en 2000, pour accorder au SBDC de nouveaux pouvoirs substantiels dans les enquêtes sur les comportements (notamment celui de mener des perquisitions surprises et de créer un programme de clémence), et en 2007, pour clarifier les procédures de règlement amiable des affaires de comportement et autoriser les règlements amiables dans les affaires d'entente. Une législation complète qui modifierait à plusieurs égards la structure du SBDC et ses procédures est à l'étude au Congrès. La majorité des fonctions exercées par les trois organismes qui composent aujourd'hui le système seraient regroupées au sein du CADE. Le mandat des commissaires du CADE passerait de deux à quatre ans et deviendrait non renouvelable. Un nouveau bureau serait créé au sein du CADE pour assumer les fonctions d'enquête actuellement confiées au SDE et au SEAE. La notification préalable des fusions serait instituée, exigeant ainsi des parties à un projet de fusion qu'elles retardent leur transaction jusqu'à la fin de son examen par le CADE. Enfin, et c'est important, les ressources du CADE seraient consolidées par la création de 200 postes internes permanents. Cette législation est décrite plus en détail à la section 4.

2.1 Comportement

10. Les articles 20 et 21 de la loi 8884 traitent de toutes pratiques anticoncurrentielles autres que les fusions. Contrairement à la législation de beaucoup d'autres pays, celle du Brésil ne contient aucune disposition distincte concernant les accords anticoncurrentiels et les comportements abusifs d'une seule entreprise[6]. L'article 20, qui établit la norme générale, interdit

> *... tout acte ayant pour but d'une façon ou d'une autre ou autrement susceptible*
> *d'avoir les effets énumérés ci-dessous, même si ces effets ne sont pas atteints. . .*
> *I – limiter, restreindre ou léser de quelque façon la concurrence ou la libre entreprise ;*
> *II – contrôler le marché pertinent d'un certain produit ou service ;*
> *III – augmenter ses bénéfices de façon discrétionnaire ; and*
> *IV – abuser de son contrôle du marché.*

11. Toutefois, cet article exclut spécifiquement de la violation définie à l'alinéa II le contrôle du marché obtenu au moyen de « l'efficience concurrentielle ». L'article prévoit en outre qu'il y a présomption de position dominante quand « une société ou un groupe de sociétés » contrôlent 20 pour cent d'un marché pertinent. Il précise que le CADE peut modifier ce seuil de 20 pour cent « pour certains secteurs de l'économie », mais le CADE n'a pas jusqu'à présent utilisé officiellement cette possibilité.

12. L'article 21 contient une longue liste d'actes qui sont considérés comme des violations de l'article 20 s'ils produisent les effets énumérés dans ce dernier, mais la liste n'est pas exclusive. Parmi les pratiques énumérées figurent différents types d'accords horizontaux et verticaux et d'abus unilatéraux de pouvoir de

[6] Il est cependant intéressant de noter que dans les lois des deux voisins du Brésil, à savoir l'Argentine et le Chili, une seule disposition combine également ces différentes formes de comportements anticoncurrentiels.

marché. Les ententes injustifiables sont clairement interdites. Sont spécifiquement mentionnés les accords visant à fixer des prix ou des conditions de vente, répartir des marchés, soumettre des offres truquées ou encore restreindre la recherche et le développement. Parmi les pratiques verticales visées (elles peuvent être abusives si elles sont imposées de manière unilatérale) figurent les prix imposés, ainsi que d'autres restrictions concernant les ventes à des tiers, la discrimination par les prix et les ventes liées. Parmi les pratiques unilatérales énumérées figurent diverses actions visant à exclure ou à désavantager les nouveaux arrivants ou les rivaux existants, y compris le refus de vente et les restrictions à l'accès à des facteurs de production ou à des réseaux de distribution, « la vente à perte de produits à des prix déraisonnables » et la fixation de « prix abusifs ou le fait d'augmenter de manière déraisonnable le prix d'un produit ou d'un service »[7].

13. Outre ces pratiques qui sont généralement considérées comme des infractions au droit de la concurrence dans les autres pays, l'article 21 en cite plusieurs autres qui, telles qu'elles sont décrites, sont moins habituelles. On retiendra les suivantes : « refuser la vente d'un certain produit ou service dans les conditions de paiement appliquées habituellement aux pratiques et politiques commerciales normales » ; « retenir des biens de production ou de consommation, sauf pour récupérer les coûts de production », « abandonner ou faire abandonner ou détruire des productions ou des récoltes sans […] motif valable » et « interrompre partiellement ou totalement les activités de l'entreprise sans […] motif valable ». Ces dispositions créent les conditions favorables à une application inappropriée de la loi, mais cela ne s'est jamais produit. Les décisions du CADE sont en règle générale fondées sur des concepts désormais utilisés dans de nombreux pays dans le domaine de la lutte contre les ententes.

14. Le droit de la concurrence s'applique aux entreprises, aux associations d'entreprises et aux personnes physiques[8]. Les entreprises sont passibles d'amendes dont le montant varie de 1 à 30 pourcent du chiffre d'affaires total avant impôt de l'année précédant le début de l'enquête, étant entendu que les amendes infligées sont dans tous les cas au moins égales au montant tiré du comportement illicite. Les dirigeants d'entreprises en infraction peuvent se voir imposer des amendes atteignant 10 à 50 pourcent de l'amende infligée à leur entreprise. Il convient de préciser que l'amende est calculée sous forme de pourcentage des revenus totaux du défendeur, et non pas uniquement des revenus tirés du marché concerné ou pertinent[9]. Les autres individus et entités exerçant une activité non commerciale (comme les associations professionnelles) qui ne génère par conséquent aucune recette pouvant servir de base de calcul d'une amende sont passibles d'une amende d'environ 6 000 à 6 000 000 BRL (actuellement 3 500 à 3 500 000 USD environ).

15. Le CADE dispose d'autres sanctions comme le pouvoir d'interdire à une entreprise toute participation à des appels d'offres ouverts, et ce pendant une période pouvant atteindre cinq ans, le pouvoir d'ordonner la dissolution d'une entreprise ou la cession partielle de ses actifs ou encore celui d'imposer

7 L'article 21 fournit ensuite des détails sur la méthodologie pour l'évaluation des pratiques de prix susceptibles d'être abusives : « Pour mettre en évidence l'existence de prix abusifs ou de hausses de prix abusives, il conviendra de prendre en considération les éléments suivants, tout en tenant suffisamment compte d'autres circonstances économiques ou de marché qui s'avèreraient pertinentes : (I) le prix ou toute hausse du prix d'un produit ou d'un service, en tenant compte des fluctuations du prix de leurs matières premières respectives ou de l'amélioration de leur qualité ; (II) le prix d'un produit fabriqué précédemment, en comparaison avec le produit globalement identique par lequel il a été substitué sur le marché ; (III) le prix d'un produit ou d'un service similaire, ou de toute amélioration de ces derniers, sur des marchés concurrentiels comparables ; et (IV) l'existence d'accords ou d'arrangements quels qu'ils soient, qui entraînent une hausse du prix d'un produit ou d'un service, ou de leurs coûts respectifs ».

8 Article 15.

9 En plusieurs occasions, le CADE a basé le calcul de ses amendes uniquement sur marché concerné, mais pour des raisons d'équité et de proportionnalité (par exemple lorsque l'un des défendeurs dans une affaire d'entente avait des revenus totaux nettement supérieurs à ceux de ses coconspirateurs).

des mesures correctrices de nature à empêcher toute récidive[10]. Il peut également infliger des amendes en cas de non respect de l'une de ses décisions ou d'obstruction à une enquête par divers moyens[11].

16. Des lignes directrices pour l'analyse des « pratiques commerciales restrictives » sont présentées dans les annexes à la Résolution 20 du CADE, publiée en 1999. L'annexe I de la résolution renferme des définitions et des classifications relatives aux pratiques anticoncurrentielles. Elle donne des définitions qui établissent une distinction entre les « ententes » et les « autres accords [horizontaux] ». Elle n'applique pas explicitement une règle « per se » aux premières, mais implique qu'une norme plus stricte s'appliquera au comportement d'entente. Elle signale que les accords autres que les ententes peuvent avoir des effets proconcurrentiels bénéfiques, ce qui exige « une application de la règle de raison, qui s'avère plus judicieuse ». Elle définit les « prix d'éviction » comme la « pratique délibérée de prix inférieurs au coût variable moyen, en vue d'éliminer les concurrents pour pouvoir ensuite imposer des prix et dégager des bénéfices qui se rapprochent de niveaux monopolistiques ». La définition exige expressément l'existence des circonstances nécessaires pour que l'entreprise puisse compenser ses pertes initiales après avoir réussi à exclure ses concurrents du marché. L'annexe définit aussi les pratiques restrictives verticales en notant qu'elles peuvent avoir comme principaux effets anticoncurrentiels d'exclure les rivaux ou de faciliter la collusion en aval ou en amont, mais aussi qu'elles peuvent être bénéfiques pour la concurrence dans certains cas, ce qui nécessite l'application de la règle de raison. Elle indique que « les pratiques restrictives verticales supposent en général l'existence d'un pouvoir de marché sur le marché pertinent… ».

17. L'annexe II définit les « critères de base pour l'analyse des pratiques commerciales restrictives ». Elle décrit une série d'étapes à suivre : définition du marché pertinent du point de vue des produits et de la situation géographique, en prenant en considération les possibilités effectives ou potentielles de substitution par les acheteurs ; calcul des parts de marché et de la concentration en utilisant soit l'un des indices CRx et HHI, soit les deux ; analyse des barrières à l'entrée ; analyse des effets de la pratique en cause sur la concurrence ; analyse des gains d'efficience économique que cette pratique pourrait entraîner ; enfin, comparaison de ces gains d'efficience par rapport au préjudice causé par cette pratique sur la concurrence, si nécessaire.

2.1.1 Ententes

18. C'est en 2000 que le SBDC s'est attelé à poursuivre les comportements d'entente, après avoir mené à bien en 1999 ce que beaucoup considèrent comme sa première véritable affaire du genre, dans le secteur de l'acier[12]. En 2000, une loi portant modification de la loi sur la concurrence a conféré au SBDC

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10 Article 24. Toute entreprise ayant fait l'objet d'une décision administrative définitive constatant un abus de pouvoir économique peut se voir refuser l'inscription au registre SISCOMEX des importateurs et des exportateurs, conformément à une ordonnance du ministère du Commerce extérieur ; toutefois, ce pouvoir n'a pas été utilisé à ce jour dans les affaires relatives à la concurrence.

11 Article 25.

12 Trois fabricants de produits en acier plat laminé avaient augmenté leurs prix simultanément après avoir averti le SEAE de leurs intentions. Cette notification au SEAE s'explique par le fait que, jusqu'en 1992, les prix de l'acier étaient réglementés, le SEAE étant à l'époque chargé de les contrôler. Le SEAE a rapidement répondu à ces producteurs qu'il était désormais illégal de se mettre d'accord pour augmenter les prix, mais une hausse de prix est malgré tout intervenue peu de temps plus tard. Les producteurs ont alors nié s'être mis d'accord pour cette augmentation, et il n'existait aucune preuve directe de l'accord. Le CADE a néanmoins conclu que l'existence d'un accord pouvait être déduite de la somme des éléments de preuve réunis et a infligé aux producteurs l'amende minimale prévue par la loi, c'est-à-dire 1 % du chiffre d'affaires brut de l'année précédente de chaque entreprise, soit environ 51 millions BRL, plus des amendes de 5 millions BRL pour avoir soumis de fausses informations. Les défendeurs ont fait appel de la décision devant les tribunaux et l'affaire est toujours en attente d'un jugement en appel.

deux nouveaux pouvoirs importants, à savoir la possibilité de mener des perquisitions surprises et de créer un programme de clémence[13]. Pendant plusieurs années, ces nouveaux pouvoirs sont toutefois restés sous-exploités. Le SBDC se trouvait entravé par un processus de contrôle de fusion qui s'était avéré hautement inefficient. Le contrôle des fusions était en effet lent, même pour les opérations qui ne représentaient de toute évidence aucune menace significative pour la concurrence, et mobilisait trop de ressources – jusqu'à 70 % selon certaines estimations. Le SBDC ne disposait pas des ressources suffisantes pour engager un programme musclé de lutte contre les ententes et manquait de l'expérience nécessaire pour utiliser efficacement ses nouveaux outils d'investigation.

19. La situation a commencé à évoluer en 2003. Le SBDC a adopté de nouvelles procédures visant à rendre le processus de contrôle des fusions plus efficient et à libérer des ressources pour les activités de lutte contre les ententes. La même année, le SDE a mené ses premières perquisitions surprises et a conclu son premier accord de clémence. Le SDE s'est réorganisé dans l'optique de se consacrer essentiellement à la lutte contre les ententes. En 2007, il a institué une unité spécialisée dans les offres truquées et la promotion de la concurrence dans la passation des marchés publics. En 2009, il a créé sa propre unité d'expertise judiciaire informatique, placée sous la direction d'un expert en TI et équipée de matériel informatique et de logiciels sophistiqués pour analyser les données électroniques obtenues notamment lors de perquisitions surprises.

20. Ces dernières années, et plus particulièrement depuis 2006, le programme de lutte contre les ententes du SBDC a régulièrement gagné en envergure (voir le Tableau 1).

Tableau 1. L'effort de lutte contre les ententes : 2003-2009

	2003	2004	2005	2006	2007	2008	2009*
Affaires d'entente engagées**	N/D	N/D	5	4	5	3	14
Perquisitions surprises***	7	4	0	19	84	93	24
Sanctions imposées	5	8	10	5	8	6	3
Amendes infligées (millions USD)	418	1 833	0	1	2 495	60 485	61 199

* De janvier à septembre.
** Ces chiffres portent sur les enquêtes menées à leur terme et sur les « procédures administratives » entamées. La procédure administrative est la troisième étape du processus d'enquête au sein du SDE, qui fait suite à l'« enregistrement des poursuites » et à l'« enquête préliminaire ».
*** Avec mandat.

2.1.1.1 Le programme de clémence

21. Le Brésil dispose d'un programme de clémence efficace, qui suscite des demandes et entraîne l'ouverture d'un certain nombre d'affaires[14]. Sa structure ressemble à celle des programmes déjà en vigueur dans plusieurs autres pays. L'article 35B de la loi sur la concurrence habilite les autorités à conclure des accords de clémence. Il prévoit en effet que le SDE peut passer des accords avec des personnes physique et morales parties prenantes à une entente, et que ces accords peuvent, selon les circonstances, soit exempter totalement le candidat de toute sanction, soit réduire d'un à deux tiers les sanctions applicables. Le candidat doit satisfaire aux conditions suivantes :

13 Loi 10149/00.

14 Pour une présentation détaillée de ce programme, voir la contribution du Brésil au Forum latino-américain sur la concurrence (Chili, septembre 2009) à l'adresse : http://www.oecd.org/dataoecd/33/48/43536874.pdf, également disponible sur Olis sous la référence DAF/COMP/LACF(2009)7. Les contributions d'autres pays d'Amérique latine peuvent également être consultées à l'adresse www.oecd.org/competition/latinamerica.

(i) le candidat est le premier à se manifester et reconnaît sa participation à la pratique illicite ; (ii) le candidat met fin à son implication dans la pratique anticoncurrentielle ; (iii) le candidat n'était pas à l'initiative de l'activité dénoncée ; (iv) le candidat accepte de coopérer pleinement à l'enquête ; (v) coopérer suppose d'identifier d'autres membres de la conspiration et de remettre des documents établissant la preuve de la pratique anticoncurrentielle ; (vi) au moment où l'entreprise se manifeste, le SDE n'a pas recueilli suffisamment d'informations sur l'activité illégale pour lui garantir une condamnation du candidat[15].

22. La dispense de sanctions dont bénéficiera le candidat pour sa participation à une entente sera plus ou moins importante selon que le SDE avait connaissance ou non de la présumée entente. L'immunité totale est possible si le SDE ne savait rien du comportement illégal, tandis qu'une clémence partielle pouvant atteindre deux tiers de l'amende potentielle peut être proposée si le SDE en connaissait l'existence. Dans tous les cas, si une amende est imposée, elle ne pourra pas être supérieure à la plus basse des amendes infligées aux autres participants à cette entente. Un accord passé avec une société peut être étendu à ses hauts responsables et à ses employés si ces derniers signent également l'accord et satisfont aux autres conditions visées plus haut. L'octroi d'une clémence dans le cadre de ce programme protège également le candidat de toute poursuite pénale qui pourrait être engagée contre lui pour le même comportement en application de la Loi fédérale sur les infractions économiques[16]. En revanche, le programme ne prévoit pas d'immunité vis-à-vis d'autres lois pénales susceptibles d'être applicables à ce comportement, par exemple en matière de racket ou de fraude, et il ne dégage pas non plus le candidat de ses responsabilités éventuelles en cas d'actions privées en dommages et intérêts[17].

23. L'article 35 prévoit par ailleurs une « clémence renforcée », que l'on retrouve également dans les programmes de clémence d'autres pays. Un candidat qui ne remplit pas les conditions requises pour bénéficier du programme de clémence pour son implication dans une entente donnée, mais qui révèle au SDE l'existence d'une deuxième entente, peut alors bénéficier d'une clémence totale pour cette deuxième entente et d'une réduction maximale d'un tiers de la sanction applicable pour la première affaire. Enfin, si le SDE, principal organe d'investigation des affaires de comportement au sein du SBDC, est habilité à conclure un accord de clémence de son propre chef, la décision finale sur la sanction revient en revanche au CADE, qui choisira soit de dispenser totalement le candidat de toute sanction, soit de réduire le montant de son amende, selon que le SDE avait préalablement ou non connaissance du comportement incriminé.

24. Le SBDC continue de moderniser son programme de clémence. Comme dans certains autres pays, le programme brésilien propose la clémence uniquement au premier participant d'une entente qui se manifeste. Cela peut avoir un effet déstabilisant non négligeable sur une entente et créer parmi ses participants une incitation à être le premier à faire la demande d'un accord de clémence, notamment si les conspirateurs ont de nouvelles raisons de craindre d'être démasqués. Cela étant, il peut arriver qu'au moment où un candidat à la clémence se manifeste, il ne dispose pas de suffisamment d'informations pour remplir toutes les conditions requises. En 2006, le SBDC a instauré un « système de marqueurs », que l'on trouve également dans d'autres pays, grâce auquel un candidat peut réserver sa place dans la file d'attente du programme de clémence en soumettant simplement au SDE une demande initiale informelle précisant

15 Ministère de la Justice, Secrétariat pour la législation économique, *Brazil's Leniency Programme*, 2008, consultable sur le site Internet du SDE à l'adresse www.mj.gov.br/sde, en portugais et en anglais.

16 Loi 8137/90.

17 Il semble que la probabilité que des poursuites soient engagées sur l'un ou l'autre de ces chefs d'accusation dans des affaires où un accord de clémence a été conclu soit faible. Comme l'explique plus en avant la section 2.1.1.3, le SBDC travaille en étroite collaboration avec les procureurs fédéraux et des États, or c'est à ces derniers qu'il reviendrait d'engager de telles poursuites. Dans les faits, ils travaillent ainsi rarement, voire jamais, dans des sens différents.

certaines informations de base[18]. Il dispose ensuite de 30 jours pour compléter sa demande avec des informations plus détaillées, puis doit négocier un accord final de clémence au plus tard dans les six mois[19]. En 2008, le SDE a publié un *Modèle annoté d'accord de clémence* et des *Lignes directrices pour interpréter la politique de clémence*, tandis que le SBDC a publié un manuel très complet en couleur destiné au grand public et intitulé *Comment lutter contre les ententes : le programme de clémence du Brésil (Fighting Cartels: Brazil's Leniency Programme)*[20].

25. Entre 2003 et 2009, le SDE a conclu 15 accords de clémence et plusieurs autres étaient en cours de négociation à cette date. Environ 60 % de ces accords portaient sur des ententes internationales dont les participants avaient déjà conclu des accords de clémence dans d'autres pays. Cela étant, le programme de clémence a également donné lieu à des poursuites d'ententes à l'échelon national. La plus connue de ces affaires est peut-être celle des prestataires de services d'agents de sécurité (voir plus bas). Le SDE s'est beaucoup investi dans la promotion du programme de clémence. Il a envoyé à 1 000 entreprises brésiliennes une lettre d'information sur le programme, ce qui a amené plusieurs sociétés à se manifester pour se renseigner sur leur éligibilité. Le SDE a également organisé une « tournée de présentation » pendant laquelle il a tenu des réunions avec des sociétés de droit international implantées à Washington et à Bruxelles pour les informer des responsabilités, voire des poursuites pénales éventuelles, auxquelles s'exposent les cadres étrangers impliqués dans des ententes affectant le commerce brésilien.

2.1.1.2 Règlement amiable des affaires d'entente

26. L'article 53 de la loi sur la concurrence autorise le CADE à conclure des accords de règlement amiable avec les défendeurs dans les affaires de comportement, mais la loi a dans un premier temps spécifiquement exclu les affaires d'entente de ces procédures. Cette situation a évolué lorsque la loi sur la concurrence a été modifiée en 2007[21]. Un défendeur peut ainsi proposer un accord à tout moment de la procédure, que l'enquête soit entre les mains du SDE ou du CADE. Le CADE est certes le seul habilité à négocier un règlement amiable, mais le SDE peut néanmoins lui adresser des recommandations concernant les termes de l'accord. En 2009, le CADE a créé une unité spéciale dont les membres mènent toutes les négociations en vue d'un règlement[22]. Dans une affaire impliquant plusieurs défendeurs, il est possible qu'un seul défendeur souscrive un accord amiable, tandis que l'instruction de l'affaire contre les autres participants suit son cours.

27. Les défendeurs n'ont qu'une seule occasion d'accepter un règlement amiable. L'accord doit être conclu dans un délai de 30 jours à compter du lancement des négociations, avec une extension possible de 30 jours supplémentaires. Les règlements amiables peuvent comporter des aveux ou pas (plaidoyer de nolo contendere), comme le CADE le juge opportun, mais si l'affaire a été engagée dans le cadre d'un programme de clémence, des aveux sont alors obligatoires. L'accord précisera le montant de la sanction pécuniaire, qui devra être au moins égal au minimum prévu par la loi sur la concurrence (1 % des revenus totaux engrangés par l'entreprise défenderesse pendant l'année précédente). L'accord peut aussi imposer au défendeur d'autres conditions, telles que des mesures nécessaires pour mettre fin à la violation présumée ou encore un programme de mise en conformité. Un règlement amiable porte uniquement sur la responsabilité administrative. Les défendeurs hors programme de clémence doivent négocier au cas par cas avec les procureurs fédéraux et des État.

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18 Ordonnance n° 04/2006 du ministère de la Justice.

19 Ce délai de six mois peut être prolongé de six mois supplémentaires si aucun autre candidat à la clémence ne s'est manifesté pendant l'enquête.

20 Tous ces documents peuvent être consultés sur le site Internet du SDE, *supra*, n.15.

21 Loi 11482/07.

22 Ordonnance n° 51 (2009) du CADE.

28. À ce jour, des règlements amiables ont été conclus dans cinq affaires d'entente, dont trois récentes impliquant des ententes internationales, la première dans les flexibles marins, la deuxième dans les compresseurs et la troisième dans le secteur des écoles de conduite. En 2007, le CADE a conclu des accords amiables dans deux affaires différentes avec deux entreprises également d'envergure internationale dans l'industrie du ciment et de la viande de bœuf.

2.1.1.3 Poursuites pénales contre les ententes

29. En quelques années seulement, le Brésil a mis au point un programme permettant de poursuivre pénalement les ententes, ce qui le place parmi les pays les plus actifs dans ce domaine. Toute violation du droit de la concurrence constitue une infraction administrative, mais les comportements d'entente sont également des violations de la loi fédérale sur les infractions économiques[23]. L'article 4 II de cette loi interdit en tant que délit : « tout accord entre concurrents visant à fixer des prix ou des quantités, répartir des marchés ou contrôler la production ou les canaux de distribution[24]». Cette loi s'applique uniquement aux personnes physiques et pas aux sociétés. Toute violation de cet ordre est passible d'une amende et de deux à cinq ans d'emprisonnement. Le SBDC n'est pas habilité à faire appliquer la loi sur les infractions économiques. Cette compétence revient aux procureurs fédéraux et des États (le Brésil compte 26 États et un District fédéral). Bien que la loi sur les infractions économiques soit une législation fédérale, les procureurs des États ont toute compétence pour la faire appliquer.

30. Les informations disponibles sur les poursuites pénales engagées contre les ententes sont malheureusement incomplètes. Le SBDC signale néanmoins que depuis le début de l'initiative, 34 personnes ont été condamnées au pénal. La plupart d'entre elles avaient participé à des conspirations à l'échelon local ou régional, et notamment à des ententes dans le secteur de la distribution de carburant au détail. Sur ces 34 personnes, dix ont écopé de peines de prison, mais aucune de ces sentences n'a été appliquée à ce jour, en raison de la formation systématique de recours en appel. Le SBDC précise également que fin 2009, une centaine de cadres étaient formellement accusés d'infraction pénale ou faisaient l'objet d'une enquête concernant des agissements commis dans le cadre d'ententes et passibles de poursuites pénales.

31. Le SBDC et les fonctionnaires fédéraux et des États chargés de faire appliquer le droit travaillent en étroite collaboration. Une loi de 2002 permet à la police fédérale d'assister le SBDC dans les enquêtes sur des ententes lorsque le comportement incriminé a des répercussions dans plusieurs États ou à l'échelon international[25]. Le SDE et le Département de la police fédérale ont conclu un accord de coopération formelle renouvelé très récemment en 2008. Cet accord prévoit l'échange d'informations et une assistance technique. Il institue également un groupe de travail composé de deux représentants de chaque partie, dont les responsabilités consistent à : « : (i) coordonner l'échange d'informations, de documents et d'expertise entre les parties et (ii) mettre en place un Centre d'investigation sur les ententes qui devra exploiter les synergies dégagées par les travaux réalisés sur les comportements anticoncurrentiels… ». La police assiste activement le SDE dans ses enquêtes sur les ententes, notamment dans le cadre des perquisitions surprises.

32. L'une des conséquences intéressantes de cette coopération est le fait que le droit pénal brésilien autorise le placement en garde à vue des personnes (pour une durée de cinq jours pouvant être prolongée de cinq jours supplémentaires) lors de la fouille ou de la perquisition surprise de leurs locaux, afin d'empêcher la destruction ou l'altération des éléments de preuve. Selon le SBDC, en 2007, 30 personnes

23 Loi 8137/90.

24 Ce même article interdit également d'autres types de comportements anticoncurrentiels, et notamment l'« abus de puissance économique », l'« exploitation d'un pouvoir de monopole en augmentant les prix sans justification », la « vente à un prix inférieur au coût de revient visant à entraver la concurrence », ainsi que certaines formes de discrimination par les prix. À ce jour, les poursuites pénales contre ces autres types de comportements restent rares, voire inexistantes.

25 Loi 10446/02.

ont ainsi été placées en détention provisoire grâce à cette disposition, et ce chiffre est passé à 53 en 2008. Dans une affaire de 2007 portant sur une entente présumée dans le domaine de la distribution de carburant au détail à Belo Horizonte, la troisième plus grande conurbation du pays, 250 policiers et agents du SBDC ont perquisitionné par surprise 42 entreprises. Vingt-trois personnes ont été temporairement incarcérées. Ce pouvoir est exercé conformément aux ordonnances des tribunaux sollicitées par le procureur. Le SDE peut proposer que le procureur demande aux tribunaux de rendre de telles ordonnances, mais dans ses enquêtes, il a rarement recours à cette procédure, qui est plutôt utilisée par les procureurs dans les affaires qu'ils engagent seuls (voir plus bas).

33. Le SDE et les procureurs fédéraux et des États coopèrent étroitement. Lorsque le SDE décide d'ouvrir une enquête sur une entente, il a pour habitude de demander aux procureurs de lancer simultanément une enquête pénale. Les procureurs sont également invités à signer les accords de clémences, ce qui garantit aux candidats qu'ils ne feront pas l'objet de poursuites pénales parallèles. En 2008, le bureau du procureur de l'État de São Paulo a créé une unité spéciale chargée d'enquêter sur les ententes et de coopérer avec le SDE dans le cadre d'enquêtes administratives et pénales conjointes. Cet arrangement a servi de modèle pour la coopération entre le SDE et les procureurs d'autres États et il existe aujourd'hui des accords de ce type dans 23 États. Ces initiatives ont abouti à la « Stratégie nationale de lutte contre les ententes (Estratégia Nacional de Combate a Cartéis – ENACC) » adoptée en octobre 2009 à l'occasion de la deuxième journée nationale de lutte contre les ententes. Deux cents procureurs et officiers de police de différents États brésiliens se sont alors réunis pour discuter de la mise en œuvre des dispositions pénales du pays en matière de lutte contre les ententes. Au terme de cette rencontre, les principales autorités ont signé la « Déclaration de Brasilia » qui réaffirme et vise à renforcer leur coopération dans le cadre du programme de lutte contre les ententes.

34. Les procureurs fédéraux et des États peuvent engager des affaires de concurrence en application de la loi sur les infractions économiques indépendamment du SBDC. Il est difficile d'obtenir des informations à ce sujet, mais il semble que cette pratique soit relativement courante. Les procureurs ne sont pas tenus d'aviser le SBDC des affaires qu'ils engagent, mais des efforts croissants sont déployés par l'intermédiaire de l'ENACC (voir ci-dessus) afin d'encourager la coordination de ces instances dans ce type d'affaires.

Encadré 1. Récentes affaires marquantes en matière d'entente

2009 : Compresseurs de réfrigération[26]

Cette récente affaire, qui porte sur une entente internationale présumée, a été engagée suite à un accord de clémence passé avec le SDE. Des perquisitions surprises simultanées ont ultérieurement été menées au Brésil, aux États-Unis et en Europe dans des entreprises suspectées de participer à l'entente. Plus de 60 agents du SDE, de la police fédérale et des procureurs fédéraux ont pris part à l'opération déployée au Brésil. Aux yeux des observateurs, cette affaire marque un tournant dans la politique brésilienne de lutte contre les ententes. Un commentateur brésilien a déclaré : « Pour la première fois, les autorités brésiliennes de la concurrence ont joué un rôle de premier plan dans une enquête portant sur une entente d'envergure internationale. Il faut peut-être y voir le début d'une ère nouvelle dans l'application du droit des ententes à l'échelon mondial. Mais cet événement est également l'aboutissement d'un processus de constante évolution de l'application du droit de la concurrence dans le pays »[27].

26 Whirlpool, S.A., *et al*. (2009).

27 Peixoto, Brazil: Cartels and Leniency, dans Global Competition Review, Antitrust Review of the Americas 2010, disponible sur le site Internet de la GCR à l'adresse www.globalcompetitionreview.com.

Encadré 1. (suite)

Trois filiales brésiliennes du fabricant américain d'électroménager ont conclu avec le CADE un règlement amiable par lequel la société s'est vu infliger une amende de 100 millions BRL (environ 58,7 millions USD), tandis que six cadres ont dû s'acquitter d'une amende totale de 3 millions BRL (1,8 million UDS). À ce jour, ces amendes sont les plus élevées jamais imposées et payées dans une affaire d'entente. Les défendeurs ont reconnu leur culpabilité en contrepartie de l'accord, mais les conditions du règlement amiable ne stipulaient pas qu'ils devaient poursuivre leur coopération à l'enquête, ce qui a suscité les critiques de certains milieux[28]. Le CADE rétorque que le SBDC était déjà en possession d'un grand nombre de preuves concernant l'entente et que l'intérêt d'une éventuelle coopération supplémentaire des défendeurs a de ce fait été jugé minime.

2008 : Sable de construction[29]

Le CADE a démasqué dans l'État de Rio Grande do Sul une entente sur les prix impliquant quatre entreprises du secteur de l'extraction de sable utilisé pour la construction. Les conspirateurs avaient tous ensemble fait appel aux services d'une société de conseil pour réaliser des études comparées des prix qu'ils pratiquaient. Cette société a analysé des facteurs tels que les distances entre les mines des entreprises et leurs entrepôts (le transport étant une composante importante du prix de ce pondéreux), puis a recommandé à chaque entreprise des prix susceptibles de réduire au minimum la migration des clients entre elles. La preuve de l'accord passé entre les défendeurs a été établie sur la base de documents internes, d'enregistrements téléphoniques et de dépositions orales.

Le CADE a infligé aux quatre entreprises et à la société de conseil des amendes allant de 10 à 22,5 % de leurs revenus de 2005.

2007 : Services d'agents de sécurité[30]

Le CADE a mis au jour dans l'État de Rio Grande do Sul un système de soumissions concertées à des appels d'offres établi de longue date entre 16 sociétés, trois associations professionnelles et 18 individus dans le secteur de la prestation de services d'agents de sécurité. Cette affaire a été engagée suite au premier accord de clémence conclu par le SDE. L'existence des agissements illicites a pu être prouvée à partir des éléments fournis par le candidat à la clémence, mais aussi grâce à des enregistrements de conversations téléphoniques et à des documents recueillis lors de perquisitions surprises. Ces preuves indiquaient que depuis 1990, les entreprises incriminées avaient adopté des comportements collusoires en se répartissant les contrats et en pratiquant des prix d'éviction pour punir les entreprises qui refusaient de se conformer aux règles de l'entente.

Les parties organisaient régulièrement des réunions au siège d'une association professionnelle, dans des restaurants et même lors de barbecues afin de se mettre d'accord sur l'issue de tel ou tel appel d'offres public. Les participants à ces soumissions concertées ont tenté de détourner dans leur intérêt les critères imposés aux entreprises pour participer aux appels d'offres publics. Les associations professionnelles et le syndicat des agents de sécurité ont collaboré en révélant aux autorités des irrégularités concernant les relations du travail dans des entreprises non impliquées dans cette entente.

Le CADE a imposé aux entreprises une amende de 15 % de leurs revenus bruts de 2002, majorée de 5 % pour les instigateurs de l'entente. Les dirigeants ont été condamnés à payer des amendes de 15 à 20 % de celle imposée à leur entreprise, le total des amendes atteignant 40 millions BRL (23 millions USD). Par ailleurs, les entreprises se sont vu interdire pendant cinq ans la participation à tout appel d'offres public et la passation de tout contrat avec des institutions financières officielles. C'est dans cette affaire qu'une sanction de cette nature a été prononcée pour la première fois.

2005 : Pierres concassés [31]

Cette affaire a porté sur une entente présumée concernant la pierre concassée, l'un des matériaux de base

28 Dans une autre affaire portant sur une entente internationale dans le domaine des flexibles marins, trois défendeurs ont en revanche accepté de pleinement coopérer.

29 Sociedade dos Mineradores do Rio Jacuí Ltda. (Smarja) (2008).

30 Rota-Sul Empresa de Vigilancia Ltda., (2007).

31 SINDIPEDRAS, *et al.* (2005)

Encadré 1. (suite)

utilisés dans la construction civile. Les défendeurs étaient une association professionnelle et 21 entreprises membres, qui contrôlaient au total environ 70 % de la pierre concassée produite dans l'État de São Paulo. À la suite d'une dénonciation anonyme, le SDE a mené en 2003 dans les locaux de l'association professionnelle une perquisition surprise, la première depuis les modifications apportées en 2000 à la loi sur la concurrence. La perquisition s'est avérée extrêmement fructueuse et a permis de saisir des documents prouvant que les défendeurs se rencontraient régulièrement au bureau de l'association, où ils tenaient à jour sur un ordinateur des données relatives à leurs prix et à leurs ventes journalières. Il a pu être établi que lors de leurs réunions, ils fixaient des prix, se répartissaient les clients, organisaient des soumissions concertées à des appels d'offres publics et mettaient en œuvre des mécanismes coercitifs sophistiqués pour punir les membres qui ne respectaient pas l'accord.

Le langage utilisé dans certains documents était particulièrement évocateur. Les membres de l'association se désignaient eux-mêmes par l'expression « le Groupe ». Le Groupe s'était assigné une mission officielle qui consistait entre autres choses à « organiser le marché ». Les participants acceptaient de « respecter [mutuellement] leurs clients ». Le Groupe énonçait clairement ses « valeurs », à savoir « intégrité, confiance, respect et harmonie ». L'entente fixait explicitement des objectifs de prix précis, qui étaient atteints. Les prix avaient régulièrement baissé à la fin des années 1990, jusqu'à la constitution de l'entente en 1999. Une étude des prix réalisée par le SDE a montré qu'en 2001, ils étaient remontés d'environ un tiers.

Au terme de l'enquête, le SDE a recommandé au CADE de reconnaître l'association professionnelle et 18 entreprises coupables de collusion. Le CADE a suivi ces recommandations et a infligé aux entreprises des amendes de 15 à 20 % de leurs revenus totaux de 2001. Le SBDC et les procureurs ont travaillé d'un bout à l'autre de l'affaire en étroite collaboration, une collaboration qui a donné lieu à des poursuites pénales à l'encontre de plusieurs personnes. Les procédures pénales ont toutes été réglées à l'amiable par le paiement d'amendes.

Certains défendeurs dans la procédure ouverte par le SBDC ont fait appel de la décision du CADE devant les tribunaux. La décision du CADE a pour l'instant été confirmée par les juridictions inférieures, mais la procédure d'appels n'est toujours pas terminée.

2.1.1.4 Promotion de la concurrence au sein des ententes

35. Le SBDC a mis beaucoup d'ardeur à sensibiliser le public à son programme de lutte contre les ententes et a publié à cette fin un manuel très complet et en couleur consacré au programme de clémence (voir plus haut). Le SDE a publié d'autres brochures similaires en 2008 et 2009 sur « La lutte contre les soumissions d'offres concertées », « La lutte contre les ententes dans les associations professionnelles » et « La lutte contre les ententes dans le secteur de la distribution de carburant au détail ». Il a par ailleurs fait réaliser une bande dessinée destinée aux enfants qui reprend les personnages de la série de bandes dessinées la plus célèbre du pays et raconte l'histoire d'une entente entre des kiosques à limonade.

36. Le SDE a aussi créé en mars 2008 un outil électronique baptisé « Cliquer ici pour signaler une infraction » qui permet aux Brésiliens de rapporter des indications confidentielles sur des ententes suspectées à partir du site Internet du SDE. En septembre 2009, plus de 300 indications avaient ainsi été recueillies, dont 70 % environ concernaient des ententes. En 2008, une journée de l'application du droit des ententes a été instaurée au Brésil par décret présidentiel. Cette journée a été fixée au 8 octobre, c'est-à-dire la date anniversaire de la signature du premier accord de clémence en 2003. Cette journée a été l'occasion d'organiser une campagne dans sept grands aéroports du pays, où ont été distribués 450 000 dépliants et autres supports d'information. La deuxième édition de cette journée a bénéficié de la participation de plusieurs hauts responsables du gouvernement brésilien, et notamment du président et du vice-président, mais aussi de fonctionnaires occupant de hautes fonctions dans ce domaine aux États-Unis, à la Commission européenne et au Portugal. Par ailleurs, la journée a été marquée par la réunion des procureurs fédéraux et des États mentionnée plus haut.

37. En juillet 2009, le SDE et l'OCDE ont collaboré à l'organisation, dans cinq grandes villes, d'un programme appelé Lutte contre les soumissions concertées dans les marchés publics. Dans chacune de ces

villes se sont tenues deux sessions de formation sur la détection et la poursuite des offres truquées, l'une destinée aux fonctionnaires en charge de la passation des marchés publics et l'autre aux enquêteurs dans les affaires pénales. Plus de 600 stagiaires ont répondu présents. Dans le cadre de cette initiative sur les soumissions concertées, le SDE a publié ses Lignes directrices pour l'analyse des plaintes relatives à la passation des marchés publics[32], qui décrivent la méthodologie suivie par le SDE pour analyser les soumissions concertées et les comportements apparentés. Le SDE a signé des accords de coopération avec trois autres organismes publics – la Cour des comptes fédérale brésilienne et le Bureau du contrôleur général, qui réalisent des contrôles des contrats conclus par les pouvoirs publics, et l'Observatoire des dépenses publiques, qui concentre son action sur la fraude et la corruption au sein de l'administration – afin d'élargir le programme de lutte contre les soumissions concertées. Enfin, sur ordre du SDE, le ministère brésilien du Plan a publié en septembre 2009 une réglementation exigeant des participants aux appels d'offres publics fédéraux qu'ils présentent un certificat de détermination indépendante des offres (CDIO), précisant qu'ils n'ont jamais participé à une soumission concertée. Le CDIO a été créé à partir d'un modèle élaboré par le SDE avec l'aide de l'OCDE[33].

2.1.1.5 Le programme de lutte contre les ententes et les milieux d'affaires

38. La nouvelle priorité donnée à la poursuite des ententes par le SBDC a éveillé l'attention des milieux d'affaires, en particulier des grandes entreprises et des avocats d'affaires. Les cadres d'affaires sont conscients de leur responsabilité pénale et des sanctions auxquelles ils s'exposent, y compris l'incarcération, s'ils participent à des ententes. Le risque de devoir payer une forte amende est pour beaucoup dans l'augmentation des demandes de clémence, tout comme la possibilité pour un entrepreneur de se voir interdire tout contrat avec les pouvoirs publics en cas de condamnation dans une affaire d'entente.

39. Le SDE est salué pour son agressivité, bien que certains praticiens la considèrent parfois excessive. Ces derniers voient d'un mauvais œil le placement en détention provisoire au début d'une enquête (voir plus haut), mais comme précisé plus haut, ce recours est rarement utilisé dans les enquêtes du SDE. Les critiques portent également sur la longueur des délais entre le moment où affaire est engagée par le SDE, avec la plupart du temps des perquisitions surprises, et sa conclusion. Certains affirment que le SDE est plus efficace pour engager des affaires que pour les conclure. Comme expliqué plus bas à la section 3.2, le SDE s'emploie à résoudre ce problème, mais de l'avis de tous, la question de fond est celle du manque de moyens.

40. Néanmoins, les procédures contentieuses engagées par les entreprises elles-mêmes constituent également une importante source de retard. Ces dernières années, les entreprises qui faisaient l'objet d'une enquête se sont de plus en plus efforcées d'obtenir l'arrêt de cette enquête auprès des tribunaux pour vice de forme. Les entreprises ont également compris qu'elles pouvaient retarder sensiblement le moment de l'exécution finale des sanctions retenues dans des affaires d'entente en faisant appel des décisions du CADE devant les tribunaux. Comme indiqué à la section 3.7 ci-après, de nombreuses amendes imposées par le CADE n'ont pas été payées car les affaires sont en cours d'appel. Cela étant, les entreprises, et plus particulièrement celles qui opèrent à l'international, sont de plus en plus désireuses de parvenir à un règlement amiable avec le CADE, en premier lieu pour classer définitivement une affaire et mettre fin à toute incertitude. Les individus sont en revanche réputés réticents à l'idée d'envisager un règlement amiable avec le CADE en raison de l'éventuelle responsabilité pénale à laquelle ils s'exposent. Comme précisé plus haut, il semble que le SDE et les procureurs s'efforcent d'améliorer la coordination de leur action dans le but d'éliminer cette incertitude, au moins dans le cadre du programme de clémence.

32 Ordonnance 51 du SDE, 2009.

33 Pour plus d'informations sur le sujet, voir les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées dans les marchés publics, disponible à l'adresse www.oecd.org/competition/bidrigging.

2.1.2 Accords horizontaux autres que les ententes

41. Le SBDC a identifié relativement peu d'accords horizontaux autres que des ententes, en partie du fait qu'il classe avec ces dernières certaines affaires qui pourraient être considérées comme relevant d'une autre catégorie. Comme indiqué plus haut, la règle *per se* ne s'applique pas au Brésil. Par conséquent, dans toutes les affaires, il est nécessaire d'établir la preuve de l'existence d'un certain degré de pouvoir de marché, bien que pour les véritables affaires d'entente, il semble que seule une preuve minimale soit exigée.

42. Le SBDC s'intéresse depuis longtemps au secteur des soins de santé, où un secteur privé très dynamique complète le service public de santé. En 2006, le CADE a étudié quatre affaires impliquant l'élaboration de grilles tarifaires suggérées par des associations de professionnels de la santé. L'une d'entre elles était effectivement une entente. Un groupe d'anesthésistes de l'État de Bahia avait publié une grille de prix qui augmentait de fait les primes dues à leurs assureurs. Lorsqu'un assureur a protesté, deux coopératives ont simultanément résilié leurs accords en envoyant des courriers identiques tapés sur la même machine à écrire. Le CADE a infligé aux coopératives une amende totale de 94 000 USD[34].

43. Le SDE a enquêté et continue d'enquêter sur l'utilisation d'accords d'exclusivité entre Visa et son réseau de traitement. Initialement, les grandes banques possédaient leurs propres réseaux de cartes de crédit, et au fil du temps deux réseaux distincts mais exclusifs ont été créés, l'un pour Visa et l'autre pour Mastercard, or les banques sont en fait tenues d'appartenir aux deux réseaux, au même titre que les commerçants. Dans le cadre de la mission de promotion de la concurrence du SBDC, le SEAE, le SDE et la Banque centrale avaient soumis des propositions de réforme de ce secteur, qui prévoyaient la suppression des clauses d'exclusivité. C'est ce qu'a fait récemment Mastercard, et en décembre 2009, le CADE est parvenu à un règlement amiable avec Visa par lequel ce dernier s'engage à supprimer ses contraintes d'exclusivité.

2.1.3 Accords verticaux

44. Le SBDC engage très rarement des poursuites contre des restrictions verticales qui ne soient pas également considérées comme des abus de position dominante. Néanmoins, l'une d'entre elles, conclue en 2008, impliquait des accords d'exclusivité entre l'entreprise de bâtiment Odebrecht et quatre grands fournisseurs de turbines hydroélectriques, General Electric, Alsthom, Siemens et Voith Madeira. Ces accords interdisaient aux fournisseurs de turbines de participer à d'autres consortiums dans le cadre d'un appel d'offres pour un accord de concession hydroélectrique de 20 milliards BRL. Suite à une enquête, le SDE a ordonné des mesures provisoires visant à suspendre ces arrangements. Odebrecht a contesté cette décision devant les tribunaux, mais avant qu'un jugement ne soit rendu en l'espèce, l'entreprise a négocié avec le CADE un règlement amiable prévoyant l'annulation des accords d'exclusivité. Odebrecht a finalement remporté le marché, mais comme la décision du CADE avait autorisé d'autres soumissionnaires à participer, le montant du contrat a été considérablement revu à la baisse par rapport à son montant de départ. Le prix final a été fixé largement en-deçà du prix de réserve, et d'après certaines estimations, le total des économies réalisées pour les consommateurs brésiliens sur le cycle de vie de 30 ans de la concession s'élève à environ 16,4 milliards BRL (9,4 milliards USD).

2.1.4 Abus de position dominante

45. Le SBDC examine régulièrement des plaintes pour abus de position dominante déposées par des parties privées. Bon nombre de ces dernières sont finalement classées sans suite car elles ne sont pas jugées suffisamment valables. Le SDE ouvre aussi régulièrement d'office des enquêtes en matière de position dominante. Les données du tableau suivant concernent les affaires menées jusqu'au stade de l'enquête approfondie.

34 Coopanest-GPA (2006).

Tableau 2. Affaires d'abus de position dominante

	2005	2006	2007	2008	2009*
Affaires engagées**	18	13	11	15	22
Infractions détectées	19	3	17	11	7
Amendes infligées (millions USD)	0	0	0	0	205.6***

* De janvier à septembre.
** Poursuites administratives.
*** Dans une affaire, l'affaire AmBev décrite plus en avant (voir Encadré 2).

46. Plusieurs des affaires de position dominante engagées par le SBDC ont impliqué la coopérative de médecins Unimed et l'une des principales sociétés d'assurance maladie au Brésil. Unimed compte des filiales dans presque toutes les grandes villes ou districts du pays. Ces filiales indépendantes concluent des contrats avec les médecins et les hôpitaux locaux pour la prestation de services de santé, et il arrive souvent que ces accords soient exclusifs, c'est-à-dire que les prestataires ne soient pas autorisés à adhérer à d'autres dispositifs quels qu'ils soient. Il arrive couramment que plus 50 % des médecins d'une communauté s'affilient à Unimed. Le SBDC examine ces arrangements ville par ville et lorsque la part de marché est élevée, le CADE interdit les accords d'exclusivité. Entre 1994 et 2008, le CADE a examiné plus de 60 affaires de cette nature. Un deuxième type d'affaires de position dominante relativement courant concerne les faux procès, qui consistent à entamer des poursuites judiciaires volontairement fantaisistes dans l'optique d'exclure des concurrents. Pendant la période 2005-2008, le SDE a engagé au total neuf enquêtes de la sorte dans divers secteurs, et notamment dans celui des produits pharmaceutiques et des pièces détachées automobiles. Toutes sont encore en cours d'examen par le SBDC.

47. Les prix abusifs ou excessifs sont considérés comme un abus de position dominante et constituent une violation de l'article 20 de la loi sur la concurrence. En vertu d'une disposition spéciale de l'article 30 de la loi sur la concurrence, le SDE est tenu d'entamer une procédure administrative (sans enquête préliminaire) si l'une ou l'autre des Chambres du Congrès lui en fait la demande. Le Congrès émet régulièrement de telles demandes concernant de possibles pratiques de prix abusifs dans le domaine des produits pharmaceutiques. Au début des années 2000, le SDE a ouvert des dizaines d'enquêtes de ce type, mais les a ensuite laissées traîner. Le SDE a déployé des efforts concertés pour combler ce retard, avec à la clé l'examen par le CADE de 55 procédures administratives de ce type entre 2005 et 2008 (le tableau ci-dessus ne les fait pas apparaître). Le SDE et le CADE privilégient dans ces affaires une approche économique et le CADE n'a jamais conclu à une infraction dans ce domaine. Il n'a en effet jamais pu déceler sur la base de prix abusifs un comportement constituant un abus de position dominante.

48. Ces dernières années, le CADE a statué sur deux affaires impliquant des « clauses de rayon d'achalandage » imposées par de grands centres commerciaux à leurs locataires, leur interdisant d'ouvrir un magasin à moins d'une certaine distance du centre commercial. Dans les deux affaires, cette restriction a été jugée illicite et le défendeur a été tenu de retirer la clause incriminée. Ces affaires reposaient en partie sur la question de la définition de marché, comme bon nombre des affaires de position dominante. Ainsi, dans l'une d'entre elles, le marché pertinent a été défini comme étant celui des « centres commerciaux régionaux de grand luxe » dans certains secteurs de São Paulo. Les décisions rendues par le CADE dans ces deux affaires ont fait l'objet d'appels devant les tribunaux. Les instances de juridiction inférieure ont confirmé les décisions du CADE, mais les procédures en appel se poursuivent[35].

49. Entre 2005 et 2009, le CADE s'est prononcé sur quatre affaires dans différents secteurs des télécommunications. L'une portait sur un arrangement conclu entre Telemar, fournisseur de téléphonie fixe, et un éditeur d'annuaires téléphoniques. Le plaignant était un éditeur d'annuaires indépendant qui avait entretenu par le passé des relations contractuelles identiques avec Telemar. Le CADE a conclu que le

35 Shopping Iguatemi (2007) ; Center Norte S/A (2007).

nouvel accord était simplement le fruit d'une concurrence saine pour le marché et qu'il n'était pas en soi anticoncurrentiel. Le CADE craignait toutefois que le maintien de l'accord ne finisse par placer le nouvel arrivant en position de domination et a recommandé au SDE d'examiner de manière plus approfondie les relations entre prestataires de services téléphoniques et éditeurs d'annuaires.

50. Dans deux autres affaires impliquant Telesp, un fournisseur de téléphonie fixe dans l'État de São Paulo, le CADE a jugé que ce prestataire avait imposé, pour l'accès à son réseau, des conditions discriminatoires à un fournisseur de services Internet ainsi qu'à un fournisseur de téléphonie interurbaine, et lui a donc ordonné de fournir un accès non discriminatoire. La quatrième affaire du secteur des télécommunications concernait Globosat, un prestataire de programmes de télévision, qui bénéficiait d'accords d'exclusivité pour la couverture des événements sportifs phares, dont les principaux étaient les championnats de football. Globosat est affilié au Groupe Globo, principal acteur des médias au Brésil, qui propose des services de diffusion et de télévision par câble et par satellite. Le CADE a jugé que ces arrangements portaient préjudice à la concurrence sur le marché de la diffusion des événements sportifs (marché en amont) et de la fourniture au détail de télévision par satellite (marché en aval). L'accord conclu avec le CADE impose à Globosat de renoncer à ses droits exclusifs pour certains de ces événements, notamment pour les championnats de football, et ce pour une durée de trois ans, et de mettre un terme à ses accords d'exclusivité avec la chaîne Sport TV, principale chaîne sportive du Brésil.

Encadré 2. AmBev

Il est intéressant de citer l'exemple d'AmBev, le plus gros producteur de bière du pays, qui apparaît dans les annales du SBDC à de nombreuses reprises. AmBev est né d'une fusion intervenue en 2000 entre les deux plus gros brasseurs brésiliens de l'époque, Brahma et Antarctica, qui contrôlaient environ 50 % et 25 % respectivement des ventes de bière sur le territoire national. La fusion a suscité un grand intérêt et présentait clairement d'importants problèmes en termes de concurrence. Le SBDC était partagé quant à la nature des mesures à prendre. Le CADE a finalement décidé d'ordonner la cession de l'une des marques les moins importantes contrôlées par les deux entreprises, en plus d'autres mesures comportementales visant à favoriser l'entrée de nouveaux concurrents ou l'expansion de marques de plus petite envergure. De nouveaux acteurs sont entrés sur le marché, et les études de suivi réalisées après la fusion ont montré que les prix avaient effectivement baissé, au moins dans le court terme. Cependant, AmBev contrôle toujours environ 70 % du marché brésilien de la bière. Ces dernières années, AmBev a fusionné avec plusieurs autres brasseurs internationaux (y compris avec le plus grand brasseur argentin), et est devenu aujourd'hui une filiale d'Anheuser-Busch InBev, le plus grand brasseur mondial, dont le siège est en Belgique.

En 2004, le SDE a ouvert une procédure administrative à l'encontre d'AmBev concernant un programme de fidélité qu'il avait institué. Le programme attribuait des points aux établissements de vente au détail en fonction de leurs achats de bière AmBev, et ces points pouvaient ensuite être échangés contre des cadeaux. À première vue, le programme ne semblait pas constituer une pratique d'exclusion, mais l'enquête, et plus précisément un contrôle qui a permis de recueillir d'importantes preuves documentaires, a révélé qu'en pratique AmBev exigeait effectivement que les détaillants achètent exclusivement ses bières pour pouvoir participer au programme. En 2009, le CADE a conclu que ce comportement constituait un abus de position dominante. Il a ordonné à AmBev de mettre fin au programme et a infligé à la société une amende de 2 % de ses bénéfices totaux réalisés au Brésil en 2002. L'amende a été fixée à quelque 353 millions BRL (206 millions USD), la plus élevée jamais infligée par le CADE.

Le CADE envisage actuellement une deuxième procédure contre AmBev. Une bonne partie de la bière vendue au Brésil est conditionnée dans des bouteilles réutilisables. Ces bouteilles ont un format standard (600 ML) qui permet aux brasseurs du pays de coordonner leurs programmes de recyclage (réutilisation des bouteilles). AmBev a récemment mis sur le marché une bouteille de 630 ML qui, aux dires de ses concurrents de plus petite envergure, élèvera les coûts de recyclage. Le SDE a ordonné des mesures provisoires en interdisant à AmBev la vente de sa nouvelle bouteille avant la conclusion de l'affaire. AmBev a fait appel de cette décision auprès du CADE, ce qu'autorise la loi sur la concurrence (voir section 3.2 ci-dessous). Le CADE a partiellement levé cette mesure en restreignant la zone de commercialisation de la nouvelle bouteille AmBev et en obligeant ce dernier à mettre en place un programme d'échange temporaire grâce auquel il assumera la plupart des coûts additionnels entraînés. Dans cette affaire, aucune décision finale n'a été prise à ce jour.

2.2 Fusions

2.2.1 Règles de fond

51. La principale disposition de la loi 8884 relative au contrôle des fusions est l'article 54 :

> *Tout acte qui peut limiter ou autrement restreindre la libre concurrence, ou qui a pour résultat le contrôle des marchés pertinents de certains produits ou services, doit être soumis au CADE pour examen.*

52. Ce libellé pourrait inclure tous les accords, et pas uniquement les fusions. En 2001, le SEAE et le SDE ont conjointement publié un ensemble de lignes directrices qui, selon eux, ne s'appliquent qu'aux fusions horizontales. Ces lignes directrices confirment cependant que l'article 54 « s'applique également au contrôle d'autres opérations pouvant limiter ou autrement porter préjudice à la libre concurrence, ou encore avoir pour résultat la domination des marchés pertinents de certains produits ou services, comme des accords horizontaux entre concurrents ». Cela étant, la grande majorité des notifications qui ont été soumises impliquaient des fusions.

53. Tel qu'il est libellé, l'article 54 ne précise pas spécifiquement quelle norme de fond devrait être employée dans le contrôle des fusions. Toutefois, le paragraphe 1 de cet article prévoit qu'une fusion présentant les quatre caractéristiques suivantes peut être approuvée :

1. la transaction « augmente la productivité ; améliore la qualité d'un produit ou service ; entraîne une efficience accrue, et favorise le développement technologique ou économique » ;
2. les avantages résultant de la transaction sont « répartis équitablement » entre les parties à la fusion et les consommateurs ;
3. la transaction ne supprime pas la concurrence sur « une partie substantielle du marché pertinent d'un produit ou service » ;
4. la transaction est limitée aux actes nécessaires pour obtenir ces effets bénéfiques.

54. On pourrait interpréter ces termes comme imposant aux parties à la fusion la charge de prouver que leur transaction est économiquement bénéfique. Dans la pratique cependant, le CADE n'a pas imposé cette exigence, qui intervient seulement quand il conclut que, tout bien pesé, la transaction réduirait notablement la concurrence. On considère que ce paragraphe ménage la possibilité d'invoquer l'efficience, cet argument ne pouvant jouer que pour les fusions qui sont par ailleurs anticoncurrentielles.

55. Le paragraphe 2 de l'article 54 contient une disposition spéciale qui permet l'approbation des fusions qui satisfont à seulement trois des quatre caractéristiques énumérées dans le paragraphe 1 et qui sont « dans l'intérêt général ou autrement nécessaires pour le bien de l'économie brésilienne, à condition qu'aucun préjudice ne soit causé aux consommateurs finaux ». Cette disposition se retrouve sous une forme ou une autre dans les lois sur le contrôle des fusions de plusieurs pays ; elle permet l'approbation de fusions qui revêtent des aspects anticoncurrentiels, mais qui sont d'importance primordiale pour l'intérêt national. Jusqu'à présent, toutefois, aucune fusion n'a été approuvée au Brésil en vertu de cette disposition.

56. Les lignes directrices du SEAE et du SDE relatives aux fusions reprennent l'analyse traditionnellement développée en la matière. Elles décrivent un processus en cinq étapes : (1) définir le produit et les marchés géographiques pertinents ; (2) déterminer si la part de marché de l'entité résultant de la fusion est suffisamment importante pour permettre l'exercice d'un pouvoir de marché ; (3) évaluer la probabilité qu'un pouvoir de marché soit exercé après la fusion ; (4) examiner les gains d'efficience générés par l'opération ; et (5) évaluer l'effet net de l'opération en termes de bien-être économique.

57. La première étape, celle de définition de marché, utilise pour déterminer le produit et les marchés géographiques pertinents une méthodologie principalement basée sur le principe de substitution par les consommateurs face à un hypothétique changement de prix[36]. Pour la deuxième étape, les lignes directrices indiquent des seuils de concentration de marché correspondant à des niveaux de préoccupation quant à l'exercice potentiel d'un pouvoir de marché de l'une ou l'autre des façons suivantes : soit par une seule entreprise, de manière unilatérale, lorsque cette dernière a une part de marché d'au moins 20 % ; soit par une action coordonnée de plusieurs entreprises sur un marché où le taux de concentration des quatre plus grandes firmes est d'au moins 75 % et si l'entreprise résultant de l'opération détient une part de marché d'au moins 10 %. Si la concentration dépasse un de ces deux seuils, le SEAE passe à l'étape 3, l'étude des conditions de marché relatives à l'exercice probable d'un pouvoir de marché. Ces conditions sont la possibilité d'une augmentation des importations, les conditions d'entrée et d'autres facteurs qui peuvent jouer sur la compétition. Si après cette troisième étape, le SEAE continue d'éprouver des préoccupations quant aux effets d'une transaction sur la concurrence, l'analyse passe à l'évaluation des efficiences que la fusion peut créer, et finalement à celle de l'effet économique net de la transaction.

58. Les lignes directrices ne mentionnent pas explicitement l'emploi de l'indice de Herfindahl-Hirschman (IHH) pour mesurer la concentration, mais le CADE et le SEAE affirment, eux, y avoir bien évidemment recours. Les lignes directrices ne font pas non plus référence à l'argument de la fusion de sauvetage. Le CADE l'a quant à lui examiné dans plusieurs affaires et l'a en règle générale rejeté. Enfin, si le CADE n'a pas officiellement adopté les lignes directrices conjointes du SEAE et du SDE, il les traite cependant comme des orientations non contraignantes et cite souvent certaines de leurs dispositions dans ses décisions. Deux nouveaux ensembles de lignes directrices, relatives aux fusions horizontales et verticales, sont à l'étude au sein du SBDC et devraient être approuvées en 2010.

2.2.2 Notification

59. Les projets de fusions qui atteignent certains seuils de taille minimale doivent être notifiés au SBDC. Les candidats doivent également payer des frais de notification de 45 000 BRL (26 000 USD). Ces frais sont répartis à parts égales entre le CADE, le SDE et le SEAE.

60. Le paragraphe 3 de l'article 54 précise les seuils de notification. Les fusions qui remplissent l'une des deux conditions suivantes doivent être notifiées : l'entreprise ou le groupe d'entreprises résultant de la fusion « représente vingt pourcent (20 %) d'un marché pertinent » ou l'opération « se traduit par des revenus bruts atteignant 400 000 000 BRL » (232 millions USD)[37]. Ces critères ont suscité trois types de critiques : (1) le seuil de revenus semblait s'appliquer au chiffre d'affaires mondial, d'où la possibilité qu'une fusion ayant un impact minime sur les marchés brésiliens doive néanmoins être notifiée. (2) Puisqu'il suffisait que l'entreprise résultant de la fusion atteigne la part de marché ou les revenus totaux requis, même de petites acquisitions par de grandes entreprises qui remplissaient à elles seules l'un de ces critères devaient être notifiées. (3) Le test de part de marché de 20% introduit un élément subjectif dans l'obligation de notification : la définition de marché. Les parties et le CADE pourraient de bonne foi être en désaccord sur la définition du marché pertinent ; d'où une incertitude quant à l'obligation de notification.

61. En 2005, le CADE a effectivement éliminé le premier problème en décrétant que le seuil de 400 millions s'appliquerait uniquement aux revenus tirés des activités réalisées au Brésil[38]. Reste qu'une

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36 La substituabilité du côté de l'offre est parfois également prise en compte à ce stade. (Dans certains autres pays, la substituabilité du côté de l'offre est prise en compte lors de l'identification des firmes en concurrence sur le marché pertinent.)

37 « Revenus bruts » signifie la totalité des revenus avant impôt des parties sur l'ensemble des marchés.

38 *Súmula* (jurisprudence) du CADE n° 01 (2005) publiée conformément à la Résolution n° 39 (2005) du CADE.

petite acquisition réalisée par une entreprise dont les revenus dépassent déjà les 400 millions doit être notifiée, mais ces opérations font habituellement l'objet d'une procédure accélérée du SBDC (voir plus bas) donnant lieu à une approbation rapide. Le CADE a également modifié par voie administrative l'applicabilité du critère de part de marché en décidant que ce critère s'applique uniquement si l'entreprise résultant de la fusion obtient une part de marché supérieure à 20 % ou si les deux parties à une fusion opèrent sur le même marché et si l'une d'elles en détient une part de 20 %. Reste la troisième critique, selon laquelle le test de part de marché est trop subjectif, mais cet effet a lui aussi été atténué au fil du temps. Peu fréquents sont les cas de notifications où le test de part de marché est positif mais pas celui des revenus. Le CADE prend rarement des mesures coercitives pour défaut de notification en se basant sur le critère de marché.

62. Une caractéristique importante – et beaucoup la jugent essentielle – du régime brésilien de notification des fusions est le fait que la notification, bien qu'elle soit obligatoire, ne doit pas nécessairement être préalable à la fusion. En d'autres termes, il n'est pas interdit aux parties de procéder à leur transaction avant ou pendant son examen par le SBDC. (Comme l'explique en détail la section 4 ci-après, la législation à l'étude au Congrès instaurerait une notification préalable à la fusion et règlerait les problèmes liés aux seuils de notification mentionnés plus haut). Le paragraphe 4 de l'article 54 exige que la notification soit faite « au plus tard quinze jours ouvrables <u>après</u>… [la transaction] (texte non souligné dans l'original) ». Les règles internes du CADE[39] précisent la date à partir de laquelle est décompté le délai de 15 jours. Il s'agit de la date à laquelle « le premier document juridiquement contraignant [est] signé par les candidats ».

63. L'absence de notification préalable a des répercussions importantes, tant au niveau du fond que de la forme, sur le contrôle des fusions au Brésil. Sur le plan de la procédure, cette absence de notification allonge le processus d'examen. Le SBDC n'est soumis à aucun délai formel pour rendre sa décision. De plus, du fait que les parties à la fusion sont autorisées à procéder à leur transaction avant la conclusion de son examen (sauf en cas de décision préjudicielle, voir plus bas), rien n'incite les autorités à accélérer le processus. Il s'ensuit, entre autres choses, que les parties peuvent faire preuve de moins de réactivité face aux demandes d'informations du SBDC. Le SEAE, qui mène l'enquête principale sur les fusions notifiées, déplore cette lenteur dans certaines affaires.

64. En substance, la réalisation de la transaction peut avoir une incidence sur les mesures correctrices que le CADE peut imposer s'il conclut que la fusion est illégale. Plus précisément, l'annulation d'une fusion d'ores et déjà réalisée est, de l'avis général, très difficile, ce qui complique la tâche du CADE lorsqu'il entend interdire purement et simplement une transaction. Depuis 2004, trois fusions au total ont été entièrement rejetées par le CADE, mais selon ce dernier, ce nombre réduit ne serait pas en premier lieu dû à l'absence de notification préalable. Il explique que, dans la mesure du possible, il préfère ordonner des mesures correctrices qui permettent de poursuivre la transaction sous-jacente tout en préservant les gains d'efficience et les économies d'échelles qui, à ses yeux, sont importants pour l'économie brésilienne.

65. Quoi qu'il en soit, le CADE a pallié ces faiblesses au moins partiellement en recourant à des décisions préjudicielles par lesquelles il impose aux parties de prendre certaines dispositions de nature à préserver sa capacité de prononcer des mesures correctrices effectives dans l'hypothèse où la fusion s'avèrerait illégale. Le CADE peut imposer à cette fin des « mesures de précaution », comme sa Résolution 45[40] l'y autorise. Cependant, les procédures relatives à la publication de ces décisions sont essentiellement contradictoires et les décisions du CADE peuvent être contestées devant les tribunaux. Entre 2005 et 2009, le CADE a rendu 11 décisions préjudicielles concernant des fusions.

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39 Approuvées par la Résolution n° 45.

40 Ce pouvoir a été d'abord conféré par la Résolution 28, adoptée en 2002, laquelle a été remplacée en 2007 par la résolution 45.

66. Le CADE peut également décider de rendre un jugement d'expédient produisant les mêmes effets, ce qu'il fait d'ailleurs plus couramment. La résolution 45 a créé un mécanisme appelé « Accord pour la préservation de la réversibilité de la transaction » (« Acordo de Preservação de Reversibilidade da Operação » ou APRO). De 2007 à 2009, le CADE a conclu 10 APRO. En général, les décisions préventives et les APRO imposent à la société acquéreur des restrictions ou des conditions concernant sa liberté de rassembler des activités, de fermer des magasins ou des usines, de renvoyer du personnel, de mettre fin à des marques ou à des lignes de produits, de modifier les politiques de marketing, d'investissement ou de recherche, ou encore de liquider des actifs. Les décisions préventives et les APRO comportent tous des clauses qui prévoient des amendes en cas d'inobservation des restrictions imposées.

67. L'absence de notification préalable aux fusions a eu un autre effet sur le régime de fusion du SBDC. Étant donné qu'il est possible de procéder à une fusion avant la fin de l'examen du CADE, il est dans l'intérêt de ce dernier de prendre connaissance de la transaction le plus tôt possible, à la fois pour minimiser les effets anticoncurrentiels de l'opération, si elle s'avère dommageable, et pour préserver sa capacité d'imposer, si nécessaire, des mesures correctrices effectives. Comme précisé plus haut, le règlement du CADE définit une « date pivot » à partir de laquelle est décompté le délai de 15 jours dans lequel une fusion doit être notifiée. Dans le passé, le CADE a opté pour une interprétation agressive de cette définition de la date pivot et a engagé un grand nombre d'affaires dans lesquelles il a requis des amendes pour non respect du délai de notification (L'article 54(5) prévoit que le CADE peut imposer des amendes de 6 000 à 6 000 000 BRL en cas de défaut de notification de fusion dans les délais impartis)[41]. Ce nombre a diminué depuis la fin des années 1990 grâce à l'expérience acquise par le SBDC et le secteur privé dans l'interprétation de ces dispositions[42]. Cela étant, le nombre de ces affaires reste élevé à bien des égards, comme le montre le Tableau 3 ci-dessous.

2.2.3 Nombre d'affaires de fusion traitées par le SBDC

Tableau 3. Fusions intervenues entre 2004 et 2009

	2004	2005	2006	2007	2008	2009*
Fusions notifiées	516	386	411	591	616	306
Approuvées	574	345	352	490	550	364
Autorisées avec des restrictions	43	37	20	37	58	19
Refusées	1	0	0	0	1	1
Réglées à l'amiable	0	3	1	4	8	3
% total nécessitant des mesures correctrices	7.2	9.7	5.4	7.0	9.7	5.2
Affaires engagées pour défaut de notification dans les temps	18	8	13	24	20	13

* De juin à septembre

68. Ces données font apparaître une diminution du nombre de fusions notifiées en 2005 et en 2006 par rapport aux chiffres de 2004. Cette baisse s'explique en grande partie par la décision du CADE d'appliquer le seuil de 400 millions de revenus uniquement aux activités réalisées au Brésil. En 2007, le CADE a rendu d'autres jugements qui ont apporté des éclairages différents sur la nécessité de notification

41 En 2007, le CADE a pris l'ordonnance n° 44, qui comportait des lignes directrices sur le calcul du montant de ces amendes. Les critères entrant en ligne de compte sont la taille de la transaction et des parties, le fait que le CADE ait finalement ordonné ou non des mesures correctrices ou refusé d'autoriser l'opération, et la notification spontanée, même si elle a été tardive, de l'opération par les parties. Le montant de l'amende est doublé en cas de récidive.

42 Dans une récente décision de justice, l'interprétation de la notion de date pivot par le CADE a été remise en question par une partie qui estimait qu'aux termes de la loi, le délai de 15 jours ne pouvait commencer qu'à compter de la réalisation totale de l'opération. La Cour suprême s'est prononcée en faveur de l'interprétation du CADE. Sonaeimo c. CADE (2009).

dans certaines situations spécifiques[43]. Le nombre de notifications est cependant repassé à la hausse en 2007 et 2008. Cette augmentation est mise sur le compte du renforcement de l'économie brésilienne pendant ces années et des fluctuations monétaires qui ont favorisé les fusions entre firmes brésiliennes. La baisse enregistrée en 2009 reflète quant à elle les revirements conjoncturels intervenus au Brésil et dans le monde entier.

69. La proportion de transactions notifiées nécessitant des mesures correctrices se situe dans une fourchette de 5 à 10 %, comparable à la situation de la plupart des autres pays. Cependant le nombre de ces fusions semble élevé pour certaines années - pas moins de 58 en 2008. La principale raison à cela est le nombre relativement élevé de fusions comportant des clauses de non-concurrence, c'est-à-dire des arrangements passés dans le cadre d'acquisitions partielles, dans lesquels le vendeur s'engage à ne pas faire concurrence à l'acquéreur sur le marché en cause pendant une certaine période. Le SBDC juge régulièrement ces clauses trop restrictives et ordonne leur annulation ou la réduction de leur portée. Les transactions assorties de clauses de non-concurrence ont représenté 40 à 78 % du nombre total de fusions ayant donné lieu à des mesures correctrices[44].

70. Le contrôle des fusions par le SBDC se caractérise aussi par le nombre relativement élevé de transactions pour lesquelles des mesures correctrices comportementales (décisions imposant à l'entité fusionnée d'ouvrir l'accès à son réseau de distribution ou de pratiquer une tarification transparente, par exemple) sont imposées, en comparaison avec les mesures correctrices structurelles (cession d'actifs ou, moins fréquemment, rejet pur et simple de l'opération). Le Tableau 4 montre la ventilation de ces deux types de mesures correctrices pour 2007 et 2008. Ces données n'englobent pas les décisions impliquant des clauses de non-concurrence. Il convient également de préciser que, dans certaines affaires, des mesures correctrices des deux types ont été requises ; ces affaires ont alors été comptabilisées deux fois.

Tableau 4. Ventilation des mesures correctrices comportementales et structurelles, 2007-2008

	2007	2008	Total
Comportementales	8	10	18
Structurelles	4	8	12

71. De toute évidence, les mesures comportementales sont imputables au fait que le SBDC doive traiter les fusions ex post. Le CADE affirme avoir une préférence pour les mesures structurelles, tout en ayant conscience de la nécessité de préserver les gains d'efficience que génère une fusion, ce que ne permet peut-être pas une mesure correctrice structurelle. Dans une fusion récente réalisée dans le secteur ferroviaire, par exemple, les réseaux des parties n'étaient pas directement superposables, mais le CADE a conclu que l'opération éliminerait la concurrence dans le transport du soja, l'une des principales exportations agricoles du Brésil, entre l'ouest du pays et les ports de substitution de São Paulo et Santa Catarina. En outre, l'une des parties à la fusion était intégrée verticalement dans la production du soja, et la transaction aurait pu aboutir à une discrimination pratiquée par l'entité fusionnée vis-à-vis des producteurs non intégrés. Néanmoins, le CADE a par ailleurs identifié d'importantes efficiences générées par la fusion et susceptibles de réduire sensiblement les coûts des transitaires. Le CADE et les parties ont signé une convention d'expédient qui ne comportait aucune cession d'actifs, mais imposait en revanche des mesures

43 La Súmula n° 2 a précisé les circonstances dans lesquelles la notification d'une acquisition de participations minoritaires par des actionnaires déjà majoritaires n'est pas obligatoire. La Súmula n° 3 concernait les situations dans lesquelles un accord a pour seul objectif de participer à une procédure de passation d'un marché public pour l'octroi d'une concession.

44 Le CADE s'oppose à ces transactions lorsque la clause de non-concurrence dépasse 5 années. Cette période a été établie dans le Code civil brésilien comme période par défaut. Il est toutefois arrivé que le CADE accepte des périodes plus longues dans certaines affaires, principalement lorsqu'il s'agit d'entreprises communes et lorsque des activités de recherche et développement sont en jeu.

correctrices comportementales interdisant à l'entité fusionnée de pratiquer toute discrimination et prévoyant certaines contraintes en matière de prix et de service, de sorte que les avantages de l'opération soient répercutés sur les consommateurs[45].

72. Il convient également de mentionner le recours à un mécanisme de règlement amiable dans les affaires de fusion. L'article 58 de la loi sur la concurrence autorise le CADE à conclure des « Accords de performance », qui sont des accords passés avec les parties concernant les mesures correctrices à appliquer dans les fusions jugées anticoncurrentielles. Les accords de performance peuvent comprendre à la fois des mesures comportementales et structurelles. Ils peuvent prévoir des cessions d'actifs matériels ou de propriété intellectuelle, comme des noms de marques, le respect d'objectifs de performance et/ou d'investissement, la fourniture ou la production de biens ou de services pour des clients ou pour d'autres parties pendant une période donnée, la suppression d'accords d'exclusivité et le maintien en place des effectifs. Le CADE a eu couramment recours aux accords de performance à la fin des années 1990, puis nettement moins entre 2000 et 2004, avant d'y faire appel de nouveau depuis 2005, comme le montre le Tableau 3 ci-dessus.

Encadré 3. Récentes affaires marquantes en matière de fusion

2009 : Thé prêt à consommer[46]

Coca-Cola a passé un accord avec Leão Junior SA, une société brésilienne, pour le rachat de l'activité de cette dernière dans la fabrication et la vente de thé prêt à consommer (« maté ») et de thé glacé. Coca-Cola vendait déjà ces produits au Brésil sous la marque Nestea par l'intermédiaire d'une entreprise commune créée avec Nestlé, propriétaire de la marque. Le CADE a négocié un APRO avec Coca-Cola exigeant de ce dernier qu'il préserve les actifs et la direction de la société rachetée pendant le déroulement de l'enquête. La transaction était contestée par Pepsi-Cola, le rival de Coca-Cola, qui vendait lui aussi ces produits sous sa propre marque Lipton, et par l'association brésilienne des fabricants de boissons sans alcool. L'affaire s'est orientée sur la définition du marché de produits en cause. Coca-Cola a argué qu'il existait un marché englobant presque toutes les boissons non alcoolisées, y compris le maté, sur lequel Leão était en position de leader, mais que ce marché ne comprenait pas le segment du thé glacé, qu'il dominait lui-même.

À la demande de Coca-Cola et de Pepsi-Cola, le SEAE a demandé la réalisation d'études économétriques sur la substituabilité du maté et du thé glacé. Ces études ont produit des résultats contradictoires. L'enjeu consistait également à déterminer si un thé fait à partir du guarana, une baie brésilienne utilisée pour fabriquer des boissons locales populaires sans alcool, devait également être intégré au marché de produits en cause. Il a été allégué que le maté et le thé au guarana étaient tous deux substituables aussi bien du côté de l'offre que de celui de la demande, étant entendu que des éléments probants attestaient de la substituabilité entre ces deux produits du côté de l'offre.

En fin de compte, après avoir examiné les éléments de preuve aussi bien quantitatifs que qualitatifs, le CADE a toutefois décidé que le marché en cause englobait les deux types de thé et que la fusion serait anticoncurrentielle. Il a donc autorisé l'opération à la condition que Coca-Cola cède ses activités Nestea.

45 América Latina Logística S.A. (« ALL »), Brasil Ferrovias S.A. (« BF ») ; Novoeste Brasil S.A. (« NV »), n° 08012.005747/2006-21 (2006). Dans une récente fusion impliquant des restrictions verticales, dans le secteur de la distribution de carburant, Petrobras / Ipiranga (2009). Le CADE a choisi d'ordonner la suppression des accords d'exclusivité entre les grossistes en carburant et les détaillants plutôt que d'imposer la cession de points de vente au détail, contrairement à la décision qu'il avait prise dans une précédente affaire similaire.

46 Coca Cola / Leão Junior SA (2009).

Encadré 3. (Suite)

2009 : Distribution de magazines[47]

Dans cette affaire, le marché en cause était celui de la distribution nationale de magazines. Certains éditeurs de magazines distribuaient leurs magazines directement aux consommateurs (« distribution directe »), tandis que d'autres faisaient appel à des distributeurs intermédiaires qui traitaient avec des établissements de vente au détail (« distribution indirecte »). La fusion ne posait pas de problème concernant la distribution directe, mais elle créait un monopole sur le marché national de la distribution indirecte. L'une des parties, Abril, était le premier éditeur national de magazines. Détenant environ 60 % du secteur, il était intégré verticalement dans la distribution via son distributeur DGB, dont la part du marché de la distribution indirecte s'élevait à 70 %. L'autre partie développait ses activités dans la distribution uniquement et y détenait une part de marché de 30 %.

L'enjeu de l'affaire reposait sur la question de l'entrée sur le marché, une entrée jugée difficile par le SEAE et le CADE. Pour réussir, un distributeur national doit avoir une gamme et une échelle suffisantes. Plus précisément, il doit pouvoir proposer un éventail adéquat de publications susceptibles d'intéresser à la fois ses éditeurs en amont et ses détaillants en aval. Un facteur important à cet égard était la relation verticale établie entre Abril et DGB, qui mettait de facto jusqu'à 60 % des magazines du pays hors d'atteinte de tout nouvel arrivant. Le SBDC a imaginé un scenario dans lequel les 40 % restants traiteraient avec un nouvel arrivant, mais il a estimé cette possibilité peu probable, pour diverses raisons. Le fait que les arrangements passés entre éditeurs et distributeurs aient été exclusifs compliquait d'autant l'entrée de nouveaux concurrents, qui devaient en outre engager d'importants frais irrécupérables pour pouvoir réussir leur entrée.

Le SEAE a recommandé au CADE de rejeter la fusion. Cette affaire fut l'une des rares dans lesquelles le CADE n'a pas suivi les recommandations du SEAE, mais a conclu un règlement amiable (accords de performance, voir plus haut) avec les parties. L'accord prévoyait entre autres choses des actions visant à faciliter l'entrée de nouveaux concurrents. DGB a dû céder ses actifs matériels utilisés pour la distribution à São Paulo et à Rio de Janeiro, les deux marchés les plus importants du Brésil, et renoncer à ses clauses d'exclusivité dans ses contrats de distribution pendant une période de dix ans. D'autres mesures comportementales avaient pour objet de préserver la structure autonome de l'activité de distribution du groupe Abril.

2008 : Renforts en fibre de verre[48]

Cette affaire portait sur l'acquisition par Owens Corning d'actifs de Saint-Gobain dans le domaine des renforts en fibre de verre et des matériaux composites, et comportait des effets sur plusieurs marchés mondiaux[49].

Les deux entreprises étaient les seules à fabriquer des renforts en fibre de verre au Brésil. La question clé de l'affaire était celle de la définition du marché géographique en cause. Les parties à la fusion soutenaient que ce marché était mondial et qu'il englobait des fabricants chinois de ces produits. Les parties à la fusion et le SEAE ont chacun réalisé des études économétriques sur les fluctuations des prix en comparant celles constatées au Brésil avec celles d'autres régions du monde. Une autre étude économétrique a également été soumise par un tiers intéressé.

Le CADE a estimé qu'aucune de ces études n'était probante. Il s'en est remis aux preuves qualitatives recueillies par le SEAE. Les tiers acquéreurs ont été interrogés quant à la viabilité de la Chine en tant que source d'approvisionnement, et ces derniers ont affirmé qu'elle ne constituait pas une alternative suffisante pour eux pour des raisons de qualité et du fait des délais de transport nécessaires. Le CADE a jugé la fusion illégale et exigé la cession de l'usine Saint Gobain au Brésil.

47 DBG/Chinaglia (2009).

48 Saint-Gobain/Owens Corning (2008).

49 La transaction était contestée aux États-Unis par la Commission fédérale du commerce et a été réglée par un jugement d'expédient ordonnant à Owens Corning de céder son activité nord-américaine dans les mats de silionne. Voir le communiqué de presse de l'USFTC du 26 octobre 2007, consultable sur le site Internet de l'USFTC à l'adresse www.ftc.gov.

Encadré 3. (Suite)

2005 : Minerai de fer et transport par le rail[50]

Vale S.A. (auparavant connue sous le nom de Companhia Vale do Rio Doce – CVRD) est la deuxième plus grande compagnie minière au monde. Elle développe ses activités dans plusieurs pays et est le plus gros exportateur de minerai de fer au monde. Vale a été créée en 1942 en tant qu'entreprise d'État avant d'être privatisée en 1997. Au Brésil, elle contrôle par ailleurs plusieurs lignes de fret ferroviaire, ainsi que des terminaux portuaires. Depuis sa privatisation, Vale a continué d'acquérir des actifs miniers, à la fois au Brésil et à l'étranger. Au début des années 2000, elle a fait l'acquisition de quatre compagnies d'extraction de minerai de fer, ainsi que les voies ferrées connexes dans le sud-est du Brésil, et un grand producteur d'acier, CSN, qui contrôlait lui aussi une importante mine de fer.

Au cours de l'enquête, le SDE a conclu que ces acquisitions auraient des effets néfastes sur certains marchés du minerai de fer et du transport ferroviaire, et a rendu une décision préjudicielle imposant à Vale certaines restrictions en attendant que le CADE statue. En 2005, ce dernier a reconnu que les transactions portaient préjudice à la concurrence. Il les a approuvées à la condition que Vale accepte de céder la compagnie minière Ferteco, la troisième plus grande compagnie minière du Brésil avant son rachat par Vale, ou qu'elle renonce à son droit exclusif d'acheter la production minière de CSN. L'affaire est bien connue pour la bataille juridique acharnée que Vale a alors menée devant les tribunaux. La compagnie a fait appel de la décision du CADE pour raisons de forme et cette affaire de concurrence a été la première à être portée jusqu'à la Cour suprême brésilienne. En 2007, la cour s'est prononcée en faveur du CADE, puis Vale a introduit un second recours, lui aussi rejeté en appel[51].

2.3 Concurrence déloyale et protection du consommateur

73. La question de la « concurrence déloyale », qui porte préjudice aux entreprises individuelles en concurrence, n'est pas abordée dans la loi 8884, mais fait l'objet d'une autre loi sur laquelle se fondent les poursuites pénales et les actions civiles privées engagées en la matière. La loi sur la propriété industrielle (n° 9279/96) définit le délit de concurrence déloyale comme englobant le dénigrement commercial, l'utilisation frauduleuse de marques, le détournement frauduleux de flux commerciaux, la publicité visant à entraîner des confusions entre des marques, la violation des droits attachés aux marques, la corruption dans les transactions commerciales, l'appropriation ou la divulgation illégitime de secrets professionnels et la revendication abusive d'un brevet (art. 195). Les procureurs publics peuvent entamer des poursuites pénales en application de cette loi, et les victimes d'actes de concurrence déloyale peuvent elles aussi se prévaloir de la loi pour demander des dommages et intérêts et des mesures de réparation par voie d'injonction dans le cadre de procédures civiles.

74. Le code brésilien de défense du consommateur (Loi 8078), adopté en 1990, régit les pratiques commerciales telles que la publicité mensongère, les fausses allégations, le démarchage à domicile, le télémarketing, les hausses de prix abusives et, de manière générale, les contrats conclus par les consommateurs. Le « Système national de défense du consommateur » repose sur trois composantes : (1) un organisme fédéral, le Département de la défense et de la protection du consommateur (« DDPC »), qui appartient au SDE, (2) des organismes de protection du consommateur au niveau local et des États (appelés « Procons ») et (3) des organisations de consommateurs non gouvernementales (OCNG). Le DDPC est en charge de la coordination globale du système et assume diverses responsabilités spécifiques en application de la loi.

50 CVRD, *et al*. (2005).

51 Le CADE était représenté en justice par son procureur général, nommé président du CADE en 2008. Sa confirmation au poste de président par le Sénat a été retardée (mais finalement approuvée), soi-disant en raison de l'opposition de certains intérêts industriels. Parmi eux, a-t-on dit, figurait Vale. Voir Global Competition Review, *The Prizefighter*, consultable sur le site internet de la GCR à l'adresse www.globalcompetitionreview.com.

75. Les Procons sont présents dans chacun des 26 États brésiliens, dans le district fédéral (Brasilia) et dans de nombreuses municipalités, où ils assurent des services spécifiques pour les consommateurs et prennent part aux procédures judiciaires collectives. Parmi les OCNG brésiliennes, on compte diverses organisations à l'échelon régional, des États et national. Elles agissent dans le cadre des procédures judiciaires collectives, mais aussi publient des magazines sur la consommation, assurent des fonctions d'éducation des consommateurs et développent d'autres activités encore, comme l'élaboration de tests comparatifs de produits.

76. Conformément au code de défense du consommateur, un consommateur individuel ou un groupe de consommateurs qui revendiquent des dommages-intérêts peuvent déposer une plainte - individuelle ou collective – devant les tribunaux. En cas de grief collectif, des poursuites judiciaires peuvent également être entamées par les Procons ou les procureurs, et les OCNG peuvent elles aussi intenter des actions en justice en leur propre nom pour le compte d'une catégorie de victimes. Au-delà des actions en dommages-intérêts, la loi prévoit des poursuites pénales et civiles. Des procédures pénales, qui peuvent donner lieu à des amendes et à des peines d'emprisonnement, peuvent être engagées à l'initiative des procureurs publics devant les tribunaux fédéraux et locaux. Les procédures civiles d'application du droit aux niveaux fédéral et local peuvent aboutir à des injonctions et à des mesures pécuniaire de réparation des consommateurs, et peuvent être introduites par des poursuivants, des ONG et (selon le tribunal impliqué) par le DDPC ou par les Procons.

77. Le DDPC a aussi une mission d'éducation des consommateurs, dont il s'acquitte à travers son site Internet, la formation du personnel des OCNG, l'édition de brochures à l'attention des consommateurs et la conception de supports d'information pédagogiques destinés aux écoles. Étant donné que le DDPC et le département du SDE pour la lutte contre les ententes sont apparentés, il existe certaines opportunités de synergie entre les fonctions de promotion de la concurrence et d'éducation des consommateurs. Les deux départements échangent également leurs points de vue concernant les recours introduits en justice et se consultent sur certaines questions de sensibilisation à la concurrence qui ont trait d'une façon ou d'une autre à la protection du consommateur.

3. Questions institutionnelles : structures et pratiques

3.1 Les institutions du SBDC

78. Le SBDC se compose de trois organismes distincts : le SDE, le SEAE et le CADE. Le SDE relève du ministère de la Justice. Il est dirigé par un secrétaire et est divisé en deux départements, l'un en charge de la mise en application du droit de la concurrence (le Département de la défense et de la protection de l'économie, ou DDPE), l'autre du droit de la protection du consommateur (le Département de la défense et de la protection du consommateur, ou DDPC). En octobre 2009, le DDPE employait 32 professionnels et 27 agents administratifs.

79. Le SEAE est placé sous l'autorité d'un secrétaire nommé par le ministre des Finances. Ses principales responsabilités sont au nombre de trois : (1) assurer certaines fonctions d'enquête et de conseil en application du droit de la concurrence, (2) fournir des analyses économiques pour les programmes de réglementation économique (et notamment des études sur les prix), et (3) surveiller les conditions de marché au Brésil. En octobre 2009, le personnel du SEAE comptait 78 professionnels et 72 employés administratifs. Les activités du SEAE en matière de promotion de la concurrence sont réalisées depuis ses bureaux de Brasilia. Son unité de contrôle des fusions est installée à Rio de Janeiro depuis 2004.

80. L'article 3 de la loi sur la concurrence institue le CADE en tant qu'« organisme fédéral indépendant » rattaché au ministère de la Justice pour des raisons budgétaires. Son organe directeur est un conseil composé d'un président et de six commissaires. Le président et les commissaires sont nommés par

le président du Brésil puis approuvés par le Sénat pour un mandat de deux ans renouvelable une fois. Les membres du conseil ne peuvent pas être renvoyés, sauf pour certaines infractions pénales et pour d'autres fautes prévues par la loi[52]. En octobre 2009, le CADE employait 49 professionnels et 137 agents administratifs.

81. En octobre 2008, le CADE a été restructuré. Quatre unités techniques ont été créées, élargissant ainsi l'infrastructure habituelle pour la prise de décisions dans les affaires. Il s'agit des unités (a) marchés réglementés, (b) économie, (c) affaires internationales et (d) négociations en vue d'un règlement (transactions pénales). Chaque unité est placée sous l'autorité d'un ou plusieurs commissaires. L'unité technique en charge des négociations est chargée de développer des compétences en négociation. Cette unité est dirigée par l'un des commissaires du CADE et se compose de dix membres, tous recrutés parmi le personnel technique et juridique du CADE. Des commissions *ad hoc* de trois membres, qui comptent en règle générale un ou plusieurs membres de l'unité technique, sont chargées de négocier les règlements et les transactions pénales. En novembre 2009, deux accords avaient été finalisés selon cette procédure et trois autres étaient en cours de négociation.

82. Comme son nom l'indique, l'unité des affaires internationales est chargée de représenter le CADE dans ses nombreuses relations avec les organisations internationales et les autorités étrangères. L'unité technique des marchés réglementés a un ordre du jour ambitieux. Il est reconnu que bon nombre des affaires examinées par le CADE relèvent de secteurs réglementés et nécessitent impérativement une connaissance spécialisée des marchés en cause. C'est à cette unité qu'incombera la tâche d'acquérir une expertise de ces secteurs et d'assister le CADE dans les affaires qui le nécessiteront. Pour cela, l'unité est chargée, entre autres choses, de réaliser des études des marchés réglementés, notamment lorsque la réglementation affecte la concurrence dans un secteur donné, de nouer des relations avec les autorités de réglementation sectorielle et de participer aux discussions menées entre les différentes instances en matière de réglementation et de concurrence. Reste à préciser de quelle façon cette nouvelle unité interagira avec le SEAE, qui a déjà acquis une expertise non négligeable dans ces domaines.

83. En septembre 2009, le CADE a créé le Département d'études économiques (DEE), au sein duquel sera intégrée l'unité technique économie, créée en 2008. Il était prévu que, fin 2009, le DEE compte parmi son personnel cinq économistes à temps plein, dont deux titulaires de doctorats d'universités des États-Unis. La principale mission du DEE sera d'apporter une assistance aux commissaires en matière d'économie. C'est dans cette optique qu'avec l'unité technique économie, il a entrepris toute une série d'activités telles que l'organisation de sessions de formation internes, la participation à des forums internationaux sur les aspects économiques de la lutte contre les ententes et à des consultations bilatérales avec des experts en économie d'autres juridictions, l'évaluation de rapports de consultants en économie, la réalisation d'exercices économétriques et la rédaction de documents techniques sur différentes questions en la matière. Son programme pour 2010 est ambitieux et prévoit la réalisation d'études sur les pratiques d'exclusion, le calcul des dommages et intérêts et la détection des ententes.

84. Deux hommes de loi indépendants travaillent pour le CADE. Le premier est le procureur général du CADE (habilité par l'article 10 de la loi sur la concurrence), choisi par le ministre de la Justice et nommé par le président de la République après approbation du Sénat. Le procureur général est soumis aux mêmes conditions que les commissaires en termes de durée de mandat, de qualifications, de renouvellement de mandat et de renvoi (art. 11). Il ne peut donc pas être renvoyé par le conseil. Le procureur général représente le CADE en justice. Il ou elle peut aussi formuler des avis dans des affaires en cours au CADE. En 2009, 20 personnes au total, dont huit professionnels, étaient affectées au bureau du procureur général. En 2009, le procureur général s'est vu confier le contrôle de la conformité des décisions du CADE.

52 Article 5.

85. Le deuxième est le procureur public, un représentant du procureur général fédéral. L'article 12 de la loi sur la concurrence établit qu'il revient au procureur général de nommer un membre du bureau du procureur public « pour traiter » les affaires soumises à l'examen du CADE. Cet article ajoute que le CADE peut demander au procureur général de faire exécuter ses décisions par la voie judiciaire et d'engager d'autres actions en justice, en vertu de la mission de protection de l'ordre économique que la loi lui assigne. Il semble que le rôle du procureur public soit principalement celui de maintenir au sein de l'organisme une voix indépendante représentant l'intérêt public. Le bureau du procureur (cette unité compte actuellement deux professionnels) peut émettre des avis écrits sur les affaires portées à l'attention du CADE. S'il conclut qu'une décision ou une action du CADE présente une irrégularité d'ordre juridique, il peut contester cette action devant un tribunal fédéral. Il l'a déjà fait à quelques reprises, mais pas ces dernières années.

3.2 Procédures dans les affaires de comportement

86. Le SDE peut ouvrir une « enquête préliminaire » sur une violation éventuelle, soit d'office, soit sur plainte ou requête d'une partie intéressée. Il a le pouvoir d'exiger que les personnes visées par l'enquête et d'autres entités publiques et privées lui fournissent des informations au cours de cette phase. Dans un délai maximum de 60 jours (qui peut être prorogé par les demandes d'information), le SDE peut décider de clore l'enquête, sous réserve de l'approbation du CADE, ou d'ouvrir une « procédure administrative » qui constitue un stade plus officiel de l'enquête. La personne interrogée ou qui fait l'objet de l'enquête est informée officiellement de la nature de la violation présumée et invitée à présenter sa défense. Le SDE peut poursuivre l'enquête et dispose d'un pouvoir complet de recherche d'informations à ce stade, y compris la possibilité de recueillir des témoignages. À la fin de cette phase, il rédige un rapport écrit contenant ses constatations et recommandations et le transmet avec le dossier au CADE.

87. Le SDE peut, soit d'office soit à la requête du procureur général du CADE, prendre une ordonnance de ne pas faire au stade de la procédure administrative (injonction préliminaire) quand il estime qu'il y a « de bonnes raisons de croire que le défendeur, directement ou indirectement, a causé ou peut causer des dommages irréparables ou importants au marché, ou qu'il peut rendre inefficace le résultat de la procédure[53] ». Il est possible de faire appel de cette ordonnance devant le CADE.

88. Le SDE est tenu de notifier au SEAE l'ouverture d'une procédure administrative, et le SEAE peut choisir de fournir un avis au SDE sur la question[54]. Une autre loi donne au SEAE le pouvoir d'enquêter sur des infractions possibles au droit de la concurrence[55]. Le SEAE peut de ce fait conduire de telles enquêtes préliminaires seul ou en collaboration avec le SDE. Comme précisé plus bas, cependant, le SEAE a nettement revu à la baisse sa participation aux affaires de comportement. La loi sur la concurrence ne lui confère aucune fonction de jugement ou d'exécution du droit.

89. Dès réception par le CADE du rapport du SDE, l'affaire est assignée à l'un des six commissaires choisis au hasard, qui est désigné comme rapporteur, et au procureur général du CADE. La loi stipule que le procureur général donne son avis sur l'affaire dans les 20 jours[56] ; cet avis est généralement centré sur les aspects juridiques de l'affaire, mais il peut aussi s'étendre aux questions de fond. Le rapporteur doit décider s'il y a lieu d'ouvrir une enquête supplémentaire dans les 60 jours qui suivent la réception du rapport. Le CADE dispose des mêmes pouvoirs de recherche d'informations que le SDE. L'ouverture d'une enquête supplémentaire est toutefois rare. Il arrive que le CADE renvoie l'affaire au SDE afin d'obtenir davantage

53 Loi 8.884, article 52.

54 Article 38.

55 Loi 9021.

56 Article 42.

d'informations. Tout comme le secrétaire du SDE, le rapporteur peut invoquer l'article 52 pour rendre une ordonnance de ne pas faire, afin d'empêcher que ne soient causés des dommages immédiats et irréparables. Cette ordonnance prend effet sans délai, mais un recours peut être formé devant le CADE réuni en session plénière, puis devant les tribunaux.

90. Au terme du délai de 60 jours ou de l'enquête supplémentaire, l'affaire est inscrite au rôle du CADE sous la rubrique « À juger au plus vite »[57]. Le rapporteur doit rédiger un rapport écrit et une recommandation sur la résolution de l'affaire. Il est tenu remettre ce rapport aux autres commissaires et aux parties au plus tard cinq jours avant l'audience de jugement. La décision du conseil est rendue lors d'une séance publique dans laquelle le procureur général du CADE et le défendeur ont la possibilité d'intervenir. Le SDE et le SEAE peuvent également y participer et expliquer leurs avis techniques. Le quorum requis pour le conseil est de cinq membres et les décisions sont prises à la majorité des votes des participants. Le président fait partie des sept membres ayant droit de vote et, en cas d'égalité, son vote compte double.

91. L'une des forces de ce processus d'examen est sa transparence. Aucun praticien ne remet en question la régularité de la procédure. Les défendeurs sont informés en bonne et due forme des charges retenues contre eux et ont suffisamment d'occasions au cours de la procédure pour assurer leur défense. Les décisions du CADE sont prises lors d'une audience publique. Il est possible d'assister physiquement à la procédure ou de la suivre en audio sur Internet. Les décisions du CADE sont rendues par écrit et communiquées au public.

92. À une époque, certains avocats du secteur privé se sont plaints du traitement des informations confidentielles. Le CADE a tenté de régler ce problème avec sa réglementation n°45, qui reprend en détail l'ensemble des procédures officielles du CADE relatives à la protection des informations confidentielles. Cette réglementation prévoit que sur requête d'une partie intéressée, le rapporteur ou le président peut déclarer telle ou telle information confidentielle et non accessible au public. La même réglementation dresse la liste des types d'informations susceptibles d'être classées confidentielles, comme celles relatives aux revenus, aux coûts, aux pertes et profits, aux secrets professionnels et aux processus industriels, ainsi qu'aux clients et aux fournisseurs. Elle établit aussi la liste des informations qui ne peuvent pas être classées confidentielles, comme celles accessibles au public et celles relatives à la structure de l'entreprise, à son actionnariat ou encore à ses branches d'activité. C'est au requérant de la mesure de confidentialité que revient la charge d'établir la preuve que l'information en question devrait être protégée.

93. Le SBDC est critiqué pour le temps qu'il met à résoudre une affaire de comportement. Pour atténuer ce problème, il a pris certaines dispositions qui commencent à porter leurs fruits. L'un des problèmes structurels évidents qui découle de la loi sur la concurrence est le chevauchement des responsabilités des trois organismes, en particulier du SDE et du SEAE. Début 2003, ces deux organismes ont commencé à rationaliser leur travail ; le SDE devant se concentrer sur les affaires de comportement, en particulier les ententes, et le SEAE sur les fusions. Les deux entités ont conclu un accord formel en 2006 prévoyant des procédures d'enquêtes conjointes à la fois pour les affaires de fusion et de comportement[58]. Aujourd'hui, la répartition des responsabilités est presque achevée. La loi exige du SDE qu'il formule un avis sur les fusions notifiées, mais pour cela, le SDE se fonde lui-même en grande partie sur l'analyse du SEAE. En revanche, le SEAE n'intervient plus dans les affaires de comportement.

94. Les Tableaux 5 à 7 ci-dessous décrivent la charge de travail du SDE.

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57 Résolution 45 du CADE.

58 Ordonnance conjointe n° 33/2006 du SDE et du SEAE.

Tableau 5. Plaintes

	2004	2005	2006	2007	2008	2009*
Reçues	163	154	172	120	181	146
Conclues	60	128	131	126	186	143

Tableau 6. Enquêtes préliminaires

	2004	2005	2006	2007	2008	2009*
Ouvertes	33	32	10	19	76	85
Conclues	15	29	11	50	76	41

Tableau 7. Poursuites administratives

	2004	2005	2006	2007	2008	2009*
Ouvertes	36	18	17	16	18	36
Conclues	29	37	8	34	58	19

*Jusqu'à septembre

95. Pendant des années, les affaires se sont accumulées au sein du SDE, et cette tendance s'est accentuée au fil du temps. Le SDE s'est récemment employé à résoudre ce problème. Il est intéressant de noter que jusqu'en 2007, on recensait en général pour chacune des trois phases d'enquête ci-dessus davantage d'affaires ouvertes que d'affaires conclues. Cette tendance s'est inversée en 2007 (voir Tableau 8). Bien que le problème semble être réapparu pendant les trois premiers trimestres 2009, le SDE a néanmoins accompli des progrès en termes de résorption de ses retards.

Tableau 8. Affaires transmises au CADE et retards 2006-2008

	2006	2007	2008
Affaires transmises au CADE*	21	90	134
Retard*	396	341	300

* Comprend à la fois les enquêtes préliminaires et les procédures administratives

96. Les données sur le temps nécessaire au SDE pour conclure une affaire ne sont pas faciles à obtenir et pourraient à certains égards prêter à confusion. Le temps total moyen mis par le SDE pour des enquêtes qui atteignent la phase de la procédure administrative se situe dans une fourchette de deux à six ans. Qui plus est, cette moyenne a augmenté ces dernières années. En effet, les répondants recourent davantage aux tribunaux pour des questions de procédure. De plus, cette progression peut être, au moins en partie, la conséquence des efforts déployés par le SDE pour réduire ses retards. Étant donné qu'il se consacre à la résolution des affaires en attente les plus anciennes, les délais d'examen de toutes les affaires s'en trouvent rallongés pour cette année. Cela étant, certaines affaires restent bloquées au SDE pendant des années. L'une des raisons à cela est peut-être la disposition de loi susvisée qui fait obligation au CADE d'approuver les décisions du SDE lorsqu'il choisit de clore des enquêtes préliminaires et des procédures administratives sans engager d'autre action. Or, c'est ce scenario qui, bien évidemment, se répète dans la grande majorité des cas. Cette procédure consomme des ressources à la fois du SDE, qui doit élaborer un rapport, mais aussi du CADE, qui doit approuver formellement chaque décision de clore une affaire. Dans tous les cas, il semble que l'origine fondamentale de ces retards chroniques au SDE soit son manque de personnel, lequel est détaillé plus en avant. Entre les trois organismes, c'est au SDE que le problème de ressources semble le plus aigu.

97. Le CADE a lui aussi concentré ses efforts sur la réduction des délais nécessaires à la conclusion des affaires, et a produit dans ce domaine des résultats positifs.

Tableau 9. Délai moyen de traitement des affaires au CADE (en jours)

2005	2006	2007	2008	2009
453	426	261	268	409

98. Le CADE considère que l'augmentation de 2009 tient au fait que, dans l'optique de rattraper son retard, le SDE lui a transmis cette année là un plus grand nombre d'affaires, qui plus est d'une plus grande complexité. Quoi qu'il en soit, il apparaît que les affaires de comportement peuvent demander jusqu'à une année, voire plus, pour être tranchées par le CADE.

99. Le tableau suivant fait apparaître la durée totale de traitement par le SDE et par le CADE de quatre des cinq affaires de comportement décrites plus haut dans les encadrés 2 et 3 (trois ententes et une affaire de position dominante). La cinquième affaire, celle des compresseurs visée à l'encadré 2, est toujours en cours. L'une des parties a conclu un règlement amiable avec le CADE. Cet accord a été passé environ sept mois après que l'affaire a été engagée au SDE.

Tableau 10. Durée de traitement des affaires par le SDE et le CADE

	Durée au SDE (en jours)	Durée au CADE (en jours)	Total
Sable de construction	479	359	838
Services d'agents de sécurité	1 066	355	1 421
Pierres concassées	493	230	723
AmBev (programme de fidélité)	1 031	861	1 892

3.3 Procédures dans les affaires de fusion

100. L'article 54 de la loi sur la concurrence définit les procédures applicables au contrôle des fusions notifiées. La notification doit être adressée au SDE, qui en transmet rapidement une copie au SEAE et au CADE. Le SEAE dispose de 30 jours pour remettre un rapport technique au SDE, lequel doit fournir une recommandation au CADE dans un délai de 30 jours à partir de la date de réception du rapport du SEAE. Les recommandations du SEAE et du SDE sont rendues publiques, sans toutefois révéler aucune information confidentielle. À ce stade, les dossiers sont transmis au CADE, qui doit rendre une décision dans les 60 jours. Le CADE n'est en rien lié par les recommandations du SEAE et du SDE. Le non-respect du délai de 30 jours imposé par la loi au SEAE et au SDE n'a aucune conséquence légale. En revanche, en l'absence de décision du CADE dans le délai de 60 jours prévu, la fusion est réputée approuvée. Par conséquent, le délai légal maximum prévu par l'article 54 pour le contrôle des fusions est de 120 jours. Chacun des trois organismes a toutefois le pouvoir de demander aux parties à la fusion de lui fournir des informations supplémentaires. Cette demande a pour effet de suspendre le délai applicable jusqu'à ce que l'information soit fournie.

101. La résolution 15, qui contient le règlement d'exécution du droit des fusions, a été adoptée en 1998. Cette résolution a instauré un processus « en deux étapes » comportant un formulaire de notification initiale (Annexe I de la résolution) et un deuxième formulaire (Annexe II) qui exige nettement plus d'informations si une enquête supplémentaire a été jugée nécessaire[59]. Avec la pratique, la procédure a néanmoins évolué, et si une fusion est suffisamment complexe pour justifier une « deuxième demande »

[59] La résolution 15 a été remplacée par la résolution 45, mais ses deux annexes sont restées en vigueur. Par ailleurs, en 2007, le SBDC a entrepris de mettre en place un système de notification électronique des fusions. Le projet s'est toutefois avéré difficile sur le plan technique, et le SBDC recherche actuellement des prestataires TI capables de le mener jusqu'à son terme.

d'informations, le SEAE prépare désormais des questions spécialement adaptées à l'opération examinée. De la même façon, si le CADE décide qu'une fusion présentée par le SDE et le SEAE requiert des informations supplémentaires, l'enquête complémentaire sera menée par le rapporteur et se concentrera sur les points précis à éclaircir.

102. Très tôt, le processus d'examen des fusions du SBDC a été critiqué pour sa longueur excessive, en particulier pour les fusions présentant à première vue un risque minime, voire nul, d'un point de vue légal. Ce problème était, en partie au moins, une conséquence inévitable de l'absence d'obligation de notification préalable des fusions, comme expliqué à la section 2.2.2 ci-dessus. Cela étant, l'une des récentes réussites à porter au crédit du SBDC est la mise en place d'une procédure accélérée pour les fusions dites « simples ». Elle a été introduite en 2002, lorsque le SEAE et le SDE ont adopté de manière informelle une procédure simplifiée pour les affaires simples, pour lesquelles chaque organisme devait produire un rapport sous forme de formulaire succinct dans un délai de 15 jours. Cette procédure a été formalisée en 2003 via une ordonnance conjointe[60] précisant les critères de sélection des fusions devant faire l'objet d'une procédure accélérée. En 2004, les deux organismes ont commencé à examiner simultanément les fusions notifiées et à soumettre un rapport conjoint au CADE. Le CADE a, pour sa part, allégé ses procédures et a plus fréquemment repris à son compte le rapport conjoint du SEAE et du SDE, évitant ainsi de devoir en élaborer un nouveau.

103. En 2006, l'ordonnance conjointe n° 33 du SEAE et du SDE a davantage encore institutionnalisé la coopération entre les deux organismes et a confié une plus grande partie du travail d'enquête au SEAE. Dernièrement, en mars 2009, le SBDC a apporté de nouvelles améliorations à sa procédure accélérée dans le cadre d'un accord officiel entre les trois organismes et le procureur général. Alors que les rapports élaborés dans ces affaires comptaient jusqu'alors cinq à sept pages en moyenne, un formulaire électronique a été créé dans l'optique de limiter désormais leur longueur à deux pages. Le SDE a maintenant pour habitude de reprendre à son propre compte le rapport du SEAE. Quant au CADE, le procureur général émettait régulièrement ses propres recommandations sur les affaires, y compris sur les fusions. L'accord de 2009 prévoit que le procureur général doit fournir de tels rapports uniquement dans certaines circonstances, en règle générale lorsque se posent des questions légales ou de procédure. Enfin, au CADE, s'agissant des fusions relevant de la procédure accélérée, les commissaires votent une fois pour l'ensemble des dossiers à l'ordre du jour ; en l'absence de désaccord, tous les dossiers sont approuvés en une seule fois.

104. En conséquence, les délais d'examen de ces transactions ont régulièrement diminué. Il n'est pas rare que des fusions examinées selon la procédure accélérée soient approuvées en 30 jours, voire moins.

Tableau 11. Fusions examinées par le SBCD selon la procédure accélérée

	2005	2006	2007	2008	2009*
Proportion de procédures accélérées sur l'ensemble des affaires	n/d	68 %	68 %	65 %	63 %
Examen par le SEAE (en jours)	n/d	17	15	20	21
Examen par le CADE (en jours)	56	45	43	42	35

* Jusqu'à septembre

105. Ces réductions des délais pour les procédures accélérées, combinées à certaines réductions des délais de traitement dans les procédures « ordinaires », ont permis de diminuer sensiblement la durée moyenne d'examen des fusions, toutes catégories confondues.

60 Ordonnance conjointe n° 1 du SEAE et du SDE.

Tableau 12. Durée moyenne d'examen – toutes fusions confondues

	2005	2006	2007	2008	2009*
Examen par le SEAE et le SDE (en jours)	161	120	105	104	135
Examen par le CADE (en jours)	81	64	48	50	45
Total	242	184	153	154	180

* Jusqu'à octobre

3.2.1 Les milieux d'affaires et le processus de fusion du SBDC

106. Les praticiens privés félicitent unanimement le SBDC pour ses nouvelles procédures accélérées. Certains regrettent que les procédures ordinaires d'enquête sur les fusions soient toujours trop longues. Comme précisé plus haut, il est évident qu'un régime de notification préalable des fusions apporterait aux parties aux fusions les incitations nécessaires pour accélérer le processus. Le SEAE se plaint quant à lui que les parties ne lui communiquent pas toujours l'intégralité de leur analyse avant qu'il ne soumette son rapport au CADE.

107. Comme pour les enquêtes sur les comportements, les praticiens jugent le processus suffisamment transparent et n'émettent aucune critique en matière de régularité de procédure. Certains regrettent cependant que le processus de règlement amiable ne soit pas suffisamment souple. Les règlements amiables vont prendre une importance croissante, notamment si la notification préalable à la fusion est adoptée. Comme indiqué plus haut, le CADE a pris certaines dispositions visant à normaliser ses procédures de négociation. Enfin, les praticiens jugent compétente et professionnelle l'analyse menée au SEAE et au CADE en matière de fusion, bien que certains affirment que la qualité du travail fourni par le CADE souffre du taux élevé de rotation du personnel à la fois au sein du conseil et dans le reste des effectifs.

3.4 Ressources des organismes

3.4.1 Personnel

108. Une caractéristique importante du personnel fédéral brésilien est qu'il est en grande partie employé sous contrat, et par conséquent considéré comme du personnel temporaire. Le nombre d'employés contractuels est particulièrement élevé dans les postes administratifs des services transversaux. Le Brésil dispose néanmoins d'une fonction publique permanente. Certains de ces employés sont qualifiés pour des carrières spécifiques. Il existe notamment la catégorie des « *gestores* » (spécialistes en politiques publiques et en gestion des affaires publiques), ainsi que celle des analystes financiers et inspecteurs (AFC), affectés au ministère des Finances[61]. Ces professionnels doivent réussir un examen difficile. Ils peuvent ensuite passer de l'un des nombreux ministères ou services de l'administration à un autre, cette pratique étant tout à fait courante. Les plus compétents d'entre eux sont très demandés dans toute l'administration, et les différentes unités se disputent leurs talents de plusieurs façons.

109. Au-dessus de cette structure de postes permanents/temporaires, il existe le dispositif « DAS ». DAS est l'acronyme de « Direção e Assessoramento Superior », qui se traduit par « direction et conseil supérieur ». Le DAS est composé de sept échelons et a été initialement conçu pour recruter du personnel contractuel temporaire pour assurer des fonctions d'encadrement. Au fil des années, les échelons inférieurs du DAS ont été utilisés non seulement pour recruter du personnel fonctionnel non permanent, mais aussi pour compléter les traitements d'employés permanents. Les employés permanents qui occupent un poste relevant du DAS touchent en plus de leur traitement de fonctionnaire une portion (dans la plupart des cas 60 pourcent) du traitement correspondant à leur échelon DAS. Les organismes convoitent les postes DAS

61 Les juristes affectés au bureau du procureur général appartiennent à une autre catégorie de fonctionnaires.

car les échelons supérieurs peuvent servir pour recruter des hauts responsables, tandis que les échelons moins élevés peuvent tenir lieu de rémunération complémentaire pour attirer et retenir du personnel junior permanent. Le ministère du Plan fixe le nombre de postes permanents et temporaires auxquels chaque administration a droit, ainsi que le nombre de postes DAS et leurs échelons. Les agents contractuels recrutés au titre du DAS peuvent être renvoyés à chaque changement de l'administration politique, mais seuls les postes les plus élevés son en général concernés.

110. Les trois organismes du SBDC souffrent d'une pénurie de personnel professionnel spécialisé et d'un taux élevé de rotation. Au CADE, ce problème de rotation est particulièrement aigu. La loi de 1994 sur la concurrence prévoyait la création de postes permanents au CADE, mais cette disposition n'a jamais été mise en application. Jusqu'en 2006, le CADE ne disposait d'aucun poste permanent. Tous ses professionnels étaient soit des employés contractuels du DAS ou des employés permanents d'autres administrations affectés à certaines tâches pour le compte du CADE. Le taux de rotation de son personnel était élevé. Ce problème de rotation était exacerbé par le fait que de nombreux professionnels étaient rattachés à un commissaire spécifique, or la durée du mandat des commissaires était et continue d'être courte, à savoir deux ans, renouvelable une fois. Lorsqu'un commissaire arrivait en fin de mandat, habituellement son personnel quittait lui aussi ses fonctions. La durée de service d'un professionnel du CADE est d'environ trois ans en moyenne, ce qui a de toute évidence des effets néfastes sur la « mémoire institutionnelle » de l'organisme. La législation à l'étude au Congrès (voir section 4) vise précisément à résoudre à ces problèmes.

111. En 2006, le CADE a été autorisé à créer 27 postes permanents (fin 2009, 25 de ces postes étaient pourvus)[62]. Bien que ces nouveaux effectifs représentaient moins de la moitié de l'ensemble des fonctionnaires du CADE, la situation s'est améliorée. Dans le passé, bon nombre des professionnels qui travaillaient au CADE n'avaient aucun intérêt particulier pour ce domaine et étaient par conséquent prompts à changer de service à la moindre occasion. Aujourd'hui, en revanche, ceux qui y occupent des postes permanents ont véritablement choisi de travailler au CADE. Ils disent apprécier leur travail et la réputation prestigieuse dont ils bénéficient. Cette tendance laisse augurer de ce qui pourrait se passer au sein de l'organisme en cas d'adoption de la législation à l'étude au Congrès, qui prévoit la création de 200 postes permanents au CADE, comme expliqué ci-après.

112. Comme indiqué plus haut, le SDE affiche un retard chronique dans ses enquêtes et fait toujours l'objet de critiques concernant sa lenteur dans les enquêtes complexes. Il s'est dernièrement employé à résorber son retard, mais il semble qu'aucune réelle amélioration ne soit possible sans un renforcement de ses effectifs. Le SDE déploie des efforts soutenus pour attirer et retenir des *gestores* compétents. Pour ce faire, entre autres choses, il complète leurs traitements de fonctionnaires par des contrats du DAS. Ce programme privilégie donc la rémunération du personnel plus qualifiés, et présente en revanche l'inconvénient de ne pas favoriser l'augmentation du nombre total d'employés, mais l'organisme a estimé que dans le long terme, le fait de disposer d'un personnel permanent et motivé sera pour lui un atout. De plus, tout comme le CADE, le SDE insiste sur la dimension qualitative de son travail. Au Brésil comme dans tous les autres pays, les professionnels des autorités de la concurrence trouvent le travail de lutte contre les ententes intéressant, voire passionnant. Le SDE s'est restructuré en tant qu'unité de lutte contre les ententes, ce qui, entre autres choses, accroîtra sa capacité de capter et de retenir de bons éléments.

113. Le Tableau 13 compile des données sur le personnel des trois organismes (en personnes-années).

62 Là encore, il ne s'agit cependant pas de postes requérant des compétences spécifiques à la mission du CADE.

Tableau 13. Données sur le personnel du CADE, du SDE et du SEAE

CADE

	2005	2006	2007	2008	2009
Professionnel	51	54	51	48	49
Administratif	127	111	113	138	137

SDE

	2005	2006	2007	2008	2009
Professionnel	35	37	34	28	32
Administratif	32	35	35	48	27

SEAE

	2005	2006	2007	2008	2009
Professionnel	67	80	78	77	78
Administratif	101	85	77	67	72

114. Contrairement au CADE et au SDE, dont les effectifs professionnels sont restée au même niveau ces dernières années, ceux du SEAE ont été augmentés de 16 % entre 2005 et 2009. Il s'agit principalement de fonctionnaires, et non pas d'employés rattachés au DAS, qui ont été pour la plupart affectés spécifiquement au SEAE plutôt que détachés temporairement d'autres administrations. Comme indiqué plus haut, le SEAE a réalisé des gains d'efficience significatifs dans le cadre de son programme de contrôle des fusions[63]. Son analyse de fond en matière de fusion est également jugée sérieuse. Selon lui, ces trois dernières années, 99 % de ses recommandations ont été suivies par le CADE. Mais la rotation du personnel y reste malgré tout élevée. Le SEAE indique que pour la seule année 2008, il a perdu 35 % de son personnel professionnel (27 employés sur 77), qui a dû être remplacé. Le SEAE attribue ce phénomène au fait que les postes n'ont pas été créés spécifiquement pour le SEAE, c'est-à-dire qu'ils n'exigent pas des qualifications suffisamment adaptées à sa mission (ce qui se vérifie également pour le CADE et le SDE). La plupart des professionnels du SEAE sont soit des experts en politique publique ou en gestion publique, soit des analystes financiers. C'est pourquoi ils sont plus enclins à convoiter les postes d'autres administrations qui se libèrent.

115. Les postes attribués au SDE sont tous consacrés à ses activités liées à la politique de la concurrence. Bon nombre des postes indiqués pour le SEAE sont affectés d'une manière ou d'une autre à sa fonction globale de promotion de la concurrence (voir section 6), et pas à l'application du droit de la concurrence. Dans tous les cas, le total de 339 personnes qui travaillent pour la politique de la concurrence au sein de ces trois organismes est peu élevé pour un pays de la taille du Brésil.

3.4.2 Budget

116. La structure du budget du CADE est différente de celle du SDE et du SEAE car le CADE est un organe indépendant, alors que les autres appartiennent à des ministères. En tant qu'organisme indépendant, le CADE doit faire face à certaines dépenses que les autres n'ont pas à assumer, comme les loyers, la téléphonie et d'autres services logistiques que les ministères gèrent de manière centralisée. Le budget du CADE est financé par les droits de notification des fusions et par une dotation de l'État. Le SDE et le SEAE se partagent également les recettes tirées des droits de notification. Le SDE dépend essentiellement

63 Le personnel professionnel du SEAE indiqué au Tableau 13 inclut l'ensemble des employés affectés au contrôle des fusions, à la réglementation et à la promotion de la concurrence. Ceux d'entre eux qui s'occupent des fusions sont relativement peu nombreux par rapport à l'effectif total. En 2009, par exemple, 17 des 78 professionnels étaient chargés de contrôler les fusions.

de ces recettes, tandis que le SEAE reçoit en plus une dotation budgétaire du ministère des Finances, ainsi que les recettes tirées des droits payés par les demandeurs d'autorisations pour l'organisation de concours promotionnels. Du fait que la plupart des professionnels du CADE sont détachés par d'autres administrations, ce dernier n'a pas à budgétiser leurs traitements. Comme signalé plus haut, certains postes permanents dépendent désormais directement du CADE, qui paye leurs traitements et ceux du personnel sous contrat. En revanche, le SDE et la SEAE ne subviennent pas eux-mêmes à leurs dépenses de personnel, exception faite de certains employés administratifs temporaires du SEAE.

117. Le Tableau 14 fait apparaître les budgets des trois organismes (en millions BRL). Les chiffres pour le CADE comprennent une partie des dépenses de personnel, mais pas toutes (voir ci-dessus), tandis que les chiffres du SDE et du SEAE excluent tous les salaires. Les chiffres du SDE sont uniquement ceux de la division de la concurrence. Il se peut cependant que ces derniers soient quelque peu sous-estimés, étant donné que la division de la concurrence bénéficie également d'autres postes du budget global du SDE et que certains de ses postes, comme la technologie de l'information et les services de presse, sont budgétisés au niveau ministériel.

Tableau 14. Budgets du CADE, du SDE et du SEAE (en millions BRL)

	2005	2006	2007	2008	2009
CADE	13.5	10.4	10.3	11.9	13.5
SDE	4.2	2.4	1.8	2.0	1.7
SEAE	8.4	8.4	11.4	12.7	7.3

118. Le CADE perçoit également des subsides de la Banque mondiale. Ces subsides, qui font partie d'un accord-cadre passé entre le Brésil et la Banque mondiale, sont destinés à des projets spéciaux tels que la création d'un système électronique pour le suivi du flux de travail. Ils ne sont pas négligeables et ont représenté 20 pourcent du financement total du CADE.

3.5 Aspects internationaux de l'application du droit

119. L'article 2 de la loi sur la concurrence intègre explicitement le test des « effets extraterritoriaux » au droit brésilien de la concurrence. À ce sujet, lorsqu'il a décidé en 2005 d'appliquer le seuil de notification de fusion de 400 millions BRL aux revenus tirés des activités développées au Brésil uniquement, le CADE a rendu la loi plus cohérente avec ce test. Auparavant, même les fusions qui n'avaient quasiment aucun effet dans le pays devaient nécessairement être notifiées. Par ailleurs, dans les procédures du SBDC, les firmes étrangères sont traitées sur un pied d'égalité avec les entreprises nationales. Dans ses analyses, le SBDC a pour habitude de prendre en compte l'impact du commerce international, et dans ses affaires de fusions, il tient généralement compte des importations effectives ou potentielles lorsqu'il définit le marché en cause et évalue les parts de marché et les effets sur la concurrence.

120. Le SBDC a conclu des accords de coopération bilatéraux avec les États-Unis (2003), l'Argentine (2003), le Portugal (2005), le Canada (2008), le Chili (2008), la Russie (2009) et la Commission européenne (2009). Il a conclu un nouvel accord avec le Portugal (en 2010). L'accord avec la Commission européenne a été signé à l'occasion de la deuxième journée de lutte contre les ententes au Brésil, en octobre 2009 (voir section 2.1.1.4). Cet accord a fait suite à une conférence sur le commerce et la concurrence animée par des représentants des deux juridictions en mai 2009. En 2009, le SBDC a signé deux protocoles d'accords de coopération technique au sein du MERCOSUR. Le SBDC participe régulièrement à des formations et à des consultations bilatérales avec des responsables d'autres pays dans le domaine de la concurrence. En novembre 2008, trois représentants de la Commission américaine du commerce et du département américain de la Justice se sont rendus au CADE pour y dispenser un cours sur

les procédures de notification préalable de fusion, et en septembre 2009, deux économistes de la même commission américaine y ont donné un cours d'économétrie avec la participation du Département des études économiques du CADE.

121. Les professionnels du SBDC ont suivi des cours dispensés par des experts du Royaume-Uni et par l'autorité espagnole de la concurrence, à un cours de négociations donné à l'université de Harvard pour les membres de l'unité technique de négociations du CADE, à un cours sur la réglementation à l'université George Washington aux États-Unis et à des formations organisées à l'étranger au département américain de la Justice et à la Commission fédérale du commerce des États-Unis, à la Direction générale de la concurrence de la Commission européenne et à l'Autorité de la concurrence du Canada. Le CADE finance aussi partiellement des cours de langues pour son personnel. Ces arrangements de coopération ont produit des résultats probants. Comme expliqué plus haut à la section 2.1.1.3, le Brésil, les États-Unis et la Commission européenne ont récemment organisé des perquisitions surprises simultanées dans leurs juridictions respectives, ce qui a permis le succès des poursuites engagées dans l'affaire des compresseurs.

122. Le SBDC reçoit certes de l'assistance technique, mais il en fournit également. En 2006, le SDE et le CADE ont conseillé le Salvador sur les techniques de lutte contre les ententes, ce pays venant tout juste d'adopter sa première loi sur la concurrence. Le SBDC a également partagé son expertise dans ce domaine avec le Chili et l'Argentine. Il a soutenu l'autorité chilienne de la concurrence, la Fiscalía Nacional Económica (FNE), dans ses efforts visant à convaincre les législateurs d'adopter un programme de clémence. En juin 2009, deux commissaires du CADE ont accepté des invitations du Paraguay pour participer à une série de débats publics sur un projet de loi actuellement à l'étude au Congrès paraguayen. S'il est voté, ce texte deviendra la première législation du pays en matière de concurrence. Le SBDC travaille également avec la CNUCED en apportant une assistance technique à d'autres autorités de la concurrence en Amérique latine. Enfin, le SBDC réfléchit avec les autorités angolaises à un arrangement de coopération informelle par lequel il aiderait l'Angola à mettre au point sa législation et à développer ses capacités en matière de concurrence.

123. En 2009 également, les trois organismes du SBDC ont mis sur pied un programme de stages destiné aux responsables de l'application du droit des pays latino-américains. Ce programme prévoit pour ces professionnels des séjours d'un mois au sein de l'un des trois organismes brésiliens. Il est organisé deux fois par an, et le premier stage a eu lieu en juillet 2009. Pour cette première édition, le CADE, le SDE et le SEAE ont accueilli des représentants des autorités de la concurrence du Chili, de l'Argentine, du Pérou et du Salvador. Le deuxième stage, auquel ont participé des représentants de huit pays d'Amérique latine, s'est tenu en janvier 2010. Le SBDC a réussi à obtenir de l'Agence brésilienne de coopération (ABC) la prise en charge des frais de transport et de séjour de ses huit stagiaires. Il négocie actuellement avec elle la signature d'un protocole d'accord qui pérenniserait cet arrangement.

124. Le Brésil intervient également dans divers forums internationaux. Il est observateur auprès du Comité de la concurrence de l'OCDE, où il prend une part active à toutes les réunions et discussions ouvertes aux pays non-membres. Par ailleurs, il participe activement au forum mondial annuel de l'OCDE sur la concurrence. Le Brésil et le Chili ont été les premiers à participer au programme de l'OCDE de lutte contre les soumissions concertées dans les marchés publics en Amérique latine (voir section 2.1.1.4). Le SBDC joue aussi un rôle actif au sein du RIC. Le CADE est co-président du comité directeur du RIC et du Groupe de travail sur l'efficacité des autorités de la concurrence. Il a également une fonction d'assistant au sein du dispositif de soutien du RIC, qui apporte actuellement son aide à l'autorité de la concurrence du Vietnam. Le SDE est quant à lui co-président du sous groupe n°1 du Groupe de travail sur les ententes du RIC. Le SBDC participera au projet de l'OMPI sur la propriété intellectuelle et la concurrence, programmé pour 2010-2011, et accueillera en 2010 à Rio de Janeiro la première conférence régionale organisée dans le cadre de ce projet pour les pays latino-américains et les Caraïbes. Le SBDC participe aussi à la CNUCED (il accueillera un séminaire de la CNUCED en 2010), au Forum BID/OCDE sur la concurrence en

Amérique latine, au Forum ibéro-américain sur la concurrence, à la Conférence internationale du BRIC (Brésil, Russie, Inde et Chine), à l'Association internationale du barreau, à l'American Bar Association, à la conférence annuelle de Fordham et à la Global Competition Review.

125. Enfin, et principalement par l'intermédiaire du SEAE, le SBDC joue un rôle actif dans les procédures commerciales engagées au Brésil. Le SEAE participe à des discussions à la Chambre de commerce extérieur (Câmara de Comércio Exterior – CAMEX). Le CADE intervient également auprès de la CAMEX en qualité d'observateur. La CAMEX fait partie du Conseil de la Présidence de la République du Brésil et a pour mission de coordonner les activités et les politiques relatives au commerce extérieur, et notamment au tourisme. Elle est présidée par le ministre du Développement, de l'Industrie et du Commerce. Ses membres sont les ministères des Finances, des Affaires civiles, des Relations extérieures, de l'Agriculture et du Plan. Le SEAE est invité à la plupart des discussions techniques organisées par la CAMEX, y compris à celles sur les tarifs douaniers. La CAMEX tient lieu de forum où sont abordées les interactions entre commerce et concurrence.

126. Le SEAE joue également un rôle de conseil dans les procédures de concurrence ouvertes contre les pratiques de dumping et les importations déloyales. Les plaintes de parties privées portant sur des importations déloyales sont examinées par un service du ministère du Développement, de l'Industrie et du Commerce qui, après avoir recueilli les commentaires des parties intéressées et d'autres organismes publics, transmet ses recommandations à la CAMEX, à qui il revient de trancher. En collaboration avec un autre secrétariat du ministère des Finances, le SEAE participe à la formulation des recommandations du ministère dans les affaires de cette nature. Le rôle du SEAE dans ce domaine consiste à évaluer les effets sur la concurrence des droits imposés par les politiques commerciales, une question que cet organisme d'enquête n'a pas pour habitude de prendre en considération. Le SEAE a remporté des succès remarquables dans ces affaires. En 2005, par exemple, après avoir enquêté sur une fusion intervenue sur le marché brésilien de l'insuline, il a persuadé la CAMEX de mettre fin à des mesures de lutte contre le dumping dans ce marché. Il a également obtenu de la CAMEX qu'elle suspende certaines mesures antidumping dans le secteur du ciment dans le but d'y encourager la concurrence dans le nord du Brésil. Par ailleurs, le CADE et le SDE ont, dans certaines circonstances, soumis des recommandations à la CAMEX concernant des affaires commerciales.

3.6 Application de la loi par les États et les parties privées

127. Les États brésiliens ne disposent pas de leur propre droit civil de la concurrence, et mis à part le SBDC, aucun organisme public fédéral ou des États n'est habilité à mettre en application la loi 8884. S'agissant de l'exécution de la loi sur les ententes par des parties privées, un plaignant insatisfait d'une décision du CADE n'a le droit ni de former un recours devant le SBDC ni de solliciter un examen judiciaire. En vertu de l'article 29 de la loi sur la concurrence, néanmoins, les parties privées peuvent de leur propre chef intenter une action en dommages-intérêts devant les tribunaux si elles estiment avoir été lésées par un comportement anticoncurrentiel. Il n'existe pas de données détaillées sur le nombre et la fréquence des actions privées entamées au Brésil en matière d'ententes. Le SEAE a toutefois réalisé une étude non officielle qui révèle à ce sujet une hausse sensible de ces affaires entre 2005, où environ 30 affaires de ce type ont été recensées, et 2008, où l'on en compte environ 150. Ces affaires ont toutes été portées devant les cours d'appel fédérales et des États, et tendaient à se concentrer dans certaines zones géographiques ainsi que dans les secteurs des services financiers et de la distribution de carburant au détail. De plus, ces affaires ne relevaient pas toutes de l'article 29 de la loi sur la concurrence, et certains recours, par exemple, avaient été introduits en vertu du code de protection du consommateur.

128. Deux types d'actions collectives privées sont possibles. Il existe d'abord l'« action civile publique », qui peut être intentée à l'initiative d'organisations de consommateurs, de procureurs publics, de syndicats ou d'autres organismes publics. Elle a pour objet d'obtenir des réparations au titre des intérêts

collectifs ou diffus du public. Si les plaignants ne peuvent pas obtenir de dommages-intérêts pécuniaires, les défendeurs peuvent en revanche se voir condamnés à verser des dommages-intérêts à un fonds public en guise d'indemnisation[64]. Le deuxième type d'action collective est une procédure dite en défense « des droits homogènes des individus ». Ces recours collectifs visent à obtenir des mesures de réparation par voie d'injonction et des dommages-intérêts pécuniaires. Comme pour les actions civiles publiques, différents types d'entités publiques et privées sont habilitées à introduire de tels recours. Une affaire de cette nature a été engagée avec succès par un procureur public dans l'État de Rio Grande do Sul en 2007. Après avoir mené à bien une procédure pénale impliquant une entente sur le marché de la distribution de carburant au détail, qui s'est traduite par à la condamnation de cinq défendeurs à des peines de prison de deux ans et demie, le procureur a obtenu le versement de dommages-intérêts pécuniaires pour le compte des consommateurs lésés par cette entente.

3.7 Examen judiciaire

129. Le SBDC montre une propension de plus en plus grande à reconnaître que les tribunaux brésiliens sont un maillon essentiel du processus d'application de la loi sur la concurrence. Dans les affaires de concurrence, les défendeurs sont de plus en plus enclins à contester les décisions du SBDC devant les tribunaux, à la fois en déposant des requêtes préjudicielles pendant le déroulement d'une enquête ou d'une affaire, et en interjetant appel des décisions finales du CADE. Cette tendance à solliciter la justice dans les affaires de concurrence a pour principal effet de retarder les procédures. Jusqu'à récemment, la grande majorité des décisions du CADE rendues dans des affaires de comportement n'avaient pu être exécutées en raison des appels en justice. De surcroît, le traitement des affaires par le système judiciaire brésilien est lent, et ce quelle que soit leur nature. Il n'est pas rare de voir une affaire durer dix années, voire plus encore. En 2006, le SBDC s'est attaqué à cette question avec un certain succès (voir plus bas), mais le problème sous-jacent demeure.

130. Les requêtes de parties privées en réexamen de procédures engagées à l'initiative d'organismes publics sont examinées par les tribunaux fédéraux de première instance. La loi prévoit que les recours formés contre des procédures ouvertes par des organismes du SBDC doivent être introduits devant le tribunal sis à Brasilia. Le juge de première instance a le pouvoir de statuer sur la plupart des requêtes et peut aussi conduire une instruction pour verser au dossier des éléments de fait nouveaux. Le deuxième degré d'appel dans le système fédéral brésilien est la cour d'appel de la région géographique dans laquelle a été rendue la décision judiciaire initiale. Les recours contre les arrêts des cours d'appel régionales sont introduits devant la Cour supérieure de justice (STJ). Les affaires impliquant des recours pour application anticonstitutionnelle de la loi peuvent donner lieu à des appels devant une juridiction supérieure à la Cour supérieure de justice, la Cour suprême fédérale (STF), constituée de 11 juges chargés d'étudier les questions de constitutionnalité uniquement.

131. Au Brésil, le principe du *stare decisis* – la doctrine du précédent que l'on retrouve dans les systèmes de *common law*, selon laquelle les juridictions inférieures respectent (avec parfois un caractère impératif) les décisions prises dans des affaires précédentes par les juridictions supérieures ou égales – n'est pas formellement applicable. Auparavant, les juges étaient en théorie parfaitement indépendants et pouvaient quasiment ignorer les décisions des juridictions supérieures, mais cette situation a quelque peu évolué. Les décisions des juridictions supérieures établissent des précédents, en particulier concernant les questions de constitutionnalité. Qui plus est, les tribunaux brésiliens ont traditionnellement refusé de se prononcer sur le bien-fondé des décisions de tribunaux spécialisés tels que le CADE, au motif que les tribunaux de juridiction générale ne disposent pas des compétences requises.

64 Voir Peixoto, *Brazil: Cartels and Leniency*, dans The Antitrust Review of the Americas, 2010 (2009).

132. Il semble néanmoins que les tribunaux soient de plus en plus disposés à examiner le bien-fondé des décisions du CADE et d'autres tribunaux spécialisés, parfois soi-disant pour prévenir tout abus de pouvoir, ou lorsqu'une décision d'un tribunal s'avère fondamentalement en contradiction avec le sens ou l'objet de la loi en question. En tout état de cause, dans les affaires engagées par le SBDC, les recours en justice formés par les défendeurs sont en général fondés sur des aspects de respect de la procédure ou de constitutionnalité.

133. Ces dernières années, le CADE a obtenu des résultats remarquables concernant l'une de ses activités devant les tribunaux, à savoir le recouvrement d'amendes. En 2006, le procureur général du CADE a entrepris d'établir un bilan des amendes infligées dans des affaires de comportement, et a pu constater que peu d'entre elles avaient été payées. Le CADE a invoqué une procédure du droit brésilien en vertu de laquelle les amendes impayées peuvent être transformées en « dettes exigibles par les autorités fédérales », dont le recouvrement peut être obtenu par voie judiciaire. Cette initiative a produit des résultats immédiats.

Tableau 15. État du programme de recouvrement et amendes recouvrées

	2005	2006	2007	2008	2009*
Amendes inscrites au programme de recouvrement (en millions USD)	0.8	50.0	280.6	63.0	15.1
Nombre de débiteurs concernés par le programme de recouvrement	14	92	101	95	35
Amendes recouvrées (en millions USD)	1.4	6.2	16.0	37.1	21.9

* Jusqu'à septembre

134. Le nombre d'amendes et de débiteurs inscrits au programme de recouvrement a diminué en 2009 du fait que le retard accumulé avait été en grande partie résorbé (voir le Tableau 15). Le total des amendes collectées en 2008 est nettement supérieur et s'explique en partie par la résolution de deux affaires impliquant chacune de très fortes amendes. Les amendes sont versées par les parties au Fonds fédéral pour la défense des droits collectifs, géré par une commission interministérielle (à laquelle siègent le SDE, le SEAE et le CADE), et sont affectées à divers projets publics, qui concernent notamment les consommateurs, l'environnement et la culture.

135. D'autre part, avec sa politique plus agressive en matière d'amendes, le procureur général a souhaité mettre un terme à une situation où, après avoir fait appel de décisions du CADE devant le tribunal de première instance, les défendeurs réussissaient souvent à obtenir une injonction annulant l'exécution de la décision du CADE. Les amendes restaient alors impayées cependant que l'affaire passait de tribunal en tribunal, malgré des dispositions spécifiques des articles 65 et 66 de la loi sur la concurrence qui exigent des appelants la consignation de leur amende par le tribunal ou le versement d'une caution en garantie de son paiement pour le cas où l'amende initiale serait confirmée en dernier recours. Le procureur général s'est donc mis à défendre devant la cour et avec succès le caractère nécessaire d'une telle consignation, ce qui a pour effet salutaire de réduire pour les appelants les incitations à introduire des recours lorsqu'ils n'ont pour objectif que d'échapper au paiement de leur amende. Du fait des efforts déployés par le SDE pour contrer ces tactiques, le nombre de ces actions en justice a sensiblement diminué ; début 2010, en effet, elles avaient toutes été réglées.

136. Par ailleurs, le nombre d'affaires du SBDC en cours de jugement est significatif. Il arrive que les défendeurs avancent des objections légales pendant la phase d'enquête. Il n'est pas rare, par exemple, que des défendeurs ayant fait l'objet d'une perquisition surprise cherchent à obtenir une décision de justice ordonnant la suppression des preuves recueillies au motif que la perquisition n'a pas été menée dans les

règles. Les juristes du SDE ont réagi promptement et avec vigueur face à ces recours. Leur taux de réussite est élevé.

137. Le Tableau 16 montre le nombre de procédures en justice du CADE – un nombre effectivement très élevé.

Tableau 16. Affaires judiciaires engagées par année

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009*
93	111	186	180	162	193	240	480	338	132

* Jusqu'à septembre

138. Le CADE attribue en partie les augmentations enregistrées en 2006-2008 à ses initiatives proactives en matière de recouvrement d'amendes impayées. Le nombre de ces procédures a diminué en 2009, comme expliqué ci-dessus, et pour le CADE, cette baisse s'explique en partie par le fait qu'il a réussi à convaincre les tribunaux d'exiger des défendeurs la consignation de leurs amendes ou le versement d'une caution, ce qui a réduit les incitations à se pourvoir en appel.

139. Le CADE affiche un taux élevé de réussite dans ses procédures en justice, comme le montre le Tableau 17.

Tableau 17. Résultat des décisions de justice, 2005-2009

	2005	2006	2007	2008	2009	Total
Décisions favorables	8	31	54	49	10	152
Décisions défavorables	6	14	10	9	5	44
Pourcentage de décisions favorables	57 %	69 %	84 %	84 %	67 %	78 %

140. Cela étant, le CADE a conscience qu'il a des défis considérables à relever concernant son programme judiciaire. Il a entrepris de réorganiser le bureau du procureur général dans l'optique de le rendre à la fois plus efficient et plus performant. Auparavant, une affaire donnée était confiée successivement à plusieurs procureurs, un premier pour la phase administrative, un deuxième pour le mémoire en duplique, un troisième pour le pourvoi en appel, etc. Aujourd'hui, toutes les étapes d'une affaire sont gérées par le(s) même(s) procureur(s). Un meilleur système de suivi des affaires a également été mis en place. Parallèlement, le CADE cherche à faire preuve de davantage de proactivité vis-à-vis des juges et s'emploie à les familiariser avec les affaires de concurrence en leur proposant des conférences et des séminaires. Vu le grand nombre d'affaires engagées par le CADE, ses procureurs n'étaient pas toujours présents aux audiences ou à certaines étapes de procédure. Le CADE s'est réellement mobilisé à cet égard, et il arrive qu'un membre du Conseil, voire son président en personne, assistent eux aussi aux audiences.

141. Les procureurs du SBDC sont appréciés à la fois des tribunaux et des avocats des parties privées pour leur compétence et leur travail acharné.

4. La législation à l'étude

142. Une législation très complète est à l'étude au Congrès brésilien depuis plusieurs années. Elle réformerait le SBDC et résoudrait bon nombre des problèmes qui entravent son action depuis si longtemps. Comme indiqué ci-devant, bien que cette législation ait été plus d'une fois remise à plus tard, il se dégageait à la date du présent rapport une dynamique générale en faveur de son adoption. Le président du pays l'a fortement soutenue et les milieux d'affaires, qui ont dans un premier temps émis des réserves sur certains de ses aspects, notamment concernant la notification préalable des fusions, ont également fini par l'approuver. Le projet de loi bénéficiait d'un soutien marqué au sein des deux Chambres du Congrès et ses

auteurs se disaient optimistes quant à son adoption. Cependant, les manœuvres se sont poursuivies au sein du Congrès, et il était urgent de boucler le processus avant la fin du premier semestre 2010, au risque que l'élection nationale prévue pour le deuxième semestre ne relègue une fois de plus le projet de loi au second plan. À la date de ce rapport, la législation avait été approuvée par la Chambre des députés et était en cours d'examen par le Sénat. Quelques modifications avaient été proposées par cette dernière, lesquelles, si elles sont acceptées, nécessiteront un retour du texte devant la Chambre des députés.

143. Ci-après figure une description des dispositions phares du projet de loi tel qu'il a été adopté par la Chambre des députés.

4.1 Structure du SBDC

144. Le CADE reste un organisme indépendant, mais devient un « tribunal administratif » et non plus un « conseil ». Les mandats de ses commissaires seront portés de deux ans à quatre ans (non renouvelables), et leurs termes seront échelonnés dans le temps, afin d'éviter des vacances de postes simultanées et le risque que le quorum nécessaire ne puisse être atteint. La procédure de nomination des commissaires est légèrement modifiée. La personne désignée par le président de la République sera recommandée conjointement par les ministres des Finances et de la Justice, et les personnes désignées pour les postes de commissaires seront recommandées alternativement par ces deux ministres. L'aval du Sénat est maintenu pour ces nominations. Auparavant, un poste de commissaire pouvait rester vacant relativement longtemps, cependant que le président et le Sénat examinaient les nominations. Le nouveau projet de loi permet au président du CADE de nommer un commissaire temporaire jusqu'à confirmation de la personne définitivement choisie. Le procureur général du CADE et le chef économiste, tous deux également nommés par le président avec l'aval du Sénat, se verront eux aussi confier des mandats de quatre ans. Le quorum nécessaire pour le tribunal est quant à lui ramené de cinq à quatre.

145. Les plus importants changements institutionnels du projet de loi concernent le SDE et le SEAE. Le Département de la défense et de la protection de l'économie (DDPE) du SDE est supprimé et ses responsabilités en matière d'enquête et d'exécution préliminaire du droit dans les affaires de concurrence sont transférées à une nouvelle direction générale (DG) du CADE, composée d'un directeur général et de deux directeurs adjoints. Le directeur général, nommé par le président de la République sur recommandation conjointe des ministres des Finances et de la Justice, et approuvé par le Sénat, aura un mandat de deux ans renouvelable une fois. Le rôle du SEAE en tant que conseiller dans les enquêtes sur les comportements et les fusions est en pratique supprimé, mais son mandat de promotion de la concurrence est toutefois maintenu.

146. Un élément important du projet de loi est la création de 200 postes fixes au sein du CADE. Aucune compétence spécifique à la mission du CADE ne serait toutefois exigée. Au lieu de cela, les candidats seraient recrutés parmi d'autres spécialités de la fonction publique fédérale.

4.2 Procédures dans les affaires de comportement

147. En tant que successeur du DDPE, la direction générale du CADE se voit confier la charge de surveiller les marchés, d'identifier les possibles infractions et de mener des enquêtes. Le projet de loi prévoit pour la direction générale trois étapes de procédure : la « procédure préparatoire », l'« enquête administrative » et la « procédure administrative », chacune assortie de délais. La première étape est engagée par la direction générale afin d'évaluer si un comportement relève de la compétence du SBDC. La deuxième étape est celle de l'enquête formelle, tandis que la troisième consiste en l'élaboration d'un dossier formel qui sera soumis au tribunal. Dans la pratique, lorsqu'une plainte formelle a été déposée auprès du SDE, la mission de ce dernier se résume actuellement à deux phases d'enquête. Une décision de la direction générale de mettre fin à une enquête au terme de la deuxième phase peut être réexaminée par le

tribunal. Une fois l'affaire soumise au tribunal, la seule différence avec la procédure actuelle est le fait que le directeur général ou le rapporteur peuvent autoriser la participation de tout tiers à l'affaire à la condition que la décision du tribunal affecte ce tiers ou qu'il représente les intérêts d'une catégorie de parties concernées.

148. À l'heure actuelle, le CADE peut imposer à une société une amende d'un maximum de 30 % du montant total de ses revenus bruts. Le projet de loi ramène ce plafond à 30 % des revenus de l'entreprise tirés du marché affecté ou pertinent, mais tout comme la loi actuelle le prévoit, l'amende ne peut être inférieure au montant du préjudice causé par le comportement incriminé.

149. Le projet de loi porte plusieurs modifications au programme de clémence. La règle actuelle selon laquelle la clémence ne peut bénéficier à un « instigateur » de l'entente est supprimée, et ce pour deux raisons : premièrement, car il est difficile de déterminer parmi les participants à une entente celui qui en a été l'instigateur, et deuxièmement, parce que le fait de refuser la clémence à l'instigateur d'une entente aurait pour effet d'exclure (au moins dans un premier temps) la partie qui détiendrait probablement le plus d'informations sur l'entente. De plus, comme indiqué plus haut à la section 2.1.1.1, la clémence s'applique aujourd'hui à la responsabilité pénale introduite par la loi fédérale sur les infractions économiques, mais elle ne couvre pas d'autres infractions éventuelles à d'autres lois pénales, en matière de fraude aux marchés publics par exemple. Le projet de loi élargit également le champ d'application de la clémence à ces infractions.

4.3 Contrôle des fusions

150. La loi actuelle est dépourvue de règle substantielle explicite concernant le contrôle des fusions, même si les règles effectivement appliquées par le SBDC sont les mêmes que celles employées dans de nombreux autres pays. Le projet de loi énonce clairement une règle inspirée de celle sur laquelle se fonde la réglementation de la Commission européenne en matière de fusion. Une autre évolution essentielle que prévoit le projet de loi a trait aux inefficiences. Actuellement, l'article 54 exige que si une fusion par ailleurs anticoncurrentielle doit être approuvée parce que les gains d'efficience qu'elle génère compensent largement les préjudices qu'elle cause, les efficiences ainsi obtenues doivent être « équitablement réparties » (ce qui signifie vraisemblablement réparties de manière égale) entre les parties à la fusion et les consommateurs. Le projet de loi exige quant à lui simplement que les consommateurs « bénéficient d'une partie » des gains d'efficience.

151. Le projet de loi prévoit des modifications importantes des procédures de contrôle des fusions. La notification préalable des fusions est introduite : il est interdit aux parties à une fusion de réaliser leur transaction avant son approbation par le CADE ou avant l'expiration du délai légal. Alors que l'article 54 en vigueur aujourd'hui s'applique, selon ses termes, à tous les accords même s'il ne constituent pas formellement des fusions, le projet de loi s'applique en revanche uniquement aux « fusions », définies comme des transactions par lesquelles (1) deux entreprises fusionnent, (2) une entreprise prend le contrôle du stock ou de l'actif d'une autre, ou (3) une entreprise commune est créée, impliquant la constitution d'une entité économique indépendante. Les seuils de notification ont également été modifiés. Le projet de loi prévoit des seuils de taille minimale exprimés en montant total des revenus réalisés au Brésil, pour deux parties fusionnantes. L'une des parties doit avoir des revenus d'au moins 400 millions BRL et l'autre de 30 millions BRL. Aujourd'hui, la loi ne requiert aucune taille minimale pour la deuxième partie. Le projet de loi abandonne le test de part de marché de 20 pourcent actuellement en vigueur. Les droits de notification de 45 000 BRL ont été maintenus et doivent être intégralement reversés au CADE.

152. Comme indiqué plus haut, le projet de loi n'attribue aucun rôle formel au SEAE dans le contrôle des fusions. Dans un délai de cinq jours ouvrables à compter de la réception d'une notification, la direction générale doit publier un résumé de la transaction proposée (tous les délais prévus dans le projet de loi sont

exprimés en jours ouvrables et, sauf mention contraire, tous courent à partir de la date de notification)[65]. Dans un délai de 20 jours après la notification, la direction générale doit soit approuver la fusion, soit demander des informations complémentaires. En cas d'approbation par la direction générale, le CADE dispose de 15 jours à compter de la décision de la direction générale pour réexaminer son approbation, mais il n'est pas tenu de la faire. Par ailleurs, un tiers intéressé peut, dans un délai de 15 jours, contester devant le CADE l'approbation donnée par la direction générale. En l'absence d'appel formé par un tiers, et si le CADE ne décide pas de réexaminer la décision de la direction générale, la fusion est automatiquement approuvée à expiration du délai de 15 jours. Ce processus est l'équivalent de l'actuelle procédure dite accélérée.

153. Si la direction générale décide de demander des informations supplémentaires, le directeur général dispose d'un délai de 60 jours à compter de la date de la notification pour décider d'approuver la fusion ou de recommander au CADE de la rejeter ou de demander sa modification. En cas d'approbation par la direction générale, la même procédure de 15 jours que celle décrite ci-dessus pour les fusions accélérées s'applique alors. Il est important de préciser que la demande d'informations supplémentaires ne suspend pas le délai de 60 jours applicable. Il s'agit là d'une insuffisance potentielle du projet de loi, car les candidats peuvent de toute évidence en profiter pour laisser s'écouler une bonne partie, voire la totalité de la période de 60 jours prévue avant de soumettre les informations supplémentaires demandées. Dans ce cas, la direction générale devrait bien sûr recommander au CADE le rejet de la demande. Une autre option, peut-être plus probable, serait pour elle de déclarer la fusion « complexe ».

154. La législation prévoit en effet une procédure distincte, et à certains égards parallèle, pour les fusions déclarées « complexes » par la direction générale. Cette dernière jouit d'un pouvoir discrétionnaire pour déterminer qu'une fusion est complexe, et dispose à cette fin d'un délai de 50 jours à compter du dépôt de la notification. Cette procédure constituerait pour la direction générale une solution alternative pour les situations où, au 50ème jour, une demande d'informations supplémentaires assortie d'un délai de 20 jours n'a toujours pas été satisfaite par les parties. De toute évidence, la direction générale pourrait se prononcer sur la complexité de l'opération au cours des 20 premiers jours, évitant ainsi de devoir émettre deux demandes supplémentaires.

155. Si la direction générale déclare une fusion complexe, elle doit adresser sa demande d'informations supplémentaires avant l'expiration du délai prescrit de 50 jours. Ces informations doivent être soumises dans un délai de 90 jours à compter de la date de la notification. À l'expiration de ce délai de 90 jours, la direction générale dispose de 10 jours pour décider d'approuver la fusion ou de recommander son rejet ou son approbation accompagnée de restrictions. Dans le premier cas, la procédure des 15 jours décrite ci-dessus s'applique.

156. Si la direction générale recommande le rejet ou la modification de la transaction dans le cadre de l'une ou l'autre des procédures visées ci-dessus, le tribunal procèdera comme suit. Dans les 48 heures, l'affaire est assignée à un rapporteur choisi au hasard. Dans un délai de 20 jours à compter de la décision de la direction générale de ne pas approuver la fusion, le rapporteur doit soit programmer le jugement de l'affaire, soit demander à la direction générale d'exiger des informations supplémentaires, s'il l'estime nécessaire. Si des informations supplémentaires sont exigées, le rapporteur doit programmer le jugement de l'affaire dans un délai de 30 jours à compter de la réception desdites informations. Aucun délai n'est

65 La direction générale peut estimer que la notification présente certaines insuffisances et la retourner aux parties pour modification. Les parties ont alors 10 jours pour y remédier. Si ces insuffisances ne sont pas corrigées, la fusion ne sera pas examinée. La décision de la direction générale d'exiger une modification de la notification a pour effet, entre autres choses, de prolonger de 15 jours les délais suivants, comme le prévoit la loi – un délai de cinq jours pour permettre à la direction générale de juger si la notification est complète, puis un délai de dix jours pour que les parties procèdent à leurs modifications.

prescrit pour le jugement de l'affaire, mais aux termes du projet de loi, la décision finale doit être rendue au plus tard 240 jours après la date de la notification. Ce délai peut être prolongé dans deux circonstances : (1) si les candidats font la demande d'une extension de 60 jours ou (2) si le tribunal ordonne une extension de 90 jours. Par conséquent, une affaire de fusion doit en tout état de cause être tranchée par le CADE dans un délai maximal de 330 jours après la date de la notification.

157. La possibilité pour un tiers de faire appel de l'approbation d'une fusion par la direction générale est un droit nouveau. L'appel est d'abord formé devant la direction générale, qui a cinq jours pour décider de revenir sur sa décision ou de transmettre le pourvoi en appel au tribunal. Dans ce dernier cas, le rapporteur rend une détermination (qui peut être réexaminée par le tribunal) par laquelle il déclare le pourvoi recevable ou non. Si le pourvoi est déclaré recevable, l'appelant joue alors le rôle généralement joué par la direction générale, étant entendu que cette dernière conserve malgré tout le pouvoir d'intervenir en tant que partie pour défendre sa position. Si un appel formé par une partie privée est déclaré recevable, mais que la partie est finalement déboutée, le tribunal doit lui infliger une amende de 5 000 à 5 millions BRL (2 815 USD à 22.8 millions USD). Le montant fixé doit être calculé en fonction de la situation économique de l'appelant, de sa réactivité au cours de la procédure, de sa bonne foi et des conséquences du retard sur la transaction.

158. Le projet de loi prévoit aussi un mécanisme formel pour résoudre les affaires de fusion par règlement amiable. La direction générale peut négocier un règlement amiable concernant une fusion notifiée, et ce à n'importe quel moment avant que l'opération contestée ne soit soumise au tribunal. Une fois négocié, l'accord doit être publié pendant au moins 10 jours pour recueillir les commentaires du public, après quoi la direction générale peut choisir de renégocier la proposition avant de la transmettre au tribunal pour qu'elle y soit entérinée.

5. Limites de la politique de la concurrence : exemptions et régimes réglementaires spéciaux

159. Selon ses propres termes, la loi sur la concurrence s'applique aux « individus, aux entreprises publiques et privées [et] aux associations privées ou professionnelles », quelle que soit leur organisation, « même si elles exercent une activité considérée comme un monopole légal » (article 15). Le SBDC estime que la loi est applicable à l'administration fédérale et à ses organismes, même si aucune affaire n'a permis de le vérifier. Dans la pratique, le SBDC interagit avec les autorités fédérales sur des questions de concurrence dans le cadre de sa mission de promotion de la concurrence. Les administrations des États et leurs organismes sont considérés comme exclus du champ d'application de la loi pour des raisons de fédéralisme. La loi s'applique à toutes les entités privées de tous les secteurs de l'économie, et par conséquent aux entreprises des secteurs réglementés. La seule exception à cette règle concerne le secteur bancaire (voir ci-après). La loi sur la concurrence s'applique explicitement aux entreprises commerciales détenues par les pouvoirs publics au niveau fédéral ou des États. Les sections suivantes décrivent les régimes réglementaires de certains secteurs et les interactions entre l'application du droit de la concurrence et la réglementation de ces derniers.

5.1 Télécommunications

160. Ce secteur a été libéralisé en 1997. Les entreprises publiques ont alors été privatisées et la loi sur les télécommunications nationales adoptée la même année a institué une nouvelle autorité de réglementation sectorielle, l'autorité nationale des télécommunications (ANATEL). À la différence de ce que l'on peut observer dans la plupart des autres secteurs réglementés, la loi sur les télécommunications porte spécifiquement sur les relations entre la réglementation et le droit de la concurrence. Elle prévoit l'application du droit de la concurrence à ce secteur et confie son exécution à la fois à l'ANATEL et au CADE. Aux termes de son article 7, « les règles générales régissant la protection de l'ordre économique [ce qui couvre la loi 8884] s'appliquent au secteur des télécommunications lorsqu'elles ne sont pas

contraires aux dispositions de la loi ». En outre, en vertu de l'article 19, l'ANATEL « est chargée de contrôler, empêcher et combattre toute violation de l'ordre économique dans le secteur des télécommunications, sans préjudice des prérogatives… [du CADE] ». Il s'ensuit que les affaires de comportement et de fusion peuvent être examinées soir par l'ANATEL, soit par le CADE, soit par ces deux autorités. La loi sur les télécommunications a instauré un régime spécial pour les fusions. Une notification préalable des fusions doit être déposée auprès de l'ANATEL, ce secteur étant à ce jour le seul au Brésil doté d'un contrôle préalable des fusions.

161. Le CADE et l'ANATEL sont parvenus à un accord de coopération en vertu duquel l'ANATEL assume le rôle du SDE et du SEAE dans les affaires de fusions impliquant des services de télécommunication. Aux termes de cet accord, l'ANATEL conduit l'enquête et rend un avis technique, tandis qu'il revient au CADE de statuer en dernier ressort. Selon ses dires, l'ANATEL suit le processus employé par le SBDC pour l'analyse des fusions. Si le SBDC accueille favorablement les contributions de l'ANATEL concernant les fusions intervenues dans ce secteur, il conclut que le processus serait plus efficient si l'enquête était réalisée par le seul SBDC, ce qui est le cas dans tous les autres secteurs réglementés. Cette question a fait l'objet d'un débat au sein du Congrès lors de la discussion de la nouvelle loi, mais début 2010, elle n'avait pas été résolue. S'agissant des affaires de comportement, l'ANATEL partage des compétences concurrentes avec le SDE et le SEAE, de telle sorte que l'un ou l'autre de ces trois organismes, ou tous les trois ensembles, peuvent exercer des fonctions d'enquête et soumettre des recommandations au CADE. Le CADE examine régulièrement des affaires de fusion et de comportement dans le secteur des télécommunications (voir la description de certaines d'entre elles à la section 2.1.4). Le CADE et l'ANATEL ont assumé leurs missions dans le cadre de toute une série d'accords de coopération limités dans le temps. Ils n'ont pas pour habitude de travailler en étroite collaboration, mais cela leur est déjà arrivé dans certains domaines tels que le câble et la télévision payante. Par ailleurs, ils ont conjointement mis au point des règles relatives à la méthodologie pour l'analyse de la concurrence.

5.2 Pétrole et gaz

162. La loi de 1997 sur les hydrocarbures a institué une nouvelle autorité de réglementation, l'autorité nationale du pétrole – ANP, dont le rôle est de surveiller les marchés du gaz naturel et du pétrole. Cette loi fait elle aussi explicitement référence aux interactions entre l'autorité de réglementation et le SBDC. L'ANP est tenue d'aviser le SDE et le CADE de toute preuve qu'elle détient suggérant une violation du droit de la concurrence. Le CADE doit, en retour, informer l'ANP des sanctions qu'il applique aux entreprises du secteur, afin que cette dernière puisse de son côté prendre toute mesure légale appropriée (comme la résiliation de licences)[66].

163. Le secteur est aujourd'hui encore dominé par Petrobras, qui a détenu un monopole légal jusqu'en 1997 et est toujours contrôlé par les pouvoirs publics. Il assure de loin la plus grosse partie de l'exploration, de la production, du transport, du raffinage et de la distribution de pétrole et de produits raffinés dans le pays[67]. Sa domination du marché du gaz naturel (qui représente une part relativement réduite de la consommation énergétique du Brésil) est encore plus évidente. Petrobras contrôle en effet plus de 90 pourcent des réserves de gaz brésiliennes et assure l'exploitation du réseau de gazoducs inter États du pays[68]. L'ANP exerce son pouvoir réglementaire dans divers segments du secteur pétrolier et

66 Art. 10 de la loi 9478/97.

67 Le Brésil est devenu l'un des plus gros producteurs et le premier exportateur mondial de biocarburant (éthanol) au monde. Petrobras est également présent sur ce marché. Voir Agence américaine pour l'information sur l'énergie, *Brazil Country Analysis Brief* (2009), consultable à l'adresse http://www.eia.doe.gov/emeu/cabs/Brazil/pdf.

68 En 2009, une loi sur le gaz attendue de longue date a été votée au Brésil. L'un de ses objectifs phares est de faciliter la concurrence dans le secteur.

gazier, notamment dans l'exploration et le transport. Les prix au détail des dérivés pétroliers et gaziers ne sont plus contrôlés.

164. Le CADE examine régulièrement des affaires de comportement dans les secteurs du pétrole et du gaz, mais ces dernières années, la position dominante de Petrobras n'a pas été directement impliquée. Le CADE a poursuivi en justice des ententes dans le domaine du carburant automobile au détail (voir plus haut). Il a également poursuivi des ententes locales dans le domaine du gaz de pétrole liquéfié en 2008 et en 2004, ainsi qu'une entente dans le gasoil en 2004. Il évalue aussi occasionnellement des fusions dans ces secteurs. L'une d'entre elles a impliqué une entreprise commune constituée par Petrobras et une entreprise appelée White Martins pour la production de gaz naturel liquéfié (GNL). Comme indiqué plus haut, Petrobras détenait le monopole du transport du gaz naturel et occupait également une position dominante dans la production de gaz de pétrole liquéfié (GPL), utilisé pour remplacer le GNL dans de nombreuses applications. Petrobras ne produisait toutefois pas de GNL, pas plus que White Martins, le numéro un de la production de gaz industriels non énergétiques (comme l'oxygène et l'azote). Le CADE a soulevé dans cette opération des questions de nature verticale liées au contrôle par Petrobras du marché du gaz naturel, le facteur de production nécessaire. Les parties ont fait valoir que l'entreprise commune génèrerait en contrepartie d'importants gains d'efficience, ce qu'a admis le CADE. Ce dernier a autorisé la transaction, mais a imposé des mesures correctrices exigeant la transparence des prix et des contrats des parties, de manière à faciliter la détection et la poursuite de tout comportement illicite qui pourrait intervenir à l'avenir[69]. Plus récemment, le CADE a approuvé sans condition une fusion entre deux distributeurs de GPL[70].

5.3 Électricité

165. L'instance de réglementation de ce secteur, l'autorité nationale pour l'énergie électrique (ANEEL), a également été créée en 1997 par une loi qui précise que, dans la mesure du possible, elle doit mettre en application les principes de concurrence. La capacité de production d'électricité du pays est majoritairement hydraulique, mais la part de la production d'hydroélectricité a diminué de 83 % en 2001 à 72 % en 2009, au profit de la production thermique. Le pays compte également une petite production d'électricité nucléaire et éolienne. Environ 70 % de la capacité totale de production est détenue par les pouvoirs publics, à la fois à l'échelon fédéral et des États. L'ancien monopole d'État, Electrobras, contrôle toujours environ 40 % du marché. La concurrence concernant la production se joue par le biais d'un processus d'enchère. Les actifs de transport sont principalement contrôlés par les autorités fédérales et des États. Les deux tiers environ des actifs de distribution sont exploités par des intérêts privés, et l'on dénombre plus de 60 entreprises sur ce marché.

166. L'ANEEL et le CADE ont passé un accord de coopération formel et, ces dernières années, les deux organismes ont développé d'étroites relations de travail. Leurs représentants se rencontrent régulièrement pour échanger diverses informations. Le CADE examine régulièrement des fusions dans ce secteur, parmi lesquelles peuvent figurer des fusions entre distributeurs ou des acquisitions de petits producteurs. Le CADE consulte l'ANEEL à propos de ces transactions, qu'il autorise presque toujours sans restriction. Il s'est récemment penché sur la création d'un consortium composé de trois centrales thermiques qui ont remporté un appel d'offres de l'ANEEL concernant l'alimentation du réseau électrique. L'ANEEL avait approuvé la constitution du consortium, et les parties ont fait valoir que cette approbation retirait au CADE toute compétence en l'espèce. Dans sa décision, le CADE a évacué cet argument, mais a

69 White Martins/Petroleum Brasileiro (2006).

70 Ultragaz/Shell Gas (2008).

néanmoins approuvé les transactions tout en infligeant une amende pour défaut de notification de fusion dans les délais[71].

5.4 Transport de surface

167. L'autorité nationale des transports de surface (ANTT) a été créée en 2002[72] et s'est vu confier la réglementation des services ferroviaires et routiers. Il existe peu de services ferroviaires voyageurs au Brésil, sauf dans les zones urbaines, où ils sont réglementés par les États, puisqu'il n'existe pas de liaisons entre les États[73]. L'ANTT règlemente l'accès au réseau et les tarifs du fret par un système de prix plafonds. À la fin des années 1990, le mauvais état de certaines routes au Brésil a décidé les pouvoirs publics à signer des accords de concessions avec des entrepreneurs privés pour la construction et l'entretien de tronçons du réseau routier interétatique avec, en contrepartie, le droit d'établir des péages dont le niveau serait réglementé. Une deuxième série d'accords de concessions est intervenue en 2007. Comme indiqué plus haut, le SEAE a joué à cette occasion un rôle de conseil important dans la définition des accords passés.

168. L'ANTT réglemente par ailleurs le transport de voyageurs par bus entre les États. Dans certains pays, le transport interurbain par bus est peu réglementé, voire pas du tout, mais au Brésil, ce service est important pour de nombreux citoyens et peut à ce titre entrer dans le champ d'application d'une exigence constitutionnelle selon laquelle les « services publics » doivent être contrôlés. L'ANTT octroie des licences d'exploitation sur certains itinéraires par voie d'appels d'offres dont le cahier des charges inclut les tarifs et la fréquence des services. L'autorité est souvent confrontée à la présence d'exploitants non autorisés sur des itinéraires plus fréquentés. Les changements de prix sont soumis à l'examen de l'ANTT, bien que les opérateurs soient libres de proposer des tarifs « promotionnels », tant qu'il ne s'agit pas de prix d'éviction (ce qui est difficile à vérifier dans ce secteur) ou qu'ils ne constituent pas d'autres « violations de l'ordre économique ».

169. Le CADE et le SEAE ont conclu des accords de coopération avec l'ANTT. Le SEAE communique souvent avec les autorités de réglementation des transports, mais, comme précisé ci-dessus, les contacts entre ces dernières et le CADE sont beaucoup moins réguliers. Il arrive au CADE d'examiner des affaires relevant du secteur ferroviaire. La fusion Vale/CSN évoquée à la section 2.2.3 de ce rapport a été l'une des plus importantes affaires de fusion de ces dernières années. L'affaire ALL également décrite à la section 2.2.3 figure elle aussi parmi les affaires de fusion de ce secteur.

5.5 Transport aérien civil

170. Jusqu'à récemment, l'aviation civile au Brésil était placée sous le contrôle du département de l'aviation civile (DAC), qui dépendait lui-même du ministère brésilien de la Défense. Le directeur de la DAC et certains de ses employés appartenaient au personnel militaire. Les relations entre aviation civile et aviation militaire étaient déterminées par un principe selon lequel les deux secteurs partageaient certaines installations telles que les aéroports et le système de contrôle du trafic aérien. En 2006, cependant, l'autorité nationale de l'aviation civile (ANAC) a été instituée en tant qu'instance de réglementation indépendante de ce secteur. Elle est chargée d'assurer la réglementation en matière de sûreté et de sécurité, de certification du personnel, d'opérations de vol et d'aéroports. Les prix et l'entrée ont été déréglementés, ce qui a entraîné une profonde restructuration du secteur. Ce dernier est actuellement très concentré et

71 Petróleo Brasileiro S.A., *et al*. (2008).

72 La réglementation de ce secteur relevait jusqu'alors du ministère des Transports.

73 Il est envisagé de créer une ligne ferroviaire à grande vitesse entre São Paulo et Rio de Janeiro. Des études sont en cours, mais aucun calendrier n'a été arrêté.

compte seulement deux principaux transporteurs qui contrôlent environ 90 % du marché. Toutefois, deux autres compagnies ont récemment fait leur entrée et gagnent des parts de marché.

171. Peu après sa création, l'ANAC a été confrontée à ce que l'on a appelé la « crise aérienne », déclenchée par la catastrophe aérienne la plus meurtrière que le pays ait jamais connue. Le système de contrôle du trafic aérien et le fait que 67 des plus grands aéroports du pays soient exploités par l'entreprise publique INFRAERO ont suscité de violentes critiques. Si l'ANAC a annoncé une série de mesures correctrices, les différentes questions soulevées par la crise font toujours débat.

172. Au Brésil, comme dans d'autres pays, la nécessité d'obtenir des créneaux horaires d'atterrissage et de décollage dans les aéroports les plus fréquentés du pays, et notamment ceux des centres-villes de São Paulo et de Rio constitue une barrière à l'entrée. En 2008, le CADE s'est penché sur la proposition d'acquisition de VARIG par GOL, l'une des deux plus grandes compagnies aériennes du pays. Après avoir été la compagnie aérienne brésilienne internationale numéro un, VARIG avait vu son activité chuter vertigineusement suite à la déréglementation et était alors au bord de la faillite. Le CADE s'est plus particulièrement intéressé à la question du transfert des créneaux horaires de VARIG à GOL concernant l'aéroport de Congonhas à São Paulo, et a finalement décidé d'approuver la transaction[74]. Jusqu'à ce que le SBDC mette récemment l'accent sur la poursuite des ententes, l'une des plus importantes affaires traitées en la matière par le CADE avait été engagée en 2004 à l'encontre de quatre compagnies aériennes (affaire amorcée en 1999) pour entente sur les prix concernant la liaison Rio–São Paulo. Seules des preuves indirectes laissaient supposer l'existence d'un accord, à savoir des changements de prix identiques et simultanés par les défendeurs. Le CADE a néanmoins conclu qu'un accord avait été passé et a infligé aux défendeurs des amendes dont le montant a été fixé au minimum prévu par la loi, à savoir 1 % de leurs revenus de 1999 réalisés sur la liaison Rio – São Paulo[75].

5.6 Santé

173. Comme indiqué plus haut, il existe au Brésil un système public de santé auquel s'ajoute un secteur privé de l'assurance maladie déjà bien développé et en expansion, qui concerne pas moins de 42 millions de Brésiliens. Jusqu'à 2000, ce secteur est resté en grande partie non réglementé, mais une loi adoptée cette année-là a institué l'autorité nationale de santé complémentaire (ANS), à laquelle ont été conférés certains pouvoirs en matière de prix[76]. Il existe deux grands types d'assurance maladie : l'assurance maladie collective, qui est proposée à un groupe, en général par les employeurs, et l'assurance maladie individuelle.

174. Les prix de départ pratiqués par les assureurs qui entrent sur le marché (et ceux en place lorsque la réglementation a été mise en œuvre) ne sont pas contrôlés, bien que l'ANS détermine, sur une base actuarielle, s'ils sont suffisants pour garantir la stabilité financière du nouvel entrant. Les hausses de prix ultérieures des polices individuelles (mais pas des polices collectives) sont soumises à la réglementation de l'ANS. Il existe 1 400 assureurs qui proposent des services privés d'assurance maladie, toutes catégories confondues, mais 48 d'entre eux se partagent environ la moitié du marché.

175. À partir de 2000, les prix des produits pharmaceutiques ont également été réglementés et depuis 2003, une réglementation par plafonnement des prix est mise en œuvre par la chambre de réglementation du marché des médicaments (CMED), un organe interministériel où sont représentés les ministères de la Santé, des Finances, de la Justice et du Développement, de l'Industrie et du Commerce. Comme précisé

74 GOL, *et al.* (2008).

75 Viação Aérea Rio-Grandense, *et al.* (2004).

76 Loi 9,961/2000.

plus haut à la section 2.1.4, l'entrée en vigueur de la réglementation des prix des produits pharmaceutiques a correspondu à peu près au moment où le Congrès a transmis au SDE plusieurs cas de possibles pratiques de prix abusifs par les fabricants de médicaments. À ce jour, les investigations menées n'ont cependant permis de mettre en lumière aucun agissement répréhensible.

176. La loi sur la concurrence s'applique pleinement au secteur de la santé, dans lequel le SBDC étudie régulièrement des affaires de comportement et de fusion, comme indiqué plus haut.

5.7 Banque

177. Il existe au Brésil environ 161 banques, un chiffre qui englobe les banques commerciales et les banques d'épargne[77]. Il s'agit d'un secteur concentré. Les dix plus grandes banques représentent environ 90 % de l'actif total et le CR4 s'élève à environ 68 %. Certaines banques sont toujours détenues par les États et par l'administration fédérale, mais leur nombre tend à diminuer. Les banques détenues ou contrôlées par des fonds publics représentent aujourd'hui environ 36 % du marché. La Banque du Brésil, la plus grande du marché, est contrôlée par les autorités fédérales, bien qu'elles fassent appel public à l'épargne. Au début des années 2000, de grandes banques étrangères sont entrées sur le marché, mais bon nombre d'entre elles ont ensuite fait volte-face. Le Brésil a connu récemment une série de fusions bancaires. En 2007, ABN Real a en effet été racheté par l'espagnol Santander, qui a été le premier acteur étranger à se poser en rival direct des grandes enseignes nationales. En 2008, Itaú, la deuxième plus grande banque brésilienne, est passée numéro un grâce à l'acquisition d'Unibanco. La Banque du Brésil a riposté en rachetant des établissements d'épargne et de prêt, dont deux avaient appartenu à d'importants États (São Paulo et Santa Catarina), ce qui lui a permis de retrouver sa pole position.

178. La banque est le seul secteur réglementé où la loi sur la concurrence n'a pas été pleinement appliquée. La Banque centrale – BACEN – a pendant longtemps soutenu qu'elle devrait être la seule autorité compétente dans ce domaine pour des raisons « prudentielles », à savoir la sécurité du système financier. Plus précisément, la BACEN revendique le contrôle exclusif des fusions bancaires au motif qu'elle doit veiller à la cession en bonne et due forme des « banques en difficulté » et faire appliquer les limites prévues par la constitution concernant l'entrée sur le territoire de banques étrangères. En 2001, le Bureau du procureur général fédéral a rendu un avis juridique concluant que la spécificité du droit bancaire brésilien prévalait sur la portée plus générale de la loi sur la concurrence, et a par conséquent fait de la Banque centrale la seule juridiction compétente pour toute question d'ordre bancaire.

179. Le CADE n'a jamais souscrit à cet avis, arguant d'une part que la loi sur la concurrence (adoptée après la loi bancaire) est applicable, selon ses propres termes, à toute entreprise commerciale, et soutenant d'autre part que lui-même, en tant qu'autorité indépendante, ne saurait être lié par un avis juridique émanant de l'exécutif. Le différend a été soumis à la justice à l'occasion d'un appel formé contre une décision du CADE d'infliger une amende à deux banques, Bradesco et BCN, auxquelles il reprochait de ne pas lui avoir notifié leur fusion. Le tribunal de première instance et les cours d'appel se sont prononcés en faveur du CADE, mais l'affaire est toujours en appel devant la Cour supérieure de justice.

180. Quoi qu'il en soit, en 2005, le CADE et la BACEN ont conclu un accord de coopération en matière de partage d'informations. Les deux instances ont collaboré à la rédaction d'un ensemble de lignes directrices pour les fusions dans le secteur bancaire, et se sont inspiré pour cela des lignes directrices du SEAE et du SDE. Un projet de loi visant à résoudre le conflit de compétence a été soumis au Congrès en 2003. Le Sénat l'a approuvé en 2007 et le texte est désormais à l'étude à la Chambre des députés. Ce projet de loi prévoit d'attribuer à la Banque centrale une juridiction exclusive en ce qui concerne l'examen des

[77] D'après les données de septembre 2009 publiées par la Banque centrale brésilienne, consultables à l'adresse www.bacen.gov.br.

fusions impliquant un risque pour la stabilité globale du système financier (l'évaluation de ce risque revenant à la BACEN). Le pouvoir de contrôle des autres fusions serait partagé entre le CADE et la BACEN. Le SBDC conserverait la responsabilité exclusive du traitement des affaires de comportement dans le secteur bancaire.

181. En 2008, le CADE et la BACEN ont passé un accord relatif à l'examen conjoint de fusions bancaires et selon lequel les deux autorités s'engagent à mettre en œuvre la législation susvisée. À l'aune de cet accord, la Cour supérieure de justice a d'ailleurs décidé de remettre à plus tard l'audience qui avait été fixée en l'affaire Bradesco/BCN susmentionnée. Conformément à cet accord, les fusions bancaires doivent être notifiées aux deux organismes. La fusion Unibanco/Itaú en est un exemple. Elle a été approuvée par la BACEN, mais l'affaire est toujours en cours au CADE. La BACEN n'a jamais formellement rejeté une proposition de fusion. Elle les approuve en règle générale au motif qu'elles génèrent des gains d'efficience et qu'elles sont bénéfiques pour la concurrence.

5.8 Projet de loi fourre-tout pour les autorités de réglementation sectorielle

182. En 2003, un projet de loi a été présenté au Congrès dans l'optique, entre autres choses, de normaliser les relations entre les autorités de réglementation sectorielle et le SBDC. (En vertu de la législation sectorielle, les autorités de contrôle sont déjà tenues de promouvoir la concurrence dans les secteurs placés sous leur tutelle). Les autorités de réglementation seraient ainsi tenues de veiller à la conformité de leur secteur à la loi sur la concurrence, de signaler tout soupçon de violation et de remettre à la demande du CADE des rapports techniques destinés à être utilisés dans le cadre de procédures coercitives. Le CADE est quant à lui tenu de notifier à l'autorité concernée les décisions qu'il rend dans des affaires de comportement et de fusion, de sorte que l'autorité puisse prendre toute mesure légale nécessaire. Le projet de loi prévoit également la révision des procédures concernant les commentaires formulés par le SEAE sur les propositions de réglementations. Les autorités de réglementation sont tenues de solliciter un avis du SEAE 15 jours avant que les normes et réglementations ne soient publiées pour recueillir les commentaires du public. Le SEAE est tenu de rendre dans les 30 jours qui suivent un avis public sur les implications de la proposition sur la concurrence[78]. Le projet de loi est toujours en attente à la Chambre des députés et son adoption ne semble pas susciter d'enthousiasme général.

6. Promotion de la concurrence

183. La promotion de la concurrence comporte deux volets. Premièrement, l'autorité de la concurrence joue un rôle de conseiller auprès des pouvoirs publics et des autorités de réglementation sectorielle concernant la législation et la réglementation relevant de la politique de la concurrence. Deuxièmement, elle formule des propositions visant à accroître la compréhension et l'acceptation des principes de concurrence par le public.

184. Le SEAE est un ardent défenseur de la concurrence auprès d'autres branches de l'administration et des autorités de réglementation. Ce rôle de premier plan s'explique par des raisons historiques mais aussi structurelles. Comme indiqué plus haut, jusqu'au milieu des années 1990, l'économie était très réglementée et le ministère des Finances, auquel appartient le SEAE, était un acteur central de ce système. Le SEAE faisait alors office de groupe de réflexion national sur les questions de cette nature. Lorsque la libéralisation de l'économie a été lancée, en 1994, mais avant la création des autorités de réglementation sectorielle, le ministère des Finances a été chargé de contrôler les « prix des services publics ». Une loi de 1995 mettant en œuvre le « Real Plan » prévoyait que :

[78] Le respect de ce délai de 30 jours n'a aucune répercussion sur les suites données à la proposition.

> *À compter du 1er juillet 1994, les hausses et les contrôles des prix du secteur public et des tarifs des services publics seront déterminés… par des lois, des règles et des critères qui devront être définis par le ministère des Finances*[79].

185. Un autre décret a ultérieurement confié au SEAE (dont il convient de rappeler le nom complet, Secrétariat de la surveillance économique) des responsabilités importantes en lien avec cette surveillance, et notamment celles d'élaborer des analyses techniques des fluctuations des prix, de « rendre des avis » sur les décisions en matière de réglementation et sur la privatisation des entreprises publiques, d'« assurer le suivi du développement des secteurs et des programmes », de « représenter le ministère des Finances dans les activités interministérielles » et de « favoriser la coordination entre les entités du secteur public, le secteur privé et les organisations non gouvernementales » également impliquées dans ces tâches[80].

186. Le rôle prépondérant que joue le SEAE en matière de promotion de la concurrence au sein du gouvernement tient aussi au fait que l'élaboration des politiques publiques dans plusieurs pans de l'économie est confiée à un conseil ou à une commission auxquels siègent des représentants de plusieurs ministères. On retrouve ces conseils dans les secteurs des transports de surface, de la santé, de l'aviation civile et de l'énergie par exemple. Le ministère des Finances participe à presque tous ces derniers, or, en vertu de la loi susmentionnée, le SEAE est son représentant. Il y a lieu, toutefois, de préciser que la force du SEAE – du fait qu'il est rattaché à un ministère puissant – est également une faiblesse potentielle. Son action en matière de promotion de la concurrence dans certaines affaires est, en effet, plus susceptible d'être influencée par le pouvoir politique que ne le serait celle d'une autorité indépendante. Le SEAE fait cependant valoir que depuis 2004 au moins, il n'a fait l'objet d'aucune pression politique dans l'exercice de sa fonction de défenseur de la concurrence. Il estime avoir toute latitude pour agir comme bon lui semble dans ce domaine.

187. Il est impossible de dresser la liste détaillée des nombreuses contributions du SEAE au titre de son rôle de défenseur de la concurrence. Les paragraphes suivants donnent un aperçu des activités qu'il a menées ces dernières années dans certains secteurs :

- Transport terrestre : le SEAE participe aux réunions du Programme brésilien pour l'accélération de la croissance, une initiative présidentielle, qui joue un rôle actif dans la formulation des politiques publiques en matière de transports. Il examine les tarifs des transports ferroviaires et formule des commentaires sur la structure de la réglementation (plafonds de prix). Il a conseillé l'ANTT sur la procédure à suivre pour lancer son appel d'offres concernant les concessions routières (voir plus haut). Les prix ont pu être abaissés de 46 % en premier lieu grâce à ses recommandations. Il a également conseillé l'ANTT sur ses grilles tarifaires pour le transport de passagers.

- Ports : Le SEAE a participé à un groupe de travail chargé de développer des procédures de passation de contrats efficaces pour le dragage. En 2008, il a élaboré une étude sur la réglementation et la concurrence dans les ports en se fondant sur l'expérience internationale dans ce secteur. La même année, il a participé avec le SDE à la rédaction d'un décret, baptisé décret sur les ports, qui énonçait des politiques et des lignes directrices pour le développement du secteur maritime au Brésil.

- Transport civil aérien : Le SEAE a pris part aux délibérations qui ont abouti en 2006 à la création de l'ANAC, la nouvelle autorité de réglementation de ce secteur. Il a formulé des

79 Loi 9,069/1995, art. 70.

80 Décret n° 6531/2008, art. 12, anciennement décret n° 1849/1996.

recommandations sur le processus d'octroi des créneaux horaires dans les aéroports encombrés, lesquelles ont reçu toute l'attention du public, bien que finalement elles n'aient pas été toutes suivies. Le SEAE siège à diverses commissions techniques qui conçoivent des politiques publiques pour le secteur. Il a apporté une réponse face à la crise aérienne décrite plus haut en soumettant plusieurs recommandations visant toutes à renforcer la concurrence dans le secteur.

- Télécommunications : Le SEAE a contribué à plusieurs reprises à des consultations publiques parrainées par l'ANATEL, l'autorité de réglementation des télécommunications. Parmi ces contributions, on rappellera des commentaires sur : (i) le changement de méthodologie utilisée pour répercuter les gains de productivité sur les tarifs réglementés pour les services de téléphonie fixe ; (ii) l'utilisation efficace du spectre de fréquence radio afin d'en réserver une partie pour les nouveaux arrivants ; (iii) un Plan général pour la mise à jour de la réglementation relative aux télécommunications (PGR) ; (iv) des propositions de révisions des zones déléguées pour les services vocaux fixes locaux, facilitant ainsi l'entrée de prestataires opérant dans d'autres zones. Le SEAE a également participé à la rédaction d'une législation, désormais à l'étude au Congrès, qui modifierait le marché de la télévision payante. La législation instaurerait une neutralité technologique dans ce service, permettant ainsi l'amélioration de la concurrence et l'entrée de nouveaux acteurs, en particulier de sociétés de téléphonie.

- Santé : Comme indiqué plus haut, une partie du marché privé de l'assurance maladie est soumise à une réglementation des prix de l'ANS, l'autorité de réglementation du secteur. Le droit applicable requiert que les ajustements annuels des primes d'assurance soient soumis au SEAE pour approbation avant leur entrée en vigueur. À ce jour, le SEAE ne s'est jamais opposé à ces modifications de prix. Les prix des produits pharmaceutiques sont également réglementés (au moyen de prix plafonds) par un organisme interministériel distinct, auquel siège le ministère des Finances, représenté par le SEAE.

- Banque : En 2006, le SEAE, le SDE et la Banque centrale ont conclu un accord de coopération qui a donné lieu à une étude très approfondie du marché de la carte de crédit au Brésil, laquelle a été achevée en 2009 puis publiée. Elle comportait diverses recommandations et a, entre autres choses, été à l'origine de la décision de Visa et de MasterCard d'abandonner les arrangements d'exclusivité qu'ils avaient passés avec leurs réseaux de traitement respectifs (voir section 2.1.2). En 2007, la Banque centrale et le ministère des Finances, y compris le SEAE, ont travaillé de concert à l'élaboration d'une série de règles publiées par la Banque centrale sur la tarification des services bancaires.

- Transports urbains : Les transports en commun urbains sont réglementés à l'échelon local et des États. Le rôle de l'administration fédérale, tel que l'établit la constitution, consiste à élaborer des lignes directrices pour ces services. Le SEAE a participé à cette fin à la rédaction d'un ensemble de règles. En 2007 a été présenté au Congrès un projet de loi qui permettrait aux communes d'adhérer à ce programme. Cette législation est aujourd'hui à l'étude.

- Autres marchés : Le SEAE participe à la Coordination générale pour la défense de la concurrence (COGDC), laquelle a des responsabilités en matière de surveillance dans plusieurs marchés réglementés, y compris dans certains marchés soumis à la réglementation locale et des États. Le SEAE a participé à des études sur les services de taxi, d'écoles de conduite et de funérariums. S'agissant des écoles de conduite, par exemple, une enquête sur le mode de fixation des prix a révélé que certains services administratifs des États aux affaires routières avaient donné des instructions accompagnées de prix minimaux et maximaux pour ces services. Leur objectif était de veiller au maintien d'un niveau de qualité suffisant, mais le SEAE les a convaincus qu'il était

possible d'y parvenir par d'autres moyens que la fixation de prix, et cette pratique a été abandonnée.

- Révision de la législation : Une modification du Code de la défense du consommateur a été proposée dans le but d'exiger que tout fournisseur de biens et de services « de nature continue » « étende aux contrats d'ores et déjà en vigueur les conditions de souscription proposées aux prospects ». Le SEAE a validé le principe mis en avant par le projet de loi, à savoir l'égalité de traitement des consommateurs, mais a conclu qu'il pouvait s'avérer préjudiciable pour ces derniers à d'autres égards, par exemple en décourageant l'organisation de promotions susceptibles de bénéficier au final à tous les acheteurs sur le marché. Le SEAE a d'ailleurs recommandé de ne pas voter le projet de loi.

- Commerce : Le SEAE joue un rôle actif dans la formulation de la politique commerciale et un rôle de conseil dans les affaires commerciales, comme précisé à la section 3.5 ci-dessus.

188. Le CADE et le SDE participent également de différentes manières à la promotion de la concurrence au sein même de l'administration. Comme indiqué à la section 3.1, à l'occasion d'une récente réorganisation, le CADE a créé une unité technique sur les marchés réglementés, dont la mission consiste à la fois à mieux informer le Conseil dans les affaires liées aux secteurs réglementés et à développer des relations avec les autorités de réglementation sectorielle. L'unité a tenu une série de réunions avec l'ANEEL, l'autorité de réglementation de l'électricité, et travaille à l'heure actuelle à la conclusion d'accords de coopération avec l'ANEEL, l'ANP (pétrole et gaz), l'ANATEL (télécommunications) et l'ANAC (aviation). Un accord entre le CADE et l'ANTT (transports de surface) a été signé en 2006. Le SDE a également participé à des projets inter-autorités, en particulier à l'étude sur les cartes de crédit. Il participe aussi en qualité de représentant du ministère de la Justice au CMED, l'autorité de réglementation des prix du secteur pharmaceutique. Le CADE et le SDE se sont joints au SEAE pour signer en 2009 un accord de coopération avec l'ANS (santé) dans l'optique d'étudier la concurrence sur le marché privé de l'assurance maladie.

189. Les trois organismes sont actifs dans le deuxième aspect de la promotion de la concurrence, à savoir sensibiliser le public à la politique de la concurrence et obtenir son soutien. L'activité très dense du SDE dans la lutte contre les ententes est documentée à la section 2.1.1.4. Le CADE publie son *Journal sur le droit de la concurrence*, qui contient des articles à ce sujet. Trente trois volumes de ce journal ont déjà été publiés. Le CADE publie également un *Guide pratique sur la défense de la concurrence au Brésil*, une publication bilingue présentant des informations sur la législation pertinente et sur les principales décisions prises par le CADE. La 3ème édition a été publiée en 2007. Le CADE a passé des accords avec divers établissements d'enseignement au Brésil dans le but de promouvoir l'étude du droit de la concurrence.

190. Ces trois organismes sont dotés de programmes d'échange universitaire. Deux fois par an, des étudiants passent environ un mois au sein de ces organismes, où ils ont l'occasion de travailler avec des universitaires et des spécialistes du domaine. À l'issue du programme, ils peuvent soumettre un rapport final contrôlé par un professionnel. Le programme s'est avéré un outil de recrutement utile. Plusieurs de ses participants sont venus par la suite travailler au sein des organismes. En 2006, en partenariat avec une université brésilienne et la Banque mondiale, le SEAE a créé un prix qui récompense avec une somme d'argent la meilleure monographie sur la concurrence et la réglementation. Cent cinquante quatre travaux ont été présentés lors de la première édition de cette compétition. Le CADE est pourvu d'un programme analogue.

191. Les représentants des trois agences participent régulièrement à des conférences et des séminaires sur la politique de la concurrence. Les trois organismes ont chacun leur propre site Internet où ils publient

des informations[81]. Celui du SEAE et du SDE incluent des sections en anglais, et le CADE réfléchit à la création de sections en anglais et en espagnol pour 2010.

7. Conclusions et recommandations

7.1 Forces et faiblesses

192. Le Rapport[82] de 2005 présentait en détails les progrès accomplis par le SBDC depuis le début de la décennie, et le système continue de tirer parti de ces réalisations. Deux résultats sont particulièrement remarquables. Le programme de lutte contre les ententes du SBDC, pratiquement inexistant en 2000, est désormais opérationnel et efficace. Le volet consacré à l'application du droit pénal mérite d'être souligné. Au Brésil, à l'instar de la plupart des pays où la constitution d'une entente peut donner lieu à des poursuites pénales, une législation pénale spécifique et distincte du droit de la concurrence régit les ententes. Cette législation est appliquée par les procureurs publics et pas par l'autorité de la concurrence. Pour qu'un programme de poursuites pénales soit efficace, les procureurs et l'autorité de la concurrence doivent coopérer étroitement. Le Brésil a accompli des progrès notables à cet égard. De même, le SBDC, et notamment le SDE, a considérablement amélioré ses compétences d'enquête dans les affaires d'entente ; il utilise pleinement les instruments dont il dispose : perquisitions surprises, programme de clémence, contrôles (visites dans les entreprises avec préavis) et techniques d'expertise judiciaire informatique. En Amérique latine, le Brésil est largement considéré comme le chef de file pour les poursuites contre les ententes, et ses voisins le consultent régulièrement dans ce domaine. Le programme de sensibilisation mené par le SDE en matière d'ententes est novateur et couronné de succès.

193. La deuxième grande réussite à porter au crédit du SBDC est sa gestion du processus d'examen accéléré des fusions. Le système était paralysé par des procédures d'examen inefficientes, qui absorbaient jusqu'à 70 % des ressources et entraînaient des retards indus. Désormais, le programme accéléré s'applique à 70 % des fusions signalées au SBDC, libérant des ressources pour d'autres tâches, notamment le programme de lutte contre les ententes, et procurant aux entreprises l'avantage d'accélérer l'approbation de leurs transactions. Le processus accéléré a également pour effet positif d'ouvrir la voie à la notification préalable des fusions. La plupart des entreprises ont publiquement déclaré leur soutien à cette notification préalable (à la condition expresse que le SBDC dispose de ressources supplémentaires suffisantes pour gérer efficacement ce système), mais ce soutien n'existerait probablement pas si le SBDC n'avait pas prouvé son aptitude à traiter rapidement les fusions. Le SBDC a également amélioré le fonctionnement administratif du processus de notification des fusions en déterminant que le seuil de chiffre d'affaires de 400 millions BRL concerne uniquement les recettes réalisées au Brésil, en limitant l'application du seuil de 20 % de part de marché et en précisant, dans une certaine mesure, la définition de la date qui déclenche le délai de notification de 15 jours.

194. Le SEAE poursuit son rôle actif de promotion de la concurrence auprès du gouvernement et des autorités sectorielles. Par ailleurs, le SBDC défend efficacement la concurrence dans la sphère publique, et participe activement aux débats internationaux sur la concurrence par divers biais. Le SBDC est respecté par les autres autorités publiques, par les tribunaux et par les entreprises.

195. Toutefois, le SBDC reste confronté à plusieurs problèmes, dont le principal est le taux élevé de rotation du personnel des trois organismes. Au CADE, ce problème est particulièrement aigu. Il s'explique par au moins deux raisons : la brièveté du mandat des commissaires – deux ans – et le fait que, récemment encore, tous les professionnels qui y travaillaient étaient soit des employés sous contrat, soit du personnel rattaché en permanence à d'autres organismes publics. Ce problème de rotation est exacerbé par le fait que

81 CADE : www.cade.gov.br/ ; SDE : www.mj.gov.br/sde ; SEAE : www.seae.fazenda.gov.br/.

82 Voir la note de bas de page 1.

les organismes manquent d'effectifs. C'est surtout vrai au CADE et au SDE. Cette insuffisance de ressources se traduit par un retard constant des enquêtes sur les comportements au sein du SDE et des délais importants pour résoudre une affaire type. Même si des améliorations sensibles ont été apportées au processus d'examen des fusions, il continue de pâtir de l'absence de notification préalable. Cela a pour conséquence de rallonger les délais de la procédure normale (non accélérée) d'examen des fusions et de multiplier les obstacles à l'imposition de mesures correctrices structurelles par le CADE lorsque les fusions s'avèrent préjudiciables à la concurrence.

196. L'examen judiciaire des affaires de concurrence apparaît comme une question importante pour le SBDC. De nombreuses décisions du CADE imposant des sanctions ou des mesures correctrices ont fait l'objet d'appels devant les tribunaux. Ceux-ci ont émis des injonctions aux fins de suspendre l'application des décisions du CADE ; sachant que le délai d'instruction d'une affaire peut atteindre dix ans, voire plus, en cas de recours devant les plus hautes juridictions, l'effet est d'enrayer le processus d'application de la loi. Ces dernières années, le CADE a adopté une attitude plus anticipative à l'égard des tribunaux, avec un certain succès, surtout dans le recouvrement des amendes, mais il y a des limites à ce que le SBDC peut faire de son propre chef.

7.2 Recommandations et appel à légiférer

7.2.1 Adopter au Congrès le projet de loi visant à modifier le droit de la concurrence.

197. Les recommandations suivantes sont mentionnées dans le projet de loi décrit à la section 4 ci-dessus et figuraient également dans le Rapport de 2005.

7.2.1.1 Regrouper les fonctions d'enquête, de poursuite et de jugement du SBDC dans un seul et même organisme autonome.

198. Le SBDC a su tirer le meilleur parti d'un système qui était très inefficace. Le chevauchement des tâches entre le SDE et le SEAE est désormais éliminé. Ces deux organismes excellent dans leurs domaines de compétence, à savoir les enquêtes pour le SDE, l'examen des fusions et la promotion de la concurrence pour le SEAE. Néanmoins, le fait que ces trois fonctions soient exercées par des entités séparées est source d'inefficience, et la communication entre elles est parfois insuffisante. Le Rapport de 2005 souligne que la création d'un organisme unique a été couronnée de succès dans de nombreux pays, et à condition que les ressources soient adéquates, il n'y a aucune raison de penser que cela ne fonctionnerait pas au Brésil.

199. Cette loi confierait les responsabilités du SDE en matière d'enquête à une nouvelle direction générale au sein du CADE. La fonction d'examen des fusions du SEAE serait également transférée à cette direction générale, tandis que le SEAE conserverait son mandat de promotion de la concurrence. Néanmoins, cette restructuration ne va pas sans difficultés. Il sera important de préserver l'expertise acquise au sein du SDE et du SEAE, tout en améliorant leur efficience.

7.2.1.2 Créer des postes de carrière au sein du CADE et débloquer des ressources adéquates pour recruter et conserver un nombre suffisant de professionnels qualifiés.

200. Cet aspect est essentiel. Le Rapport de 2005 constatait qu'un personnel insuffisant et un taux de rotation élevé étaient le principal problème au sein du SBDC, et la situation est aujourd'hui identique. Entre autres choses, le soutien des entreprises à la notification préalable des fusions dépend de l'existence de ressources suffisantes au sein de l'organisme pour pouvoir la gérer avec efficacité.

201. Le projet de loi prévoit la création de 200 postes de carrière permanents au sein du CADE. Il semble qu'il ne s'agisse pas de postes dans le domaine de la concurrence, c'est-à-dire créés pour le CADE et nécessitant des compétences spécifiques à sa mission, mais plutôt de postes permanents attribués à l'organisme qui seront occupés par des fonctionnaires fédéraux. La première option serait préférable, car

susceptible d'accroître le niveau général de qualification des professionnels et de réduire la rotation, mais la création de postes permanents aussi nombreux est néanmoins une excellente chose.

7.2.1.3 Porter à quatre ans au moins la durée du mandat des commissaires, du directeur général et des autres hauts fonctionnaires du CADE, en faisant en sorte que les mandats des commissaires ne coïncident pas.

202. Le mandat de deux ans des commissaires du CADE renouvelable une fois contribue au taux élevé de rotation du personnel de l'organisme et nuit à sa mémoire institutionnelle. Il augmente également le risque d'ingérence politique dans le processus de nomination. Le gouvernement a ainsi la possibilité de remanier entièrement le Conseil en seulement deux ans. Par ailleurs, les commissaires en place sont incités à ajuster leurs décisions en vue d'être reconduits dans leurs fonctions s'ils le souhaitent. Le Rapport de 2005 préconisait de porter la durée du mandat à quatre ans au moins, et à cinq de préférence, ce qui empêcherait le Président du Brésil, élu pour quatre ans, de remplacer tous les membres du Tribunal au cours d'un mandat.

203. Le projet de loi porte le mandat des commissaires à quatre ans, non renouvelable, et décale leurs dates de début et de fin, réduisant ainsi le risque que le nombre de postes vacants au Tribunal soit tel qu'il empêche la constitution d'un quorum, ce qui s'est produit en 2008. Il fixe également à quatre ans le mandat du procureur général et du chef économiste. Néanmoins, le mandat du directeur général prévu par le projet de loi est de deux ans, renouvelable une fois. Ce poste a une grande importance stratégique ; le directeur général contrôle le programme d'enquêtes de l'organisme. Son mandat devrait lui aussi être porté à quatre ans.

7.2.1.4. Fixer le quorum du Tribunal du CADE à quatre (au lieu de cinq) chaque fois que le nombre de commissaires présents pour se prononcer sur un dossier est réduit à quatre pour cause de vacance de poste ou de récusation.

204. Cette recommandation vise également à éviter l'absence de quorum au Conseil. Elle est moins importante si les autres mesures relatives au mandat des commissaires décrites ci-dessus sont prises. En outre, le projet de loi semble donner au Président du Tribunal le pouvoir de nommer un commissaire temporaire si un poste vacant n'est pas pourvu. Quoi qu'il en soit, le projet de loi ramène bien le quorum nécessaire à quatre.

7.2.1.5 Modifier le processus de notification et de contrôle des fusions pour

- Mettre en place un système de notification préalable des fusions.
- Supprimer le seuil de notification actuel défini en termes de part de marché, et adopter des seuils fondés sur les chiffres d'affaires nationaux réalisés par toutes les parties à la transaction, quelle que soit leur taille.
- Mettre fin à la notification des transactions autres que les fusions.

205. Le processus de notification des fusions comporte des lacunes bien connues qui sont analysées en détails à la section 2.2.2. Le projet de loi remédie à ces problèmes en suivant les recommandations formulées.

7.2.1.6 Instituer une procédure accélérée de contrôle et d'autorisation des transactions qui ne suscitent aucune préoccupation sur le plan de la concurrence.

206. Comme on l'a vu précédemment, le SBDC y est largement parvenu en usant de moyens administratifs. Le projet de loi institutionnalise le processus, comme l'explique la section 4.3.

7.2.1.7 Instaurer des procédures officielles de règlement amiable pour les affaires de fusion.

207. Là encore, ces dernières années, le SBDC a négocié plus fréquemment un règlement amiable dans des affaires de fusion, en se prévalant des pouvoirs accordés par l'article 58 de la loi en vigueur. Le projet de loi apporte quelques modifications à ces procédures, en confiant les pouvoirs de règlement au nouveau directeur général, en fixant une période formelle pour les commentaires et en confiant l'approbation finale au Tribunal.

7.2.1.8 Adopter une norme explicite concernant l'examen des effets sur la concurrence des opérations de fusion.

208. Il n'existe pas, dans la législation actuelle, de norme fondamentale pour l'examen des fusions, bien que les critères appliqués par le SBDC soient fréquemment employés dans d'autres pays. Le projet de loi comporte une norme qui s'appuie sur celle du Règlement sur les concentrations de la Commission européenne.

7.2.1.9 Modifier le programme de clémence pour faire en sorte que les personnes demandant à bénéficier de ce programme qui jouissent d'une immunité de poursuites au regard de la loi sur les infractions économiques, voient cette immunité élargie à l'ensemble des dispositions du droit pénal.

209. Le programme de clémence du SBDC obtient d'excellents résultats et plusieurs personnes ont demandé à en bénéficier. Il dispose que les personnes qui bénéficient de la clémence jouissent également d'une immunité de poursuites au regard de la loi sur les infractions économiques. Néanmoins, à l'heure actuelle, elles peuvent être poursuivies au titre d'autres lois pénales applicables à leur comportement. Cela peut dissuader certaines personnes de se faire connaître. Le projet de loi remédie à ce problème en étendant l'immunité à ces autres lois.

210. Les recommandations suivantes ne dépendent pas de l'adoption du projet de loi au Congrès, mais son adoption aura néanmoins des effets sur leur mise en œuvre.

7.2.2 Adopter la loi portant application du droit de la concurrence dans le secteur bancaire

211. Un différend a opposé le CADE et la Banque centrale sur l'organisme ayant compétence pour examiner les fusions dans le secteur bancaire. Le projet de loi, soutenu par les deux organismes, conférerait à la Banque centrale l'autorité exclusive pour contrôler les fusions qui impliquent un risque pour la stabilité générale du système financier, tandis qu'ils se partageraient les compétences pour toutes les autres opérations de fusion bancaire.

7.3 Autres recommandations

7.3.1 Résorber le retard dans les enquêtes et les affaires portant sur les comportements instruites par le SBDC et raccourcir le délai nécessaire pour parvenir à une décision dans une enquête ou un dossier.

212. Des progrès ont été accomplis dans ce domaine ces dernières années, mais le problème reste important. Les nouvelles ressources prévues par le projet de loi contribueront largement à le résoudre, mais le SBDC, que le projet de loi soit ou non adopté, devrait examiner ses procédures pour en accroître l'efficience. De même que le processus d'examen des fusions a été amélioré avec la mise en place d'une procédure accélérée pour les transactions ne suscitant pas d'inquiétude sur le plan de la concurrence, un processus analogue pourrait être instauré pour les enquêtes sur les comportements. Un facteur susceptible de compliquer la situation est que, selon la législation actuelle, le CADE doit approuver la décision du SDE de clore une enquête préliminaire, nécessitant un rapport du SDE et une décision formelle du CADE.

Le SBDC devrait réfléchir aux moyens de rationaliser ce processus, conformément aux obligations de diligence imposées aux parties concernées par la législation brésilienne.

213. Le regroupement du processus au sein du CADE, objectif poursuivi par le projet de loi, devrait aller dans ce sens. Le directeur général prendrait la décision finale de clore une enquête au stade préliminaire. À première vue, le projet de loi suscite certaines inquiétudes parce qu'il semble créer une troisième étape formelle dans le processus d'enquête (voir la section 4.2). Cela risque de ralentir l'instruction des dossiers, dans la mesure où des procédures formelles au sein de la direction générale sont jugées nécessaires à la progression d'une enquête d'une étape à l'autre. Il faut veiller à ce que le processus soit aussi efficient et aussi peu bureaucratique que possible, dans le respect des obligations de diligence.

7.3.2 S'efforcer, dans la mesure du possible, d'imposer des mesures correctrices de nature structurelle plutôt que comportementale dans les affaires de fusion.

214. Le CADE a souvent imposé des mesures comportementales dans les affaires de fusion. Il pourrait être utile d'étudier l'efficacité de ces mesures dans certaines de ces affaires. L'expérience d'autres pays a toutefois montré que les mesures structurelles sont plus efficaces que celles comportementales et plus simples à gérer. Si le projet de loi est adopté, la notification préalable des fusions renforcera la capacité du CADE d'exiger des mesures correctrices structurelles, ce qu'il doit faire dès qu'il en a la possibilité.

7.3.3 Poursuivre les efforts visant à améliorer la communication et la coordination entre le SBDC et les procureurs fédéraux et des États, surtout dans les affaires et les enquêtes engagées à l'initiative des procureurs.

215. Les poursuites pénales constituent un volet important du programme brésilien de lutte contre les ententes. Ces affaires sont instruites par les procureurs fédéraux et des États, et non par le SBDC. Le SBDC et les procureurs ont noué des relations de travail de qualité, surtout dans les enquêtes engagées par le SDE. Toutefois, les procureurs sont habilités à entamer une procédure indépendamment du SBDC, et ils l'ont fait à plusieurs occasions. Lorsqu'ils agissent ainsi, ils consultent souvent le SBDC, mais n'y sont pas obligés. Il serait opportun d'obliger les procureurs à consulter le SBDC avant d'ouvrir une enquête pour violation du droit de la concurrence. Cette coordination permettrait d'éviter les procédures indues, notamment celles qui ne justifient pas des poursuites pénales ou qui ne sont pas viables en vertu des principes de concurrence applicables.

216. Cette coordination renforcée aurait notamment pour avantage de procurer des données de meilleure qualité dans les affaires pénales, comme le nombre de condamnations et le nombre et la durée des peines d'emprisonnement. Ces informations n'ont pas qu'un intérêt purement théorique. Dûment réunies et diffusées, elles renforcent l'effet dissuasif puissant des poursuites pénales.

7.3.4. Créer une fonction de promotion de la concurrence au sein du CADE, mais éviter surtout un chevauchement des tâches avec le SEAE dans ce domaine.

217. La contribution du SEAE à la promotion de la concurrence n'est pas négligeable (voir la section 6). Néanmoins, le CADE a décidé à juste titre de renforcer ses capacités en économie de la concurrence, notamment en vue de créer un département de promotion de la concurrence. Ce département devra communiquer avec les organismes de régulation sectoriels dans les affaires les concernant. En effet, ces affaires peuvent donner lieu à des propositions d'actions réglementaires dont l'organisme de régulation doit être informé. À certaines occasions, mais le plus rarement possible, le CADE et le SEAE peuvent ne pas être d'accord sur un aspect important touchant la promotion de la concurrence. Il sera encore plus important d'accumuler une expertise réglementaire si le projet de loi est voté, car il aura pour effet de tracer une ligne de démarcation nette entre le SEAE et les autorités chargées d'appliquer le droit de la

concurrence. Parallèlement, le CADE ne doit pas faire double emploi avec les fonctions de promotion de la concurrence exercées par le SEAE ; les deux organismes doivent coordonner leurs activités dans ce domaine. Ils doivent collaborer dans une affaire si l'efficience est en jeu.

7.3.5 Poursuivre les efforts pour agir plus efficacement en justice. À plus long terme, envisager de modifier le système judiciaire en vue d'accélérer le traitement des affaires de concurrence.

218. Le SBDC est désormais conscient qu'il s'agit de l'une de ses principales tâches. De fait, si le projet de loi est voté, remédiant à plusieurs problèmes mentionnés précédemment, ce sera le principal défi à relever. Il a commencé à travailler sur cette question en engageant des actions en justice pour faire appliquer les décisions du CADE, réorganisant ses procédures d'instruction des dossiers, renforçant ses compétences pour agir en justice et sensibilisant les juges aux dossiers de concurrence et aux difficultés particulières qu'ils comportent. Ces efforts doivent être poursuivis et, si le projet de loi est adopté, des ressources supplémentaires doivent leur être consacrées.

219. Malheureusement, le problème sous-jacent, à savoir les retards dans l'instruction des dossiers par la justice, échappe largement au SBDC. Le SBDC et d'autres parties concernées pourraient réfléchir aux modifications à apporter au système susceptibles d'accélérer l'examen des affaires de concurrence. Le Rapport de 2005 préconisait de désigner des juges spécialisés et d'instaurer des commissions d'appel afin de résoudre les questions relatives au droit de la concurrence. À une question posée à ce sujet, le SBDC a répondu que le CADE avait pris contact avec l'Association des juges fédéraux afin d'évaluer la faisabilité de cette proposition. Les juges ont répondu que le nombre d'affaires de concurrence était trop faible pour justifier la nomination de juges spécialisés. Il faut également souligner que tous les appels d'une décision du CADE étant interjetés devant le tribunal de première instance du district fédéral, ce tribunal sera de plus en plus familier de ces affaires.

220. Quoi qu'il en soit, le problème des délais excessifs continue de se poser. Une solution pourrait consister à créer des règles spéciales qui s'appliqueraient aux appels formés à l'encontre de décisions rendues par des tribunaux spécialisés comme le CADE, par exemple contourner le tribunal de première instance et interjeter l'appel directement devant un tribunal de deuxième instance. Il existe sans doute d'autres solutions auxquelles les experts juridiques brésiliens pourraient réfléchir.

7.3.6 Tirer profit des procédures établies pour le règlement amiable des affaires de comportement et de fusion, ce qui accroîtrait l'efficience et éviterait des recours judiciaires longs et coûteux.

221. Il existe des procédures permettant de régler à la fois les affaires de comportement et de fusion, et le CADE a commencé à les appliquer plus souvent. Conscient de l'importance de disposer d'un instrument à cette fin, il a mis en place une unité spécialisée dans les négociations en vue d'un règlement. Si le projet de loi est adopté, établissant une notification préalable aux fusions, les parties à la fusion seront plus incitées à régler à l'amiable les questions problématiques afin que leur projet puisse aller rapidement de l'avant. Si les défendeurs dans des affaires de comportement ont le sentiment qu'ils peuvent retarder indéfiniment l'imposition des sanctions décidées par le CADE en faisant appel devant les tribunaux, ils continueront probablement de préférer cette solution. Le CADE a trouvé la bonne parade en affirmant résolument son droit d'imposer aux défendeurs de consigner leur amende auprès du tribunal ou de déposer une caution. Ces deux formules peuvent être onéreuses dans la durée. Quoi qu'il en soit, le CADE constate que les participants dans les affaires d'ententes internationales sont disposés à négocier un règlement, ne serait-ce que pour dissiper l'incertitude.

222. Une mise en garde s'impose concernant les efforts du CADE pour parvenir à un règlement amiable : l'organisme ne doit pas se satisfaire d'un accord sur un montant trop faible. À long terme, cette pratique aurait un impact négatif considérable sur l'application du droit.

COMPETITION LAW AND POLICY IN BRAZIL

PORTUGUESE VERSION

Lei e Política de Concorrência no Brasil

Uma revisão pelos pares

OCDE

2010

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LEI E POLÍTICA DE CONCORRÊNCIA NO BRASIL

Uma revisão pelos pares

-- 2010 --

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Prefácio

O Sistema Brasileiro de Defesa da Concorrência (SBDC) foi objeto de revisão pelos pares (*peer review*) em 2010, no Fórum Global da Concorrência que aconteceu em Paris nos dias 18 e 19 de fevereiro de 2010. O Fórum, que reúne líderes de autoridades de defesa da concorrência de cerca de 80 jurisdições ao redor do mundo, é uma fonte significativa para as autoridades atuantes no que diz respeito às melhores práticas de concorrência.

A revisão pelos pares é um elemento central do trabalho da OCDE. Ela está fundada na disposição de um país em submeter suas leis e políticas a revisões substantivas conduzidas por outros membros da comunidade internacional. O processo fornece valiosos *insights* para o país objeto do estudo, além de promover a transparência e o entendimento recíproco em benefício de todos.

A revisão pelos pares é também um importante instrumento para o fortalecimento das instituições de concorrência nacionais. Órgãos de concorrência fortes e eficazes podem, por sua vez, promover e proteger a concorrência em dada economia, o que aumenta a produtividade e o desempenho econômico em geral.

Essa é a segunda vez que o SBDC se submete à revisão pelos pares e esta acontece em um momento relevante, em que o Congresso Nacional brasileiro analisa o fortalecimento e a racionalização do Sistema. Espera-se que a análise e as recomendações dessa revisão pelos pares sejam úteis para o processo de reforma. A primeira revisão pelos pares foi realizada em 2005, no Fórum Latino-Americano de Concorrência organizado pelo BID/OCDE.

A OCDE e o BID, por meio de seu Setor de Integração e Comércio (SIC), sentem-se honrados pelo fato de essa parceria poder contribuir para a promoção de políticas de concorrência na América Latina e no Caribe. Esse trabalho é consistente com as políticas e os objetivos de ambas as Organizações: apoiar políticas pró-concorrenciais e reformas regulatórias que venham a promover o crescimento econômico dos mercados na região.

A OCDE e o BID desejam agradecer ao governo brasileiro por voluntariar-se para ser examinado por seus pares. Gostaríamos também de agradecer ao Sr. John Clark, autor do relatório, aos Examinadores (Enrique Vergara, Chile; Mona Yassine, Egito; e William Kovacic, Estados Unidos) e aos diversos representantes de autoridades de defesa da concorrência cuja participação ativa na revisão pelos pares contribuiu para o seu êxito.

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Resumo

A era moderna da política de concorrência no Brasil iniciou com a publicação da Lei de Defesa da Concorrência de 1994, que criou os três órgãos que compõem o Sistema Brasileiro de Defesa da Concorrência – SBDC. Avanços realizados desde 2003 eliminaram a sobreposição de funções, de modo que a SDE se concentrou nos acordos anticompetitivos e condutas unilaterais e a SEAE na análise dos atos de concentração.

As investigações de cartéis foram aperfeiçoadas, por meio da introdução de poderes para a condução de buscas e apreensões e da criação de um programa de leniência. A persecução penal de cartéis é conduzida pelos Ministérios Públicos Federal e Estadual, em cooperação com o SBDC.

A análise dos atos de concentração foi aprimorada pela adoção de procedimentos sumários, de forma que os atos de concentração que não apresentem problemas concorrenciais sejam analisados e aprovados rapidamente. Entretanto, essa análise ainda carece de um sistema de notificação prévia.

A advocacia da concorrência junto a outros órgãos governamentais e reguladores é particularmente relevante e eficaz, uma vez que é realizada principalmente pela SEAE, cuja posição dentro do poderoso Ministério da Fazenda permite acesso a diversas áreas do governo.

O principal problema enfrentado pelo SBDC continua sendo a falta de pessoal, combinada com a alta taxa de rotatividade dos funcionários. O CADE não possui um corpo de funcionários permanente. A SDE também sofre de déficit crônico de pessoal, o que leva a um grande acúmulo de investigações. Outro problema existente é a revisão judicial. Recursos impetrados contra as decisões do CADE são bastante comuns, e os casos demoram anos para tramitarem por todo o sistema judicial brasileiro. O resultado pode ser, efetivamente, a frustração completa da aplicação das decisões do CADE durante esse longo processo de sucessivos recursos judiciais.

Propostas para corrigir as falhas da legislação de concorrência de 1994 têm sido feitas por anos, sem que se tenha, contudo, obtido êxito. Mas, atualmente, o prognóstico da reforma parece bastante promissor. Em meados de janeiro de 2010, o projeto de lei que consolida o SBDC em uma única agência, impõe a notificação prévia dos atos de concentração e provê a autoridade com um número significativo de cargos permanentes, havia sido aprovado pela Câmara dos Deputados e estava em trâmite no Senado Federal. Entretanto, esse processo

ainda não foi concluído, e havia a necessidade urgente de finalizá-lo na primeira metade do ano, antes que fosse posto de lado em virtude de outros eventos relevantes, dentre os quais, em particular, as eleições nacionais em outubro.

O relatório fornece diversas recomendações para o aprimoramento do Sistema. A mais importante é, de longe, a ênfase na promulgação do projeto de lei em trâmite no Congresso Nacional. Outras recomendações estão relacionadas à: redução do acúmulo das investigações de condutas anticoncorrenciais; ampliação do uso de acordos tanto em casos de conduta como em atos de concentração, aumentando assim a eficiência e reduzindo o número de recursos interpostos junto aos tribunais; ampliação da aplicação de remédios estruturais em atos de concentração; ampliação da cooperação entre os órgãos de concorrência e os Ministérios Públicos nas instâncias estadual e federal em processos criminais por estes iniciados; promulgação de projeto de lei que confirmaria a competência da autoridade de concorrência para a análise de concentrações no setor financeiro, atualmente em discussão; desenvolvimento de maior capacidade de exercício da advocacia da concorrência pelo CADE, em coordenação com a SEAE; e continuação da busca por soluções mais eficazes para o tratamento e tramitação de litígios do SBDC perante os tribunais.

Introdução

A história da política de concorrência no Brasil é rica e interessante. A era moderna da política de concorrência começou em meados dos anos 90, coincidentemente com a transição do país para uma economia de mercado. O novo sistema de aplicação da Lei de Defesa da Concorrência ganhou rapidamente reputação de profissionalismo e esforço, ao mesmo tempo em que suas decisões refletiam um novo entendimento da política e análise da concorrência. Entretanto, o Sistema foi confrontado com uma série de problemas, muitos dos quais encontram sua raiz na própria Lei de Defesa da Concorrência promulgada em 1994. O Sistema criado foi composto por três autoridades independentes, que coordenavam suas atividades de forma ineficiente. As investigações ocorriam lentamente; muitos recursos foram destinados à análise de atos de concentração, a grande maioria das quais não representava uma ameaça à concorrência; pouca atenção foi dedicada ao combate a cartéis clássicos (*hard core*), sabidamente o tipo mais prejudicial de conduta anticoncorrencial. E, talvez o elemento mais fragilizador, as autoridades padeciam de recursos insuficientes e altos índices de rotatividade de pessoal.

As falhas da Lei de Defesa da Concorrência tornaram-se aparentes de forma bastante rápida. Diversas alterações foram propostas no início de 2000, mas a maior parte delas não entrou em vigor. Não obstante, o sistema de política de concorrência demonstrou um progresso consistente, até mesmo notável. Tornou-se mais eficiente, especialmente na análise de fusões, permitindo que redirecionasse suas prioridades para a repressão a cartéis. Seu programa de combate a cartéis é hoje amplamente respeitado no Brasil e no exterior. Entranto, progressos adicionais dependem de mudanças na Lei de Defesa da Concorrência. Quando da publicação deste relatório, parecia que esse importante passo estava prestes a acontecer. O projeto de lei para uma nova legislação de defesa da concorrência, discutido detalhadamente no item 4 abaixo, fora aprovado em uma das casas do Congresso e estava sendo debatida na segunda.

Esse é o segundo relatório sobre política de concorrência no Brasil, elaborado como parte do processo de revisão pelos pares da OCDE. O primeiro foi publicado em 2005 (relatório de 2005) [1]. Este relatório continha várias recomendações para o aprimoramento da política de concorrência no país, muitas das quais demandavam alterações na lei. Tais alterações podem finalmente vir a ser promulgadas. O relatório de 2005 também fez outras recomendações que não dependiam de nova legislação, a maior parte das quais foi adotada. E, finalmente, o relatório sugeriu mudanças para o

aprimoramento da legislação que estava em tramitação no Congresso e muitas dessas mudanças também foram aceitas.

O presente relatório acompanha o formato tradicional empregado pela OCDE em suas revisões pelos pares em política de concorrência. Concentra-se, em particular, no combate a cartéis, na análise de atos de concentração (conteúdo e procedimento) e na revisão judicial das decisões do CADE.

1. Política de concorrência no Brasil: fundamentos e contexto

As políticas econômicas do Brasil pós II Guerra Mundial foram caracterizadas pela profunda intervenção governamental no mercado. A maioria das grandes empresas do país nas áreas de indústria, transporte e finanças era de propriedade do Estado. Os preços eram controlados pelo Estado, o que na realidade era feito com a cooperação do setor privado; as associações comerciais consultavam regularmente o órgão governamental que estabelecia os preços.[2] Em 1962, foi promulgada a primeira lei de defesa da concorrência brasileira (Lei n.º 4.137/62) criando o Conselho Administrativo de Defesa Econômica – CADE. O CADE foi incumbido de, entre outras competências, impedir o abuso do poder econômico manifestado por meio da eliminação total ou parcial da concorrência"[3], dado o controle generalizado do governo sobre a economia. No entanto, por conta do rígido controle da economia pelo Estado, a lei surtiu pouco efeito.

O processo de liberalização econômica brasileiro foi iniciado em 1990, quando o Presidente da República promoveu uma série de reformas, incluindo a privatização, a liberalização de preços e a desregulamentação. Em 1994, em reação a um período de hiperinflação, foi adotado o Plano Real. Seus principais componentes foram a introdução de uma nova moeda, que à época estava atrelada ao dólar, (o que não ocorre desde 1999, quando foi permitida a flutuação da moeda) e de políticas fiscais e de crédito rígidas. Como parte das reformas de 1994, uma nova Lei de Defesa da Concorrência foi promulgada, a Lei n.º 8.884/94. A nova lei revigorou o CADE, que se tornou uma agência independente, e introduziu o controle de fusões. A privatização das empresas estatais continuou durante os anos 90. Agências reguladoras novas e independentes foram criadas para os setores de telecomunicações, eletricidade, petróleo e gás natural, transporte terrestre e aviação civil. Entretanto, a privatização não foi completa. O governo se mantém atuante em alguns setores, notadamente em petróleo e gás por meio do controle da Petrobrás, a empresa dominante neste setor; na geração e transmissão de eletricidade e no sistema financeiro.

2. Questões Substantivas: conteúdo e aplicação do Direito de Concorrência

A política de concorrência tem seu fundamento na Constituição Brasileira promulgada em 1988. O artigo 173, §4, determina que "[a] lei reprimirá o abuso do poder econômico que vise à dominação dos mercados, à eliminação da concorrência e ao aumento arbitrário dos lucros." O artigo 170 estabelece que "a ordem econômica, fundadana valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social", em observância a certos princípios, dentre os quais a livre concorrência, a função social da propriedade, a defesa do consumidor e a propriedade privada. O artigo 1º da Lei de Defesa da Concorrência reflete esses princípios constitucionais. Nele, estabelece-se que a Lei "dispõe sobre a prevenção e a repressão às infrações contra a ordem econômica, orientada pelos ditames constitucionais de liberdade de iniciativa, livre concorrência, função social da propriedade, defesa dos consumidores e repressão ao abuso do poder econômico."

A Lei n.º 8.884, promulgada em 1994, continua sendo a Lei de Defesa da Concorrência brasileira. Ela confere poder de decisão ao CADE, autarquia federal vinculada ao Ministério da Justiça[4]. O CADE é composto por um Presidente e seis Conselheiros. O Presidente e os Conselheiros são nomeados pelo Presidente da República e aprovados pelo Senado Federal para mandatos de dois anos, podendo ser reconduzidos para mais um mandato[5]. A Lei também atribuiu competências relevantes para sua aplicação a dois outros órgãos governamentais, a Secretaria de Direito Econômico – SDE, do Ministério da Justiça, e a Secretaria de Acompanhamento Econômico – SEAE, do Ministério da Fazenda. A SDE inicia todas as investigações em casos de conduta (acordos anticompetitivos e condutas unilaterais) e submete pareceres técnicos e recomendações aos casos encaminhados ao CADE para decisão. Também a SEAE tem poderes para a condução de investigações em casos de conduta iniciados pela SDE. Ademais, ambas analisam e submetem pareceres técnicos ao CADE em atos de concentração notificados ao SBDC. O CADE pode complementar as investigações conduzidas pela SDE e SEAE tanto em casos de conduta como de fusões. Coletivamente, os três órgãos – CADE, SDE e SEAE – compõem o Sistema Brasileiro de Defesa da Concorrência (SBDC).

A Lei foi alterada por três vezes: em 1999, para a imposição de uma taxa de notificação para atos de concentração; em 2000, para conferir ao SBDC novos poderes na condução de investigações, notadamente para conduzir buscas e apreensões e instituir um programa de leniência; e em 2007, para esclarecer os procedimentos aplicáveis à negociação de acordos em casos de conduta e autorizá-la inclusive em casos envolvendo cartéis. O

projeto de lei de defesa da concorrência em tramitação no Congresso Nacional é abrangente e prevê a modificação da estrutura do SBDC, além de alterar seus procedimentos de diversos modos. A maior parte das funções exercidas pelas três autoridades que hoje compõem o Sistema seria consolidada no CADE. Os mandatos dos Conselheiros do CADE seriam ampliados de dois para quatro anos, sem possibilidade de recondução. Uma Superintendência-Geral seria criada no âmbito do CADE para executar as funções de investigação hoje conduzidas pela SDE e pela SEAE. Seria, ainda, instaurada a notificação prévia dos atos de concentração, exigindo-se desse modo que as partes que propusessem uma fusão adiassem a conclusão da transação até que a análise do CADE fosse concluída. Os recursos humanos do CADE seriam multiplicados pela criação de 200 novos cargos, permanentes, na agência. Essa legislação é descrita em maiores detalhes no item 4 abaixo.

2.1. Condutas

Os artigos 20 e 21 da Lei nº 8.884 tratam de todos os tipos de infração à ordem econômica não relacionados a atos de concentração. Diferentemente da lei de muitos países, a lei brasileira não contém disposições diferenciadas para lidar com os acordos anticompetitivos ou com as condutas unilaterais.[6] O artigo 20, que contém as disposições gerais referentes a condutas anticompetitivas, prevê:

> *... os atos sob qualquer forma manifestados, que tenham por objeto ou possam produzir os seguintes efeitos, ainda que não sejam alcançados:*
>
> *I. limitar, falsear ou de qualquer forma prejudicar a livre concorrência ou a livre iniciativa;*
>
> *II. dominar mercado relevante de bens ou serviços;*
>
> *III. aumentar arbitrariamente os lucros;*
>
> *IV. exercer de forma abusiva posição dominante.*

O artigo exclui especificamente da violação ao inciso II a conquista de mercado por meio da eficiência competitiva. O artigo estabelece, ainda, que a posição dominante é presumida quando "uma empresa ou grupo de empresas" controla 20% de um mercado relevante. É previsto que o CADE pode alterar esse limite de 20% "para setores específicos da economia", mas o Conselho não o fez oficialmente até a presente data.

O artigo 21 contém uma longa lista – não exaustiva – de atos que são considerados violações ao artigo 20, caso produzam os efeitos enumerados neste artigo. As práticas listadas incluem vários tipos de acordos horizontais

e verticais, bem como os exercícios abusivos de posição dominante. Os cartéis são expressamente proibidos. Especificamente listados encontram-se os acordos para fixar preços ou condições de venda, dividir mercados, combinar preços ou ajustar vantagens em licitações públicas e limitar pesquisa e desenvolvimento. As práticas verticais enumeradas (que podem ser abusivas se impostas unilateralmente) incluem a manutenção de preços de revenda e outras restrições que afetam a venda para terceiros, discriminação do preço e venda casada. As práticas unilaterais listadas incluem várias ações para excluir ou prejudicar empresas entrantes ou rivais já existentes, incluindo as recusas de contratar e as limitações ao acesso a insumos ou a canais de distribuição, "vender injustificadamente mercadoria abaixo do preço de custo" ou "impor preços excessivos, ou aumentar sem justa causa o preço de bem ou serviço". [7]

Além dessas práticas, que também são comumente consideradas infrações à ordem econômica em outros países, o artigo 21 enumera várias outras, que, como descrito, são menos familiares. Entre elas estão: "recusar a venda de bens ou a prestação de serviços, dentro das condições de pagamento normais aos usos e costumes comerciais; reter bens de produção ou de consumo, exceto para garantir a cobertura dos custos de produção; abandonar, fazer abandonar ou destruir lavouras ou plantações, sem justa causa comprovada; cessar, parcial ou totalmente, as atividades da empresa sem justa causa comprovada". Essas provisões criam espaço para a aplicação imprópria da lei, mas, até o momento, isso não aconteceu. As decisões do CADE são regularmente baseadas nos mesmos conceitos antitruste utilizados em outros países.

A Lei de Defesa da Concorrência se aplica às empresas, associações de empresas e indivíduos. [8] As empresas estão sujeitas a multas de 1 a 30 por cento do faturamento bruto do ano anterior ao início da investigação, multa essa que não pode ser inferior ao ganho total proveniente da infração. Os administradores das empresas que incorrerem em violação podem ser multados com valores que oscilam entre 10 e 50 por cento da multa aplicada à empresa. Note-se que a multa deve ser calculada como um percentual do faturamento bruto total dos acusados, e não somente do faturamento bruto oriundo do mercado relevante ou afetado. [9] Outras organizações e indivíduos que não estejam envolvidos no comércio (tais como associações comerciais), e que, portanto, não possuam receitas sobre as quais uma multa possa ser calculada, podem ser multadas em valores oscilantes entre R$ 6.000,00 e R$ 6.000.000,00 (atualmente cerca de US$ 3.500,00 - US$ 3.500.000,00).

O CADE também dispõe de outras sanções possíveis de serem aplicadas, detendo inclusive poderes para impedir uma empresa de participar em licitações públicas por um período de até cinco anos; exigir a dissolução

de uma empresa ou a alienação parcial de seus bens e emitir ordens de reparação com a finalidade de prevenir a recorrência de violações.[10] O CADE também pode aplicar multas pelo descumprimento de suas determinações e pela obstrução, por quaisquer meios, de uma investigação.[11]

As diretrizes para a análise das práticas comerciais restritivas se encontram nos dois anexos da Resolução nº 20 do CADE, publicada em 1999. O anexo I da Resolução contém definições e classificações relativas às práticas anticoncorrenciais. Nele, diferenciam-se os cartéis de outros acordos horizontais. Não se aplica especificamente uma regra *per se* para os casos de cartéis, mas aplica-se um *standard* mais rigoroso a esses casos. O anexo aponta que acordos horizontais, à exceção de cartéis, podem ter efeitos benéficos, pró-concorrenciais, o que exige uma aplicação mais criteriosa da regra da razão. O anexo define "preços predatórios" como "prática deliberada de preços abaixo do custo variável médio, visando eliminar concorrentes para, em momento posterior, poder praticar preços e lucros mais próximos do nível monopolista". Essa definição exige especificamente que existam condições que permitam a recuperação das perdas iniciais, após uma bem sucedida estratégia de exclusão de concorrentes do mercado. O anexo também define práticas comerciais restritivas verticais, constatando que seus principais efeitos anticoncorrenciais podem ser a exclusão de rivais ou a facilitação de conluio no mercado *a montante* ou *a jusante*. Por outro lado, também está previsto que tais práticas podem beneficiar a concorrência em certos casos, exigindo, portanto, a aplicação da regra da razão. O anexo ainda prevê que as "práticas restritivas verticais pressupõem, em geral, a existência de poder de mercado sobre o mercado relevante 'de origem'...".

Por sua vez, o anexo II apresenta os "critérios básicos na análise de práticas restritivas", que descrevem uma série de passos que devem ser seguidos. Os passos incluem: a definição de mercado relevante em ambas as dimensões, de produto e geográfica, aplicando considerações de substitutabilidade efetiva ou potencial por compradores; identificação de participação de mercado e índices de concentração, utilizando o índice CRx e/ ou HHI; análise de barreiras à entrada; análise dos efeitos concorrenciais da infração; análise de possíveis eficiências econômicas resultantes da conduta e a ponderação entre os ganhos de eficiência e o prejuízo para a concorrência em decorrência da conduta, se necessário.

2.1.1. Cartéis

A partir de 2000, o SBDC começou a se concentrar no combate a cartéis. Em 1999, foi concluído o que muitos consideram ser o primeiro verdadeiro caso de cartel no Brasil, ocorrido na indústria de aço.[12] Em 2000,

uma alteração na Lei de Defesa da Concorrência conferiu ao SBDC dois novos importantes poderes: a possibilidade de realizar buscas e apreensões e o de instituir um programa de leniência.[13] Entretanto, esses poderes foram subutilizados por alguns anos. O SBDC estava limitado por um processo de revisão de atos de concentração, o que era altamente ineficiente. As análises de tais atos eram lentas, mesmo para os casos que claramente não representavam uma ameaça significativa à concorrência. Esse processo ainda ocupava recursos em demasia - até 70%, de acordo com algumas estimativas. O SBDC não dispunha de recursos suficientes para promover um vigoroso programa de combate a cartéis, e, além disso, não possuía a experiência necessária para utilizar suas novas ferramentas investigativas de forma efetiva.

A situação começou a mudar em 2003. O SBDC adotou novos procedimentos que tornaram as análises de atos de concentração mais eficientes, liberando recursos para a atividade de combate a cartéis. Nesse mesmo ano, a SDE realizou as primeiras buscas e apreensões e o primeiro acordo de leniência foi assinado. A SDE foi reconfigurada para se tornar essencialmente uma unidade de combate a cartéis. Em 2007, a SDE criou uma coordenação específica para concentrar-se no combate a cartéis em licitações e em promover a concorrência em compras públicas. Em 2009, a SDE criou seu próprio laboratório de informática, dirigido por um especialista em tecnologia de informação, que opera ferramentas de *hardware* e *software* sofisticados com a finalidade de analisar as informações obtidas nas operações de buscas e apreensões e por outros meios.

Nos últimos anos, especialmente a partir de 2006, o programa de combate a cartéis do SBDC cresceu de forma constante (veja a Tabela 1).

Tabela 1. O esforço de combate a cartéis: 2003-2009

	2003	2004	2005	2006	2007	2008	2009*
Casos de Cartel instaurados **	N/A	N/A	5	4	5	3	14
Buscas e Apreensões***	7	4	0	19	84	93	24
Sanções impostas	5	8	10	5	8	6	3
Multas estipuladas (em milhões de dólares)	418	1 833	0	1	2 495	60 485	61 199

* Janeiro a Setembro.

** Estes números representam investigações em seu estágio mais completo, ou seja, "processos administrativos". Um processo administrativo é a terceira fase no processo de investigação na SDE, após o "procedimento administrativo" e a "averiguação preliminar".

*** Mandados de busca e apreensão cumpridos.

2.1.1.1. O programa de leniência

O Brasil tem um programa de leniência ativo, que vem resultando em novas propostas de acordos de leniência e de casos[14]. A estrutura de tal programa se assemelha à existente em vários outros países. O artigo 35-B da Lei de Defesa da Concorrência é o dispositivo legal que permite a celebração de acordos de leniência. Esse artigo prevê que a SDE pode celebrar acordos com pessoas físicas e jurídicas participantes de um cartel e que, dependendo das circunstâncias, isso pode resultar em imunidade administrativa total aos proponentes ou pode reduzir as sanções aplicáveis em um a dois terços. O candidato deve preencher as seguintes condições:

> *i. A empresa ou pessoa física seja a primeira a se qualificar com respeito à infração noticiada ou sob investigação; ii. a empresa ou pessoa física cesse completamente seu envolvimento na infração noticiada ou sob investigação a partir da data de propositura do acordo; iii. O proponente não pode ter estado à frente da conduta tida como infração caracterizada; iv. O proponente deve concordar em cooperar plenamente com a investigação; v. A cooperação deve resultar na identificação dos outros membros da conspiração e na obtenção de provas que demonstrem a prática denunciada; vi. No momento da propositura do acordo, a SDE não pode dispor de provas suficientes para assegurar a condenação do proponente.*[15]

O grau em que o proponente estará dispensado das sanções aplicáveis à infração dependerá do nível de conhecimento prévio da SDE sobre o suposto cartel. A imunidade total é aplicável se a SDE não tiver qualquer conhecimento da atividade ilegal; a leniência parcial, que prevê redução de até dois terços da multa prevista, é conferida se a SDE tiver algum conhecimento prévio da conduta. No entanto, neste caso, se a multa for aplicada, ela não poderá ser superior à menor multa aplicada a qualquer outro participante do cartel. Um acordo de leniência firmado com uma empresa pode ser estendido aos seus representantes e funcionários, caso eles também o assinem e sejam observadas as demais condições acima descritas. A concessão de leniência no âmbito deste programa também exclui o requerente de processo criminal pela mesma conduta no âmbito da Lei Federal de Crimes contra a Ordem Econômica.[16] Porém, esse benefício não se estende a outros dispositivos penais, como seria o caso de extorsão e fraude, que podem se aplicar a essa conduta. O proponente, ademais, não fica excluído de possível responsabilidade por danos em uma ação civil.[17]

O artigo 35 prevê, ainda, a possibilidade de concessão de "leniência *plus*", que também faz parte de programas de leniência de outros países. Um candidato que não se qualificar para a leniência em um determinado cartel, mas que revelar à SDE a existência de um segundo cartel, torna-se elegível

para receber leniência plena para o segundo cartel e uma redução de até um terço da pena aplicável ao primeiro. Por fim, conquanto a SDE, principal responsável pela investigação de condutas anticoncorrenciais dentro do SBDC, tenha autoridade para firmar um acordo de leniência por conta própria, cabe ao CADE tomar a decisão final acerca da sanção aplicável, dispensando a aplicação da sanção ao beneficiário da leniência ou reduzindo-lhe as penalidades, a depender do fato de ter a SDE conhecimento prévio da conduta.

O SBDC continua a atualizar o seu programa de leniência. O programa brasileiro, como o de alguns outros países, oferece leniência apenas para o primeiro participante de cartel que se apresenta às autoridades. Isso pode ter um forte efeito desestabilizador sobre o conluio, criando um incentivo entre os participantes para que sejam os primeiros a se apresentar, especialmente em situações em que haja um crescente receio de que o cartel possa ser descoberto. Pode ocorrer de um candidato não ter informações suficientes para se qualificar totalmente a um pedido de leniência em um primeiro momento. Em 2006, o SBDC criou um "sistema de senhas", novamente a exemplo do encontrado em outros países, por meio do qual um candidato pode garantir seu lugar na fila de leniência simplesmente fazendo um pedido inicial, informal, à SDE, e provendo algumas informações básicas.[18] É preciso que essa proposição inicial seja posteriormente aperfeiçoada, fornecendo informações mais detalhadas no prazo de 30 dias, e o acordo final de leniência deve ser negociado no prazo de seis meses.[19] Em 2008, a SDE publicou um Modelo de Acordo de Leniência e o Guia do Programa de Leniência e o SBDC publicou uma cartilha para o público, denominada *Cartilha sobre Combate a Cartéis e Programa de Leniência*.[20]

Entre 2003 e 2009, a SDE firmou 15 acordos de leniência e outros estavam sendo negociados. Aproximadamente 60% desses acordos foram firmados com partes envolvidas em cartéis internacionais, em situações em que elas assinaram acordos de leniência em outros países. Houve também alguns processos referentes a cartéis nacionais que resultaram de acordos de leniência. Talvez o mais notável deles tenha sido o cartel de prestação de serviços de segurança (o denominado Cartel dos Vigilantes), descrito abaixo. A SDE tem sido particularmente pró-ativa na promoção do programa de leniência. A Secretaria enviou cartas para 1.000 empresas no Brasil, informando-as do programa de leniência, o que incentivou várias delas a se apresentar e discutir sua elegibilidade. Também conduziu uma missão internacional, no âmbito da qual foram realizadas reuniões com escritórios de advocacia em Washington e Bruxelas, informando-os das conseqüências da persecução da infração de cartel no Brasil, incluindo um possível processo penal, a que estavam sujeitos os executivos estrangeiros envolvidos em cartel que afetasse o mercado brasileiro.

2.1.1.2. Acordos de cessação da investigação em casos de cartel (Termo de Compromisso de Cessação de Prática)

O artigo 53 da Lei de Defesa da Concorrência permite ao CADE celebrar acordos em casos de conduta para encerrar um processo administrativo (Termos de Compromisso de Cessação - TCCs), mas tal Lei inicialmente previa que isso não era aplicável aos casos de cartel. Isso mudou com a alteração da Lei de Defesa da Concorrência ocorrida em 2007.[21] Um Representado pode propor um acordo a qualquer tempo durante o processo, esteja a investigação na SDE ou no CADE. O CADE tem competência exclusiva para negociar tais acordos, embora a SDE possa fazer recomendações ao CADE acerca de seus termos. Em 2009, o CADE criou uma Comissão especializada, cujos membros conduzem todas as negociações de acordos em casos de conduta.[22] Em um caso com vários Representados, um único acusado pode chegar a um acordo, sendo que o processo continuará contra os demais investigados.

Os Representados têm uma única oportunidade para chegar a um acordo com a autoridade antitruste. Esse acordo deve ser alcançado no prazo de 30 dias, a partir do início das negociações, com a possibilidade de uma única prorrogação por mais 30 dias. Os acordos podem ser alcançados com ou sem a admissão de culpa (*nolo contendere*), a critério do CADE. Contudo, se o processo tiver sido iniciado por meio de um acordo de leniência, o Representado deve admitir a culpa. O acordo irá prever o montante da contribuição pecuniária, que não deve ser inferior à multa mínima fixada na Lei de Defesa da Concorrência (1% do faturamento bruto da empresa no ano anterior). O acordo pode também exigir outras ações por parte do Representado, tais como medidas necessárias para cessar a suposta infração ou a criação de um programa de prevenção de infrações à ordem econômica. O acordo se restringe apenas à responsabilidade administrativa. Um Representado que não seja beneficiário de um acordo de leniência deve lidar com os promotores federais e estaduais, em uma análise caso a caso.

Até o momento, acordos para a cessação da investigação em casos de conduta foram celebrados em cinco casos de cartel. Três deles são recentes, um envolvendo um cartel internacional de mangueiras marítimas, o segundo, um cartel internacional de compressores e o terceiro envolvendo auto-escolas. Em 2007, o CADE firmou, em casos separados, acordo com duas empresas que também operam no mercado internacional, quais sejam nas indústrias de cimento e de carne.

2.1.1.3. Ação penal em casos de cartel

Em um período relativamente curto, o Brasil desenvolveu um programa para processar criminalmente os cartéis, programa esse que o posiciona entre os países mais atuantes nesta área. A violação à Lei de Defesa da Concorrência é uma infração administrativa, mas a conduta de cartel também é uma violação à Lei de Crimes contra a Ordem Econômica.[23] O artigo 4º, parágrafo II, desta Lei, aponta como crime: os acordos entre concorrentes para fixar preços ou quantidades, dividir mercados ou controlar o fornecimento ou os canais de distribuição.[24] A lei criminal se aplica apenas aos indivíduos e não às empresas. As violações são puníveis com multa e reclusão de dois a cinco anos. O SBDC não tem competência legal para aplicar a Lei de Crimes contra a Ordem Econômica, sendo isso da competência dos Ministérios Públicos Federal e Estadual (existem 26 Estados e um Distrito Federal no Brasil). Embora a Lei de Crimes contra a Ordem Econômica seja uma lei federal, os promotores de justiça, que atuam na esfera estadual, também têm jurisdição e competência para dar-lhe aplicação.

Os dados sobre processos penais referentes a cartéis são, infelizmente, incompletos. Ainda assim, o SBDC relata que trinta e quatro indivíduos foram condenados criminalmente desde que a iniciativa começou. A maioria desses indivíduos estava envolvida em conluios locais ou regionais, particularmente em cartéis na revenda de combustíveis. Destes, dez receberam sentenças de prisão, mas nenhuma dessas sentenças foi cumprida até a presente data, pois todos os casos estão em fase recursal. O SBDC também afirma que, até o final de 2009, cerca de 100 executivos estavam sendo formalmente acusados de crime de formação de cartel ou estavam sob investigação por tal atividade criminosa.

O SBDC e as autoridades em âmbito federal e estadual que apuram práticas de cartéis mantêm estreitas relações de trabalho. Uma lei de 2002 permite que a Polícia Federal auxilie o SBDC em investigações de cartéis, nos casos em que a conduta tiver efeitos interestaduais ou internacionais.[25] A SDE e a Polícia Federal firmaram um acordo de cooperação, renovado em 2008, que prevê o intercâmbio de informações e de assistência técnica entre esses órgãos. Esse acordo também cria um Grupo de Trabalho composto por dois representantes de cada instituição, cujas responsabilidades são: "(i) coordenar a troca de informações, documentos e experiências entre os órgãos e (ii) a criação de um Centro de Investigação de Cartel, que terá por intuito aproveitar as sinergias nos trabalhos desenvolvidos no que tange às condutas anticoncorrencias...". A polícia auxilia ativamente a SDE em suas investigações de cartéis, e em particular na realização de operações de busca e apreensão.

Um efeito interessante dessa cooperação resulta do fato de a lei penal brasileira autorizar a prisão temporária de indivíduos (por até cinco dias, com a possibilidade de uma extensão por mais cinco dias) no momento da realização de buscas e apreensões nas sedes das empresas, com a finalidade de impedir a destruição ou a alteração de provas. O SBDC relata que, em 2007, 30 pessoas foram presas em investigações de cartéis com fundamento nesse dispositivo legal, e que esse número subiu para 53 em 2008. Em um caso em 2007, referente a suposto cartel na revenda de combustíveis em Belo Horizonte - a terceira maior área metropolitana do Brasil - , 250 policiais e agentes do SBDC participaram das operações de busca e apreensão em 42 empresas. Vinte e três pessoas foram detidas temporariamente. Essa medida é exercida por meio de mandados judiciais de prisão emitidos após a requisição do Ministério Público, mas a SDE raramente o faz em suas investigações. É mais provável que isso seja utilizado pelo Ministério Público em casos iniciados de forma independente por este órgão, como descrito abaixo.

A SDE e os membros dos Ministérios Públicos Federal e Estadual trabalham em conjunto, de forma muito próxima. Quando a SDE inicia uma investigação de cartel, rotineiramente ela solicita aos promotores que iniciem uma investigação criminal paralela. Os promotores também são convidados a assinar acordos de leniência, garantindo assim que o Beneficiário não estará sujeito a processo criminal paralelo. Em 2008, o Ministério Público do Estado de São Paulo criou uma unidade especial para investigar cartéis e cooperar com a SDE em investigações penais e administrativas conjuntas. Este acordo tornou-se um modelo de cooperação entre a SDE e o Ministério Público de outros Estados. Atualmente existem acordos entre a SDE e o Ministério Público de 23 Estados. Estes acordos culminaram na Estratégia Nacional de Combate a Cartéis - ENACC, criada em outubro de 2009 como parte do segundo Dia Nacional de Combate a Cartéis. Duzentos promotores e policiais de diferentes Estados brasileiros se reuniram para discutir a implementação da legislação criminal de combate a cartéis no país. Ao final do evento, as principais autoridades assinaram a "Declaração de Brasília", dedicada a reafirmar e reforçar a cooperação entre essas autoridades no programa nacional de combate a cartéis.

Independentemente do SBDC, os Ministérios Públicos Federal e Estadual podem iniciar processos de investigação de condutas anticoncorrenciais com fundamento na Lei de Crimes contra a Ordem Econômica. Embora os dados correspondentes a esses casos não se encontrem disponíveis, verifica-se que essa prática é relativamente comum. Os promotores não são obrigados a notificar o SBDC quando iniciam tais processos, mas os esforços são crescentes no sentido de melhorar a coordenação entre os órgãos nesses casos, por meio da ENACC, descrita acima.

Quadro 1. Casos recentes e significativos de cartel

2009: Compressores utilizados em refrigeração [26]

Este caso recente, que envolve um suposto cartel internacional, foi iniciado como resultado de um acordo de leniência firmado com a SDE. Posteriormente, houve operações de buscas e apreensões simultâneas realizadas no Brasil, nos Estados Unidos e na Europa, visando os suspeitos de participação no cartel. Mais de 60 agentes da SDE, da Polícia Federal e membros do Ministério Público Federal conduziram a operação no Brasil. Observadores consideraram o caso um marco no programa brasileiro de combate a cartéis. Um autor brasileiro observou: "Foi a primeira vez que as autoridades antitruste brasileiras desempenharam um papel de maior destaque em uma investigação de cartel internacional e é, possivelmente, o início de uma nova era global anticartéis. Foi também o ápice de um processo evolutivo constante de aplicação da legislação de defesa da concorrência no país."[27]

Três subsidiárias brasileiras da fabricante americana de eletrodomésticos Whirlpool chegaram a um acordo com o CADE, pelo qual a empresa pagaria uma contribuição pecuniária de R$ 100 milhões (cerca de US$ 58,7 milhões), e seis executivos pagariam contribuições totalizando R$ 3 milhões (US$ 1,8 milhões). Estas foram as maiores multas estipuladas e pagas até a presente data em um processo de cartel. Como resultado do acordo, os acusados admitiram culpa, mas não foi requisitado uma maior cooperação deles ao longo da investigação, fato este que gerou críticas por parte de alguns setores.[28] O CADE esclarece que o SBDC já estava de posse de uma grande quantidade de elementos de prova sobre o cartel e, portanto, uma possível cooperação adicional dos acusados traria ganho apenas marginal para a produção de provas**.** Ao invés disso, optou-se por maximizar a contribuição pecuniária, pelo seu efeito dissuasório. O processo contra os outros acusados continua em tramitação.

2008: Areia para construção [29]

O CADE concluiu que quatro empresas envolvidas na mineração de areia utilizada na construção civil no Estado do Rio Grande do Sul estavam envolvidas em um cartel de fixação de preços. Juntas, elas haviam contratado uma empresa de consultoria para realizar estudos comparativos sobre os preços entre as partes. O estudo analisou fatores como a distância entre as minas das empresas e seus depósitos (o transporte pode ser um componente importante no custo do produto a granel), e, em seguida, os preços recomendados para cada um, de modo a minimizar a migração de clientes entre eles. A evidência da combinação entre os Representados foi feita através de documentos internos, registros de telefone e depoimentos orais.

O CADE aplicou multas que variaram entre 10% e 22,5% do faturamento de 2005 das quatro empresas, incluindo a empresa de consultoria.

2007: Serviços de segurança (Vigilantes) [30]

O CADE concluiu que dezesseis empresas, três associações comerciais e dezoito indivíduos participaram de um conluio de longa duração em licitações no mercado de prestação de serviços de segurança privada no Estado do Rio Grande do Sul. Essa investigação resultou do primeiro acordo de leniência celebrado pela SDE. As evidências das irregularidades incluíram as provas fornecidas pelo beneficiário da leniência, bem como os registros de áudio de conversas telefônicas e documentos recolhidos em operações de busca e apreensão. As evidências mostraram que, desde 1990, as empresas estavam envolvidas em práticas concertadas, dividindo os contratos entre si e adotando preços predatórios para punir aquelas empresas que se desviavam das regras do cartel.

As partes envolvidas realizavam reuniões periódicas na sede da associação comercial, em restaurantes e até em churrascos de confraternização, a fim de manipular os resultados das licitações públicas. Os participantes desse cartel tentaram manipular os requisitos que uma empresa tinha que cumprir para se habilitar para as licitações. As associações de classe e o sindicato das empresas de segurança privada colaboraram notificando funcionários do governo sobre irregularidades trabalhistas em empresas que não faziam parte do cartel.

O CADE aplicou uma multa de 15% sobre o faturamento bruto das empresas no ano de 2002 com um acréscimo de 5% para os líderes do cartel. Os administradores foram multados entre 15% e 20% da penalidade que havia sido aplicada às suas empresas. As multas totalizaram R$ 40 milhões (US$ 23 milhões). Além disso, as empresas foram proibidas de participar de licitações públicas e de firmar contratos com instituições financeiras oficiais, por um período de cinco anos. Este foi o primeiro caso em que esta sanção foi imposta.

2005: Britas [31]

Este caso envolveu um suposto cartel no mercado de brita, uma matéria-prima essencial utilizada na construção civil. Os acusados eram uma associação de classe e 21 empresas associadas, que juntas controlavam cerca de 70% da brita produzida no Estado de São Paulo. Após uma denúncia anônima, em 2003, a SDE realizou uma operação de busca e apreensão na sede do sindicato, que consistiu na primeira diligência dessa natureza após as alterações na Lei de Defesa da Concorrência ocorridas em 2000. A operação foi altamente produtiva. Foram coletados documentos que evidenciavam que os participantes se reuniam regularmente no escritório da associação, onde eram mantidos dados sobre preços e vendas diárias em um computador. Nas reuniões, as empresas fixavam os preços, repartiam clientes, fraudavam o caráter competitivo de licitações públicas e criavam mecanismos sofisticados para punir os membros que se desviavam do acordo.

A linguagem de alguns dos documentos era especialmente interessante. Os membros da associação se intitulavam de "O Grupo". O Grupo estabeleceu uma missão formal, parte da qual era "organizar o mercado". Os participantes concordaram em “respeitar os clientes [um do outro]”. O Grupo elencava seus "valores", que eram

"integridade, confiança, respeito e harmonia". O cartel estabelecia preços com metas específicas, que foram alcançadas. Os preços tinham declinado na década de 1990, até o cartel ser formado em 1999. Uma análise dos preços feita pela SDE mostrou que, em 2001, houve um aumento de cerca de um terço no preço do produto.

Após a conclusão da investigação, a SDE recomendou ao CADE que condenasse o sindicato e dezoito empresas por formação de cartel. O CADE assim o fez e multou as empresas em 15 a 20% do total de seus faturamentos de 2001. Houve uma forte cooperação entre o SBDC e os promotores de justiça ao longo de todo o caso, o que levou à instauração de processos criminais contra alguns dos indivíduos. Os processos penais foram todos resolvidos com o pagamento de multas.

Alguns dos acusados do processo em trâmite no SBDC apelaram da decisão do CADE nos tribunais. A decisão do CADE até agora tem sido acolhida pelos tribunais, mas a fase recursal ainda não foi concluída.

2.1.1.4. Advocacia da concorrência em casos de cartéis

O SBDC tem sido particularmente ativo na disseminação de seu programa de combate a cartéis ao público. Além da cartilha acima indicada, referente ao programa de leniência, a SDE publicou outras cartilhas semelhantes em 2008 e 2009 sobre "Combate a cartéis em licitações", "Combate a cartéis em sindicatos e associações" e "Combate a cartéis na revenda de combustíveis". Além disso, foi publicada uma revista em quadrinhos para crianças, com os personagens da série mais popular do país (Turma da Mônica), contando a estória de um cartel entre bancas de limonada.

A SDE também criou, em março de 2008, uma ferramenta chamada "Clique Denúncia", permitindo que os cidadãos brasileiros forneçam pistas confidenciais sobre quaisquer atividades suspeitas de cartel, diretamente no site da SDE. Mais de 300 denúncias foram recebidas até setembro de 2009, sendo que cerca de 70% delas eram relacionadas a cartéis. Em 2008, um Decreto Presidencial criou o Dia Nacional de Combate aos Cartéis no Brasil, a ser celebrado todos os anos em 8 de outubro, o dia em que o primeiro acordo de leniência foi assinado, em 2003. Nesse dia realizou-se uma campanha em sete importantes aeroportos do país, em que 450.000 cartilhas e outros materiais foram distribuídos. O segundo Dia Nacional de Combate a Cartéis contou com a presença de altas autoridades do governo brasileiro - incluindo o Presidente e o Vice-Presidente da República -, além de importantes autoridades de defesa da concorrência dos Estados Unidos, da Comissão Européia e de Portugal, e também ensejou a reunião de representantes dos Ministérios Públicos Federal e Estadual, conforme descrito acima.

Em julho de 2009, a SDE e a OCDE atuaram em conjunto em um programa chamado "Oficinas de Combate a Cartéis em Licitações", que foi desenvolvido em cinco cidades brasileiras. Em cada cidade, houve duas sessões de treinamento para detectar e reprimir o conluio entre licitantes: uma destinada a pregoeiros, membros de comissões de licitação e agentes diretamente relacionados a compras públicas, e outra para investigadores criminais. Mais de 600 agentes foram treinados. Como parte da iniciativa contra cartéis em licitações, a SDE lançou seu "Guia de Análise de Denúncias sobre Possíveis Infrações Concorrenciais em Licitações"[32], descrevendo a metodologia da SDE para analisar cartéis em licitações e condutas relacionadas. A SDE assinou acordos de cooperação com outros três órgãos – o Tribunal de Contas da União e a Controladoria-Geral da União, que conduzem auditorias nos contratos do governo federal, e o Observatório da Despesa Pública, que se concentra nas ocorrências de fraude e corrupção no governo –, com a finalidade de expandir o programa de combate a cartéis em licitações. Finalmente, por indicação da SDE, o Ministério do Planejamento publicou, em setembro de 2009, um regulamento que obriga os participantes de licitações públicas federais a apresentar uma Declaração de Elaboração Independente de Propostas, afirmando que eles não se envolveram em conluio com concorrentes. A declaração foi baseada em um modelo produzido pela SDE com a colaboração da OCDE[33].

2.1.1.5. O programa de combate a cartéis e a comunidade empresarial

A nova ênfase do SBDC na persecução de cartéis ganhou a atenção da comunidade empresarial, especialmente das grandes empresas e corporações. Os executivos estão cada vez mais conscientes da sua potencial responsabilização criminal em caso de participação em cartéis, incluindo prisão. A possibilidade de imposição de pesadas multas para as empresas tem sido uma força motriz para o crescente número de pedidos de leniência. Outro estímulo tem sido a possibilidade de que uma empresa seja proibida de fazer negócios com o governo, se condenada pela prática de cartel.

A SDE recebe elogios pela sua agressividade, apesar de alguns profissionais acharem que, por vezes, seu comportamento é demasiadamente agressivo. Tais profissionais criticam o uso da prisão temporária no início de uma investigação, como descrito acima, mas, como relatado, essa medida raramente é usada nas investigações da SDE. Há críticas quanto aos atrasos entre a abertura de um processo na SDE, muitas vezes por meio da realização de buscas e apreensões, e sua conclusão. Também é dito que a SDE é melhor em iniciar os casos do que em finalizá-los. A SDE vem

lidando com esse problema, conforme discutido abaixo no item 3.2. Todos reconhecem que o problema da SDE é, fundamentalmente, a falta de pessoal.

As discussões judiciais iniciadas pelas próprias empresas são outra fonte de atraso. Nos últimos anos, os Representados têm crescentemente tentado bloquear as investigações questionando-as nos tribunais, com fundamentos de cunho processual. As empresas também entendem que podem atrasar por um tempo significativo a imposição de sanções finais em um processo de cartel se recorrerem das decisões do CADE junto aos tribunais. Como discutido no item 3.7 abaixo, muitas das multas impostas pelo CADE não foram pagas porque os casos estão em fase recursal. Ainda assim, as empresas, especialmente as que operam internacionalmente, estão cada vez mais dispostas a discutir acordos com o CADE, principalmente para resolver um caso completamente e remover incertezas. No entanto, os indivíduos ainda estão relutantes em considerar a celebração de acordos com o CADE, por conta da eventual responsabilidade criminal que eles enfrentariam. Como mencionado acima, parece haver um aumento da coordenação entre a SDE e o Ministério Público com a finalidade de eliminar essa incerteza, ao menos para o programa de leniência.

2.1.2. Acordos horizontais à exceção de cartéis

O SBDC analisou poucos casos de acordos horizontais que não configurem cartéis. Isso se deve em parte ao fato de que o Sistema classifica como cartéis alguns casos que poderiam ser considerados como casos que não configuram cartéis. Como mencionado anteriormente, a regra *per se* não é aplicável no Brasil. Assim, em todos os casos, algum grau de poder de mercado deve ser demonstrado, embora em casos de cartéis clássicos aparentemente apenas uma demonstração mínima é exigida.

O SBDC há muito tempo tem se mostrado atuante no setor de planos de saúde, em que há um ativo setor privado que complementa o serviço público de saúde. Em 2006, o CADE analisou quatro casos envolvendo a emissão de tabelas de preços sugeridas por associações de profissionais médicos. Um desses casos foi efetivamente um cartel. Um grupo de anestesiologistas no Estado da Bahia publicou uma tabela que efetivamente aumentava seus honorários médicos para as operadoras de planos de saúde. Quando uma operadora protestou, duas cooperativas simultaneamente cancelaram seus acordos existentes, por meio de cartas idênticas preparadas na mesma máquina de escrever. O CADE multou as cooperativas em um montante total de US$ 94.000,00.[34]

A SDE iniciou investigação acerca dos efeitos de acordos de exclusividade entre a Visa e a operadora de sua rede de processamento. Originalmente, os grandes bancos mantinham suas redes próprias de cartão de crédito, que evoluíram para duas redes separadas, mas exclusivas, uma para a Visa e outra para a MasterCard. Para poderem operar com ambas as bandeiras de cartão, bancos e comerciantes se vêem obrigados a fazer parte das duas redes. Como parte da função de advocacia da concorrência desempenhada pelo SBDC, a SEAE e a SDE, juntamente com o Banco Central, apresentaram propostas de reforma para essa indústria, que incluíam eliminar as exigências de exclusividade. Recentemente, a MasterCard assim o fez, e, em dezembro de 2009, o CADE chegou a um acordo com a Visa em que este concordava em suspender suas cláusulas de exclusividade, bem como acelerar o processo de integração de novas redes.

2.1.3. Acordos verticais

O SBDC julga muito poucas restrições verticais que não sejam também consideradas como abusos de posição dominante. Uma delas, no entanto, decidida em 2008, envolvia acordos de exclusividade entre a Odebrecht, empresa de construção civil, e os quatro principais fornecedores de turbinas de hidrelétricas, General Electric, Alstom, Siemens e Voith Madeira, que proibia tais empresas de turbinas de participar com outros consórcios em uma licitação de R$20 bilhões para a concessão de uma hidrelétrica. Após a investigação, a SDE adotou uma medida preventiva que suspendia tais acordos de exclusividade. A Odebrecht contestou judicialmente tal decisão, mas antes que a Justiça se pronunciasse, a empresa negociou um acordo com o CADE, que resultou no cancelamento de tais acordos de exclusividade. A Odebrecht acabou por vencer o leilão, mas devido ao fato de a ordem do CADE ter permitido a participação de outros licitantes no certame, o preço contratado foi significativamente menor do que o previsto se essa alteração não tivesse ocorrido. O preço final foi substancialmente inferior ao preço de reserva, e estimou-se que a economia total para os consumidores brasileiros, ao longo dos 30 anos do período da concessão, foi de aproximadamente R$16,4 bilhões (US$ 9,4 bilhões).

2.1.4. Abuso de posição dominante

O SBDC regularmente examina denúncias de abuso de posição dominante apresentadas por particulares. Em um número significativo dessas denúncias, o SBDC posiciona-se por sua improcedência. A SDE também inicia regularmente, por iniciativa própria, investigações referentes a essa conduta anticoncorrencial. Os dados na tabela abaixo dizem respeito a casos que chegaram à fase de Processo Administrativo.

Tabela 2. Casos de abuso de posição dominante

	2005	2006	2007	2008	2009*
Casos abertos**	18	13	11	15	22
Casos condenados	19	3	17	11	7
Multas aplicadas (US$ milhões)	0	0	0	0	***205.6

* Janeiro a Setembro.
** Processos Administrativos.
*** Em um caso, a AmBev, descrito abaixo (veja Quadro 2).

Vários casos do SBDC referentes a abusos de posição dominante envolveram a Unimed, uma cooperativa de médicos e uma das maiores empresas de plano de saúde no Brasil. Há filiais da Unimed em quase todas as cidades ou municípios do país. As filiais, que atuam de forma independente, contratam com médicos e hospitais locais a prestação de serviços de saúde, e muitas vezes esses acordos contêm previsão de exclusividade, ou seja, os médicos não estão autorizados a se filiar a qualquer outro plano de saúde. É comum que mais de 50% dos médicos de uma comunidade sejam associados à Unimed. O SBDC analisa estes acordos cidade a cidade e, onde a participação de mercado da Unimed é alta, o CADE proíbe os acordos de exclusividade. Entre 1994 e 2008, o CADE examinou mais de 60 desses casos. Um segundo tipo de caso de abuso de posição dominante que é relativamente comum envolve *sham litigation* - a proposição de supostos processos judiciais sem fundamento para fins de exclusão de concorrentes. No período de 2005 a 2008, a SDE deu início a nove investigações desse tipo em vários setores, incluindo de produtos farmacêuticos e autopeças. Todos ainda estão sob análise no âmbito do SBDC.

Preços abusivos ou excessivos são considerados um abuso de posição dominante e uma violação ao artigo 20 da Lei de Defesa da Concorrência. Uma disposição específica do artigo 30 de tal diploma legal exige que a SDE inicie um Processo Administrativo (desconsiderando a fase da Averiguação Preliminar) sempre que for solicitada a fazê-lo por uma das casas do Congresso Nacional. O Congresso tem feito regularmente esses pedidos envolvendo possíveis preços abusivos de medicamentos. No início da década, a SDE abriu dezenas dessas investigações, mas elas permaneceram na Secretaria por algum tempo. A SDE tem feito um esforço concentrado para eliminar esse estoque, o que resultou na análise pelo CADE de 55 Processos Administrativos dessa natureza (não mostrados na tabela acima), no período 2005 a 2008. A SDE e o CADE destacaram a aplicação de uma metodologia econômica para esses casos, e em nenhum deles o CADE constatou uma violação concorrencial. Na verdade, o CADE nunca encontrou uma conduta de abuso de posição dominante com base em preços abusivos.

Nos últimos anos, o CADE decidiu dois casos que envolviam "cláusulas de raio" impostas pelos grandes *shoppings centers* a seus lojistas, proibindo o locatário de abrir uma loja dentro de determinada distância do *shopping center*. Em ambos os casos, a restrição foi considerada ilegal e os Representados foram obrigados a retirar tal cláusula. Os casos tendem a girar em torno da definição de mercado, como em muitos casos de posição dominante. Assim, em um caso, o mercado relevante foi determinado como "mercado de *shopping centers* de alto luxo" em determinadas regiões de São Paulo. As decisões do CADE em ambos os casos foram contestadas judicialmente. Os tribunais de primeira instância confirmaram as decisões do CADE, mas os recursos continuam.[35]

O CADE decidiu quatro casos relacionados ao setor de telecomunicações no período de 2005 a 2009. Um deles envolvia um acordo entre a Telemar, uma prestadora de serviços de telefonia fixa, e uma empresa editora de listas telefônicas. O autor da denúncia foi outro editor independente de listas telefônicas que dispunha anteriormente da mesma relação contratual com a Telemar. O CADE concluiu que o novo arranjo era simplesmente o resultado da concorrência pelo mercado e não era anticoncorrencial em si. No entanto, o CADE mostrou-se preocupado com que a continuação do acordo pudesse resultar em dominação de mercado pelo novo entrante e recomendou à SDE que analisasse de maneira mais ampla a relação entre prestadores de serviços de telefonia e as editoras de listas telefônicas.

Em outros dois casos envolvendo a Telesp, uma prestadora de telefonia fixa no Estado de São Paulo, o CADE considerou que a Telesp tinha adotado tratamento discriminatório contra um provedor de Internet e uma prestadora de telefonia de longa distância no acesso à sua rede. O CADE determinou que o acesso fosse garantido de forma não-discriminatória. O quarto caso de telecomunicações envolveu a Globosat, fornecedora de programação para televisão, que tinha acordos de exclusividade com os eventos esportivos mais atraentes, especialmente os campeonatos de futebol. A Globosat é afiliada ao Grupo Globo, o maior grupo de mídia do Brasil, que provê serviços tanto de TV aberta como de TV por assinatura, por cabo e satélite. O CADE constatou que tais acordos prejudicaram a concorrência no mercado de transmissão em rede de eventos esportivos (mercado a montante) e na oferta de televisão por satélite a varejo (mercado a jusante). Nos termos do acordo com o CADE, a Globosat teve de abandonar os seus direitos de exclusividade sobre alguns dos eventos, incluindo campeonatos de futebol, por um período de três anos, e cessar os contratos de exclusividade com o canal Sport TV, o principal canal esportivo do país.

Quadro 2. AmBev

O SBDC tem uma longa e interessante história com a AmBev, a maior produtora de cerveja do país. A AmBev é produto de uma fusão ocorrida em 2000 entre as duas maiores cervejarias do Brasil à época, Brahma e Antarctica, que controlavam cerca de 50% e 25%, respectivamente, das vendas nacionais de cerveja. A transação atraiu grande interesse e claramente apresentou significativos problemas competitivos. Houve divergências dentro do SBDC sobre qual o remédio adequado. O CADE finalmente decidiu requerer a alienação de uma das marcas menores controladas pelas duas empresas, juntamente com outros remédios comportamentais desenhados para promover o ingresso ou a expansão de marcas menores. Houve algumas entradas de concorrentes no mercado, e estudos de acompanhamento após a fusão sugeriram que os preços realmente diminuíram, pelo menos no curto prazo, mas a AmBev continua a controlar cerca de 70% do mercado brasileiro de cerveja. Nos últimos anos, a AmBev filiou-se, por meio de atos de concentração, a várias outras cervejarias internacionais (incluindo a maior cervejaria da Argentina), e hoje é uma subsidiária da Anheuser-Busch InBev, com sede na Bélgica, a maior cervejaria do mundo.

Em 2004, a SDE deu início a Processo Administrativo contra a AmBev, relativo a um programa de fidelidade que a companhia instituiu. O programa atribuía pontos aos estabelecimentos de varejo, baseado em suas compras de cervejas da AmBev, que poderiam ser trocados por brindes. Por este lado, o programa não era exclusionário, mas a investigação, que incluiu uma inspeção que produziu importantes provas documentais, revelou que, na prática, a AmBev efetivamente exigia dos varejistas que comprassem exclusivamente suas cervejas para participar do referido programa. Em 2009, o CADE deliberou que tal conduta era um abuso de posição dominante, determinando à AmBev que encerrasse o programa e aplicando à empresa multa no valor de 2% de seu faturamento total no Brasil em 2002. A multa foi de cerca de R$353 milhões (US$ 206 milhões), a maior já imposta pelo CADE.

O CADE está atualmente analisando um segundo caso contra a AmBev. Grande parte da cerveja vendida no Brasil é embalada em garrafas reutilizáveis. As garrafas têm um tamanho padrão (600 ml), permitindo que os fabricantes de cerveja do país possam coordenar a sua reciclagem (para reutilização). A AmBev introduziu recentemente uma garrafa de 630 ml, sendo que seus concorrentes menores reclamaram que isso iria aumentar os seus custos de reciclagem. A SDE adotou uma medida preventiva, que proibia a AmBev de introduzir a nova garrafa enquanto o processo continuasse. A AmBev recorreu dessa decisão ao CADE, o que é admissível no âmbito da lei de defesa da concorrência (ver item 3.2 abaixo). O CADE suspendeu parcialmente a ordem, restringindo a área geográfica em que a AmBev poderia introduzir a garrafa e a obrigou a criar um programa temporário de trocas sob o qual a AmBev iria absorver a maior parte dos custos adicionais. A decisão final sobre o caso ainda não foi proferida.

2.2. Atos de concentração

2.2.1. Regras substantivas

A previsão de controle, na Lei 8.884, dos atos de concentração encontra fundamento no artigo 54:

> *Os atos, sob qualquer forma manifestados, que possam limitar ou de toda forma prejudicar a livre concorrência, ou resultar na dominação de mercados relevantes de bens ou serviços, deverão ser submetidos à apreciação do Cade.*

Essa linguagem parece incluir todos os atos de concentração, não somente as fusões. Em 2001, SEAE e SDE publicaram em conjunto um Guia para a Análise Econômica de Atos de Concentração que, por suas condições, só se aplica às concentrações horizontais. O Guia confirma, no entanto, que o artigo 54 também se aplica para o controle de outras operações que possam limitar ou prejudicar a livre concorrência, ou resultar na dominação de mercados relevantes e de bens e serviços, tais como acordos horizontais entre concorrentes. A grande maioria das notificações apresentadas, no entanto, envolveram fusões.

O artigo 54 não contém determinações específicas que estabeleçam os critérios substantivos a serem empregados na análise dos atos de concentração. Contudo, o parágrafo primeiro do artigo prevê que os atos de concentração que possuam os quatro atributos a seguir podem ser aprovados:

1. e tiverem por objetivo, cumulada ou alternativamente: a) aumento da produtividade; b) melhoria da qualidade de bens ou serviços; ou c) propiciar a eficiência e o desenvolvimento tecnológico ou econômico;
2. se os benefícios decorrentes forem eles distribuídos eqüitativamente entre os seus participantes, por um lado, e entre os consumidores ou usuários finais, por outro;
3. se não implicarem na eliminação da concorrência de parte substancial do mercado relevante de bens e serviços;
4. se forem observados os limites estritamente necessários para que se atinjam os objetivos visados.

Esta linguagem pode ser interpretada da seguinte forma: o ônus de mostrar que a transação é economicamente benéfica recai sobre as partes do ato de concentração. Na prática, porém, o CADE não tem imposto tal

exigência, intervindo apenas quando conclui que, em geral, haveria uma redução significativa da concorrência. O parágrafo é usado para proporcionar uma defesa com base nas eficiências, a ser aplicada somente aos casos de fusão que sejam considerados anticompetitivos.

O parágrafo 2º do artigo 54 contém uma disposição especial, que permite que as fusões a serem aprovadas satisfaçam apenas três dos quatro atributos enumerados no parágrafo 1º, "quando necessários por motivo preponderantes da economia nacional e do bem comum, e desde que não impliquem em prejuízo ao consumidor ou usuário final". Tal disposição encontra-se presente de alguma forma nas legislações de controle de concentrações de diversos países, permitindo a aprovação de atos que de outra maneira seriam considerados anticoncorrenciais, mas que tenham fundamento em preponderante interesse nacional. Até o momento, no entanto, nenhuma operação no Brasil foi aprovada especificamente ao abrigo desta disposição.

O Guia para a Análise Econômica de Atos de Concentração Horizontal da SEAE/SDE emprega análises tradicionais para os atos de concentração. Ele descreve cinco etapas do procedimento: (1) definição dos mercados relevantes de produto e geográfico, (2) determinação sobre se a participação de mercado da nova empresa formada é suficientemente ampla para permitir o exercício de poder de mercado; (3) avaliação da probabilidade do poder de mercado a ser exercido após a concentração, (4) exame das eficiências geradas pela operação, e (5) avaliação do efeito líquido da operação sobre o bem-estar econômico.

No primeiro passo, a definição de mercado, utiliza-se a metodologia para a definição dos mercados relevantes de produto e geográfico, que se baseia, principalmente, na substituição pelos consumidores como resposta a mudanças hipotéticas ocorridas no preço[36]. No segundo passo, o Guia descreve os níveis preocupantes de concentração de mercado quanto à possibilidade de exercício de poder de mercado, por duas formas: por uma única empresa, unilateralmente, quando essa empresa tem uma participação de mercado de pelo menos 20%, ou através de coordenação de empresas em um mercado em que o índice de concentração das quatro maiores empresas é de pelo menos 75% e a empresa resultante tem uma participação de mercado de pelo menos 10%. Se a concentração de mercado for superior a qualquer um desses níveis, a SEAE prosseguirá para o terceiro passo, considerando as condições de mercado relacionadas à probabilidade de exercício de poder de mercado. Essas condições incluem a possibilidade de aumento das importações, as condições de entrada e outros fatores que podem afetar a rivalidade. Se, após a conclusão da terceira etapa, a SEAE continuar a alimentar preocupações com respeito aos efeitos concorrenciais da operação, a análise prossegue considerando os ganhos de eficiência que a fusão pode

gerar, e finalmente a uma avaliação do efeito econômico líquido da operação.

O Guia não aplica explicitamente o índice Herfindahl-Hirschman (HHI) como uma medida de concentração. Porém, CADE e SEAE afirmam que o utilizam normalmente. O Guia também não se refere à teoria da defesa de empresa insolvente (*failing firm defence*), mas o CADE também tem considerado tal argumento em alguns casos, normalmente rejeitando-o. Finalmente, embora o CADE não tenha aprovado formalmente o Guia da SEAE/SDE, ele o trata como diretrizes não-vinculantes, e as suas disposições são freqüentemente citadas nas decisões do Conselho. Dois novos conjuntos de diretrizes, para concentrações horizontais e verticais, estão sendo discutidos no SBDC e suas aprovações são esperadas em 2010.

2.2.2. Notificação

Os atos de concentração propostos que atendam a certos limites mínimos devem ser notificadas ao SBDC. As requerentes também devem pagar uma taxa de notificação de R$ 45.000,00 (US$ 26.000,00). As taxas são compartilhadas igualmente entre CADE, SDE e SEAE.

O parágrafo 3º do artigo 54 estabelece os critérios da notificação. As fusões que satisfaçam um desse dois critérios devem ser notificadas: a empresa ou grupo de empresas resultante tenha participação em vinte por cento (20%) de um mercado relevante, ou quando qualquer dos participantes da transação tenha registrado faturamento bruto anual equivalente a R$400.000.000 (US$232 milhões)[37]. Estes critérios têm sido submetidos a três críticas: (1) o critério do faturamento parecia aplicar-se ao faturamento mundial, dando ensejo a que uma fusão com impacto mínimo sobre o mercado brasileiro tivesse que ser notificada. (2) Uma vez que era necessário apenas que a empresa resultante tivesse determinada participação de mercado ou faturamento total, mesmo a aquisição de firmas muito pequenas por grandes empresas que já cumpriam um destes critérios teria de ser notificada. (3) O teste de 20% de participação de mercado introduz um elemento subjetivo para a obrigação de notificação: a definição de mercado. As partes envolvidas e o CADE poderiam discordar de boa fé sobre a definição de mercado relevante para este fim, dando origem a uma incerteza sobre se uma transação deveria ser ou não notificada.

Em 2005 o CADE efetivamente eliminou o primeiro problema, decretando que o critério de 400 milhões só seria aplicável ao faturamento obtido no Brasil.[38] Ainda é o caso de que uma pequena aquisição por parte de uma empresa com faturamento já superior aos 400 milhões tenha que ser notificada, mas estas operações são, geralmente, sujeitas ao procedimento sumário pelo SBDC, descrito mais adiante, resultando em rápida aprovação.

A aplicabilidade do critério de participação de mercado também foi alterada administrativamente pelo CADE, que decretou que o mesmo só se aplica se, por conta da operação, a empresa resultante exceder 20% do seu mercado, ou se ambas as partes de um ato de concentração operarem no mesmo mercado e uma delas tiver participação em 20% desse mercado. A terceira crítica que permanece aponta que o teste da participação no mercado é muito subjetivo, mas esse efeito também foi reduzido ao longo do tempo. O número de notificações em que o critério de participação de mercado é atingido, mas não o critério do faturamento bruto, é pequeno. O CADE raramente inicia uma ação de execução por falta de comunicação sobre o critério da participação no mercado.

Uma característica importante e, muitos afirmam, notória, no regime de notificação no Brasil, é que a notificação, conquanto obrigatória, não precisa ser feita anteriormente à fusão (*premerger*), ou seja, as partes não estão proibidas de consumar a operação antes ou durante a análise do ato de concentração pelo SBDC. (Conforme descrito detalhadamente no item 4, o projeto de lei em trâmite no Congresso Nacional estabeleceria a notificação prévia das fusões e resolveria os problemas dos critérios de notificação descritos acima). O parágrafo 4º do artigo 54 exige que a notificação seja feita em, no máximo, quinze dias úteis após a realização do ato. Regras internas do CADE [39] definem a data em que o período de 15 dias começa a correr, a partir do dia em que o primeiro documento vinculativo for celebrado entre os envolvidos.

A ausência de notificação prévia tem implicações importantes tanto para o procedimento como para a substância da análise de fusões no Brasil. Um efeito procedimental é o aumento do tempo de análise das fusões. O SBDC não está sujeito a qualquer prazo formal para a tomada de decisões. Da mesma forma, como as partes de uma fusão são autorizadas a consumar a operação antes que a análise seja concluída (na ausência de uma medida preventiva, discutida mais a frente), falta-lhes incentivo para acelerar o processo. O resultado é que as partes podem ser menos sensíveis às solicitações de informação por parte do SBDC. A SEAE, que conduz as principais investigações nos atos de concentração notificados, queixa-se dessa lentidão em alguns casos.

Substantivamente, a consumação da transação pode afetar os remédios disponíveis ao CADE caso este verifique que o ato de concentração é ilegal. Especificamente, a capacidade do CADE de proibir inteiramente uma operação é, neste caso, dificultada, por ter de determinar o desfazimento de uma fusão consumada, uma tarefa sobremaneira complexa. Desde 2004, um total de três atos de concentração foram totalmente reprovados pelo CADE. No entanto, o CADE não aponta a falta de notificação prévia de fusão como a principal razão para o reduzido número de reprovações. O CADE diz que,

sempre que possível, prefere adotar remédios que permitam operações relevantes de avançarem, preservando os ganhos de eficiência e a economia de escala tão importantes e necessários para a economia brasileira.

De qualquer modo, estas deficiências têm sido, pelo menos parcialmente, resolvidas pelo CADE mediante uso de medidas cautelares, exigindo que as partes adotem certas medidas para preservar a capacidade do CADE de ordenar medidas eficazes caso a fusão venha, ao final, a ser considerada ilegal. O CADE tem o poder de emitir uma medida cautelar para esse fim, autorizada pela Resolução n.º 45[40] do mesmo Órgão. Contudo, os procedimentos relativos à adoção dessas medidas são essencialmente contraditórios, e podem ser objeto de recurso nos tribunais. No período compreendido entre 2005 e 2009, foram adotadas 11 medidas cautelares em atos de concentração.

O CADE também pode adotar medidas preventivas para o mesmo efeito, cujo uso têm sido mais frequente. A Resolução n.º 45 criou um mecanismo denominado "Acordo de Preservação de Reversibilidade da Operação" ou APRO. Nos anos de 2007 a 2009, o CADE emitiu 10 APROs. Normalmente, as medidas preventivas e APROs impõem restrições ou condições à liberdade da empresa adquirente para incorporar ou integrar atividades, fechar lojas ou fábricas, demitir trabalhadores, extinguir marcas ou linhas de produtos, alterar marketing, investimentos ou planos de pesquisa, ou liquidar ativos. Ambas as medidas cautelares e APROs incluem disposições que especificam multas pelo descumprimento das restrições impostas.

A inexistência de um sistema de notificação prévia repercute também de outro modo sobre o regime de análise de concentrações do SBDC. Haja vista que a fusão pode ser consumada antes da análise do CADE estar completa, é do interesse do CADE aprender o mais rápido possível sobre a operação, tanto para minimizar os efeitos anticoncorrenciais da fusão, caso esta seja prejudicial, como para preservar sua capacidade de estabelecer um remédio efetivo, caso seja necessário. Como mencionado anteriormente, as regras do CADE definem a data que inicia a contagem do prazo de 15 dias dentro do qual um ato de concentração deve ser notificado. Em anos anteriores, o CADE interpretava agressivamente essa definição, e assim estipulou um grande número de multas em decorrência de notificações não-tempestivas. [O artigo 54 (5) estabelece que o CADE pode aplicar multas de R$ 6.000,00 a R$ 6.000.000,00 pela ausência de apresentação tempestiva de um ato de concentração[41]]. Esse número tem caído desde o fim da década de 1990, na medida em que tanto o SBDC como o setor privado ganham experiência na interpretação dessas disposições [42]. Ainda assim, o número de casos pode ser considerado elevado, como se vê no Tabela 3 abaixo.

Tabela 3. Atos de concentração de 2004 a 2009

	2004	2005	2006	2007	2008	2009*
Atos de concentração notificados	516	386	411	591	616	306
Aprovados	574	345	352	490	550	364
Aprovados com restrições	43	37	20	37	58	19
Reprovados	1	0	0	0	1	1
Número de acordos firmados	0	3	1	4	8	3
% do total aprovados com restrições	7.2	9.7	5.4	7.0	9.7	5.2
Casos de notificação intempestiva	18	8	13	24	20	13

* Janeiro a Setembro

2.2.3. Número de atos de concentração no SBDC.

Esses dados mostram o declínio do número de fusões notificadas em 2005 e 2006 em relação a 2004. Grande parte desse declínio se deve à decisão do CADE de aplicar o critério de 400 milhões de receita somente para as receitas brasileiras. Em 2007, o CADE emitiu outras normas que esclareceram a necessidade de notificação em determinadas situações específicas[43]. No entanto, o número de notificações aumentou novamente em 2007 e 2008. O aumento é atribuído ao fortalecimento da economia naqueles anos e às flutuações da moeda, que favoreceram fusões envolvendo empresas brasileiras. A queda em 2009 reflete a crise econômica no Brasil e no mundo.

A proporção das operações notificadas que exigem a adoção de algum remédio varia entre 5 e 10 por cento, geralmente dentro da faixa experimentada pela maioria dos países. Ainda assim, o número em alguns anos parece elevado, até 58. A principal razão para tanto é o número relativamente elevado de fusões que envolvem cláusulas de não-concorrência - acordos em que o vendedor se compromete a não concorrer com o adquirente no mercado afetado por um período de tempo. O SBDC regularmente entende que estas cláusulas são demasiadas restritivas e ordena que elas sejam eliminadas ou reduzidas. As transações envolvendo cláusulas de não-concorrência representam de 40% a 78% do total de remédios impostos.[44]

Outra característica da análise de atos de concentração conduzida pelo SBDC é o número relativamente elevado de transações em que são impostos remédios comportamentais - ordens que exigem da companhia resultante da fusão que forneça acesso à sua rede de distribuição, ou exija a transparência

dos preços, por exemplo -, ao contrário de remédios estruturais – como por exemplo a alienação de ativos ou, menos freqüentemente, a reprovação completa da transação. A Tabela 4 mostra a distribuição desses dois tipos de remédios no SBDC, para os exercícios de 2007 e 2008. Estes dados não incluem medidas envolvendo cláusulas de não-concorrência. Além disso, convém notar que em alguns casos os dois tipos de remédios foram impostos, sendo assim estão representados duas vezes.

Tabela 4. Distribuição de remédios comportamentais e estruturais, em 2007 e 2008

	2007	2008	Total
Comportamentais	8	10	18
Estruturais	4	8	12

Os remédios comportamentais parecem resultar do fato de o SBDC ter que lidar com as fusões *ex post*. O CADE afirma que tem uma preferência por medidas estruturais, mas que tem consciência da necessidade de preservar os ganhos de eficiência que uma concentração propicia, o que poderia não ser possível com a aplicação de um remédio estrutural. Em uma recente fusão envolvendo estradas de ferro, por exemplo, os sistemas ferroviários das partes envolvidas não se sobrepunham diretamente, mas o CADE concluiu que a operação iria eliminar a concorrência no transporte de soja, um dos principais produtos agrícolas de exportação do Brasil, do oeste do Brasil para outros portos alternativos em São Paulo e Santa Catarina. Além disso, uma das partes da fusão era verticalmente integrada na produção de soja e a transação poderia resultar em que a empresa passasse a discriminar produtores não integrados. Entretanto, o CADE também identificou eficiências significativas resultantes da fusão, que poderiam reduzir significativamente os custos de embarque. O CADE e as partes envolvidas entraram em um acordo que não envolvia a venda de ativos, mas que impunha restrições comportamentais, proibindo discriminação por parte da nova entidade e incluindo certas limitações de preço e serviço com o propósito de assegurar que os benefícios fossem passados aos consumidores.[45]

Ainda digno de nota é o uso de um mecanismo para a solução negociada de casos envolvendo atos de concentração. O artigo 58 da Lei de Defesa da Concorrência autoriza o CADE a celebrar "Termos de Compromisso de Desempenho" (TCDs), que são acordos firmados com as partes, prevendo remédios em atos de concentração considerados anticoncorrenciais. Os TCDs podem conter tanto remédios estruturais como comportamentais. Neles, têm-se exigido ações como alienações de ativos físicos ou de propriedade intelectual, tais como marcas, conformidade com metas de

desempenho e/ou de investimento, prestação ou fornecimento de bens ou serviços a clientes ou outras partes por período determinado, eliminação de acordos de exclusividade e manutenção de níveis de emprego. A utilização do TCDs pelo CADE era comum no final dos anos 1990, mas foi abandonada entre 2000 e 2004. Desde 2005, contudo, o dispositivo voltou a ser utilizado, conforme demonstrado na Tabela 3 acima.

Quadro 3. Casos recentes e significativos de atos de concentração

2009: Chá pronto para consumo[46]

A Coca-Cola fez um acordo com a empresa brasileira Leão Junior SA, para adquirir o negócio desta última de fabricação e venda de chá pronto para consumo ("mate") e chá gelado. A Coca-Cola já vendia esses produtos no Brasil sob a marca Nestea, por meio de uma *joint venture* com a Nestlé, proprietária da marca. O CADE e a Coca-Cola negociaram um APRO, pelo qual a Coca-Cola deveria manter os ativos e a administração da empresa adquirida durante o o período de investigação. A operação foi contestada pela rival da Coca-Cola, a Pepsi-Cola, que também vendia esses produtos sob sua marca Lipton, e pela Associação Brasileira de Produtores de Refrigerantes. O caso concentrou-se na definição do mercado relevante do produto. A Coca-Cola argumentou que o mercado era composto de praticamente todas as bebidas não-alcoólicas, incluindo a erva-mate, ponto forte da Mate-Leão, mas não incluindo o chá gelado, onde a Coca-Cola era mais forte.

A SEAE solicitou estudos econométricos, tanto da Coca-Cola quanto da Pepsi-Cola, referentes à substituibilidade entre erva-mate e chá gelado. Os estudos produziram resultados conflitantes. Outra questão em causa era saber se um chá feito de guaraná, fruta utilizada para fazer um refrigerante muito popular localmente, também estava inserido no mercado relevante de produto. Argumentou-se que o chá mate e o chá de guaraná são substituíveis tanto no lado da demanda quanto da oferta. Houve alguma evidência convincente de substituibilidade entre estes dois produtos do lado da oferta.

No final, contudo, após analisar as provas quantitativas e qualitativas sobre a questão, o CADE concluiu que o mercado relevante compreendia os dois tipos de chá e que a fusão seria anticompetitiva. O CADE aprovou a operação condicionando-a à alienação das operações da marca Nestea pela Coca Cola.

2009: Distribuição de Revistas[47]

O mercado relevante neste caso envolveu a distribuição nacional de revistas. Alguns editores de revistas distribuíam suas publicações diretamente aos consumidores (distribuição direta). Outros usavam distribuidores intermediários, que lidavam com os estabelecimentos de varejo (distribuição indireta). A fusão não criou problema na distribuição direta, mas criou um monopólio no mercado nacional de distribuição indireta. Uma das partes, Abril, a maior editora de revistas do país, controlava cerca de 60% do setor, e se integrou verticalmente por meio de seu

distribuidor DGB, cuja participação no mercado de distribuição indireta era de 70%. A outra parte estava envolvida unicamente com a distribuição, da qual detinha uma participação de 30%.

A análise do caso concentrou-se na probabilidade de novas entradas. A SEAE e o CADE determinaram que a entrada era difícil. Um distribuidor nacional de sucesso precisa ter escala e escopo suficientes e, especificamente, deve ter um mix adequado de publicações que seja atraente tanto para seus editores a montante como para seus varejistas a jusante. Um fator importante nesse sentido foi a relação vertical entre Abril e DGB, que garantia que até 60% de revistas do país não estaria disponível para um novo entrante. O SBDC considerou um cenário em que os 40% restantes teriam contrato com um novo entrante, mas avaliou que isso não seria provável, por várias razões. Novas entradas seriam ainda mais complicadas pelo fato de os acordos entre editores e distribuidores serem exclusivos e pela necessidade de se incorrer em custos irrecuperáveis significativos para ingressar no mercado.

A SEAE recomendou ao CADE que a fusão fosse reprovada. Essa foi uma das poucas vezes em que o CADE não concordou com a recomendação da SEAE e entrou em um acordo com as partes (por meio de um TCD, descrito anteriormente). Dentre outras determinações, o acordo estabeleceu ações para facilitar novas entradas. A DGB foi obrigada a alienar os seus ativos físicos utilizados na distribuição em São Paulo e Rio de Janeiro, dois dos maiores mercados do Brasil, e eliminar as cláusulas de exclusividade nos contratos de distribuição por um período de dez anos. Também foram estabelecidos remédios comportamentais no TCD, destinados a preservar a estrutura autônoma dos negócios do Grupo Abril na distribuição.

2008: Reforços de fibra de vidro [48]

Este caso envolveu a aquisição de reforços de fibra de vidro e ativos de tecido composto da Saint-Gobain pela Owens Corning, que afetaria vários mercados em nível mundial.[49]

As duas empresas eram as únicas envolvidas na fabricação de reforços de fibra de vidro no Brasil. A questão-chave no processo foi a definição do mercado relevante geográfico. As partes envolvidas na fusão alegaram que o mercado era mundial, incluindo os fabricantes desses produtos na China. Tanto as partes da fusão quanto a SEAE realizaram estudos econométricos dos movimentos de preços, comparando a evolução do Brasil com a de outras regiões. Um terceiro interessado também apresentou um estudo econométrico.

O CADE concluiu que nenhum dos estudos era conclusivo, e se voltou para as evidências qualitativas desenvolvidas pela SEAE. Alguns clientes das partes foram questionados sobre a viabilidade da China como uma fonte de abastecimento, e declararam que ela não era uma alternativa suficiente por razões de qualidade e do tempo de trânsito necessário. O CADE concluiu que a operação era ilegal e exigiu a alienação da fábrica da Saint-Gobain no Brasil.

2005: O minério de ferro e o transporte ferroviário [50]

A Vale SA, (anteriormente conhecida como Companhia Vale do Rio Doce - CVRD) é a segunda maior empresa mineradora do mundo, operando em diversos países; além disso, é o maior exportador mundial de minério de ferro. A Vale foi criada em 1942 como uma empresa estatal e privatizada em 1997. No Brasil, ela também controla várias linhas de transporte ferroviário e terminais portuários. Desde sua privatização, a Vale tem mantido a aquisição de ativos de mineração, tanto no Brasil como no exterior. No início de 2000, ela adquiriu quatro empresas de exploração de minério de ferro e suas linhas ferroviárias associadas na região sudeste do Brasil, além de uma grande empresa produtora de aço, a CSN, que também controlava uma grande mina de minério de ferro.

No decurso da investigação, a SDE concluiu que as aquisições teriam efeitos adversos em certos mercados de minério de ferro e de transporte ferroviário e emitiu uma liminar impondo certas restrições à Vale até que o CADE proferisse sua decisão final. Em 2005, o CADE decidiu que as operações eram prejudiciais do ponto de vista concorrencial. Elas foram aprovadas com a condição de que a Vale ou alienasse a mineradora Ferteco, que antes da aquisição pela Vale era a terceira maior empresa de mineração do Brasil, ou renunciasse a seu direito exclusivo de comprar a produção de mineração da CSN. O caso é digno de nota pelos vigorosos recursos legais de que a Vale se valeu em seguida. Ela apelou da decisão do CADE, por razões processuais, e o caso foi o primeiro caso de defesa da concorrência a chegar ao Supremo Tribunal Federal. Em 2007, o Tribunal decidiu a favor do CADE, e a Vale interpôs a seguir um segundo recurso legal, que também foi rejeitado por um tribunal recursal[51].

2.3. Concorrência desleal e proteção ao consumidor

A "concorrência desleal", que prejudica empresas concorrentes individuais, não é objeto da Lei nº 8.884/94, mas sim de outro diploma legal que fornece os fundamentos para ações criminais e ações civis. A Lei de Propriedade Industrial (Lei nº 9.279/96) define como crime de concorrência desleal a publicação ou divulgação de falsa afirmação em detrimento do concorrente, o emprego de meio fraudulento para desviar a clientela de outrem em proveito próprio ou alheio, o uso de expressão ou de sinal de propaganda alheio, de modo a criar confusão entre os produtos ou estabelecimento, a venda de produto adulterado ou falsificado, a divulgação de segredos comerciais e a venda de produtos objeto de patente falsa (art. 195). O Ministério Público pode propor uma ação penal nos termos da lei e as vítimas da concorrência desleal também podem invocar a lei para reaver os prejuízos e solicitar a reparação dos danos em uma ação civil.

O Código Brasileiro de Defesa do Consumidor (Lei nº 8.078), adotado em 1990, regula práticas de mercado tais como publicidade enganosa, falsas garantias, vendas de porta em porta, telemarketing e aumentos abusivos de

preços, bem como contratos com consumidores em geral. Existem três componentes para o chamado Sistema Nacional de Defesa do Consumidor: (1) uma agência federal, o Departamento de Proteção e Defesa do Consumidor (DPDC), que integra a SDE (2) agências estaduais e municipais de proteção aos consumidores, (Procons) e (3) organizações não-governamentais de consumidores (ONGCs). O DPDC é responsável pela coordenação geral do Sistema e tem várias responsabilidades específicas nos termos da lei.

Os Procons, localizados em todos os 26 Estados brasileiros e no Distrito Federal (Brasília), e em muitos municípios, prestam serviços específicos para os consumidores e entram com ações civis públicas para tutelar o interesse dos consumidores. As ONGCs incluem várias organizações nacionais, estaduais e regionais no Brasil. Elas são ativas nas ações coletivas de consumidores, e também publicam revistas voltadas aos consumidores, realizam atividades educativas sobre consumo e conduzem outras atividades (tais como testes comparativos de produtos).

O Código de Defesa do Consumidor estabelece que as reclamações dos consumidores que buscam indenização por danos podem ser interpostas perante o Judiciário por um consumidor individual ou por um grupo de consumidores, por meio de uma ação comum. No caso das ações civis públicas, elas podem ser iniciadas pelos Procons ou pelo Ministério Público. Além disso, as ONGCs podem igualmente iniciar ações judiciais em seu próprio nome, em benefício de um grupo prejudicado. Além de autorizar ações judiciais para o ressarcimento de danos, a lei estabelece a possibilidade de que sejam movidas ações penais e cíveis. As ações penais podem resultar no estabelecimento de multas e pena de prisão, e podem ser iniciadas por promotores públicos tanto junto a tribunais federais como estaduais. Por seu turno, as ações civis, movidas na esfera federal ou estadual, podem implicar a concessão de medidas liminares e o dever de indenizar os consumidores, e podem ser iniciadas por advogados, ONGCs, e (dependendo do tribunal envolvido) pelo DPDC ou pelos Procons.

O DPDC também desempenha uma função educativa junto ao consumidor, implementada por meio da manutenção de um *website*, da realização de treinamentos para funcionários das ONGCs, da publicação de cartilhas e do desenvolvimento de materiais educativos para currículos escolares. Como o DPDC é o departamento-irmão do Departamento de Proteção e Defesa Econômica da SDE (DPDE), há oportunidades de sinergia entre as funções de promoção da concorrência e educação dos consumidores. Os dois Departamentos também trocam informações sobre casos e discutem sobre questões de defesa da concorrência que tenham um componente de proteção ao consumidor

3. Questões institucionais: estruturas e práticas

3.1. As instituições do SBDC

Três instituições distintas compõem o SBDC: SDE, SEAE e CADE. A SDE, parte do Ministério da Justiça, é liderada por um Secretário e dividida em dois Departamentos, um com a responsabilidade de aplicação da Lei de Defesa da Concorrência (Departamento de Proteção e Defesa Econômica, ou DPDE), e outro responsável pela defesa dos direitos do consumidor (Departamento de Proteção e Defesa do Consumidor, ou DPDC). Em outubro de 2009, havia 32 profissionais técnicos e 27 funcionários de suporte administrativo empregados no DPDE.

A SEAE, dirigida por um Secretário nomeado pelo Ministro da Fazenda, possui três funções principais: (1) executar determinadas funções de investigação e de consultoria no âmbito do direito da concorrência (2), fornecer análise econômica para programas regulatórios (incluindo a análise de preços), e (3) monitorar as condições do mercado no Brasil. Em outubro de 2009 havia 78 profissionais técnicos e 72 funcionários de suporte administrativo empregados na SEAE. O trabalho da SEAE em advocacia da concorrência é realizado a partir de sua sede em Brasília. Sua unidade de análise de fusões encontra-se no Rio de Janeiro desde 2004.

A Lei de Defesa da Concorrência (Art. 3) estabelece o CADE como uma autarquia federal independente, associada ao Ministério da Justiça, para efeitos orçamentais. O Plenário do CADE é composto por um Presidente e seis Conselheiros. O Presidente e os Conselheiros são nomeados pelo Presidente da República, e confirmados pelo Senado para um mandato de dois anos, podendo ser reconduzidos por igual período. Os membros do Conselho não podem ser removidos, a não ser que incorram em infrações penais ou prevaricação, conforme especificado por lei. [52] Em outubro de 2009, havia 49 profissionais técnicos e 137 funcionários de administrativos empregados no CADE.

Em outubro de 2008 o CADE se submeteu a uma reestruturação interna. Foram criados quatro grupos técnicos, ampliando a infra-estrutura regular apoio para a decisão de casos: (a) mercados regulados, (b) métodos em economia, (c) relações internacionais, e (d) negociações de acordos. Cada grupo é supervisionado por um ou mais Conselheiros. O Grupo Técnico de Negociações é responsável pelo desenvolvimento de expertise em negociações. Separadamente, em 2009, o CADE criou uma Comissão especializada encarregada da negociação de todos os acordos do CADE em casos de conduta. A Comissão é composta por três ou mais membros, todos recrutados no corpo técnico do CADE, e supervisionada por um dos

Conselheiros. Em novembro de 2009, a Comissão havia concluído com êxito dois acordos e outros três estavam em negociação.

O Grupo Técnico de Relações Internacionais, como o nome indica, é responsável por representar o CADE em suas muitas relações com organizações internacionais e governos estrangeiros. O Grupo Técnico de Mercados Regulados tem uma agenda ambiciosa. Sabe-se que muitos dos casos do CADE surgem em setores regulados, em que o conhecimento especializado sobre os mercados relevantes é essencial. Caberá a este Grupo adquirir experiência nestes setores, e apoiar o CADE em seus casos, quando necessário. Para tal, o grupo é encarregado de, entre outras coisas, realizar estudos de mercados regulados, especialmente na medida em que a regulação afeta a concorrência em um dado setor, construir relações com as autoridades reguladoras em questão e participar de discussões entre instituições em matéria de regulação e concorrência. Não está claro como esse novo grupo irá interagir com a SEAE, que já amealha importante experiência nestas áreas.

Em setembro de 2009 o CADE criou o Departamento de Estudos Econômicos (DEE), ao qual o Grupo Técnico de Métodos em Economia, criado em 2008, será integrado. Até o final de 2009 o DEE deveria ter em seus quadros quatro economistas em tempo integral, dois dos quais com título de Dout em universidades dos Estados Unidos. A principal atribuição do DEE será a de prestar suporte econômico aos Conselheiros. Para este efeito, em conjunto com o Grupo Técnico de Métodos em Economia, envolveu-se em uma série de atividades, incluindo a realização de sessões de treinamento interno, participação em fóruns internacionais sobre economia em antitruste e em consultas bilaterais com economistas especialistas de outras jurisdições, avaliação de relatórios de consultores econômicos, realização de exercícios econométricos e elaboração de artigos técnicos sobre diversos temas relacionados à área. O Departamento tem uma agenda ambiciosa para 2010, que inclui a realização de estudos de práticas de exclusão, o cálculo dos danos e a identificação de cartéis.

Há dois representantes de órgãos jurídicos distintos e independentes no CADE. Um deles é o Procurador-Geral do CADE (art. 10 da Lei de Defesa da Concorrência), indicado pelo Ministro da Justiça e nomeado pelo Presidente da República, após aprovação do Senado Federal. O Procurador-Geral serve sob as mesmas condições aplicáveis aos membros do Conselho no tocante à duração do mandato, qualificações, recondução e perda de mandato (art. 11) e, portanto, não está sujeito à remoção pelo Conselho. O Procurador-Geral representa o CADE perante o Judiciário. Ele também pode emitir pareceres em processos em trâmite no CADE. Em 2009 havia um total de 20 pessoas trabalhando na Procuradoria do CADE, incluindo oito

procuradores. Em 2009, o Procurador-Geral recebeu a tarefa de acompanhar o cumprimento das decisões do CADE.

O segundo é um Procurador da República, representante do Ministério Público Federal (MPF) junto ao CADE. O artigo 12 da Lei de Defesa da Concorrência prevê que o Procurador-Geral da República designe um membro Ministério Público Federal para oficiar nos processos sujeitos à apreciação do CADE. A Lei acrescenta que o CADE pode solicitar ao Ministério Público Federal que promova a execução de suas decisões e acordos junto aos tribunais, bem como adote outras medidas judiciais em cumprimento ao dever legal do Ministério Público de proteger a ordem econômica. Aparentemente o papel do Ministério Público Federal é principalmente o de ser uma voz independente dentro da agência, representando o interesse público. Atualmente existem dois profissionais do MPF atuando no CADE, que podem preparar pareceres escritos nos casos sujeitos à apreciação do órgão. Caso concluam que uma decisão ou ação do CADE é juridicamente contestável, esta pode ser questionada perante um tribunal federal. Tal fato ocorreu ocasionalmente, mas não nos últimos anos.

3.2. Procedimentos em casos de conduta

A SDE pode iniciar uma Averiguação Preliminar para apurar possível conduta anticoncorrencial, seja ex officio, seja a partir de denúncia ou solicitação de um interessado. A SDE tem poderes para requisitar que os sujeitos da investigação e outras entidades públicas e privadas prestem informações durante essa fase. Antes ou ao fim de 60 dias (que podem ser estendidos em razão de pedido de informações), a SDE pode decidir pelo arquivamento da investigação, o que deve ser confirmado pelo CADE, ou pela instauração de um Processo Administrativo, que é um estágio mais formal no processo de investigação. O Representado ou sujeito da investigação é formalmente informado da natureza da alegada violação e é então notificado a apresentar sua defesa. A SDE pode conduzir maiores apurações e tem poderes plenos de instrução processual nesta fase, incluindo a possibilidade de realizar oitiva de testemunhas. Ao final desta fase processual, a SDE irá emitir um relatório escrito contendo suas conclusões e recomendações e o encaminhará, juntamente com os autos do processo, para o CADE.

A SDE poderá, por iniciativa própria ou mediante provocação do Procurador-Geral do CADE, adotar medida preventiva em processo administrativo, quando houver "indício ou fundado receio de que o representado, direta ou indiretamente, cause ou possa causar ao mercado lesão irreparável ou de difícil reparação, ou torne ineficaz o resultado final do processo". [53] Dessa decisão da SDE cabe recurso voluntário ao CADE.

A SDE é obrigada a notificar a SEAE quando da instauração de Processo Administrativo, a fim de que esta Secretaria possa decidir por emitir um parecer à SDE sobre o assunto.[54] Além disso, uma lei específica confere à SEAE poderes para investigar possíveis violações à Lei de Defesa da Concorrência.[55] Assim, a SEAE pode atuar separadamente ou em cooperação com a SDE na condução de investigações de condutas anticoncorrenciais. Como descrito abaixo, no entanto, a SEAE tem reduzido drasticamente a sua participação em casos de conduta. A SEAE não tem função adjudicatória ou executiva no âmbito da Lei de Defesa da Concorrência.

Quando o CADE recebe o parecer da SDE sobre determinado processo, o caso é distribuído de forma aleatória a um dos seis Conselheiros, que é designado como Conselheiro-Relator, e encaminhado ao Procurador-Geral do CADE. A Lei exige que o Procurador-Geral emita um parecer sobre o caso no prazo de 20 dias.[56] O parecer do Procurador-Geral geralmente enfatiza os aspectos jurídicos do processo, mas pode estender-se também a questões substantivas. O Conselheiro-Relator deve decidir se realizará diligências complementares no prazo de 60 dias após o recebimento do processo. O CADE dispõe dos mesmos poderes que a SDE para requerer informações. No entanto, é raro que uma investigação suplementar seja iniciada. Ocasionalmente, o CADE tem reenviado o processo à SDE para instrução adicional. Assim como o Secretário da SDE, o Conselheiro-Relator tem o poder de invocar o artigo 52 para emitir uma medida preventiva com o objetivo de prevenir dano imediato e irreparável. A medida entra em vigor imediatamente, mas pode ser objeto de recurso ao Plenário do CADE, além de poder ser discutida nos tribunais.

Após o término do período de 60 dias ou da investigação complementar, o processo é lançado na pauta de julgamentos do CADE, para que seja decidido o mais rapidamente possível. [57] O Conselheiro-Relator deve preparar o relatório e a decisão com a recomendação para o caso. O Conselheiro deve apresentar o relatório aos outros Conselheiros e às partes envolvidas, em prazo não inferior a cinco dias antes da sessão de julgamento. A decisão do Conselho é emitida em uma sessão pública, durante a qual o Procurador-Geral do CADE e o Representado têm a oportunidade de participar. A SDE e a SEAE também podem participar e explicar seus pareceres técnicos nessas sessões. O *quorum* necessário para julgamento pelo Conselho é de cinco membros, e uma decisão é tomada pela maioria dos votos dos participantes. O Presidente é um dos sete membros votantes e, em caso de empate, poderá emitir um voto adicional.

Um ponto forte deste processo de análise é a sua transparência. Não há queixas por parte dos profissionais atuantes na área quanto ao devido processo legal. Os Representados são devidamente informados das

acusações que enfrentam e têm oportunidades suficientes durante todo o processo para fazer sua defesa. As decisões do CADE são proferidas em sessão pública; o processo pode ser acompanhado ao vivo também em áudio pela Internet. As decisões são apresentadas por escrito e tornadas públicas.

Houve queixas por parte dos advogados acerca do tratamento de informações confidenciais. O CADE tentou resolver isso por meio da Resolução nº 45, que é um regulamento abrangente de procedimentos oficiais do Conselho relativos à proteção de informações confidenciais. A Resolução estipula que, por solicitação de uma parte interessada, o Conselheiro-Relator ou o Presidente do CADE podem classificar as informações como confidenciais e não disponíveis ao público. O dispositivo legal enumera os tipos de informações que podem ser classificadas como confidenciais, tais como faturamento, informações sobre custos, lucros e prejuízos, segredos de empresa e de processos industriais, e informações de clientes e fornecedores. Tal Resolução também lista os tipos de informações que não podem ser consideradas confidenciais, tais como informações notadamente públicas, composição acionária, estrutura de controle e linhas de produtos ou serviços ofertados. O solicitante da confidencialidade tem o ônus de demonstrar que a informação deve ser protegida.

O SBDC é criticado pelo tempo utilizado para concluir um caso de conduta. Medidas para amenizar o problema têm sido tomadas e estão começando a dar frutos. Um óbvio problema estrutural criado pela Lei de Defesa da Concorrência é a sobreposição de responsabilidades entre as três agências, em especial entre a SDE e a SEAE. A partir de 2003, essas duas agências começaram a racionalizar o seu trabalho; a SDE passou a se concentrar em casos de conduta, em especial cartéis, enquanto a SEAE passou a enfocar atos de concentração. As duas Secretarias formalizaram um acordo em 2006, que articulou os procedimentos de investigação conjunta, tanto para atos de concentração quanto para casos de conduta. Atualmente, a divisão de responsabilidades é quase completa. Embora a Lei exija que a SDE emita um parecer sobre os atos de concentração notificados, isso vem sendo diretamente atendido pelos pareceres da SEAE. A SEAE, por outro lado, já não se envolve em casos de conduta.[58]

Abaixo estão as Tabelas 5-7, descrevendo o volume de trabalho na SDE.

Tabela 5. Procedimentos Administrativos

	2004	2005	2006	2007	2008	2009*
Recebidos	163	154	172	120	181	146
Concluídos	60	128	131	126	186	143

Tabela 6. Averiguações Preliminares

	2004	2005	2006	2007	2008	2009*
Instauradas	33	32	10	19	76	85
Concluídas	15	29	11	50	76	41

Tabela 7. Processos Administrativos

	2004	2005	2006	2007	2008	2009*
Instauradas	36	18	17	16	18	36
Concluídas	29	37	8	34	58	19

* Até Setembro

Por anos houve um crescente acúmulo de casos na SDE. Nos últimos anos, contudo, a SDE tem feito um esforço concentrado para enfrentar esse problema. Note-se que, até 2007, em cada uma das três fases de investigação acima, havia normalmente mais casos iniciados que concluídos. Essa tendência foi revertida em 2007 (ver Tabela 8). Embora pareça que o acúmulo tenha sido retomado nos três primeiros trimestres de 2009, a SDE tem feito progressos na redução de seu estoque de casos.

Tabela 8. Casos enviados ao CADE e estoques de 2006-2008

	2006	2007	2008
Casos enviados ao CADE*	21	90	134
Estoque*	396	341	300

* Inclui tanto as averiguações preliminares quanto os processos administrativos.

Dados sobre o tempo necessário para a conclusão de um processo na SDE não estão totalmente disponíveis e podem conter certo grau de imprecisão. O tempo médio total na SDE para investigações que atingem a fase do Processo Administrativo varia entre dois e seis anos. Além disso, a média tem crescido nos últimos anos. Uma razão para isso é que os Representados estão recorrendo mais ao Judiciário para discutir questões processuais. Ademais, o aumento pode ser resultado, pelo menos em parte, do esforço da SDE em reduzir seu estoque. À medida que se conclui alguns dos casos mais antigos, o efeito é aumentar a média para todos os casos daquele ano. Ainda assim, alguns casos permanecem na SDE por anos. Um possível obstáculo é a previsão legal, descrita anteriormente, de que o CADE deve aprovar todas as decisões da SDE para o arquivamento de averiguações preliminares e processos administrativos sem a adoção de medidas adicionais. Esse resultado, naturalmente, ocorre na grande maioria dos casos. Esse procedimento consome recursos tanto da SDE, que tem que

preparar o parecer, quanto do CADE, que deve aprovar formalmente cada decisão de arquivamento. De qualquer forma, parece que a razão fundamental para esse persistente estoque na SDE é a falta de pessoal, que será discutida melhor em seguida. Dos três órgãos, o problema de pessoal é mais agudo na SDE.

O CADE também tem se esforçado para reduzir o tempo necessário para a conclusão dos casos, com resultados positivos.

Tabela 9. Tempo médio de tramitação dos casos no CADE (em dias).

2005	2006	2007	2008	2009
453	426	261	268	409

O CADE conclui que o aumento verificado em 2009 resultou do fato de que mais casos, e de maior complexidade, foram enviados pela SDE nesse ano, em um esforço para reduzir o seu estoque. De toda forma, pode-se observar que os casos de conduta podem levar até um ano ou mais para serem finalmente decididos pelo CADE.

A tabela a seguir mostra o tempo total decorrido na SDE e no CADE para quatro dos cinco casos de conduta, três de cartéis e um de abuso de posição dominante, descritos acima, nos Quadros 2 e 3. O quinto caso, dos compressores, descrito no Quadro 2, ainda está em trâmite. Uma parte celebrou acordo com o CADE, sendo que tal acordo foi assinado, aproximadamente, sete meses depois que o caso foi aberto na SDE.

Tabela 10. Tempo de tramitação dos casos na SDE e no CADE

	Tempo na SDE (em dias)	Tempo no CADE (em dias)	Total
Areia para a construção	479	359	838
Serviços de Segurança	1 066	355	1 421
Britas	493	230	723
AmBev (programa de fidelidade)	1 031	861	1 892

3.3. Procedimentos em atos de concentração

O artigo 54 da Lei de Defesa da Concorrência estabelece os procedimentos para a análise dos atos de concentração notificados. A notificação deve ser feita à SDE, que imediatamente fornece cópias à SEAE e ao CADE. A SEAE tem um prazo de 30 dias para apresentar um relatório técnico à SDE, que deve, dentro de 30 dias a contar do recebimento do parecer da SEAE, fornecer uma

recomendação ao CADE. As recomendações da SEAE e da SDE são públicas, com as informações confidenciais editadas. Nesse ponto, os autos são transferidos ao CADE, que deve proferir uma decisão em 60 dias. O CADE não se vincula às recomendações da SEAE e da SDE. Não há conseqüências legais caso a SEAE e a SDE não cumpram seus prazos regulamentares de 30 dias. No entanto, se o CADE não tomar uma decisão dentro do período de 60 dias, a operação é considerada aprovada. Assim, o prazo máximo legal para a apreciação dos atos de concentração, nos termos do artigo 54, é de 120 dias. Todavia, cada uma das três agências também tem o poder de emitir um ou mais pedidos de informações adicionais; a contagem dos prazos legais fica suspensa a partir do momento do pedido, até que a informação seja fornecida.

A Resolução 15, que regulamenta a execução de atos de concentração, foi adotada em 1998. A Resolução introduziu um procedimento de duas etapas, composto por um formulário de notificação inicial (Anexo I) e um segundo formulário (Anexo II), que exige uma quantidade significativamente maior de informações, caso seja determinada a necessidade de uma investigação adicional. [59] Entretanto, à medida que a prática foi se desenvolvendo, caso uma fusão seja suficientemente complexa para que haja necessidade de uma segunda etapa de solicitação de informações, a SEAE irá elaborar perguntas especialmente direcionadas à transação em análise. Da mesma maneira, se o CADE decidir que uma fusão apresentada pelo SDE e pelo SEAE necessita de informações adicionais, o pedido suplementar será conduzido pelo Relator e enfocará as questões específicas identificadas para exame.

Uma crítica inicial feita ao processo de análise de atos de concentração do SBDC referia-se à demora demasiada da análise, especialmente em casos de atos de concentração que evocavam pouca ou nenhuma preocupação perante a Lei. Isso foi, ao menos em parte, uma conseqüência inevitável da inexistência de um sistema de notificação prévia de atos de concentração, como discutido no item 2.2.2 acima. De qualquer maneira, uma importante e recente conquista do SBDC foi a implementação de um procedimento sumário para atos de concentração mais simples. Ele foi iniciado em 2002, quando a SEAE e a SDE adotaram informalmente um procedimento simplificado para casos de menor complexidade, onde cada órgão prepararia um relatório simplificado e curto dentro de 15 dias. O procedimento foi formalizado em 2003 por meio de uma Portaria Conjunta[60], que estabeleceu critérios para a qualificação de atos de concentração para o procedimento sumário. Em 2004, os dois órgãos começaram a analisar as fusões notificadas simultaneamente e a mandar um relatório conjunto ao CADE. Por sua vez, o CADE dinamizou seus procedimentos; ele passou a adotar mais freqüentemente os relatórios da SEAE/SDE, ao invés de criar um novo relatório próprio.

Em 2006, SEAE e SDE emitiram a Portaria Conjunta Nº 33 que deu continuidade à institucionalização da cooperação entre os dois órgãos e transferiu a maior parte do trabalho investigativo à SEAE. Mais recentemente, em março de 2009, o SBDC fez maiores ajustes ao procedimento sumário, em

um acordo formal entre os três órgãos e a Procuradoria do CADE. Antes, os relatórios tinham, em média, de cinco a sete páginas de extensão. Um formulário eletrônico de relatório foi criado, resultando em relatórios que agora estão reduzidos a duas páginas. A SDE agora frequentemente adota os relatórios da SEAE. No CADE, a Procuradoria costumava fornecer suas próprias recomendações aos casos, incluindo em atos de concentração. O acordo de 2009 estabeleceu que a Procuradoria do CADE elaboraria tais relatórios apenas em determinadas circunstâncias, normalmente quando do surgimento de alguma questão legal ou processual. Atualmente, no CADE, os Conselheiros emitem em conjunto seus votos em todos os atos de concentração analisados sob o procedimento sumário; se não houver desacordo, todos são aprovados simultaneamente.

O resultado tem sido a diminuição contínua do prazo necessário para a revisão dessas operações. Não é incomum que atos de concentração em procedimento sumário sejam aprovados em 30 dias ou menos.

Tabela 11. Atos de concentração analisados sob o procedimento sumário no SBDC

	2005	2006	2007	2008	2009*
Percentagem de procedimentos sumários em relação ao total	n/a	68%	68%	65%	63%
Dias na SEAE	n/a	17	15	20	21
Dias no CADE	56	45	43	42	35

* Até setembro

Essas reduções no tempo de análise de atos de concentração sob o procedimento sumário, juntamente com algumas reduções no tempo de análise de procedimentos ordinários, têm resultado em diminuições substanciais no tempo médio de análise para todos os atos de concentração

Tabela 12. Tempo médio de análise – Todos os atos de concentração

	2005	2006	2007	2008	2009*
Dias na SEAE/SDE	161	120	105	104	135
Dias no CADE	81	64	48	50	45
Total	242	184	153	154	180

* Até Outubro

3.3.1. A comunidade empresarial e o processo de concentração do SBDC

Profissionais do setor privado unanimemente elogiam o SBDC pelos avanços promovidos no procedimento sumário. Há algumas reclamações no sentido de que as investigações de atos de concentração em procedimento ordinário ainda demoram demasiadamente. Resta claro, como citado anteriormente, que as partes envolvidas não possuem os incentivos para acelerar o processo como teriam em um regime de notificação prévia de fusões. Por sua vez, a SEAE reclama que em alguns momentos as partes não revelam totalmente suas análises até que ela apresente seu relatório ao CADE.

Assim como em investigações de conduta, os profissionais envolvidos não registraram reclamações quanto ao devido processo legal; todos consideram o processo suficientemente transparente. Entretanto, há algumas reclamações de que o procedimento de negociação de acordos não é suficientemente flexível. Os acordos irão se tornar cada vez mais importantes, especialmente se o sistema de notificação prévia de atos de concentração for adotado. O CADE tem tomado previdências para regularizar seus procedimentos de negociação, como discutido anteriormente. Finalmente, os profissionais consideram a análise de atos de concentração conduzida pela SEAE e pelo CADE competente e profissional, apesar de também afirmarem que a qualidade do trabalho realizado no CADE é afetada adversamente pela alta rotatividade de pessoal, tanto no Conselho como na equipe de funcionários.

3.4 Recursos das autoridades

3.4.1. Pessoal

Uma característica notável dos funcionários do serviço público federal no Brasil é que um número significativo destes é empregado por meio de contratos, e são, portanto, considerados funcionários "temporários". O número de funcionários contratados é particularmente alto (cargos terceirizados de suporte administrativo) . Entretanto, o Brasil também dispõe de servidores públicos concursados. Alguns desses funcionários são qualificados para carreiras específicas, que incluem uma classificação conhecida como "Gestores" (Especialistas em Políticas Públicas e Gestão Governamental - EPPGGs) e outra titulada Analista de Finanças e Controle (AFCs), designados para o Ministério da Fazenda[61]. Esses profissionais se submetem a um concurso público rigoroso. Eles podem ser transferidos entre os diversos Ministérios e agências do governo, e freqüentemente o fazem. Os mais qualificados são solicitados por todo o governo e agências competem por seus serviços de diversas maneiras.

Acima dessa estrutura concursada/ contratada está o sistema de DAS (Direção e Assessoramento Superior). Este é dividido em sete categorias e foi originalmente designado como um mecanismo para admissão de funcionários com contrato temporário para cargos de gestão. Ao longo dos anos, as categorias mais baixas de DAS têm sido utilizadas não somente para contratar funcionários não-concursados, mas também para complementar o salário dos servidores públicos concursados. Os funcionários concursados que possuem cargo DAS recebem, além do salário referente à sua função no serviço público, uma percentagem (na maioria dos casos, 60 por cento) do salário associado à sua categoria DAS. Os órgãos ambicionam dispor de cargos DAS porque as categorias mais altas podem ser utilizadas para contratar técnicos seniores e as categorias mais baixas podem ser usadas como remuneração suplementar para atrair e manter servidores concursados em cargos juniores. O Ministério do Planejamento controla o número de cargos concursados e contratados e disponíveis em um órgão, incluindo o número e a categoria dos cargos DAS. Os funcionários contratados por DAS estão sujeitos à rescisão de seus contratos com a mudança da administração política, apesar de essas mudanças normalmente afetarem somente os funcionários mais graduados.

Todos os três órgãos do SBDC sofrem com a falta de mão-de-obra qualificada e com a alta rotatividade de pessoal. No CADE, o problema da rotatividade é especialmente acentuado. A Lei de Defesa da Concorrência de 1994 estipulou a criação de um quadro de pessoal permanente para o CADE, mas esse dispositivo nunca foi implementado. Até 2006, nenhum cargo permanente havia sido designado para o CADE. Todo o seu corpo técnico era formado por funcionários temporários contratados sob o sistema de DAS ou por funcionários concursados oriundos de outros órgãos governamentais designados para o CADE. A rotatividade da equipe era demasiadamente alta devido ao fato de muitos dos funcionários serem especificamente designados a um Conselheiro. O mandato dos Conselheiros era, e continua sendo, curto – apenas dois anos, com a possibilidade de uma recondução por igual período. Quando um Conselheiro deixava seu cargo, sua equipe normalmente também assim procedia. O tempo de permanência de um funcionário no CADE tem sido em média três anos. Isso tem uma óbvia influência negativa na "memória institucional" do órgão. O projeto de lei em trâmite no Congresso Nacional, descrito no item 4 adiante, é voltado diretamente à solução desses problemas.

Em 2006, o CADE recebeu autorização para a disponibilização de 27 cargos permanentes (no final de 2009, 25 desses cargos foram ocupados).[62] Apesar de esse número não corresponder nem à metade dos funcionários lotados no CADE, a situação do órgão já melhorou. No passado, muitos profissionais que trabalhavam no órgão não possuíam nenhum interesse especial pela área de defesa da concorrência, e estavam prontos para pedir transferência caso uma oportunidade surgisse. Atualmente, aqueles que ocupam cargos concursados no CADE afirmam ter escolhido o órgão. Eles esclarecem que gostam de seu trabalho e do prestígio que dele advém. Essa tendência é indicadora do que

poderia acontecer caso o projeto de lei em trâmite no Congresso, que autorizaria a criação de 200 cargos permanentes para o CADE, venha a ser aprovado, consoante relatado mais adiante.

Como dito anteriormente, a SDE tem um atraso crônico em suas investigações, e a percepção é a de que o órgão ainda demora demasiadamente para concluir as investigações complexas. Nos últimos anos, a SDE tem se concentrado em reduzir esse atraso, mas aparentemente um real progresso só poderá ser realizado por meio do aumento de seu pessoal. A Secretaria tem se esforçado para atrair e manter gestores competentes, em parte através da complementação de seus salários de funcionários concursados com contratos DAS. Um dos resultados dessa iniciativa é a manutenção de um baixo número total de funcionários, uma vez que os mais qualificados recebem melhores salários, mas a SDE acredita que, a longo prazo, irá se beneficiar por ter uma equipe permanente motivada. Ademais, a SDE enfatiza os aspectos qualitativos do trabalho no órgão, tal como no CADE. No Brasil, como em todos os países, os profissionais de agências de concorrência acham o trabalho de combate a cartéis interessante, até mesmo emocionante. A SDE reestruturou-se como uma unidade de combate a cartéis, tendo como um dos resultados a melhoria de sua capacidade de atração e manutenção de bons funcionários.

A tabela 13 mostra o quantitativo de funcionários das três agências.

Tabela 13. Funcionários do SBDC

			CADE		
	2005	2006	2007	2008	2009
Técnicos	51	54	51	48	49
Suporte	127	111	113	138	137
			SDE		
	2005	2006	2007	2008	2009
Técnicos	35	37	34	28	32
Suporte	32	35	35	48	27
			SEAE		
	2005	2006	2007	2008	2009
Técnicos	67	80	78	77	78
Suporte	101	85	77	67	72

Ao contrário do CADE e da SDE, cuja dimensão do corpo técnico tem permanecido constante nos últimos anos, a SEAE teve um aumento de 16% entre 2005 e 2009. A maior parte é composta por servidores concursados, e não apenas DASs, e a maioria foi designada especificamente à SEAE, ao invés de serem temporariamente alocados a partir de outras agências do

governo. Como mencionado acima, a SEAE tem conquistado significativos ganhos em eficiência em seu procedimento de análise de fusões.[63] Sua análise substantiva de fusões também é considerada competente. Segundo a SEAE, nos últimos três anos 99% de suas recomendações foram acolhidas pelo CADE. Ainda assim, a rotatividade de profissionais na SEAE é alta. A SEAE relata que somente em 2008 ela perdeu 35% de seus profissionais (27 de um total de 77), que tiveram de ser substituídos. A SEAE atribui isso ao fato que os cargos disponíveis não tenham sido criados especificamente para o órgão, isto é, exigindo qualificações que corresponderiam mais estreitamente à sua missão. (O mesmo ocorre com o CADE e a SDE.) A maioria dos profissionais da SEAE é qualificada como Especialistas em Políticas Públicas e Gestão Governamental ou como Analistas Financeiros. Como tal, eles estão mais dispostos a considerar cargos em outras agências do governo quando eles se tornam disponíveis.

Os cargos enumerados para a SDE na tabela acima são integralmente dedicados à sua função de aplicação da política da concorrência. Muitos dos funcionários da SEAE trabalham em algum aspecto da sua ampla função de promoção da advocacia da concorrência, descrita no item 6 abaixo, e não na aplicação da legislação de concorrência. De qualquer modo, o total de 339 pessoas trabalhando em política da concorrência nas três agências é pequeno para um país do tamanho do Brasil.

3.4.2. Orçamento

A estrutura de orçamento do CADE difere daquela da SDE e da SEAE uma vez que o CADE é um órgão independente, enquanto os demais são partes de ministérios do governo federal. O CADE, sendo uma agência independente, é responsável por algumas despesas que os outros não possuem, isdeve pagar pelo aluguel do prédio, serviço de telefonia e outros serviços de apoio que são administrados centralmente nos ministérios. O orçamento do CADE é proveniente das taxas de notificação de fusões e de dotação orçamentária do governo. A SDE e a SEAE também recebem parte das receitas provenientes da taxa de notificação de fusões. A SDE é em grande parte dependente desta receita, enquanto a SEAE recebe ainda dotação orçamentária do Ministério da Fazenda, bem como receitas de uma taxa paga por requerentes para a autorização de realização de loterias promocionais. Como a maioria dos profissionaistécnicos do CADE é proveniente de outros órgãos do governo, o CADE não é responsável pelo pagamento dos salários respectivos em seu orçamento. Consoante mencionado anteriormente, alguns servidores públicos de carreira são diretamente atribuídos ao CADE, que paga seus salários e também os vencimentos dos funcionários contratados (terceirizados) e cargos DAS. Em

contrapartida, os gastos com salários não fazem parte dos orçamentos da SDE e da SEAE, com a exceção de certos funcionários de suporte na SEAE.

A Tabela 14 mostra os orçamentos para as três agências (em R$ milhões). Os dados para o CADE incluem algumas despesas salariais, mas não todas, como explicado acima, enquanto para a SDE e a SEAE os dados não incluem os salários. Os dados da SDE são relativos somente ao Departamento de Proteção e Defesa Econômica (DPDE). Os números da SDE podem estar um pouco atenuados, uma vez que o DPDE também tem algum acesso a outras partes do orçamento global da SDE, além de que algumas das suas funções, tais como tecnologia de informação e serviços de imprensa, são financiadas pelo Ministério.

Tabela 14. Orçamento do CADE, SDE e SEAE (em R$ milhões)

	2005	2006	2007	2008	2009
CADE	13.5	10.4	10.3	11.9	13.5
SDE	4.2	2.4	1.8	2.0	1.7
SEAE	8.4	8.4	11.4	12.7	7.3

O orçamento do CADE também é complementado por financiamento do Banco Mundial. O financiamento parte de um acordo-quadro firmado entre o Brasil e o Banco Mundial é destinado a projetos especiais, tais como a criação de um sistema de processo eletrônico para otimizar o trâmite de instrução e julgamento de casos pelo SBDC. O financiamento não é insignificante e corresponde a cerca de 20 por cento do orçamento total do CADE.

3.5. Aspectos internacionais da aplicação da lei e política de concorrência

O artigo 2º da Lei de Defesa da Concorrência incorpora explicitamente a teoria dos efeitos extraterritoriais no direito da concorrência brasileiro. Neste sentido, a decisão do CADE em 2005 de interpretar que o critério de R$ 400 milhões para notificação das fusões se aplica ao faturamento bruto anual registrado exclusivamente no território brasileiro só fez a lei mais coerente com a aplicação da teoria. Antes dessa mudança, era necessário notificar fusões que praticamente não geravam efeitos no país. Em outros aspectos, nos procedimentos do SBDC as empresas estrangeiras são tratadas de forma idêntica às empresas nacionais. O SBDC usualmente leva em conta, em sua análise, o impacto do comércio internacional. Nos casos de atos de concentração, o SBDC habitualmente considera a importação ou o possível

advento de importação quando da definição do mercado relevante, as participações de mercado e os efeitos anticoncorrenciais.

O SBDC assinou acordos de cooperação bilateral com os Estados Unidos (2003), Argentina (2003), Portugal (2005) Canadá (2008), Chile (2008), Rússia (2009) e a Comissão Européia (2009). Em 2010, o SBDC celebrou um novo acordo de cooperação com Portugal (2010). O acordo com a Comissão Européia foi assinado durante O Dia Nacional de Combate a Cartéis do Brasil, em outubro de 2009, descrito no item 2.1.1.4 acima. Esse acordo foi precedido de uma conferência sobre defesa comercial e defesa da concorrência envolvendo representantes das duas jurisdições, realizada em maio de 2009. Em 2009, o SBDC internalizou dois memorandos de entendimento que prevêem a cooperação técnica no âmbito do Mercosul. O SBDC regularmente promove treinamentos e consultas bilaterais com as autoridades de concorrência de outros países. Em novembro de 2008, três representantes da FTC (*Federal Trade Commission*) e da divisão antitruste do DOJ (*Department of Justice*), as autoridades de defesa da concorrência dos Estados Unidos, estiveram no CADE para oferecer um curso sobre os procedimentos de notificação prévia de fusões e, em setembro de 2009, dois economistas do USFTC ministraram um curso de Econometria, com a participação do Departamento de Estudos Econômicos do CADE.

Profissionais do SBDC participaram, ainda, de cursos ministrados por especialistas do Reino Unido; pela autoridade da concorrência espanhola; em curso sobre condução de negociações na Universidade de Harvard para os membros do Grupo Técnico de Negociações no CADE; em curso sobre regulamentação na Universidade George Washington, nos Estados Unidos, e em estágios no exterior, notadamente no DOJ e na FTC (Estados Unidos), no *DG Competition* (Diretório Geral de Concorrência, Comissão Européia) e na autoridade de concorrência do Canadá. O CADE também concede financiamento parcial para que seus funcionários façam cursos de idiomas. Essas iniciativas de cooperação renderam frutos concretos. Recentemente, conforme descrito anteriormente no item 2.1.1.3, Brasil, Estados Unidos e Comissão Européia realizaram operações simultâneas de busca e apreensão em suas respectivas jurisdições, levando à instauração do bem-sucedido caso dos compressores.

Contudo, o SBDC não é apenas beneficiário de assistência técnica, é também provedor. Em 2006, a SDE e o CADE forneceram consultoria a El Salvador, que acabara de promulgar sua primeira lei da concorrência, sobre técnicas de combate a cartéis. Além disso, tem compartilhado sua experiência de combate a cartéis com o Chile e a Argentina. O SBDC contribuiu com a autoridade de concorrência chilena, a Fiscalía Nacional

Econômica (FNE), em seu esforço para convencer os legisladores a aprovar um programa de leniência no Chile. Em junho de 2009, dois Conselheiros do CADE aceitaram convites para visitar o Paraguai e participar de uma série de discussões públicas sobre um projeto de lei de defesa da concorrência atualmente em trâmite junto ao Congresso do Paraguai, que configuraria a primeira lei de concorrência do país. O SBDC também está trabalhando em conjunto com a UNCTAD para a prestação de assistência técnica a outras autoridades de concorrência da América Latina. Por fim, o SBDC está trabalhando com o governo de Angola em um acordo de cooperação informal no qual o SBDC iria ajudar o país na elaboração da sua legislação de concorrência e na formação de capacitação técnica.

Ainda em 2009, as três agências do SBDC criaram um programa de treinamento para os funcionários responsáveis pela aplicação de leis de concorrência provenientes de autoridades de países latino-americanos, no qual os profissionais devem passar um mês em uma das agências do SBDC. O programa é oferecido duas vezes ao ano. A primeira edição foi realizada em julho de 2009, quando CADE, SDE e SEAE receberam representantes das autoridades de defesa da concorrência do Chile, Argentina, Peru e El Salvador. A segunda, da qual participaram representantes de oito países latino-americanos, foi realizada em janeiro de 2010. O SBDC foi bem sucedido na obtenção de financiamento junto à Agência Brasileira de Cooperação (ABC), para o pagamento de passagens aéreas e diárias aos representantes estrangeiros. O SBDC está atualmente em negociações com a ABC para a assinatura de um protocolo de intenções que irá regularizar esse apoio.

O Brasil também atua ativamente em diversos fóruns internacionais. É observador no Comitê da Concorrência da OCDE, onde participa ativamente de todas as reuniões e debates abertos a não-membros, e participa da edição anual do Fórum Global de Concorrência da OCDE. Juntamente com o Chile, foi o primeiro a participar na América Latina do programa da OCDE voltado ao combate a cartéis em licitações, descrito no item 2.1.1.4 acima. O SBDC também é ativo na Rede Internacional de Concorrência (*International Competition Network* - ICN. O CADE é co-presidente do grupo responsável pela coordenação geral das atividades da ICN, denominado *Steering Group*, e ainda é co-presidente do Grupo de Trabalho sobre a Efetividade das Agências (*Agency Effectiveness*). Ele também oferece palestras no âmbito do Sistema de Suporte da ICN, que está atualmente prestando assistência à autoridade de concorrência do Vietnã. A SDE, por sua vez, é co-presidente do Grupo de Trabalho sobre Cartéis Subgrupo 1, da ICN. O SBDC irá participar do Projeto da OMPI (Organização Mundial da Propriedade Intelectual) sobre Propriedade Intelectual e Concorrência, previsto para o ano 2010-2011, e irá realizar em 2010 a primeira conferência regional

organizada no âmbito do Projeto, para os países da América Latina e Caribe, na cidade no Rio de Janeiro. O SBDC também participa da UNCTAD (e hospedará inclusive um de seus seminários em 2010), do Foro Latino-Americano de Concorrência, do Foro Ibero-Americano da Concorrência, da Conferência Internacional dos países do BRIC (Brasil, Rússia, Índia e China), da *International Bar Association*, da *American Bar Association*, da conferência anual da *Fordham* e fornece contribuições à publicação especializada *Global Competition Review*.

Finalmente, o SBDC, principalmente por intermédio da SEAE, desempenha papel ativo nos procedimentos de comércio externo brasileiro. A SEAE participa dos debates da Câmara de Comércio Exterior (CAMEX). O CADE também participa da CAMEX como observador. A CAMEX é um órgão do Conselho de Governo da Presidência da República do Brasil, e tem como objetivo a coordenação de atividades e políticas relativas ao Comércio Exterior, incluindo o turismo. A CAMEX é presidida pelo Ministro do Desenvolvimento, Indústria e Comércio Exterior, e inclui como membros os Ministros da Fazenda, Casa Civil, Relações Exteriores, Agricultura, Desenvolvimento Agrário e Planejamento A SEAE é convidada para a maior parte das discussões técnicas na CAMEX, incluindo as que envolvem tarifas. A CAMEX é o fórum onde a interação entre o comércio e a concorrência ocorre.

O SEAE também tem um papel consultivo no âmbito dos processos antidumping e de concorrência desleal das importações. Reclamações de particulares alegando importações desleais são investigadas por um departamento do Ministério do Desenvolvimento, Indústria e Comércio Exterior (DECOM), que, depois de receber comentários das partes interessadas e outras agências governamentais, transmite sua recomendação para decisão da CAMEX. A SEAE participa com outra Secretaria do Ministério da Fazenda (SAIN) na formulação das recomendações do Ministério nestes casos. O papel da SEAE a este respeito é o de abordar os efeitos concorrenciais da imposição de tarifas de política comercial, que é um tema normalmente não considerado pela autoridade investigadora. A SEAE teve alguns sucessos notáveis em tais casos. Em 2005, por exemplo, convenceu a CAMEX a revogar as medidas antidumping que afetavam o mercado brasileiro de insulina, após investigar uma fusão ocorrida nesse mercado. A SEAE também persuadiu a CAMEX a suspender determinadas medidas antidumping no mercado de cimento, como meio de promover a concorrência nesse mercado no norte do Brasil. Ademais, o CADE e a SDE têm, ocasionalmente, feito recomendações à CAMEX em questões comerciais.

3.6. Aplicação da legislação de concorrência pelos Estados e por particulares

Os Estados brasileiros não têm as suas próprias leis de defesa da concorrência e não há outras agências federais ou estaduais que não o SBDC com autoridade para fazer cumprir a Lei nº 8.884. Com relação à aplicação da lei antitruste a particulares, uma parte prejudicada pela prática de infração contra a ordem econômica, que esteja insatisfeita com a decisão do CADE , não tem direito de recorrer dessa decisão, seja no âmbito do SBDC, seja perante o Judiciário. Nos termos do artigo 29 da Lei de Defesa da Concorrência, contudo, o particular pode propor suas próprias ações perante o Judiciário por danos decorrentes de conduta anticompetitiva, em face daquele que os causou. Não há dados disponíveis sobre o número e a freqüência de ações antitruste privadas no Brasil. Um estudo extra-oficial realizado pela SEAE, no entanto, mostrou um aumento significativo de tais casos entre 2005, quando cerca de 30 casos foram registrados, e 2008, quando houve cerca de 150 casos. Estes foram apenas os casos interpostos junto aos tribunais federais e estaduais, e tenderam a se concentrar em determinadas áreas geográficas e nos setores de serviços financeiros e de revenda de combustíveis. Além disso, eles não foram limitados a ações privadas propostas nos termos do artigo 29 da Lei de Defesa da Concorrência, mas incluíram outras fundamentadas, por exemplo, no Código de Defesa do Consumidor.

Há dois tipos de ação coletiva para defender interesses de particulares. A primeira é a ação civil pública, que pode ser iniciada por organizações de defesa do consumidor, Ministério Público, sindicatos e outros órgãos públicos. Seu propósito é defender interesses públicos difusos e coletivos. Os reclamantes podem não receber o ressarcimento dos danos sofridos, mas os acusados podem ser ordenados a pagar por tais danos, sendo que tais recursos são destinados ao fundo de direitos difusos.[64] Um segundo tipo de ação coletiva é aquela destinada a defender os interesses individuais homogêneos. Essas são ações coletivas destinadas a obter medidas de reparação de direitos e de danos materiais. Quanto às ações civis públicas, diversos tipos de entidades públicas e privadas são legitimas para propor esses casos. Uma dessas ações foi exitosamente iniciada por um promotor de justiça do Estado do Rio Grande do Sul em 2007. Após a conclusão dos processos criminais envolvendo um cartel na revenda de combustíveis em que cinco acusados foram sentenciados a penas de prisão de 2 anos e meio, o promotor obteve a reparação dos danos materiais em nome dos consumidores prejudicados pelo cartel.

3.7. Revisão judicial

O SBDC reconhece cada vez mais que os tribunais brasileiros são uma parte crítica do processo de aplicação do direito da concorrência. As partes envolvidas em processos relacionados à defesa da concorrência estão cada vez mais dispostos a recorrer das decisões do SBDC junto aos tribunais, seja em busca de medidas liminares, enquanto uma investigação ou processo está em curso, seja interpondo recursos contra a decisão final do CADE. O principal efeito dessa propensão ao litígio nos casos de defesa da concorrência tem sido o atraso na implementação das decisões do CADE. Até recentemente, a grande maioria das decisões do CADE em casos de conduta não havia sido aplicada devido aos inúmeros recursos judiciais propostos. Além disso, casos de todos os tipos progridem lentamente no sistema judiciário brasileiro. Não é incomum que um caso leve dez anos ou mais para que alcance uma decisão final junto ao Judiciário. Em 2006 o SBDC confrontou este problema, havendo alcançado relativo sucesso, como descrito abaixo. Porém, os problemas subjacentes permanecem.

Recursos interpostos por particulares para a revisão dos atos de agências do governo são analisados por um juiz federal de primeira instância. Por lei, os recursos contra os atos das autoridades do SBDC devem ser propostos perante o tribunal federal localizado em Brasília. O juiz de primeira instância tem autoridade para decidir a maioria dos pedidos, e pode também conduzir procedimentos probatórios para complementar os elementos fáticos. O segundo grau recursal no sistema federal é composto pelos tribunais de segunda instância da mesma região em que a primeira decisão judicial foi proferida. Por seu turno, recursos dos tribunais de segunda instância são encaminhados ao Superior Tribunal de Justiça (STJ). Os casos que envolvem pedidos com fundamento em dispositivos constitucionais podem ser contestados para além do Superior Tribunal de Justiça, junto ao Supremo Tribunal Federal (STF), instância máxima do Judiciário brasileiro, composta por um corpo de 11 magistrados que tratam apenas de questões constitucionais.

No Brasil, o princípio do *stare decisis* - doutrina da *common law* que confere efeito de precedente, em alguns casos vinculante, a julgados anteriores de um mesmo tribunal ou de tribunal superior, não é formalmente aplicável. No passado, os juízes eram, em teoria, completamente independentes, e poderiam ignorar as decisões de tribunais superiores. Porém, isso mudou em certo grau. Decisões de tribunais superiores agora têm certo efeito vinculante, especialmente em questões constitucionais. Além disso, os tribunais brasileiros têm tradicionalmente se recusado a analisar o mérito de decisões de tribunais especializados, tais como o CADE, com base na teoria de que os tribunais de jurisdição geral não estão qualificados para fazê-lo.

Contudo, parece que os tribunais estão cada vez mais dispostos a examinar o mérito das decisões do CADE e as das de outros tribunais de competência especializada, por vezes sob teoria do abuso de poder, ou quando se determina que a decisão de um tribunal especializado está fundamentalmente em desacordo com o propósito ou objetivos subjacentes da lei. De qualquer modo, as partes em casos do SBDC regularmente recorrem aos tribunais contra os atos do SBDC com fundamento no devido processo legal e em dispositivos constitucionais.

O CADE alcançou um êxito notável nos últimos anos em um aspecto da suas ações junto aos tribunais - a arrecadação de multas. Em 2006, a Procuradoria do CADE empreendeu o levantamento do *status* das multas que haviam sido impostas em casos de conduta, e concluiu que poucas haviam sido pagas. O CADE recorreu a um procedimento respaldado pela legislação brasileira, que prevê que as multas não pagas sejam inscritas em Dívida Ativa, que podem então ser exigidas e depositadas em juízo. O esforço produziu efeitos imediatos.

Tabela 15. Status da inscrição em Dívida Ativa e multas arrecadadas

	2005	2006	2007	2008	2009*
Multas inscritas em Dívida Ativa (em US$ milhões)	0.8	50.0	280.6	63.0	15.1
Número de devedores inscritos em Dívida Ativa	14	92	101	95	35
Multas arrecadadas (em US$ milhões)	1.4	6.2	16.0	37.1	21.9

* Até o final de setembro.

O número de multas e de devedores inscritos em Dívida Ativa diminuiu em 2009, principalmente por conta da eliminação do acúmulo da cobrança de multas em atraso (ver Tabela 15). O alto valor das multas cobradas em 2008 deve-se, em parte, ao fato de que dois casos envolvendo multas significativas foram resolvidos. As multas são pagas pelas partes envolvidas ao Fundo de Defesa de Direitos Difusos, administrado por uma comissão interministerial (da qual a SDE, a SEAE e o CADE participam), e são aplicadas em vários projetos públicos, incluindo aqueles com propósitos culturais, ambientais e de defesa do consumidor.

A segunda parte da iniciativa da Procuradoria do CADE de adoção de uma postura mais agressiva em relação a multas diz respeito ao fato de que, quando as partes recorriam das decisões do CADE junto a tribunais de primeira instância, elas muitas vezes eram bem-sucedidas na obtenção de uma liminar suspendendo o cumprimento da decisão do CADE. O pagamento das multas estabelecidas pelo CADE era suspenso enquanto o processo percorria todo o trâmite pelos tribunais, apesar de disposições específicas nos artigos 65 e 66 da Lei de Defesa da Concorrência exigirem que os recorrentes depositem as multas em juízo ou prestem caução para garantir seu pagamento, caso sejam obrigados a fazê-lo ao final da ação judicial. A Procuradoria do CADE começou a argüir com sucesso em tribunais que esse depósito judicial era necessário. Essa iniciativa tem o efeito salutar de reduzir os incentivos para que as partes recorram ao Judiciário apenas para evitar o pagamento das multas aplicadas pelo CADE.

Em outros aspectos, a SBDC tem um significativo número de ações junto ao Judiciário. Ocasionalmente, os envolvidos impetram recursos durante a fase de investigação. Não é raro, por exemplo, que as partes submetidas à busca e apreensão busquem uma ordem judicial para suprimir as evidências, sob o fundamento de que a busca e apreensão foi conduzida ilegalmente. Os advogados da SDE têm reagido com força e rapidez nestes casos, e sua taxa de êxito tem sido elevada. Como resultado dos esforços da SDE para conter essas táticas, o número dessas ações reduziu substancialmente; de fato, no início de 2010, não havia nenhuma ação de tal natureza em curso.

A Tabela 16 mostra o grande número de processos judiciais interpostos pelo CADE.

Tabela 16. Processos judiciais instituídos por ano

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009*
93	111	186	180	162	193	240	480	338	132

* Até o final de setembro.

O CADE atribui parte do aumento em 2006-08 a seu esforço pró-ativo de cobrança das multas não pagas. O número dessas ações declinou em 2009, pelas razões expostas acima, e o CADE também conclui que parte do declínio de 2009 pode ser atribuído a seu sucesso em convencer os tribunais a exigirem dos recorrentes o depósito em juízo do valor de suas multas ou a prestação de caução, reduzindo assim os incentivos à interposição de recursos junto ao Judiciário.

O CADE tem desfrutado de boa taxa de êxito junto aos tribunais, como mostra a Tabela 17.

Tabela 17. Decisões judiciais, 2005-2009

	2005	2006	2007	2008	2009	Total
Decisões favoráveis	8	31	54	49	10	152
Decisões desfavoráveis	6	14	10	9	5	44
Percentagem favorável	57%	69%	84%	84%	67%	78%

Mesmo assim, o CADE entende que enfrenta grandes desafios nas lides junto ao Judiciário. A Procuradoria do CADE foi reorganizada com o objetivo de torná-la mais eficiente e eficaz. Anteriormente, procuradores distintos eram responsáveis por um mesmo caso em diferentes fases: um deles poderia cuidar do caso na fase administrativa, outro seria responsável pela tréplica, outro por um recurso judicial, e assim por diante. Agora, o mesmo procurador ou procuradores são responsáveis por um caso em todas as suas fases. Ademais, foi implementado um sistema aprimorado para o monitoramento dos casos. Ao mesmo tempo, o CADE objetiva tornar-se mais proativo perante os juízes, fazendo um esforço para familiarizá-los com os casos de defesa da concorrência por meio de palestras e seminários. Devido a seu grande volume de trabalho, os procuradores do CADE não estavam sempre presentes nos tribunais quando um caso de sua responsabilidade, ou algum aspecto dele, era tratado em juízo. O CADE tem se esforçado também nesse sentido, e até mesmo membros do Conselho, incluindo o Presidente, têm se apresentado aos tribunais.

Os advogados do SBDC responsáveis por sua defesa junto ao Judiciário são respeitados tanto pelos tribunais como pela Ordem dos Advogados do Brasil (OAB). Eles são considerados profissionais sérios e muito trabalhadores.

4. A legislação pendente

Há vários anos, tramita no Congresso Nacional brasileiro um projeto de lei de defesa da concorrência abrangente (PL 06/2009), que revisaria amplamente o SBDC e resolveria muitos dos problemas que há muito o atingem. A consideração desse projeto de lei foi postergada por diversas vezes mas, como mencionado anteriormente, à época da elaboração deste relatório havia um forte ímpeto para sua aprovação. O Presidente da República o defendeu veementemente; a comunidade empresarial, que no passado havia demonstrado reservas quanto a alguns de seus aspectos,

especialmente acerca da notificação prévia de atos de concentração, declarou apoio à legislação. O projeto teve apoio efetivo em ambas as casas do Congresso Nacional, e os proponentes estão otimistas sobre sua eventual aprovação. Ainda assim, a tramitação no Congresso continua em andamento; há urgência para se completar esse esforço no primeiro semestre de 2010; caso contrário, as eleições nacionais previstas para o final do ano postergariam novamente a aprovação do projeto de lei. A legislação foi aprovada na Câmara dos Deputados e está sendo debatida no Senado. Algumas emendas foram propostas no Senado, que se aceitas exigiriam sua submissão à Câmara dos Deputados.

Abaixo segue a descrição do que se compreende como sendo as principais disposições do projeto de lei conforme aprovado pela Câmara dos Deputados:

4.1. A estrutura do SBDC

O CADE permanecerá sendo uma autarquia federal, passando a ter *status* de Tribunal Administrativo e não mais de Conselho. O mandato de seus Conselheiros será de quatro anos (não renovável), contra os dois atuais, e os mandatos serão escalonados, para evitar vacâncias simultâneas e a possibilidade de que o *quorum* não seja atingido. O processo de nomeação dos membros do Tribunal será ligeiramente distinto, de modo que o candidato a Presidente do CADE nomeado pelo Presidente da República será indicado conjuntamente pelos Ministros da Fazenda e da Justiça, e os candidatos para os cargos de Conselheiro serão indicados alternadamente pelos dois Ministérios. A aprovação das indicações pelo Senado continua sendo necessária. No passado, o cargo de Conselheiro chegou a ficar vago por um período significativo, enquanto o Presidente do Senado considerava as indicações. A nova Lei permitirá que o Presidente do CADE possa nomear um Conselheiro em caráter temporário, até a posse de um membro permanente. O Procurador-Geral do CADE e o Economista-Chefe, ambos também nomeados pelo Presidente da República com aprovação do Senado, também servirão em mandatos de quatro anos. O *quorum* necessário para a tomada de decisões pelo Tribunal será reduzido de cinco para quatro membros.

As mudanças institucionais mais dramáticas trazidas pelo projeto de lei afetam a SDE e a SEAE. O Departamento de Proteção e Defesa Econômica (DPDE) da SDE será abolido, e suas responsabilidades de execução preliminar e investigação nos casos de defesa da concorrência serão transferidas para uma nova Superintendência-Geral no CADE (SG), composta por um Superintendente-Geral e dois Superintendentes-Adjuntos. O Superintendente-Geral, nomeado pelo Presidente da República mediante

indicação conjunta dos Ministros da Fazenda e da Justiça e aprovação pelo Senado, terá mandato de dois anos, com a possibilidade de uma recondução. O papel da SEAE na investigação de casos de conduta e atos de concentração será efetivamente extinto. No entanto, a Secretaria manterá sua competência relativa à advocacia da concorrência.

Um elemento importante no projeto de lei é a criação de 200 cargos permanentes no CADE. Esses cargos não exigiriam qualificações específicas para o exercício das funções do CADE; seus ocupantes seriam designados a partir de outras áreas de especialidade do serviço público federal.

4.2. Procedimentos em casos de conduta

A Superintendência-Geral do CADE, como sucessora do DPDE/ SDE, será responsável pelo monitoramento dos mercados, identificação das possíveis infrações e condução das investigações. O projeto de lei cria três estágios de procedimento na SG, o "procedimento preparatório", o "inquérito administrativo" e o "processo administrativo", com prazos de duração estabelecidos para cada um deles. O primeiro estágio é o procedimento preparatório, instaurado caso a SG deseje averiguar se uma conduta recai sob a competência do SBDC. O segundo é o estágio de investigação formal, enquanto o terceiro é o estágio no qual um relatório formal fundado na investigação conduzida deve ser preparado para submissão ao Tribunal. Atualmente, existem efetivamente apenas duas fases investigativas na SDE após a apresentação de reclamação formal à Secretaria. No projeto de lei, uma decisão da SG de encerrar a investigação no segundo estágio poderá ser revista pelo Tribunal. Assim que o caso estiver no Tribunal, a única mudança em relação aos procedimentos atuais é que o Superintendente-Geral ou o Conselheiro-Relator poderá permitir a participação no caso de terceiro interessado que seria afetado pela decisão do Tribunal, ou que tenha legitimidade para representar os interesses de uma classe afetada.

Atualmente, o CADE pode impor uma multa máxima de 30% do faturamento bruto da empresa investigada. O projeto de lei reduz esse máximo para 30% do valor do faturamento bruto da empresa no mercado relevante em que ocorreu a infração, mas, tal como ocorre na lei atual, a multa não poderá ser inferior à vantagem auferida em decorrência da conduta.

O projeto de lei traz algumas modificações ao programa de leniência. A regra atual de que o acordo de leniência não está disponível ao líder do cartel será eliminada, por dois motivos: em primeiro lugar, é difícil determinar qual dos participantes do cartel é o líder e, em segundo lugar, negar a celebração de acordo de leniência ao líder tem o efeito de impedir o

acesso (ao menos inicialmente) a um participante que provavelmente tem a maioria das informações sobre o cartel. Ademais, conforme observado acima no item 2.1.1.1, a redução ou suspensão da ação punitiva decorrente da celebração de acordo de leniência atualmente se estende apenas à responsabilidade criminal prevista na Lei de Crimes contra a Ordem Econômica, e não a outros possíveis crimes previstos em diplomas legais criminais, como fraudes em compras públicas. O projeto de lei amplia a concessão dos benefícios resultantes da celebração do acordo de leniência, para que se apliquem também a esses crimes.

4.3. Análise dos atos de concentração

A atual lei carece de um padrão substantivo explícito para revisão de atos de concentração, embora os padrões atualmente empregados pelo SBDC sejam os mesmos utilizados em muitos outros países. O projeto de lei estabelece um padrão baseado no Regulamento de Atos de Concentração da Comissão Européia. Outra mudança substancial prevista no projeto de lei diz respeito às eficiências. O artigo 54 exige, atualmente, que se um ato de concentração inicialmente considerado como anticoncorrencial for aprovado porque as eficiências que ele produz suplantam os prejuízos, as eficiências devem ser "alocadas equitativamente", o que presumidamente significa "alocadas igualmente", entre os participantes da transação e os consumidores. O projeto de lei exige simplesmente que os consumidores "compartilhem" os ganhos de eficiência.

Há mudanças significativas no projeto de lei que afetam os procedimentos de revisão de atos de concentração. Será introduzida a notificação prévia dos atos de concentração: as partes da operação não poderão consumar a transação até que o CADE a tenha aprovado ou até que o prazo legal para análise expire. Ademais, enquanto o atual artigo 54 se aplica a atos de concentração que formalmente não constituem fusões, o projeto de lei se aplica somente a "fusões", definidas como transações nas quais: (1) duas empresas se fundem, (2) uma empresa adquira o controle dos ativos de outra, ou (3) seja realizada uma *joint venture* que possibilite a formação de uma entidade econômica independente. Os parâmetros da notificação também serão alterados. O projeto de lei estipula parâmetros de tamanho mínimos para a submissão de notificação, expressos pelo faturamento total obtido no Brasil, para os dois participantes do ato de concentração. Um dos participantes deve ter faturamento de, no mínimo, R$400 milhões, e o outro de R$30 milhões. Atualmente, não existe parâmetro mínimo exigido para o segundo participante. O parâmetro de participação de mercado de 20 por cento presente na Lei atual é excluído no projeto de lei. A taxa de notificação de R$45.000 é mantida, a ser alocada inteiramente ao CADE.

Conforme observado no projeto de lei, a SEAE não terá papel formal na revisão de um ato de concentração. Após o recebimento de uma notificação, a Superintendência-Geral (SG) deve, no prazo de cinco dias úteis, publicar um edital contendo o resumo da transação proposta. (Todos os prazos no projeto de lei estão expressos em termos de dias úteis e, exceto se forem observados de forma diferente, todos se iniciam na data da notificação.)[65] No prazo de 20 dias após a notificação, a SG deve aprovar a fusão ou determinar a realização de instrução complementar, para a obtenção de informações adicionais. No caso de aprovação pela SG, o CADE tem 15 dias a contar da decisão da SG para rever a aprovação, mas não precisa fazê-lo. Ademais, uma terceira parte interessada pode, no prazo de 15 dias, recorrer ao CADE da decisão da SG. Se não houver recurso de terceiros interessados, nem determinação pelo CADE de rever a decisão da SG, a operação é automaticamente aprovada após expirados os 15 dias. Esse procedimento é o equivalente ao atual procedimento sumário.

Se a SG determinar a realização de instrução complementar para obter informações adicionais, o Superintendente tem um período de 60 dias a contar da data de notificação para decidir se aprovará a fusão ou se recomendará ao CADE que ela seja rejeitada ou aprovada com restrições. Se a SG aprovar a fusão, aplica-se o mesmo procedimento de 15 dias descrito anteriormente, referente às operações analisadas sob o procedimento sumário. Cumpre ressaltar que a determinação de realização de instrução complementar pela SG não suspende o transcorrer do período de 60 dias. Esta é uma falha potencial no projeto de lei, porquanto apresenta a oportunidade óbvia para os solicitantes retardarem a submissão das informações suplementares durante a maior parte ou a totalidade do período de 60 dias. Uma resposta óbvia pela SG nessa hipótese seria recomendar a rejeição da operação ao CADE. Entretanto, existe outra opção, talvez mais provável, que seria a de a SG declarar a fusão "complexa".

A legislação estipula um procedimento separado, e de certa forma paralelo, para os participantes da fusão que seja declarada pela SG como "complexa". A SG deve, a seu critério, fazer essa determinação no prazo de 50 dias da apresentação da notificação. O uso desse procedimento seria outra forma de a SG tratar de uma situação na qual as partes não tenham cumprido com o prazo de 20 dias do pedido inicial para a apresentação de informações, até o 50º dia. Resta claro que a SG poderia tomar a decisão de declarar a operação "complexa" dentro dos primeiros 20 dias, evitando assim a necessidade de emitir dois pedidos suplementares.

Se a SG declarar que uma operação é complexa, deve emitir seu pedido de informações suplementares dentro do prazo de 50 dias. As informações devem ser fornecidas no prazo de 90 dias a contar da data da notificação. Após expirados os 90 dias, a SG tem 10 dias para decidir se aprova a

operação ou para recomendar sua rejeição ou aprovação com restrições. No primeiro caso, aplica-se o mesmo procedimento de 15 dias explicado anteriormente.

Se a SG recomendar a rejeição ou modificação da transação por qualquer processo descrito acima, o procedimento a seguir aplica-se no Tribunal. No prazo de 48 horas, o caso será encaminhado a um Conselheiro Relator de forma aleatória. No prazo de 20 dias a contar da decisão da SG rejeitando o ato de concentração, o Conselheiro Relator deverá ordenar que o caso seja agendado para julgamento ou, caso seja necessário obter informações adicionais, que a SG emita outro pedido de instrução complementar. Se forem solicitadas informações adicionais, o Conselheiro Relator deverá agendar o caso para julgamento no prazo de 30 dias do recebimento das informações. Não existe período determinado para o julgamento, mas o projeto de lei estipula um prazo para que a decisão final do caso seja tomada, a saber, 240 dias a contar da data da notificação. Esses 240 dias podem ser prorrogados em duas circunstâncias: (1) se as partes solicitarem uma prorrogação de 60 dias, ou (2) se o Tribunal ordenar uma prorrogação de 90 dias. Desse modo, todos os processos de fusão devem ser decididos pelo CADE no prazo máximo de 330 dias da data de notificação.

O direito de um terceiro interessado de recorrer contra decisão da Superintendência-Geral que aprove uma concentração é novidade. O recurso é apresentado primeiramente na SG, que tem cinco dias para reverter sua decisão ou encaminhar o recurso ao Tribunal. Caso seja encaminhado, o Conselheiro Relator determinará (sujeito à revisão pelo Tribunal) se conhecerá do recurso. Caso positivo, o recorrente desempenhará o papel que a Superintendência-Geral desempenharia. A SG, entretanto, tem a possibilidade de participar como parte, para defender sua decisão. Se o recurso interposto por um particular for conhecido, mas ao final rejeitado, o Tribunal deverá impor multa de R$5.000 a R$5 milhões (US$2.815 a US$2,8 milhões). O valor cobrado deverá ser determinado considerando-se a condição econômica do apelante, sua atuação no processo, sua boa-fé e os efeitos do retardamento para a aprovação do ato.

O projeto de lei também estabelece um mecanismo formal para a solução de casos de fusão por meio de acordos. A Superintendência-Geral terá poderes para negociar um acordo referente à concentração notificada a qualquer tempo antes de a mesma ser contestada junto ao Tribunal. Uma vez negociado, o acordo deverá ser disponibilizado durante pelo menos 10 dias para consulta pública, após o que a SG poderá decidir renegociar a proposta antes de transmiti-la ao Tribunal para decisão final.

5. Limites da política de concorrência: isenções e regimes regulatórios especiais

A Lei de Defesa da Concorrência, por seus termos, aplica-se "às pessoas físicas ou jurídicas de direito público ou privado, bem como a quaisquer associações de entidades ou pessoas, constituídas de fato ou de direito, ainda que temporariamente, com ou sem personalidade jurídica, mesmo que exerçam atividade sob o regime de monopólio legal (artigo 15)." O SBDC entende que a Lei é aplicável ao governo federal e a suas agências, embora nunca tenha havido um caso para testar essa afirmação. Na realidade, o SBDC interage com o governo federal em questões de concorrência por meio da advocacia da concorrência. Os governos estaduais e suas agências são considerados fora do âmbito da lei em razão do federalismo. A lei aplica-se a todas as entidades privadas de todos os setores da economia e, por conseguinte, a empresas que operam em setores regulados. A única exceção a este princípio tem surgido no setor financeiro, descrito adiante. As empresas comerciais de propriedade do governo federal ou estaduais estão claramente abrangidas. Os regimes regulatórios e as interações entre a aplicação da legislação de defesa da concorrência e regulação em setores selecionados são descritas a seguir.

5.1. Telecomunicações

Este setor foi liberalizado em 1997. As empresas estatais foram privatizadas e a Lei Nacional de Telecomunicações promulgada naquele ano criou uma nova agência reguladora, a Agência Nacional de Telecomunicações (ANATEL). Diferentemente da maioria dos outros setores regulados, a Lei de Telecomunicações foi específica sobre a relação entre regulação e a legislação de defesa da concorrência. A Lei estipulou a aplicação da Lei de Defesa da Concorrência para aquele setor, e autorizou tanto a ANATEL quanto o CADE a aplicá-la. O artigo 7º da Lei estipula que "as normas gerais de proteção à ordem econômica [que incluem a Lei 8.884] são aplicáveis ao setor de telecomunicações, quando não conflitarem com o disposto nesta Lei". Ademais, o artigo 19 estabelece como função da ANATEL "exercer, relativamente às telecomunicações, as competências legais em matéria de controle, prevenção e repressão das infrações à ordem econômica, ressalvadas as pertencentes ao Conselho Administrativo de Defesa Econômica – CADE". Portanto, condutas e operações de concentração podem ser consideradas tanto pela ANATEL como pelo CADE, ou por ambos. A Lei de Telecomunicações criou um regime especial para atos de concentração. A notificação prévia de atos de concentração no setor de telecomunicações deve ser submetida à ANATEL, única hipótese

atualmente existente no Brasil em que há o controle prévio de atos de concentração.

O CADE e a ANATEL têm desenvolvido um arranjo de trabalho cooperativo pelo qual a ANATEL assume o papel da SDE e da SEAE em casos de atos de concentração envolvendo serviços de telecomunicações. Pelo arranjo, a ANATEL realiza a investigação e fornece um parecer técnico, enquanto o CADE profere a decisão final. A ANATEL afirma que segue o processo analítico de atos de concentração empregado pelo SBDC. Embora o SBDC recepcione informações provenientes da ANATEL em quaisquer atos de concentração no setor, conclui-se que o processo seria mais eficiente se a investigação fosse conduzida unicamente pelo SBDC, como ocorre em todos os demais setores regulados. Esse tópico foi objeto de debate no Congresso Nacional quando da consideração do projeto de lei de defesa da concorrência, mas até o início de 2010 a questão ainda não havia sido resolvida.

Em relação a casos de conduta, a ANATEL tem competência concorrente com a SDE e a SEAE, de modo que qualquer uma ou todas as três agências podem realizar funções investigativas e apresentar recomendações ao CADE. O CADE considera regularmente tanto casos de fusão como de conduta no setor de telecomunicações, alguns dos quais estão descritos no item 2.1.4. As duas agências têm operado sob uma série de acordos de cooperação, com duração determinada. As duas não trabalham em conjunto de forma particularmente estreita, mas têm colaborado em áreas como televisão a cabo e por assinatura, e têm desenvolvido conjuntamente regras referentes à metodologia para a análise antitruste.

5.2. Petróleo e gás natural

A Lei de Hidrocarbonetos de 1997 criou uma nova agência reguladora para supervisionar os mercados de gás natural e petróleo, a Agência Nacional do Petróleo, Gás Natural e Biocombustíveis – ANP. Esta lei, explicitamente, cuida ainda da interação entre a agência reguladora e o SBDC. A ANP deve comunicar à SDE e ao CADE se tomar conhecimento de evidência que sugira uma violação à Lei de Defesa da Concorrência. O CADE, por sua vez, deve comunicar à ANP quaisquer sanções que aplicar a empresas do setor, de tal forma que a ANP possa adotar qualquer medida legal apropriada (como o cancelamento de licenças).[66]

O setor continua a ser dominado pela Petrobrás, que manteve monopólio legal até 1997 e ainda é controlada pelo governo. Esta empresa é, de longe, responsável pela maior parcela da exploração, produção, transporte, refino e distribuição de petróleo e produtos refinados no país.[67] Seu domínio em gás natural (responsável por uma parte relativamente pequena do consumo de

energia no Brasil) é ainda maior. Ela controla mais de 90 por cento das reservas de gás do Brasil e opera o sistema de gasodutos interestaduais do país.[68] A ANP exerce sua autoridade reguladora em diversas partes do setor de petróleo e gás, notadamente a exploração e o transporte. Os preços de varejo dos derivados de petróleo e gás não são mais controlados.

O CADE considera regularmente casos de conduta nos setores de petróleo e gás, embora nenhum tenha envolvido diretamente abuso de posição dominante da Petrobrás nos últimos anos. O CADE tem analisado casos de cartéis de venda a varejo de combustível automotivo, comentados anteriormente. Ele processou cartéis locais em gás de petróleo liquefeito em 2004 e 2008, e um cartel de óleo diesel em 2004. Eventualmente, tem também avaliado atos de concentração nesses setores. Um destes envolveu a *joint venture* entre a Petrobrás e a empresa White Martins para a produção de gás natural liquefeito (GNL). A Petrobrás era monopolista no transporte de gás natural, conforme observado acima, e também era dominante na produção de gás de petróleo liquefeito (GLP), uma alternativa ao GNL para muitas aplicações. Entretanto, nem a Petrobrás nem a White Martins, esta última líder na produção de gases industriais não relacionados à energia (como oxigênio e nitrogênio), produziam GNL. O CADE identificou preocupações verticais na transação decorrentes do controle pela Petrobrás de gás natural, o insumo necessário. Todavia, as partes argumentaram que a *joint venture* geraria eficiências significativas, o que foi aceito pelo CADE. A transação foi autorizada, mas foi imposta uma restrição exigindo que as partes tornassem seus preços e contratos transparentes, tornando assim mais fácil identificar e processar condutas ilegais futuras.[69] Mais recentemente, o CADE aprovou sem restrições uma fusão entre dois distribuidores de GLP.[70]

5.3. Eletricidade

O regulador para este setor, a Agência Nacional de Energia Elétrica (ANEEL), foi também criada em 1997, e sua lei também exige que sejam efetivados os princípios da concorrência sempre que possível. A maior parte da capacidade de geração elétrica do país é hidrelétrica, mas a participação da energia hidrelétrica caiu de 83% em 2001 para 72% em 2009, em favor da geração térmica. Existem também pequenos componentes nucleares e eólicos. Cerca de 70% da capacidade total de geração é de propriedade pública, tanto do governo federal quanto dos estaduais. A empresa estatal monopolista anterior, Eletrobrás, continua controlando cerca de 40% do mercado. Existe também concorrência no nível de geração de energia, por meio de processos de leilão. Os ativos de transmissão são na maioria controlados pelos governos federal e estaduais. Cerca de dois terços dos ativos de distribuição são operados pela iniciativa privada; existem mais de 60 empresas de distribuição.

A ANEEL e o CADE têm um acordo formal de cooperação e, recentemente, as duas agências têm desenvolvido estreitas relações de trabalho. Seus representantes reúnem-se regularmente e trocam diversas informações. O CADE considera regularmente os atos de concentração no setor, que podem envolver fusões de distribuidores ou aquisições de pequenos produtores. O CADE consulta a ANEEL acerca dessas transações, as quais são, praticamente em sua totalidade, aprovadas sem restrições. Recentemente, o CADE considerou a criação de um consórcio de três usinas de geração térmica que concorreram com sucesso em um leilão da ANEEL para fornecer energia à rede. A ANEEL havia aprovado a formação do consórcio, e as partes argumentaram que isto excluía a competência do CADE sobre a matéria. Em sua decisão, o CADE rejeitou este argumento, mas aprovou a transação, impondo uma multa pela ausência de notificação tempestiva do ato de concentração.[71]

5.4. Transporte terrestre

A Agência Nacional de Transportes Terrestres (ANTT) foi criada em 2002[72] e incumbida da responsabilidade de regular os serviços ferroviários e rodoviários. Há poucos serviços ferroviários de transporte de passageiros no Brasil, à exceção das áreas urbanas, que, pelo fato de não envolverem serviço interestadual, são regulamentados pelos estados.[73] A ANTT regula o acesso à rede e as tarifas dos fretes por meio de um sistema de *price cap*. No final dos anos 90 as condições precárias de algumas estradas no Brasil estimularam o governo a celebrar acordos de concessão com empreiteiras privadas, que construiriam e manteriam seções do sistema rodoviário interestadual em troca do direito de cobrar pedágios, cujo nível seria regulamentado. Uma segunda fase do processo de concessão foi concluída em 2007. Conforme discutido adiante, a SEAE teve um papel consultivo importante na estruturação do projeto dessas concessões da segunda fase.

A ANTT também regulamenta o transporte interestadual de passageiros em ônibus. Em alguns países, o transporte de ônibus de longa distância é regulamentado de forma branda, ou nem é regulamentado, mas no Brasil este serviço é importante para muitos cidadãos e, como tal, pode estar sujeito à exigência constitucional de supervisão de "serviços públicos". A ANTT concede licenças para a operação de certas rotas por meio de processo licitatório, cujos termos incluem tarifas e freqüência de serviço. A agência enfrenta regularmente o problema de provedores não autorizados operando nas rotas mais populares. As mudanças nas tarifas estão sujeitas à revisão da ANTT, embora os operadores tenham liberdade para oferecer tarifas "promocionais" desde que não sejam predatórias (o que é especialmente difícil de determinar nesta indústria) ou envolvendo uma "violação à ordem econômica".

Tanto o CADE como a SEAE têm acordos de cooperação com a ANTT. A SEAE geralmente interage com os reguladores de transporte, conforme descrito adiante, e o CADE menos. O CADE ocasionalmente considera casos no setor ferroviário. A fusão Vale/CSN descrita no item 2.2.3 foi um dos casos de fusão mais importantes recentemente. O caso ALL também descrito no item 2.2.3 foi outra fusão no setor.

5.5. Aviação civil

Até recentemente, a aviação civil no Brasil estava sob o controle do Departamento de Aviação Civil (DAC), inserido no Ministério da Defesa do Brasil. O Diretor do DAC e alguns de seus empregados eram militares. A base lógica declarada para a relação entre a aviação civil e militar era de que ambos os setores compartilham algumas instalações, incluindo aeroportos e o sistema de controle de tráfego aéreo. Em 2006, entretanto, a Agência Nacional de Aviação Civil (ANAC) foi criada como uma agência reguladora independente para o setor. Ela é responsável pela regulamentação das questões de segurança, licenciamento de pessoal, operações e aeroportos. Os preços e o acesso têm sido desregulamentados, o que causou reestruturação significativa na indústria. Atualmente, o setor está altamente concentrado, com duas empresas líderes controlando por volta de 90% do mercado, embora duas outras empresas tenham entrado recentemente e estejam ganhando parcelas do mercado.

Não muito tempo após a ANAC ter sido criada, esta enfrentou o que foi chamado de "crise na aviação", que foi iniciada pelo maior acidente aéreo ocorrido no Brasil. O sistema de controle de tráfego aéreo, aliado ao fato de 67 dos maiores aeroportos do país serem operados pela INFRAERO, uma companhia estatal, foi alvo de críticas pesadas. Apesar de a ANAC ter anunciado uma série de medidas corretivas, as diversas questões geradas pela crise ainda estão sendo debatidas.

Uma barreira à entrada no Brasil, como em alguns outros países, é a necessidade de *slots* nos aeroportos mais movimentados do país, notadamente os aeroportos centrais das cidades de São Paulo e do Rio. Em 2008, o CADE analisou a proposta de aquisição pela GOL, uma das duas maiores empresas aéreas do país, da VARIG, que já foi a empresa aérea internacional líder no Brasil, mas cujos ativos sofreram um declínio vertiginoso desde a desregulamentação e a deixaram próxima da falência. A questão concorrencial examinada mais detalhadamente pelo CADE foi a transferência para a GOL de *slots* da VARIG no Aeroporto de Congonhas em São Paulo. Entretanto, decidiu-se finalmente pela aprovação da transação.[74] Até a recente ênfase na ação contra cartéis pelo SBDC, um caso de 2004 contra quatro empresas aéreas (o caso foi instaurado em 1999) pela

fixação de preços na ponte aérea Rio-São Paulo, foi um dos mais importantes casos de cartel analisados pelo CADE. Havia apenas evidências circunstanciais de um acordo, consistindo em mudanças simultâneas e idênticas nos preços pelos representados. O CADE, entretanto, considerou que havia um acordo, e multou os representados com base no mínimo legal, de 1% de seus respectivos faturamentos em 1999 na rota Rio-São Paulo.[75]

5.6. Saúde

O Brasil possui um serviço público de saúde, conforme mencionado anteriormente, mas existe também um setor grande e crescente de planos de saúde privada, do qual cerca de 42 milhões de brasileiros participam. Até 2000, este setor era quase todo desregulamentado, mas naquele ano uma lei criou a Agência Nacional de Saúde Suplementar (ANS), conferindo-lhe certa autoridade sobre os preços.[76] Existem dois tipos básicos de plano de saúde: coletivo - o que é prestado a um grupo, geralmente por empregadores – e individual.

Os preços iniciais das seguradoras que entram no mercado (e das que existiam quando da implantação da regulamentação) não são controlados, embora a ANS determine, atualmente, com base atuarial, que os mesmos sejam suficientes para a estabilidade financeira da entrante. Aumentos subseqüentes nos preços do plano individual (mas não nos coletivos) estão sujeitos à regulamentação pela ANS. Há cerca de 1.400 provedores de planos de saúde de algum tipo, mas 48 deles respondem por cerca de metade do mercado.

A partir de 2000, os preços dos produtos farmacêuticos também foram regulamentados. Desde 2003, eles estão sujeitos à regulamentação por *price cap* pela Câmara de Regulação do Mercado de Medicamentos (CMED), que é um órgão interministerial no qual os Ministérios da Saúde, Fazenda, Justiça, e Desenvolvimento, Indústria e Comércio Exterior estão representados. Conforme observado anteriormente no item 2.1.4, por volta da mesma época em que os preços dos produtos farmacêuticos passaram a ser regulamentados, o Congresso encaminhou à SDE diversas situações de possíveis preços abusivos por parte de empresas de medicamentos. Entretanto, até o momento, nenhuma delas resultou em decisão afirmando sua ilegalidade.

A Lei de Defesa da Concorrência aplica-se integralmente ao setor da saúde, no qual o SBDC tem considerado regularmente tanto casos de conduta como de atos de concentração, conforme descrito anteriormente.

5.7. Sistema financeiro

No Brasil existem cerca de 161 bancos, incluindo bancos comerciais e instituições de poupança e crédito.[77] É um setor concentrado. Os dez maiores bancos respondem por cerca de 90% do total dos ativos e o CR4 é de cerca de 68%. Continuam existindo bancos estatais federais e estaduais, embora o número esteja declinando gradativamente. Os bancos públicos ou controlados pelo governo respondem por 36% do mercado. O Banco do Brasil, o maior do sistema, tem controle federal, embora suas ações sejam comercializadas publicamente. No início da década de 2000, houve a entrada de alguns bancos estrangeiros de grande porte, embora muitos deles tenham abandonado o mercado posteriormente. Recentemente, houve uma espécie de onda de fusões de bancos no Brasil. Em 2007, o ABN Real foi adquirido pelo Santander da Espanha, representando a primeira vez em que um banco estrangeiro desafiou os líderes locais. Em 2008, o Itaú, o segundo maior banco do Brasil, adquiriu o Unibanco, alcançando a posição de número um no país. O Banco do Brasil respondeu adquirindo instituições de poupança e empréstimo, incluindo duas que haviam sido de propriedade de estados importantes (São Paulo e Santa Catarina), reassumindo, assim, o primeiro lugar.

O sistema financeiro é o único setor regulado no qual a Lei de Defesa da Concorrência não tem sido plenamente aplicada. O Banco Central – BACEN - há muito defende a tese de que ele deve ter a jurisdição exclusiva neste setor por motivos "prudenciais" – a segurança do sistema financeiro. Em especial, o Banco Central tem exercido controle exclusivo sobre as fusões de bancos, baseado no fato de que ele deve assegurar solução apropriada a "bancos problemáticos" e fazer cumprir os limites constitucionais sobre a entrada de instituições bancárias estrangeiras. Em 2001, a Advocacia-Geral da União emitiu parecer legal concluindo que a especificidade da legislação financeira no Brasil tinha precedência sobre a linguagem mais geral da Lei de Defesa da Concorrência e, assim, atribuiu efetivamente ao Banco Central a competência exclusiva sobre bancos para todas as finalidades.

O CADE nunca concordou com essa opinião, assumindo a posição de que a Lei de Defesa da Concorrência (que foi promulgada após a lei dos bancos) é aplicável por seus termos a todas as empresas comerciais, e que o CADE, como agência autônoma, não está vinculado a um parecer legal emitido pelo Poder Executivo. A questão foi submetida aos tribunais em recurso contra decisão do CADE que multou dois bancos, Bradesco e BCN, por não haverem notificado o ato de concentração ao CADE. O tribunal de primeira instância e o tribunal recursal decidiram em favor do CADE, mas o caso foi submetido a novo recurso, junto ao Superior Tribunal de Justiça.

Entretanto, em 2005, o CADE e o BACEN celebraram um acordo de cooperação estipulando a troca de informações. Os dois colaboraram para a elaboração de um conjunto de diretrizes sobre atos de concentração para o setor financeiro, que foram baseadas no guia de análise de concentrações horizontais da SEAE/SDE. Um projeto de lei resolvendo a disputa sobre competência foi enviado ao Congresso em 2003 e aprovado pelo Senado em 2007, e está atualmente pendente na Câmara dos Deputados. O projeto de lei estipula que o Banco Central deverá ter competência exclusiva para rever fusões que envolvam risco sistêmico para a estabilidade do sistema financeiro (uma questão que seria determinada pelo BACEN). O CADE e o BACEN compartilhariam a autoridade de rever todos os outros casos atos de concentração. A competência para tratar de casos de conduta no setor financeiro permaneceria exclusiva ao SBDC.

Em 2008, CADE e BACEN chegaram a um acordo estipulando a revisão conjunta dos atos de concentração de bancos e estipulando, ainda, que ambas as agências trabalhariam para a promulgação da legislação acima descrita. (Esse acordo levou o Tribunal Superior de Justiça a adiar a audiência que tinha sido marcada no caso Bradesco/BCN descrito anteriormente). Em conformidade com o acordo, as fusões de bancos são comunicadas a ambas as agências. A fusão Unibanco/Itaú, já mencionada, foi uma delas. Ela foi aprovada pelo BACEN, mas o caso continua no CADE. O BACEN nunca desaprovou formalmente uma proposta de fusão a ele submetida, geralmente sustentando-as com base no fato de que criam eficiências e beneficiam a concorrência.

5.8. O Projeto de Lei para as agências reguladoras

Em 2003, foi apresentado um projeto de lei ao Congresso que padronizaria, entre outras coisas, a relação entre as agências reguladoras e o SBDC (no âmbito das legislações setoriais, as agências reguladoras já são obrigadas a promover a concorrência nos setores sob sua supervisão). Os reguladores deveriam monitorar suas indústrias quanto ao cumprimento da Lei de Defesa da Concorrência, informar suspeitas de violações e fornecer relatórios técnicos a pedido do CADE, para uso em seus procedimentos. O CADE deveria comunicar à agência específica as decisões tomadas em casos de conduta e atos de concentração de seu setor, para que a agência pudesse adotar quaisquer medidas legais necessárias. O projeto de lei também revê os procedimentos para comentário pela SEAE sobre regulamentos propostos. As agências reguladoras deveriam solicitar um parecer da SEAE, 15 dias antes das normas e regulamentos propostos serem divulgados para consulta pública. A SEAE deveria emitir, posteriormente, no prazo de 30 dias, um parecer público sobre as implicações da norma

proposta para a concorrência.[78] O projeto permanece na Câmara dos Deputados, e parece não haver muita disposição para sua aprovação.

6. Advocacia da concorrência

A advocacia da concorrência possui duas dimensões. A primeira reflete o papel da agência de concorrência como consultora do governo e das agências reguladoras setoriais com relação à legislação e aos regulamentos que constituem a política da concorrência. A segunda é a busca do aumento do entendimento e da aceitação pública aos princípios da concorrência.

A SEAE é muito atuante na advocacia da concorrência perante outros setores do governo e agências reguladoras. Existem motivos históricos e estruturais para o destaque da SEAE neste campo. Conforme descrito acima, até meados dos anos 90, havia um controle pesado do Estado sobre a economia, e o Ministério da Fazenda, do qual a SEAE é parte, foi ator central deste esquema. A SEAE era o que pode ser chamado de *think tank* em questões deste tipo. Quando a liberalização econômica teve início em 1994, mas antes da criação das agências reguladoras, o Ministério da Fazenda era responsável por monitorar os "preços do serviço público". Uma lei de 1995, que implementou o Plano Real, estipulou:

> *"A partir de 1º de julho de 1994, o reajuste e a revisão dos preços públicos e das tarifas de serviços públicos serão determinados (...) de acordo com os atos, normas e critérios a serem fixados pelo Ministro da Fazenda".*[79]

Um decreto subseqüente conferiu à SEAE (lembrando que seu nome completo é Secretaria de Acompanhamento Econômico) tarefas importantes nesta supervisão, incluindo a realização de análise técnica de alterações de preços, emissão de pareceres sobre decisões regulatórias e privatização de companhias estatais, monitoramento do desenvolvimento de setores e programas, representação do Ministério da Fazenda em atividades interministeriais e fomento da coordenação com as entidades do setor público, setor privado e organizações não-governamentais também envolvidas nestas tarefas.[80]

Uma característica estrutural que fomenta o destaque da SEAE na advocacia da concorrência intra-governamental é o fato de que a elaboração de políticas em diversos setores da economia está nas mãos de um conselho ou comitê no qual participam representantes de diversos ministérios. Há conselhos nos setores de transporte terrestre, saúde, aviação civil e energia, por exemplo. O Ministério da Fazenda participa de praticamente todos eles,

e a SEAE, em virtude da lei acima citada, é a representante do Ministério. Deve ser salientado, entretanto, que a força da SEAE – que faz parte de um ministério poderoso do governo – é também uma fraqueza em potencial. Sua advocacia em diversos assuntos poderia ser mais suscetível à influência política do que o seria uma agência independente. A SEAE afirma, entretanto, que, ao menos desde 2004, não está sujeita a qualquer influência política em sua função de advocacia da concorrência e que se considera capaz de atuar de forma independente nesta área.

Não é possível relacionar, detalhadamente, as inúmeras contribuições da SEAE neste papel de advocacia. Segue, abaixo, uma descrição geral de sua atividade nos últimos anos em alguns setores:

- Transporte terrestre de superfície: A SEAE participa de reuniões do Programa de Aceleração do Crescimento brasileiro (PAC), uma iniciativa presidencial, que tem papel ativo na formulação da política de transportes. A SEAE revê as tarifas de transporte ferroviário e elabora comentários sobre a estrutura reguladora (*price caps*). Ademais, tem assessorado a ANTT em seu processo de licitação de concessões de estradas. Suas recomendações tiveram um papel de destaque na redução dos preços, em até 46% abaixo do preço mínimo previsto nas licitações. Ela também tem assessorado a ANTT na estruturação das fórmulas para tarifas de ônibus de passageiros.

- Portos: A SEAE participou de uma força-tarefa encarregada de desenvolver procedimentos eficientes de contratação para dragagem. Em 2008, preparou estudo sobre regulamentação e concorrência em portos, empregando a experiência internacional no setor. No mesmo ano, a SEAE e a SDE participaram do desenvolvimento de um decreto, conhecido como Decreto Portuário, que estabeleceu políticas e diretrizes para o desenvolvimento do setor marítimo do Brasil.

- Transporte aéreo civil: A SEAE participou das deliberações que resultaram na criação, em 2006, da ANAC, a nova agência reguladora do setor. Forneceu recomendações sobre o processo de alocação de *slots* em aeroportos congestionados, que receberam ampla atenção pública, embora nem todas elas tenham sido adotadas. A SEAE participa de diversos comitês técnicos que formulam as políticas para o setor. Respondeu à crise na aviação, descrita anteriormente, com diversas recomendações, todas projetadas para introduzir maior concorrência no setor.

- Telecomunicações: A SEAE tem apresentado diversas contribuições nas consultas públicas patrocinadas pela ANATEL, a agência

reguladora de telecomunicações. Entre elas, foram tecidos comentários sobre: (i) mudança da metodologia usada para contabilizar os ganhos de produtividade em serviços de telefonia fixa sujeitos a tarifas reguladas; (ii) uso eficiente do espectro de radiofreqüência, com a finalidade de reservar partes dele para os novos entrantes; (iii) o Plano Geral para a Atualização da Regulamentação das Telecomunicações (PGR); (iv) propôs revisões das áreas delegadas para serviços fixos locais, facilitando a entrada de provedores que operam em outras áreas. A SEAE participou, ainda, da criação da legislação atualmente no Congresso, que alteraria o mercado de TV paga. A legislação estabeleceria neutralidade tecnológica neste serviço, melhorando a concorrência e permitindo novas entradas, especialmente de companhias telefônicas.

- Saúde: Conforme comentado acima, parte do mercado de planos de saúde privados está sujeita a regulação de preços pela ANS, a agência reguladora do setor. A lei aplicável exige que ajustes anuais nos planos de saúde sejam submetidos à SEAE para aprovação antes de entrarem em vigor. Até hoje, a SEAE não reprovou qualquer mudança. Os preços dos produtos farmacêuticos são também regulados (por meio de price caps) por uma agência interministerial separada, da qual participa o Ministério da Fazenda, representado pela SEAE.

- Atividades bancárias: Em 2006, a SEAE, a SDE e o Banco Central formalizaram um acordo de cooperação, resultando em um estudo detalhado sobre o mercado de cartões de crédito no Brasil, concluído e publicado em 2009. Este estudo continha diversas recomendações e, entre outras coisas, resultou na decisão da Visa e da MasterCard de abandonarem os acordos exclusivos que tinham com suas respectivas redes de processamento, como descrito no item 2.1.2. Em 2007, o Banco Central e o Ministério da Fazenda, inclusive a SEAE, trabalharam em conjunto para desenvolver uma série de regras emitidas pelo Banco Central, disciplinando as tarifas de serviços financeiros.

- Transporte Urbano: O transporte de massa urbano é regulamentado nos níveis estadual e municipal. O papel do governo federal, estabelecido na Constituição Federal, é o da elaboração de diretrizes para estes serviços. A SEAE participou da elaboração de minuta de um conjunto de regras para este fim. Em 2007, foi apresentado um projeto de lei no Congresso que permitiria aos municípios aderirem a esse programa; a legislação está pendente.

- Outros mercados: A Coordenação Geral da Defesa da Concorrência (COGDC), que pertence à SEAE, possui responsabilidades de supervisão em diversos mercados regulados, incluindo alguns que são regulados em nível estadual e municipal. A SEAE tem participado de estudos dos serviços de taxis, auto-escolas e funerárias. Nas auto-escolas, por exemplo, uma investigação da fixação de preços revelou que alguns departamentos de trânsito estaduais tinham emitido instruções estabelecendo preços máximos e mínimos para este serviço. Tinham assim procedido com a finalidade de assegurar a qualidade suficiente do serviço, mas a SEAE convenceu-os de que essa meta poderia ser atingida por outros meios que não a fixação de preços, e a prática foi encerrada.

- Revisão da legislação: Foi proposta uma alteração do Código de Defesa do Consumidor, que exigiria que um fornecedor de bens e serviços "de natureza contínua" "estendesse as condições oferecidas para adesão de novos consumidores a contratos já em vigor". A SEAE concluiu que, apesar do projeto articular uma preocupação válida, a saber, prover tratamento igual a consumidores, isto poderia prejudicá-los de outras formas, ao desestimular, por exemplo, as promoções que poderiam beneficiar todos os compradores no mercado. A SEAE recomendou que o projeto não fosse promulgado.

- Comércio: A SEAE participa ativamente da formulação da política comercial e desempenha um papel consultivo em casos de comércio, conforme está descrito no item 3.5.

O CADE e a SEAE também participam de diversas formas na advocacia de concorrência intra-governamental. Conforme observado no item 3.1, em uma recente reorganização interna o CADE criou um Grupo Técnico de Mercados Regulados, cuja finalidade é a de melhor informar o Conselho em questões sobre indústrias reguladas e desenvolver relações com os reguladores setoriais. O Grupo tem realizado diversas reuniões com a ANEEL, a agência reguladora de eletricidade, e está trabalhando em acordos de cooperação com a ANEEL, ANP (petróleo e gás), ANATEL (telecomunicações) e ANAC (aviação civil). Um acordo entre o CADE e a ANTT (transporte terrestre) foi assinado em 2006. A SDE tem ainda participado de projetos entre agências, notadamente o estudo sobre cartões de crédito, descrito anteriormente. Também participa como representante do Ministério da Justiça no CMED, que regula os preços de produtos farmacêuticos. Em 2009, o CADE e a SDE juntaram-se à SEAE na assinatura de acordo de cooperação com a ANS (saúde), com a finalidade de estudar a concorrência no mercado de planos de saúde privados.

Todos os três órgãos são atuantes no segundo aspecto da advocacia da concorrência, a promoção da conscientização pública e suporte à política de concorrência. A atividade extensa da SDE no combate a cartéis está documentada no item 2.1.1.4. O CADE publica um boletim informativo (Cade Informa) contendo artigos da área. O boletim está em seu 23º volume. Também foi publicado o Guia Prático do CADE sobre Defesa da Concorrência no Brasil, uma publicação bilíngüe com informações sobre a legislação relevante e as principais decisões do CADE. A 3ª edição foi publicada em 2007. O CADE celebrou acordos com diversas instituições de ensino no Brasil, com a finalidade de promover o estudo da política de concorrência.

Os três órgãos possuem programas de intercâmbio acadêmico no qual, duas vezes por ano, alunos universitários passam cerca de um mês nas instituições, onde eles têm a oportunidade de trabalhar com acadêmicos e profissionais da área. Ao final do programa, eles devem apresentar um trabalho final orientado por um profissional de uma das agências. O programa comprovou ser uma ferramenta útil de recrutamento. Diversos participantes foram, posteriormente, trabalhar em um dos três órgãos. Em 2006, a SEAE, em parceria com uma universidade brasileira e o Banco Mundial, criou um prêmio em dinheiro para monografias sobre concorrência e regulação. No primeiro concurso, foram apresentados 154 trabalhos. O CADE possuiu um programa similar.

Representantes dos três órgãos participam regularmente de conferências e seminários sobre política de concorrência. Os três órgãos mantêm *websites* informativos.[81] Os da SEAE e da SDE incluem seções em inglês, e o CADE pretende criar seções tanto em espanhol como em inglês em 2010.

7. Conclusões e recomendações

7.1. Pontos fortes e fracos

O Relatório de 2005[82] detalhava o progresso que o SBDC havia alcançado desde o início da década, e o Sistema continuou a se desenvolver sobre estas conquistas. Dentre suas diversas realizações, duas se destacam. O programa de combate a cartéis do SBDC, praticamente inexistente em 2000, apresenta-se agora ativo e eficaz. Particularmente notável é o componente da execução criminal. O Brasil é como a maioria dos países nos quais a conduta de cartel pode ser processada criminalmente, em que leis criminais apartadas se aplicam à conduta, afora a aplicação da Lei de Defesa da Concorrência. Aquelas leis são aplicadas por promotores públicos, e não pela autoridade de concorrência. Para um programa criminal ser bem

sucedido, deve haver uma estreita cooperação entre os promotores e a autoridade de concorrência. O Brasil progrediu significativamente neste sentido. Da mesma forma, o SBDC, especialmente a SDE, deu grandes passos no desenvolvimento de suas aptidões de investigação de cartéis; a autoridade faz uso pleno das ferramentas à sua disposição - buscas e apreensões, programa de leniência, inspeções (visitas a escritórios comerciais mediante aviso) e técnicas judiciais computadorizadas. Na América Latina, o Brasil é visto como líder no combate a cartéis, e seus vizinhos consultam-no regularmente nessa matéria. O programa de advocacia da SDE em cartéis é inovador e bem-sucedido.

A segunda grande realização do SBDC foi a implementação do procedimento sumário de revisão de atos de concentração. O Sistema havia ficado atolado por procedimentos ineficientes de revisão de fusões, que consumiam até 70% dos recursos do Sistema e ocasionavam atrasos indevidos. O procedimento sumário aplica-se atualmente a 90% dos atos de concentração notificados ao SBDC, liberando recursos para outros trabalhos, notadamente o programa de combate a cartéis, e beneficiando a comunidade empresarial ao acelerar a aprovação de suas transações. O procedimento sumário tem outro efeito benéfico, o de pavimentar o caminho para a notificação prévia de fusões. A maior parte da comunidade empresarial apóia a notificação prévia de atos de concentração (com a ressalva de que sejam conferidos ao SBDC recursos adicionais suficientes para operá-la de forma eficiente), mas este apoio provavelmente não existiria se o SBDC não tivesse demonstrado que pode processar os atos de concentração rapidamente. Em outros aspectos, o SBDC aprimorou administrativamente o processo de notificação dos atos de concentração ao interpretar o critério de R$400 milhões como sendo aplicável apenas ao faturamento bruto no Brasil, ao restringir a aplicação do critério de participação em 20% de um mercado relevante e esclarecendo, até certo ponto, a definição da data que inicia a contagem do prazo de 15 dias para a notificação dos atos de concentração.

A SEAE continua tendo acesso significativo junto ao governo e às agências reguladoras setoriais como defensora da concorrência. Em outros aspectos o SBDC advoga em prol da concorrência de forma eficiente na esfera pública, e participa ativamente, de várias formas, na comunidade de concorrência internacional. O SBDC é respeitado em outras áreas do governo, pelos tribunais e pela comunidade empresarial.

Entretanto, o SBDC continua enfrentando diversos problemas. O principal deles refere-se ao índice elevado de rotatividade de pessoal nas três agências. No CADE, o problema tem sido particularmente grave. Houve pelo menos duas razões os para tanto: a curta duração do mandato dos Conselheiros – dois anos - e o fato de que até recentemente todos os profissionais que ali trabalhavam serem funcionários contratados ou

concursados cedidos por outras agências do governo. O problema desta rotatividade é exacerbado pelo fato das agências disporem, de antemão, de um número reduzido de funcionários. Isso é particularmente expressivo no CADE e da SEAE. Um resultado deste problema é o acúmulo permanente das investigações de conduta na SDE e o prazo médio para que um caso de conduta seja concluído. Apesar de terem ocorrido melhorias substanciais no processo de análise de atos de concentração, o Sistema continua padecendo da ausência de notificações prévias. O resultado são longos períodos de análise de atos de concentração sujeitos ao procedimento ordinário e maiores obstáculos para a imposição de remédios estruturais pelo CADE quando as fusões forem consideradas anticoncorrenciais.

A revisão judicial dos casos de defesa da concorrência emergiu como uma questão importante para o SBDC. Muitas das decisões do CADE impondo sanções ou remédios foram objeto de recursos junto aos tribunais. Estes têm concedido liminares suspendendo a implementação das decisões do CADE e, devido ao fato de um caso típico poder levar dez anos ou mais para ser concluído caso chegue à última instância recursal no Judiciário, o efeito é efetivamente o de frustrar a implementação das decisões do CADE. O CADE tem adotado uma postura mais pró-ativa no Judiciário nos últimos anos com a obtenção de certo sucesso, especialmente na cobrança de multas, mas há limites ao que o SBDC pode fazer por si só.

7.2. Recomendações que dependem de legislação

7.2.1. Promulgar o projeto de lei em trâmite no Congresso Nacional para alterar a Lei de Defesa da Concorrência

As recomendações a seguir estão abordadas na legislação proposta, descrita no item 4 acima, e foram também apresentadas no Relatório de 2005.

7.2.1.1. Consolidar as funções do SBDC de investigação, acusação e decisão em uma agência autônoma.

O SBDC tem feito o melhor de um Sistema que um dia foi considerado altamente ineficiente. A duplicação dos esforços que existia entre a SDE e a SEAE foi eliminada. Ambas as Secretarias tornaram-se eficientes em suas áreas de responsabilidade, a SDE em investigações de casos de conduta e a SEAE na análise dos atos de concentração e advocacia da concorrência. Ainda assim, existem ineficiências oriundas do fato das três funções estarem em agências separadas, e por vezes há falta de comunicação. O Relatório de 2005 aponta que o modelo de agência única provou ser bem sucedido em

muitas jurisdições, e uma vez fornecidos os recursos apropriados não há motivo algum para se acreditar que ele não funcionaria no Brasil.

A legislação transferiria as responsabilidades investigativas da SDE para a nova Superintendência-Geral do CADE. A função de revisão dos atos de concentração exercida pela SEAE também seria transferida para a Superintendência-Geral, enquanto a SEAE manteria sua competência para advocacia de concorrência. Entretanto, essa reestruturação impõe seus desafios. Desse modo, será importante preservar a *expertise* que se desenvolveu na SDE e na SEAE, e ao mesmo tempo aumentar sua eficiência.

7.2.1.2. Criar cargos de carreira no CADE e prover recursos adequados para contratar e reter um número suficiente de profissionais qualificados.

Esse é um ponto crítico. O Relatório de 2005 apontou o número inadequado de funcionários, bem como sua elevada rotatividade, como sendo o principal problema do SBDC, que permanece até os dias atuais. Dentre outros, o apoio da comunidade empresarial ao estabelecimento de um sistema de notificação prévia de atos de concentração está condicionado à existência de recursos suficientes na autoridade para administrá-lo de maneira eficiente.

O projeto de lei prevê a criação de 200 cargos permanentes no CADE. Entende-se que estes cargos não seriam cargos de carreira específicos para a área de defesa da concorrência, ou seja, criados para o exercício das funções do CADE e exigindo qualificações específicas para sua missão, mas sim cargos permanentes designados para a autoridade, que seriam preenchidos por servidores públicos federais. A primeira hipótese é preferível, pois resultaria em um quadro ainda mais qualificado de profissionais, bem como reduziria sua alta rotatividade; contudo, a criação de um quadro permanente deste porte é, de qualquer modo, de extrema importância.

7.2.1.3. Ampliar os mandatos dos Conselheiros e de outros funcionários seniores sujeitos a indicações políticas, incluindo o Superintendente-Geral, para pelo menos quatro anos, e tornar os mandatos não-coincidentes.

O curto mandato de dois anos para os Conselheiros do CADE, com a possibilidade de uma recondução, contribui para a alta rotatividade na autoridade e afeta de maneira adversa sua memória institucional, aumentando, ainda, a oportunidade de exercício de influência política por meio do processo de indicação. O governo tem a capacidade de reformar

completamente o Conselho em apenas dois anos. Cria-se também um incentivo para que Conselheiros em exercício ajustem suas decisões de forma a obterem a recondução, caso a desejem. O Relatório de 2005 recomendou que a duração do mandato fosse de, no mínimo, quatro anos, e expressou uma preferência por cinco anos, tornando assim impossível ao Presidente da República, cujo próprio mandato é de quatro anos, substituir completamente o Tribunal em um mandato.

O projeto de lei amplia os mandatos dos Conselheiros para quatro anos, não-renováveis, e alterna suas datas de início e término, reduzindo assim o perigo de haver tantas vacâncias no Tribunal que o *quorum* não possa ser atingido, o que ocorreu recentemente em 2008. Os mandatos do Procurador-Geral e do Economista-Chefe também seriam estendidos para quatro anos. Entretanto, o mandato do Superintendente-Geral seria de dois anos, com a possibilidade de recondução para mais um mandato. Este é um cargo altamente importante, visto que o Superintendente controlaria a agenda investigativa da agência. Esse mandato deveria, também, ser prorrogado para quatro anos.

7.2.1.4. Fixar o quorum necessário para o Tribunal do CADE em quatro ao invés vez de cinco membros sempre que o número de Conselheiros disponível para votar em um caso estiver reduzido para quatro devido a vacâncias ou recusas.

Esta foi outra recomendação destinada a evitar a falta de *quorum* no Conselho. Seria uma modificação menos relevante se as outras medidas acima descritas, que afetam os mandatos dos Conselheiros, forem adotadas. Ademais, a legislação proposta aparentemente também dá ao Presidente do Tribunal o poder de nomear um Conselheiro temporário na hipótese de vacância por um longo período. De qualquer forma, o projeto de lei reduz o *quorum* necessário para quatro.

7.2.1.5. Modificar o processo de notificação e revisão do ato de cncentração para:

- Estabelecer um sistema de notificação prévia.
- Eliminar o atual critério de participação no mercado relevante e adotar critérios baseados no faturamento bruto doméstico das partes de maior e de menor porte envolvidas na transação.
- Eliminar a notificação de transações em que não haja fusão.

Essas são deficiências bem documentadas no processo de notificação de atos de concentração, discutidas de forma abrangente no item 2.2.2. O projeto de lei proposto corrige estes problemas em consonância com as recomendações.

7.2.1.6. Proporcionar a revisão e a aprovação sumárias de atos de concentração que não tragam preocupações concorrenciais

Como discutido anteriormente, o SBDC teve amplo sucesso utilizando-se de procedimentos administrativos para esse fim. A legislação proposta institucionaliza o procedimento, conforme descrito no item 4.3 acima.

7.2.1.7. Estabelecer procedimentos formais para acordos em atos de concentração.

Nos últimos anos, o SBDC tem negociado com maior freqüência acordos em atos de concentração, com fundamento nos poderes a ele conferidos pelo artigo 58 da atual Lei de Defesa da Concorrência. A legislação proposta altera parcialmente esses procedimentos, conferindo poderes de decisão ao novo Superintendente-Geral e prevendo um período formal para consulta pública e aprovação final pelo Tribunal.

7.2.1.8. Adotar um padrão explícito para a revisão dos efeitos competitivos de um ato de concentração.

A lei atual carece de um padrão substancial explícito para a revisão de atos de concentração, embora as normas efetivamente aplicadas pelo SBDC sejam aquelas usualmente empregadas em outras jurisdições. O projeto de lei articula um padrão baseado no Regulamento de Atos de Concentração da Comissão Européia.

7.2.1.9. Modificar o Programa de Leniência para eliminar a exposição dos beneficiários da leniência a outros processos penais, para além da Lei de Crimes contra a Ordem Econômica.

O Programa de Leniência do SBDC está provando ser bem sucedido, e tem gerado diversas candidaturas. O Programa estipula que os indivíduos que receberem leniência também receberão imunidade na ação criminal sob a Lei de Crimes contra a Ordem Econômica. Entretanto, eles não recebem atualmente imunidade no âmbito de outras leis criminais que possam se aplicadas a casos de conduta. Isto pode inibir alguns interessados de se

candidatarem no Programa de Leniência. O projeto de lei corrige esse problema, ao estender a imunidade às outras leis criminais.

As recomendações a seguir não dependem da promulgação do projeto de lei de defesa da concorrência pelo Congresso, mas sua implementação será afetada pela promulgação do mesmo.

7.2.2. Promulgar o projeto de lei que trata da aplicação da legislação de concorrência no setor financeiro.

Tem existido uma disputa entre o CADE e o Banco Central sobre qual agência teria competência para supervisionar os atos de concentração no setor financeiro. O projeto de lei existente, que recebe o apoio de ambas as agências, concederá competência exclusiva ao Banco Central para a revisão de atos de concentração em que haja risco sistêmico à estabilidade do sistema financeiro, enquanto ambas as agências irão compartilhar a competência sobre todas as demais concentrações no setor financeiro.

7.3. Outras recomendações

7.3.1. Reduzir o acúmulo de investigações em casos de conduta no SBDC e o tempo necessário para se alcançar uma determinação final em uma investigação ou caso.

Apesar de ter havido algum progresso nos últimos anos nessa área, o problema ainda é significativo. Os novos recursos previstos no projeto de lei proposto trarão uma contribuição substancial para a solução desse problema, mas o SBDC, independentemente da aprovação do projeto de lei, deveria avaliar seus procedimentos em busca de maior eficiência. Assim como a análise de atos de concentração se tornou mais eficiente com a criação de um procedimento sumário para fusões que podem ser rapidamente identificadas como não-problemáticas, um procedimento similar poderia ser estabelecido para investigações de conduta. Um fator complicador existente na lei atual poderia decorrer do fato de o CADE ter de aprovar a decisão da SDE de encerrar uma investigação preliminar, o que gera a necessidade de um relatório da SDE e de uma decisão formal do CADE. O SBDC deveria buscar meios de aperfeiçoar esse procedimento, em consonância com as exigências do devido processo legal sob a legislação brasileira para as partes interessadas.

A consolidação do processo no CADE, como o projeto de lei faria, contribuiria nesse sentido. O Superintendente-Geral tomaria a decisão final sobre quando encerrar uma investigação em estágio preliminar. Contudo, o

projeto de lei também causaria certa apreensão, porque ele parece criar um terceiro estágio formal no procedimento de investigação (ver item 4.3 acima). À medida que os procedimentos formais no âmbito da Superintendência-Geral venham a ser considerados como necessários ao progresso de uma investigação por meio destes estágios, eles poderiam resultar na desaceleração do processo. Este deveria se tornar o mais eficiente e não-burocrático possível, e ao mesmo tempo manter-se em consonância com o princípio do devido processo legal.

7.3.2. Buscar impor remédios estruturais ao invés de remédios comportamentais em casos de atos de concentração, sempre que possível.

O CADE tem imposto regularmente remédios comportamentais a atos de concentração. Poderia ser útil a realização de um estudo sobre a eficácia desses remédios em alguns dos casos. Em outros países, a experiência tem mostrado serem as restrições estruturais mais eficazes que as comportamentais, além de mais fáceis de administrar. Se o projeto de lei for aprovado, a notificação prévia fortalecerá a capacidade do CADE de exigir restrições estruturais, o que deveria ser feito sempre que possível.

7.3.3. Prosseguir com os esforços para melhorar a comunicação e a coordenação entre o SBDC e os Ministérios Públicos Estadual e Federal, especialmente nos casos e investigações iniciadas pelo Ministério Público.

O processo criminal é um componente importante do programa brasileiro de combate a cartéis. Ações dessa natureza são conduzidas pelo Ministério Público e não pelo SBDC. O SBDC e os promotores desenvolveram boas relações de trabalho, especialmente em investigações iniciadas pela SDE. Contudo, os promotores têm o poder de instaurar casos de forma independente em relação ao SBDC, e não é incomum assim procederem. Os promotores geralmente consultam o SBDC nos casos por eles iniciados, mas não possuem a obrigatoriedade de fazê-lo. Seria útil colocar em funcionamento um programa que estabelecesse esta consulta ao SBDC antes de iniciar um caso que também consista em infração à Lei de Defesa da Concorrência. Essa coordenação ajudaria a impedir a instauração de casos indevidos, incluindo aqueles que possam não ser apropriados para a instauração de processo criminal ou aqueles que possam não ser sustentáveis de acordo com princípios relevantes de defesa da concorrência.

Um benefício oriundo de uma coordenação aprimorada nesse sentido seria o de desenvolver melhores dados sobre casos criminais, incluindo o

número e a duração das condenações de prisão impostas. Essas informações extrapolam o interesse acadêmico. Uma vez compiladas e publicadas, contribuirão para o forte efeito dissuasório proporcionado pela ação criminal.

7.3.4. Desenvolver capacidade de advocacia de concorrência no CADE, mas de forma a evitar a duplicidade com a SEAE nesta matéria.

As contribuições da SEAE na área da advocacia da concorrência são significativas (ver item 6 acima). Entretanto, o CADE decidiu, corretamente, aumentar sua capacitação em economia, com o propósito, dentre outros, de desenvolver a função de advocacia da concorrência. O CADE terá que se comunicar com as agências reguladoras quando tiver casos nos respectivos setores. Seus casos podem gerar propostas para a adoção de iniciativas de regulação que deveriam ser comunicadas à agência reguladora. Em algumas ocasiões, espera-se que raramente, o CADE e a SEAE podem vir a discordar em advocacia da concorrência. A importância de se desenvolver uma *expertise* regulatória poderá ser maior se o projeto de lei vier a ser promulgado, resultando na dissociação completa da SEAE da aplicação da Lei de Defesa da Concorrência. Ao mesmo tempo, o CADE não deve duplicar a função de advocacia da concorrência da SEAE; as duas agências deveriam coordenar seus esforços nessa esfera, e trabalhar juntas nos casos em que fosse mais eficiente fazê-lo.

7.3.5. Continuar buscando uma atuação mais eficaz junto aos tribunais. Em longo prazo, considerar propostas de modificação do sistema judicial que possam ajudar a acelerar a análise dos casos de defesa da concorrência.

O SBDC entende agora que este é um de seus desafios mais importantes. De fato, se o projeto de lei for aprovado, corrigindo os diversos problemas anteriormente elencados, este será provavelmente o seu maior desafio. O SBDC já começou a se concentrar nessa questão, enfatizando a execução das decisões do CADE junto aos tribunais, reorganizando seus procedimentos internos para o tratamento dos casos, fortalecendo suas aptidões de litígio e dialogando com os juízes de modo a familiarizá-los com os casos de defesa da concorrência e as questões específicas que estes apresentam. Esses esforços devem continuar e a eles devem ser adicionados maiores recursos, caso o projeto de lei seja aprovado.

Infelizmente, os atrasos inerentes aos processos judiciais, um problema básico, encontram-se fora do controle do SBDC. O SBDC e outras partes

interessadas poderiam começar a pensar em mudanças no sistema, que pudessem acelerar a revisão judicial dos casos de defesa da concorrência. O Relatório de 2005 recomendou que as questões de direto da concorrência fossem consideradas por juízes especializados e painéis de apelação. Diante dessa questão, o SBDC respondeu que o CADE tem estado em contato com a Associação dos Juízes Federais do Brasil para avaliar a viabilidade desta proposta. A resposta dos juízes foi que o número de casos de defesa da concorrência é muito pequeno para justificar juízos especializados. Deve, ainda, ser observado que, uma vez que todos os recursos contra as decisões do CADE são propostos junto ao tribunal de primeira instância do Distrito Federal, esse tribunal, com o tempo, tornar-se-á mais familiarizado com esses casos.

Em todo caso, o problema do atraso desordenado permaneceria. Uma solução poderia ser a criação de regras especiais que se aplicariam aos recursos de decisões de tribunais especializados como o CADE, evitando, por exemplo, o tribunal de primeira instância e apresentando o recurso diretamente a um tribunal de segunda instância. Poderia haver outras idéias concebidas por juristas brasileiros.

7.3.6. Tirar proveito dos procedimentos para a obtenção de acordos tanto em casos de conduta como de atos de concentração, promovendo assim a eficiência e evitando recursos judiciais onerosos e demorados.

Os procedimentos para que sejam firmados acordos em casos de conduta e de atos de concentração existem, e o CADE começou a utilizá-los com mais freqüência. O CADE reconhece a importância desse instrumento e criou uma unidade que se especializará em negociações de acordos. Se o projeto de lei for aprovado e a notificação prévia for estabelecida, os incentivos para as partes de atos de concentração de firmarem acordos em fusões problemáticas mudarão; elas estarão mais dispostas a firmar um acordo, para que possam consumar suas transações rapidamente. Se os representados nos casos de conduta perceberem que podem retardar injustificadamente a imposição das sanções estabelecidas pelo CADE por meio da interposição de recursos junto aos tribunais, eles ainda poderão preferir esta alternativa. O CADE está respondendo corretamente a essa questão, ao fazer valer vigorosamente seu direito de exigir que os réus depositem sua multa ou apresentem pagamento de caução em juízo. Qualquer uma das alternativas pode ser dispendiosa no decorrer do tempo. Em todo caso, o CADE tem encontrado uma disposição favorável por parte dos participantes de casos de cartéis internacionais em assinar acords, mesmo que seja apenas para eliminar a incerteza.

Uma clara advertência para qualquer esforço para o estabelecimento de acordos é que a autoridade não deve firmá-los por muito pouco. Em longo prazo, tal prática terá um impacto negativo acentuado na implementação da lei.

Notas

1. OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), disponível no site OECD/Competition em www.oecd.org/competition. A OCDE primeiro estudou o sistema brasileiro de política de concorrência em 2000, que resultou em um relatório sobre o tema, publicado como *Competition Law and Policy Developments in Brazil*, OECD Journal of Competition Law and Policy, Outubro de 2000, volume. 02, N. º 3.
2. Competition Policy International, *Trustbusters, Competition Policy Authorities Speak Out*, 38-42 (2009).
3. Artigo 2 da Lei 4.137/62.
4. Artigo 3 da Lei 8.884/94.
5. Artigo 4 da Lei 8.884/94.
6. Curiosamente, entretanto, as leis de dois vizinhos do Brasil, Argentina e Chile, também combinam essas diferentes formas de condutas anticoncorrenciais em uma única disposição legal.
7. O artigo 21 reforça a metodologia de avaliação de possíveis preços abusivos: "Parágrafo único. Na caracterização da imposição de preços excessivos ou do aumento injustificado de preços, além de outras circunstâncias econômicas e mercadológicas relevantes, considerar-se-á: I - o preço do produto ou serviço, ou sua elevação, não justificados pelo comportamento do custo dos respectivos insumos, ou pela introdução de melhorias de qualidade; I - o preço de produto anteriormente produzido, quando se tratar de sucedâneo resultante de alterações não substanciais; III - o preço de produtos e serviços similares, ou sua evolução, em mercados competitivos comparáveis; IV - a existência de ajuste ou acordo, sob qualquer forma, que resulte em majoração do preço de bem ou serviço ou dos respectivos custos."
8. Artigo 15.

9. No entanto, em algumas ocasiões, o CADE calcula a multa com base exclusivamente no mercado afetado, para fins de equidade e proporcionalidade (por exemplo, quando um dos Representados em um processo de cartel teve receita total muito maior que a de seus co-conspiradores).

10 . Artigo 24. Ademais, se a uma empresa for aplicada uma decisão administrativa final de abuso de poder econômico, o seu registro no SISCOMEX como importador ou exportador pode ser negado, segundo a Portaria n. 25/2008 do Ministério do Desenvolvimento, Indústria e Comércio Exterior; entretanto, essa medida ainda não foi aplicada em casos de concorrência.

11. Artigo 25.

12. Três produtores de aços planos aumentaram os seus preços simultaneamente após terem informado à SEAE que tinham a intenção de fazê-lo. O motivo da notificação à SEAE foi que, até 1992, os preços do aço eram controlados e cabia à SEAE monitorá-los. A SEAE prontamente respondeu aos produtores que era ilegal se engajar em acordos com concorrentes para aumentar preços. Contudo, pouco tempo depois, os preços aumentaram. Os produtores negaram que tivessem qualquer acordo e alegaram não haver qualquer evidência de conluio. Ainda assim, o CADE concluiu que o acordo poderia ser inferido a partir das evidências obtidas e multou os produtores com o valor mínimo previsto na Lei, ou seja, 1% do faturamento bruto de cada empresa no ano anterior ao início do processo, que somou cerca de R$51 milhões. Foram ainda aplicadas multas adicionais no valor de R$5 milhões, em razão de terem sido prestadas informações falsas. Os Representados recorreram dessa decisão nos tribunais, e o caso permanece em análise.

13. Lei nº 10.149/00.

14. Para uma apresentação detalhada desse programa, ver a contribuição do Brasil para o Fórum Latino-Americano de Concorrência (Chile, setembro de 2009) em: http://www.oecd.org/dataoecd/33/48/43536874.pdf, também disponível no Olis como DAF/COMP/LACF(2009)7. Contribuições de outros países latino-americanos também podem ser encontradas em www.oecd.org/competition/latinamerica.

15. Ministério da Justiça, Secretaria de Direito Econômico, *Programa de Leniência Brasileiro*, 2008, disponível no site da SDE em www.mj.gov.br/sde em português e inglês.

16. Lei nº 8137/90.

17. Aparentemente, a probabilidade de processo para um desses outros crimes nos casos em que haja um acordo de leniência é pequena. Como descrito abaixo, no item 2.1.1.3, o SBDC trabalha diretamente com os membros dos Ministérios Públicos Estadual e Federal, que são responsáveis por conduzir tais processos. Resultado disso é que eles raramente ou nunca trabalham com objetivos superpostos ou cruzados.

18. Ministério da Justiça. Portaria Nº 04/2006.

19. Esse período de seis meses pode ser prorrogado por outros seis meses, se não houver nenhum outro candidato à leniência nesse processo.

20. Todos disponíveis no site da SDE, *supra*, nº 15.

21. Lei nº 11482/07.

22. CADE, Portaria n.º 51 (2009).

23. Lei nº 8.137/90.

24. O mesmo artigo também proíbe outras formas de condutas anticompetitivas, incluindo "abuso de poder econômico", "exploração do poder de monopólio pelo aumento de preços sem justa causa", "vender mercadorias abaixo do preço de custo, com o fim de impedir a concorrência" e algumas formas de discriminação de preços. Até o momento, processos criminais para esses outros tipos de conduta anticoncorrencial têm sido raros ou inexistentes.

25. Lei nº 10.446/02.

26. Whirlpool, S.A., et al. (2009).

27. Peixoto, *Brazil: Cartels and Leniency*, em *Global Competition Review*, *Antitrust Review of the Americas 2010*, disponível no site do GCR em www.globalcompetitionreview.com.

28. Em outro caso em que foram celebrados termos de compromisso de cessação, envolvendo um cartel internacional de mangueiras marítimas, três acusados concordaram em cooperar com a investigação.

29. Sociedade dos Mineradores do Rio Jacuí Ltda. (Smarja) (2008).

30. Rota-Sul Empresa de Vigilância Ltda., (2007).

31. SINDIPEDRAS, *et al.*. (2005).

32. Portaria SDE Nº 51 de 2009.

33. Para mais informações sobre o assunto, ver as Diretrizes da OCDE para combater o conluio entre concorrentes em contratações públicas, em: www.oecd.org/competition/bidrigging.

34. Coopanest-GPA (2006).

35. Shopping Iguatemi (2007); Centro Norte S/A (2007).

36. A substituibilidade do lado da oferta é, por vezes, considerada neste estágio (em outros países a substituibilidade do lado da oferta é considerada ao se identificar as empresas que competem em um mercado relevante).

37. Faturamento bruto significa o faturamento total (antes de impostos) dos envolvidos em todos os mercados.

38. Súmula n º 01 (2005) do CADE, estabelecida em consonância com a Resolução nº 39 (2005) do CADE.

39. Aprovadas na Resolução nº 45 do CADE.

40. O poder foi primeiro autorizado pela Resolução 28, adotada em 2002, que foi substituída pela Resolução n.º 45 de 2007.

41. Em 2007, o CADE publicou a Portaria n º 44, que fornece orientações sobre cálculo dessas multas. Dentre os critérios relevantes, encontram-se o tamanho da operação e das partes envolvidas, se a operação foi objeto de remédios ou reprovação por parte do CADE e se as partes não forneceram notificação espontaneamente, caso esta tenha sido apresentada intempestivamente. A multa é cobrada em dobro em caso de reincidência.

42. Em uma recente decisão judicial, o conceito do CADE dessa data-base foi questionado por uma parte envolvida, que sustentou que nos termos da Lei somente após a consumação completa da operação teria início a execução de 15 dias. O STF respaldou a definição do CADE. Sonaeimo vs. CADE (2009).

43. A Súmula Nº 2 definiu as circunstâncias em que a notificação de uma aquisição de cotas minoritárias por acionistas majoritários não é obrigatória. A Súmula n º 3 se aplica a situações em que o único objetivo de um acordo é o de participar de uma licitação pública que tem por objeto uma concessão.

44. O CADE questiona essas transações quando a cláusula de não-concorrência excede o período de cinco anos; este período foi definido pelo Código Civil Brasileiro como período-base. Contudo, o CADE já aceitou períodos mais longos em alguns casos, principalmente relativos a *joint ventures* ou a atividades de Pesquisa e Desenvolvimento.

45. América Latina Logística S.A. ("ALL"), Brasil Ferrovias S.A. ("BF"); Novoeste Brasil S.A. ("NV"), No. 08012.005747/2006-21 (2006). Numa fusão recente envolvendo restrições verticais ao setor varejista de combustíveis, PETROBRAS /IPIRANGA (2009), o CADE optou por

requerer a eliminação de acordos de exclusividade entre atacadistas e varejistas do setor, ao invés de requerer a venda ou cessão de postos de venda de combustíveis a varejo, como havia determinado anteriormente em caso similar.

46. Coca Cola/ Leão Junior SA (2009).

47. DBG/Chinaglia (2009).

48. Saint-Gobain/Owens Corning (2008).

49. A operação foi contestada nos Estados Unidos pela Comissão Federal do Comércio (USFTC) e chegou a acordo por meio de uma ordem de consentimento, obrigando a Owens Corning a alienar seu negócio de esteira de filamento contínuo na América do Norte. Veja a nota para a imprensa da USFTC de 26 de outubro de 2007, disponível no sítio da USFTC em www.ftc.gov.

50. CVRD, *et al*. (2005).

51. O CADE foi representado por seu Procurador-Geral, que em 2008 foi nomeado Presidente do CADE. A sua confirmação como presidente do órgão, feita pelo Senado, foi lenta (mas finalmente aprovada), supostamente por conta de oposição animada pelos interesses de determinadas empresas. Dentre elas, foi dito, encontrava-se a Vale. Veja *Global Competition Review*, *The Prizefighter*, disponível no sítio do GCR em www.globalcompetitionreview.com.

52. Artigo 5.

53. Lei nº 8.884, art. 52.

54. Art. 38.

55. Lei nº 9.021.

56. Artigo 42.

57. CADE, Resolução nº 45.

58. SDE/SEAE. Portaria Conjunta nº 33/2006.

59. A Resolução 15 foi substituída pela Resolução 45, mas os dois anexos continuam em exercício. Além disso, em 2007, o SBDC se comprometeu a criar um sistema de notificação eletrônica para fusões. Entretanto, o projeto provou ser tecnicamente difícil e o SBDC está, no momento, em processo de identificar fornecedores externos de TI capazes de completar o projeto.

60. SEAE/SDE. Portaria Conjunta No. 1

61. Os advogados designados para a Advocacia Geral possuem outro cargo.

62. Entretanto, essas posições não exigem qualificações específicas para a missão do CADE.

63 O número de funcionários da SEAE mostrado na Tabela 13 inclui todos aqueles que trabalham em análise de fusões, regulação e advocacia da concorrência. O número dos que trabalham em fusões é relativamente pequeno se comparado ao total. Em 2009, por exemplo, 17 dos 78 profissionais conduziram análises de fusões.

64. Ver Peixoto, *Brazil: Cartels and Leniency*, in The Antitrust Review of the Americas, 2010 (2009).

65. A Superintendência-Geral pode determinar que a notificação é deficiente em algum aspecto e mandá-la de volta às partes envolvidas para complementação. As partes têm 10 dias para fazê-lo. Caso as deficiências não sejam corrigidas, a fusão não é analisada. Um dos efeitos da decisão da SG de requerer a complementação das informações é o de prorrogar os períodos subseqüentes, previstos em lei, em 15 dias – o período de 5 dias para a SG decidir se a notificação está completa e o período de dez dias para as partes complementarem as informações.

66. Lei nº 9478/97, art. 10.

67. O Brasil se tornou o maior produtor em larga escala de biocombustível (etanol) do mundo, e é o maior exportador do produto. A Petrobrás é atuante no mercado também. Ver em: United States Energy Information Administration, *Brazil Country Analysis Brief* (2009), disponível em http://www.eia.doe.gov/emeu/cabs/Brazil/pdf.pdf.

68. Em 2009, uma lei muito esperada sobre gás foi aprovada no Brasil, com o objetivo central de facilitar a concorrência neste setor.

69. White Martins/Petroleum Brasileiro (2006).

70. Ultragaz/Shell Gas (2008).

71. Petróleo Brasileiro S.A., et al. (2008).

72. A regulação estava anteriormente a cargo do Ministério dos Transportes.

73. Existe uma proposta de construção de uma linha férrea de alta velocidade entre São Paulo e o Rio de Janeiro. Estudos estão em andamento, mas não existe prazo para a conclusão.

74. GOL, et al. (2008).

75. Viação Aérea Rio-Grandense, et al. (2004).

76. Lei 9.961/2000.

77. De acordo com dados de setembro de 2009 publicados pelo Banco Central do Brasil em www.bacen.gov.br.

78. A observância da data-limite de 30 dias não afeta o andamento da proposta.

79. Lei 9.069/19956. Art. 70.

80. Decreto número 1.849/1996, atualmente Decreto número 6.531/2008, Art. 12.

81. CADE: www.cade.gov.br/; SDE: www.mj.gov.br/sde; SEAE: www.seae.fazenda.gov.br/.

82. Ver nota de rodapé 1.

PRESENTATION BY MR. JOHN CLARK

COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW

-- Presentation by Mr. John Clark --

1. What is a Peer Review?
2. The 2010 Peer Review report on Brazil
3. The Evolution of Competition Policy in Brazil
   - Cartels
   - Mergers
   - Advocacy
   - Judicial Review
   - Institutional Issues
4. Recommendations
5. The Pending Legislation
6. Conclusion

1. WHAT IS A PEER REVIEW?

- It's an in-depth analysis of competition policy and competition law enforcement in a country.
- It begins with an in-depth questionnaire sent to the Competition Authority, comprehensive research, on site interviews and document review.
- A draft report is prepared and discussed. In this case, it was at the February 2010 meeting of the OECD Global Forum on Competition (in presence of 90 countries and IGOs/NGOs).
- Representatives of the country under review are subject to searching questions by selected country examiners.
- Finally the report is published and presented in the reviewed country.

2. THE 2010 PEER REVIEW REPORT ON BRAZIL

- The OECD and the IDB have been studying competition policy in Brazil for ten years. An OECD report published in 2000 (not a peer review) was followed by a full peer review in 2005. This 2010 Report is the second peer review of Brazil done by the OECD in partnership with the IDB.
- These reports document the remarkable progress made in competition policy here in the past decade. These achievements were made despite what many experts believe to be serious flaws in Brazil's competition law, Law 8884, enacted in 1994.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: CARTELS

- Hard core cartels – agreements among competitors fixing prices or allocating markets – are considered on a global scale to be the most harmful of all types of anticompetitive conduct, and prosecuting them should have high priority in a competition agency.
- In 2000, the anti-cartel programme of the BCPS (comprising CADE, SDE and SEAE) was almost nonexistent. Today it is robust, and widely admired.
- The BCPS effectively employs such important tools as a leniency programme and dawn raids in its anti-cartel effort. Its use of criminal process against cartels is especially noted.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: MERGERS

- In 2000, merger review occupied a substantial part of the BCPS' resources – as much as 70%. The review process was slow and inefficient. The rules controlling merger notification were flawed; notably, notification before consummation ("pre-merger notification") was not required.
- Beginning in 2003 the BCPS perfected a "fast track" review process for non-problematic mergers. Ambiguities in the notification rules were largely (but not completely) resolved. The lack of pre-merger notification, however, continues to be an impediment.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: ADVOCACY

- Competition advocacy has two functions – promoting competition policy in other parts of government and in regulation, and promoting public support for an effective competition policy.
- The BCPS excels in both of these areas. SEAE, as part of the Ministry of Finance, has long had an influential role in the formulation of government policies. CADE and SDE are active in the public arena in various ways. SDE's efforts in promoting the anti-cartel agenda are especially notable.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: JUDICIAL REVIEW

- Review of CADE's decisions by the courts has become an important issue. The standards for judicial review of competition cases are not well articulated. As in many countries, courts are not familiar with competition cases. For years, fines imposed by CADE had not been collected. Perhaps most important, appeals to the courts meant long delays – up to ten years or more.
- Beginning in 2006 CADE became much more aggressive about collecting fines in court – with good results. CADE revised its internal litigation procedures, making them more efficient and effective. But fundamental problems remain.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: INSTITUTIONAL ISSUES

- The BCPS has long faced problems resulting from its institutional design. Interaction between the three agencies was inefficient. Their budgets were inadequate. They suffered from a lack of permanently assigned staff – the problem was especially acute at CADE. A chronic problem at the three agencies was a high rate of staff turnover. The terms of CADE's commissioners (two years) were too short.
- The three agencies now work together much more efficiently, but other institutional problems, which are mostly a function of the competition law, continue.

4. RECOMMENDATIONS

The BCPS has made great progress in the past decade. Notable achievements include its development of a vigorous anti-cartel program and the creation of a fast track merger review process. More should be done, however. The 2010 Report sets out a number of recommendations, the most important of which are:

4. RECOMMENDATIONS

Consolidate the functions of the BCPS into one agency. *The BCPS has made the best out of what once was a highly inefficient system. Still, the single agency model, which has proved successful in many other jurisdictions, should result in further improvements in Brazil.*

4. RECOMMENDATIONS

Create CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff. *Of the problems facing the BCPS at present, inadequate staffing and high employee turnover may be the most critical.*

4. RECOMMENDATIONS

Extend the terms of the commissioners and other politically appointed senior officers to at least four years and make the terms non-coincident. *The short terms of the commissioners are another reason for high staff turnover, and they adversely affect CADE's institutional memory and its political independence.*

4. RECOMMENDATIONS

Modify the merger notification and review process to provide for premerger notification and revise the notification rules to conform to international best practices. *These reforms will make BCPS merger review more efficient and predictable. The fast track process is evidence of the ability of the BPCS to review mergers quickly, which is important for pre-merger notification.*

4. RECOMMENDATIONS

Reduce the backlog of conduct investigations and cases within the BCPS and shorten the time required for the final disposition of an investigation or case.

The backlog of conduct investigations in the BCPS is significant, though it has been reduced somewhat in recent years. Resolution of conduct investigations can take years. Reorganization and additional resources will help, but the BCPS should assess and revise its own procedures for further efficiencies.

4. RECOMMENDATIONS

Continue to strive for a more effective litigation programme in court. In the longer run, consider proposals for changes in the judicial system that could help to expedite competition cases.

The BCPS has begun to address this litigation issue, but not all problems, especially that of inordinate delay, are within its control. The BCPS and other interested parties could begin to think about changes in the system that could speed the review of competition cases.

4. RECOMMENDATIONS

Take advantage of procedures for settling cases (reaching agreement with respondents on an appropriate remedy).

Settling competition cases is common in some other countries. Procedures for settling both conduct and merger cases exist in Brazil, and CADE has begun to use them more often. Settling cases (but not too cheaply) promotes efficiency and helps to avoid costly and lengthy judicial appeals.

Also in the Report are several more specific recommendations on various issues.

5. THE PENDING LEGISLATION

The legislation now in Congress addresses all of the major concerns expressed in the Peer Review Report. The Bill is complex; most importantly it:

- consolidates most of the functions of CADE, SEAE and SDE into one agency, CADE, and provides for more efficient review procedures;
- provides for more resources and for permanent positions in the new agency;
- lengthens the terms of CADE's commissioners;
- provides for pre-merger notification and revises the notification rules appropriately.

6. CONCLUSION

The BCPS has made historic strides in its enforcement of the competition law and in implementing competition policy in Brazil. More is to be done, however, and much depends on implementing structural changes of the kind articulated in the revisions to the competition law currently pending in Congress.

SESSION III

BREAKOUT SESSIONS
ON COLLUSION AND CORRUPTION
IN PUBLIC PROCUREMENT

COMPILATION OF COUNTRY EXPERIENCES

BREAKOUT SESSIONS ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Country Experiences --

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-- Australia --

1. The Australian Competition and Consumer Commission (the ACCC) has developed an extensive education and advocacy program for government officials involved in public procurement.

2. This paper discusses the experiences of the ACCC in seeking to promote greater awareness of competition issues amongst procurement officials. It focuses, in particular, on the ACCC's recent advocacy initiatives in relation to cartel conduct. It also highlights the importance of having an integrated compliance program, which includes a mix of education, advocacy and enforcement action, to promote awareness of the obligations of businesses to comply with the *Trade Practices Act 1974*.

Public Procurement in Australia

3. In Australia the principles which apply to the Commonwealth in respect to public procurement are set out in the Commonwealth Procurement Guidelines[1] (CPGs). The CPGs establish the core procurement policy framework and articulate the Australian Government's expectations for certain Commonwealth departments and agencies (agencies) and their officials, when performing duties in relation to procurement.[2] The Commonwealth Department of Finance and Deregulation is responsible for administering the Commonwealth's procurement policy framework.

4. The CPGs define procurement in the following way:[3]

> *Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.*

5. The core principles which apply to procurement under the CPGs are:

- Value for Money
- Encouraging Competition
- Efficient, Effective and Ethical Use of Resources
- Accountability and Transparency

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1 A copy of the CPGs is available at http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html.

2 Australia's state and territory governments operate their own separate public procurement frameworks. These frameworks are determined on a state-by-state / territory-by-territory basis.

3 Commonwealth Procurement Guidelines (December 2008), p. 3.

6. Competition is a key element of the Australian Government's procurement policy framework. It enhances value for money, the core principle underpinning Australian Government procurement. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes.

7. The Commonwealth procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and be treated equitably based on their legal, commercial, technical and financial abilities. Equitable treatment of suppliers enables business to be conducted fairly, reasonably and with integrity.

8. Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

9. The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.

ACCC Compliance Initiatives

10. The ACCC is Australia's national competition regulator. It is responsible for administering the *Trade Practices Act 1974* (the Act), including by educating Australian consumers, businesses and governments about their trade practices rights and responsibilities. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Act and the state/territory application legislation.

11. The ACCC has actively engaged with procurement officials across all levels of government to alert them to the issues and risks that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- Risks for government
- The law in Australia
- Procurement design
- Detection tips
- Deterrence tips
- Do's and don'ts in public procurement

12. In 2005 the ACCC launched its first specific compliance program for procurement officials. The primary objective of this program was to alert officials on how to detect possible cartel activity in the procurement process. The material released by the ACCC provided guidance to officials on how to detect the warning signs of cartel conduct.

Consultation with Procurement Officials

13. The ACCC compliance program was developed with the benefit of advice and information provided by officials directly involved in Commonwealth procurement. The ACCC conducted extensive consultation with a range of procurement officials, including the Commonwealth Department of Finance.

14. The ACCC also undertook a number of trial seminars with the draft material to determine whether the guidance was appropriate and would achieve the desired outcomes.

Education Material

15. The central component of the ACCC's compliance program was a multi-media CD-ROM which was provided to public sector procurement agencies, as well as private companies involved in procurement. In developing this material, the ACCC was able to draw on the experience of the Canadian Competition Bureau and the United States Department of Justice, Antitrust Division.

16. The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information. This information included: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity.

17. In addition to the CD-ROM, the ACCC developed guidelines for procurement officials on cartel conduct.

18. The material also contained a short video presentation from ACCC Chairman, Graeme Samuel, outlining the importance of detecting cartels in public procurement.

Presentations & Seminars

19. The initial roll out of the ACCC's procurement strategy included over 50 presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments. Importantly, a number of these seminars were delivered to national and state conferences for procurement officials.

Advocacy

20. In addition to the educational aspects of the compliance program, the ACCC wrote to Commonwealth Government Ministers and the Premiers and Chief Ministers of each of Australia's states and territories. The purpose of this was twofold. Firstly, to seek support for the ACCC's education and compliance program at a high level within each Government. This support was received from all Governments.

21. The second purpose was to request all Governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines. This proposal had mixed results with only some government agencies introducing measures to deal with cartel conduct.

Investigations and Litigation

22. As a result of the initial procurement compliance program, the ACCC received various reports from procurement officials identifying activity which may breach competition laws. Whilst there were

some investigations as a result of these reports, none of these have led to enforcement action by the ACCC to date.

Review of Procurement Compliance Program

23. In 2007 the ACCC reviewed and updated its compliance program, and developed a DVD which was sent to Chief Financial Officers in 23 Commonwealth agencies. Unlike the initial roll-out of the program, the ACCC did not undertake the same extensive presentations and seminar series to educate procurement officials. One of the reasons for this was pending court action in the Baxter[4] case.

Baxter Case – Derivative Crown Immunity

24. The ACCC took these proceedings following a complaint from a medical practitioner that exclusivity agreements between the government and Baxter Healthcare Pty Ltd (Baxter) limited the choice of treatment which would best meet the needs of their patients requiring dialysis.

25. The ACCC alleged that Baxter had entered into long-term, exclusive, bundled contracts with state purchasing authorities (SPAs) which tied the supply of sterile fluids to the supply of peritoneal dialysis products. It claimed that bundling all sterile fluids and peritoneal dialysis products in this way amounted to exclusive dealing in breach of section 47 of the Act, and that Baxter had taken advantage of its substantial market power in sterile fluids to structure the terms on which it offered to enter into the contracts.

Federal Court Decision

26. On 16 May 2005 the trial judge, Justice Allsop, handed down judgment applying a line of judicial authority based on the High Court's decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[5] (Bradken). This authority provided that where the Crown enjoys immunity from the Act (which was not contested in the case), this immunity should extend to corporations with which the Crown deals, where the application of the Act would interfere with the proprietary, contractual and/or other legal interests of the Crown (known as derivative Crown immunity). Applying this authority, Justice Allsop held that the Act did not apply to either Baxter's contracts with the SPAs or its other conduct.

27. But for the existence of Crown or derivative Crown immunity, Justice Allsop said he would have found that Baxter had committed one breach of section 46 and a number of breaches of section 47 of the Act.

28. The ACCC appealed the decision on the basis that Justice Allsop had incorrectly held that the Act did not apply to Baxter's conduct.

Full Federal Court Decision

29. On 24 August 2006 the Full Federal Court handed down its decision, holding that Justice Allsop's finding on the Crown immunity issue was correct.

30. The Court made the following observations about the possible implications of its decision:

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4 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) available at http://www.austlii.edu.au/au/cases/cth/FCA/2005/581.html.

5 [1979] HCA 15 (5 April 1979) available at http://www.austlii.edu.au/au/cases/cth/HCA/1979/15.html.

> *It is one thing to exempt the executive government from legislative prohibition as to conduct… It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers.*

31. The ACCC sought special leave to appeal the decision to the High Court and, on 29 August 2007, the High Court upheld the appeal, finding that the Act applied to Baxter's conduct. The High Court was of the view that:[6]

> *The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business.*

32. Baxter would therefore be liable for penalties, injunctions and other sanctions (to be determined by the Full Federal Court on remittal[7]).

Implications of the Baxter Case

33. Following the Federal Court and Full Federal Court decisions in Baxter, the ACCC was concerned that Crown immunity may pass through to businesses involved in cartel conduct if a bid was submitted for a government tender. However, the High Court's decision confirms that the Act *will* apply to collusive practices in the context of government procurement.

Procurement Outreach Program

34. The Baxter case was significant in that it removed any uncertainty that collusive practices involving Government tenders would be subject to the cartel provisions under the Act.

35. Following the High Court's decision, the ACCC trialled a new education and advocacy approach for public procurement. The trial program commenced in the state of South Australia and following its initial success was implemented nationally.

36. The trial program involved extensive consultation and liaison with state and local government entities, including over 70 presentations by ACCC staff. In addition to these presentations, an ACCC Outreach Officer was specifically tasked to liaise directly with these government entities, focusing on education and advocacy for procurement reform.

37. The ACCC also updated its guidelines for procurement officials on cartel conduct to reflect the decision in Baxter, and pending commencement of the new criminal cartel regime.[8]

38. In April 2009 the ACCC released a new guidance publication for procurement officials: "*Cartels: deterrence and detection —a guide for government procurement officers"*.[9]

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6 *Australian Competition and Consumer Commission v Baxter Healthcare* [2007] HCA 38 (29 August 2007), at para 74. The decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2007/38.html.

7 *See Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (11 August 2008) available at: http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html.

8 New laws criminalising cartel conduct came into effect in Australia on 24 July 2009. More information about the new criminal cartel regime is available at: http://www.accc.gov.au/content/index.phtml/tag/cartels/.

39. During the four years following the release of the ACCC's compliance program, the ACCC did not bring any bid-rigging case to court. However, in 2009 this changed when the ACCC instituted proceedings against American-based company, DRS C3 Systems[10] (DRS), for alleged market sharing in the international military defence training systems industry.

40. The conduct relates to an alleged agreement between DRS and another company, that DRS would withdraw from a proposed procurement for an air combat manoeuvring instrumentation system, conducted by the Australian Government. The case is ongoing.

41. Whilst the DRS case is an important step in highlighting anti-competitive conduct in the public procurement sector, a more recent investigation into the construction sector in the state of Queensland has had a more significant impact in raising public awareness of the economic harm of bid-rigging, especially amongst government Ministers.

42. The ACCC commenced legal proceedings on 21 September 2009 alleging that three construction companies[11] engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland. The alleged conduct involved the exchange of cover prices (a practice referred to in the building industry as "cover pricing") for the construction of a school, rail facilities and an airport refurbishment.

43. As the conduct covers a wide range of government tenders, this case has significantly raised awareness of the risks of cartel activity within the public procurement sector.

ACCC – Lessons Learnt from Public Procurement Outreach Programs

44. In the course of implementing our compliance programs, the ACCC has learnt that to successfully achieve our compliance objectives, particularly with respect to public procurement, it is necessary to have a mix of strategies and approaches. For example, education and advocacy messages (while necessary) will not be successful in raising awareness about the economic harm associated with bid-rigging for government tenders, or in preventing breaches of the law, without strong enforcement action.

45. In the ACCC's experience it is necessary to have an integrated approach, which includes:

- Enforcement of the law, including resolution of possible contraventions, both administratively and by litigation
- Encouraging compliance with the law by educating and informing both businesses and officials involved in procurement about their rights and responsibilities under the *Trade Practices Act 1974*, and
- Developing ongoing and effective partnerships with other government agencies to implement these objectives.

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9 The guide is available at: http://www.accc.gov.au/content/index.phtml/itemId/869010.

10 *ACCC v DRS C3 Systems, Inc* NSD588/2009.

11 *ACCC v T F Woollam & Son Pty Ltd & Ors* QUD236/2009.

-- Canada --

1. Certificates of Independent Bid Determination ("CIBD")[1]

1. To deter bid-rigging activity, the Competition Bureau (the "Bureau") has developed a model Certificate of Independent Bid Determination ("CIBD")[2], attached as Appendix A, for use by tendering authorities when calling for bids, tenders or quotations. This document requires bidders to disclose, to the tendering authority, all material facts regarding any communications and arrangements between the bidder and its competitors in respect of a specific call for tenders. Accordingly, bidders are explicitly advised that the procurement agency is monitoring the bid process for any signs of collusion.

2. The Bureau strongly encourages public procurement agencies to adopt a CIBD, or a similar one of their own design, when buying goods or services through a competitive process. Take up is growing; for example, the federal department of Public Works and Government Services Canada ("PWGSC"), which provides federal government departments and agencies with procurement services, has incorporated CIBD-type concepts in its Code of Conduct for Procurement, although it does not make use of a stand-alone CIBD.

3. Another example is the Vancouver Organizing Committee ("VANOC") for the 2010 Vancouver Winter Olympics. VANOC included a "no collusion requirement" similar to the CIBD in its tender documents following discussions with Bureau representatives. The "no collusion requirement" stipulated that bidders must arrive at their bids independently and that communications with other bidders must be disclosed. VANOC also reserved the right to request a CIBD in addition to the "no collusion requirement" if it had reason to suspect that bids were not arrived at independently.

4. The Bureau has recently begun to track steps taken by procurement agencies to strengthen their processes in light of the Bureau's outreach activities. While data is only preliminary, it is nonetheless interesting to note that a number of procurement agencies in Canada have recently adopted CIBDs. The Bureau has also learned that implementing CIBDs has, in some cases, stopped bid-rigging in its tracks, as parties have realized the enhanced scrutiny that procurement agencies are applying to bidders' activities.

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1 On February 19, 2010, Canada will be making a presentation on CIBDs as part of the Global Forum on Competition's breakout sessions on collusion and corruption in public procurement.

2 Available online at : http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html

APPENDIX A

Certificate of Independent Bid Determination

I, the undersigned, in submitting the accompanying bid or tender (hereinafter "bid") to:

_____
(Corporate Name of Recipient of this Submission)

for: _____
(Name and Number of Bid and Project)

in response to the call or request (hereinafter "call") for bids made by:

_____
(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: _____ that:
(Corporate Name of Bidder or Tenderer [hereinafter "Bidder"])

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
3. I am authorized by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
4. each person whose signature appears on the accompanying bid has been authorized by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
5. for the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder, who:

   (a) has been requested to submit a bid in response to this call for bids;

   (b) could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;

6. the Bidder discloses that (check one of the following, as applicable):

   (a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor; ❑

   (b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements; ❑

7. in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

   (a) prices;

   (b) methods, factors or formulas used to calculate prices;

   (c) the intention or decision to submit, or not to submit, a bid; or

   (d) the submission of a bid which does not meet the specifications of the call for bids;

   except as specifically disclosed pursuant to paragraph (6)(b) above;

8. in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorized by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;

9. the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

_____
(Printed Name and Signature of Authorized Agent of Bidder)

_____ _____
(Position Title) (Date)

2. The use of guidelines, such as the OECD Guidelines for Fighting Bid Rigging in Public Procurement, in fighting bid-rigging in public procurement

5. The OECD Competition Committee has devoted significant time and resources to studying the issue of public procurement, resulting in the release in May 2009 of the OECD's Guidelines for Fighting Bid Rigging in Public Procurement ("OECD Guidelines") and related brochures. These documents indicate that, while public procurement agencies often require governments to rely on a tendering process to obtain best value for taxpayers' money when purchasing goods and services, the lack of flexibility created by detailed administrative regulations and procedures can limit the public procurement agency's ability to react strategically when confronted with a suspected bid-rigging situation. As a result, public procurement can become an attractive vehicle for collusion and bid-rigging.

6. In addition to active enforcement, in an effort to increase deterrence, the Competition Bureau (the "Bureau") is actively engaged in a wide range of anti bid-rigging initiatives - outreach presentations and proactive engagement with public procurement agencies - that draw heavily from the OECD Guidelines. The Bureau has also posted a copy of the OECD Guidelines on its website and references them regularly in its outreach activities.

7. The Bureau provides anti bid-rigging presentations to provide businesses and all levels of government with the means to detect, deter and report bid-rigging. The Bureau's anti bid-rigging outreach activities focus on educating public procurement officials on how to better detect and prevent bid-rigging. In the Bureau's view, procurement officials are in a prime position to detect bid-rigging, given their knowledge of the relevant sector and their ability to observe the often subtle patterns that may indicate the existence of a secret bid-rigging scheme.

3. Working with other parts of government to fight bid-rigging

8. The Competition Bureau (the "Bureau") is actively engaged with other parts of government to promote the detection, deterrence and reporting of bid-rigging. In addition to its enforcement efforts in this area, the Bureau has conducted extensive outreach activities, including presentations to all levels of government.

9. By way of example of how collaboration can enhance our common interests, in 2005, the federal department of Public Works and Government Services Canada ("PWGSC"), Canada's central purchasing agent and largest public purchaser of goods and services, contacted the Bureau to express concerns regarding bidding processes for information technology services. As a result, the Bureau initiated an inquiry that led to the laying of bid-rigging charges against 14 individuals and 7 companies in February 2009. The parties were accused of rigging ten bids to obtain Government of Canada contracts worth approximately CAD$67 million. Two individuals have since pleaded guilty to one count of bid-rigging each. The case concerning the other individuals and companies is currently before the courts.

10. As a result of the publicity generated by this case in the media and outreach activities directed towards major public procurement agencies immediately following the laying of charges, the public procurement community's awareness of the importance of combating bid-rigging has been raised. The Bureau took advantage of this opportunity to expand its educational initiatives and, in particular, to increase collaboration with government departments. The Commissioner of Competition sent letters to the most senior officials in federal government departments involved in public procurement, outlining how the Bureau could help them recognize and prevent such illegal activity from occurring in the future. Possible areas of collaboration were discussed during high-level meetings. Since February 2009, the Bureau has initiated 10 new bid-rigging investigations as a result of this collaboration.

11. In terms of outreach initiatives, the Bureau has proactively engaged with nine federal government departments, offering to contribute to procurement renewal initiatives by identifying adjustments to existing processes that are designed to deter bid-rigging. Two departments have incorporated bid-rigging material into the training they provide to their procurement officers. The Bureau is also exploring the possibility of offering an online course for government procurement officers.

12. The Bureau continues to work with other federal departments that reach out to small and medium-sized enterprises to encourage pro-competitive bidding on government contracts. In this context, the Bureau provides anti bid-rigging material for distribution at seminars, trade shows and booth exhibits.

13. The Bureau is also actively examining possible ways to better align incentives under its Immunity Program with public procurement agencies' policies on disqualification from future tendering in cases of vendor malfeasance.

14. Finally, the Bureau is in the process of examining a renewed national outreach strategy and has revamped the Bureau's online presence with a multimedia anti bid-rigging awareness toolkit and speaker presentation to increase the reach of our anti bid-rigging message.

-- Chile --

1. The FNE (Chilean Competition Agency) has been actively involved in fighting bid rigging since it was invited by the OECD to participate in a joint programme with the support of the Canadian Competition Bureau, in 2008.

2. As to the technique "Working with other parts of government to fight bid rigging":

The Anti-Bid Rigging Interagency Taskforce

3. In May 2008, the FNE brought together several public bodies and an association of public procurement officers, to a work team which was named *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller of the Republic (constitutionally independent body in charge of controlling –ex-ante and ex-post- the legality of the Administration's acts), the (E-)Public Procurement Bureau (body in charge of modernising the public contracting through electronic purchases), the Ministry of Public Works, the Council for the Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group. This Interagency Taskforce has held 9 work meetings between May 2008 and December 2009.

4. Among others, the work of this Taskforce has achieved the following outcomes:

- Inclusion of bid rigging questions in the certificate exams to be rendered by public procurement officers (November 2008);

- Cooperation and exchange of information agreement signed between the FNE and the Bureau of the General Comptroller of the Republic; (2008)

- Cooperation and exchange of information agreement signed between the FNE and the Ministry of Public Works; on the basis of this agreement, the Ministry set up a Competition and Anti-Collusion Unit within the Ministry (2009)

- Adoption by the Bureau of the General Comptroller of the Republic of the OECD bid rigging detection criteria in its auditing processes methodology (January 2009);

- Implementation of seminars and training activities, as a result of bilateral links with the taskforce members and also as a byproduct of installing the risk of collusion among bidders in the agendas of such bodies. Nearly 1000 public procurement officers have attended these activities. (2008-2009).

5. As to the technique "The use of guidelines", since the involvement of the FNE in the programme for fighting bid rigging, two guidelines have been issued at the national level and OECD guidelines have been broadly disseminated.

6. At the national level, the interagency taskforce drafted, printed and distributed a *Detection Checklist* to be used by procurement officers (November 2008);

7. The Public Procurement Bureau issued the Directive of Public Contracting Nr. 11 containing "**Instructions for preventing bid rigging in public procurement**" (January 2009)

8. The criteria for bid rigging detection considered in the OECD guidelines have been adopted by the Bureau of the General Comptroller of the Republic in its auditing processes methodology. This public body has sent several cases to the FNE for initiating an investigation.

9. More actively use of these guidelines has not been reported at this stage of the programme development.

10. As to the technique "CIBD", during 2009 and within the Interagency Taskforce, the proposal of incorporating a Certificate of Independent Bid Determination has been discussed. Even though no general agreement for the introduction of the instrument has been attained, one of the members of the Taskforce (the Regulator for Private Managed Pension Funds) included the CIBD model drafted by the FNE as a requirement in an important tender. (A headline of the corresponding news highlights the CIBD, see it in attached file). In the next months it is likely that CIBD will be included as a requirement in amendments to the Regulations of Public Works Contracts and maybe in public e-procurement.

ANNEX 1: ARTICLE FROM LA TERCERA AND FREE TRANSLATION

LA TERCERA Sábado 21 de noviembre de 2009 57

Negocios

Inversión & Finanzas

Bases de licitación de cartera de AFP fijan boletas de garantías, plazos y servicios para postulantes

La Contraloría tomó razón del documento el 2 de noviembre, pero la Superintendencia de Pensiones aún no confirma la fecha en que hará el llamado a licitación.

La estricta declaración de los oferentes

Uno de los principales objetivos de la licitación de la cartera de afiliados es dar mayor competencia al sector, obligando a que la comisión que se descuenta a los trabajadores por el manejo de sus ahorros (de 1,36% a 2,5% del sueldo bruto) baje. Por ello, las exigencias de calidad de servicio son inferiores a las actuales y si el oferente que gana es una AFP actual, deberá extender esa comisión al resto de sus afiliados. Por ello, en las bases se incluye una "declaración jurada de independencia de la oferta" donde el postulante debe informar si se comunicó con algún competidor, definido éste como cualquier individuo u organización además del oferente, relacionado o no con él. Se advierte incluso que de falsear información, puede haber pena de cárcel. Si el oferente reconoce haber entablado consultas, comunicaciones, acuerdos o convenios con uno o más competidores, se le exige detallarlos, informando nombres y cargos. "Es para evitar la colusión", opina el ex superintendente Julio Bustamante.

6 meses

tendrán los postulantes para formar la AFP.

THE BASES OF BIDDING REGARDING AFP (PENSION FUND MANAGERS) SET GUARANTEES, DATES AND SERVICES FOR THE CANDIDATES

The "Controlaría" (Treasury inspector's office) approved the document on 2nd November but the Pensions supervisor has not yet confirmed the date when the call for tenders will take place.

The strict declaration of the bidders

One of the main objectives of the bidding is to offer better competition to the sector, forcing to lower the commission which is deducted from the workers for looking after their savings (between 1.36% and 2.5% of their gross salary). That is why the quality requirements for services are inferior to the current ones and if the winning bidder is an existing AFP, they will have to extend their commission to the rest of their members.

That is why the document includes a "sworn statement of independence of the offer" (=Certificate of Independent Bid Determination) where the candidate must indicate whether he/she has been in touch with another competitor, that is to say an individual or an organisation who is not the bidder, and who is connected or not with him. The candidates are also warned that falsifying information can lead to a jail sentence. If the bidder admits that he/she has entered into consultations, has been in touch with one or more competitors, or has reached agreements with them, he/she will have to provide details including the names and functions of said competitors. "This is to avoid collusion" says ex-Supervisor Julio Bustamente.

(This is a free translation prepared by the OECD Secretariat from the Article above published in LA TERCERA on Saturday 21 November 2009 – original language: Spanish)

-- Ireland --

1. Value of Certificates of Independent Bid Determination (CIBD) and similar tools

1. Since October 2008, representatives of the Competition Authority and the National Public Procurement Policy Unit (NPPPU) of the Department of Finance (the government department which oversees public procurement activities within Ireland), have been engaged in periodic discussions about public procurement and cartel detection. They collaborated on comments and suggestions for the OECD Bid Rigging publications.

2. During the course of these discussions, the prospect of introducing a certificate of independent bid determination (CIBD) into Ireland's tendering process has been explored generally. We will continue to pursue that possibility in 2010.

3. The Competition Authority is of the view that such a certificate has a number of related benefits. First, a CIBD can serve as a continuous reminder of the obligation in public tenders to comply with both the procurement rules and the applicable competition laws. Second, properly crafted so as to require signature by an officer or director of an undertaking, a CIBD serves as a commitment by the undertaking and its principals about the bona fides of their tender. Third, a CIBD provides an added incentive for undertakings and their principals to ensure that all managers and employees are made aware of competition prohibitions through regular compliance training programmes and understand that their actions and violations may be imputed to the undertaking. Fourth, for those undertakings or individuals who would compound anticompetitive collusion by falsifying their CIBD, evidence of such activities if adduced at trial would tend to be additional proof of culpability in respect of the underlying bid rigging offence.

2. Discussion on the usefulness of guidelines in Public Procurement

4. As a member of the EU, Ireland has implemented the two EU Directives on procurement (the European Communities (Award of Public Authorities' Contracts) Regulations 2006, S.I. No. 329 of 2006 implemented Directive 2004/18/EC. The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 implemented Directive 2004/17/EC) by way of statutory instruments. The Department of Finance Public Procurement Guidelines-Competitive Process provide at paragraph 3.8:

- Contracting authorities should watch for anti-competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority: telephone (01) 804 5400.

5. We believe that the inclusion of such a paragraph in the guidelines used by public procurement authorities both at the national and local level in Ireland is very useful.

3. Experiences working with other parts of the government to fight bid rigging

6. As noted above, the Department of Finance in its Procurement Guidelines has provided clear guidance about contacting the Competition Authority in instances where suspected collusive tendering has taken place. That advice has resulted in procurement agents reporting allegations of bid rigging and

collusive tendering to the Authority. Three cases presently before the Central Criminal Court alleging collusive behaviour in relation to a public tender resulted from an agency referral.

7. In the past year the Competition Authority has increased its outreach activities to make government departments, agencies and procurement officers aware of the Competition Authority and collusive tendering. The Authority has been asked to present a module on cartels and bid rigging as part of an eight day public procurement training course sponsored by Public Affairs Ireland, an organisation dedicated to on-going training and education about the public sector in Ireland. The Authority has developed a "Bid Rigging Road Show", which is designed to alert contracting officers to bid rigging schemes and collusive practices. To date, the Road Show has been presented to approximately 90 individuals involved in procurement from over 40 departments, agencies and local authorities in Ireland. We intend to increase the number of presentations in 2010.

8. In February 2009, the NPPPU sought input from the Competition Authority in order to respond to a questionnaire from the EU Advisory Committee on Public Contracts within DG Internal Markets concerning Public Procurement and Antitrust Law.

9. As a result of our regular meetings with the NPPPU and with individuals involved in various committees of the Department of Finance, the Authority has been consulted on specific issues surrounding competition in public contracts. A dialogue has been initiated which we intend to pursue in greater depth in 2010. Government agencies contemplating issues that might arise in respect of public procurements have consulted with staff of the Advocacy and enforcement Divisions of the Competition Authority in advance of their tenders. Whilst such consultations are undertaken with the clear caveat that the Competition Authority does not provide legal advice or give advisory opinions, the consultations have permitted agencies to explore the types of questions or issues that might arise in respect of competition from certain proposed courses of action.

10. Significantly, as a result of the Competition Authority's continuing liaison with the NPPPU, the Authority was asked to nominate a representative from the Authority to be a member of the Government Construction Contracts Committee, a sub-committee of the NPPPU. The Manager of the Cartels Division serves in that capacity.

11. We believe that each of these avenues will increase the capacity of the Competition Authority, government departments, local authorities and procurement officials to more effectively identify collusive tendering and to ensure that the procurement rules and competition laws are enforced.

-- Japan --

Efforts by the JFTC to prevent bid rigging

I. Use of guidelines as preventive measures against bid rigging

1. Objective and background

1. In view of the frequent recurrence of bid rigging, it seemed that understanding of the Antimonopoly Act ("AMA") in related industries was still insufficient. The Japan Fair Trade Commission ("JFTC") regarded it needed to show its views concretely on what kind of activities of firms and trade associations are seen as problematic under the provisions of the AMA, based on the past experiences of the JFTC in enforcing the AMA. In July 1994, the JFTC published the "Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids" ("Public Bids Guidelines")[14]. They were revised in January 2006 in accordance with the amendment of the AMA.

2. Summary of the Public Bids Guidelines

2. Part I, "Outline of the Provisions of the AMA Regarding the Activities of Firms and Trade Associations in Connection with Bids," outlines the provisions of the AMA by introducing what kind of conduct by firms or trade associations is prohibited by the AMA in connection with bids, and by describing the legal action against such violations.

3. Part II, "The AMA and the Actual Activities of Firms and Trade Associations in Connection with Bids," provides an outline of the JFTC's viewpoint in interpreting the actual activities of firms or trade associations in connection with bids, in light of the provisions of the AMA with reference to the past experiences of the JFTC in enforcing the Act. In addition, examples classified into "Conduct in principle constituting violation," "Conduct suspected to be in violation" and "Conduct in principle not constituting violation" are given for four categories of conducts such as those related to the selection of conduct awardees, those related to bid prices, those related to contractual quantity and those collecting and offering information and management guidance (see Appendix for examples of the conduct).

a) For "Conduct in principle constituting violation," examples of the conduct are given on the basis of the past JFTC rulings and surcharge payment orders. In addition, some points to be noted are described for the purpose of preventing bid rigging in relation to examples for "Conduct in principle constituting violation."

b) For "Conduct suspected to be in violation," examples of the conduct are given on the basis of violation and facts relating to violation in the past JFTC rulings; this conduct includes that which tends to accompany violation or that which may lead to violations.

c) For "Conduct in principle not constituting violation," examples of the conduct, which in itself is not deemed as violation in principle, are given.

[14] http://www.jftc.go.jp/e-page/legislation/ama/publicbids.pdf.

3. Dissemination and enlightenment of the Public Bids Guidelines

4. The JFTC has actively disseminated the Public Bids Guidelines by holding seminars and dispatching its staff members as lecturers to the seminars, etc., held by procurement institutions. In addition to this, the JFTC has been making efforts for dissemination and enlightenment of the Public Bids Guidelines through seminars for procurement officers of procurement agencies and local governments.

5. In addition, the JFTC published the "Guidelines Concerning the Activities of Trade Associations under the AMA"[15], to show the relationship between their general activities and the AMA.

II. Coordination and cooperation with procurement agencies for preventing bid rigging

1. Coordination and cooperation with procurement agencies

6. Procurement agencies' efforts are essential for the prevention of bid rigging.

7. From this point of view, the JFTC has held the "Meetings among Liaison Officers with the JFTC Concerning Public Bids" since FY 1993 to meet with liaison officers designated in the procurement agencies of the central government and has promoted building communication and cooperative relationships between the JFTC and the liaison officers.

8. Also, to prevent bid rigging, the JFTC has held seminars for procurement officers of local governments and public corporations, and in addition, the JFTC dispatches lecturers to the seminars held by procurement agencies and receives consultations from them at any time.

Meetings among Liaison officers with the JFTC concerning public bids

9. "Meetings among Liaison Officers with the JFTC Concerning Public Bids" are held for the purpose of facilitating procurement agencies of the central government to provide information on activities suspected to be AMA violations for the JFTC. Both the JFTC staff and directors of accounting affairs and other equivalent officers who have been designated as liaison officers in each procurement agency attend the meetings to exchange their opinions and information. Such meetings are held between the JFTC and liaison officers not only at the headquarter level but also at the local branch level.

Trainings for procurement officers to prevent bid rigging

10. To prevent bid rigging concerning procurement not only by the central government but also by local governments and public corporations, the JFTC has held training sessions for procurement officers of these procurement institutions. In addition, the JFTC is willing to dispatch its staff as lecturers to the workshops held by procurement organisations for the purpose of preventing bid rigging.

11. Information provision based on the Act for Promoting Proper Tendering and Contracting for Public Works

12. Article 10 of the Act for Promoting Proper Tendering and Contracting for Public Works, which was enforced in April 2001, requires that all procurement institutions tendering and contracting for public works, such as the central government, local governments and public corporations, etc., report the fact to the JFTC where there are facts leading to sufficient suspicion of bid rigging. Accordingly, the JFTC

[15] http://www.jftc.go.jp/e-page/legislation/ama/tradeassociation.pdf.

receives a lot of information every year. The number of reports based on this Act was 23 in FY 2008 (33 in FY 2007).

2. Details on the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc. ("Involvement Prevention Act") and its Amendment in 2006[16]

13. This act was established in July 2002 based on a lawmaker-initiated bill in order to prevent central government or local government employees from becoming involved in bid rigging (so-called "government-initiated bid rigging") and was enforced in January 2003. When the JFTC recognises that the officials of procurement agencies have been involved in bid rigging, etc., as specified in the Act ((1) Express indication for bid rigging; (2) Indication that a specific party is preferred as the counter party to the contract; (3) Disclosure of secret information about ordering; and, (4) Aiding a specific act of bid rigging, etc.), it will implement elimination measures against companies based on the AMA and at the same time, it will demand that the heads of the procurement agencies implement improvement measures based on the Involvement Prevention Act. When the procurement agencies receive the demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

14. However, even after the enforcement of this act, many so-called government-initiated bid rigging cases continued to occur at both the central government and local government level. Considering such circumstances, the Involvement Prevention Act was amended in December 2006 (1) to make employees of the ordering organisations subject to criminal punishment, (2) to enlarge the scope considered as involvement in bid rigging, etc., and (3) to increase the number and type of ordering organisations to which the act applies (The Involvement Prevention Act as amended was enforced on March 14, 2007).

15. In addition, in order to disseminate the amendment, the JFTC prepared and distributed leaflets and other materials to explain the details of the amended act. Moreover, it held extraordinary sessions of the "Meetings among Liaison Officers with the JFTC Concerning Public Bids," explained above, and held seminars for the procurement officers of public corporations. Furthermore, the JFTC dispatched its staff members as lecturers to explanatory meetings for prefectures and municipalities that were hosted by 47 prefectures (at 58 locations) all over the country.

16. So far, there have been 6 cases where the JFTC has demanded the heads of the procurement agencies implement improvement measures. Recently, the JFTC demanded improvement measures respectively to the mayor of the City of Sapporo and the Minister of Land, Infrastructure, Transport and Tourism. (For further details of the 6 cases, please refer to Japan's contribution to the Roundtable on "Collusion and Corruption in Public Procurement.")

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16 For further details about the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc., see http://www.jftc.go.jp/e-page/legislation/ama/aepibr.pdf.

APPENDIX: CATEGORIES OF CONDUCTS IN RELATION TO THE ANTIMONOPOLY ACT (AMA) IN PUBLIC BIDS GUIDELINES

Type of activities	**Conduct in principle constituting violation (And Important Notes)**	**Conduct suspected to be in violation**	**Conduct in principle not constituting violation**
1. Conduct Related to the Selection of Conduct Awardees	1-1 Predetermining an expected bid winner (Important Notes) 1-1-1 Exchange of information concerning interest in being awarded a contract 1-1-2 Collating and offering information regarding the number of times designated and past record of contracts awarded 1-1-3 Adjustment of bid prices 1-1-4 Distribution of benefits to others such as participating firms 1-1-5 Inviting or compelling firms to participate in the predetermination of an expected bid winner	1-2 Reporting the fact of designation and planned participation in bids 1-3 Exchange of information concerning combination of partners in a joint venture 1-4 Levying of special membership-fees or charges	1-5 Expression of interest in participation in a bid to the contract awarding public agency 1-6 Declining to participate in a bid on one's own judgment
2. Conduct Related to Bid Prices	2-1 Predetermining a minimum bid price (Important Notes) 2-1-1 Exchange of information concerning bid prices	2-2 Exchange of information concerning price levels of goods or services subject to a bid	2-3 Study concerning computation criteria 2-4 Formulation of general rule of computation
3. Conduct Related to Contractual Quantity	3-1 Predetermining quantities or shares of contracts		3-2 Publishing rough aggregate of past public procurements
4. Collecting and Offering Information and Management Guidance	(Important Notes) (Points to be noted concerning conduct of predetermining an expected bid winner) Exchange of information concerning interest in being awarded a contract (same as 1-1-1) Collating and offering information regarding the number of times designated and past record of contracts awarded (same as 1-1-2) (Points to be noted concerning conduct of predetermining a minimum bid price) Exchange of information concerning bid prices (same as 2-1-1)	4-1 Reporting the fact of designation and planned participation in bids (same as 1-2) 4-2 Exchange of information concerning combination of partners in a joint venture (same as 1-3) 4-3 Exchange of information concerning price levels of goods or services subject to a bid (same as 2-2)	4-4 Collecting and offering general information concerning bids 4-5 Publishing rough aggregate of past public procurements (same as 3-2) 4-6 Formulating and offering average management indicators 4-7 Collecting and offering information concerning the content of a bid and the required level of technical capabilities 4-8 Offering information concerning combination of partners in permanent joint venture 4-9 Collection of information for selection of partners in a joint venture 4-10 Expression of interest in participation in a bid to the contract awarding public Agency (same as 1-5) 4-11 Formulation of general rule of computation (same as 2-4) 4-12 Formulating and offering guidelines for the operation of permanent joint ventures 4-13 Study concerning computation criteria (same as 2-3) 4-14 Activities for the propagation of general knowledge relevant to the AMA 4-15 Activities for the enlightenment of firms on the necessity of the fulfilment of contractual obligations 4-16 Expression of opinions or requests to the national and local governments 4-17 Giving technical information to contract awarding public agency

-- Latvia --

1. Brief description on legal provision prohibiting bid rigging (Competition Law) and evidences for disclosing infringements

1. Prohibition of bid rigging is included in Competition Law[1] Article 11, prohibiting certain agreements:

> *Article 11. Prohibited Agreements and Agreements which are Considered to be in Effect*
>
> *(1) Agreements between market participants, which have as their object or effect the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding:*
>
> *1) the direct or indirect fixing of prices and tariffs in any manner, or provisions for their formation, as well as regarding such exchange of information as relates to prices or conditions of sale;(..)*
>
> *3) the allocation of markets, taking into account territory, customers, suppliers, or other conditions;(..)*
>
> *5) the participation or non-participation in competitions or auctions or regarding the provisions for such actions (inactions), except for cases when the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition;*

2. In "procurement cases" Competition Council of Latvia (CCL) has applied both point 1 and 5 of Art.11.(1). Point 5? of Art.11.(1) is directly applicable to public procurements, however as bid participants often concerts on participation in procurement (including choosing the eventual winner, exposing also their financial offers, allowing other participants to adjust their offers) it is also possible to apply point 1 of Art.11.(1). Point 3 of Art.11.(1) has not been applied (in procurement cases) yet, however it would be the case if partitioning of *markets, taking into account territory, customers, suppliers, or other conditions* in procurements would be established.

3. Procedure for public procurement is determined by Public Procurement Law.

4. Certificates of Independent Bid Determination are not required to be used by Law. In 2009 CCL initiated proposal for amendments in Public Procurement Law requiring all procurement participants to declare that application for the tender has been prepared independently from other participants. However this proposal was not supported by Saeima (parliament). Nevertheless CCL invited purchasers (contractors) to elaborate this requirement in the criteria for tenders.

5. Amendments in Public Procurement Law including particular proposals initiated by CCL came into effect in 2009. These amendments concretise the regulation regarding exclusion of market participant

[1] http://www.kp.gov.lv/?object_id=605.

essentially infringing Competition Law from procurement procedures. Such exclusion will last for 12 months and will start from the day when decision of CCL comes into effect (becomes final).

6. CCL has dealt with bid rigging infringement (collusion) cases since 2005 as the rights to make surprise inspections-dawn raids were granted to CCL in 2004.

7. According to the statistics the majority of infringements occurred in the construction, road construction and road up-keeping markets. Results of anonymous poll[2] show that 44% respondents confirmed their participation in collusive riggings in the bids. Also contractors are more or less responsible for creation of the favourable environment for collusion. It seems that in one third of the established bid rigging cases probably existed also some indications on corruption, including situations when contractors somehow were not able to espy self-evident evidences of collusion, that offers of different pretenders were not prepared independently.

The statistics on bid rigging (collusion) cases in 2002-2009:

Year	2002	2003	2004	2005	2006	2007	2008	2009
Number of investigated bid rigging collusion cases	1	1	1	1	4	3	5	1
Number or established infringements	0	0	0	1	3	3	3	1
Number of penalised market participants	0	0	0	3	9	10	19	2
Volume of fines Ls/EUR	0	0	0	76 672/ 109 095	403 670/ 574 374	77 750/ 110 629	197 081/ 280 423	69 733/ 99 222
Industries	Road construc-ction	Construc-tion	Road construc-tion	Construc-tion	Supply of oil products, construc-tion	Marketing services, supply of equipment for metal works, road up keeping	Road construc-tion, up keeping, landscape services	Road up keeping

8. The main sources of initial information on the possible infringements are applications received from the public authorities and undertakings organising public procurement or controlling the legality of tenders (see also point 2).

9. Direct evidences mostly are obtained during the dawn raids[3] at the premises of the undertakings concerned. Direct evidences for disclosing of infringements are documents (including. electronically prepared), which witness that exchange of sensitive information has occurred. For example the estimate of one bid offer is found in the premises of other bid pretender (usually found in computers), which is its competitor. The estimations most frequently are saved electronically and from the file properties it may be established that the estimation has been prepared by competing undertaking..

10. Indirect evidences may be very different and they are analyzed jointly. Actually the most cases are built on indirect evidences, which often are identical grammatical, syntactical and other mistakes in the offerings of different (independent) bid pretenders.

2 Performed within the framework of survey on competition in construction market (2006).

3 Dawn raids are performed by CCL with the court order and in presence of police.

11. The public procurement procedures develop and now it is allowed for the procurement organiser to prepare unitary application forms and send to the bidders electronically for filling in their data. It is comfortable for procurement organisers and bidders, as well as provides transparency; saving resources. Nevertheless the new procedure decreases the possibility for CCL to distinguish the features of the bid rigging (diminished opportunity for identical mistakes, identical document designs as evidences for bid rigging to arise).

12. Undertakings now are more aware of CCL's professional activities including evidences used, which means the bidders will spend more attention and time for checking eventual mistakes and preparing different designs of application forms and documents in case of collusion.

13. In its practice CCL has met the problem when bidders were *de facto* or *de jure* one undertaking (related companies). Such situations create a fiction, misinformation for the procurement organiser, to make an impression that the competition exists. Neither the Public Procurement Law nor the Competition Law provides a direct prohibition for such situations. CCL have tried to initiate provisions that would require to disclose the participation of related entities in one procurement, however also this proposal was not supported by the parliament.

14. It has to be admitted that the number of public procurement procedures (most of them arranged within the house and road construction sectors) where the bid rigging cases were found correlates to overall economical situation in the state. The sector inquiry for road and water supply infrastructure 2008 – 2009, showed a decrease of the number of procurement procedures meanwhile the average number of bidders per procurement increased from 2 in previous years to 14 in 2009. Economic crisis and decreased public funding leads to increased competition in tenders.

15. Therefore it is possible to suppose that in construction procurements where public funding is insufficient there will be less bid rigging cases, however in areas where public funding doesn't significantly decrease like supply of medicines, there still maintains high risk of bid rigging. The existing economical situation may increase the number of corruption cases in the public procurements.

2. Cooperation with other authorities

16. Public procurement is supervised by 3 authorities:

- Competition Council of Latvia (CCL) investigating prohibited agreements between suppliers;
- The Corruption Prevention and Combating Bureau (KNAB) combating corruption also in public procurements;
- Procurement Surveillance Bureau (IUB) surveying procurements procedure correspondence to regulatory enactments.

17. From 17 investigated cases in 7 cases investigation was initiated in result of application submitted by the relevant supervisory institutions (Procurements Surveillance Bureau (3), Corruption Prevention and Combating Bureau (1), Ministry of Economics (2), Investment and Development Agency of Latvia (1)). Applications were submitted also from contracting state enterprises and municipalities' institutions. In one case complaint was submitted by competitor who had lost in the bidding. Other case was initiated by CCL on the basis of information made public by KNAB as a result of their investigation. On request of CCL KNAB gave CCL access to the evidences in this criminal case initiated for the investigation of a corruption case. The transcripts of overheard phone conversations, taken by KNAB, were also used as evidence in the competition case. From the phone conversation it was clear that the official of a municipality gave instructions to the

representatives of the undertakings concerned how to participate in the planned bid for supply of oil products and that the representatives agreed, on prices that should be included into the financial offers of each bidder, the sum of procurement and remuneration for each pretender after the bid. Three undertakings were involved into the bid rigging. The phone conversations were between natural persons, two of them formally were not related to the companies they represented. CCL had to prove the link between relevant natural persons and according bidders. While analyzing the offers CCL also established that the prices mentioned in the phone conversations and prices shown in the offers were the same. Besides the information on the bidders transactions on oil product supply market were analysed and it was established that the "planned winner" in the relevant bid offered a price that was approximately by 10% higher than other his prices in similar supplies. Other bidder at the time of procurement did not deal dealt with supplies of oil products at all. CCL established the infringement and imposed fine. This is the only case when CCL used the information (transcripts of the overheard phone conversations) from the criminal case investigated by other authority. Investigation of this case was a good example of good cooperation between competition and corruption prevention authorities fighting against bid rigging in public procurement.

18. To rise the awareness of the other surveillance authorities as well as contracting authorities on possible antitrust violations in procurement several educational seminars were provided for the main contracting state and municipalities enterprises and authorities, however these measures were not enough to significantly increase awareness and educational work regarding possible antitrust violations in procurement in future has to be continued and extended in respect of all contractors in the state and municipalities level.

19. At this moment negotiations with IUB are continuing on access to the data bases of all procurement results for CCL allowing also a search function according to the certain given criteria.

4. Application of OECD guidelines

20. Already before OECD Guidelines for Fighting Bid Rigging in Public Procurement were issued CCL made an investigations according to the publication Combating Fraud in Public Purchasing, (Eliot Spitzer, Attorney General of New York State, Antitrust Bureau 2003, prepared by Bob Hubbard and Ling Feng Fu of the Antitrust Bureau).

21. OECD Guidelines for Fighting Bid Rigging in Public Procurement is a very useful recommendation for purchasers, state and municipality institutions as well as competition and procurement surveillance authorities. CCL has referred to this document during the discussions on possible amendments in Public Procurement Law. Link to the English and Russian version of the guidelines is made available in homepage of CCL and we hope that during the next year it will be possible to provide their translation in Latvian.

22. However as Latvia is a small country with a small economy and relatively small public funding, there are differences that are to be taken into account:

1. Objects for the tenders that are big for Latvia may be regarded as small for international market. Therefore possible profit of participation in regional or national level procurements may be not sufficiently attractive in comparison with the necessary input. All this leads to the situation when due to the lack of foreign competitors local companies feel themselves very comfortable regarding the participation in procurements.

2. Many top managers of competing companies have graduated the same universities and know each other. Corporate and even private contacts are very strong. This creates comfortable conditions for collusion, when nothing is agreed in writing, and therefore no direct evidences can be found.

3. Identification of bid rigging on the basis of identical grammatical mistakes, reference to the competitors fax number or other similarities are very primitive methods suitable only for small

companies participating in small procurements. Big companies have enough resources to act more sophisticated. For investigation of bid rigging in big procurements other methods and resources requiring systematic analysis of procurements and their results are needed.

4. Procurement organisers are quite passive participators in investigations, which indicates that they are not interested in reducing the costs (feature of economical growth period) and probably could indicate on possible corruption.

5. Small contractors like municipalities often have not sufficient resources for elaboration of high quality procurement provisions and assess possible features of bid rigging. Mostly all of the bid riggings found by CCL have occurred in small procurements.

23. All at the above-mentioned shows the need for continuous improvement of prevention and fighting with bid rigging.

-- Papua New Guinea --

1. Size and Policy Objectives

1. Papua New Guinea has a relatively small economy in global terms and is very much a developing economy and society. The Papua New Guinea population is one of the least urbanised in the world, with a large proportion of the people living in small and often isolated village locations.

2. Accordingly, government involvement in the economy and in the supply of goods and services beyond the village subsistence economy is very significant, much more so than in richer, developed economies. It is estimated that about 70% of the procurement of goods and services in Papua New Guinea is government procurement of one sort or another. This procurement activity is undertaken by all three levels of government, at the national, provincial and local level.

3. Because of its significance in the overall domestic economy in PNG, government procurement and how it is organised is of critical importance. Many firms in many industries throughout the country are heavily dependent on government customers, in some cases government being their only major customer. This may have positive effects in requiring firms to be cautious that they do not alienate their government customers through trying to charge higher prices by colluding with competitors, but at the same time there may be negative effects with the close commercial relationship between private firms and government, and the dependence on government as a customer, leading to corruption between the supplier and the acquirer of goods and services.

2. Corruption

4. Papua New Guinea has significant problems with corruption; it ranks poorly in international comparisons made in the Transparency International Corruption Index. Anti-corruption measures and institutions are operating widely throughout Papua New Guinea (the Ombudsman Commission, in particular, is very active and has a high profile) but these efforts have not been able to stem the occurrence of corrupt practices. Not surprisingly, that is particularly so in government procurement, where the sums of money involved can be significant. The Ombudsman Commission has in recent years frequently been frustrated, through blocking or delaying legal action or otherwise, in its efforts to prosecute corruption. The Independent Consumer and Competition Commission (ICCC), the national competition regulator, has no direct role in investigating or prosecuting corruption matters.

5. Corruption in PNG can arise, or remain unchecked, for a number of social, cultural and economic reasons. As far as corruption in government procurement is concerned, the strong social custom of "wantok" can provide opportunities for unscrupulous persons to subvert the procurement process through corrupt conduct. The wantok system is a longstanding tradition of mutual assistance for extended family or village groups, whereby a person is obligated to assist his family member, or wantok, to the maximum extent that he can, and in whatever way, while the wantok has a similar obligation to other family members. This cultural tradition, very important in traditional village life where outside support may be unavailable, has not translated well to a modern economy where it can lead to nepotism or corruption.

6. Corruption in the form of political patronage can also occur in the use of government funds. Most government infrastructure projects and other major government spending is required, by law, to be arranged by competitive tender through the Central Supply and Tenders Board (CSTB) or Provincial Supply and Tenders Board (PSTB), whose procedures are designed to be transparent and avoid corruption. However,

each member of the National Parliament is given a substantial amount of money each year, which has increased dramatically in the last couple of years, to be spent on projects benefitting the member's electorate.

7. While those funds are supposed to be acquitted fully and openly to the national government and, in respect of amounts over 300,000 kina (about US$110,000) to be allocated through the CSTB or PSTB tender processes, this acquittal often does not occur; the funds are allocated personally and directly by the Member of Parliament to individuals or firms within the electorate. There is anecdotal evidence of such funds being used corruptly, as would inevitably be the case where the allocation of money is within the personal gift of an individual, and proper procedures for fairness and transparency are bypassed.

8. Further opportunities for corruption occur in the procurement of goods and services by provincial and local level governments, who are supposed to use CSTB procedures and processes, but frequently do not. With such a lack of transparency, it is difficult to conclude that those procurement contracts are fair and provide value for money.

3. Collusion

9. In an economy the size of that of Papua New Guinea, most sectors of the market have either very small businesses (e.g. in retailing and distribution) or a relatively small number of larger firms participating in the market. Often that may be limited to three firms or less competing in a particular market, which makes collusion much more likely than in a vigorously competitive market with many participants. The range of firms that are large enough to tender for government goods or services is likely to be even further limited.

10. Also, where CSTB processes are not followed in government procurement (see above), the opportunity for collusion to go undetected or unremarked is greater. In such situations there is often no great desire to ensure that the government is getting the best value for money from that procurement.

11. The ICCC, when it identified the likelihood of collusion and bid rigging in government procurement, engaged with the CSTB to make the CSTB and its staff aware of the risks of collusive bid rigging and how it can occur. The CSTB, as part of that process, sought the ICCC's assistance to introduce in the CSTB's Standardised Bidding Documents (SBD) mention of corruption and collusion in government procurement. The SBD contract conditions (which are still in draft form) specify clearly to contractors that where corrupt, fraudulent, collusive, coercive or obstructive practice is detected, the contract will be terminated by the procuring agency. The ICCC's discussions with the CSTB are ongoing.

12. Papua New Guinea, through the CSTB, does not require a Certificate of Independent Bid Determination (CIBD), though the current tender documents require certification of no conflict of interest. Following the discussions at the 2010 Global Forum on Competition, the ICCC will consider the desirability of introducing a form of CIBD into the tendering process.

4. Fighting Collusion and Corruption

13. Over the years there have been quite a number of investigations into alleged corrupt practices, by politicians and others, though only a proportion of them relate to government procurement. These investigations have been carried out by, typically, the Ombudsman Commission, the police Fraud Squad and, on occasion, by specially created commissions of inquiry or Royal Commissions. Such inquiries are strongly transparent, with public hearings which are widely reported. Some of these investigations have resulted in prosecutions, while others have not.

14. Investigations into corruption have typically concentrated on that issue and have not also examined possible collusion as well. The ICCC has alerted the CSTB to the tell-tale signs of bid rigging, but to date the CSTB has not brought forward any particular matters to the ICCC for investigation.

15. The ICCC has been trying to publicise the dangers and destructive effects of collusive conduct and the broader issue of cartel behaviour, without limiting this to government procurement, but for the whole of industry. Part of that publicity has been to highlight the detriment such conduct can cause to the victims of collusion or cartel conduct, requesting them to report their suspicions to the ICCC for investigation. This publicity is an ongoing process which may last for a long time.

5. Advocacy

16. In 2009 the ICCC, and the CSTB, in conjunction with a number of government departments, conducted a series of Joint Central Supply and Tenders Procurement Forums in selected urban areas in Papua New Guinea. These forums brought a measure of awareness to departmental procurement officers around the country and highlighted the harm which collusive tendering and bid rigging can cause. This will form a basis for the ICCC's continuing advocacy for stamping out collusive bidding and anti-competitive behaviour generally; this advocacy will always continue as an important part of the ICCC's charter.

17. As part of its recognition of the detriment caused by collusion and corruption in public procurement, the Papua New Guinea Government's Procurement Manual identified corruption, fraud and conflict of interest as three main areas of concern. "Conflict of interest" should probably be broadened to include all collusive practices, which have a seriously bad effect on trying to have government procurement as transparent, fair and producing value for money. These efforts to stamp out such corruption and collusion will continue for the foreseeable future.

-- Singapore --

Introduction

1. The Singapore Government procures a substantial amount of goods and services annually. In 2008, the Singapore Government purchased S$10 billion (approximately 5 billion Euros) worth of goods and services, amounting to a 4% share of GDP (S$257 billion). Singapore recognises the dangers and harms of collusion and corruption in the sphere of public contracting and adopts clear and comprehensive laws to address this. Singapore is party to the World Trade Organisation's 1994 Agreement on Government Procurement ("WTO-GPA") and implements the WTO-GPA in the form of the Government Procurement Act, Government Procurement Regulations, Government Procurement (Challenge Proceedings) Regulations and the Government Procurement (Application) Order (the "GPA Laws"). In this regard, a multi-pronged approach has been adopted to complement and enhance the legal framework and Singapore's public procurement framework is aligned with the OECD Guidelines for Fighting Bid Rigging in Public Procurement; for instance in the use of performance specifications in tender requirements, training programmes on bid rigging detection for procurement officials and the deployment of an electronic bidding system for the whole of government.

Processes and procedures: GeBIZ -- A common framework to manage procurement

2. All public procurements are done electronically for the whole of government through a single web portal, namely the government electronic business (GeBIZ) website (http://www.gebiz.gov.sg). The portal allows government procuring entities (GPEs) to appoint and manage contracts through inviting suppliers to quote for the required services. Suppliers registered with GeBIZ can gain access to all procurement opportunities in the public sector and to thereafter submit their quotations, proposals and invoices through the portal. (Please refer to Annex 1 and 2)

3. Procurement procedures via GeBIZ will be made transparent as information on the procuring entity, description of products, services, or works to be procured, dates of tender opening and closing, and venue for the collection of tender documents, are published on the portal. This will enable the GPEs to exercise vigilance and have proper oversight of submitted contracts to prevent and combat bid-rigging behaviour. All procurement procedures, starting from the announcement of a tender to the final award of the contract, are made through GeBIZ. Unsuccessful tenderers are also able to request for a review of the results and the evaluation process.

4. By reducing the burden of sourcing on procurement officers, GeBIZ encourages more open competition by widening the supplier base to both local and international bidders, hence enabling suppliers to compete on a level playing field through equitable access opportunities. This results in GPEs enjoying potentially more competitively priced contracts and hence, better value for money for the required procured services. Demand aggregation and bulk purchases also allow GPEs to enjoy reap the benefits of economies of scale through bulk discounts.

5. In addition to the establishment of a procurement framework, combined with comprehensive regulations to ensure that public procurement is conducted in a rigorous and transparent manner, government bodies also work closely together in the fight against collusion.

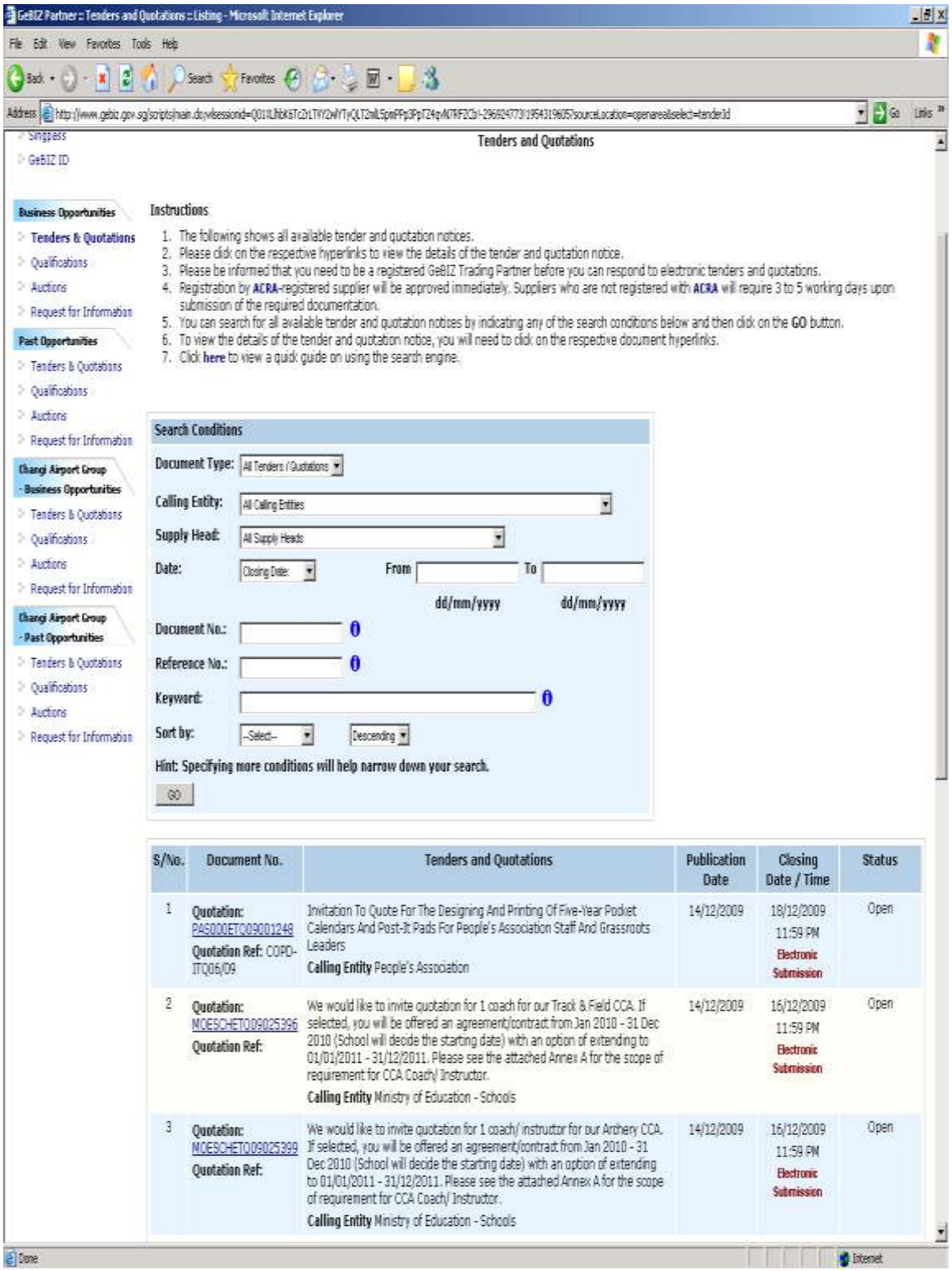
People: Working with other government agencies

6. The Competition Commission of Singapore (CCS) recognises that it is crucial to educate public procurement officers about the dangers of bid rigging in the public procurement domain and the important role that these officers can play in helping to uncover these cases. As a result, CCS actively engages other government agencies by conducting a regular series of monthly seminars and workshops that is compulsory for all new public procurement officers, aimed to raise their awareness of bid-rigging practices in their scope of work and how to spot such activities. Some of the recommendations which CCS proposes to procurement officers are:

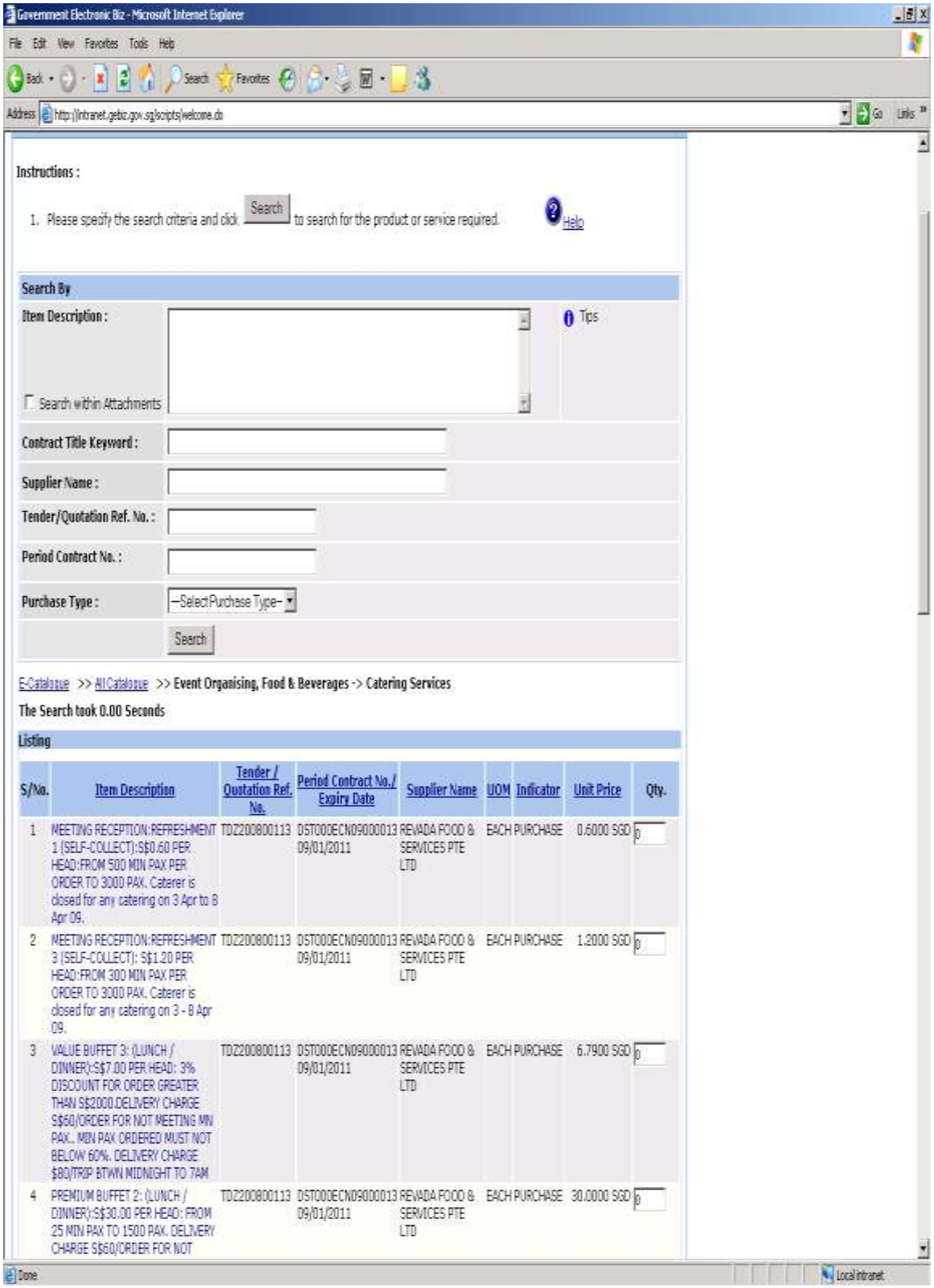
- Keeping a record of bids
- Having a wider scope in tender requirements for more potential bidders to qualify
- Increasing the pool of potential bidders by having open rather than limited tenders
- Seeking information from bidders on their associated companies and subsidiaries
- Making a contemporaneous note of conversations with suppliers.
- Keeping copies of the relevant documents, e.g. records of a tender and all communications with the tenderers.
- Contacting CCS as soon as possible should an irregularity be detected.
- Refraining from discussing the issue with anyone other than one's immediate superior.

7. Further, it is recognised that often both collusion and corruption can occur concurrently in the public procurement process. As a result, CCS maintains close working relationships with the Corrupt Practices Investigation Bureau (CPIB), the agency which investigates and aims to prevent corruption in the public and private sectors in Singapore. CCS has established a protocol with CPIB that addresses case allocation and administration between the two agencies and ensures clarity and efficiency in case management. In cases where it appears that both competition and corruption laws may be infringed, both CCS and CPIB will collaborate to handle the case.

ANNEX 1: TENDERS AND QUOTES FOR SUPPLIERS



ANNEX 2: PERIOD CONTRACTS FOR GPES PURCHASING NEEDS



Government Electronic Biz - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Address http://intranet.gebiz.gov.sg/scripts/welcome.do

Instructions :

1. Please specify the search criteria and click Search to search for the product or service required. Help

Search By

Item Description : Tips

Search within Attachments

Contract Title Keyword :

Supplier Name :

Tender/Quotation Ref. No. :

Period Contract No. :

Purchase Type : –Select Purchase Type–

Search

E-Catalogue >> All Catalogue >> Event Organising, Food & Beverages -> Catering Services

The Search took 0.00 Seconds

Listing

S/No.	Item Description	Tender / Quotation Ref. No.	Period Contract No./ Expiry Date	Supplier Name	UOM	Indicator	Unit Price	Qty.
1	MEETING RECEPTION:REFRESHMENT 1 (SELF-COLLECT):S$0.60 PER HEAD:FROM 500 MIN PAX PER ORDER TO 3000 PAX. Caterer is closed for any catering on 3 Apr to 8 Apr 09.	TD2200800113	0ST000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH	PURCHASE	0.6000 SGD	0
2	MEETING RECEPTION:REFRESHMENT 3 (SELF-COLLECT): S$1.20 PER HEAD:FROM 300 MIN PAX PER ORDER TO 3000 PAX. Caterer is closed for any catering on 3 - 8 Apr 09.	TD2200800113	0ST000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH	PURCHASE	1.2000 SGD	0
3	VALUE BUFFET 3: (LUNCH / DINNER):S$7.00 PER HEAD: 3% DISCOUNT FOR ORDER GREATER THAN S$2000.DELIVERY CHARGE S$60/ORDER FOR NOT MEETING MIN PAX.. MIN PAX ORDERED MUST NOT BELOW 60%. DELIVERY CHARGE $80/TRIP BTWN MIDNIGHT TO 7AM	TD2200800113	0ST000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH	PURCHASE	6.7900 SGD	0
4	PREMIUM BUFFET 2: (LUNCH / DINNER):S$30.00 PER HEAD: FROM 25 MIN PAX TO 1500 PAX. DELIVERY CHARGE S$60/ORDER FOR NOT	TD2200800113	0ST000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH	PURCHASE	30.0000 SGD	0

Done Local intranet

-- South Africa --

1. This paper sets out the techniques used by the Competition Commission to tackle collusion in public procurement. The paper does not deal with corruption as the Commission's mandate is confined to competition matters and corruption in government or state owned entities is dealt with by other authorities and law enforcement agencies such as the Public Servants Commission, the National Treasury's contracts management divisions, the Special Investigations Unit, and the police.

2. The following techniques have been used by the Commission for tackling collusion in public procurement:

I. Internal workshops

3. In 2007, the Commission held a 3-day workshop with its staff to build on their skills in investigating suspected cartel activity with specific focus on collusive tendering. The workshop was facilitated by two staff members of the United States Department of Justice, Antitrust Division using a case study methodology with cases adapted to the South African context.

4. There are plans to create a dedicated cartels division within the Commission with the capacity to deal with increased workload arising from an increase in the number of corporate leniency applications. This division will also deal with cases of collusion public procurement. New staff recruited into this division will require further training in 2010.

II. Certificates of Independent Bid Determination ("CIBD")

5. The Commission has made submissions to the National Treasury proposing that its procurement processes be changed to include a requirement for suppliers to provide CIBDs when tendering. The National Treasury is keen to adopt this proposal and has indicated that it will include it in its procurement policy in 2010.

6. In addition, the Commission has also held 3 workshops/presentations with the state owned entity electricity supplier Eskom, which has identified bid rigging as one of its key concerns. Eskom is building power stations to increase its capacity to meet the electricity needs of the country. The Commission recommended *inter alia* that Eskom use the CIBD in its tender requirements. Eskom has subsequently incorporated this into its tender policy.

III. The use of guidelines, such as "The OECD Guidelines for fighting bid rigging in public procurement"

7. The Commission developed a pamphlet on "Bid Rigging" drawing heavily from the OECD's guidelines. This pamphlet is distributed to procurement officials at all Commission workshops on bid-rigging.

IV. Working with other parts of government to tackle collusion in public procurement

8. In July 2009, the government established a Ministerial Task Team to "scrutinise public expenditure trends and propose cost-cutting measures as part of the government's response to the economic meltdown and the negative impact of the current recession on the national fiscus." This task team is tasked with *inter alia* preventing fraud and corruption in public procurement, although it makes no specific mention of bid-rigging. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre. The Commission will interact with the task team and advocate for special measures with respect to collusion in public procurement.

9. The Commission is committed to working with the National Treasury which is the custodian of public procurement policy. Several workshops have been held addressing approximately 250 procurement officials from national and provincial government departments. These workshops are as follows:

- The Commission presented to the National Treasury's Contract Management Division (former State Tender Board) in August 2008.

- The Commission held a workshop on tackling bid rigging for national government departments in November 2008. The target audience for this workshop was the government procurement practitioners as well as the chairpersons of Adjudicative Committees.

- In response to the National Treasury's request that the Commission cascade the workshops to their provincial treasury departments, the Commission held provincial workshops on tackling bid rigging in the Western Cape; the Eastern Cape; KwaZulu Natal and Gauteng.

-- Tunisia --

Présentation de deux cas pratique de PAC

A. Marché public : Approvisionnement d'un établissement public en pain (Lycée)

I L'Indice

- Source de l'indice: Direction régionale du commerce,
- Objet de l'indice: offres de couverture
- Les parties concernées : les 3 soumissionnaires (boulangeries) dans l'appel d'offre

II L'Enquête

- Le marché pertinent : Fourniture du pain pour les besoins d'un lycée.
- Les pratiques relevées :
  - Offres de couverture établis en concertation afin de faire croire à l'acheteur public qu'il existe une concurrence réelle et d'orienter l'établissement public vers l'offre voulue (pré-désignée).
- Les preuves :
  - les preuves documentaires : concernent les offres financières émanant des candidats :
- Au niveau de la présentation de l'offre : utilisation de la même écriture et le même police de caractère (documents remplis par la même personne)
- Au niveau du contenu de l'offre : le contenu des offres se présente comme suit:
  - Une soumission qui propose une offre des prix inférieurs aux deux autres soumissions (soumissionnaire pré-désigné),
  - Deux offres identiques et plus élevées que l'offre du soumissionnaire pré-désigné,

	Prix unitaire (dinars tunisien)	
Les offres	**Gros pain (250g)**	**Baguette (250g)**
L'offre la "moins-disante" (pré-désignée)	0,210	0,190
Offre de couverture 1	0,220	0,200
Offre de couverture 2	0,220	0,200

- les déclarations (PV d'audition): le résumé du contenu des PV d'audition des parties concernées se présente comme suit :

Les soumissionnaires	Contenu des déclarations
Soumissionnaire (1) pré-désigné	• Ancienneté dans l'approvisionnement de l'établissement concerné (depuis environ 3 années consécutives), • élaboration du contenu des offres des autres candidats,
Soumissionnaire (2)	• La non rédaction du contenu de l'offre, • Son intervention se limite à la simple signature de l'offre et à l'apposition du cachet de l'entreprise,
Soumissionnaire (3)	• La non rédaction du contenu de l'offre, • Son intervention se limite à la simple signature de l'offre et l'apposition du cachet de l'entreprise, • l'absence d'intention de participer à l'appel d'offre,

III Saisine du conseil de la concurrence

- Requête :

1. Le 16 décembre 2002 le ministre chargé du commerce a saisi le conseil de la concurrence contre ces trois soumissionnaires pour entente illicite ayant pour objet la présentation d'offres de complaisances et de couvertures afin de fausser le libre jeu de la concurrence.

IV Décision du conseil : Décision n° 2145 du 25 décembre 2003

2. Sur la base de l'article 34 de la loi n° 91-64 relative à la concurrence et aux prix, le conseil de la concurrence a infligé des amendes à l'encontre des trois parties concernées par la pratique d'entente illicite:

- Le principal acteur (soumissionnaire pré-désigné) : 4 % du chiffre d'affaire,

- Les deux autres soumissionnaires : 2% du chiffre d'affaire,

V Les suites de l'affaire

- Recours en appel de la décision du conseil de la concurrence

3. La décision du conseil de la concurrence a fait l'objet d'un recours en appel sur la base de l'article 21 de la loi n° 91-64 relative à la concurrence et aux prix,

4. Le tribunal administratif en tant que cour d'appel a rendu son jugement le 15 novembre 2006 en confirmant la décision du conseil de la concurrence. (Décision n° 24898 du 15 novembre 2006).

B. Marché public : Approvisionnement d'un Établissement public en viande rouge

I L'indice

- Source de l'indice : Direction Régionale du Commerce.

- Objet de l'indice: Pratiques des prix d'éviction et offres de couverture par des soumissionnaires dans les appels d'offre publics relatifs à la fourniture de viandes rouges pour des établissements d'enseignement pour l'année scolaire 2006-2007.

- Parties concernées: Trois soumissionnaires (commerçants de viandes rouges)

II L'enquête

a) La délimitation du marché pertinent:

5. Dans les marchés publics, l'objet de l'appel d'offre est le marché pertinent. Il s'agit ici de l'approvisionnement d'un établissement d'enseignement en viande.

b) Caractéristiques du marché pertinent:

6. Au niveau de la demande :

- Besoins annuels des Établissements publics d'éducation
  - Bovines: 86 Tonnes
  - Ovines : 13 Tonnes
- Nombre d'appels d'offre:

	2004	2005	2006
Nb d'appels d'offre	35	36	12

- Au niveau de l'offre: L'ensemble des soumissions présentées par les candidats:

	2004	2005	2006
Nb des offreurs Participants	7	6	6
Nb des titulaires des marchés	3	4	2

7. Aspects juridiques et réglementaires*:*

- La loi n° 91-64 du 29 juillet 1991 relative à la concurrence et aux prix telle que modifiée et révisée par les autres lois.
- Code de la comptabilité publique.
- Décret n° 2002-3158 du 17 décembre 2002, portant réglementation des marchés publics telle que modifié et révisé.

c) Les pratiques relevées:

- Abus de position dominante du soumissionnaire 1(S1) sur le marché pertinent,
- Collusion entre soumissionnaires: offres de couverture des soumissionnaires 2 et 3 pour tromper l'acheteur public sur le niveau et l'intensité de la concurrence.
- Échange d'information entre les trois soumissionnaires.
- Détermination de l'abus de la position dominante sur le dit marché :

La position dominante:

	2004	2005	2006	Total
Nb d'appels d'offres	35	36	12	**83**
Valeur totales des offres (DT)	576760	687677	682703	**1947140**
Nb des AO obtenues par le S1	33	31	11	**75**
Valeur totales des offres obtenues par S1 (DT)	534085	612662	680183	**1826930**
Part du marché en valeur (%)	**92,6**	**89**	**99,6**	**93,8**
Pourcentage des offres obtenues	**94,2**	**86,1**	**91,6**	**90,3**

8. Manifestation de l'abus de la position dominante:

- Pratique de prix d'éviction dans les appels d'offres concurrentiels (plusieurs soumissionnaires) et la compensation par la pratique d'un prix plus élevé (allant jusqu' au double) lors de la soumission dans les appels d'offres non concurrentiels,

9. Moyens de preuve:

- Comparaison des prix proposés et pratiqués par S1 dans les divers marchés qui montrent des écarts importants entre ses soumissions allant jusqu'au double dans la viande bovine,

- Pratique des offres de prix très bas : acte répétitif durant une période de 3 ans.

Viande Bovine	Offre des Prix du soumissionnaire (1) D/KG	
Année :	Absence des concurrents	Plusieurs concurrents
2005	7,5	5,2
2006	7,1	4,9

- Absence de justification économique des prix très bas offerts et pratiqués par S1 qui se situent à environ 65 % de la moyenne des prix de gros sur les marchés de bestiaux durant cette période. Sachant que le S1 n'est ni éleveur ni producteur,

- Les déclarations de S1 dans lesquelles, il a avoué que ces offres de prix ne couvrent pas ses couts (achat, transport, stockage…)

10. Collusion entre soumissionnaires :

a) Objet:

- La présentation d'offres de couverture par les S2 et S3 a permis au soumissionnaire S1 de remporter le marché pour 6 appels d'offres concernant l'année 2004,

- Échange d'information lors de la présentation des offres financières.

b) Les moyens de preuve:

- L'analyse des offres financières révèle un écart très important entre les prix de S2 et S3 et celui de S1,

- Prix très élevés dans les six marchés objet de la collusion par rapport à la moyenne des prix du marché.

- Déclarations des soumissionnaires S1 et S2 et S3,

- Liens familiaux entre les soumissionnaires.

III Décision du C.C n 81159 du 31/12/2008:

11. Le conseil a infligé des sanctions pécuniaires s'élevant au total à 25 milles dinars (environ 14,7 Milles Euros) et se répartissant de la manière suivante :

- 15 000 dinars pour S1,

- 5 000 dinars pour S2,

- 5 000 dinars pour S3.

-- United States --

Outreach and Training Programmes

1. In the United States, attorneys at the U.S. Department of Justice Antitrust Division (DOJ) have for many years spent considerable time conducting outreach and training programmes for public procurement officials and government investigators, including investigators who work for other government agencies that solicit bids for various projects. These outreach programmes help develop an effective working relationship between the DOJ officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. DOJ officials advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and DOJ attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

2. This paper provides an overview of the Antitrust Division's public procurement outreach and training programmes. Part 1 sets forth the purposes of these programmes. Part 2 describes the use of publications – brochures, newsletters – as tools of outreach programmes. The key features of an effective outreach presentation are laid out in Part 3. Part 4 describes the Certificate of Independent Price Determination, a critical tool in preserving competition in public procurement, and Part 5 notes the relationship between corruption and bid-rigging violations. Part 6 describes a recent DOJ training initiative aimed at safeguarding the ongoing economic stimulus programme, and Part 7 concludes.

1. Purposes of Public Procurement Outreach and Training Programmes

3. Public procurement outreach and training programmes serve a number of purposes. First, these programmes help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers.

4. Second, outreach programmes help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, resulting in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 15 below.

5. Third, outreach programmes educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Antitrust agency officials provide advice about

techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract. DOJ attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 17-18 below.

6. Fourth, outreach programmes help develop a close working relationship between public procurement officials, government investigators, and antitrust agency officials. This is a critical goal of an outreach programme. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for its occurrence on their watch. During outreach programmes, antitrust agencies should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy that was carried out in secret without their knowledge; procurement offices and antitrust agencies have the same interest in trying to prevent and prosecute bid rigging. The statistics indicate that the joint efforts of public procurement officials, government investigators, and DOJ attorneys have reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the proportion and total number of bid-rigging prosecutions has declined.

7. Finally, as will be discussed more fully below in paragraphs 19-20, sometimes public procurement officials are in fact involved in bid rigging and other illegal conduct that undermines competition, in the form of kickbacks or other remuneration received from companies that submit bids. Outreach programmes serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

2. The Use of Publications to Make an Outreach Programme More Effective

8. Brochures – In the United States, DOJ attorneys provide brochures to public procurement officials and government investigators to make outreach programmes more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For" ("Bid Rigging Brochure") can be found at http://www.justice.gov/atr/public/guidelines/211578.pdf; and "An Antitrust Primer For Federal Law Enforcement Personnel" can be found at http://www.justice.gov/atr/public/guidelines/209114.pdf.

9. Newsletters – Offices within the Antitrust Division publish newsletters that discuss certain cases that have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. For example, a four-page, colour newsletter published by the Chicago Field Office in the fall of 2008 was distributed to about 1,700 recipients, including federal, state, and local public procurement officials and government investigators.

3. Key Features of an Effective Outreach Presentation

10. Explain the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the *agreement* to rig bids is the crime. In other countries, the legal standard may be

different, but it is important for antitrust agency officials to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand this, they will not know what to look for and report to the authorities. In U.S. outreach programmes, DOJ attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

11. Explain how antitrust investigations are conducted – During outreach programmes, antitrust agency attorneys explain the procedures used to conduct an investigation. In the United States, these procedures include taping conversations with the assistance of co-operating witnesses, using search warrants and wiretaps, conducting unannounced "drop-in" interviews, and using grand jury subpoenas for documents and testimony. Also, DOJ attorneys discuss the Corporate Leniency Policy which may enable a co-operating company to avoid prosecution.

12. Discuss Penalties for Bid Rigging and Other Antitrust Violations – Outreach programmes provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

13. Discuss Indicators of Bid Rigging – A key part of U.S. outreach programmes is a discussion of factors suggesting that bid rigging may be taking place. For example, a pattern where company A wins a contract one year, and company B wins the next year, with each taking turns in subsequent years, may reveal that the companies are engaged in a bid-rotation scheme. Another indicator of bid rigging occurs when the same errors (misspelled words and typographic or arithmetic errors) are evident in bids submitted by allegedly competing companies. This, of course, suggests the companies prepared the bids in concert. Yet another indicator involves the situation where a new company enters the bidding unexpectedly, and at a much lower price than the bids of the other companies that traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging their bids and winning contracts at high, non-competitive prices.

14. Encourage procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report their suspicions that illegal conduct is occurring. Antitrust agency officials should encourage procurement officials and investigators to contact them if procurement officials or investigators have *any* concerns that bid rigging or other procurement violations may be occurring. Antitrust agency officials should also assure procurement officials that they are always willing to talk about procurement concerns. Sometimes antitrust agency officials will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

15. Give examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of public procurement officials. This will demonstrate to procurement officials that action will be taken when they report their suspicions. Each country will have its own examples to use, but in the United States, DOJ attorneys have used the following examples in outreach programmes:

- Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies co-ordinated their bidding such that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their

concerns, and after an investigation by the DOJ, the companies and their executives were successfully prosecuted for bid rigging;

- Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: "Please give us a call **us** if you have any question." The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations;

- The government sought to buy four types of gloves: 1) women's dress gloves; 2) women's outdoor gloves; 3) men's dress gloves, and 4) men's outdoor gloves. The government intended to award four contracts, one for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. Following a DOJ investigation, the companies and culpable individuals were successfully prosecuted for bid rigging.

16. Discuss Other Crimes Which May Be Prosecuted – In U.S. outreach programmes, DOJ attorneys explain to public procurement officials and government investigators that the DOJ prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the procurement process, such as kickback schemes, may not be violations of U.S. antitrust laws; such conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when the DOJ investigates these schemes it may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement is discussed in more detail below in paragraphs 19-20.

4. Certificate of Independent Price Determination – What It Is and Why It Is Important?

17. A Certificate of Independent Price Determination has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Basically, this document requires each company that submits a bid to sign a statement under oath that it has neither agreed with its competitors about the bids which it will submit nor disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids. The key part of the certificate states:

- The offeror certifies that :

  - The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered,

  - The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law, and

  - No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

18. Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on who would win the project for which bids were submitted.

5. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials

19. In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may not be clear whether the companies involved are also engaged in bid rigging. However, in a number of cases DOJ attorneys have developed evidence that corrupt procurement officials were paid off to facilitate a bid-rigging scheme.

20. It is important to determine whether corrupt procurement officials are assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official. These types of cases are important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is legitimate.

6. Proactive Initiative to Safeguard Large Government Expenditures: Antitrust Division Programme to Protect Economic Recovery Stimulus Programmes from Fraud, Waste, and Abuse

21. In May 2009, the Antitrust Division announced the details of an initiative aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009. The Recovery Act, a multi-billion dollar economic stimulus programme, was signed into law by President Obama on Feb. 17, 2009 as an effort to jumpstart the economy and to create or save jobs. The Antitrust Division's Recovery Initiative involves training procurement and grant officials, government contractors, and agency auditors and investigators, on techniques for identifying the "red flags of collusion" before stimulus awards are made and taxpayer money is unnecessarily wasted. The initiative makes available to agencies Antitrust Division competition experts who can evaluate procurement and programme funding processes. These Division experts make recommendations on "best practices" that may be adopted by the agencies to further protect processes from fraud, waste and abuse and maximise open and fair competition. Finally, the initiative commits the Antitrust Division to playing a significant role in assisting agencies to investigate and prosecute those who seek to or succeed in defrauding the government's efforts to maximise competition for stimulus funds.

22. The Antitrust Division's Recovery Initiative has had a significant impact. Since March 2009, in partnership with agency Inspector Generals handling stimulus funds, the Antitrust Division has already assisted in training thousands of federal and state procurement, grant and programme officials nationwide, with thousands more scheduled to be trained in the coming months. The Antitrust Division has also launched a Recovery Initiative Web site through which consumers, contractors and federal, state and local agencies, can review information about the antitrust laws and the Division's training programmes, request training, and report suspicious activity. The Web site is located at http://www.justice.gov/atr/public/criminal/economic_recovery.htm. This Web site is linked to www.recovery.gov, the official website of the Recovery Accountability and Transparency Board. The board is responsible for overseeing federal agencies to ensure that there is transparency and accountability for the expenditure of Recovery Act funds.

7. Summary and Conclusion

23. A comprehensive outreach and training programme for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist antitrust agencies in investigating and prosecuting bid rigging. In order for that to happen, antitrust agency attorneys need to educate procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Antitrust agency officials also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

24. The ultimate goal of an outreach and training programme is to encourage public procurement officials, government investigators, and antitrust agency attorneys to work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programmes.

BRIEFING NOTE

-- Breakout Session 1 --

CERTIFICATES OF INDEPENDENT BID DETERMINATION

-- Briefing Note by the Secretariat --

I. Introduction

1. One way that governments can try to ensure that they will receive fair pricing for the goods and services they purchase through tenders or bids is to require those who bid for government contracts to submit a Certificate of Independent Bid Determination (CIBD). CIBD rules typically require each company submitting a bid to sign a statement that it has not agreed with its competitors about bids, that it has not disclosed bid prices to any of its competitors and that it has not attempted to convince a competitor to rig bids.

2. Use of CIBDs may help governments save substantial resources and implement efficient procurement strategies. CIBDs may make bid rigging conspiracies less likely because:

- They inform bidders about the illegality of bid rigging and also signal that the procurement officials are alert to the issue of collusion;
- They may make prosecution of bid riggers easier;
- They add additional penalties, including possibly criminal penalties, for the filing of a false statement by the conspirators; and
- They make prosecution of a firm that attempts to rig bids possible, even when other bidders do not agree, or cannot be proved to have agreed, to the proposed scheme.

3. Procurement agencies in Canada, the United Kingdom, and the United States have used CIBDs to seek to reduce acquisitions costs and save taxpayer money. On the other hand, there are a significant number of developed and developing countries that do not appear to use CIBDs.

II. Prosecution or other Consequences for Parties Filing a False CIBD

4. Governments often rely upon statements by firms and individuals to make decisions. Unfortunately dishonest individuals sometimes make statements to the government that they know are false in an attempt to skew the decision-making processes in their favour. In that situation, CIBDs can provide an independent basis for enforcement action often based on existing statutes governing false statements.

5. If a firm can be proved to have falsely certified that it did not share bid price information, it can be prosecuted for the false statement made on the CIBD independently of any prosecution for cartel behaviour. Because false statements made under oath to the government are considered a serious offense in many countries, penalties are often significant.

6. In the United States, penalties for false statements under oath include fines, imprisonment for up to 5 years, or both. In one case[1], two companies paid a total of 300,000 USD in criminal fines for falsely certifying that they had not shared bid price information.

7. In Canada, bidders who make or file a false CIBD may be prosecuted under the forgery provisions of the Criminal Code or, in some circumstances, a variant of the perjury offense may be applied.

8. The criminal law is not the only way that enforcement action could be taken against a party falsely executing a CIBD or similar documentation. For example, bidders could be required to provide a warranty that their CIBD is correct, or directly warrant that their bids have been independently determined.[2] In that case, civil damages actions may flow under contract law for breach of a contractual term – at least as against the winning bidder. Indeed, such an approach shows that private sector procurement exercises may also benefit from requiring bidders to provide such warranties.

9. Governments may also take independent steps to "suspend" or "disqualify" the company from submitting future bids for government contracts. In essence, procurement agencies or other government bodies determine how long a firm will be unable to sell products or services to the government. The risk of suspension or permanent disqualification, therefore, can be a serious penalty and, as a result, is likely to encourage firms to submit truthful CIBDs where they consider there is a reasonable risk that they might be caught.

10. In addition to these penalties for submitting a false CIBD, firms and individuals may also be prosecuted for any underlying bid rigging or price fixing conspiracy that can be proven where national laws prohibit cartel behaviour. Significant penalties can be an especially strong deterrent to firms and individuals that are engaging in a bid rigging conspiracy or are thinking about entering into one. Many jurisdictions have significantly increased penalties in recent years for cartel and bid rigging conspiracies in order to deter their harmful effects and punish those firms and individuals that engaged in them.

III. Contrasting the Enforcement of CIBD and Enforcing Competition Law

11. It is important to recognise that there is a significant difference between the evidence that is required to prove a false statement in a CIBD, and a substantive breach of competition law. There are both differences:

- In the substantive nature of the prohibition: that a firm lied in its CIBD and the type of evidence required to prove that a firm engaged in a bid rigging cartel; and

- In whether the prohibition is a civil or criminal prohibition.

12. Competition law focuses on agreements to restrict competition. Proving that two or more firms agreed to raise price by rigging bids can be difficult, often requiring significantly more evidence and resources than what is required to show that a firm submitted a false CIBD. Put simply, it may be easier to prove that one firm did something wrong as opposed to showing that two firms agreed to do something wrong.

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1 *US v Maymead Inc* (2002); and *US v Taylor & Murphy* (2002).

2 See "Cartels: Deterrence and Detection, A Guide for Government Procurement Officials", *Australian Competition and Consumer Commission,* 2009 (page 17). Available at www.accc.gov.au.

13. In contrast, CIBDs focus on practices that help firms rig bids, but filing a false CIBD is not usually itself generally a violation of the competition law.

14. Evidence that a company lied in its CIBD may trigger prosecution efforts under statute provisions related to false written statements, rather than the competition law. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors (perhaps through a telephone call, in a meeting or by mail) or attempted to convince its competitors to rig bids. Firms may be prosecuted under false statement statutes even though they did not actually agree on prices or on who would win the project, as would be required under the competition law.

15. On the other hand, it is possible that in some circumstances the reverse may be the case. In many countries cartel prohibitions are of a civil not criminal nature and this document elaborates on each possibility below.

16. Depending on the facts of the case, in such jurisdictions, it may be more difficult to prove both mental and physical elements of a criminal violation for a false CIBD than it is for a civil prosecution to be undertaken (or administrative decision reached) at a lower evidentiary threshold and when the relevant mental element is merely agreement rather than wrongful intention.[3]

17. In some cases, where a country has only civil competition prohibitions but criminal prohibitions against executing a false CIBD, commencing to use CIBDs may be a way to transition towards increasing the penalties for hard core cartel conduct.

IV. Text of a CIBD

18. In the US, the Federal Government requires the use by its procurement officials to require the following CIBD to be provided by bidders in procurement processes:

Box 1. An Example from the United States

Each bidder must certify for each bid that:

1. The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices;

2. The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law; and

3. No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

Source : Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 52.203-2.

[3] It is noteworthy that in the cases referred to above (*US v Maymead* and *US v Taylor & Murphy*) both defendants agreed to a joint submission following fact: "At the time that the corporate officer signed the bid form, he did *knowingly and wilfully* make and cause to be made a materially false, fictitious and fraudulent statement and representation in a matter" which the prosecution was not then required to prove at trial.

19. The italicised terms in the CIBD example above indicate that the standard of proof necessary to prosecute a false CIBD is generally lower than that required to prosecute firms for rigged bids or fixed prices. Note this model is not limited to requiring firms to certify the absence of an "agreement" on price. If a CIBD focused only on agreements, it would likely not significantly aid enforcement efforts or strengthen the competitive process, as that prohibition is likely to be embedded in the competition law already.

20. The above CIBDs require a firm to certify that its bid price has not been *knowingly disclosed* to any competitor before the bid opening. Thus, any firms that exchange bid prices prior to the opening of a bid may potentially be prosecuted for falsely certifying that they did not share bid information.

21. In addition, although some countries' competition laws prohibit both collusion and attempted collusion[4], others only prohibit actual collusion. In countries where attempted collusion is not actionable under competition law, a CIBD can broaden the range of prohibited conduct to include attempt. The sample CIBD above requires that each firm certify that it has not and will *not attempt* to induce a competitor to restrict the competitive process, by increasing bid prices or encouraging other competitors not to bid, for example. Thus, a firm that falsely certifies that it made no attempt to solicit a competitor to rig bids may be prosecuted for a false CIBD even if the competitor did not agree to rig the bid and the firm cannot be prosecuted for bid rigging. These requirements are intended to provide additional safeguards for the competitive bidding process for government contracts beyond the deterrence provided by traditional cartel enforcement.

22. The text of a Canadian CIBD is attached to this paper. I It is notable that while there are many common concepts, it is also the case that the text differs significantly. One possible reason for this is that in Canada there is a limited statutory exception to collusive bid rigging where enterprises that have entered into an arrangement have notified the procurement agency of the arrangement at or before the time the bid is submitted.[5] Two observations flow from this comparison and the possible explanation for it. First, exceptions of the sort referred to in Canada are reasonably common in competition laws of other countries and have direct implications for the drafting of CIBDs. Second, there is the more general point country's competition laws can vary in ways that may make for differently worded CIBDs.

V. CIBD can Help Uncover Cartels and Bid Rigging Conspiracies

23. Evidence that a firm submitted a false CIBD can be highly probative evidence of the existence of a bid-rigging conspiracy or in justifying the imposition of a higher penalty for cartel behaviour. A false certification concealing contacts with competitors can provide evidence of consciousness of guilt and be very persuasive in proving the underlying cartel offence.

24. In addition, firms caught making false statements to the government may be willing to co-operate with investigators and provide assistance in the underlying cartel investigation in exchange for receiving a more favourable sentencing recommendation for having co-operated with the Government. This is especially true if the penalties for making false statements exceed those for cartel offences. Co-operation by a firm can lead to additional evidence that can be used to prove the bid rigging conspiracy against many conspirators, and, possibly, uncover other conspiracies.

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4 For example, see the section 80(1)(b) of the *Commerce Act (New Zealand) 1986*.

5 See section 47(1) of the *Competition Act*.

VI. Extensions of the Basic CIBD Concept to Enhance the Effectiveness of Tenders and to Fight Corruption in Public Procurement

25. As well as the central concept of a CIBD discussed above, there are also examples of procurement exercises that have extended the use of the concept into other areas.

26. For example, in some cases, bidders were required to certify that they were not connected to other bidding companies (for example that there were no common ownership links between two competing bidders) and, indeed, prosecutions have followed.[6]

27. Similarly, to fight corruption, certifications have been asked[7]:

- From procurement officials that they did not improperly release procurement information to bidders; and
- From the competing bidders that they have not received or solicited procurement information.

28. The latter point will not be a topic for discussion in the specific CIBD break-out session but is relevant in the broader plenary discussion that will follow on the same afternoon concerning public procurement more generally including a discussion of the linkages between corruption and collusion.

VII. Discussion Points for the CIBD Breakout Session

29. At the breakout sessions, countries may wish to discuss:

- What different types of laws could be used to take enforcement action against a false CIBD? The examples cited in this paper are from common law countries. Is there any relevant distinction for countries with a civil law system?
- Is it common internationally that:
  - Knowingly making a false CIBD would breach the law; and
  - That CIBDs would enhance the ability to deter cartels, detect cartels or effectively punish cartel behaviour?
- Are there any relevant differences between countries based on the state of development of the country's competition regime? For example, if competition law is new to a country and if the enforcement agency is in the early stages of educating the business community and taking their first enforcement activities:
  - Might cartels may be more common and easier to detect suggesting that the value of a CIBD may be less?
  - Might introducing and explaining a further new legal instrument such as a CIBD before competition law itself is well understood, be impractical or confusing?

6 *US v LaDURON (2008).*

7 OECD: "*Bribery in Public Procurement, Methods, Actors and Counter-Measures*", 2007.

  - Might other innovations (eg the introduction of a leniency policy) be of higher priority?

  - On the other hand, is a CIBD valuable in that the standard required of businesses can be even simpler to understand than avoiding cartel conduct and could a CIBD simplify the considerable initial enforcement challenges facing a new agency?

- Competition law enforcement agencies face varying reactions from procurement decision makers on the desirability of adopting CIBDs. What impediments exist (if any) in your country to the adoption of CIBDs?

- Would it be of value if there was an international model or template CIBD available, or are the laws relied for CIBDs sufficiently different that this would not be useful? If a model or template is not useful, would it be useful to set out principles or considerations which countries can apply in preparing the text of their own CIBD?

APPENDIX: CANADIAN CERTIFICATE OF INDEPENDENT BID DETERMINATION[8]

I, the undersigned, in submitting the accompanying bid or tender (hereinafter "bid") to:

_____

(Corporate Name of Recipient of this Submission)

for: _____

(Name and Number of Bid and Project)

in response to the call or request (hereinafter "call") for bids made by:

_____

(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: _____ that:

(Corporate Name of Bidder or Tenderer [hereinafter "Bidder"])

① I have read and I understand the contents of this Certificate;

② I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;

③ I am authorised by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;

④ each person whose signature appears on the accompanying bid has been authorised by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;

⑤ for the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organisation, other than the Bidder, whether or not affiliated with the Bidder, who:

(a) has been requested to submit a bid in response to this call for bids;

(b) could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;

⑥ the Bidder discloses that (check one of the following, as applicable):

(a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor; ❑

(b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements; ❑

⑦ in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

(a) prices;

(b) methods, factors or formulas used to calculate prices;

(c) the intention or decision to submit, or not to submit, a bid; or

(d) the submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (6)(b) above;

⑧ in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorised by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;

⑨ the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

_____

(Printed Name and Signature of Authorised Agent of Bidder)

_____ _____

(Position Title) (Date)

[8] See www.competitionbureau.gc.ca.

BRIEFING NOTE

-- Breakout Session 2 --

USEFULNESS OF GUIDELINES IN PUBLIC PROCUREMENT

-- Briefing Note by the Secretariat --

1. Background

1. The Guidelines for Fighting Bid Rigging in Public Procurement were adopted by the OECD Competition Committee in February 2009. The purpose of the Guidelines is to assist government officials to design tenders to reduce the risks of bid rigging and to detect bid rigging when it occurs. The Guidelines have been translated into nearly 20 languages. They are available at www.oecd.org/competition/bidrigging.

2. Common Forms of Bid Rigging

2. Although firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one (or more) of several common strategies. These strategies in turn may result in patterns that officials can detect and which can then help uncover bid-rigging schemes.

- Cover bidding. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition;

- Bid suppression. Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration;

- Bid rotation. In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company;

- Market allocation. Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm.

3. Industry, Product and Service Characteristics that Help Support Collusion

3. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Some of these characteristics include:

- Small number of companies. Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids;

- Standardised or simple products. The chances of bid rigging are greater if the products or services being purchased are standardised and simple, and do not change over time. Under these circumstances, it is easier to work out an agreement and have it last a long time;

- Little or no entry. When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

4. The OECD Checklists for Fighting Bid Rigging

4. The Guidelines contain two checklists which officials can use to help design tenders to reduce the risks of bid rigging and to detect it when it occurs. These checklists are briefly described in the next two sections.

4.1 Checklist for Designing Public Procurement Tenders to Reduces the Risks of Bid Rigging

5. There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

4.1.1 Learn about the market

6. Knowledge of the prices that have been submitted in recent tenders for the same or similar products, as well as familiarity with recent trends in the market, help procurement officials identify acceptable bids. It is particularly useful to gather information about potential suppliers' prices and costs, including prices in other geographic areas or for similar products.

4.1.2 Encourage participation by bidders

7. The tender process should be design to encourage participation. Unnecessary restrictions on the size of firms, composition or nature can reduce the number of bidders. Bidders can also be discouraged if the cost of preparing their bid is high. In addition, allowing bidding on a portion of a large contract will permit small and medium-sized firms to participate. Similarly, allowing foreign firms to submit a bid will make collusion more difficult.

4.1.3 Have clear requirements and allow for unpredictability in the tender process

8. Tender specifications should be defined in terms of functional performance, where possible, rather than by reference to specific products. Tenders should allow for alternative or innovative sources of supply. Clear tender requirements encourage additional firms to bid. Predictable purchasing patterns facilitate bid-rigging schemes.

4.1.4 Limit communication among bidders

9. Bid rigging requires bidders to communicate with each other. If the procurement process is designed to make it difficult for potential bidders to identify their competitors, then bid rigging becomes more difficult. Procurement agencies should avoid bringing potential bidders together, avoid disclosing the names of bidders, and allow bidding by mail, by telephone, or electronically.

10. Governments can also require those who bid for government contracts to submit a *certificate of independent bid determination*. Certificate rules typically require a statement under oath from each firm confirming that there has been no collusive behaviour, whether through inappropriate communication between competitors, disclosure of bid prices or encouragement to rig bids.

4.1.5 Evaluate the criteria for awarding contracts

11. The probability of bid rigging increases when there is a small number of potential bidders. It is therefore important to consider the impact of the design of the procurement process on the number of bidders over the long term. Specifications should clearly describe all award criteria to encourage maximum participation. It is important to avoid preferential treatment of certain classes of suppliers, or of firms that currently have contracts up for renewal.

4.1.6 Provide training to procurement staff about bid rigging

12. Appropriate training will help procurement staff to design a procurement process that is less susceptible to bid rigging. Similarly, development of a data base that contains past and present bid results will assist staff to detect potential problems quickly and help to rectify them. The competition agency may be able to assist in these efforts and help to review the data. Informal interviews with bidders who have stopped participating in tenders, or who have lost a number of bids, may also aid in identifying design problems.

4.2 Checklist for Detecting Bid Rigging in Public Procurement

13. Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does.

4.2.1 Look for opportunities that the bidders have to communicate with each other

14. Bidders need to know and communicate with each other to reach an agreement. Once bidders know each other well enough to discuss bid rigging, they need a convenient location where they can talk. These meetings occur most often at, or in association with, trade association meetings, or other professional or social events. They are also likely to occur prior to the opening of the tender process.

4.2.2 Look for indications that the bidders have communicated with each other

15. Bid rigging requires actual and often repeated communications between the bidders. Procurement officials may hear or come across statements indicating that information may have been shared, such as a bidder having knowledge of another bidder's pricing, or not expecting to be the low bidder, or perhaps when a bidder refers to "industry" or "standard" practices or prices.

4.2.3 Look for any relationships among the bidders after the successful bid is announced

16. In some cases, bidders may attempt to split the extra profit that is earned through bid rigging. This is especially true if one large contract is involved. Sometimes the winning firm may pay the other bidders directly; however, the 'profit split' can also be passed on through lucrative sub-contracts to do some of the work or to supply inputs to the project. Joint bids can also be used as a way to split profits.

4.2.4 Look for suspicious bidding patterns

17. It is important that officials look for bidding patterns. Bidders may have devised a scheme that reveals itself as a pattern over the course of many bids. For example, there may be a pattern to the winner (A, B, C, A, B, C), or it may be that the same bidder always wins bids of a certain type or size, or that some bidders only bid in particular geographic areas. Pricing may be unusual. All bids may be unexpectedly high, or discounts or rebates may be unexpectedly small. Bids may also be different from previous, similar procurements, but the differences are unrelated to any change in the underlying economic conditions. Bid levels may change when a new bidder (i.e. one who has not bid in the past) submits a bid.

4.2.5 Look for Unusual Behaviour

18. Procurement officials expect the winning bidder to accept the contract, so it could be considered 'unusual', for example, if the winner chose not to accept it, or withdrew before the award was made. Submitting a bid without normal detail or required documentation, or without the necessary information from suppliers, may also constitute unusual behaviour, as does a situation where the number of bidders is unexpectedly small, with some normal bidders not participating.

4.2.6 Look for Similarities in the Documents

19. Bid-riggers sometimes have a single person prepare all the bids. Alternatively, a number of people may work on the bids, but they may work closely with each other. If the bid documents are put side-by-side, one may notice the same type of paper, the same postmarks, the same misspellings, the same handwriting, the same wording, the same alterations or changes, the same miscalculations or the same amounts.

BRIEFING NOTE

-- Breakout Session 3 --

WORKING WITH OTHER PARTS OF THE GOVERNMENT TO FIGHT BID RIGGING

-- Briefing Note by the Secretariat --

I. Introduction

1. The Third Report on the Implementation of the 1998 Recommendation on Hard Core Cartels lists the fight against anticompetitive behaviour in auction and procurement markets among the enforcement priorities that countries should pursue in their fight against hard core cartels. The Report notes that more countries should expand their awareness programmes, and work more extensively with procurement officials in an effort to fight bid rigging more effectively because the procurement authority is frequently the best placed agency to detect signs of unlawful bidding arrangements.

2. However, programmes to systematically educate procurement officials exist only in a few member countries. Moreover, because bid rigging can occur when other crimes occur, such as tax evasion, it is also important that a variety of agencies be made aware of bid rigging. This suggests that a variety of officials in many countries are not yet sufficiently aware of the danger of bid rigging and of the important role they can play in preventing and detecting it.

3. This workshop will explore ways in which competition authorities can work with procurement agencies and other parts of the government. The workshop will focus on practical issues and will seek to answer the following questions:

- What parts of the government should competition authorities seek to work with in order to enhance their fight against bid rigging?
- What methods should be used to raise awareness among officials about the risks of bid rigging?
- What steps can competition authorities take to ensure that outreach begins smoothly?
- How frequently should competition authorities conduct outreach work with other government agencies?
- How can competition authorities build upon their outreach work to enhance the profile of their own work?

II. Working with procurement agencies and other parts of the government

4. In order to fight bid rigging, some competition authorities have sought to connect government attorneys, who have the expertise to investigate and prosecute bid rigging, with public procurement agents, who are in the best position to detect and prevent bid rigging. A significant goal of these programmes is to increase the willingness of procurement agents to report bid rigging. These programmes often focus on detecting bid rigging rather than on helping procurement agencies design tenders to reduce the risks of bid rigging. Manuals, charts and other materials are frequently distributed to officials in order to increase their awareness. These documents explain what bid rigging is, the antitrust laws, suspicious behaviour and bidding patterns, and how to contact the competition authority. In many instances, half day programmes are conducted.

5. Some competition authorities have also sought to strengthen their relationship with other government agencies, including those that fight corruption, have police powers, or prosecute individuals and companies for legal violations. As with procurement agencies, an important goal of this work is to explain the legal standards for a violation of the competition law, to raise awareness of indicators of bid rigging, and to discuss penalties. However, because bid rigging can occur alongside other crimes, such as fraud, money laundering, tax violations and public corruption, it is important these agencies be made aware that additional penalties can be imposed.

III. Successful examples of advocacy work

a) Canada

6. The Canadian Bureau has a mandate to promote and maintain competition in Canadian markets. Part of the Bureau's outreach activities involves giving presentations to procurement officials throughout Canada. In 2008 alone the Bureau gave over 35 presentations to procurement officials. Since 2005, more than 3,000 officials have attended the Bureau's outreach programme. Bureau officers give general explanations about the Competition Act and then focus on the way it applies to procurement processes. The Bureau's goals are to increase awareness about competition law offenses in the procurement process; help procurement agents detect collusion and help officials design tenders that reduce the risks of bid rigging. The Bureau's outreach strategy has led to an influx of complaints.

b) Chile

7. *Fiscalía Nacional Económica* (FNE) is the sole agency responsible for investigating and prosecuting bid rigging in Chile. In 2008, FNE established the Interagency Taskforce for Fighting Bid Rigging, one of the few cross-agency partnerships ever created in Chile. Founding members of the Taskforce include: the e-procurement agency for the Chilean government, the Ministry of Public Works, an Association of Public Procurement Officers, the General Comptroller and the Internal Government Comptroller. Recent additions include the housing ministry, the pensions agency, and the transport agency.

8. The main purpose of the Taskforce is to help officials understand what bid rigging is, the importance of tackling it, how to detect it, and steps that agencies can take to prevent bid rigging from occurring. Meetings are scheduled on a bi-monthly basis and focus on common concerns such as the difficulty of simultaneously executing core procurement work and detecting bid rigging. Discussions also highlight practices that individual Taskforce members have taken to fight bid rigging. After numerous meetings and discussions, Taskforce members now have a common view that fighting bid rigging requires strong, co-ordinated efforts from multiple partners in order to achieve lasting results.

c) Finland

9. The Finish Competition Authority (FCA) has carried out a project called the Public Sector Partnership. The objective of the partnership was to work closely with procurement agents in order to proactively attack cartels. Beginning in 2005, the FCA began approaching the largest purchasing organisations located in 14 cities. Procurement agencies were highly receptive to the FCA's offer to conduct half-day training sessions. FCA presentations focused on its activities and the legal prohibitions against cartels; the process of investigation and prosecuting a cartel; how to detect cartels; and how to design tenders to reduce the risks of collusion. FCA presentations led to numerous reports of suspicious conduct and to investigations. The ultimate goal of their work is to create a communication channel through which they will learn about suspicious behaviour and through which municipalities could obtain information about combating cartels.

SESSION IV

FIFTH ANNIVERSARY OF THE OECD-HUNGARY REGIONAL CENTRE FOR COMPETITION

PRESENTATION BY MR. ZOLTAN NAGY

OECD-Hungary Regional Centre for Competition in Budapest - a well-functioning training institution

OECD Global Forum on Competition
Ninth Meeting
18-19 February 2010

Zoltán Nagy
President
Gazdasági Versenyhivatal (GVH, Hungarian Competition Authority)

Support from each side

- **the OECD and the GVH**
- **the competition authorities of the beneficiary economies**
- **the Hungarian government**
- **the Competition Division of the OECD**
- **competition authorities of the OECD member states**

Target groups of the RCC in Budapest

1. Core activity - Eastern and South-East Europe:

	Albania
Russia	Bosnia and Herzegovina
Belarus	Kosovo
Ukraine	Macedonia
Armenia	Moldova
Azerbaijan	Montenegro
Georgia	Serbia
Kazakhstan	Croatia
Kyrgyzstan	Bulgaria
	Romania

2. Judges (European judges dealing with competition law)
3. GVH (the Hungarian Competition Authority), Central European countries

Programmes offered

1. Core activity
   - intermediate level courses
   - advanced level courses
   - 2-week-long seminar
   - heads' meeting

Interactive
Hypothetical case
Country report/case study
Topical
Focused on needs

2. Other activity
   - Judges - seminar or workshop
   - CECI - workshop
   - GVH - staff training

Topics of the programmes

- Abuse of dominance
- Merger analysis and procedures, remedies
- Anti-cartel enforcement in practice and other restrictive agreements
- Assessing market power
- Regulated sectors: telecommunications sector, electricity markets, financial sector, aviation industry
- Quantitative methods and their role in competition policy analysis
- Efficiency and effectiveness of a competition authority

Facts and figures between 2005-2009

	'Core' activity	Seminars for judges	'Other' activities
Number of events	27	6	8
Number of participants	594 (from 22 countries and international organisations)	297 (from 36 countries and international organisations)	179 (from 23 countries and international organisations)
Number of speakers	182 (from 23 countries and international organisations)	45 (from 10 countries and international organisations)	32 (from 11 countries and international organisations)

Financial and intellectual contributions I.

Financial contributions
between 2005-2009 (EUR)

GVH, Hungary:	2 444 447	86,5%
OECD:	90 000	3,2%
EU Commission:	291 719	10,3%
	2 826 166	**100%**

Financial and intellectual contributions II.

Sources of the intellectual contribution
between 2005-2009
(in person-days of delivered capacity building)

1. Competition Division A4 (post financed by the GVH):		90
2. Competition Division outreach activity:		64
a) Two-week-long seminar	40	
b) Other seminars	24	
3. Speakers from the GVH:		143
4. Speakers from other OECD member states:		383

Results of the evaluation of our programmes

The overall usefullness of the **topics**

	'Core' activity	Seminars for judges	'Topics in Competition Policy' seminars
2006	4.4	N/A	-
2007	4.3	4.2	4.5
2008	4.4	4.6	4.4
2009	4.2	4.6	4.0

Results of the evaluation of our programmes

The overall usefullness of the **events**

	'Core' activity	Seminars for judges	'Topics in Competition Policy' seminars
2006	4.7	N/A	-
2007	4.5	4.6	4.5
2008	4.3	4.6	4.6
2009	4.2	4.6	4.4

Output from the RCC towards the target groups of the core activity

1. Single forum offering institutionalized trainings (↔ ICN, OECD, UNCTAD)
2. Professional formation
3. Financed by the RCC, free for the target groups
4. Regular and co-ordinated timetable
5. Tailormade to the needs
6. Institutionalized framework

Changes in the environment of the Budapest RCC

A lot of changes in the competition authorities

- **different developments in the competition laws**
- **development in the activities and work of the ICN and its working groups**
- **the effect of the economic crisis**

Answers to these changes

- **there are some basic values, which are not changeable - - mission, strategy, main principles**
- **there are some, which should be changed - - priorities, topics, methodology**

Anniversary events in Budapest

- 2 March - - workshop dedicated to the target countries of the core activity on agency effectiveness (Moderators: Allan Fels, William Kovacic, Joe Phillips)
- 3 March - - a conference, beginning with ceremonial part, continuing with the title of Competition Policy After the Crisis (Speakers: Mr. Fréderic Jenny, Mr. Aart de Geus, Mr. William Kovacic, Mr. David Lewis, Ms. Olgica Spevec, Mr.Petko Nikolov, Mr. Bogdan Chiritoiu etc.)

Thank you for your attention!

SESSION V

ROUNDTABLE ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

By the Secretariat

A roundtable discussion on Collusion and Corruption in Public Procurement was held at the Ninth Global Forum on Competition. In light of this discussion, the Secretariat's background paper, the country submissions and several individual contributions, a number of key points regarding the topic emerge.

(1) Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect. They are best viewed, therefore, as concomitant threats to the integrity of public procurement.

Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money. In both developed and developing economics, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.

Collusion involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process. Bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should "win" the tender, and then arrange their bids – for example, by bid rotation, complementary bidding or cover pricing – in such a way as to ensure that the designated bidder is selected by the purportedly competitive process. In most legal systems, bid rigging is a hard core cartel offence, and is accordingly prohibited by the competition law. In many countries bid rigging is also a criminal offence.

Corruption occurs where public officials use public powers for personal gain, for example, by accepting a bribe in exchange for granting a tender. While usually occurring during the procurement process, instances of post-award corruption also arise. Corruption constitutes a vertical relationship between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as sellers in this instance. Corruption is generally prohibited by the national criminal justice rules, legislation on ethics in public office or by the specific public procurement regulations.

Ultimately, however, these discrete offences have the same effect: a public contract is awarded on a basis other than fair competition and the merit of the successful contractor, so that maximum value for public money is not achieved. The country contributions (including those of Colombia, France, Latvia and the United States) provided some empirical evidence that corruption and collusion can occur in tandem, and certainly, these offences have a mutually reinforcing effect. Where corruption occurs in a public contract, collusion between bidders – for example, in the form of compensatory payments or the granting of subcontracts – may be necessary to ensure that losing bidders do not expose the illegal conduct to the public authorities. Equally, economic rents derived from collusion may foster corruption, while collusion is also facilitated by having an "insider" in the public agency that provides the bidders with information necessary to rig bids in a plausible manner and may even operate as a cartel enforcement mechanism.

(2) The distinctiveness of public procurement and its context makes the process particularly vulnerable to collusion and corruption, while also increasing the magnitude of harm that these offences cause.

Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anticompetitive and corrupt practices, and magnifies the resultant harm. It is for this reason that the problems of collusion and corruption within the field of public procurement specifically merit individual attention.

Public procurement is vitally important to the economic system of a State: the country contributions indicated that it typically accounts for between 15-20% of Gross Domestic Product. Effective public procurement determines the quality of public infrastructure and services and it impacts on the range and depth of infrastructure and services that a State can provide to its citizens, as money wasted because of collusion and/or corruption ultimately results in fewer public funds. In this way, public procurement is an issue of key importance for a State's economic development.

Aspects of the public procurement process nevertheless render it particularly vulnerable to anticompetitive and corrupt practices. Public procurement frequently involves large, high value projects, which present attractive opportunities for collusion and corruption. Regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating opportunity for collusion. Certain sectors frequently subject to public procurement, including construction and medical goods and services, may be particularly prone to anticompetitive or corrupt practices. Finally, the sheer quantity of goods and services that are contracted by the State creates monitoring difficulties and increases the likelihood that the public procurement process may fall prey to collusion or corruption.

The effects of collusion and corruption in public procurement are arguably more problematic than in private procurement. Moneys lost because of subversion of the public procurement process represent wastage of public funds. The resulting loss to public infrastructure and services, whether in quality or range, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. Distortion of the public procurement process is detrimental for democracy and for a sound public governance, and it inhibits investment and economic development. Thus, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement.

(3) Tackling collusion and corruption are not mutually exclusive goals, so there is a need to accommodate both in order to better protect the public procurement process. Tensions between the sometimes competing approaches to the prevention of collusion and corruption within public procurement may necessitate trade-offs to achieve both effectively. For example, while transparency is indispensible for corruption prevention, excessive or unnecessary transparency should be avoided.

Both collusion and corruption prevention are necessary aspects of any overall strategy aimed at protecting the integrity of the public procurement process: that is, ensuring that no party to a public procurement transaction acts in a manner contrary to the objective of securing best value for public money. Collusion and corruption are typically pursued under separate but largely compatible legal frameworks. Moreover, as these problems are mutually reinforcing, reducing the likelihood of one offence will also decrease the risk of the other.

At an operational level, however, best practice approaches to avoidance of collusion and corruption can differ. In terms of designing the procurement process, for example, while a pattern of regular small tenders is seen to facilitate collusion, large lumpy tenders can foster corruption. A significant difference is the role and importance of transparency in the procurement process. The principle of transparency – which relates to the availability of information on contract opportunities, the rules of the process, decision-making and verification and enforcement – is of critical importance in preventing corruption. In certain instances, however, transparency is inconsistent with the need to ensure maximum competition within the procurement process. Transparency requirements can result in unnecessary dissemination of commercially sensitive information, allowing firms to align their bidding strategies and thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a procurement procedure predictable, which can further assist collusion.

This may lead to tensions between the sometimes competing approaches to prevention of collusion and corruption within public procurement and require trade-offs in terms of how to achieve these objectives. While transparency of the process is indispensible to limit corruption, excessive or unnecessary transparency should be avoided in order not to foster collusion. There is some uncertainty, however, as to what information can facilitate collusion, and so further research on this is desirable. Nevertheless, sound procedural design can go a long way towards achieving effective procurement and mitigating this trade-off. For example, procurement rules might require only information on winning bids to be released and not require bidder identities to be disclosed. Bidding procedures should not provide participants with sensitive information regarding the actions of others tenders, but, conversely, should allow for review of decisions of public officials by independent public agencies.

(4) Co-operation between the various national enforcement agencies with jurisdiction over collusion and corruption in public procurement is paramount, in order to achieve a coherent overall strategy and ensure its full implementation, and additionally, to facilitate efficient prosecution of these offences.

Incidents of collusion and corruption are typically investigated and sanctioned by separate national agencies: collusion generally comes within the remit of the competition authority, whereas corruption is pursued by public prosecutors or specialised anti-corruption agencies. However, due to the mutually reinforcing nature of collusion and corruption plus the likelihood that such offences occur in tandem, the most effective approach to protecting the integrity of the public procurement process requires co-operation between the various enforcement agencies, whether by means of a formal memorandum of understanding, notification requirements or other mechanisms.

The benefits to a co-ordinated approach are considerable. Evidence of collusion may come to light during a corruption investigation, and vice versa; having in place a knowledge-sharing policy ensures that this information is brought to the attention of the appropriate enforcement body. Evidence-sharing, where compatible with national evidentiary rules, also assists those enforcement agencies (typically, competition authorities) that have more limited evidence-gathering powers than the public prosecutor or other criminal justice agencies. The introduction of a formal co-operation policy can improve knowledge of misconduct in public procurement amongst enforcement agencies more generally. Co-operation between enforcers can therefore go some way towards addressing the deleterious effects of cumulative attacks on public procurement through collusion and corruption. In certain jurisdictions, a single agency may have both a collusion and corruption remit, thus internalising this co-operation. While a combined approach is not a necessary requirement of an effective strategy for the protection of public procurement,

whatever the structure of the co-operation mechanism utilised, it should, as basic principle, ensure: (i) comprehensive coverage of all forms of malfeasance in public procurement; and (ii) efficient prosecution of any such offences that arise in practice.

Enforcement agencies should also seek to establish a collaborative relationship with front line public procurement officials. The purpose of such co-operation is two-fold. There is an educative effect, alerting officials to the possibility and warning signs of collusion, as well as warning of the consequences for officials who themselves engage in corrupt practices. Additionally, co-operation establishes channels of communication between procurement officials and enforcers, thus further facilitating efficient prosecution of suspected instances of collusion and/or corruption.

(5) In addition to the existing framework of competition law, criminal justice legislation and public procurement regulations, a variety of more specialised mechanisms have been developed to protect and improve the integrity of the public procurement process. Nevertheless, such techniques must balance the sometimes competing requirements of collusion and corruption prevention, and the need to achieve a mutual accommodation of these objectives.

In addition to enforcement of the general competition law, criminal justice provisions and any public procurement rules, there exist a variety of methods by which integrity of the public procurement process, specifically, might be protected or improved. Such mechanisms include:

- *Opening national markets to international competition*, thus increasing the number of bidders in any tendering process.
- *Redesign of the procurement process*, maximising transparency without allowing sharing of commercially-sensitive information. Generally, sealed bid tenders are less prone to collusion than dynamic or open tender mechanisms; whereas individual negotiation has greater potential for corruption or favouritism than competitive bidding, although in certain circumstances it may be the most efficient procurement tool.
- *E-procurement*, that is, the organisation of tenders by electronic means via an internet portal. Care must be taken to ensure that the e-procurement procedure itself does not facilitate collusion, especially as this method eliminates the paper trail that might otherwise have provided evidence of bid rigging in the process.
- *Certificates of Independent Bid Determination (CIBD)*, which require bidders to certify that they have arrived at their tender price absolutely independent of other bidders. CIBDs operate as both a reminder of the relevant legislation and as a commitment by the bidder that these rules have been complied with, and are of particular value in situations where tender participants may be less aware of national legislation prohibiting corruption and collusion. Prosecution of CIBD violations can also be a possibility where absence of proof of an agreement makes it impossible to charge an antitrust violation.
- *Education* of public officials, business and civil society. This is perceived to be especially relevant in economies where rules against collusion and/or corruption in public tendering are relatively new or under-enforced.
- *Data analysis tools*, such as comparison of public databases to identify indicators of anti-competitive or corrupt activity.
- *Specialised review mechanisms for public contract awards*, whereby unsuccessful bidders who suspect flaws in the procurement procedure can challenge the award before a

specialised tribunal. While such procedures can identify individual instances of corruption or collusion, they are generally unsuitable for detecting patterns of corruption and/or collusion across a number of contracts.

- *Auditing* of public procurement procedures, whether conducted internally by a separate wing of the relevant public agency, or externally by an independent State body with specific powers of audit.

(6) Sanctions for collusion and/or corruption in public procurement range from fines and imprisonment to more specialised penalties like debarment from participation in future public procurement procedures. A key factor to achieving deterrence is to ensure a credible prospect of detection and prosecution, coupled with a sufficiently severe penalty. However, generating a "culture of compliance" should be a key objective for enforcement agencies.

In fighting collusion and corruption in public procurement, there must a credible threat of discovery and prosecution, coupled with strong sanctions upon conviction. The typical penalties imposed for corruption in the contributing country submissions are fines and imprisonment, and dismissal within the employment context. Bid rigging is generally subject to the same penalties as other hard core cartels, meaning fines and, depending on the jurisdiction, imprisonment. Many countries have competition leniency programmes in place which grant immunity or reduced fines to firms that reveal the existence of cartels and participate in their subsequent investigation.

A number of sanctions, specific to the public procurement context, can be identified. In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time. Particularly in smaller economies, however, this penalty may have the paradoxical effect of reducing the number of qualified bidders to an uncompetitive level. In those jurisdictions that utilise Certificates of Independent Bid Determination (CIBD) in public procurement, prosecution for false statements in certification can provide a straightforward means of penalising collusion in tendering. While the possibility of civil suits against corrupt officials and/or firms that participated in collusion was mentioned in the contributions, quasi private action of this nature is utilised to a lesser extent in the public context.

For some businesses, fines imposed for anticompetitive or corrupt behaviour are considered simply a cost of doing business. The United Kingdom's contribution suggests that the adverse publicity and the possibility of disqualification from holding certain company offices may represent a greater harm, and function as a greater deterrent, for firms. More generally, while eliminating collusion and corruption entirely is a very challenging goal for any legal system, the development of a "culture of compliance" is an important step towards reducing such behaviours. As competing firms are often best placed to identify irregularities in public procurement, getting business on board in the fight against collusion and corruption can reap benefits in terms of both deterrence and detection.

(7) The optimal strategy to tackle both collusion and corruption in public procurement appears to require a three–pronged approach: development of best practice rules for public procurement; extensive advocacy efforts; and vigorous enforcement action taken against any instances of corruption and/or collusion that are uncovered.

The optimal strategy to protect the integrity of public procurement that emerges from the contributions is a three-pronged approach, combining development of best practice rules with wide-ranging advocacy efforts and vigorous law enforcement.

Co-ordinated efforts to develop best practices rules for public procurement can utilise the benefits of hands-on experience to shape balanced and effective regulations for this complex area. Knowledge-sharing can occur on at least three levels: as part of a co-operation strategy between enforcement agencies at the national level; through transnational networks of national enforcement agencies; and through the work of international organisations, including the OECD.

With regard to advocacy efforts, a broad range of useful target areas can be identified: education of public officials; of business; of the media; and of the wider community. Effective advocacy can promote a change of culture in State practices and generate public support for enforcement efforts. More generally, enforcement agencies should identify and advocate for the removal of any public procurement rules or procedures that facilitate or foster collusion or corruption. Business also has a role in this process, in terms of the education of its personnel and the development of internal compliance mechanisms.

As regards enforcement, the principles already outlined – including credible likelihood of discovery and prosecution, strong sanctions, use of specialised detection mechanisms and inter-agency co-operation – should govern such procedures. Moreover, enforcement should extend to the frontline of public procurement – namely, procurement officials themselves – so as to develop a synergy between all State agencies charged with the protection of the public procurement process.

SYNTHÈSE

SYNTHÈSE

par le Secrétariat

Une table ronde sur la collusion et la corruption dans la passation des marchés publics s'est tenue dans le cadre du Neuvième Forum mondial sur la concurrence. À la lumière de ces débats, de la note de référence du Secrétariat et des contributions soumises par les pays et par différents intervenants, plusieurs points clés se dégagent.

1) La collusion et la corruption sont des problèmes distincts qui touchent la passation des marchés publics, mais ils se produisent souvent concomitamment, et leurs effets se renforcent mutuellement. Il convient donc de les envisager conjointement comme une menace pesant sur l'intégrité des marchés publics.

Les marchés publics portent sur l'achat par l'État de biens et services nécessaires à ses activités, et leur but premier est d'obtenir la meilleure utilisation possible des deniers publics. Dans les économies développées comme en développement, cependant, le bon fonctionnement de cette procédure d'achat peut être altéré par des problèmes de collusion, ou de corruption, ou des deux.

Dans le cadre d'un appel d'offres portant sur un marché public, la collusion désigne une entente entre les soumissionnaires, qui s'organisent pour éliminer l'élément concurrentiel du processus. Le mécanisme des soumissions concertées est typique de la collusion dans ce contexte : les soumissionnaires déterminent entre eux celui qui devrait remporter le marché, et "truquent" leurs offres – par exemple en assurant une rotation des offres, en faisant des offres complémentaires ou en pratiquant des offres de couverture – de telle sorte que le soumissionnaire qu'ils ont désigné soit sélectionné par la procédure soi-disant concurrentielle. Dans la plupart des régimes juridiques, les soumissions concertées sont considérées comme une entente injustifiable et interdites à ce titre par le droit de la concurrence. Dans de nombreux pays, elles constituent aussi une infraction pénale.

On parle de corruption lorsque des fonctionnaires utilisent la puissance publique à des fins d'enrichissement personnel, par exemple en acceptant un « pot de vin » en contrepartie de l'octroi d'un marché. Si ce phénomène survient habituellement pendant le processus de passation des marchés, il se produit aussi des cas de corruption postérieurement à l'attribution des marchés. La corruption est une relation verticale entre le fonctionnaire concerné, qui est l'acheteur dans le cadre de la transaction, et un ou plusieurs soumissionnaires qui sont dans ce contexte les vendeurs. La corruption est généralement interdite par le droit pénal national, par la législation relative à l'éthique dans la fonction publique ou par la réglementation spécifique de la passation des marchés publics.

En fin de compte, ces infractions, quoique distinctes, produisent cependant le même effet : un marché public est attribué en fonction de critères autres que la concurrence équitable et les mérites de l'offre retenue, de sorte qu'il n'est pas fait une utilisation maximale des deniers publics. Les contributions de certains pays (notamment la Colombie, la France, la Lettonie et les États-Unis) présentent des données empiriques montrant que la corruption et la collusion peuvent coexister et que, sans aucun doute, elles se renforcent mutuellement. Lorsqu'un marché public est entaché de corruption, la collusion entre soumissionnaires – par exemple sous la forme d'un dédommagement ou de l'attribution de marchés secondaires – peut être nécessaire pour que les

candidats éliminés ne révèlent pas le comportement illicite aux autorités. De même, les rentes économiques tirées de la collusion peuvent favoriser la corruption, tandis que la collusion est facilitée par la présence d'un « allié » à l'intérieur de l'organisme acheteur, qui fournit aux soumissionnaires les renseignements nécessaires pour truquer les offres d'une manière plausible et peut même surveiller la bonne exécution du mécanisme d'entente.

2) Le caractère particulier de la passation des marchés publics et de leur contexte rend ce processus particulièrement vulnérable à la collusion et à la corruption, et accroît d'autant l'ampleur des préjudices causés par ces infractions.

Toutes les procédures de passation de marchés, que ce soit dans le secteur public ou privé, peuvent être entachées de collusion et de corruption. Pourtant, le caractère particulier de la passation des marchés publics rend celle-ci particulièrement vulnérable aux pratiques anticoncurrentielles et à la corruption, et amplifie les dommages qui en résultent. C'est pour cette raison que les problèmes de collusion et de corruption qui se posent tout particulièrement dans la passation des marchés publics méritent une attention spéciale.

Les marchés publics sont d'une importance vitale pour l'économie d'un pays : comme l'indiquent les contributions reçues, ils représentent généralement 15 à 20 % du produit intérieur brut. L'efficacité de la passation de ces marchés détermine la qualité des infrastructures et services publics, et elle a une incidence sur la gamme et la qualité des infrastructures et des services qu'un État peut offrir à ses citoyens, puisque l'argent gaspillé du fait de la collusion ou de la corruption se traduit, au bout du compte, par un moindre volume de ressources publiques disponibles. C'est la raison pour laquelle la passation des marchés publics est une question de toute première importance pour le développement économique d'un pays.

Certains aspects de ce processus le rendent toutefois particulièrement vulnérable aux pratiques corrompues et anticoncurrentielles. Les marchés publics portent fréquemment sur de grands projets assortis de budgets élevés, qui présentent des occasions lucratives de pratiquer la collusion et la corruption. Les exigences de la réglementation, en dictant des procédures particulières, peuvent rendre le processus extrêmement prévisible, ce qui crée des opportunités de collusion. Certains secteurs faisant souvent l'objet d'appels d'offres, comme le BTP ou la santé, peuvent être particulièrement exposés aux pratiques corrompues ou anticoncurrentielles. Enfin, le simple volume des biens et services achetés par l'État rend en lui-même la surveillance difficile et accroît la probabilité que le processus de passation des marchés soit victime de la collusion et de la corruption.

On peut avancer que les effets de la collusion et de la corruption sont plus problématiques pour les marchés publics que pour les marchés privés. En effet, les ressources perdues du fait de la distorsion du processus de passation des marchés publics représentent un gaspillage des deniers publics. La perte qui en résulte en termes d'infrastructures et de services publics, que ce soit sur le plan de leur qualité ou de leur diversité, exerce ses effets les plus néfastes sur les couches les plus défavorisées de la population, parce que ce sont elles qui font le plus appel à l'offre publique de services et d'infrastructures. L'altération du processus de passation des marchés publics se fait au détriment de la démocratie et d'une bonne gouvernance publique, et elle entrave l'investissement et le développement économique. C'est ainsi que les déficiences du processus de passation des marchés publics produisent sur l'ensemble de l'économie un impact qui n'est pas celui des marchés privés.

3) La lutte contre la collusion et la lutte contre la corruption ne sont pas des objectifs qui s'excluent mutuellement : les deux devraient être menés de front pour mieux protéger le

processus de passation des marchés publics. La prévention de la collusion et de la corruption faisant parfois appel à des méthodes concurrentes, des arbitrages peuvent être nécessaires pour atteindre efficacement ces deux objectifs. Ainsi, tandis que la transparence est indispensable à la prévention de la corruption, il faut éviter d'imposer une transparence excessive ou superflue.

La prévention de la collusion et la lutte contre la corruption sont deux aspects nécessaires de toute stratégie d'ensemble visant à protéger l'intégrité du processus de passation des marchés publics : il faut s'assurer qu'aucune partie à une transaction portant sur un marché public n'agit à l'encontre de l'objectif visant à obtenir la meilleure utilisation possible des deniers publics. Ces deux aspects de la prévention sont généralement mis en œuvre au sein de cadres juridiques distincts mais en grande partie compatibles. De plus, comme ces problèmes se renforcent mutuellement, si l'on réduit les risques de voir se produire l'une de ces infractions, on abaisse aussi la probabilité que l'autre survienne.

Au niveau opérationnel, toutefois, les bonnes pratiques appliquées pour éviter la collusion et la corruption peuvent être différentes. Si l'on prend l'exemple du schéma adopté pour les adjudications, de petits appels d'offres réguliers ont tendance à faciliter la collusion, tandis que les grands appels d'offres généraux peuvent favoriser la corruption. Une différence notable à cet égard réside dans le rôle et l'importance de la transparence dans le processus. Le principe de transparence – qui se rapporte à la disponibilité des informations sur les marchés à pourvoir, les règles de procédure, la prise de décision ainsi que la vérification et l'application des règles – est d'une importance critique pour prévenir la corruption. Dans certains cas, cependant, la transparence n'est pas compatible avec la nécessité d'assurer un degré maximal de concurrence dans le processus. L'exigence de transparence peut se traduire par la diffusion inutile d'informations commercialement sensibles, ce qui permet aux entreprises d'aligner leurs stratégies et facilite ainsi la formation et la surveillance de cartels d'entente. La transparence peut aussi rendre prévisible une procédure de passation de marchés, ce qui favorise encore davantage la collusion.

Il peut en résulter des tensions, du fait que la prévention de la collusion et de la corruption dans la passation des marchés publics repose parfois sur des méthodes concurrentes, ce qui peut nécessiter des arbitrages quant à la manière d'atteindre ces deux objectifs. Ainsi, tandis que la transparence est indispensable à la prévention de la corruption, il faut éviter d'imposer une transparence excessive ou superflue pour ne pas favoriser la collusion. Des incertitudes demeurent toutefois sur la nature des informations qui peuvent faciliter la collusion, et il serait souhaitable de mener de plus amples recherches sur cette question. Néanmoins, une bonne conception des procédures peut déjà faire beaucoup pour améliorer l'efficacité de la passation des marchés et atténuer ces inconvénients. Par exemple, les règles des appels d'offres peuvent imposer de ne publier que les informations concernant les offres gagnantes, sans divulgation de l'identité des soumissionnaires. Les procédures ne doivent pas fournir aux participants des informations sensibles sur les actions des autres soumissionnaires mais elles doivent néanmoins permettre à des organismes publics indépendants de contrôler les décisions prises par les fonctionnaires responsables.

4) La coopération entre les divers organismes chargés de la lutte contre la collusion et la corruption dans la passation des marchés publics est d'une importance capitale pour que la stratégie d'ensemble soit cohérente, pour qu'elle soit pleinement appliquée et pour que, de plus, les infractions fassent l'objet de poursuites efficaces.

Les cas de collusion et de corruption sont souvent traités et sanctionnés par des organismes nationaux distincts : la collusion relève généralement de l'autorité de la concurrence, tandis que la corruption est du domaine du ministère public ou d'organes spécialisés dans la lutte contre la corruption. Cependant, étant donné que la collusion et la corruption se renforcent mutuellement et que ces comportements sont souvent concomitants, la méthode la plus efficace pour préserver l'intégrité du processus de passation des marchés publics repose sur une coopération entre les différents organes compétents, qu'elle prenne la forme d'un protocole d'accord officiel, d'une obligation de notification ou d'autres mécanismes.

Une approche coordonnée présente des avantages considérables. Ainsi, des indices de collusion peuvent être mis au jour lors d'une enquête sur un cas de corruption, et vice versa. S'il existe une politique d'échange de données, cette information sera alors portée à l'attention de l'organe d'intervention approprié. L'échange de preuves, lorsqu'il est compatible avec les règles nationales en la matière, facilite en outre le travail des organes d'intervention (le plus souvent, l'autorité de la concurrence) qui ont des pouvoirs plus limités que le ministère public ou d'autres services de la justice pénale. La mise en place d'une politique officielle de coopération peut contribuer, de manière plus générale, à ce que l'ensemble des organes d'application des lois aient une meilleure connaissance des pratiques illicites dans la passation des marchés publics. Ce type de coopération peut donc contribuer utilement à contrer les effets néfastes du cumul de la collusion et de la corruption à l'encontre de la passation des marchés publics. Dans certains pays, un seul organe est chargé de la lutte contre la collusion et la corruption, ce qui internalise cette coopération. Une approche combinée n'est pas absolument nécessaire à l'efficacité d'une stratégie de protection des marchés publics mais, quelle que soit la structure du mécanisme de coopération utilisé, elle devrait au minimum assurer i) une large couverture de toutes les formes de malversations dans la passation des marchés publics, et ii) l'efficacité des poursuites contre les infractions effectivement constatées.

Les instances d'intervention devraient également chercher à établir des relations de collaboration avec les fonctionnaires qui traitent eux-mêmes les dossiers de passation des marchés publics. Une telle collaboration présente un double avantage. Elle a d'une part un effet éducatif, en sensibilisant les fonctionnaires aux possibilités et aux indices de collusion, et d'autre part elle alerte les agents des conséquences qu'entraînerait leur participation à des pratiques illicites. Par ailleurs, la coopération ouvre des voies de communication entre les agents chargés des marchés publics et les services de répression, ce qui favorise l'efficacité des poursuites dans les cas présumés de collusion ou de corruption.

5) Outre le cadre existant que constituent le droit de la concurrence, le droit pénal et la réglementation des marchés publics, divers mécanismes plus spécialisés ont été mis au point pour préserver et améliorer l'intégrité du processus de passation des marchés publics. Ces techniques doivent néanmoins trouver un équilibre entre les exigences parfois contradictoires de la prévention de la collusion et de la corruption, et réussir à tenir compte de ces deux objectifs.

Outre l'application du droit général de la concurrence, des dispositions de la justice pénale et des règles concernant les marchés publics, diverses méthodes permettent de préserver et d'améliorer

spécifiquement l'intégrité du processus de passation des marchés publics. Ces mécanismes sont notamment les suivants.

- *L'ouverture des marchés nationaux à la concurrence internationale*, qui accroît le nombre de soumissionnaires participant aux appels d'offres.
- *La révision du format des adjudications*, en vue de maximiser la transparence sans pour autant révéler des informations commercialement sensibles. De manière générale, la remise des offres sous pli scellé donne moins prise à la collusion que les appels d'offres ouverts ou les enchères dynamiques. Si les négociations individuelles avec les fournisseurs sont plus susceptibles d'être entachées de corruption ou de favoritisme que l'appel à la concurrence, elles constituent néanmoins dans certaines circonstances l'outil de passation de marchés le plus efficace.
- *La passation de marchés par voie électronique*, c'est-à-dire l'organisation des appels d'offres sous forme électronique par l'intermédiaire d'un portail sur Internet. Il faut veiller à ce que la procédure électronique ne facilite pas en elle-même la collusion, d'autant plus que l'élimination de toute trace du processus sur papier ne permet plus de fournir la preuve d'une entente entre soumissionnaires.
- *L'attestation d'absence de collusion*, qui exige des soumissionnaires qu'ils certifient avoir établi le prix de leur offre en toute indépendance par rapport aux autres candidats. Ces attestations non seulement servent à rappeler aux participants la teneur de la législation existante, mais elles les engagent aussi à certifier qu'ils se sont conformés aux règles ; elles peuvent être particulièrement utiles dans les situations où les soumissionnaires sont peu conscients du fait que la législation nationale interdit la corruption et la collusion. La poursuite en cas de violation de ces attestations peut aussi être envisagée en l'absence de preuve d'un accord qui rende impossible d'estimer la violation antitrust.
- *L'éducation* des agents de la fonction publique, des entreprises et de la société civile, considérée comme particulièrement utile dans les économies où les règles interdisant la collusion ou la corruption dans la passation des marchés publics sont relativement récentes ou peu respectées.
- *Les outils d'analyse de données*, permettant par exemple de comparer des bases de données publiques pour établir des indicateurs de corruption ou d'activité anticoncurrentielle.
- *Les mécanismes spécialisés d'examen de l'attribution des marchés publics*, grâce auxquels les participants éliminés qui soupçonnent des anomalies dans une procédure peuvent faire appel de la décision d'adjudication devant un tribunal spécialisé. Si ces mécanismes contribuent à repérer des cas isolés de corruption ou de collusion, ils ne sont généralement pas adaptés pour détecter des schémas de corruption ou de collusion sur un grand nombre de marchés.
- *L'audit* des procédures de passation des marchés publics, qui peut être mené en interne par un service distinct de l'organisme public concerné, ou à l'extérieur, par une entité publique indépendante ayant des compétences d'audit spécifiques.

6) Les sanctions punissant la collusion ou la corruption dans les marchés publics comprennent des amendes et des peines de prison, mais aussi des pénalités plus spécialisées comme l'interdiction de participer à de nouveaux appels d'offres publics. Un facteur clé de dissuasion est la perspective crédible de voir de tels actes découverts et poursuivis, associée à des sanctions suffisamment sévères. L'instauration d'une « culture de la conformité » devrait toutefois être un objectif majeur des instances de répression.

La lutte contre la collusion et la corruption dans la passation des marchés publics doit s'accompagner d'une menace crédible de voir les faits découverts et punis, ainsi que de sanctions sévères lors de la condamnation. Les contributions des pays indiquent que les sanctions généralement imposées pour corruption sont des amendes et des peines de prison, ainsi que le licenciement dans le contexte d'une entreprise. Les soumissions concertées font habituellement l'objet des mêmes sanctions que les autres types d'ententes injustifiables, c'est-à-dire des amendes et, selon les pays, des peines de prison. De nombreux pays ont mis en place des programmes de clémence qui accordent une immunité ou une réduction des amendes aux entreprises qui révèlent l'existence d'ententes et participent aux enquêtes qui s'ensuivent.

Il existe différentes sanctions spécifiques au contexte des marchés publics. Dans de nombreux pays, une condamnation pour participation à des actes de collusion ou de corruption dans le cadre des marchés publics entraîne l'interdiction de participer, pendant un certain temps, à d'autres appels d'offres. Cette sanction peut toutefois, surtout dans les petites économies, avoir l'effet paradoxal de faire tomber le nombre de soumissionnaires qualifiés au-dessous du niveau concurrentiel. Dans les pays qui ont recours aux attestations d'absence de collusion, les poursuites pour fausse déclaration offrent un moyen simple de pénaliser la collusion dans les appels d'offres. Bien que les contributions mentionnent la possibilité de procès civils contre des fonctionnaires corrompus ou des entreprises accusées de collusion, des actions quasiment privées de ce type sont moins utilisées dans le contexte public.

Certaines entreprises considèrent les amendes pour corruption ou comportement anticoncurrentiel comme un simple coût opérationnel. La contribution du Royaume-Uni laisse penser que la mauvaise publicité faite à l'entreprise et l'éventualité de l'interdiction d'exercer certaines fonctions en entreprise font plus de tort et sont plus dissuasives. De manière plus générale, si l'élimination totale de la collusion et de la corruption est un objectif très difficile à atteindre quel que soit le système juridique, le développement d'une « culture de la conformité » est un pas important vers la limitation de tels comportements. Comme les entreprises soumissionnaires sont souvent les mieux placées pour constater des irrégularités dans la passation des marchés publics, leur participation à la lutte contre la collusion et la corruption peut porter ses fruits, tant sur le plan de la dissuasion que de la détection.

7) La stratégie optimale pour lutter à la fois contre la collusion et contre la corruption dans les marchés publics paraît nécessiter une triple approche : élaboration de règles de bonnes pratiques pour la passation des marchés publics ; vigoureux efforts de sensibilisation ; et stricte application de la législation à l'encontre de tous les cas de corruption et de collusion.

Au vu des contributions, la stratégie optimale pour préserver l'intégrité dans les marchés publics est une triple approche, associant l'élaboration de règles de bonnes pratiques, de vigoureux efforts de sensibilisation, et une stricte application de la législation.

Une action coordonnée en vue d'élaborer des règles de bonnes pratiques aux fins de la passation des marchés publics peut tirer parti de l'expérience directe des acteurs concernés pour formuler des règles équilibrées et efficaces qui soient applicables à ce domaine complexe. Le partage

d'expérience peut se dérouler à trois niveaux au moins : dans le cadre d'une stratégie de coopération entre les entités chargées de faire respecter la réglementation au niveau national ; par le biais des réseaux transnationaux des instances nationales chargées de l'application des lois ; et au travers des travaux d'organisations internationales telles que l'OCDE.

En ce qui concerne les actions de sensibilisation, une large gamme de destinataires potentiels peut être visée par des campagnes d'éducation : les agents de la fonction publique ; les entreprises ; les médias ; et la collectivité dans son ensemble. Si de telles campagnes sont efficaces, elles peuvent susciter un changement de culture ayant des effets sur les pratiques de l'État et amener l'opinion publique à soutenir les actions de répression. Plus généralement, les entités chargées de faire respecter les dispositions en vigueur devraient repérer les règles et les procédures qui facilitent ou encouragent la collusion ou la corruption dans les marchés publics et plaider en faveur de leur suppression. Le monde des affaires a également un rôle à jouer dans ce processus, en sensibilisant le personnel des entreprises et en mettant sur pied des mécanismes internes visant à assurer le respect de la réglementation.

Pour ce qui est de veiller au respect des règles, ces procédures devraient obéir aux principes déjà décrits – la perspective crédible de voir les comportements illicites découverts et condamnés, des sanctions sévères, des mécanismes de détection spécialisés et la coopération entre les organismes concernés. De plus, les mesures de répression devraient s'appliquer également aux fonctionnaires ayant la responsabilité directe des marchés publics, de manière à créer une synergie entre tous les organes de l'État chargés de la protection du processus de passation des marchés publics.

INTRODUCTORY PAPER
BY THE SECRETARIAT

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

INTRODUCTORY PAPER BY THE SECRETARIAT

Introduction

1. In many countries large public procurement contracts raise serious issues of collusion, corruption and favouritism. Given the large sums involved, the incentives of bidders to collude and the temptation facing public officials can be substantial.

2. This paper will briefly discuss some of the complementarities and trade-offs that the fight against collusion and corruption presents to policy makers. In particular, this paper will briefly look at the following issues:

- The importance of public procurement in national economies and the relationship between collusion and corruption in public procurement;
- How the degree of transparency of the tender process may affect the likelihood of corruption and collusion;
- How the choice of bidding procedure can influence the likelihood that collusion or corruption could occur during the procurement process;
- The benefits that could be achieved by fighting collusion and corruption in public procurement in a co-ordinated way;
- Institutional frameworks that can facilitate the detection, investigation and prosecution of bid rigging and bribery in public procurement.

3. Annex I to the Issues Paper lists a suggested bibliography related to the issues discussed in the paper.

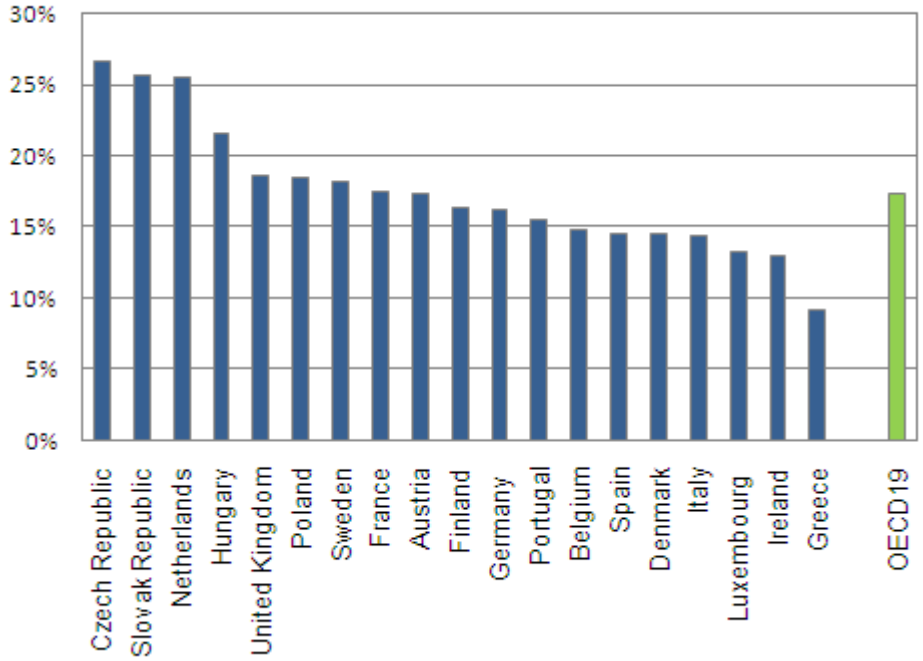
4. Annex II to the Issues Paper includes the issues and questions listed in the letter calling for country contributions of 1 December 2009 [DAF/COMP/GF(2009)14].

1. Collusion, Corruption and Public Procurement

5. The performance of public procurement markets has significant implications for the effectiveness of governance in both developed and developing countries. As the statistics below indicate, public procurement accounts for more than 15% of Gross Domestic Product (GDP) in OECD countries. The share of GDP is even higher in non-OECD countries.[1] Moreover, procurement often involves goods and services with substantial economic and social significance, including transportation infrastructures, hospitals and health services, and education supplies.

[1] OECD (2005), Public Procurement in OECD, Fighting Corruption and Promoting Integrity in Public Procurement, Paris.

Figure 1. Public Procurement as a percentage of GDP (2006)



Source: OECD, 2006

6. The fundamental purpose of public procurement is to obtain goods and services at the lowest possible price or, more generally, achieve the best value for money. Ensuring that public procurement markets function effectively requires policy makers to address two distinct but inter-related challenges: (i) promoting effective competition among suppliers and (ii) ensuring integrity in administrative processes. Unfortunately, the potential for both collusion and corruption in public procurement exists in all countries and in all sectors. Moreover, collusion and corruption are often associated with other crimes, such as money laundering, accounting fraud, tax evasion and extortion.

7. The size of public tenders can generate strong competition but firms may seek to escape competitive pressures through collusion and bribery:

- *Collusion* is a relationship between bidders which restricts competition and harms the public purchaser. Through bid-rigging, the price paid by the public administration for goods or services is artificially raised. These practices have a direct and immediate impact on public expenditures and, therefore, on taxpayers;

- *Corruption* involves a vertical relationship between one or more bidders and the procurement official. It is first and foremost a principal-agent problem where the agent (the procurement official) enriches himself at the expense of his principal, the government purchaser (or the public more generally). Corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or for other rewards. As public procurement accounts for a large share of national economies, the potential of corruption to damage a national economy is significant.

8. Collusion and corruption affect the efficient allocation of public contracts. By definition, they involve an allocation of contracts which would have been obtained through the competitive process. Collusion implies that public contracts are allocated to the firm chosen by the cartel. Corruption leads to the allocation of the contract to the firm who has offered the bribe. In this sense, corruption implies a distortion of competition. Thus, while fighting collusion and fighting corruption are separate policy challenges, they are often highly complementary. This is the case, for example, when the procurement official is paid to organise and monitor a bid rigging conspiracy.

Box 1. Examples of Cases Involving Collusion and Corruption

Hungary – In recent years, the Hungarian road construction market has witnessed a series of bid rigging cases. So far, the biggest antitrust fine (approximately EUR 27.7 million) was imposed in a bid rigging case involving highway construction. The contract was valued at EUR 630 million. The Hungarian competition authority found that the bidders had previously agreed among them on who was going to win the tender and also on the competing bidder to which the general contractor would offer a subcontract in the construction works. The press has repeatedly reported that road construction projects may have provided an ideal environment for corruption, and suspected that the illegal gains from bid rigging were a major source for financing political campaigns.

Japan - In 2005, the Japanese Fair Trade Commission (JFTC) ordered 45 Japanese steel bridge builders to stop rigging bids for government contracts. More than 70% of the steel projects for steel bridges given out between 1999 and 2004 by the Japan Highway Public Corporation were won by 47 companies which belonged to two bid-rigging associations. Their bids were almost exactly the same as the public corporation estimates. In one of the largest bid rigging cases in Japanese history, the JFTC also ordered the Japan Highway Public Corporation to improve its bridge contract procurement practices, alleging that some 20 former public officials had been involved in bid-rigging practices to secure future jobs with the 45 companies. According to one tally nearly 60% of former bureaucrats involved in road work got jobs after they retired with one of the top 10 corporate bodies that do road work.

France – Another example is the case of three major French construction companies, Bouygues, Suez-Lyonnaise and Vivendi which were the subject of a major investigation for a scandal which was described as “an agreed system for misappropriation of public funds” (Le Monde, 10 Dec 1998). The three companies participated in a corrupt cartel over building work for schools in the Ile-de-France (the region around Paris) between 1989 and 1996. Contracts worth over four billion Euros were shared out by the three major French building companies. The system also involved political corruption: a levy of 2% on all contracts was paid to finance the major political parties in the region.

2. The Role of Transparency in Public Procurement

9. Transparency is crucial for sound procurement. Transparency is understood as the availability of information on the procurement decision-making process. It refers not only to the external publicity of the procurement event but also to the information that is disclosed to the bidders during the tender or after.

10. The effect of transparency on the procurement process is two-fold:

- An opaque and complex procurement system provides an ideal environment for corruption to thrive. Transparency is therefore among the most effective deterrents to corruption. Transparent procedures allow a wide variety of stakeholders to scrutinise public officials’ and contractors’ decisions and performance. This scrutiny helps keeping officials and contractors accountable;

- Transparency alone, however, does not guarantee an efficient procurement process. Care must be taken to ensure that the enhancement of transparency of the procurement process for purposes of fighting corruption does not increase the scope for anti-competitive practices. A procurement system based on enhanced transparency can increase the scope for collusion between bidders, if bidders are given the opportunity to know the competitors’ bidding strategy and to align to it to the detriment of competition.

2.1 Relationship between Transparency and Corruption

11. Transparency requirements help to root-out and deter corruption by requiring information on the public procurement tender to be made publicly available. Procurement rules may increase the degree of transparency of the procurement system by requiring the basic facts and figures; award criteria and weights; the identities of the winning bidder and other bidders; and the terms offered by individual bidders, to be made publicly available. Introducing transparency into the procurement process deters corruption in various ways:

- Publicised and transparent procedures allow scrutiny of public officials' decisions and, thereby, keep public officials accountable. A high degree of transparency reduces the information asymmetries and facilitates monitoring, supervision and control of the procurement process. It also favours public control when information is publicly available;

- Transparency makes bidders accountable and facilitates detection and punishment of malfeasance. Transparency also increases the likelihood that other bidders denounce corrupt activities, which sends positive signals about trust in the process;

- Transparency helps bidders to avoid the prisoner's dilemma in cases where it is not known if other bidders are bribing or not. Where the procedure is not transparent, the prevailing strategy would be to bribe or to leave the tender, both of which would result in a non-efficient procurement outcome;

- Finally, transparency also makes it easier for government auditors to uncover illegal conduct.

2.2 Relationship between Transparency and Collusion

12. The issue of whether increasing transparency in public procurement markets helps achieve an effective and efficient procurement system deserves more attention. Improving transparency reduces the procurement official's discretion and allows the controlling bodies to monitor the process more easily. Thus increased transparency is likely to diminish corruption. However, care must be taken that increasing transparency in order to decrease corrupt practices does not increase the scope for anti-competitive practices.

13. Transparency is one of the factors required for a sustainable collusion. In order to reach terms of co-ordination, to monitor compliance with such terms and to effectively punish deviations, companies need detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is the essence of competition, can in itself eliminate normal competitive rivalry. This is particularly the case in highly concentrated markets (which is the case with most public procurement markets), where increased transparency enables companies to better predict or anticipate the conduct of their competitors and thus to align to it, expressly or tacitly.

14. In the context of public procurement tenders, which are normally attended by a limited number of suppliers, the effects of information exchanges due to a transparent procurement process raises significant competition concerns. Information on the procurement outcome revealed by the auctioneer can facilitate collusion. If the auctioneer, for example, reveals the identity of the bidders and the prices offered, that allows the cartel to work more efficiently, as that information increases the ability of cartels to detect possible deviations from the bid rigging agreement. In other words, transparency makes policing of the agreement more easy. In general, the less information provided on the tender outcome, the more difficult it is to rig bids successfully.

2.3 Policy Considerations

15. In designing transparency rules and procedures, serious consideration should be given to establishing clear and precise disclosure requirements for various types of information. Rules also need to address when and to whom the information is made available. A number of other methods could be used to make collusion harder, while safeguarding the need to reduce the risk of corruption:

- Only information on the winning bid should be released, while information on the losing bids could be made available only to issuers of tenders and controllers, and not to competitors generally;

- Because of the potentially destabilising effect of non-identifiable bidders on bid rigging, the procurement official might consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers, and the number of bidders remaining in the bidding process;

- The procurement official might allow bids to be telephoned or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe;

- The procurement official might allow a bidder to submit more than one bid under different bidder numbers, or under different identities;

- The timing of the disclosure of sensitive information (such as the losing bidders' identity and their bids) could be delayed to ease the effects of such disclosure on collusion.

3. Bidding Procedures and the Related Risks of Collusion and Corruption

16. The issues of the appropriate degree of transparency in the procurement process are closely related to the choice of bidding procedure. This is an important and delicate exercise, as various bidding procedures have different degrees of transparency which may expose them to risks of either collusion or corruption. The choice of the "right" bidding model (or, better, the most suitable bidding model given the circumstances of the procurement) is therefore the starting point of any attempt to achieve efficiency in public procurement.

3.1 Dynamic or Open Tenders and Sealed-Bid Tenders

17. At a *dynamic (or open) tender*, bidders gather at the same time and in the same place to submit multiple bids. The contract is awarded by the procurement entity to the best bidder. In dynamic auctions, bidders can observe their competitors' bidding behaviour at the tender, which facilitates co-ordination at the tender and the monitoring of the agreed contract allocation. The longer a dynamic tender, the easier the co-ordination among bidders since they have a higher number of opportunities of agreeing on allocating contracts. Moreover, a bidding system where bids are publicly disclosed with full identification of each bidder's price and specifications is the ideal instrument for the detection of price-cutters. It therefore provides the opportunity for colluders to punish firms which deviate from a collusive agreement.

18. If the risk of anti-competitive conduct is significant, the procurement official should preferably use a *sealed-bid tender* model which minimises the bidders' ability and incentives to collude. In sealed-bid tenders each bidder submits one single "best and final" offer, typically in writing, and the bid is kept secret from the other bidders. In a sealed-bid tender, a collusive outcome is possible but it is more difficult: effective prior communication between the conspirators prior to the tender is required and incentives to

cheat on a collusive understanding are significantly higher because the ability to punish deviations is reduced, if not eliminated.

19. From an anti-corruption perspective, however, competitive bidding systems (such as dynamic tenders) are perceived as offering fewer opportunities for procurement officials seeking to favour a specific firm. Usually competitive processes are subject to various levels of supervision with external bodies evaluating bids for quality, specificity and value for money. Furthermore, firms that are not awarded a contract theoretically have the opportunity to call public and judicial attention to their concern about potential irregularities.

3.2 Direct Negotiations and Framework Contracts

20. From a competition perspective, there may be situations where it is not necessary to adopt some form of competitive bidding process to achieve the most efficient procurement outcome. These are situations where *individual negotiations* with a limited number of suppliers may yield the best value for money. This could occur, for example, in the following circumstances:

- If the costs of organising and holding a tender are high and outweigh its expected benefits;
- If the likely bidders and, indeed the likely lowest-cost bidder, may already be known to the procurer. In this context, it may be more efficient for the procurer to approach the least-cost bidder directly to negotiate a price (perhaps with the threat of competitive tendering if it is felt necessary);
- If it is not possible to contractually specify in advance all the elements of the services to be supplied, as may be the case with complex projects which are difficult to define in advance and where there is significant scope for adaptations as the project develops;
- If other policy reasons or other explicit reasons exist, which do not require the procurer to select the lowest-cost supplier, i.e. if diversity of supply is essential to ensure continuity of service;
- If secrecy considerations prohibit the public solicitation of bids; this may be the case where national security interests are at stake;
- If the number of potential bidders is very small and a single bidder may have very significant market power; in this case, a tender will not yield an efficient outcome and it may be appropriate to adopt more sophisticated contracting approaches to procurement.

21. From a corruption perspective, however, non-competitive procurement contracts are considered a source of concern because of their lack of transparency and democratic oversight. Procurement officials authorised to enter into such contracts have greater power over which company receives the most lucrative contracts. Without appropriate supervision, individual preferences can easily become part of the official's final decision. From the vendor's perspective, receiving lucrative contracts without being subject to the discipline of competition is highly desirable and firms can see benefits of eliminating the risk of losing the contract by influencing and/or bribing the procurement official.

22. Similarly, procurement officials might find it more effective to use *framework contracts*, i.e. standing agreements used as a basis for purchasing goods and services from pre-qualified firms meeting a number of quality standards. Again framework agreements can save time and resources by eliminating numerous bidding processes, hence reducing the overall costs for procuring the goods or services.

However, the use of framework agreements may raise ethical concerns, particularly if prices are not fixed before frameworks are drawn up. In this case, the agreement is left opened to the risk of discrimination and favouritism.

3.3 Policy Considerations

23. Given that the many different forms of procurement models are not all equal from the point of view of fighting collusion and corruption, it is important that procurement officials are aware of the risks attached to certain bidding models. Intuitively, *dynamic (or open) tenders* are more susceptible to collusion than *sealed-bid tenders*. Similarly, *private negotiations* and *framework agreements* with potential suppliers are less likely to lead to collusion than public tender processes. However, when it comes to fighting corruption, sealed-bid and non-competitive procurement are considered to be a potential source of concern due to a lack of transparency, limited democratic oversight and a high risk of corruption.

24. The choice of the bidding model largely depends on the circumstances of the procurement. If the risk of collusion is limited (because, for example, there are many potential suppliers) an open tender would be preferable. If the risk of collusion is significant, then it would be preferable to use a sealed-bid system. If the risk of both collusion and corruption is significant, procurement officials should still consider using a sealed-bid tender, but make the tender "corruption proof". In this case, the use of electronic or on-line bidding systems, for example, could ensure that both the risks of collusion and corruption are limited. Electronic bidding allows for a dynamic tender to take place, and at the same time ensures that a record is made of each bid and of each the person who had access to the bid. This prevents corrupt procurement officials from having had improper access to the bids before the bidding window is closed and the possibility of influencing the bidding process for personal gain. Similarly, to avoid improper manipulations, the sealed bids could be opened in public, after the closure of the bidding window, and a requirement that no bid can be destroyed and replaced could be foreseen. Alternatively, technology which makes it impossible for the procurement official to tamper with the bids could also be used.

4. Fighting Malfeasance in Public Procurement – How to Prevent and Punish Corruption and Collusion?

25. Public procurement laws and regulations are designed to promote competition between bidders and secure the best value for public money. The fight against bid rigging and bribery should be an integral part of this process. National experiences show that there are many ways to fight malfeasance in the procurement process, but in general this can be done in three broad ways:

1. Increasing the awareness of public administrations and procurement officials on the risks of corruption and collusion in public procurement. Officials should be trained to apply adequate rules and control mechanisms to prevent and detect malfeasance. The use of guidelines and best practices can be particularly useful in this area where a multi-disciplinary approach can secure important results. Training should aim at improving understanding among officials of the costs that such practices have on public resources and on the benefits of ethics for the contracting authority and its officials. Training should focus on detecting signs of collusion or corruption and should also encourage officials to come forward and report instances of corruption or collusion.

Box 2. The OECD Bid Rigging Guidelines

The OECD has long recognised the vital roles that competition and procurement agencies play in fighting hard core cartels in public procurement. In 2009, the Competition Committee developed a specific methodology to help governments improve public procurement by fighting bid rigging. The OECD Guidelines for Fighting Bid Rigging in Public Procurement assist procurement officials to reduce the risks of bid rigging through careful design of the procurement process and to detect bid rigging conspiracies during the procurement process. The purpose of the Guidelines is to help procurement officials to identify:

- Markets in which bid rigging is more likely to occur so that special precautions can be taken;
- Methods that maximise the number of bids;
- Best practices for tender specifications, requirements and award criteria;
- Procedures that inhibit communication among bidders;
- Suspicious pricing patterns, statements, documents and behaviour by firms, that procurement agents can use to detect bid rigging.
- More information on the OECD Bid Rigging Guidelines can be found at www.oecd.org/competition/bidrigging.

OECD Principles for Enhancing Integrity in Public Procurement

The OECD has developed a set of Principles for Enhancing Integrity in Public Procurement. The Principles were approved as a Recommendation by the OECD Council in October 2008. This instrument provides guidance to policy makers on how to enhance integrity in public procurement. The Principles are anchored around 4 pillars: (i) Transparency; (ii) Good management; (iii) Prevention of misconduct, compliance and monitoring; and (iv) Accountability and control. The Principles support the implementation of international legal instruments developed within the framework of the OECD, as well as other organisations such as the United Nations, the World Trade Organisation and the European Union.

To help countries implement the Principles for Integrity in Public Procurement, the OECD has developed a compilation of existing tools used in member and non-member countries (the "Toolbox"). The aim of the Toolbox is to support public officials in designing and developing guidance and procedures at various points in the procurement cycle. The Toolbox is currently undergoing a consultation process with a broad group of key stakeholders from both OECD member and non-member countries. They include the national and sub-national governments, the business community, trade unions and civil society organisations.

More information on the OECD Principles for Enhancing Integrity in Public Procurement can be found at www.oecd.org/gov/ethics/procurement.

2. Establishing national (and international) networks of experts from procurement administrations, competition authorities and public prosecutors to improve the exchange of information and experiences that can enhance the detection and prevention of corruption and bribery. Networks could also be used to help officials better understand the notions of bid rigging and corruption: how they come about, the importance of tackling them, how to detect them, and the steps that can be taken to prevent bid rigging and corruption from occurring.

Box 3. Examples of National Co-operation Networks

Chile – In 2008, the Fiscalia National Economica (the Chilean Competition Authority) established an Interagency Taskforce for Fighting Bid Rigging to increase the effectiveness of detecting illegal practices in public procurement. The taskforce includes representatives of the independent body in charge of controlling the legality of the administration's acts, the (E-)Public Procurement Bureau, the Ministry of Public Works, the Council for the Internal Auditing of Government and an association of officers and staff in charge of procurement areas of different public bodies. The Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group.

South Africa - In July 2009, the South African government established a Ministerial Task Team charged with inter alia preventing fraud and corruption in public procurement. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre. Although there is no specific mention for bid-rigging, the Competition Commission will interact with the taskforce and advocate for special measures with respect to collusion in public procurement. The Commission is also committed to working with the National Treasury which is the custodian of public procurement policy.

Singapore – Recognising that often collusion and corruption can occur together, the Competition Commission of Singapore (CCS) maintains close working relationships with the Corrupt Practices Investigation Bureau (CPIB), the agency which investigates and aims to prevent corruption in the public and private sectors in Singapore. In particular, the CCS has established a protocol with CPIB that addresses case allocation and administration between the two agencies and ensures clarity and efficiency in case management.

3. The most effective deterrent for collusion and corruption is to develop clear best practices, rules and regulations on detecting collusion and corruption in procurement processes, coupled with strong enforcement. Experiences in both anti-corruption and anti-collusion polices clearly indicate that high penalties (both civil, criminal and administrative) have proved to be the most effective means to fight bribery and collusion in public procurement. In the area of public procurement, however, alternative tools could be adopted to further discourage firms and public officials from engaging in these practices. In particular, two seem to have yielded positive results: self-certifications and disqualification orders or blacklisting.

Box 4. Self-certifications

Certifications of compliance with the law by bidders and by procurers alike have proved to be very useful. In some countries, for example, bidders are required to submit a Certificate of Independent Bid Determination (CIBD) as a requirement for bidding. CIBDs typically require each bidder to certify under oath that it has not agreed with its competitors about bids, that it has not disclosed bid prices to any of its competitors and that it has not attempted to convince a competitor to rig bids. CIBDs not only inform bidders about the illegality of bid rigging, but they also make prosecution of bid riggers easier, and they add additional penalties, including possibly criminal penalties for the filing of a false statement to the government. Similarly, in some countries such as the United States, government officials involved in procurement are required to certify that they have no knowledge of or did not improperly release procurement information and that they have attended specific training courses. In some cases, they are asked to provide on a voluntary basis personal financial information to rule out possible conflict of interests.

Disqualification Orders

Next to the conventional civil, criminal and administrative sanctions, some countries have adopted specific sanctions for illegal conduct in public procurement. In particular, sanctioning corruption and bid rigging through a denial of access to future bidding opportunities – also known as disqualification or debarment – has received particular attention. Views on how to implement these sanctions are mixed. On the one hand, debarment can be a serious weapon to achieve specific and general deterrence. On the other hand, as a systematic (and automatic) debarment policy bears risks for collusion in markets where there are already few potential suppliers. These drawbacks could be avoided if the disqualification order would concern individuals involved in the conspiracy and not their company. Debarment of individuals reduces incentives to engage in illegal conduct, but allows the company to continue to participate in future procurement opportunities. Other sanctions, such as monetary sanctions, could still be imposed to the companies for the breach of competition or ethical rules by their employees.

4.1 The Role of Competition Authorities and Competition Policy in the Fight against Corruption

26. Good laws for the financing of political parties, high ethical standards in the civil service, a satisfactory level of resources and technical expertise, as well as transparent information for controlling bodies are essential for fighting corruption. This requires strong working relationships between competition, corruption, and procurement authorities. By taking stock of existing working methods and concerns, competition authorities' advocacy programmes will be better able to respond to the joint challenges facing procurement agencies. Advocacy efforts by competition authorities (and indeed by procurement agencies) can also target private companies, particularly those who are frequently active in bidding markets. While this effort could be costly in terms of resources and time, it may have beneficial effects in the long-term. There are various ways this could be achieved, including the following:

- Firms could be required by the tender notice to adopt internal procurement compliance programmes as a condition for bidding in a public procurement tender. Such compliance guidelines could be written in co-operation with or approved by the competition authority;

- Another condition could be to require the individuals who are responsible for bidding to have attended regular briefings and programmes thereby encouraging knowledge of the penalties for collusion and corruption. Those programmes could be offered by officials of the various authorities concerned, including the competition and procurement agencies.

27. Beyond advocacy, an effective antitrust regime and vigorous antitrust enforcement can significantly contribute to reducing corruption in public procurements. It is well established that rents induced by a lack of competition can foster corruption. When a company enjoys a rent and its business is under the influence of a public official, the public official can reap some of the rent by surrendering his control rights in exchange for a bribe. Thus an increase in rents, even those originating from a restriction of competition, tends to increase corruption. This suggests that policies aimed at fighting corruption should not only reform the legal system to increase punishment for malfeasance or to increase remunerations of public officials to reduce their incentive to accept kick backs, but should also adopt measures to increase competition in the procurement process as a way of limiting the scope for corruption.

5. Finding the Most Effective Institutional Framework

28. In many countries the enforcement of antitrust laws (usually entrusted to the competition authority) is entirely unrelated to the enforcement of anti-corruption statutes (usually entrusted to the judiciary or anti-corruption body). The complementarities between corruption and anti-competitive practices noted earlier suggest that a lack of co-ordination unnecessarily diminishes the deterrent effect of both competition and anti-corruption law. Conversely, a co-ordinated approach is likely to increase the probability that objectionable practices are identified and it makes punishment of complementary corruption/collusion practices more effective. In the long run, a unified approach is likely to yield larger social benefits.

29. Systematic exchanges of information between various enforcement agencies and joint investigations are therefore highly recommended. In particular, it would seem wise to systematically open a competition investigation on procurement markets for which evidence of corruption has been found. In addition, it may be possible to control collusion and favouritism by designating procurement-oversight agencies. This may involve the creation of a separate supervisory body to monitor the procurement official's conduct and ensuring that the procurement process is not used to distort competition.

Box 5. The German Bundeskartellamt as Public Procurement Tribunal

In Germany, for example, the competition authority has three public procurement chambers which act as a public procurement review body (i.e. as an appeal court against decisions of public procurement agencies). The guiding principles of the Bundeskartellamt's public procurement tribunals are competition, transparency, non-discrimination and fair tendering procedures.

In Germany, public contracts principally have to be awarded under competitive conditions through a public tender in a transparent and non-discriminatory way. In principle the contract is awarded to the bidder submitting the economically most advantageous offer.

The three public procurement tribunals set up at the Bundeskartellamt, review, upon request, whether public contracting entities have met their obligations in the award procedure. The tribunals are entitled to take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected.

30. Some countries have enacted specific legislation aimed at fighting collusion when public procurement officials are directly involved in orchestrating the bid rigging. While the anti-competitive conduct of the firms involved is caught by the provision in the competition laws, the competition authorities generally lack enforcement tools against the illegal conduct of the public officials involved. This is often the case as corruption is considered in many countries a criminal offence, which is prosecuted under the general criminal law enforcement system. Japan, however, is an example of a country where the competition authority has some enforcement powers against the public officials involved in the bid rigging.

Box 6. The Japanese Involvement Prevention Act

In order to solve the recurring problem of the involvement of procurement officials in bid rigging, Japan enacted a new law in 2002 (the Act Concerning Elimination and Prevention of Involvement in Bid Rigging) which allows the Japanese Federal Trade Commission (JFTC) to take actions against the public officials involved in bid rigging (so-called "government-initiated bid rigging"). When the JFTC finds that of procurement officials have been involved in a bid rigging conspiracy, it enforces the Antimonopoly Act against the companies involved and at the same time it can request the head of the procurement institution involved to investigate the alleged misconduct by their employees and to take all necessary measures to eliminate their involvement in the bid rigging conspiracy. The adopted measure must be made public. In addition, if the investigation has confirmed the involvement of public officials in bid rigging, under the new law the administration is entitled to demand from the involved employees compensation for the damages caused.

6. Final Remarks

31. Given the significance of public procurement for national economies, it is important for governments to address the difficult issues arising from the interface between policies aiming at eliminating collusion and corruption in public tenders. Both practices generate significant damages for taxpayers and should be addressed in a co-ordinated fashion to maximise the deterrent effect of both anti-competition and anti-corruption laws. There may be difficult trade-offs between the two policies. As this introductory paper has identified, the desired degree of transparency of the procurement process is one of example of these difficult policy choices. Should governments opt for a maximum level of transparency to reduce the risks of corruption and keep public officials accountable? Or should they opt for a minimum level of transparency to limit the opportunities for bidders to engage in collusive practices? Should open and transparent procedures be favoured in every case over direct negotiations? These questions cannot be answered in the abstract and procurement officials should tailor their choices to the specifics of each tender.

32. Competition and anti-corruption authorities can be of great support in helping procurement officials finding the most appropriate balance. Improved national and international cooperation between the three sets of officials is therefore key to tackling collusion and corruption in public procurement. The use of guidelines and best practices, possibly reflecting experiences at an international level, alongside concerted information sharing information between the public officials involved can result in more efficient procurement. This in turn will deliver cost savings to governments and taxpayers, which can benefit economic development and growth in developed and developing economies alike.

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ANNEX II - QUESTIONS AND ISSUES FOR DISCUSSION

(From the letter calling for country contributions of 1 December 2009, DAF/COMP/GF(2009)14)

1. Size and policy objectives

- What fraction of your economy does public procurement account for?
- What are the principle policy objectives of public procurement?

2. Corruption

- What is the cost of corruption?
- What factors facilitate corruption? Do some factors appear to be more important that others?
- How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?
- Are firms required to certify during the procurement process that they have not bribed an official?
- What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.
- Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

3. Collusion

- What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?
- What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?
- What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?
- Does your country employ certificates of independent bid determination?
- When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

4. Fighting collusion and corruption

- What cases from your jurisdiction have involved both corruption and collusion in public procurement?

- Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

- What methods and techniques for fighting corruption would aid the fight against collusion?

- When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

5. Advocacy

- How do regulatory or institutional conditions help facilitate bid rigging and corruption?

- In what ways can competition authorities work to improve the efficiency of public procurement?

- What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

- When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

- Has your competition agency undertaken competition advocacy in this area?

- If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

NOTE LIMINAIRE DU SECRÉTARIAT

COLLUSION ET CORRUPTION DANS LES MARCHÉS PUBLICS

NOTE LIMINAIRE DU SECRÉTARIAT

Introduction

1. Les gros marchés publics soulèvent, dans beaucoup de pays, de sérieux problèmes de collusion, corruption et favoritisme. Étant donné l'importance des sommes en jeu, les incitations à la collusion peuvent être fortes pour les soumissionnaires de même que les tentations de corruption pour les agents publics.

2. La présente note examine rapidement quelques-unes des complémentarités et options qui s'offrent aux responsables de l'élaboration des politiques dans le cadre de la lutte contre la collusion et la corruption. Elle considère notamment les aspects suivants:

- L'importance des marchés publics dans les économies nationales et les relations entre la collusion et la corruption dans leur passation;
- Comment le degré de transparence du processus d'appel d'offres peut avoir un effet sur la probabilité de corruption et de collusion;
- Comment le choix de la procédure de soumission peut influer sur les risques de collusion ou de corruption pendant le processus de passation des marchés;
- Les avantages d'une lutte coordonnée contre la collusion et la corruption dans les marchés publics;
- Les cadres institutionnels qui peuvent faciliter la détection de la collusion et de la corruption dans les marchés publics ainsi que les enquêtes et les poursuites y afférentes.

3. L'annexe I présente la liste des documents portant sur les questions examinées dans la note qu'il est suggéré de consulter.

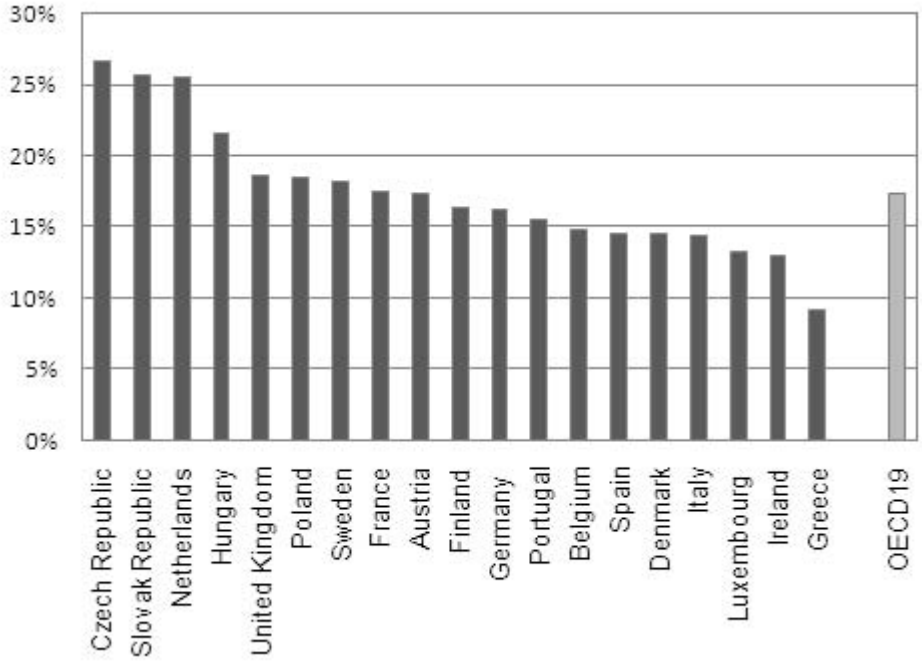
4. L'annexe II reproduit la liste des questions et problèmes à examiner qui figurait dans l'appel à contributions adressé aux pays le 1er décembre 2009 [document DAF/COMP/GF(2009)14].

1. Collusion, corruption et marchés publics

5. Le fonctionnement des marchés publics a d'importantes répercussions sur l'efficacité de la gouvernance, tant dans les pays développés que dans les pays en développement. Comme le montrent les statistiques qui suivent, les marchés publics représentent plus de 15 % du produit intérieur brut (PIB) des pays de l'OCDE. Ils constituent une part encore plus importante du PIB dans les pays non membres de l'Organisation[1]. De plus, ils concernent souvent des biens et services qui jouent un rôle économique et social important, tels que les infrastructures de transport, les hôpitaux et les services de santé, ainsi que l'enseignement.

[1] OCDE (2005), « Public Procurement » in *Fighting Corruption and Promoting Integrity in Public Procurement*, Paris.

Graphique 1. Parts des marchés publics dans le PIB (2006)



Source: OCDE, 2006

6. L'objet essentiel des marchés publics est d'obtenir des biens et services au plus bas prix possible ou, de manière plus générale, d'assurer une utilisation efficiente des deniers publics. Pour garantir un fonctionnement efficace de ces marchés, les autorités doivent atteindre concrètement deux objectifs distincts, mais étroitement liés: (i) promouvoir une concurrence effective entre les fournisseurs, et (ii) assurer l'intégrité des procédures administratives. Malheureusement, tous les pays et tous les secteurs sont vulnérables aux risques de collusion et de corruption dans les marchés publics. La collusion et la corruption sont, en outre, souvent associées à d'autres délits comme le blanchiment d'argent, la fraude comptable, la fraude fiscale et l'extorsion de fonds.

7. Lorsqu'ils portent sur de gros marchés, les appels d'offres publics peuvent susciter une forte concurrence à laquelle les entreprises peuvent essayer de se soustraire en recourant à la collusion et à la corruption:

- La *collusion* est une entente entre soumissionnaires qui a pour effet de limiter la concurrence et de léser l'acheteur public. En cas de soumissions concertées, le prix payé par l'administration publique pour des biens ou services est artificiellement relevé. Ces pratiques ont un effet direct et immédiat sur les dépenses publiques et, partant, sur les contribuables;

- La *corruption* implique une relation verticale entre au moins un des soumissionnaires et le fonctionnaire responsable du marché public concerné. C'est avant tout un problème « principal-agent » dans lequel l'agent (le fonctionnaire responsable du marché) s'enrichit au détriment du « principal » (l'acheteur public ou, d'une manière plus générale, le public). On parle de corruption dans le cadre de la passation d'un marché public, lorsque le fonctionnaire chargé par l'entité adjudicatrice de gérer la procédure est convaincu, en contrepartie de pots-de-vin ou d'autres gratifications, de l'organiser, ou d'en modifier l'issue, de manière à avantager une entreprise en particulier. Le poids des marchés publics dans les économies nationales étant important, le préjudice que la corruption peut porter à celles-ci est non négligeable.

8. La collusion et la corruption compromettent l'efficience de l'attribution des marchés publics. Elles impliquent, par définition, que les marchés ne sont pas attribués comme ils l'auraient été si le principe de mise en concurrence avait été respecté. La collusion se traduit par l'attribution d'un marché public à l'entreprise choisie par les participants à l'entente. La corruption aboutit à accorder un marché à l'entreprise qui a offert le pot-de-vin. C'est en ce sens qu'elle fausse la concurrence. Par conséquent, bien qu'elles représentent des enjeux distincts pour les pouvoirs publics, la lutte contre la collusion et la lutte contre la corruption sont souvent très complémentaires. C'est notamment le cas quand le fonctionnaire responsable de la passation d'un marché est payé pour organiser et surveiller une collusion par soumissions concertées.

Encadré 1. Exemples d'affaires de collusion et de corruption

Hongrie – Plusieurs affaires de soumissions concertées ont éclaté sur le marché hongrois de la construction routière au cours des dernières années. La plus grosse amende antitrust (27.7 millions EUR environ) imposée jusqu'à présent l'a été pour une affaire de soumissions concertées concernant la construction d'une route. Le marché était évalué à 630 millions EUR. L'autorité hongroise de la concurrence a constaté que les soumissionnaires s'étaient antérieurement mis d'accord sur celui d'entre eux qui remporterait le marché ainsi que sur le soumissionnaire auquel l'entreprise générale offrirait un contrat de sous-traitance pour les travaux de construction. La presse a maintes fois signalé que des projets de construction routière avaient pu constituer un cadre idéal pour la corruption et soupçonné que les gains illicites tirés des soumissions concertées représentaient une source de financement importante pour les campagnes politiques.

Japon - En 2005, la Commission japonaise de la concurrence (JFTC) a enjoint à 45 constructeurs japonais de ponts en acier de cesser de truquer les offres pour les marchés publics. Plus de 70% des contrats concernant des ponts en acier accordés entre 1999 et 2004 par la Japan Highway Public Corporation ont été remportés par 47 entreprises appartenant à deux associations. Leurs offres étaient presque exactement identiques aux estimations de l'entreprise publique. Dans le cadre de l'une des plus grosses affaires de collusion lors d'une adjudication, la JFTC a aussi sommé la Japan Highway Public Corporation d'améliorer ses pratiques pour la passation des marchés publics concernant les ponts en alléguant qu'une vingtaine d'anciens agents publics avaient participé au trucage d'offres en vue d'obtenir un emploi dans l'une des 45 entreprises. D'après un décompte, près de 60% des bureaucrates qui avaient occupé un emploi concernant les travaux routiers ont été embauchés après leur départ à la retraite par l'un des dix premiers établissements de travaux routiers.

France – Un autre exemple d'affaire est celui des trois principales entreprises françaises de construction (Bouygues, Suez-Lyonnaise et Vivendi) qui ont fait l'objet d'une grande enquête pour un scandale décrit comme « un système convenu de détournements de fonds publics » (Le Monde, 10 déc. 1998). Ces trois entreprises ont participé à une entente frauduleuse pour des travaux de construction d'écoles en Ile-de-France (la région qui entoure Paris) entre 1989 et 1996. Elles se sont partagé des marchés d'une valeur de plus de quatre milliards d'euros. Le système impliquait aussi une part de corruption politique, un prélèvement de 2% sur tous les marchés servant à financer les principaux partis politiques dans la région.

2. Le rôle de la transparence dans les marchés publics

9. La transparence est indispensable à une saine procédure de passation des marchés. Elle est comprise comme l'accès à l'information concernant le processus de décision. Cela couvre non seulement la publicité donnée à l'événement, mais aussi l'information divulguée aux soumissionnaires avant ou après l'appel d'offres.

10. L'effet de la transparence sur le processus de passation des marchés publics est double:

- Un système de passation des marchés opaque et complexe offre un contexte idéal pour le développement de la corruption. La transparence constitue donc l'un des moyens les plus efficaces d'empêcher celle-ci. Des procédures transparentes permettent à un large éventail de

parties prenantes d'examiner de près les décisions et le comportement des fonctionnaires et des entrepreneurs, ce qui permet d'assurer que ceux-ci restent comptables de leurs actes.

- La transparence ne garantit toutefois pas à elle seule l'efficience du processus de passation des marchés publics. Il faut veiller à ce qu'en renforçant la transparence de ce processus pour lutter contre la corruption, on n'augmente pas les possibilités de recours à des pratiques anticoncurrentielles. Un système de passation des marchés plus transparent peut, en effet, accroître les risques de collusion entre soumissionnaires si ceux-ci ont la possibilité de connaître la stratégie de leurs concurrents et de s'aligner sur elle au détriment de la concurrence.

2.1 Les relations entre la transparence et la corruption

11. Les obligations de transparence contribuent à éradiquer et empêcher la corruption, dans la mesure où elles imposent la publication des informations relatives aux appels d'offres organisés pour l'attribution des marchés publics. L'imposition de règles pour la passation de ces marchés peut accroître le degré de transparence du système en exigeant que soient rendus publics les principaux faits et chiffres, les critères d'attribution du marché et leur pondération relative, l'identité de l'adjudicataire et des autres soumissionnaires ainsi que les conditions des offres présentées par chacun des soumissionnaires. L'introduction de la transparence dans le processus de passation des marchés publics empêche la corruption de plusieurs façons:

- la publication et la transparence des procédures permettent d'examiner de près les décisions des agents publics qui sont ainsi responsabilisés. Un degré élevé de transparence réduit les asymétries d'information et facilite le suivi, la surveillance et le contrôle du processus de passation des marchés publics. Il favorise également le contrôle public quand l'information est librement accessible;

- la transparence responsabilise les soumissionnaires et facilite la détection des agissements illicites et leur sanction. La transparence augmente aussi les chances que d'autres soumissionnaires dénoncent les actes de corruption, ce qui envoie des signaux positifs sur la confiance qu'inspire le processus;

- la transparence permet aux soumissionnaires d'éviter le dilemme du prisonnier lorsqu'ils ignorent si d'autres soumissionnaires offrent ou non des pots-de-vin. En l'absence de transparence, ils choisiraient le plus souvent de recourir eux-mêmes à la corruption ou de renoncer à soumissionner, deux solutions qui se solderaient par un résultat non efficient pour la procédure de passation du marché public concerné;

- enfin, la transparence permet aussi aux commissaires aux comptes de détecter plus facilement les comportements illicites.

2.2 Les relations entre la transparence et la collusion

12. La question de savoir si une plus grande transparence des marchés publics permet d'assurer l'efficacité et l'efficience du système de passation des marchés mérite de retenir davantage l'attention. Le renforcement de la transparence réduit la liberté d'action de l'agent chargé des marchés publics et permet aux organismes de contrôle de suivre plus facilement le processus. Il a ainsi des chances de réduire la corruption. Il faut toutefois veiller à ce qu'en renforçant la transparence pour faire reculer la corruption, on n'augmente pas les risques de pratiques anticoncurrentielles.

13. La transparence est l'un des facteurs nécessaires à une collusion soutenable. Pour fixer les conditions de la coordination, s'assurer que ces conditions sont respectées et sanctionner efficacement les manquements, les entreprises doivent disposer d'informations détaillées sur les stratégies de tarification

et/ou de production de leurs concurrents. La suppression artificielle de l'incertitude entourant l'action des concurrents, qui est l'essence même de la concurrence, peut en soi éliminer la rivalité concurrentielle normale. C'est particulièrement le cas sur les marchés très concentrés (ce que sont la plupart des marchés de contrats publics) sur lesquels une plus grande transparence permet aux entreprises de mieux prédire ou anticiper le comportement de leurs concurrents et donc de s'aligner ouvertement ou tacitement sur lui.

14. Dans le cadre des appels d'offres de marchés publics auxquels participe normalement un nombre limité de fournisseurs, les effets de l'échange d'information résultant de la transparence du processus de passation des marchés soulève des problèmes non négligeables au niveau de la concurrence. Les informations sur le résultat de la procédure qui sont révélées par l'autorité adjudicatrice peuvent, en effet, faciliter la collusion. Si, par exemple, l'autorité adjudicatrice révèle l'identité des soumissionnaires et les prix offerts, cela renforce l'efficacité d'une entente en permettant à ceux qui y participent de repérer plus facilement les manquements éventuels à l'accord de collusion. Autrement dit, la transparence facilite la surveillance du respect des termes de l'accord. Dans l'ensemble, moins il est fourni d'informations sur le résultat d'une adjudication, plus il est difficile de réussir à truquer les offres.

2.3 Considérations de principe

15. En définissant les règles et les procédures relatives à la transparence, il faudrait sérieusement envisager d'établir des obligations claires et précises pour la divulgation de diverses catégories d'information. Les règles fixées devraient aussi préciser quand et à qui ces informations devraient être fournies. Plusieurs autres approches pourraient être suivies pour rendre la collusion plus difficile sans compromettre la réduction nécessaire du risque de corruption:

- il pourrait n'être exigé que de divulguer l'information relative à l'offre retenue, celle concernant les autres offres pouvant n'être communiquée qu'à l'émetteur de l'appel d'offres et aux contrôleurs et non aux concurrents d'une manière générale;
- en raison de l'effet déstabilisateur que la non-divulgation de l'identité des soumissionnaires pourrait avoir sur une éventuelle collusion, le fonctionnaire responsable de la passation d'un marché public pourrait envisager de ne révéler ni le nombre de soumissionnaires en lice, ni l'identité de chacun d'eux en ne les désignant, par exemple, que par leur numéro d'enregistrement;
- l'agent chargé de la passation d'un marché public pourrait permettre que les offres soient communiquées par téléphone ou par courrier au lieu d'obliger les soumissionnaires à remettre leurs offres personnellement à un moment et un endroit précis où ils peuvent être observés par tout le monde;
- l'agent responsable de la passation d'un marché public pourrait autoriser chaque soumissionnaire à présenter plusieurs offres sous des numéros ou des identités différents;
- le moment de la divulgation d'informations sensibles (comme l'identité des soumissionnaires perdants et les données concernant leur offre) pourrait être retardé pour atténuer les effets de ces révélations sur la collusion.

3. Les procédures d'appels d'offres et les risques de collusion et de corruption y afférents

16. Les questions concernant le degré de transparence approprié dans le processus de passation des marchés publics sont étroitement liées au choix de la procédure d'appel d'offres. C'est un exercice important et délicat, les diverses procédures offrant des degrés de transparence différents qui peuvent les exposer aux risques de collusion ou de corruption. Le choix du « bon » modèle d'appel d'offres (ou plutôt,

du modèle le plus approprié compte tenu des particularités du marché public concerné) est donc le point de départ de tout effort visant à assurer l'efficience de la passation d'un marché public.

3.1 Adjudications ouvertes et adjudications sous plis scellés

17. Les candidats à une *adjudication ouverte* se réunissent au même moment et au même endroit pour soumettre plusieurs offres. Le marché est octroyé au soumissionnaire de la meilleure offre par l'entité adjudicatrice. Dans les enchères dynamiques, les soumissionnaires peuvent observer le comportement de leurs concurrents, ce qui facilite la coordination des offres et la surveillance de la répartition convenue des marchés. Plus des enchères dynamiques durent, plus il est facile aux soumissionnaires de coordonner leurs offres puisqu'ils ont davantage de possibilités de se mettre d'accord pour l'attribution des marchés. En outre, un système dans lequel les offres sont ouvertes en public et où le prix et les caractéristiques de chaque offre sont connus constitue l'instrument idéal pour détecter les ventes à bas prix. Il permet donc aux parties à un accord de collusion de sanctionner les entreprises qui ne s'y conforment pas.

18. Il serait préférable, en cas de risque important de comportement anticoncurrentiel, que l'agent responsable de la passation du marché ait recours à un modèle d'*adjudication sous plis scellés* qui limite la capacité et l'intérêt des soumissionnaires à agir en collusion. Dans ce type d'adjudication, chaque soumissionnaire présente sa « meilleure offre définitive », généralement par écrit, et les autres soumissionnaires en ignorent la teneur. Une collusion est certes possible, mais plus difficile à réaliser: elle implique une communication préalable entre ses participants qui sont en outre beaucoup plus incités à ne pas respecter les termes de l'accord de collusion du fait que les possibilités de sanction sont réduites, voire inexistantes.

19. Du point de vue de la lutte contre la corruption, toutefois, les systèmes d'enchères (comme les enchères dynamiques) paraissent offrir moins de possibilités aux agents responsables des marchés publics de favoriser une entreprise particulière. Ces systèmes font généralement l'objet de plusieurs niveaux de surveillance, des instances extérieures évaluant la qualité, la spécificité et le rapport qualité-prix des offres. De plus, les entreprises qui n'obtiennent pas un marché, peuvent théoriquement attirer l'attention du public et de la justice sur leurs éventuels soupçons d'irrégularités.

3.2 Négociations directes et contrats-cadres

20. Du point de vue de la concurrence, il n'est pas toujours nécessaire de recourir à un processus d'appel d'offres pour obtenir le résultat le plus efficient pour un marché public. C'est le cas lorsque des *négociations particulières* avec un nombre limité de fournisseurs sont susceptibles de produire le résultat le plus rentable. On pourrait, par exemple, se trouver dans cette situation dans les circonstances suivantes:

- si le coût de l'organisation et de la réalisation d'un appel d'offres est élevé et supérieur aux avantages que l'on en attend;
- si les soumissionnaires probables, et même, le soumissionnaire le moins disant probable, sont déjà connus de l'acheteur public. Dans ce cas, il peut être plus efficient que ce dernier entre directement en contact avec le moins disant probable pour négocier un prix (en utilisant au besoin la menace du recours à un appel d'offres);
- s'il n'est pas possible de préciser contractuellement à l'avance tous les aspects des services à fournir comme ce peut être le cas avec des projets complexes qui sont difficiles à définir à l'avance et qui peuvent être adaptés au fur et à mesure de leur avancement;

- si d'autres raisons de fond ou d'autres raisons explicites existent qui font que l'acheteur public n'est pas tenu de choisir le fournisseur le moins cher, c'est-à-dire si la diversité de l'offre est essentielle pour assurer la continuité du service;

- si des considérations de confidentialité empêchent la tenue d'un appel d'offres, par exemple, si des intérêts de sécurité nationale sont en jeu;

- si le nombre de soumissionnaires potentiels est très faible et l'un d'entre eux jouit d'un pouvoir de marché considérable; un appel d'offres ne produira pas, dans ce cas, un résultat satisfaisant et il peut être indiqué d'opter pour une procédure plus élaborée pour passer le marché.

21. Du point de vue de la lutte contre la corruption, toutefois, les marchés passés en dehors de toute mise en concurrence suscitent des inquiétudes en raison de leur manque de transparence et de l'absence de contrôle démocratique. Les responsables des marchés publics qui sont autorisés à conclure ces contrats contrôlent davantage le choix des entreprises auxquelles seront accordés les contrats les plus lucratifs. Sans une surveillance adéquate, leurs préférences personnelles peuvent facilement intervenir dans leur décision finale. Sous l'angle du vendeur, il est hautement souhaitable d'obtenir des contrats lucratifs sans être soumis à la discipline de la concurrence de sorte que les entreprises peuvent être tentées d'éliminer le risque de voir ces contrats leur échapper en influençant et/ou corrompant l'agent responsable.

22. De même, celui-ci peut trouver plus efficace de recourir à des *contrats-cadres*, c'est-à-dire des accords permanents servant de base aux achats de biens et de services effectués auprès d'entreprises présélectionnées qui satisfont à un certain nombre de normes de qualité. Là encore, ces accords peuvent permettre de réaliser des économies de temps et de ressources en supprimant les procédures d'appels d'offres et en réduisant ainsi le coût global des achats de biens ou de services. L'utilisation d'accords-cadres peut cependant soulever des problèmes éthiques surtout si les prix ne sont pas fixés avant leur rédaction. Dans ce cas, les accords sont vulnérables au risque de discrimination et de favoritisme.

3.3 Considérations de principe

23. Les nombreuses formes de modèles de passation des marchés ne se valant pas du point de vue de la lutte contre la collusion et la corruption, il est important que les fonctionnaires responsables soient conscients des risques liés à certaines d'entre elles. Intuitivement, les *enchères dynamiques (ou ouvertes)* semblent plus vulnérables à la collusion que les *enchères sous plis scellés*. De même, les *négociations privées* et les *accords cadres* conclus avec les fournisseurs potentiels risquent moins de conduire à la collusion que des appels d'offres publics. Toutefois, les formules de passation des marchés reposant sur la remise de plis scellés et excluant toute mise en concurrence sont vues comme une source potentielle de problèmes du point de vue de la lutte contre la corruption du fait qu'elles se prêtent fortement à celle-ci et qu'elles pèchent par leur manque de transparence et de contrôle démocratique.

24. Le choix du modèle d'appel d'offres dépend en grande partie des circonstances qui entourent la passation du marché public. Si le risque de collusion est limité (du fait, par exemple, que les fournisseurs potentiels sont nombreux), il est préférable de recourir à des enchères ouvertes. Si le risque de collusion est important, la préférence doit être accordée à un système sous plis scellés. Si le risque à la fois de collusion et de corruption est significatif, l'agent responsable doit continuer d'envisager de recourir à cette dernière formule, mais faire en sorte qu'elle ne se prête pas à la corruption. Dans ce cas, l'utilisation de systèmes électroniques ou de soumissions en ligne, par exemple, peut permettre de limiter les deux risques. Les soumissions électroniques permettent non seulement de tenir des enchères dynamiques, mais aussi d'enregistrer chaque soumission et le nom de chaque personne qui a pu en prendre connaissance. Cela empêche que des agents corrompus puissent consulter les soumissions avant la fermeture de l'appel d'offres et influer sur le processus à des fins personnelles. Pour éviter des manipulations indues, on pourrait aussi ouvrir en public les enveloppes scellées, après la fermeture de l'appel d'offres et envisager

d'empêcher totalement la destruction et le remplacement des soumissions. On pourrait également faire appel à des dispositifs technologiques rendant impossible l'altération des soumissions par l'agent responsable.

4. Lutte contre les agissements illicites dans le cadre des marchés publics – Comment empêcher et sanctionner les actes de corruption et de collusion?

25. Les lois et les règlements relatifs aux marchés publics sont conçus pour favoriser la concurrence entre les soumissionnaires et assurer une utilisation rationnelle des deniers publics. La lutte contre les soumissions concertées et les pots-de-vin doit faire partie intégrante de ce processus. Les expériences nationales montrent qu'il existe de nombreuses façons de lutter contre les agissements illicites dans le cadre du processus de passation des marchés publics, mais on distingue, dans l'ensemble, trois principales démarches pour atteindre cet objectif:

1. Sensibilisation des administrations publiques et des agents responsables aux risques de corruption et de collusion dans la passation des marchés publics. Les agents doivent être formés à appliquer des règles et des mécanismes de contrôle appropriés pour empêcher et détecter les agissements illicites. Il peut-être particulièrement utile d'appliquer des lignes directrices et les meilleures pratiques dans ce domaine où une approche pluridisciplinaire peut permettre d'obtenir des résultats importants. La formation doit viser à faire mieux comprendre aux agents les coûts de ces pratiques délictueuses en termes de ressources publiques et les avantages de l'adoption de comportements éthiques pour l'autorité contractante et ses fonctionnaires. La formation doit être axée sur la détection des signes de collusion ou de corruption et encourager également les agents à signaler les cas où ces agissements sont observés.

Encadré 2. Les lignes directrices de l'OCDE pour la lutte contre les soumissions concertées

L'OCDE reconnaît depuis longtemps le rôle capital que les organismes responsables de la concurrence et des marchés publics jouent dans la lutte contre les ententes illicites caractérisées dans le cadre des marchés publics. En 2009, le Comité de la concurrence a mis au point une méthode spécifique pour aider les pays à améliorer la passation des marchés publics en luttant contre le trucage des offres. Les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées dans les marchés publics aident les fonctionnaires responsables de la passation de ces marchés à réduire les risques de collusion lors des adjudications, grâce à des processus soigneusement conçus, et à détecter les cas de soumissions concertées au cours de ces processus. Ces lignes directrices visent à aider les agents concernés à déterminer:

- quels sont les marchés qui sont les plus vulnérables au risque de trucage des offres afin de prendre les précautions qui s'imposent;
- les méthodes qui permettent d'obtenir le plus grand nombre de soumissions;
- les meilleures pratiques à suivre pour établir les spécifications des appels d'offres, les conditions à remplir et les critères d'attribution des marchés;
- les procédures permettant d'empêcher les soumissionnaires de communiquer entre eux, et
- les modes de fixation des prix, les déclarations, les documents et les comportements des entreprises qui doivent conduire les agents chargés des marchés publics à soupçonner l'existence d'une collusion.

Pour de plus amples informations sur les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées, consulter le site: www.oecd.org/competition/bidrigging.

Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics

L'OCDE a élaboré une série de principes en vue de renforcer l'intégrité dans les marchés publics. Ces principes ont été approuvés sous la forme d'une recommandation du Conseil de l'OCDE en octobre 2008. Ils constituent un instrument visant à aider les responsables de l'action gouvernementale à renforcer l'intégrité dans les marchés publics. Ils reposent sur quatre piliers: (i) transparence; (ii) bonne gestion; (iii) prévention des comportements réprouvés, respect des règles et surveillance, et (iv) obligation de rendre des comptes et contrôle. Les principes énoncés appuient la mise en œuvre des instruments juridiques internationaux élaborés dans le cadre de l'OCDE ainsi que d'autres organisations comme les Nations unies, l'Organisation mondiale du commerce et l'Union européenne.

Pour aider les pays à mettre en œuvre ses Principes pour renforcer l'intégrité dans les marchés publics, l'OCDE a réuni les outils existant dans les pays membres et non membres dans ce qu'elle appelle la « boîte à outils ». Celle-ci a pour objet d'aider les fonctionnaires à concevoir et élaborer des instructions et des procédures pour différentes étapes du processus de passation des marchés. Elle fait actuellement l'objet de consultations auprès d'un vaste groupe réunissant des représentants des principales parties intéressées dans les pays membres et non membres de l'OCDE, à savoir notamment: les administrations nationales et infranationales, les milieux d'affaires, les syndicats et des organisations de la société civile.

Pour de plus amples informations sur les Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics, consulter le site: www.oecd.org/gov/ethics/procurement.

2. Mise en place de réseaux nationaux (et internationaux) d'experts appartenant aux administrations chargées des marchés publics, aux autorités de la concurrence et du ministère public en vue d'améliorer l'échange d'informations et d'expériences susceptibles d'améliorer la détection et la prévention de la corruption active et passive. Ces réseaux pourraient aussi permettre d'aider les agents concernés à mieux comprendre les notions de collusion et de corruption: comment ces pratiques frauduleuses se manifestent, pourquoi il est important de s'attaquer à elles et comment les détecter et les empêcher.

Encadré 3. Exemples de réseaux nationaux de coopération

Chili – En 2008, la *Fiscalia National Económica* (l'autorité chilienne de la concurrence) a établi un comité interinstitutionnel de lutte contre la collusion en vue de rendre plus efficace la détection des pratiques illégales dans les marchés publics. Ce comité réunit des représentants de l'organisme indépendant chargé de contrôler la légalité des actes administratifs, de la direction des marchés publics, du ministère des Travaux publics, du conseil de l'audit interne des administrations publiques et d'une association des fonctionnaires et du personnel chargés des achats de divers organismes publics. Le ministère du Logement et de la Planification urbaine, le responsable des transports et l'autorité chargée de la réglementation des retraites ont, par la suite, rejoint le comité.

Afrique du Sud - En juillet 2009, le gouvernement sud-africain a mis en place une équipe ministérielle chargée notamment de prévenir la fraude et la corruption dans les marchés publics. Cette équipe inclut des représentants du Trésor public, de l'administration fiscale, du Commissaire général aux comptes, de l'Unité des enquêtes spéciales et du Centre d'information financière. Bien qu'il ne soit pas fait spécifiquement mention des soumissions concertées, la Commission de la concurrence doit dialoguer avec cette équipe ministérielle et préconiser des mesures spéciales pour lutter contre la collusion dans les marchés publics. La Commission est aussi déterminée à collaborer avec le Trésor public dont relève la politique concernant les marchés publics.

Singapour – Consciente du fait que la collusion et la corruption vont souvent de pair, la Commission de la concurrence de Singapour (CCS) collabore étroitement avec le Bureau d'enquête sur les pratiques délictueuses (CPIB), l'organisme chargé d'enquêter sur la corruption dans les secteurs public et privé et d'y faire obstacle. La CCS a notamment établi avec le CPIB un protocole qui fixe les responsabilités des deux autorités et vise à assurer une gestion claire et efficiente des cas rencontrés.

3. La façon la plus efficace de décourager la collusion et la corruption est de définir clairement les meilleurs pratiques, règles et règlements pour la détection de la collusion et de la corruption dans les processus de passation des marchés publics, et de les faire résolument respecter. L'expérience des mesures de lutte contre la corruption et la collusion montre clairement que l'application de

lourdes sanctions (aussi bien civiles que pénales et administratives) s'est avérée être le moyen le plus efficace pour lutter contre la collusion active et passive dans les marchés publics. D'autres outils pourraient toutefois être adoptés pour dissuader les entreprises et les fonctionnaires de se livrer à ces pratiques dans le cadre des marchés publics. Il en est deux qui semblent avoir plus particulièrement donné des résultats positifs: l'autocertification et l'interdiction de participation ou la mise en liste noire.

Encadré 4. Autocertification

L'autocertification du respect de la législation par les soumissionnaires et les acheteurs publics s'est révélée très utile. Dans certains pays, par exemple, les soumissionnaires doivent remettre une attestation d'absence de collusion dans l'établissement de leur soumission pour pouvoir participer à un appel d'offres. Dans cette attestation, chacun d'eux doit en général certifier sous serment qu'il ne s'est pas concerté avec ses concurrents sur les offres présentées, qu'il n'a divulgué les prix de son offre à aucun de ses concurrents et qu'il n'a pas tenté de convaincre l'un d'eux de truquer les offres. L'attestation d'absence de collusion informe non seulement les soumissionnaires du caractère illégal des soumissions concertées, mais elle facilite aussi la poursuite judiciaire des contrevenants et elle introduit des sanctions supplémentaires, y compris des sanctions pénales éventuellement, pour toute fausse déclaration aux autorités. Dans quelques pays, comme les États-Unis, les fonctionnaires chargés des marchés publics sont, de même, tenus de certifier qu'ils n'ont pas eu connaissance, ou n'ont pas indûment divulgué, des informations sur les marchés et qu'ils ont suivi des cours de formation spéciaux. Dans certains cas, ils sont invités à fournir, s'ils le souhaitent, des informations sur leur situation financière personnelle afin d'exclure le risque de conflit d'intérêts.

Interdiction de participation

En dehors des sanctions civiles, pénales et administratives traditionnelles, des pays ont introduit des sanctions spécifiques pour les actes illicites commis dans le cadre des marchés publics. Une attention particulière a notamment été accordée à l'interdiction de participer à de nouveaux appels d'offres, aussi connue sous le nom de « disqualification ». Les avis sur les façons d'appliquer ces sanctions sont partagés. D'un côté, l'interdiction de participation peut constituer un moyen sérieux de dissuasion ponctuel ou général. De l'autre, si elle est appliquée de manière systématique (et automatique), cette mesure s'accompagne d'un risque de collusion sur les marchés où le nombre de fournisseurs potentiels est déjà limité. On pourrait éviter cet inconvénient en frappant d'interdiction uniquement les personnes coupables de collusion et non leur entreprise. Cette solution permettrait de dissuader de commettre un acte illicite sans empêcher l'entreprise concernée de continuer de soumissionner pour des marchés publics. Elle n'exclurait pas l'application d'autres sanctions, monétaires notamment, à l'entreprise pour le manquement au droit de la concurrence ou au code d'éthique commis par son personnel.

4.1 Le rôle des autorités de la concurrence et de la politique de la concurrence dans la lutte contre la corruption

26. Une bonne législation pour le financement des partis politiques, l'application de normes éthiques élevées dans la fonction publique, un niveau satisfaisant de ressources et d'expertise technique ainsi qu'une transparence de l'information pour les organismes de contrôle sont des conditions indispensables pour lutter efficacement contre la corruption. Elles exigent une forte collaboration entre les autorités chargées de la concurrence, de la lutte contre la corruption et de la passation des marchés publics. En faisant le point sur les méthodes de travail employées et les problèmes rencontrés, des programmes de défense de la concurrence des autorités compétentes en la matière aideront à relever les défis partagés avec les entités responsables de la passation des marchés publics. La promotion des principes de concurrence par les autorités compétentes (ainsi que par les responsables des marchés publics) peut également être effectuée auprès des entreprises privées, surtout celles qui participent souvent aux marchés d'enchères. Bien qu'un tel effort puisse être couteux en termes de ressources et de temps, il est susceptible d'avoir des effets bénéfiques à long terme. L'objectif visé pourrait être atteint de diverses façons. Par exemple:

- l'avis d'appel d'offres pourrait indiquer aux entreprises que le droit de soumissionner est subordonné à l'adoption de programmes internes visant à assurer le respect des règles des marchés publics. Les grandes lignes de ces programmes pourraient être établies en coopération avec l'autorité de la concurrence ou être approuvées par elle;

- l'avis d'appel d'offres pourrait aussi exiger que les personnes responsables des soumissions aient participé à des séances et des programmes d'information périodiques sur les sanctions encourues en cas de collusion et de corruption. Ces séances et programmes pourraient être offerts par les responsables des diverses autorités concernées, comme l'autorité de la concurrence et les entités chargées des marchés publics.

27. Au-delà des activités de sensibilisation, un système antitrust efficace et une mise en œuvre vigoureuse du droit de la concurrence peuvent notablement contribuer à réduire la corruption dans la passation des marchés publics. Il est bien connu que les rentes favorisées par un manque de concurrence peuvent encourager la corruption. Quand une entreprise jouit d'une rente et ses activités sont tributaires des décisions d'un fonctionnaire, celui-ci peut bénéficier d'une partie de la rente en abandonnant ses droits de contrôle en échange d'un pot-de-vin. Un accroissement des rentes, même si celles-ci résultent d'une restriction de la concurrence, a donc tendance à augmenter la corruption. Cela donne à penser que les politiques visant à lutter contre la corruption devraient non seulement modifier le système juridique pour sanctionner davantage les agissements illicites ou augmenter les traitements des fonctionnaires pour qu'ils soient moins incités à accepter des dessous-de-table, mais aussi prendre des mesures pour augmenter la concurrence dans le processus de passation des marchés publics en vue de limiter les possibilités de corruption.

5. Recherche du cadre institutionnel le plus efficace

28. L'application du droit de la concurrence (généralement confiée à l'autorité de la concurrence) n'est pas liée du tout, dans de nombreux pays, à l'application des dispositions prises pour lutter contre la corruption (généralement confiée au pouvoir judiciaire ou à un organisme spécialisé). Étant donné les complémentarités existant entre la corruption et les pratiques anticoncurrentielles que nous avons signalées plus haut, il semble que cette absence de coordination réduit inutilement l'effet dissuasif du droit de la concurrence et de la législation anti-corruption. À l'inverse, une approche coordonnée a des chances d'augmenter la probabilité de la détection des pratiques répréhensibles tout en rendant plus efficace la répression des actes complémentaires de corruption et de collusion. Une approche unifiée devrait avoir à long terme de plus importantes retombées sociales bénéfiques.

29. Les échanges systématiques d'informations entre les diverses entités chargées d'appliquer les dispositions en vigueur et la conduite d'enquêtes conjointes sont donc fortement recommandés. Il semblerait notamment judicieux d'ouvrir systématiquement une enquête de concurrence sur les marchés publics pour lesquels des signes de corruption ont été observés. Il est, en outre, peut-être possible de lutter contre la collusion et le favoritisme par le biais d'organismes de surveillance des marchés publics. Il peut-être pour cela nécessaire d'établir une instance de surveillance spéciale, chargée d'observer le comportement des agents responsables des marchés publics et de veiller à ce que le processus de passation de ces marchés ne soit pas utilisé pour fausser la concurrence.

Encadré 5. Le *Bundeskartellamt* allemand et sa fonction de tribunal des marchés publics

En Allemagne, par exemple, l'autorité de la concurrence s'appuie sur trois chambres spéciales chargées de réexaminer l'attribution des marchés publics auprès desquelles il peut être fait appel de décisions prises par les entités adjudicatrices. Les principes qui guident l'action du *Bundeskartellamt* sont la concurrence, la transparence, la non-discrimination et l'équité des procédures d'appels d'offres.

En principe, les marchés publics allemands doivent être attribués dans le cadre d'une procédure de mise en concurrence à l'issue d'un appel d'offres public transparent et parfaitement équitable. La règle prévoit que c'est le mieux disant économique qui remporte le marché.

En cas de saisine, les trois chambres créées dans le cadre du *Bundeskartellamt* vérifient que les entités contractantes ont respecté leurs obligations au regard de la procédure d'adjudication. Ces chambres sont habilitées à prendre des mesures pour remédier à toute violation de droits et éviter tout préjudice aux parties intéressées.

30. Certains pays se sont dotés d'une législation spécifique pour traiter les cas de collusion dans lesquels les agents responsables des marchés publics participent directement à l'organisation de soumissions concertées. Si la conduite anticoncurrentielle des entreprises en cause relève du droit de la concurrence, les autorités de la concurrence sont généralement impuissantes en ce qui concerne l'éventuelle complicité d'agents publics. C'est souvent le cas, car de nombreux pays considèrent la corruption comme une infraction réprimée par le droit pénal général. Le Japon, toutefois, est l'un des pays où les autorités de la concurrence disposent d'un certain nombre de prérogatives pour sanctionner les fonctionnaires ayant contribué à des soumissions concertées.

Encadré 6. La loi japonaise de prévention des soumissions concertées impliquant des agents publics

Pour régler le problème récurrent de l'implication de responsables des marchés publics dans les affaires de soumissions concertées, le Japon a adopté, en 2002, une loi de prévention et de répression des soumissions concertées qui permet à la Commission japonaise de la concurrence (*Japan Fair Trade Commission,* JFTC) de poursuivre les agents publics cités dans les dossiers de soumissions concertées Quand celle-ci conclut à leur culpabilité, elle applique les dispositions de la loi antimonopole aux entreprises concernées et elle peut demander aux responsables des institutions adjudicatrices incriminées d'enquêter sur les écarts présumés de leurs agents et de prendre toutes les mesures nécessaires pour y mettre un terme. Ces mesures doivent être rendues publiques. Qui plus est, une fois que l'enquête a confirmé la participation d'un agent public au trucage d'un appel d'offres, l'administration peut s'appuyer sur la nouvelle loi pour exiger des réparations de l'intéressé.

6. Remarques finales

31. Étant donné le poids des marchés publics dans les économies nationales, il est important que les gouvernements se penchent sur les problèmes délicats qui résultent de l'interaction entre les mesures visant à éliminer la collusion et la corruption dans les marchés publics. Ces deux pratiques sont très dommageables pour les contribuables et il faudrait s'y attaquer de manière concertée pour optimiser l'effet dissuasif des législations les concernant. Des arbitrages difficiles devront peut-être être opérés entre les deux catégories de mesures. Comme il a été indiqué dans cette note liminaire, le degré souhaitable de transparence à atteindre dans le processus de passation des marchés publics est un exemple des choix difficiles à opérer pour les pouvoirs publics. Doivent-ils opter pour une transparence maximale pour réduire les risques de corruption et faire en sorte que les agents publics restent comptables de leurs actes? Ou doivent-ils, au contraire, opter pour une transparence minimale afin de limiter, pour les soumissionnaires, les possibilités de se livrer à des pratiques collusoires? La préférence doit-elle être accordée dans tous les cas à des procédures ouvertes et transparentes plutôt qu'aux négociations directes? Il est impossible de répondre à ces questions dans l'abstrait et les responsables des marchés publics devraient opérer leurs choix en fonction des particularités de chaque appel d'offres.

32. Les autorités chargées de la concurrence et de la lutte contre la corruption peuvent très utilement aider les agents chargés des marchés publics à trouver le juste équilibre. Une meilleure coopération entre ces trois catégories de fonctionnaires, aux niveaux national et international, s'impose donc pour lutter contre la collusion et la corruption dans les marchés publics. L'application de principes directeurs et des meilleures pratiques, tenant éventuellement compte des leçons tirées de l'expérience au niveau international peut, si elle s'accompagne d'un partage concerté de l'information entre les fonctionnaires concernés, permettre de rendre plus efficiente la passation des marchés publics. Cela se traduira, à son tour, par des économies pour les pays et leurs contribuables qui pourront avoir un effet bénéfique pour le développement et la croissance économiques des pays développés comme des pays en développement.

ANNEXE I - PRINCIPALES RÉFÉRENCES

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ANNEXE II - QUESTIONS ET PROBLÈMES À EXAMINER

(Liste figurant dans l'appel à contributions adressé aux pays le 1er décembre 2009, document DAF/COMP/GF(2009)14)

1. Ampleur et objectifs des marchés publics

- Quelle fraction de votre économie représentent les marchés publics?
- Quels sont leurs principaux objectifs?

2. Corruption

- Quel est le coût de la corruption?
- Quels sont les facteurs qui la facilitent? Certains semblent-ils plus importants que d'autres?
- Comment les programmes de transparence contribuent-ils à la lutte contre la corruption? Quelles autres dispositions facilitent cette lutte? Quelles méthodes et techniques semblent particulièrement efficaces dans votre juridiction?
- Les entreprises sont-elles tenues de certifier pendant la procédure de passation des marchés publics qu'elles n'ont corrompu aucun agent public?
- Quelles sanctions peuvent être infligées aux entreprises et aux individus qui se sont rendus coupables de corruption active ou passive dans votre juridiction?
- Quelles sont les autorités compétentes pour engager des poursuites dans les affaires de corruption? L'autorité de la concurrence dispose-t-elle de prérogatives en la matière?

3. Collusion

- Quels facteurs facilitent la collusion dans les marchés publics? Quels secteurs semblent tout particulièrement exposés aux soumissions concertées?
- Dans votre juridiction, quels secteurs ont connu des cas de soumissions concertées dans le domaine de marchés publics?
- De quelle expérience dispose votre organisme en termes de contribution à l'élaboration de systèmes de passation des marchés publics destinés à minimiser les risques de soumissions concertées?
- Votre pays emploie-t-il des certificats de détermination indépendante des offres?

- Lorsque des entreprises se sont engagées dans des pratiques collusoires, doit-on leur interdire de participer aux procédures de passation des marchés publics pendant un certain temps?

4. Lutte contre la collusion et la corruption

- Dans votre juridiction, quelles affaires ont porté à la fois sur des faits de corruption et de collusion dans le cadre de la passation de marchés publics?

- Les faits avérés ou allégués de collusion et de corruption recensés se sont-ils produits de manière prédominante au niveau d'administration local, provincial ou national?

- Quelles méthodes et techniques de lutte contre la corruption contribueraient à la lutte contre la collusion?

- Lorsque des individus ou des entreprises se sont rendus coupables de corruption active ou passive, peuvent-ils bénéficier de mesures de clémence dans votre juridiction?

5. Promotion de la concurrence

- En quoi le cadre réglementaire et institutionnel contribue-t-il à faciliter les soumissions concertées et la corruption?

- Comment les autorités de la concurrence peuvent-elles s'employer à améliorer l'efficience des procédures de passation des marchés publics?

- Quelles dispositions ont été prises pour améliorer l'efficience des procédures de passation des marchés publics dans votre juridiction? Des mesures spécifiques ont-elles été adoptées pour réduire la collusion et la corruption dans les marchés publics? Si oui, lesquels et quel est le bilan de ces mesures à ce jour? D'autres approches destinées à faire reculer la collusion et la corruption ont-elles été tentées dans votre juridiction, et quels ont été les résultats obtenus?

- Lors de l'adoption de mesures destinées à réduire la collusion et les soumissions concertées dans les marchés publics, avez-vous pris en compte l'impact que pourraient avoir ces mesures sur les risques de corruption?

- Votre autorité de la concurrence a-t-elle pris des mesures de promotion de la concurrence dans ce domaine?

- Si votre organisme a engagé des poursuites contre les responsables présumés de faits de corruption ou de collusion, quelles mesures correctives avez-vous envisagées?

CALL FOR COUNTRY CONTRIBUTIONS

TO ALL GLOBAL FORUM PARTICIPANTS

Re: Collusion and Corruption in Public Procurement

Global Forum on Competition (18-19 February 2010)

Session V

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable discussion on collusion and corruption in public procurement on 19 February 2010. You are invited to make a contribution by *10 January at the latest.* Questions, that you may wish to address, are included in the Annex to this letter.

The performance of public procurement markets has significant implications for the effectiveness of governance in both developed and developing countries. Statistics indicate that public procurement accounts for approximately 15% of Gross Domestic Product (GDP) in OECD countries and is even higher in non-OECD countries. Moreover, procurement often involves goods and services with substantial economic and social significance, including transportation infrastructure, hospitals and health services, and education supplies. The fundamental purpose of public procurement is to obtain goods and services at the lowest possible price or, more generally, achieve the best value for money. Ensuring that public procurement markets function effectively requires policy makers to address two distinct but inter-related challenges: (i) ensuring integrity in administrative processes so that corruption by public officials is prevented; and (ii) promoting effective competition among suppliers and preventing collusion among them.

Anticompetitive conduct affecting the outcome of the procurement process is a particularly pernicious infringement of competition rules. Through bid-rigging practices, the price paid by the public administration for goods or services is artificially raised, forcing the public sector to pay supra-competitive prices. These practices have a direct and immediate impact on public expenditures and, therefore, on taxpayers resources. The OECD has long recognised the vital roles that competition and procurement agencies play in fighting hard core cartels in public procurement.

Corruption occurs when there is an abuse of entrusted power for private gain. Government policy can reduce corruption by increasing the benefits of complying with the rules, increasing the probability of detection and punishment, and increasing the penalties levied on those caught. For example, transparency requirements help root-out and deter corruption by requiring information on the public procurement tender to be made publically available. Transparency programs may require the basic facts and figures; award criteria and weights; the identities of the winning bidder and other bidders; and the terms offered by individual bidders, to be made publically available. Full transparency requires civil servants to act in a transparent, predictable and understandable manner. Because transparency provisions require tender specifications and processes to be made publically available, firms negatively affected by corruption can find out about it and take appropriate actions. Transparency requirements also put pressure on procurement officials because it is easier for government auditors to uncover illegal conduct.

While transparency provisions are highly useful tools for fighting corruption, they can increase the risks of bid rigging. Particularly in markets where there is a limited number of firms, collusion can be reached and sustained if firms have complete and perfect information on the main variables of competition. Market transparency allows firms to align their strategies more easily and to promptly detect and punish any deviation from an anti-competitive agreement. Thus, when firms are able to access information about the other bidders and the terms and conditions offered by winning and losing bidders the risk of collusion increases. Similarly, government transparency programs which require agencies to publish the total expected procurement requirements for a fiscal year can help firms reach an agreement on how they will rig the bids and divide the market.

Policies for fighting collusion can similarly increase the risks of corruption. For example, the OECD Guidelines for Fighting Bid Rigging state that in some situations it may be appropriate to aggregate tender contracts over a period of time. The Guidelines offer this suggestion as a way to reduce predictability and, in turn, the risks of bid rigging. However, higher contract values provide an enhanced incentive for firms to offer bribes and for officials to take them. Thus, contract aggregation can increase the risk of corruption. Similarly, flexible purchasing rules which allow procurement officials under certain circumstances to negotiate directly with suppliers (rather than conduct an auction) can be the most efficient and less costly way of selecting a supplier, but at the same time can increase the risks of corruption.

This roundtable will also explore working relationships between competition, anti-corruption, and procurement authorities. By taking stock of existing working methods and concerns, competition authority advocacy programs will be better able to respond to the joint challenges facing procurement agencies. Effective programs for fighting collusion should also result in fewer corruption opportunities because the illegal gains from bid rigging cartels are often the source used by firms to bribe public officials. In the long term, a unified approach will likely yield large social benefits.

The quality and utility of the roundtable will be strengthened by written contributions from participants. It will be especially helpful if you include a discussion of relevant cases from your jurisdictions. Your written contributions will complement an issues paper prepared by the Secretariat.

To help you to prepare your contribution, a number of issues and questions are attached that you should feel free to respond to and discuss in your submissions. This is not intended to be a restrictive or comprehensive list. Participants are encouraged to raise and address other issues, as well, based on their own experience. A suggested bibliography is attached, as well.

If you have not yet done so, please advise the Secretariat **by 9 December at the latest** if you will be making a written contribution. Written contributions are due **by 10 January at the latest (members and non members).** Failure to meet that deadline could result in a contribution not being distributed in a timely fashion in advance of the meeting via the GFC website at http://oecd.org/competition/globalforum.

All communications regarding documentation for this roundtable should be sent to erica.agostinho@oecd.org, Telephone – 33 (0)1 45 24 89 73; Fax – 33 (0)1 45 24 96 95; with a copy to helene.chadzynska@oecd.org (GFC Programme Manager). Hélène will be pleased to answer any substantive questions you may have about the roundtable and the GFC in general. Her phone number is +33 1 45 24 91 05.

Questions for Consideration
in
Country Contributions

I. Size and policy objectives

1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

II. Corruption

1. What is the cost of corruption?

2. What factors facilitate corruption? Do some factors appear to be more important that others?

3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.

5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

III. Collusion.

1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimize the risks of bid rigging?

3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

IV. Fighting collusion and corruption.

1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

3. What methods and techniques for fighting corruption would aid the fight against collusion?

4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

V. Advocacy

1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

2. In what ways can competition authorities work to improve the efficiency of public procurement?

3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

5. Has your competition agency undertaken competition advocacy in this area?

6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

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APPEL À CONTRIBUTIONS

À L'ATTENTION DE TOUS LES PARTICIPANTS AU FORUM MONDIAL

Objet : Collusion et corruption dans les marchés publics

Forum mondial sur la concurrence (18 et 19 février 2010)

Session V

Madame, Monsieur,

Dans le cadre du Forum mondial de l'OCDE sur la concurrence sera organisée une table ronde sur la collusion et la corruption dans les marchés publics, le 19 février 2010. Vous êtes invité(e) à soumettre une contribution à cette manifestation *d'ici au 10 janvier*. En annexe à ce courrier figure une liste de questions, que vous jugerez sans doute utile de prendre en compte.

Le fonctionnement des marchés publics a des répercussions sensibles sur l'efficacité de la gouvernance, tant dans les pays développés qu'en développement. Les statistiques indiquent que les marchés publics représentent environ 15 % du produit intérieur brut (PIB) des pays de l'OCDE, et une proportion encore plus importante dans les économies non membres de l'Organisation. En outre, les marchés publics concernent souvent des biens et services jouant un rôle économique et social important, tels que les infrastructures de transport, les hôpitaux et les services de santé, ainsi que l'enseignement. L'objet essentiel des marchés publics est d'obtenir des biens et services au plus bas coût possible ou, de manière plus générale, de tirer le meilleur profit des ressources disponibles. Pour garantir un fonctionnement efficace des marchés publics, les autorités doivent atteindre concrètement deux objectifs distincts mais étroitement liés : (i) assurer l'intégrité des procédures administratives afin d'empêcher toute corruption d'agents publics, et (ii) promouvoir une concurrence effective entre fournisseurs et empêcher toute collusion entre ces derniers.

Les comportements anticoncurrentiels influant sur l'issue des procédures de passation des marchés publics constituent une forme particulièrement pernicieuse d'infraction au droit de la concurrence. En cas de soumissions concertées, le prix payé par l'administration publique pour certains biens ou services est artificiellement relevé, ce qui contraint le secteur public à acquitter un prix supraconcurrentiel. Ces pratiques ont un effet direct et immédiat sur les dépenses publiques et, partant, sur les ressources des contribuables. L'OCDE a reconnu de longue date l'importance cruciale du rôle que jouent les autorités de la concurrence et les organismes de passation des marchés dans la lutte contre les ententes injustifiables dans le domaine des marchés publics.

Il y a corruption dès lors qu'une personne abuse des pouvoirs qui lui ont été conférés pour en retirer un avantage personnel. Les pouvoirs publics peuvent réduire la corruption en rendant plus avantageux le respect des règles, en renforçant les probabilités de détection et de sanction, et en alourdissant les peines infligées aux personnes sanctionnées. Ainsi, des obligations de transparence contribuent à éradiquer et empêcher la corruption, dans la mesure où elles imposent la publication des informations relatives aux appels d'offres organisés pour l'attribution des marchés publics. Les programmes de transparence peuvent

exiger que soient rendus publics les principaux faits et chiffres, les critères d'attribution du marché et leur pondération relative, l'identité du soumissionnaire retenu et des autres soumissionnaires, ainsi que les conditions des offres présentées par chacun des soumissionnaires. Dans une optique de pleine transparence, les fonctionnaires doivent agir de manière transparente, prévisible et compréhensible. Dans la mesure où les dispositions applicables en matière de transparence exigent que les cahiers des charges et les procédures d'appel d'offres soient rendus publics, les entreprises qui subissent des préjudices découlant de faits de corruption peuvent le découvrir et réagir en conséquence. Les obligations de transparence exercent également des pressions sur les fonctionnaires responsables de la passation des marchés publics, car elles facilitent la mise au jour des comportements illicites par les vérificateurs de l'administration publique.

Si les règles de transparence constituent des instruments extrêmement utiles pour lutter contre la corruption, elles peuvent renforcer les risques de soumissions concertées. En particulier sur les marchés où il existe un nombre limité d'entreprises, une situation de collusion peut être instaurée et maintenue si ces entreprises disposent d'informations complètes et parfaites sur les principales variables de la concurrence. La transparence du marché permet aux entreprises d'aligner leurs stratégies plus aisément, et de déceler et sanctionner rapidement tout manquement à l'accord anticoncurrentiel qui a été conclu. Ainsi, lorsque les entreprises peuvent accéder aux informations sur les autres soumissionnaires et aux modalités et conditions offertes par les soumissionnaires retenus et ceux qui sont écartés, le risque de collusion s'accentue. De même, les programmes publics de transparence qui font obligation aux services de l'État de publier leurs prévisions d'achats totales pour un exercice budgétaire peuvent aider les entreprises à s'entendre sur la façon dont elles manipuleront les procédures d'appel d'offres et se partageront le marché.

Les mesures de lutte contre la collusion peuvent renforcer de manière similaire les risques de corruption. Ainsi, les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées dans les marchés publics indiquent que dans certaines circonstances, il peut être judicieux de regrouper les marchés attribués par appel d'offres sur une période donnée. Les Lignes directrices proposent cette approche en vue de réduire la prévisibilité des conditions des marchés publics et, partant, les risques de soumissions concertées. Néanmoins, plus la valeur des contrats considérés est élevée, plus les entreprises sont incitées à offrir des pots-de-vin et plus les agents publics sont incités à les accepter. Par conséquent, un regroupement des contrats peut accentuer le risque de corruption. De même, des règles d'achat souples, permettant aux fonctionnaires responsables de la passation des marchés publics de négocier directement avec les fournisseurs (au lieu d'organiser des enchères) dans certaines circonstances, peuvent constituer le moyen le plus efficace et le moins coûteux de sélectionner un fournisseur, tout en renforçant les risques de corruption.

Au cours de cette table ronde seront également examinées les relations entre les autorités chargées de la concurrence, de la lutte contre la corruption et de la passation des marchés publics. En faisant le point sur les méthodes de travail et les préoccupations existantes, les autorités de la concurrence seront davantage à même de s'attaquer dans le cadre de leurs programmes de sensibilisation aux problèmes auxquels sont également confrontés les organismes de passation des marchés publics. Des programmes efficaces de lutte contre la collusion devraient également réduire les possibilités de corruption, dans la mesure où les avantages illicites retirés des soumissions concertées constituent souvent la source utilisée par les entreprises pour corrompre des agents publics. Sur le long terme, une approche coordonnée offrirait probablement des avantages considérables sur le plan social.

La qualité et l'utilité de la table ronde seront renforcées par les contributions écrites des participants. Il serait particulièrement appréciable que vous présentiez une étude de cas pertinents concernant votre juridiction. Vos contributions écrites complèteront un document de réflexion préparé par le Secrétariat.

Pour vous aider à préparer votre contribution, nous avons joint à ce courrier une liste de questions auxquelles vous pourrez répondre et de problèmes que vous pourrez aborder, si vous le souhaitez, dans vos documents. Il ne s'agit en aucun cas d'une liste restrictive ou exhaustive. Les participants sont encouragés à soulever et traiter d'autres questions, en se fondant sur leur propre expérience. Vous trouverez également ci-joint une proposition de bibliographie.

Si vous ne l'avez pas encore fait, veuillez indiquer au Secrétariat **d'ici au 9 décembre** si vous présenterez une contribution écrite. Celle-ci devrait être envoyée au Secrétariat **au plus tard le 10 janvier 2010 (tant pour les membres que pour les non-membres)**. Le non-respect de ce délai pourrait empêcher la diffusion de la contribution concernée en temps voulu avant la réunion, *via* le site Internet du Forum : http://oecd.org/competition/globalforum.

Toutes les communications concernant les documents destinés à cette table ronde doivent être envoyées à erica.agostinho@oecd.org [Tél. : 33 (0)1 45 24 89 73 ; Fax : 33 (0)1 45 24 96 95] et une copie adressée à helene.chadzynska@oecd.org (Chef du programme du Forum mondial sur la concurrence). Hélène est à votre disposition pour toute question de fond concernant la table ronde et le Forum en général. Vous pouvez la joindre par téléphone au +33 1 45 24 91 05.

Questions à examiner dans les contributions par pays

I. Ampleur et objectifs des marchés publics

1. Quelle fraction de votre économie représentent les marchés publics ? Quels sont leurs principaux objectifs ?

II. Corruption

1. Quel est le coût de la corruption ?

2. Quels sont les facteurs qui la facilitent ? Certains semblent-ils plus importants que d'autres ?

3. Comment les programmes de transparence contribuent-ils à la lutte contre la corruption ? Quelles autres dispositions facilitent cette lutte ? Quelles méthodes et techniques semblent particulièrement efficaces dans votre juridiction ?

4. Les entreprises sont-elles tenues de certifier pendant la procédure de passation des marchés publics qu'elles n'ont corrompu aucun agent public ? Quelles sanctions peuvent être infligées aux entreprises et aux individus qui se sont rendus coupables de corruption active ou passive dans votre juridiction ?

5. Quelles sont les autorités compétentes pour engager des poursuites dans les affaires de corruption ? L'autorité de la concurrence dispose-t-elle de prérogatives en la matière ?

III. Collusion.

1. Quels facteurs facilitent la collusion dans les marchés publics ? Quels secteurs semblent tout particulièrement exposés aux soumissions concertées ?

2. Dans votre juridiction, quels secteurs ont connu des cas de soumissions concertées dans le domaine de marchés publics ? De quelle expérience dispose votre organisme en termes de contribution à l'élaboration de systèmes de passation des marchés publics destinés à minimiser les risques de soumissions concertées ?

3. Votre pays emploie-t-il des certificats de détermination indépendante des offres ? Lorsque des entreprises se sont engagées dans des pratiques collusoires, doit-on leur interdire de participer aux procédures de passation des marchés publics pendant un certain temps ?

IV. Lutte contre la collusion et la corruption.

1. Dans votre juridiction, quelles affaires ont porté à la fois sur des faits de corruption et de collusion dans le cadre de la passation de marchés publics ?

2. Les faits avérés ou allégués de collusion et de corruption recensés se sont-ils produits de manière prédominante au niveau d'administration local, provincial ou national ?

3. Quelles méthodes et techniques de lutte contre la corruption contribueraient à la lutte contre la collusion ?

4. Lorsque des individus ou des entreprises se sont rendus coupables de corruption active ou passive, peuvent-ils bénéficier de mesures de clémence dans votre juridiction ?

V. Promotion de la concurrence

1. En quoi le cadre réglementaire et institutionnel contribue-t-il à faciliter les soumissions concertées et la corruption ?

2. Comment les autorités de la concurrence peuvent-elles s'employer à améliorer l'efficience des procédures de passation des marchés publics ?

3. Quelles dispositions ont été prises pour améliorer l'efficience des procédures de passation des marchés publics dans votre juridiction ? Des mesures spécifiques ont-elles été adoptées pour réduire la collusion et la corruption dans les marchés publics ? Si oui, lesquelles et quel est le bilan de ces mesures à ce jour ? D'autres approches destinées à faire reculer la collusion et la corruption ont-elles été tentées dans votre juridiction, et quels ont été résultats obtenus ?

4. Lors de l'adoption de mesures destinées à réduire la collusion et les soumissions concertées dans les marchés publics, avez-vous pris en compte l'impact que pourraient avoir ces mesures sur les risques de corruption ?

5. Votre autorité de la concurrence a-t-elle pris des mesures de promotion de la concurrence dans ce domaine ?

6. Si votre organisme a engagé des poursuites contre les responsables présumés de faits de corruption ou de collusion, quelles mesures correctives avez-vous envisagées ?

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SUMMARY OF DISCUSSION

SUMMARY OF DISCUSSION

by the Secretariat

The Chairman (**Khalid Mirza**) opened the discussion, noting the general agreement that public procurement is a large and important segment of economic activity, the main objective of which is to achieve maximum value for public money. Moreover, the actual harm caused by collusion and/or corruption in public procurement goes beyond its economic magnitude: (i) the goods and services involved typically affect a large section of the population; (ii) public procurement often involves physical infrastructure or public health, which support other forms of economic activity; (iii) it impacts on international competitiveness; (iv) it can impact on the investment climate; (v) distortion of public procurement typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public services and infrastructure to the greatest extent; and (vi) public procurement often concerns "public goods", and so government failures cannot be addressed by private market mechanisms.

The Chairman stated that the roundtable discussion would consist of expert presentations, interspersed with questions posed to individual delegations. He introduced the four expert panellists: Professor Sue Arrowsmith of the University of Nottingham, United Kingdom; Dr. Benny Pasaribu, Commissioner and former Chairman of Indonesia's Competition Commission, the KPPU; Dr. Abdesselam Aboudrar, President of Morocco's Central Agency for Corruption Prevention; and Professor David Lewis of the Gordon Institute of Business Science, South Africa, and former Chairman of South Africa's Competition Tribunal. After thanking delegates for their contributions, the Chairman outlined the five topics to be covered: (i) the importance and aims of public procurement; (ii) the problem of collusion; (iii) the problem of corruption; (iv) how to fight collusion and corruption in public procurement; and (v) competition advocacy for integrity and competitiveness in public procurement. Turning to the first topic – the importance and aims of public procurement – he invited Professor Arrowsmith to make her presentation.

Professor Sue Arrowsmith began by noting that she was approaching the issue from the perspective of public procurement regulation. Transparency is frequently cited as *the* most important tool in preventing corruption in public procurement, so the more transparency there is within the procurement process, the better. Professor Arrowsmith, however, took the view that transparency may not be an unfailingly helpful value in this context. Rather, more research needs to be done on the role of transparency in addressing corruption, and on which aspects are valuable in public procurement regulation.

Professor Arrowsmith introduced the question: what is transparency? She suggested that it has four dimensions: publicity for contract opportunities; publicity for the rules of each procedure; limits on public officials' discretion; and verification and enforcement. The third dimension – limiting the discretion of procurement officials – is often seen as the fundamental aspect of transparency. The principle reason behind this is the anticorruption imperative: to constrain discretion so that there is simply no room for bribery, favouritism etc.

Instead of the well-known benefits of transparency, Professor Arrowsmith focused on its limits, particularly in relation to the third dimension. In practice, it is virtually impossible to remove all discretion from the procurement procedure, but efforts to do so in any event tend to result in a mechanical, inefficient process. Furthermore, corruption can be pushed into the post-award phase, whereby the favoured bidder knows that they can win the contract, ostensibly fairly, in accordance with the very transparent rules, and later secure lax enforcement or contract revisions.

Transparency brings with it various costs. Firstly, by removing all scope for subjective judgment from the procurement process, procurement rules can make it impossible for officials to secure the best value for money from public procurement, leading to an inefficient result. Secondly, transparency can facilitate collusion among bidders. Thirdly, the cost of the public procurement process itself is significant, which deters some good contractors from participating in public tendering processes. Related to this point, Professor Arrowsmith noted some research findings that indicated that the majority of wastage in public procurement is due, not to corruption and abuse, but to simple inefficiency – so that excessive emphasis should not be placed on transparency in this context.

Professor Arrowsmith concluded by saying that she felt there was a need for more empirical research, utilising a quantitative approach, on the various costs and benefits of specific types of transparency rules and the appropriate limits. Such research should be backed up by work on other policy aspects, such as capacity building, skills training and ethics issues, rather than a blanket focus on transparency.

The Chairman thanked Professor Arrowsmith for her presentation. He noted the contributions of Albania, which cited empirical evidence of price rises in the range of 5-10% in public procurements with small numbers of bidders, and of Mexico, which found evidence of price decreases of between 20-50% in public procurements that had benefited from increased numbers of bidders. The contribution of the Slovak Republic highlighted the risk that prior corruption or collusion could constitute a barrier to entering public procurement by new firms, while the contribution from CUTS suggested that these offences undermine incentives to invest and innovate. The Chairman then moved to the second topic – corruption in public procurement – and invited Dr. Aboudrar to make his presentation.

Dr. Abdesselam Aboudrar began by noting the importance of public procurement. With large sums of money involved, a diverse range of stakeholders and a multiplicity of complex rules, public procurement is highly exposed to the risks of collusion and corruption. This may take various forms: direct bribery; lack of public access to information facilitating differentiation between bidders; non-compliance with disclosure requirements; bias in adjudication; or post-award corruption.

The risk of corruption affects all stages of the public procurement process. At the inception stage, i.e. when defining the public need, this definition may be biased or false – the notion of "cathedrals in the desert". The next step is to define the terms of reference of the procurement, which can be drafted to favour certain suppliers. The most vulnerable stage is the tendering process itself, which is conducted in accordance with detailed procurement rules. Corruption can also occur in the post-award or delivery phase, for example, where the contractor is allowed to vary the requirements of the contract or is granted a higher price.

Typically, in Morocco, corruption is viewed in terms of the percentage of public spending that is diverted as a result. However, Dr. Aboudrar stated that this is not his primary concern. Instead, he focuses, firstly, on the enormous waste involved in corruption, particularly with regard to projects that are undertaken solely because of corruption. Secondly, corruption involves a misallocation of finite public resources. Thirdly, corruption can deter investment and impact negatively on the economic development of a country.

Morocco has undertaken numerous reforms in order to fight corruption in public procurement. Areas of reform include simplification and clarification of procedures; enhanced competition; equal treatment of bidders; reinforcing transparency and public ethics; modernising the public service; improving protection of other bidders; and complaint mechanisms for review of public procurement awards. Promotion of transparency in public procurement is important, particularly because the State as purchaser is disproportionately powerful.

There are a multitude of stakeholders, both public and private, involved in any public procurement process: the bidding firms, the procuring agency, and in Morocco now, a variety of government supervisory agencies, including the anti-corruption agency and competition authority. This multiplicity can lead to problems of co-ordination and efficiency. Morocco has signed up to a number of free trade treaties, which have included commitments to improve the quality of public procurement. Training of procurement officials and capacity-building is another means to fight corruption in public procurement.

The Chairman thanked Dr. Aboudrar for his presentation. He noted that the issue of corruption in public procurement had two aspects: the costs of corruption and the factors facilitating corruption. The country contributions highlighted a variety of costs, including wastage of public resources, loss of purchasing power, diminished ability of government to reach its policy goals and public distrust of government. While most of the contributions had focused on corruption in the awarding of public contracts, those of Croatia and Gabon had also raised the issue of post-award corruption. The Chairman invited Gabon to speak on this issue.

The delegate from **Gabon** noted that any public contract valued at €45,000 or greater must be put out to public tender, which is awarded to the lowest bidder. However, ways to distort free competition through collusion or corruption always exist. Therefore, there is *ex post* monitoring of procurement, to ensure that money has not been disbursed fraudulently. Other techniques include prosecution of procurement officials involved in corruption; building a competition culture among businesses, in particular by linking it to the notion of competitiveness; and transparency in public management.

The Chairman thanked Gabon for its contribution, and invited Norway to speak on the issue of public perceptions of levels of corruption following increased anti-corruption enforcement.

The delegate from **Norway** noted that a number of high-profile public corruption cases have taken place in Norway in recent years. However, greater enforcement has had the paradoxical effect of creating a public perception that corruption is a new and increasing phenomenon in society, and the resulting concern paved the way for a strengthening of anti-corruption legislation. By way of example, a fine of €6.5 million was imposed recently on the municipality of Oslo for failure to comply with the existing rules on public procurement.

The Chairman thanked Norway for its contribution, and then turned to the second aspect of corruption, namely the factors that facilitate corruption. The contribution of Latvia cited long-standing relationships between firms and public officials. Pakistan mentioned inadequate remuneration of public officials and weakened political institutions. Brazil listed frequent interactions between bidders. Romania's contribution reported on a study that identified reasons for corruption in Romania, and the Chairman invited Romania to elaborate further on these findings.

The delegate from **Romania** explained that the study, which was based on a survey of local public administration officials, had revealed a variety of reasons for corruption in the country: inconsistency in reforms; lack of coherence and mismanagement of the privatisation process; lack of traditions that support the market economy and administrative systems reluctant to change; low salaries among public officials; lack of financial discipline in the public sector; and fluctuations in the numbers of civil servants. The survey also identified a number of ways by which to reduce corruption in public procurement: to intensify the reform process including civil service reform; to strengthen local autonomy and increasing local authorities' capacity for financial management; and to improve public policy formulation. These were also the requirements that had to be fulfilled by Romania in order to join the European Union. The delegate concluded by stating that corruption has profound negative effects for all countries attempting to develop market economies, and for that reason, a number of public agencies with specific remit over corruption had been established in Romania since 2002.

The Chairman thanked Romania for its contribution. The contribution from Papua New Guinea highlighted how the problem of corruption can have its roots in certain social traditions. The Chairman asked Papua New Guinea to elaborate on this point.

The delegate from **Papua New Guinea** explained that a traditional system of social assistance exists in that country, whereby individuals are obliged to assist their extended family members, known as a "wantok", to the greatest extent possible. As this village tradition has been applied within the context of the modern economic system, it has fostered corrupt practices. For example, public contracts may be granted to wantoks on the basis of the needs of the wantok, rather than merit. Additionally, the prior existence of the wantok tradition has made the community in general more tolerant of corruption. However, as nepotism is not unknown in developed countries also, the delegate suggested that the wantok system might be regarded as merely a local manifestation of a global problem.

The Chairman thanked Papua New Guinea for its contribution, and noted that the contribution of Peru also mentioned historical and cultural conditions that foster corruption. Turning to the issue of sanctions, the Chairman noted that monetary fines and imprisonment are available as penalties in many but not all jurisdictions. Generally, competition authorities do not have jurisdiction over pure corruption issues, but there is a degree of co-operation and co-ordination between agencies that deal with collusion and corruption in public procurement. Indonesia, Gabon, India, Poland and Tunisia had each established independent government agencies to tackle corruption in public procurement. The contributions of Australia, France, South Africa, the United States and Japan provided examples of cases taken by competition authorities that included both collusion and corruption aspects. In Israel, the competition authority could occasionally pursue corruption aspects of a case if there were also competition violations at issue. The Chairman then introduced the third topic for discussion – collusion in public procurement – and invited Dr. Pasaribu to speak.

Dr. Benny Pasaribu began by describing the substantial growth of the Indonesian economy since the 1970s. The reform era in the country had started in 1998, and had resulted in a variety of new laws that prohibit anti-competitive and corrupt behaviours, and accompanying enforcement agencies. International and domestic competitiveness is also becoming more important. However, various surveys suggest that Indonesia remains a haven for corruption.

Dr. Pasaribu spoke about the vicious cycle of corruption and collusion that can occur, whereby collusion leads to supra-normal profits that can be used to fund bribery, which in turn reinforces lack of competition as the status quo. In particular, governments with a high level of corruption tend to have strong relationships between State officials and business. Dr. Pasaribu provided some figures regarding the relative corruption and competitiveness rankings of Indonesia and its less corrupt, more competitive neighbour, Singapore, which demonstrated the correlation between corruption and lack of competitiveness.

Dr. Pasaribu then spoke of his own experiences with the Indonesian competition authority, the KPPU. The vast majority of complaints received by the authority relate to bid rigging, constituting a disproportionate share of the case load. Problems in public procurement could involve a horizontal relationship between bidders or a vertical one between bidders and officials. While the KPPU focuses mainly on collusion in enforcement, its advocacy efforts are targeted at both corrupt and anticompetitive practices. In Indonesia, there is also a government procurement supervisory agency, with which the KPPU planned to sign a memorandum of understanding, and a corruption eradication commission (KPK), with which it had already signed such a memorandum. In addition, legislation relating to public procurement regulation was before parliament.

Dr. Pasaribu talked about the KPPU's co-operation with the KPK, whereby the KPPU would send any evidence of corruption in public procurement cases to the KPK, which has jurisdiction to investigate

corruption offences. There were a number of big cases, relating to oil container ships, electricity, first aid and ink procurement, where evidence of corruption had been sent to the KPK. Dr. Pasaribu noted that a further memorandum of understanding between the KPPU and the police and attorney general's office was pending, which would bring about a further division of responsibility between these agencies.

The Chairman thanked Dr. Pasaribu. He noted that the factors that facilitate collusion in general also apply in the public procurement context, in particular the detrimental effect of having a small number of bidders. Mexico's contribution cited the exclusion of foreign suppliers from public procurements, plus the practice of public opening of bids. Ireland identified failures to update bid qualification lists, thus restricting bidding to firms that had participated in previous procurements. Albania and Tunisia cited excessive criteria in bid specifications, which restrict the number of bidders. Colombia identified failure of competition law enforcement to protect new entrant firms from economic attacks by incumbents. Chile noted that the design of the procurement procedure could lead to excessive predictability and barriers to entry. Canada mentioned the possibility that trade associations could be used to organise collusion. El Salvador cited lack of knowledge of bid rigging among procurement officials, in a nation which is new to competition policy; the Chairman invited El Salvador to elaborate on the issue of education and training.

The delegate from **El Salvador** outlined various competition advocacy activities of the Competition Superintendence of El Salvador: production of an information booklet on bid rigging; a series of presentations to public officials which elaborated on the contents of the booklet; and development of channels of communication between procurement officials and other State agencies. Advocacy efforts are supported by enforcement efforts: in 2009, four travel agents were fined by the Superintendence for bid rigging in public tenders.

The Chairman thanked El Salvador, and invited South Korea to speak on bid rigging in design-and-build construction projects.

The delegate from **South Korea** stated that bid rigging may be especially prevalent in public tenders relating to projects where the winning bidder is responsible for design as well as construction, for several reasons: advanced technology is required, so fewer firms can bid; such projects tend to be large, further restricting bidding to larger firms; and construction companies in South Korea have close relationships, which facilitates collusion.

The Chairman thanked South Korea, and invited Latvia to speak on transparency and collusion, and the practice of sub-dividing contracts to avoid public procurement rules.

The delegate from **Latvia** noted that, in the past, many bid rigging cases were uncovered when identical mistakes were found in paper bids submitted by several firms. The introduction of e-procurement procedures, while desirable in terms of transparency and cost, reduces the possibility that evidence of collusion of this nature will come to light. Secondly, under Latvian law the procurement procedure to be followed depends on the value of the contract. By artificially sub-dividing contracts, procurement officials can avoid more onerous rules that apply to higher value contracts. It is desirable, therefore, to have some monitoring agency in place which can sanction officials who sub-divide contracts in this manner.

The Chairman thanked Latvia, and invited CUTS to speak on the detrimental effects of preference systems within public procurements.

The delegate from **CUTS** explained that preference systems limit the number of effective bidders that can participate in a public procurement, which reduces competition and its benefits. Moreover, collusion is easier to sustain among smaller numbers of bidders. In India, there is excessive heterogeneity of rules

governing public procurements, so that the procurement process could be improved by standardisation of rules.

The Chairman thanked CUTS, and invited Poland to speak on bid suppression.

The delegate from **Poland** noted that bid suppression may present evidence of collusion in tendering, whereby certain bidders fail to comply with the various requirements of the tendering process and have their bids cancelled, so the tender is granted to the most expensive bidder. Poland does not currently require bidders to certify as to bid independence; instead, the emphasis is place on corruption, with employees of the awarding agency being required to provide written statements of impartiality. However, introduction of a certificate of independent bid determination (CIBD) is being considered.

The Chairman thanked Poland, and noted that the contributions had suggested that bid rigging tends to be concentrated in a few industries, such as construction and healthcare. He invited the United Kingdom to speak about its recent series of construction industry cases.

The delegate from the **United Kingdom** explained that, while the investigation had revealed evidence of cover pricing throughout the construction sector, for pragmatic reasons relating to the efficient use of public resources only a portion of these cases had been prosecuted. The objective was to send a strong message to the sector that this practice is illegal. The competition agency had pursued those cases in which the evidence of collusion was strongest, and where there was repeated collusion. A mix of large and small firms was selected, to illustrate the endemic nature of the practice. The delegate mentioned the Office of Fair Trading's ongoing "Drivers of Compliance" project and two findings of note. Firstly, competition compliance is now viewed by businesses as an aspect of business ethics. Secondly, while fines are considered by some firms as merely a cost of doing business, the reputational effects of a competition conviction, plus the possibility of criminal liability and directorship disqualifications, may be more serious deterrents.

The Chairman thanked the United Kingdom, and invited Turkey to speak about its boycott cases relating to the healthcare sector, including on the consumer welfare effects.

The delegate from **Turkey** described two cases whereby boycott of a public tender had constituted a violation of competition law. In response to a government decision to put healthcare purchasing out to tender to minimise costs, suppliers had colluded and jointly refused to bid. As bid rigging is a criminal offence in Turkey, the case was investigated by the competition authority in conjunction with the public prosecutor, who has more extensive investigatory powers. Evidence revealed that the medical suppliers were prepared to disregard patients' urgent medical needs entirely. The undertakings involved were fined for their participation in these boycotts. The case illustrates how collusion can take a form other than bid rigging or market sharing.

The Chairman thanked Turkey, and invited Mexico to talk about the work of its competition authority to improve the design of public procurement procedures.

The delegate from **Mexico** suggested that bid rigging in public procurement typically stems from a badly designed legal framework, with three basic problems: (i) restricting bidding to domestic suppliers; (ii) multiple provision, that is, segmenting an award among a number of suppliers; and (iii) fragmentation of auctions, which are held several times a year at different regional levels. In the case of pharmaceutical procurement in Mexico, the competition authority worked with the responsible government agency, to redesign the procurement framework to address these three problems. Although there was resistance from pharmaceutical firms and some levels of government, the improvements had resulted in a significant reduction in procurement costs since their introduction.

The Chairman thanked Mexico, and asked Japan to discuss a study from 2003 that had precipitated the involvement of the JFTC in procurement reforms.

The delegate from **Japan** outlined the three principal recommendations emerging from the study: (i) expansion of the scope of general competitive bidding; (ii) promotion of the use of comprehensive bid evaluation methods; and (iii) ensuring consistency between competitiveness and other policy objectives, such as developing the local economy or facilitating participation by SMEs. Six examples of reforms introduced since the publication of the report were provided: (i) the areas of procurement subject to general competitive bidding have been widened; (ii) comprehensive bidding evaluation methods have been introduced by many procurement agencies; (iii) use of e-procurement has been extended; (iv) increased disclosure of information, in order to establish that contracts are not awarded arbitrarily; (v) strengthening of penalties for bid rigging; and (vi) efforts by procurement agencies to strike a balance between development of local economies and fair competition.

The Chairman thanked Japan, and asked Tunisia to speak about what was behind recent changes to Tunisia's legislation.

The delegate from **Tunisia** noted that revisions to the anti-corruption laws a decade ago had greatly reduced the occurrence of corruption in public procurement in Tunisia. However, bid rigging is still a common problem, in sectors such as the provision of food to schools, prisons and hospitals. What attracted the attention of the competition authority to this problem was the fact that a single operator could obtain a greater than 90% share of the relevant market. There is a further issue whereby contractors submit bids which come out below the minimum wage; so they are either hiring staff on the black market or engaging in predatory pricing. Consequently, the laws on public procurement were revised in 2008 to strengthen the provisions against bid rigging.

The Chairman thanked Tunisia, and noted the use of CIBDs in some jurisdictions, including Brazil and Canada, as a tool to eliminate collusion. The Chairman then asked for a show of hands by the delegations as to whether, in their jurisdiction, firms that were convicted of bid rigging were subsequently prohibited from bidding in procurements for a period of time -- seven positive responses were received. The discussion then moved to the fourth topic – fighting collusion and corruption – and the Chairman invited Professor Lewis to make his presentation.

Professor David Lewis suggested that bid rigging in public procurement constitutes the most egregious competition offence. While bid rigging and bid corruption may operate completely independently of each other, and in fact one may even subvert the other, the evidence is that they generally occur in tandem. Assistance on the buyer side may be necessary for a cartel to monitor cheating and avoid detection; while conversely, co-operation between bidders may be necessary to dissuade the losing bidder from exposing evidence of corruption in the awarding of a contract. Therefore, while there is no necessary relationship between collusion and corruption, frequently there is some relationship.

Professor Lewis outlined reasons why collusion and corruption in public procurement, specifically, are considered particularly problematic: (i) society is hit with a "double whammy" of criminality when these offences occur in tandem; (ii) the consumer is also hit twice, as consumer and as taxpayer; (iii) the scale of public procurement projects tends to make them attractive and susceptible to collusion and corruption, and moreover, makes monitoring difficult; (iv) collusion and corruption in this context amounts to a direct attack on good governance and public accountability; and (v) the disadvantaged in society are hit disproportionately hard, in terms of reduced range and quality of public services and infrastructure. Given that public procurement concentrates the buyer side, educating procurement officials about bid collusion and corruption is likely to yield high returns. This is particularly important because, in spite of

the dangers of bid rigging, public procurement remains an important instrument of industrial policy for governments.

Professor Lewis considered means by which to address bid rigging and bid corruption. Mechanisms to protect against one offence may work against mechanisms to protect against the other. While transparency, for example, is considered to be the most effective mechanism to prevent corruption, it may well assist collusion. Procurement via regular small bids tends to facilitate collusion, whereas large lumpy tenders may facilitate corruption. At the same time, however, information collected by anti-corruption monitoring agencies may be of assistance to anti-collusion agencies, and vice versa.

Having considered the literature, the four most common methods proposed to combat both bid corruption and bid collusion are: (i) close liaison between competition authorities and anti-corruption agencies; (ii) training of public officials to recognise collusion and corruption; (iii) transparency, although there is a need to identify more precisely which forms of information facilitate collusion; and (iv) alignment of government databases to identify indicators of collusion and/or corruption.

The Chairman thanked Professor Lewis, and noted that, of the many contributions received, very few had reported cases that involved both collusion and corruption in public procurement. Notable exceptions were the contributions of France, which delegations were encouraged to review, and that of India, which the Chairman invited the Indian delegation to speak about in greater detail.

The delegate from **India** noted that, while the competition regime in India is a relatively new phenomenon, efforts are underway to devise guidelines and other tools to govern public procurement. As the competition authority becomes fully operational, more cases of bid rigging will be detected and sanctioned. As regards corruption, this is subject to a more well-established institutional regime. India has a central vigilance commission, as well as anti-corruption agencies in the States and an office of Comptroller and Auditor General, which carries out *ex post* audits of government expenditure. There is also a Right to Information Act, which aims to promote greater transparency in public activities.

The Chairman thanked India. From the contributions, it appeared that no level of government is immune from collusion or corruption in procurement, and there is insufficient enforcement evidence to determine how common these offences are. Nevertheless, **Sweden**'s contribution reported on a major national study of collusion and corruption in public procurement, which indicated that these offences are closely related and facilitated, in large part, by a lack of understanding among front line public procurement officials. The Chairman raised the issue of enforcement techniques that can address both collusion and corruption, noting the contribution of the **United States** regarding surveillance and undercover investigation techniques in this regard. Other contributions, including those of the **Russian Federation, Bangladesh, Brazil, Romania** and **South Korea**, suggested internet-based procurement techniques as a means to prevent both collusion and corruption. Brazil listed co-operation agreements between procurement agencies and law enforcement agencies. Germany has a specialised review process for disputed public contract awards, which the Chairman invited Germany to speak about in greater detail.

The delegate from **Germany** stated that, from a competition perspective, the strengths of this review procedure are the opportunities it offers to create transparency and ensure non-discrimination in public procurement, and to correct any procurement award that has been found faulty. The primary purpose of a review is verification of whether the procedural rules have been respected in individual instances, rather than concern for the competitive process as such. Individualised review is not an appropriate means to conduct a systematic review of public procurements over time to detect suspicious patterns of bidding, which may be a more effective means of identifying collusion. Nevertheless, while there is no empirical evidence in Germany as to whether the existence of the review procedure has any effect on levels of

collusion or corruption, one might assume that the threat of *ex post* scrutiny of the procurement process by an independent body might dissuade companies somewhat from engaging in these offences.

The Chairman thanked Germany, and invited Singapore to speak about the techniques it uses to fight both corruption and collusion in public procurement.

The delegate from **Singapore** stated that the three guiding principles for public procurement in that country are transparency, open and fair competition, and value for money. To achieve *transparency*, public procurement is conducted under a substantial framework of laws, regulations and guidelines; public officials are required to disclose conflicts of interests and frequently rotated; and members of the tender-evaluation and tender-approving committees are kept separate. To achieve *open and fair competition*, tendering is conducted through an e-procurement portal; open tendering is the default option; technical specifications cannot be used as barriers to entry; and SMEs are allowed to form consortiums in order to bid in higher value tenders. To achieve *value for money*, proposals are selected on the basis that they meet the requirements and offer the best value, meaning an optimal balance of cost and benefit; higher value projects are subject to more quantifiable evaluation to remove the element of subjective discretion; and negotiation is permitted only where there is limited competition, to obtain best value. In enforcing these principles, the risk of being caught and heavily penalised – by fines, imprisonment or civil proceedings – is a strong deterrent. In Singapore, two separate State agencies are responsible for fighting collusion and corruption, with close collaboration between the two. As regards the potential tension between the principles of competition and transparency, the use of internet-based procurement platforms maximises bidder participation, reduces costs and can put in place requirements that do not unreasonably limit competition, while easy availability of information assists policing of procurement.

The Chairman thanked Singapore, and invited the United States and Federal Trade Commissioner, William Kovacic, to speak about their country contribution and individual contribution, respectively.

The delegate from the **United States** noted that both collusion and corruption subvert the competitive procurement process, and they often occur in tandem. In the United State, a single agency – the Department of Justice – has jurisdiction over both types of offence. The critical issue, however, is efficient prosecution, which can also be achieved by two or more agencies with jurisdiction, provided they have in place mechanisms for co-operation. There is additional complementarity between collusion and corruption in the area of training of public procurement officials, so that effective training should cover the problem of bid rigging and should also make officials aware of the penalties for engaging in corruption.

Commissioner William Kovacic noted that his paper, written with Robert Anderson and Anna Müller, considers the tension between mechanisms to protect the integrity of the public procurement process and those to promote competition. The paper concludes that, with careful design, transparency measures can avoid anti-competitive consequences. For example, having a procedure whereby bids are opened publicly protects the integrity of the process, but also assists cartels to monitor cheating. An alternative approach might be to keep the bids secret, but have in place an auditing mechanism by which a trusted public official reviews the process for evidence of corruption. Another example is cases of subcontracting: public projects should be reviewed to ensure that losing bidders are not routinely granted subcontracts, which might provide evidence of prior collusion in the procurement process.

The Chairman thanked Commissioner Kovacic, and invited France to discuss strategies to curtail combined collusion and corruption in public procurement.

The delegate from **France** noted that, in spite of detailed regulations governing public procurement in France, collusion and corruption may still occur. The competition authority has responsibility solely for enforcing competition law. The Administrative and Criminal courts consider related practices, such as

collusion and corruption. Favouritism is the crime most frequently prosecuted in relation to public procurement. There are mechanisms for co-operation between the competition authority and the criminal process. Moreover, a study into prevention and detection of collusion and corruption is underway.

The Chairman thanked France, and asked for a further show of hands as to whether leniency programmes for individuals and firms that had participated in bribery or corruption existed in their jurisdiction -- nine positive responses were received. The discussion then moved to the final topic of competition advocacy to promote objective and competitive public procurement. Many jurisdictions had experienced major anti-corruption and anti-collusion efforts in recent years; Croatia was invited to discuss its efforts in this regard.

The delegate from **Croatia** outlined the legal provisions governing public procurement. Specific procurement legislation regulates the entire process of competition in public procurement, with the Croatian competition authority as the implementing authority for these rules. Other State agencies, including the police force, the State attorney's office and the courts, are also involved. Recently, an anti-corruption programme for State-owned enterprises for the period 2010-12 was launched. It has three objectives: (i) improving integrity, responsibility and transparency; (ii) creating the conditions necessary for prevention of corruption at all levels; and (iii) affirmation of a zero tolerance approach to corruption. The Croatian competition authority engages in advocacy work in order to assist procurement officials and other State agencies with this process. For example, the competition authority provides advice to procurement officials on procurement design in order to prevent bid rigging from occurring. A series of seminars and an information brochure are also planned.

The Chairman thanked Croatia, and invited BIAC to discuss internal controls, which are put in place at the corporate level, to prevent collusion and corruption in procurement.

The delegate from **BIAC** noted the lack of empirical evidence available regarding the proportion of collusion/corruption occurring that is authorised by senior management versus the proportion that is unauthorised. However, companies are increasingly aware that corruption harms businesses. Many firms are putting in place multidisciplinary compliance programmes to prevent collusion and corruption in addition to other illegal business practices, for example in the environmental field. While one of the underlying assumptions of such programmes is that some illegal conduct is attributable to lower management, a compliance programme has three objectives: (i) it provides an affirmation of the company's values and requires senior management to take steps to protect these; (ii) it ensures that personnel are fully aware of the relevant rules; and (iii) it puts in place mechanisms to detect and stop illegal behaviour. Nevertheless, decentralisation in larger companies, plus the growth of performance-based compensation, means that collusion and corruption can occur at lower levels, and it is the responsibility of senior management to prevent this from happening. BIAC took the view that genuine compliance programmes should be taken into account by competition authorities when assessing alleged breaches of the competition and anti-corruption laws by firms.

The Chairman thanked BIAC, and issued a reminder to delegates that proactive competition advocacy is of paramount importance in defending the rules against collusion and corruption. He thanked all the delegations that had responded to questions, and asked the guest speakers if they would like to add anything in light of the discussion.

Dr. Pasaribu noted the repeated references in the discussions to the correlation between collusion and corruption in public procurement, and the need for a co-ordinated response among the various agencies with jurisdiction over these problems. In the Indonesian context, the competition authority has engaged in co-ordination efforts with the corruption eradication commission, the State audit agency, and now with the

police and attorney general. Co-operation with other agencies is a key aspect of prevention programmes for any competition authority.

Dr. Aboudrar stated that prevention of corruption and collusion begins before public projects are conceived. So, for example, in Morocco, public purchasers are required to publish their purchasing programmes in advance, to allow suppliers to prepare to participate. In the post-award stage, Morocco conducts *ex post* audits and reports on implementation, which can identify collusion or corruption. The two key points are: (i) getting business on board, as it is generally disappointed bidders that have the opportunity to reveal corruption or collusion in the process; and (ii) training of public procurement officials to detect risks. The "red flags of collusion", presented at the break out session that morning, was an example of a simple but effective tool.

Professor Lewis emphasised the importance of advocacy when tackling collusion and corruption in public procurement, in particular by informing civil society of the costs of corruption. When a competition authority takes on corruption, it usually takes on powerful interests in society, and so it needs to have the public on its side, in order to ensure that it is not overwhelmed by these strong opposing interests.

The Chairman thanked the speakers for their remarks, and stated that there was sufficient time remaining for two questions or comments from the floor.

The delegate from **Chile** provided an update on Chile's contribution with regard to CIBDs. In particular, CIBDs were used in two procurements by the privately-managed pension funds regulator. In one of these tenders, the certification requirement had led several bidders to disclose certain prior communications. Moreover, the result of that tender was a reduction of 24% in management fees compared with the average fees paid. This provides an example of how intelligent tender design and use of CIBDs can lead to a more competitive outcome.

The delegate from **Brazil** noted that CIBDs are now obligatory in public procurements in that country, which the competition authority, the SDE, hopes will greatly increase the deterrence of bid rigging.

The Chairman thanked the delegates for their comments, and thanked all those who had participated in the discussion, including the guest speakers and the Secretariat. He invited Professor Frédéric Jenny to take the floor, in order to sum up the afternoon's discussion.

Professor Frédéric Jenny began by praising the discussion as rich and highly interesting. He noted the importance of the topic, in view of the importance of public procurement as an economic activity and the magnitude of harm that can be caused to the process by collusion and corruption.

The discussion had begun by considering collusion and corruption as discrete phenomena. As regards corruption, it may occur because a weak system of law permits deviant behaviour by officials, or where cultural or social values lead to co-operation between citizens that feed the process of corruption, as for example in Papua New Guinea. Another factor is that the buyer is not the payer in public procurement transactions. As regards collusion, it is facilitated by a variety of factors, including bad procurement procedures, lack of training of procurement officials, excess complexity, and occasionally, too much transparency.

The link between collusion and corruption has at least two different sources. The first is the necessity of compensating losing firms, in order to avoid corruption being discovered. The second is the need to make corruption less visible, in order to create an appearance of competition even though the result has been pre-determined. These links, in particular the second one, make it desirable to have a co-ordinated response to the individual problems of collusion and corruption.

Although collusion and corruption may be more concentrated in some sectors, for example construction and health care, it appears to occur in almost every industry. Forms of collusion and corruption can be quite sophisticated – for example, the Polish case of bidders purposely getting disqualified for failure to comply with tendering requirements, in order to support a more expensive bid.

The discussion considered solutions to address collusion and corruption as separate phenomena, and joint solutions to protect public procurement from both offences. Mechanisms for fighting corruption include *ex post* audits, capacity building, building a culture of compliance, bringing high profile cases to generate public support for enforcement efforts, and limiting the discretion of public officials via transparency requirements. Mechanisms for fighting bid rigging include using enforcement as an important deterrence strategy, opening markets to international competition, collusion-proofed auction design, improving public procurement rules, reducing transaction costs, and dialogue with and training of procurement officials. Transparency is a more complex issue. While it is important in the fight against corruption, it can aid collusion between bidders and make the procurement process excessively predictable.

Close co-operation between agencies is an important means by which to reduce incidents of collusion and corruption in public procurement. This has two aspects: co-operation between competition authorities and public procurement agencies, and co-operation between competition authorities and anti-corruption agencies. In many countries, there are already links between these various bodies. While there is perhaps scope for additional work on this matter – for example, in terms of the scope of the memoranda of understandings between these agencies – this at least appears to be a fruitful way of moving forward. Moreover, advocacy in one area, collusion or corruption, can have spill-over effects in the other. In terms of structural issues, there is a need to avoid the negative side effects of transparency, although even on this point the interests of competition agencies and anti-corruption agencies can converge, for example with regard to subcontracting.

Professor Jenny drew his remarks to a close by noting that although considerable progress had been made, the topic had scope for further discussion, because of the range of good and bad experiences among countries. In particular, examination might be given to the contents of public procurement regulations and the extent to which these were compatible with competition policy. Finally, he again thanked everyone for their participation in the roundtable.

COMPTE RENDU DE LA DISCUSSION

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par le secrétariat

Le président (Khalid Mirza) ouvre les débats, prenant note du consensus général sur le fait que la passation des marchés publics constitue un segment important de l'activité économique, dont l'objectif principal est d'assurer une utilisation rationnelle des deniers publics. De plus, le préjudice effectivement causé par la collusion et la corruption dans ce domaine va au-delà de son poids économique ; en effet : i) les biens et services en jeu concernent généralement une large fraction de la population ; ii) les marchés publics portent souvent sur des infrastructures physiques ou sur la santé publique, qui soutiennent d'autres formes d'activité économique ; iii) ce problème a une incidence sur la compétitivité internationale ; iv) il peut nuire au climat d'investissement ; v) les distorsions dans l'attribution des marchés publics produisent généralement leurs effets les plus néfastes sur les couches les plus défavorisées de la population, qui font le plus appel aux services et infrastructures publics ; et vi) comme les marchés publics portent souvent sur des « biens publics », on ne peut pas compter sur les mécanismes de marché à l'œuvre dans le secteur privé pour remédier aux défaillances de l'État.

Le président annonce que la table ronde va consister en une succession de présentations d'experts, entrecoupée des questions qui seront posées aux différentes délégations. Il présente les quatre intervenants : Mme Sue Arrowsmith, de l'Université de Nottingham, Royaume-Uni ; M. Benny Pasaribu, membre et ancien président de la Commission de la concurrence de l'Indonésie (KPPU) ; M. Abdesselam Aboudrar, président de l'Instance centrale de prévention de la corruption du Maroc ; et M. David Lewis, du Gordon Institute of Business Science, Afrique du Sud, et ancien président du tribunal de la concurrence de ce pays. Après avoir remercié les délégués de leurs contributions, le président cite les cinq thèmes qui vont être abordés : i) l'importance et les buts de la passation des marchés publics ; ii) le problème de la collusion ; iii) le problème de la corruption ; iv) la lutte contre la collusion et la corruption dans la passation des marchés publics ; et v) la promotion de la concurrence comme moyen d'assurer l'intégrité et la compétitivité dans la passation des marchés publics. Sur le premier thème – l'importance et les buts de la passation des marchés publics –, le président invite Mme Sue Arrowsmith à présenter son exposé.

Mme Sue Arrowsmith commence par signaler qu'elle aborde cette question du point de vue de la réglementation régissant la passation des marchés publics. La transparence est souvent présentée comme l'outil par excellence de prévention de la corruption dans les marchés publics – plus le processus d'attribution des marchés est transparent, mieux c'est. Mme Arrowsmith est toutefois d'avis que la transparence ne présente pas toujours un intérêt incontestable dans ce contexte. Il serait utile de mener de plus amples recherches sur le rôle de la transparence dans la lutte contre la corruption et sur les aspects de la transparence qui sont utiles pour la réglementation des marchés publics.

Mme Arrowsmith pose la question : qu'est-ce que la transparence ? Elle en indique les quatre dimensions : la transparence permet de faire connaître l'existence des marchés à pourvoir, de rendre publiques les règles de chaque procédure, de limiter le pouvoir discrétionnaire des agents publics, et enfin de vérifier que les règles sont respectées. La troisième dimension – limiter le pouvoir discrétionnaire des responsables de la passation des marchés – est souvent considérée comme l'aspect fondamental de la transparence. La raison principale en est l'impératif anticorruption : il faut restreindre la liberté de décision de sorte qu'il n'y ait tout simplement pas de place pour la corruption, le favoritisme, etc.

Au lieu de se pencher sur les avantages bien connus de la transparence, Mme Arrowsmith s'est concentrée sur les limites de celle-ci, en particulier sur sa troisième dimension. En pratique, il est presque impossible d'éliminer toute marge d'appréciation de la procédure de passation de marché et, quoi qu'il en soit, les tentatives dans ce sens donnent généralement naissance à un processus mécanique et inefficace. De plus, la corruption peut entacher aussi la phase post-attribution, si le soumissionnaire favori sait qu'il peut remporter le marché, en toute équité grâce à des règles très transparentes, et ensuite bénéficier d'un contrôle laxiste du respect des règles ou de révisions contractuelles favorables.

La transparence a un certain coût. Premièrement, du fait qu'elles éliminent de la procédure toute marge d'appréciation subjective, les règles de passation des marchés peuvent empêcher les responsables d'obtenir le meilleur rapport qualité-prix, ce qui est un résultat inefficace. Deuxièmement, la transparence peut faciliter la collusion entre les soumissionnaires. Troisièmement, le coût du processus lui-même n'est pas négligeable, ce qui dissuade certaines entreprises de qualité de participer aux appels d'offres publics. À ce propos, Mme Arrowsmith évoque les conclusions de certains travaux qui indiquent que la majeure partie du gaspillage constaté dans la passation des marchés publics est due non pas à la corruption et aux abus, mais tout simplement à l'inefficacité des procédures : il ne faut donc pas exagérer les vertus de la transparence dans ce contexte.

Mme Arrowsmith estime, en conclusion, qu'il serait nécessaire de mener des recherches plus empiriques, fondées sur des méthodes quantitatives et portant sur les coûts et les avantages de types spécifiques de règles de transparence et sur les limites appropriées. De telles recherches devraient s'accompagner de travaux portant non pas sur la transparence en général, mais sur d'autres aspects de l'action des pouvoirs publics, tels que le développement des capacités, l'acquisition de qualifications ou les problèmes d'éthique.

Le président remercie Mme Arrowsmith de sa présentation. Il mentionne la contribution de l'Albanie, qui cite des données empiriques faisant état d'un surcoût de l'ordre de 5 à 10 % pour les marchés publics passés en présence d'un petit nombre de soumissionnaires, et celle du Mexique, qui atteste de prix inférieurs de 20 à 50 % lorsque les appels d'offres attirent un plus grand nombre de soumissionnaires. D'après la contribution de la Slovaquie, la présence de corruption ou de collusion en amont peut constituer un obstacle à l'entrée de nouvelles entreprises sur les marchés publics, tandis que la contribution de CUTS semble indiquer que les comportements illicites réduisent les incitations à investir et innover. Le président aborde ensuite le deuxième thème – la corruption dans la passation des marchés publics – et invite M. Aboudrar à présenter son exposé.

M. Abdesselam Aboudrar souligne tout d'abord l'importance de la passation des marchés publics. Étant donné l'ampleur des sommes en jeu, la diversité des parties prenantes, ainsi que la multiplicité et la complexité des règles, la passation des marchés publics est fortement exposée aux risques de collusion et de corruption. Celles-ci peuvent prendre différentes formes : corruption directe ; insuffisance de l'accès public aux informations facilitant la différenciation entre les soumissionnaires ; non-respect des obligations de divulgation d'informations ; biais dans l'adjudication ; ou encore corruption post-attribution.

Le risque de corruption existe à tous les stades du processus de passation des marchés publics. Au stade de la détermination du besoin public, cette définition peut être biaisée ou erronée – c'est la notion de « cathédrales dans le désert ». L'étape suivante consiste à rédiger le cahier des charges de l'appel d'offres, dont la formulation peut favoriser certains fournisseurs. L'étape la plus vulnérable est celle de l'appel d'offres lui-même, qui est mené selon des règles détaillées. La corruption peut aussi se produire dans la phase postérieure à l'attribution ou à la livraison, par exemple lorsque le soumissionnaire est autorisé à modifier des conditions contractuelles ou se voit accorder un prix plus élevé que prévu.

Au Maroc, la corruption est généralement vue sous l'angle du pourcentage de dépenses publiques qui est détourné à cause de la corruption. Mais M. Aboudrar affirme que là n'est pas son principal motif de préoccupation. Il se concentre surtout, en premier lieu, sur l'énorme gaspillage qui résulte de la corruption, notamment du fait des projets qui sont entrepris uniquement sous l'effet de la corruption. Deuxièmement, la corruption se traduit par une mauvaise affectation de ressources publiques dont le montant n'est pas infini. Troisièmement, la corruption peut dissuader les investisseurs et nuire au développement économique d'un pays.

Le Maroc a mené de nombreuses réformes pour lutter contre la corruption dans la passation des marchés publics. Ces réformes ont porté sur la simplification et la clarification des procédures ; le renforcement de la concurrence ; l'égalité de traitement des soumissionnaires ; l'accroissement de la transparence et de l'éthique dans la sphère publique ; la modernisation du service public ; l'amélioration de la protection des autres soumissionnaires ; et l'instauration de mécanismes de recours pour la révision des attributions de marchés. La promotion de la transparence dans les marchés publics est importante, en particulier parce que l'État, en tant qu'acheteur, dispose d'une puissance disproportionnée.

Une multitude de parties prenantes, publiques et privées, participent la passation d'un marché public : les entreprises soumissionnaires, l'entité adjudicatrice et, au Maroc désormais, divers organes étatiques de contrôle, dont l'instance anti-corruption et l'autorité de la concurrence. Cette multiplicité des acteurs peut susciter des problèmes de coordination et d'efficacité. Le Maroc a signé plusieurs traités de libre-échange, aux termes desquels il s'engage à améliorer la qualité de la passation des marchés publics. La formation des agents chargés de ces procédures et le développement des capacités sont d'autres moyens de lutter contre la corruption dans la passation des marchés publics.

Le président remercie M. Aboudrar de sa présentation. Il prend note du fait que le problème de la corruption dans la passation des marchés publics revêt deux aspects : le coût de la corruption, et les facteurs qui facilitent la corruption. Les contributions des pays mettent en évidence toute une série de coûts, allant du gaspillage des ressources publiques à la perte de pouvoir d'achat, en passant par une moindre capacité des gouvernements à atteindre les buts qu'ils se sont fixés et la méfiance du public à l'égard des pouvoirs publics. Si la plupart des contributions se penchent sur la corruption dans l'attribution des marchés publics, celles de la Croatie et du Gabon soulèvent aussi la question de la corruption dans les phases suivant l'attribution. Le président invite le Gabon à s'exprimer sur le sujet.

Le délégué du **Gabon** fait remarquer que tout marché d'un montant égal ou supérieur à 45 000 EUR doit faire l'objet d'un appel d'offres, qui est attribué au moins disant. Cependant, il existe toujours des moyens de fausser la concurrence par la collusion ou la corruption. Les autorités assurent donc un suivi *ex post* pour vérifier que les fonds n'ont pas été déboursés de façon frauduleuse. D'autres techniques consistent à poursuivre en justice les agents responsables de la passation des marchés qui sont impliqués dans des affaires de corruption ; à instaurer une culture de la concurrence dans les entreprises, notamment en la reliant à la notion de compétitivité ; et à pratiquer la transparence dans la gestion des affaires publiques.

Le président remercie le Gabon de sa contribution et invite la Norvège à prendre la parole au sujet du degré de corruption perçu par le public, suite à un renforcement de la répression de la corruption.

Le délégué de la **Norvège** explique que plusieurs affaires de corruption retentissantes ont touché le secteur public ces dernières années. Mais la répression accrue a paradoxalement donné au public l'impression que la corruption était un phénomène nouveau et grandissant dans la société, une préoccupation qui a ouvert la voie à un renforcement de la législation anti-corruption. Par exemple, la ville d'Oslo s'est récemment vu imposer une amende de 6,5 millions EUR pour n'avoir pas respecté les règles existantes en matière de marchés publics.

Le président remercie la Norvège de sa contribution et se tourne vers le second aspect de la corruption, à savoir les facteurs qui facilitent la corruption. La contribution de la Lettonie cite l'existence de relations de longue date entre les entreprises et des agents de la fonction publique. Celle du Pakistan mentionne l'insuffisance de la rémunération des fonctionnaires et la faiblesse des institutions politiques. Celle du Brésil évoque de fréquentes interactions entre soumissionnaires. Celle de la Roumanie fait état d'une étude qui décrit les raisons à l'origine de la corruption, et le président invite ce pays à commenter davantage les conclusions de cette étude.

Le délégué de la **Roumanie** explique que l'étude, qui est fondée sur une enquête auprès des agents de l'administration locale, révèle une série de raisons diverses à l'origine de la corruption dans ce pays : l'incohérence des réformes ; le manque de suivi dans le processus de privatisation et sa mauvaise gestion ; l'absence de culture de l'économie de marché et la réticence de l'administration face au changement ; le bas niveau des traitements des fonctionnaires ; le manque de discipline financière dans le secteur public ; et les fluctuations des effectifs de la fonction publique. L'enquête a également mis en évidence plusieurs moyens de réduire la corruption dans la passation des marchés publics : intensifier le processus de réforme, notamment dans la fonction publique ; renforcer l'autonomie des collectivités locales et leurs capacités de gestion financière ; et améliorer la formulation des politiques publiques. Ce sont d'ailleurs là les conditions que la Roumanie a dû remplir pour adhérer à l'Union européenne. Le délégué conclut en affirmant que la corruption a des effets profondément négatifs dans tous les pays qui tentent de mettre en place une économie de marché ; c'est la raison pour laquelle plusieurs organismes publics spécifiquement chargés de lutter contre la corruption ont été créés en Roumanie depuis 2002.

Le président remercie la Roumanie de sa contribution. La Papouasie – Nouvelle-Guinée montre dans sa contribution comment le problème de la corruption peut tirer ses origines de certaines traditions sociales. Le président demande à la Papouasie – Nouvelle-Guinée de développer ses commentaires.

Le délégué de la **Papouasie – Nouvelle-Guinée** explique qu'il existe dans ce pays une tradition d'assistance sociale qui oblige les individus à soutenir les membres de leur famille élargie, le *wantok,* dans toute la mesure du possible. Lorsque cette tradition, venue des villages, a commencé à s'appliquer dans le contexte du système économique moderne, elle a engendré des pratiques corrompues. Par exemple, un marché public peut être attribué à un *wantok* en raison des besoins de celle-ci plutôt que selon les mérites de son offre. De plus, l'existence préalable de cette tradition a rendu la population plus tolérante à l'égard de la corruption. Cependant, le népotisme touchant aussi les pays développés, le délégué estime qu'il faut peut-être considérer le système du *wantok* comme la simple manifestation locale d'un problème global.

Le président remercie la Papouasie – Nouvelle-Guinée de sa contribution et constate que la contribution du Pérou mentionne elle aussi des conditions historiques et culturelles qui favorisent la corruption. Abordant la question des sanctions, le président note que les amendes pécuniaires et les peines de prison figurent parmi les sanctions possibles dans de nombreux pays, mais non dans tous. De manière générale, les autorités de la concurrence n'ont pas compétence pour juger les affaires relevant purement de la corruption, mais il existe un certain degré de coopération et de coordination entre les organismes chargés de la lutte contre la collusion et la corruption dans la passation des marchés publics. L'Indonésie, le Gabon, l'Inde, la Pologne et la Tunisie sont des pays qui ont créé un organisme public indépendant doté d'un tel mandat. Les contributions de l'Australie, de la France, de l'Afrique du Sud, des États-Unis et du Japon offrent des exemples d'affaires portées devant les autorités de la concurrence et incluant des aspects de collusion et de corruption. En Israël, l'autorité de la concurrence peut occasionnellement statuer sur les aspects de corruption d'une affaire s'il y a eu également violation du droit de la concurrence. Le président présente ensuite le troisième thème du débat – la collusion dans la passation des marchés publics – et invite M. Pasaribu à s'exprimer sur le sujet.

M. Benny Pasaribu commence par évoquer la forte croissance économique que connaît l'Indonésie depuis les années 70. Les réformes ont débuté dans le pays en 1998, donnant lieu à toutes sortes de nouvelles lois interdisant les comportements anti-concurrentiels et corrompus, ainsi qu'à la création d'instances d'application de ces lois. La compétitivité internationale et intérieure commence elle aussi à prendre plus d'importance. Diverses études laissent toutefois penser que l'Indonésie demeure un havre de corruption.

M. Pasaribu évoque le cercle vicieux dans lequel la collusion conduit à réaliser des bénéfices supranormaux, que l'on peut utiliser pour financer la corruption, laquelle renforce à son tour le *statu quo* que constitue le manque de concurrence. En particulier, dans les administrations très corrompues, on constate souvent la présence de relations étroites entre les fonctionnaires et les hommes d'affaires. M. Pasaribu cite des données concernant le degré relatif de corruption et de compétitivité de l'Indonésie par rapport à Singapour, son voisin moins corrompu et plus compétitif, classement qui démontre la corrélation existant entre la corruption et le manque de compétitivité.

M. Pasaribu parle ensuite de sa propre expérience auprès de l'autorité indonésienne de la concurrence, la KPPU. La grande majorité des plaintes reçues par cette commission concerne des cas de soumissions concertées, qui constituent une part disproportionnée des affaires. Les problèmes rencontrés dans la passation des marchés publics peuvent porter sur une entente entre soumissionnaires (relation horizontale) ou entre soumissionnaires et fonctionnaires (relation verticale). Si la KPPU s'efforce principalement de faire respecter les règles anti-collusion, ses campagnes de sensibilisation visent à la fois les pratiques corrompues et anticoncurrentielles. En Indonésie, il existe aussi un organe de contrôle de la passation des marchés publics, avec lequel la KPPU prévoit de signer un protocole d'accord, et une commission d'éradication de la corruption (KPK), avec laquelle elle a déjà signé un tel protocole. En outre, le Parlement examine actuellement un projet de loi sur la réglementation de la passation des marchés publics.

M. Pasaribu évoque la coopération entre la KPPU et la KPK : la KPK ayant compétence pour enquêter sur les infractions en matière de corruption, la KPPU lui transmet toute preuve de corruption dans des dossiers de marchés publics. Dans un certain nombre d'affaires de grande ampleur, portant sur des achats de navires pétroliers, d'électricité, de matériel de premier secours et d'encre, des preuves de corruption ont ainsi été communiquées à la KPK. M. Pasaribu signale qu'un autre protocole d'accord, entre la KPPU et les services de police et du Procureur général, est en attente de signature et va se traduire par une nouvelle division des responsabilités entre ces instances.

Le président remercie M. Pasaribu. Il prend note du fait que les facteurs qui facilitent la collusion en général s'appliquent aussi au contexte des marchés publics, en particulier les effets néfastes d'un nombre restreint de soumissionnaires. Parmi ces facteurs, la contribution du Mexique cite l'exclusion des fournisseurs étrangers et la pratique de l'ouverture des offres en public. L'Irlande mentionne l'absence d'actualisation des listes d'admissibilité des offres, ce qui restreint la participation aux entreprises ayant déjà soumissionné lors de précédentes procédures de passation de marchés. L'Albanie et la Tunisie citent les critères excessifs imposés dans les cahiers des charges, qui limitent le nombre de soumissionnaires. La Colombie désigne parmi ces facteurs le non-respect du droit de la concurrence, censé protéger les nouveaux entrants contre les attaques économiques menées par les entreprises en place. Le Chili constate que la façon dont la procédure de passation des marchés est organisée peut conduire à une prévisibilité excessive et dresser des obstacles à l'entrée. Au Canada, il est possible que les associations professionnelles soient utilisées pour organiser la collusion. En El Salvador, où la politique de la concurrence est récente, les fonctionnaires chargés de la passation des marchés manquent de connaissances sur les soumissions concertées. Le président invite El Salvador à faire des commentaires sur la question de l'éducation et de la formation.

Le délégué d'**El Salvador** décrit diverses activités de promotion de la concurrence que mène l'instance chargée de la concurrence dans ce pays : production d'une brochure d'information sur les offres concertées, accompagnée d'une série de présentations à l'intention des fonctionnaires ; et mise en place d'une meilleure communication entre les services chargés de la passation des marchés et les autres organes de l'État. Les campagnes de sensibilisation sont soutenues par une meilleure mise en œuvre de la loi : en 2009, par exemple, cette instance a infligé des amendes à quatre agents de voyage pour entente dans le cadre d'un appel d'offres public.

Le président remercie El Salvador et invite la Corée du Sud à prendre la parole au sujet des soumissions concertées dans les projets de travaux publics clés en mains.

Le délégué de la **Corée du Sud** indique que les soumissions concertées sont peut-être particulièrement fréquentes dans les appels d'offres publics portant sur des projets dans lesquels l'adjudicataire est chargé à la fois des études de conception et des travaux de construction, et ce pour plusieurs raisons : ces projets font appel à des technologies avancées, ce qui restreint le nombre d'entreprises qui peuvent soumissionner ; ces projets sont souvent de grande envergure, de sorte que seules les grandes entreprises se portent candidates ; et les entreprises de bâtiment et travaux publics (BTP) en Corée sont étroitement liées entre elles, ce qui facilite la collusion.

Le président remercie la Corée du Sud et invite la Lettonie à faire des commentaires sur la transparence et la collusion, ainsi que sur la pratique consistant à subdiviser les marchés pour échapper aux règles imposant des seuils.

Le délégué de la **Lettonie** indique que, par le passé, de nombreux cas de soumissions concertées ont été mis au jour parce qu'on a découvert des erreurs identiques dans les dossiers d'offres soumis sur papier par différentes entreprises. L'instauration de procédures électroniques de passation des marchés, quoique souhaitable pour des raisons de transparence et de coût, réduit les possibilités de mettre en évidence de telles preuves de collusion. Par ailleurs, la législation lettone prévoit que la procédure de passation de marché applicable dépend du montant du marché. En subdivisant artificiellement les marchés, les fonctionnaires responsables peuvent contourner les règles plus contraignantes qui s'appliquent aux marchés plus gros. Il est donc souhaitable qu'une instance de surveillance puisse sanctionner les fonctionnaires qui subdivisent ainsi les marchés.

Le président remercie la Lettonie et donne la parole à CUTS au sujet des effets néfastes des systèmes de préférences dans la passation des marchés publics.

Le délégué de **CUTS** explique que les systèmes de préférences limitent le nombre de soumissionnaires qui peuvent effectivement répondre à un appel d'offres public, ce qui restreint la concurrence et ses bienfaits. De plus, la collusion est plus facile à entretenir avec un nombre plus faible de soumissionnaires. En Inde, les règles régissant les marchés publics sont extrêmement hétérogènes, et leur harmonisation pourrait améliorer le processus de passation des marchés.

Le président remercie CUTS et invite la Pologne à formuler des commentaires sur la suppression des offres.

Le délégué de la **Pologne** indique que l'annulation d'offres peut être le signe d'une collusion dans le cadre d'un appel d'offres : certaines offres, ne répondant pas à toutes les conditions imposées, se voient écartées, de sorte que le marché est attribué au soumissionnaire ayant présenté l'offre la plus onéreuse. À l'heure actuelle, la Pologne ne demande pas aux soumissionnaires de certifier que leur offre a été établie en toute indépendance. L'accent est plutôt mis sur la corruption : les responsables de l'attribution d'un

marché, au sein de l'entité adjudicatrice, doivent fournir une attestation écrite d'impartialité. La mise en place d'un système d'attestation d'absence de collusion est toutefois à l'étude.

Le président remercie la Pologne, et note que les contributions laissent penser que le problème des soumissions concertées se concentre généralement sur quelques secteurs, tels que le BTP et la santé. Il invite le Royaume-Uni à commenter une série récente d'affaires de collusion dans le secteur du BTP.

Le délégué du **Royaume-Uni** explique que, si des enquêtes ont mis en évidence des cas d'offres de couverture dans tout le secteur du BTP, seule une fraction de ces cas ont fait l'objet de poursuites, pour des raisons pragmatiques tenant à l'efficacité de l'emploi des ressources publiques. L'objectif était d'adresser un signal clair à ce secteur, réaffirmant le caractère illégal de cette pratique. L'organe chargé de la concurrence a porté en justice les affaires dans lesquelles les preuves de collusion étaient les plus nettes et où il y avait eu collusion répétée. La sélection comportait des entreprises grandes et petites, pour illustrer la nature endémique de cette pratique. Le délégué mentionne le projet actuel du Bureau de la concurrence, intitulé *Drivers of compliance* (« Les moteurs de la conformité »), et deux conclusions intéressantes. Premièrement, le respect des règles de la concurrence est désormais considéré par les entreprises comme un aspect standard de l'éthique des affaires. Deuxièmement, si certaines entreprises peuvent considérer les amendes comme un simple coût opérationnel, elles sont peut-être plus sérieusement dissuadées par les effets, nuisibles pour leur réputation, d'une condamnation dans une affaire de concurrence, entraînant éventuellement des conséquences pénales et une interdiction d'exercice.

Le président remercie le Royaume-Uni et invite la Turquie à parler de ses affaires de boycott dans le secteur de la santé, et de leurs effets sur le bien-être du consommateur.

Le délégué de la **Turquie** décrit deux cas dans lesquels le boycott d'un appel d'offres public a constitué une violation du droit de la concurrence. En réponse à une décision gouvernementale de procéder aux achats dans le secteur de la santé par voie d'appel d'offres en vue d'abaisser les coûts, les fournisseurs se sont entendus pour refuser collectivement de répondre à l'appel d'offres. Les soumissions concertées relevant en Turquie de la justice pénale, l'affaire a été instruite conjointement par l'autorité de la concurrence et le procureur général, qui a des pouvoirs d'investigation plus étendus. L'enquête a révélé que les fournisseurs ne se souciaient nullement des besoins médicaux urgents des patients. Les entreprises impliquées se sont vu infliger une amende pour leur participation à ce boycott. Cette affaire illustre comment la collusion peut prendre d'autres formes que les soumissions concertées ou le partage des marchés.

Le président remercie la Turquie et invite le Mexique à décrire le travail qu'effectue l'autorité de la concurrence dans ce pays pour améliorer les procédures de passation des marchés publics.

Le délégué du **Mexique** estime que les soumissions concertées dans le cadre des marchés publics sont généralement imputables à un cadre juridique mal conçu, qui pose trois problèmes principaux : i) la restriction de la participation aux appels d'offres aux seuls fournisseurs nationaux ; ii) la répartition des marchés attribués entre plusieurs fournisseurs ; iii) la fragmentation des adjudications, qui se déroulent plusieurs fois par an à différents niveaux territoriaux. Dans le secteur des produits pharmaceutiques au Mexique, l'autorité de la concurrence a, en collaboration avec l'organisme public responsable, révisé le cadre de la passation des marchés en vue de remédier à ces trois problèmes. Bien que les laboratoires pharmaceutiques et certains niveaux d'administration aient opposé une certaine résistance, les améliorations apportées se sont traduites par une réduction sensible du coût des marchés.

Le président remercie le Mexique et demande au Japon de commenter une étude de 2003 qui a précipité la participation de la Commission de la concurrence à la réforme de la passation des marchés.

Le délégué du **Japon** résume les trois recommandations principales issues de l'étude : i) élargir le périmètre d'application de l'appel général à la concurrence ; ii) encourager le recours à des méthodes détaillées d'évaluation des offres ; iii) veiller à la cohérence entre la compétitivité et d'autres objectifs du gouvernement, tels que le développement de l'économie locale ou de la participation des PME. Il donne six exemples de réformes adoptées depuis la publication du rapport sur cette étude : i) les domaines soumis à une obligation d'appel général à la concurrence ont été élargis ; ii) de nombreux organismes acheteurs ont adopté des méthodes détaillées d'évaluation des offres ; iii) le recours à la passation électronique des marchés a été élargi ; iv) la divulgation de l'information a été renforcée, ce qui permet de s'assurer que les marchés ne sont pas attribués arbitrairement ; v) les sanctions pour entente ont été alourdies ; et vi) les organismes acheteurs s'efforcent de trouver un équilibre entre développement de l'économie locale et concurrence loyale.

Le président remercie le Japon et demande à la Tunisie d'expliquer les raisons qui ont motivé le changement récent de la législation tunisienne.

Le délégué de la **Tunisie** fait remarquer que les révisions apportées aux lois anti-corruption il y a une dizaine d'années ont fortement réduit la prévalence de la corruption dans les marchés publics en Tunisie. Les soumissions concertées demeurent toutefois un problème fréquent, dans des secteurs tels que la restauration dans les écoles, les prisons et les hôpitaux. L'autorité de la concurrence a été alertée de ce problème par le fait qu'un seul fournisseur pouvait obtenir plus de 90 % d'un marché donné. Un autre problème est que des candidats soumettent des offres qui se traduisent par des salaires inférieurs au minimum légal, ce qui indique qu'ils emploient du personnel au noir ou alors qu'ils appliquent des prix abusivement bas. Ce sont les raisons pour lesquelles la législation relative aux marchés publics a été révisée en 2008 en vue de renforcer les dispositions de lutte contre les soumissions concertées.

Le président remercie la Tunisie et note que certains pays, dont le Brésil et le Canada, ont recours, pour lutter contre la collusion, aux attestations d'absence de collusion. Le président demande alors aux délégués de répondre, par un vote à main levée, à la question de savoir si, dans leur pays, les entreprises qui ont été sanctionnées pour entente se voient ensuite interdire l'accès aux appels d'offres pendant un certain temps : sept réponses positives sont enregistrées. La table ronde aborde ensuite le quatrième thème – la lutte contre la collusion et la corruption –, et le président invite M. Lewis à présenter son exposé.

M. David Lewis indique que le trucage des offres dans la passation des marchés publics constitue certainement l'infraction la plus répandue au droit de la concurrence. Si l'entente sur les offres et la corruption peuvent exister l'une sans l'autre, ou si l'une peut même pervertir l'autre, force est de constater que, de manière générale, elles se produisent de façon concomitante. Ainsi, un cartel d'entente peut avoir besoin d'une assistance du côté de l'acheteur pour surveiller le trucage et éviter d'être découvert ; à l'inverse, la coopération entre soumissionnaires peut être nécessaire pour dissuader un candidat éliminé d'exposer au grand jour les preuves de corruption dans l'attribution d'un marché. Par conséquent, si la relation entre collusion et corruption n'est pas nécessairement présente, elle est néanmoins fréquente.

M. Lewis explicite les raisons pour lesquelles la collusion et la corruption dans la passation des marchés publics sont considérées comme particulièrement problématiques : i) la société subit une "double peine" en termes de criminalité lorsque ces infractions se produisent ensemble ; ii) le citoyen est lui aussi doublement pénalisé, comme consommateur et comme contribuable ; iii) du fait de leur ampleur, les marchés publics sont souvent lucratifs, propices à la collusion et à la corruption, et de plus difficiles à surveiller ; iv) dans ce contexte, la collusion et la corruption constituent une offensive directe contre la bonne gouvernance et la responsabilité des pouvoirs publics à l'égard des citoyens ; et v) les couches défavorisées de la société en souffrent de façon disproportionnée, sous l'effet d'une diminution de la gamme et de la qualité des services publics et des infrastructures proposés. Étant donné que, dans la passation des marchés publics, la puissance d'achat est concentrée entre les mains du secteur public,

l'éducation des agents responsables quant aux offres collusives et à la corruption a toutes chances d'être très rentable. Et elle est particulièrement importante, car en dépit des dangers que présente le trucage des offres, les marchés publics demeurent un instrument important de la politique industrielle des États.

M. Lewis examine les moyens de lutte contre les soumissions concertées et la corruption dans le cadre des appels d'offres. Les mécanismes de prévention de l'un de ces problèmes peuvent œuvrer à l'encontre des mécanismes de protection contre l'autre. Si la transparence, par exemple, est considérée comme le mécanisme le plus efficace pour prévenir la corruption, elle peut cependant favoriser la collusion. La passation de marchés à l'aide de petits appels d'offres réguliers a tendance à faciliter la collusion, tandis que les grands appels d'offres généraux peuvent favoriser la corruption. Dans le même temps, cependant, les informations recueillies par les organismes anti-corruption peuvent être utiles aux instances de lutte contre la collusion et vice-versa.

Au vu des travaux publiés sur le sujet, les quatre méthodes les plus couramment proposées pour prévenir à la fois la corruption et la collusion dans les appels d'offres sont i) des contacts étroits entre autorités de la concurrence et organismes anti-corruption ; ii) la formation des fonctionnaires responsables des marchés publics pour les aider à déceler la collusion et la corruption ; iii) la transparence, bien qu'il soit nécessaire de cerner plus précisément les types d'informations qui facilitent la collusion ; et iv) l'harmonisation des bases de données nationales en vue de préciser les indicateurs de la collusion et de la corruption.

Le président remercie M. Lewis et fait remarquer que, parmi les nombreuses contributions reçues, très peu signalent des cas où collusion et corruption sont présentes en même temps dans le contexte des marchés publics. Des exceptions notables sont la contribution de la France, que les délégations sont invitées à étudier, et celle de l'Inde, que la délégation indienne est invitée à commenter de façon plus détaillée.

Le délégué de l'**Inde** précise que, si le régime de la concurrence est un phénomène relativement nouveau dans son pays, des travaux sont actuellement menés pour élaborer des lignes directrices et d'autres outils visant à encadrer la passation des marchés publics. Lorsque l'autorité de la concurrence sera pleinement opérationnelle, elle pourra détecter et sanctionner davantage de cas de soumissions concertées. La corruption fait quant à elle l'objet d'un régime institutionnel mieux établi. L'Inde dispose d'une commission centrale de vigilance et d'instances anti-corruption dans les différents États, ainsi que du bureau du Contrôleur et Auditeur général, qui procède à l'audit *ex post* des dépenses publiques. Il existe en outre une loi sur le droit à l'information, qui vise à promouvoir la transparence dans les activités du secteur public.

Le président remercie l'Inde. Au vu des contributions reçues, il apparaît qu'aucun échelon de l'administration n'est exempt de collusion ou de corruption dans la passation des marchés, et que les indices recueillis sont insuffisants pour déterminer la fréquence de ces infractions. La contribution de la **Suède** témoigne néanmoins d'une vaste étude nationale sur la collusion et la corruption dans la passation des marchés publics, qui indique que ces infractions sont étroitement associées, et facilitées en grande partie par le fait que les fonctionnaires qui traitent les dossiers ne comprennent pas la situation. Le président aborde la question des techniques qui permettent de lutter à la fois contre la collusion et la corruption, évoquant la contribution des **États-Unis** au sujet des techniques de surveillance et d'enquêtes par infiltration. D'autres contributions, dont celles de la **Fédération de Russie,** du **Bangladesh,** du **Brésil,** de la **Roumanie et** de la **Corée du Sud**, mentionnent le recours aux techniques de passation des marchés faisant appel à Internet pour prévenir à la fois la collusion et la corruption. Le Brésil énumère les accords de coopération passés entre des services acheteurs et les organes chargés de faire respecter les lois. L'Allemagne applique un processus spécial d'examen des attributions de marché contestées, que le président l'invite à présenter de façon plus détaillée.

Le délégué de l'**Allemagne** déclare que, du point de vue de la concurrence, l'avantage de cette procédure d'examen est qu'elle offre l'occasion d'apporter de la transparence et de lutter contre la discrimination dans la passation des marchés publics, mais aussi de rectifier les adjudications qui sont jugées défectueuses. Le but premier d'un tel examen est de vérifier si les règles de procédure ont bien été respectées dans le cas étudié et non de défendre les grands principes de la concurrence. L'examen individualisé n'est pas un moyen approprié pour effectuer une étude systématique de la passation des marchés publics au fil du temps et détecter des schémas suspects dans la soumission des offres, technique qui est peut-être plus efficace pour déceler la collusion. Néanmoins, bien qu'il n'existe pas en Allemagne de données empiriques permettant de déterminer si l'existence de cet examen a une incidence sur le niveau de collusion ou de corruption, on peut supposer que la menace d'un contrôle *ex post* par un organe indépendant peut dissuader quelque peu les entreprises de s'engager dans cette voie.

Le président remercie l'Allemagne et invite Singapour à commenter les techniques qu'utilise ce pays pour lutter à la fois contre la corruption et la collusion dans la passation des marchés publics.

Le délégué de **Singapour** explique que les trois principes qui guident la passation des marchés publics dans ce pays sont la transparence, la concurrence ouverte et loyale, et le rapport qualité-prix. Pour assurer la *transparence*, la passation des marchés publics se déroule au sein d'un solide cadre de lois, règlements et directives ; les fonctionnaires chargés des adjudications sont tenus de signaler les conflits d'intérêts et la rotation du personnel est fréquente ; enfin, les comités chargés de l'évaluation des offres et de leur approbation sont constitués de membres différents. Pour obtenir une *concurrence ouverte et loyale*, les appels d'offres sont publiés sur un portail électronique ; l'appel d'offres ouvert est l'option par défaut ; les spécifications techniques ne peuvent pas être des critères d'exclusion ; et les PME sont autorisées à se regrouper en consortiums pour pouvoir participer à des appels d'offres portant sur des montants plus élevés. Afin d'obtenir le meilleur *rapport qualité-prix*, les offres sont sélectionnées dans la mesure où elles répondent aux critères définis et sont assorties d'un prix intéressant, c'est-à-dire lorsqu'elles présentent un rapport coût-avantage optimal ; les projets de montant plus élevé font l'objet d'une évaluation plus quantitative de façon à éliminer l'élément d'appréciation subjective ; et la négociation n'est autorisée qu'en présence d'une concurrence limitée, afin d'obtenir le meilleur prix. Pour ce qui est du respect de ces principes, le risque d'être découvert et lourdement sanctionné – sous forme d'amendes, de peines d'emprisonnement ou de poursuites civiles – est un facteur fortement dissuasif. À Singapour, deux organismes publics distincts sont chargés de lutter contre la collusion et la corruption, mais ils œuvrent en étroite collaboration. En ce qui concerne les éventuelles contradictions de principe entre concurrence et transparence, le recours à une plateforme électronique maximise la participation, réduit les coûts et permet d'imposer des critères qui ne restreignent pas exagérément la concurrence, tandis que la facilité d'accès à l'information contribue à faire respecter les règles de la passation des marchés.

Le président remercie Singapour et invite les États-Unis et le commissaire fédéral au commerce, William Kovacic, à commenter respectivement la contribution de son pays et la sienne propre.

Pour le délégué des **États-Unis**, tant la collusion que la corruption altèrent le processus d'appel à la concurrence, et elles sont souvent présentes concomitamment. Aux États-Unis, un seul organe – le ministère de la Justice – a compétence pour juger ces deux types d'infraction. La question critique est cependant celle de l'efficacité des poursuites, qui peuvent aussi être menées par deux ou plusieurs instances compétentes, pour autant qu'elles disposent de mécanismes de coopération. Un autre domaine de complémentarité entre collusion et corruption est celui de la formation des fonctionnaires chargés des marchés publics : une formation efficace doit couvrir le problème des ententes mais aussi sensibiliser les agents aux sanctions infligées en cas de corruption.

M. William Kovacic explique que sa contribution, fruit d'une collaboration avec Robert Anderson et Anna Müller, examine les contradictions qui peuvent exister entre les mécanismes destinés à préserver

l'intégrité du processus de passation des marchés publics et ceux qui visent à encourager la concurrence. Le document conclut qu'il est possible d'éviter que les mesures en faveur de la transparence, sous réserve qu'elles soient soigneusement conçues, aient des conséquences anticoncurrentielles. Par exemple, une procédure qui prévoit l'ouverture des offres en public a pour effet de préserver l'intégrité du processus, mais elle permet aussi aux cartels de mieux surveiller le trucage. Une autre méthode consiste à maintenir le secret des offres, mais avec un mécanisme d'audit selon lequel un fonctionnaire digne de confiance examine le processus pour détecter d'éventuels signes de corruption. Les cas de sous-traitance constituent un autre exemple : dans les projets du secteur public, il convient de vérifier que les candidats éliminés ne se voient pas systématiquement accorder des contrats de sous-traitance, ce qui peut être un signe de collusion en amont dans le processus.

Le président remercie M. Kovacic et invite la France à présenter ses stratégies visant à prévenir les cas associant collusion et corruption dans la passation des marchés publics.

Le délégué de la **France** note que, en dépit d'une réglementation détaillée des marchés publics, la France connaît encore des cas de collusion et de corruption. L'Autorité de la concurrence est compétente uniquement pour faire respecter le droit de la concurrence. Ce sont les tribunaux administratifs et les cours pénales qui traitent les cas de pratiques telles que la collusion et la corruption. Le favoritisme est l'infraction qui fait le plus souvent l'objet de poursuites en relation avec la passation des marchés publics. Il existe des mécanismes de coopération entre l'Autorité de la concurrence et la justice pénale. Par ailleurs, une étude est en cours sur la prévention et la détection des cas de collusion et corruption.

Le président remercie la France et demande un nouveau vote à main levée pour savoir s'il existe, dans les pays des délégués, des programmes de clémence en faveur des personnes et des entreprises qui ont offert des pots-de-vin ou participé à des actes de corruption ; neuf réponses positives sont enregistrées. Les débats abordent ensuite le dernière thème – la promotion de la concurrence comme moyen d'assurer l'objectivité et la compétitivité dans la passation des marchés publics. De nombreux pays ont mené ces dernières années de grandes campagnes de lutte contre la corruption et la collusion. La Croatie est invitée à présenter ses activités dans ce domaine.

Le délégué de la **Croatie** décrit les grandes lignes des dispositions légales régissant la passation des marchés publics. Une législation spécifique réglemente l'ensemble du processus de concurrence dans les marchés publics, et l'autorité croate de la concurrence est responsable de l'application de ces règles. D'autres organes de l'État, dont la police, le Procureur général et les tribunaux, sont aussi actifs en la matière. Un programme anti-corruption, couvrant la période 2010-2012, a été lancé récemment à l'intention des entreprises publiques. Il poursuit trois objectifs : i) améliorer l'intégrité, la responsabilité et la transparence ; ii) créer les conditions nécessaires à la prévention de la corruption à tous les niveaux ; iii) réaffirmer le principe de la tolérance zéro à l'égard de la corruption. L'autorité croate de la concurrence mène des actions de sensibilisation pour aider les fonctionnaires chargés des marchés publics et d'autres organes de l'État à mettre ce programme en œuvre, en les conseillant par exemple pour la rédaction des appels d'offres de façon à empêcher les ententes. Une série de séminaires et la publication d'une brochure d'information sont également prévues.

Le président remercie la Croatie et invite le BIAC à présenter les contrôles internes qui sont mis en place dans les entreprises pour prévenir la collusion et la corruption dans la passation des marchés.

Le délégué du **BIAC** constate le manque de preuves empiriques disponibles au sujet de la proportion des cas de collusion et de corruption qui sont autorisés ou non par la direction des entreprises. Le monde des entreprises est toutefois de plus en plus conscient que la corruption lui fait du tort. De nombreuses sociétés mettent en place des programmes de conformité pluridisciplinaires pour prévenir la collusion et la corruption ainsi que d'autres pratiques illégales, par exemple dans le domaine de l'environnement. Ces

programmes partent souvent du principe que les pratiques illicites sont en partie imputables aux cadres subalternes, mais ils poursuivent généralement trois objectifs : i) réaffirmer les valeurs de l'entreprise et amener les cadres supérieurs à prendre des mesures pour les faire respecter ; ii) vérifier que le personnel est pleinement conscient des règles édictées ; et iii) mettre en place des mécanismes permettant de détecter les comportements délictueux et d'y mettre fin. Avec la décentralisation des activités des grandes entreprises et le développement de la rémunération en fonction des performances, la collusion et la corruption peuvent se produire aux échelons inférieurs, et c'est aux cadres supérieurs qu'il revient de prévenir ces comportements. Le BIAC est d'avis que les autorités de la concurrence devraient tenir compte des programmes de conformité réellement appliqués lorsqu'elles évaluent des cas supposés de violation du droit de la concurrence et des lois anti-corruption.

Le président remercie le BIAC et rappelle aux délégués qu'une promotion active de la concurrence est d'une importance capitale lorsqu'il s'agit de défendre le respect des règles anti-collusion et anti-corruption. Il remercie toutes les délégations qui ont répondu aux questions et demande aux orateurs invités s'ils souhaitent formuler d'autres commentaires à la lumière des interventions qui ont précédé.

M. Pasaribu fait remarquer que, dans les débats, il est souvent fait référence à la corrélation entre collusion et corruption dans la passation des marchés publics, et que les différents organes compétents en la matière se doivent d'apporter une réponse coordonnée. Dans le contexte indonésien, l'autorité de la concurrence s'efforce de coordonner son action avec la commission d'éradication de la corruption, l'office national d'audit et, désormais, également avec la police et le ministère public. Pour toute autorité de la concurrence, la coopération avec les autres instances compétentes est un aspect capital des programmes de prévention.

M. Aboudrar estime que la prévention de la corruption et de la collusion doit commencer en amont de la conception des projets publics. Ainsi, au Maroc, les acheteurs du secteur public doivent publier à l'avance leurs programmes d'achats de façon à ce que les fournisseurs puissent se préparer à participer aux appels d'offres. Postérieurement à l'attribution des marchés, le Maroc procède à des audits *ex post* et établit des rapports de mise en œuvre, qui mettent parfois en évidence des cas de collusion ou de corruption. Les deux points importants sont les suivants : i) la participation des entreprises du secteur n'est pas à négliger, car ce sont généralement les soumissionnaires déçus qui saisissent cette occasion pour signaler la présence de corruption ou de collusion dans le processus ; et ii) les fonctionnaires chargés des marchés publics doivent être formés à la détection des risques. Les « signaux d'alerte » présentés à la séance en sous-groupe du matin constituent un exemple d'outil simple mais efficace.

M. Lewis souligne l'importance des actions de sensibilisation dans la lutte contre la collusion et la corruption dans la passation des marchés publics. De telles actions peuvent consister par exemple à informer la société civile du coût de la corruption. Lorsqu'une autorité de la concurrence s'attaque à la corruption, elle se trouve généralement face à des intérêts puissants, et elle doit donc mettre l'opinion publique de son côté pour pouvoir y résister.

Le président remercie les orateurs de leurs remarques et annonce qu'il reste assez de temps pour répondre à deux questions ou commentaires de l'assistance.

Le délégué du **Chili** apporte des éléments nouveaux, par rapport à la contribution de son pays, au sujet du recours aux attestations d'absence de collusion. Celles-ci ont été utilisées dans le cadre de deux marchés passés par l'autorité de réglementation des fonds de pension, en gestion privée. Dans l'un de ces appels d'offres, l'obligation d'attestation a conduit plusieurs soumissionnaires à révéler qu'ils avaient été en communication au préalable. Par ailleurs, cet appel d'offres s'est soldé par des frais de gestion inférieurs de 24 % à la moyenne des commissions habituellement versées. C'est là un exemple qui montre qu'une

conception judicieuse des appels d'offres ainsi que le recours aux attestations d'absence de collusion peuvent aboutir à une issue plus compétitive.

Le délégué du **Brésil** signale que les attestations d'absence de collusion sont désormais obligatoires pour les marchés publics passés dans ce pays ; l'autorité de la concurrence espère que cette mesure va fortement dissuader les ententes entre soumissionnaires.

Le président remercie les délégués de ces commentaires et adresse aussi ses remerciements à tous les participants aux débats, en particulier les orateurs invités et le Secrétariat. Il invite alors Frédéric Jenny à prendre la parole pour résumer les débats de l'après-midi.

M. Frédéric Jenny fait tout d'abord l'éloge des débats, qu'il a jugé enrichissants et très intéressants. Il souligne l'importance du sujet, compte tenu du poids que représentent les marchés publics dans l'activité économique et de l'ampleur du préjudice que peuvent causer la collusion et la corruption dans ce contexte.

Dans un premier temps, les problèmes de collusion et de corruption ont été abordés comme des phénomènes distincts. La corruption peut se produire parce que les faiblesses du régime législatif permettent des comportements délictueux de la part des fonctionnaires, ou parce que des valeurs culturelles ou sociales engendrent une coopération entre citoyens qui alimente le processus de corruption, comme c'est le cas en Papouasie – Nouvelle-Guinée, par exemple. Un autre facteur résulte du fait que, dans les marchés publics, l'acheteur n'est pas le payeur. Quant à la collusion, elle est facilitée par divers facteurs, tels qu'une mauvaise conception des procédures de passation de marchés, le manque de formation des fonctionnaires responsables, un excès de complexité et, occasionnellement, trop de transparence.

La relation entre collusion et corruption a au moins deux origines. La première est la nécessité de dédommager les entreprises éliminées, afin que la corruption ne soit pas révélée. La seconde est la volonté de rendre la corruption moins visible, afin de créer une apparence de concurrence même si l'issue de la procédure est déterminée à l'avance. Ces liens, et en particulier le second facteur, imposent d'offrir une réponse coordonnée aux problèmes différents que sont la collusion et la corruption.

Bien que la collusion et la corruption soient plus concentrées sur certains secteurs, comme le BTP et la santé, elles semblent toucher pratiquement tous les secteurs. Par ailleurs, elles peuvent prendre des formes très complexes – c'est le cas, par exemple, des soumissionnaires polonais qui se font disqualifier à dessein en ne répondant pas aux critères de l'appel d'offres, dans le but de soutenir une offre plus onéreuse.

Les participants ont envisagé des solutions pour remédier aux problèmes de collusion et de corruption en tant que phénomènes séparés, mais aussi des solutions permettant de protéger les marchés publics contre ces deux types d'infraction en même temps. Parmi les mécanismes de lutte contre la corruption, on peut citer les audits *ex post*, le développement des capacités, la création d'une culture de la conformité, les poursuites judiciaires dans des affaires à haute visibilité afin d'engendrer un soutien public aux efforts d'application des lois, et la limitation du pouvoir discrétionnaire des fonctionnaires par le biais de la transparence. Pour lutter contre les ententes, les mécanismes disponibles sont la stricte application de la législation en tant que stratégie dissuasive, l'ouverture des marchés à la concurrence internationale, une conception des adjudications qui ne laisse aucune marge pour la collusion, l'amélioration des règles régissant la passation des marchés publics, la réduction des coûts de transaction, ainsi que la formation des fonctionnaires et le dialogue avec eux. La transparence est une question plus complexe. Si elle joue un rôle important dans la lutte contre la corruption, elle peut néanmoins faciliter la collusion entre soumissionnaires et rendre le processus d'adjudication trop prévisible.

Une étroite coopération entre les instances concernées est un outil important pour réduire l'incidence de la collusion et de la corruption dans les marchés publics. Elle revêt deux aspects : la coopération entre les autorités de la concurrence et les entités adjudicatrices, et la coopération entre les autorités de la concurrence et les organismes de lutte contre la corruption. Dans de nombreux pays, il existe déjà des liens entre ces diverses instances. Si des travaux supplémentaires sur cette question paraissent peut-être souhaitables – notamment sur le champ couvert par les protocoles d'accord entre ces organismes –, il semble du moins que ce soit une approche fructueuse pour avancer. De plus, les actions de sensibilisation à un problème, la collusion ou la corruption, peuvent avoir des retombées positives sur l'autre. En ce qui concerne les questions structurelles, il convient d'éviter les effets secondaires négatifs de la transparence bien que, même sur ce point, les intérêts des autorités de la concurrence puissent converger avec ceux des organismes anti-corruption, par exemple pour ce qui est de la sous-traitance.

M. Jenny conclut ses remarques en indiquant que, même si des progrès considérables ont déjà été accomplis, le sujet mérite de plus amples débats, en raison de la gamme des expériences positives et négatives enregistrées par les pays. En particulier, on pourrait examiner la teneur de la réglementation des marchés publics et la mesure dans laquelle elle est compatible avec la politique de la concurrence. Enfin, il remercie tous les participants à cette table ronde.

CONTRIBUTIONS

CONTRIBUTION FROM ALBANIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Albania --

1. Size and policy objectives

1.1. What fraction of your economy does public procurement account for?

1. According to the latest statistical data, public procurements in Albania are more than 15.4% of General Domestic Product (GDP) and this figure is very similar with the global average of public procurement vs. GDP, 15%[1]. In some countries the government expenditure for public procurement is up to 20% of GDP.

2.2. What are the principle policy objectives of public procurement?

2. The main objectives of an effective procurement are efficiencies of public funds in terms of offers of best prices and quality offered by participants and to increase the competition in relevant market. This objective will be realised through some other sub-objectives as following:

- To increase efficiency and effectiveness for the procedures of public procurement made by contractual authorities;
- To secure the good use of public funds and to reduce the procedural expenses;
- To stimulate the participation of economic operators in the procedures of public procurement;
- To stimulate competition between economic operators;
- To secure an equal and non discriminatory treatment for all economic operators that participate in the procedures of public procurements;
- To secure integrity, public trust and transparency for public procurement procedures.

2. Corruption

2.1. What is the cost of corruption?

3. The Albanian legislation provides an administrative and penal treatment for corruption in the field of public procurement. The Albanian Competition Law, almost adapted with the European legislation in the field of competition, treats prohibited agreements and abuse with dominant position as hard constrain of competition.

1. Source: OECD 2008 Fighting Cartels in Public Procurement

4. The Penal Code in the article Nr. 258 provides fines and incarceration sanctions up to 3 years for enragements of equilibration in procurements by the bureaucrats. In articles 244-245 and 259-260 are provided fines and incarceration sanctions for corruption of bureaucrats in public procurement.

5. According to the observations collected from our agency and their analyses, it was indicated an increased cost from 5% - 10% due to the concerted conduct among the firms involved in a certain case of a public procurement. The companies that co-ordinate with each other will increase the value of the bid from 95% - 99%, so near the limit of the fund. In the case where more bidders participate, the winning bid is 83% - 86 % of the fund. (Albanian Competition Authority-case)

2.2. What factors facilitate corruption?

6. The factors that facilitate corruption are:

- The existence of entry and exit barriers in the relevant market that create constrains for the possibility of more participants in public procurements;

- The existence of "specific" (i.e. particular not in the meaning in itself) criteria (economic or technical) that constrain the participation in public procurement and/or predetermine the potential bidders, creating the possibility for a coordinated behaviour.

7. Another factor may be the conflict of interest between the contractual authorities and the participants in public procurement. Even though it is foreseen in the law Nr 9643, (dated 20.11.2006) 'On Public Procurement,' it is difficult to measure the way they are implemented.

2.3. Do some factors appear to be more important that others?

8. Our experience is limited in this area of the infringements of the competition law, so it is not possible to provide a list of the factors that influence such behaviours of the players.

2.4. How do transparency programmes help fight corruption?

9. Transparency programmes help to increase the number of participants in public procurements and to increase competition by giving more information for the process. Through this programme the government and the consumers receive cheaper and better services. Since 2009 Albania is applying the online system of public procurement and at the same time in the website of the Public Procurement Agency information is published for the participants and winners.

2.5. What other policies help fight corruption?

10. The National Competition Policy, which aims to promote and protect free and effective competition in the market through preventing and detecting the anticompetitive practices, gives its contribution in fighting public procurement corruption.

2.6. What methods and techniques seem particularly effective in your jurisdiction?

11. Albanian legislation is adapted with the European Union legislation in the field of public procurement and Albania is using advanced techniques of public procurements such as the online system of public procurement.

2.7. Are firms required to certify during the procurement process that they have not bribed an official?

12. No. In the law 9643, dated 20.11.2006 'On public procurement' is not yet provided the certificate for the in depended bid CIBD, but the Albanian Competition agency may recommend it to the relevant public body But after finishing the in depth investigation the Competition Authority can recommend this to the Public Procurement Agency.

2.8. What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

13. Based on article 13/3 of the law Nr. 9643, dated 20.11.2006 'Public Procurement' the Public Procurement Agency can exclude an economic operator from participating in awarding procedures for a period of 1-3 years in the case of corruption in public procurement. Also the Penal Code in the article Nr. 258 provides fines and incarceration sanctions up to 3 years for enragements of equilibration in procurements by the bureaucrats. In articles 244-245 and 259-260 are provided fines and incarceration sanction for corruption of the bureaucrats in the public procurement.

2.9. Who are the competent authorities for prosecuting corruption cases?

14. Based on the Procedural Penal Code, the competent authority for prosecuting corruption cases is the Prosecutor.

2.10. Does the competition authority have any power in this area?

15. Not exactly in this respect. In order to foster competition policy and law advocacy, the Albanian Competition Authority has the power to make recommendations addressed to the relevant institutions for increasing competition in the field of public procurement based on the analysis of the primary and secondary legislation.

16. Also, the Competition Commission has the power to impose fines from 2-10% of the turnover if the companies abuse with the dominant position in the market (according the article 9 of the exciting law) and if companies have a prohibited agreement (according the article 4).

3. Collusion

3.1. What factors facilitate collusion in procurement?

17. In the case of a small economy like Albania the most important factor that facilitates corruption is the small number of participants for a procured service or good and in the circumstances of the friendship network. This helps the companies to collude for the procedures of public funds.

3.2. What industries seem especially vulnerable to bid rigging?

18. In principle, the sectors/industries that seem vulnerable to bid rigging are those industries that have a limited number of participants, a limited number of licenses and detailed specifications for the participants. However, those factors are important and should take into consideration to identify the relevant determinants at the level of competition in the certain procurements procedures.

3.3. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?

19. During 2009, the Albanian Competition Authority has analysed constrains of competition in the field of public procurement because of the impact that has the efficiency of the procurement of goods and services. The methodology used for this analysis is from OECD - GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT.

3.4. What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

20. The Albanian Competition Authority has collaborated with the Public Procurement Authority for opening the markets of the procured goods and services. The Competition Commission gave some recommendations, with its decision Nr 114, dated 26.05.2009, for increasing competition for the public procurement in security services. The Competition Commission recommended increasing the number of bidders because of securing the participation of economic operators (according to their size small, medium and big enterprises).

3.5. Does your country employ certificates of independent bid determination?

21. No.

3.6. When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

22. Yes, based on article 13/3 of the law Nr. 9643, dated 20.11.2006 'Public Procurement' the Public Procurement Agency can exclude an economic operator from participating in awarding procedures for a period of 1-3 years in the case of corruption in public procurement.

4. Fighting collusion and corruption

4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

23. The Competition Authority and the Prosecutor have not had any common case until now. Each institution investigates form different prospective a certain case, focusing in the respective aspects of the constraints of competition and corruption. However, both public bodies based their relevant activities on the same source of information (at the large extent. In this respect their cooperation is very crucial to develop an appropriate information exchange system.

4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

24. Collusion cases occurred only at national level until now. But it is possible to detect anticompetitive practices even in local government level.

4.3. What methods and techniques for fighting corruption would aid the fight against collusion?

25. Transparency in the procedures and in the selection process.

4.4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

26. No.

5. Advocacy

5.1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

27. No information.

5.2. In what ways can competition authorities work to improve the efficiency of public procurement?

28. According to law Nr 9121 'On competition protection', the Competition Authority gives recommendations for local and national institutions for the protection of effective competition. The Competition Authority has signed a memorandum of understanding with the Public Procurement Agency and has planned in 2010 to organise a training programme for the contractual authorities for detecting cartels.

5.3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

29. N/A.

5.4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

30. N/A.

5.5. Has your competition agency undertaken competition advocacy in this area?

31. Yes. The advocacy of competition comes through the recommendations given to the Public Procurement Agency and to the Directory of the Concentrated Procurements. We are also planning training for detecting and preventing collusion in public procurement.

5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

32. The Competition Authority has started an in depth investigation for a suspected case of collusion in public procurement market. When the investigation will finish the Competition Authority will give administrative measures for the companies that are involved in a prohibited agreement. Also, Competition Commission has recommended the procurement agency to approach the right size of bidding cluster with the size of the most players in the relevant markets, aiming to involve even the small and medium firms.

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CONTRIBUTION FROM AUSTRALIA

PUBLIC PROCUREMENT ADVOCACY

-- Australia --

1. The Australian Competition and Consumer Commission (the ACCC) has developed an extensive education and advocacy programme for government officials involved in public procurement.

2. This paper discusses the experiences of the ACCC in seeking to promote greater awareness of competition issues amongst procurement officials. It focuses, in particular, on the ACCC's recent advocacy initiatives in relation to cartel conduct. It also highlights the importance of having an integrated compliance programme, which includes a mix of education, advocacy and enforcement action, to promote awareness of the obligations of businesses to comply with the *Trade Practices Act 1974*.

1. Public Procurement in Australia

3. In Australia the principles which apply to the Commonwealth in respect to public procurement are set out in the Commonwealth Procurement Guidelines[1] (CPGs). The CPGs establish the core procurement policy framework and articulate the Australian Government's expectations for certain Commonwealth departments and agencies (agencies) and their officials, when performing duties in relation to procurement.[2] The Commonwealth Department of Finance and Deregulation is responsible for administering the Commonwealth's procurement policy framework.

4. The CPGs define procurement in the following way:[3]

> *Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.*

5. The core principles which apply to procurement under the CPGs are:

- Value for Money;
- Encouraging Competition;
- Efficient, Effective and Ethical Use of Resources;

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1 A copy of the CPGs is available at http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html.

2 Australia's state and territory governments operate their own separate public procurement frameworks. These frameworks are determined on a state-by-state / territory-by-territory basis.

3 Commonwealth Procurement Guidelines (December 2008), p. 3.

- Accountability and Transparency.

6. Competition is a key element of the Australian Government's procurement policy framework. It enhances value for money, the core principle underpinning Australian Government procurement. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes.

7. The Commonwealth procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and be treated equitably based on their legal, commercial, technical and financial abilities. Equitable treatment of suppliers enables business to be conducted fairly, reasonably and with integrity.

8. Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

9. The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.

2. ACCC Compliance Initiatives

10. The ACCC is Australia's national competition regulator. It is responsible for administering the *Trade Practices Act 1974* (the Act), including by educating Australian consumers, businesses and governments about their trade practices rights and responsibilities. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Act and the state/territory application legislation.

11. The ACCC has actively engaged with procurement officials across all levels of government to alert them to the issues and risks that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- Risks for government;
- The law in Australia;
- Procurement design;
- Detection tips;
- Deterrence tips;
- Do's and don'ts in public procurement.

12. In 2005 the ACCC launched its first specific compliance programme for procurement officials. The primary objective of this programme was to alert officials on how to detect possible cartel activity in the procurement process. The material released by the ACCC provided guidance to officials on how to detect the warning signs of cartel conduct.

2.1 Consultation with Procurement Officials

13. The ACCC compliance programme was developed with the benefit of advice and information provided by officials directly involved in Commonwealth procurement. The ACCC conducted extensive consultation with a range of procurement officials, including the Commonwealth Department of Finance.

14. The ACCC also undertook a number of trial seminars with the draft material to determine whether the guidance was appropriate and would achieve the desired outcomes.

2.2 Education Material

15. The central component of the ACCC's compliance programme was a multi-media CD-ROM which was provided to public sector procurement agencies, as well as private companies involved in procurement. In developing this material, the ACCC was able to draw on the experience of the Canadian Competition Bureau and the United States Department of Justice, Antitrust Division.

16. The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information. This information included: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity.

17. In addition to the CD-ROM, the ACCC developed guidelines for procurement officials on cartel conduct.

18. The material also contained a short video presentation from ACCC Chairman, Graeme Samuel, outlining the importance of detecting cartels in public procurement.

2.3 Presentations & Seminars

19. The initial roll out of the ACCC's procurement strategy included over 50 presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments. Importantly, a number of these seminars were delivered to national and state conferences for procurement officials.

2.4 Advocacy

20. In addition to the educational aspects of the compliance programme, the ACCC wrote to Commonwealth Government Ministers and the Premiers and Chief Ministers of each of Australia's states and territories. The purpose of this was twofold. Firstly, to seek support for the ACCC's education and compliance programme at a high level within each Government. This support was received from all Governments.

21. The second purpose was to request all Governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines. This proposal had mixed results with only some government agencies introducing measures to deal with cartel conduct.

2.5 Investigations and Litigation

22. As a result of the initial procurement compliance programme, the ACCC received various reports from procurement officials identifying activity which may breach competition laws. Whilst there were

some investigations as a result of these reports, none of these have led to enforcement action by the ACCC to date.

3. Review of Procurement Compliance Programme

23. In 2007 the ACCC reviewed and updated its compliance programme, and developed a DVD which was sent to Chief Financial Officers in 23 Commonwealth agencies. Unlike the initial roll-out of the programme, the ACCC did not undertake the same extensive presentations and seminar series to educate procurement officials. One of the reasons for this was pending court action in the Baxter[4] case.

4. Baxter Case – Derivative Crown Immunity

24. The ACCC took these proceedings following a complaint from a medical practitioner that exclusivity agreements between the government and Baxter Healthcare Pty Ltd (Baxter) limited the choice of treatment which would best meet the needs of their patients requiring dialysis.

25. The ACCC alleged that Baxter had entered into long-term, exclusive, bundled contracts with state purchasing authorities (SPAs) which tied the supply of sterile fluids to the supply of peritoneal dialysis products. It claimed that bundling all sterile fluids and peritoneal dialysis products in this way amounted to exclusive dealing in breach of section 47 of the Act, and that Baxter had taken advantage of its substantial market power in sterile fluids to structure the terms on which it offered to enter into the contracts.

4.1 Federal Court Decision

26. On 16 May 2005 the trial judge, Justice Allsop, handed down judgment applying a line of judicial authority based on the High Court's decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[5] (Bradken). This authority provided that where the Crown enjoys immunity from the Act (which was not contested in the case), this immunity should extend to corporations with which the Crown deals, where the application of the Act would interfere with the proprietary, contractual and/or other legal interests of the Crown (known as derivative Crown immunity). Applying this authority, Justice Allsop held that the Act did not apply to either Baxter's contracts with the SPAs or its other conduct.

27. But for the existence of Crown or derivative Crown immunity, Justice Allsop said he would have found that Baxter had committed one breach of section 46 and a number of breaches of section 47 of the Act.

28. The ACCC appealed the decision on the basis that Justice Allsop had incorrectly held that the Act did not apply to Baxter's conduct.

4.2 Full Federal Court Decision

29. On 24 August 2006 the Full Federal Court handed down its decision, holding that Justice Allsop's finding on the Crown immunity issue was correct.

30. The Court made the following observations about the possible implications of its decision:

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4 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) available at http://www.austlii.edu.au/au/cases/cth/FCA/2005/581.html.

5 [1979] HCA 15 (5 April 1979) available at http://www.austlii.edu.au/au/cases/cth/HCA/1979/15.html.

> *It is one thing to exempt the executive government from legislative prohibition as to conduct… It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers.*

31. The ACCC sought special leave to appeal the decision to the High Court and, on 29 August 2007, the High Court upheld the appeal, finding that the Act applied to Baxter's conduct. The High Court was of the view that:[6]

> *The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business.*

32. Baxter would therefore be liable for penalties, injunctions and other sanctions (to be determined by the Full Federal Court on remittal[7]).

4.3 Implications of the Baxter Case

33. Following the Federal Court and Full Federal Court decisions in Baxter, the ACCC was concerned that Crown immunity may pass through to businesses involved in cartel conduct if a bid was submitted for a government tender. However, the High Court's decision confirms that the Act *will* apply to collusive practices in the context of government procurement.

4.4 Procurement Outreach Programme

34. The Baxter case was significant in that it removed any uncertainty that collusive practices involving Government tenders would be subject to the cartel provisions under the Act.

35. Following the High Court's decision, the ACCC trialled a new education and advocacy approach for public procurement. The trial programme commenced in the state of South Australia and following its initial success was implemented nationally.

36. The trial programme involved extensive consultation and liaison with state and local government entities, including over 70 presentations by ACCC staff. In addition to these presentations, an ACCC Outreach Officer was specifically tasked to liaise directly with these government entities, focusing on education and advocacy for procurement reform.

37. The ACCC also updated its guidelines for procurement officials on cartel conduct to reflect the decision in Baxter, and pending commencement of the new criminal cartel regime.[8]

38. In April 2009 the ACCC released a new guidance publication for procurement officials: "*Cartels: deterrence and detection —a guide for government procurement officers"*.[9]

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6 *Australian Competition and Consumer Commission v Baxter Healthcare* [2007] HCA 38 (29 August 2007), at para 74. The decision is available at: http://www.austlii.edu.au/au/cases/cth/HCA/2007/38.html.

7 *See Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (11 August 2008) available at: http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html.

8 New laws criminalising cartel conduct came into effect in Australia on 24 July 2009. More information about the new criminal cartel regime is available at: http://www.accc.gov.au/content/index.phtml/tag/cartels/.

39. During the four years following the release of the ACCC's compliance programme, the ACCC did not bring any bid-rigging case to court. However, in 2009 this changed when the ACCC instituted proceedings against American-based company, DRS C3 Systems[10] (DRS), for alleged market sharing in the international military defence training systems industry.

40. The conduct relates to an alleged agreement between DRS and another company that DRS would withdraw from a proposed procurement for an air combat manoeuvring instrumentation system, conducted by the Australian Government. The case is ongoing.

41. Whilst the DRS case is an important step in highlighting anti-competitive conduct in the public procurement sector, a more recent investigation into the construction sector in the state of Queensland has had a more significant impact in raising public awareness of the economic harm of bid-rigging, especially amongst government Ministers.

42. The ACCC commenced legal proceedings on 21 September 2009 alleging that three construction companies[11] engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland. The alleged conduct involved the exchange of cover prices (a practice referred to in the building industry as "cover pricing") for the construction of a school, rail facilities and an airport refurbishment.

43. As the conduct covers a wide range of government tenders, this case has significantly raised awareness of the risks of cartel activity within the public procurement sector.

5. ACCC – Lessons Learnt from Public Procurement Outreach Programmes

44. In the course of implementing our compliance programmes, the ACCC has learnt that to successfully achieve our compliance objectives, particularly with respect to public procurement, it is necessary to have a mix of strategies and approaches. For example, education and advocacy messages (while necessary) will not be successful in raising awareness about the economic harm associated with bid-rigging for government tenders, or in preventing breaches of the law, without strong enforcement action.

45. In the ACCC's experience it is necessary to have an integrated approach, which includes:

- Enforcement of the law, including resolution of possible contraventions, both administratively and by litigation;
- Encouraging compliance with the law by educating and informing both businesses and officials involved in procurement about their rights and responsibilities under the *Trade Practices Act 1974*; and
- Developing ongoing and effective partnerships with other government agencies to implement these objectives.

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9 The guide is available at: http://www.accc.gov.au/content/index.phtml/itemId/869010.

10 *ACCC v DRS C3 Systems, Inc* NSD588/2009.

11 *ACCC v T F Woollam & Son Pty Ltd & Ors* QUD236/2009.

CONTRIBUTION FROM BANGLADESH

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Bangladesh --

1. Size and policy objectives

1.1 What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

1. Public procurement accounts for 20% of government expenditure worldwide and Bangladesh is no exception.

2. The set of laws, rules and regulations (including amendments) on public procurement in Bangladesh can be accessed at Central Procurement Technical Unit (CPTU) website (*www.cptu.gov.bd*). The website was launched on 9 February 2010. The parent law governing public procurement in Bangladesh is Public Procurement Act 2006 which was then amended in 2008. The subordinate legislation includes the Public Procurement Rules 2008 and associated amendments. In order to facilitate e-procurement, Governing Principles of e-Government Procurement were drafted on 6 august 2009.

2. Corruption

2.1 What is the cost of corruption?

3. There are no available estimates on the cost of corruption. General perception is that they are high.

2.2 What factors facilitate corruption? Do some factors appear to be more important that others?

4. Same factors that facilitate corruption in other countries. There are no available assessments of which factors are deemed more or less important.

2.3 How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

5. One of the techniques the current Government of Bangladesh (GoB) has introduced a Central Procurement Technical Unit (CPTU) under the Ministry of Planning (website: www.cptu.gov.bd). Under the CTPU, e-Government Procurement system (e-GP) has been introduced to enhance the efficiency and transparency in public procurement through the implementation of a comprehensive e-GP solution to be used by all government organisations in the country. Initially, on pilot basis, this will apply to a few Procuring Entities (PEs) of four target agencies namely Bangladesh Water Development Board (BWDB), Rural Electrification Board (REB), Roads and Highways Department (RHD) and Local Government Engineering Department (LGED), in Bangladesh. The System, later on, will be rolled-out across all the procuring entities in a phased manner.

6. The Anti Corruption Commission (ACC) was created through the Anti-Corruption Commission Act 2004 promulgated on 23 February 2004 that went into force on 9 May 2004. Although initially, it could not make the desired impact, but immediately following its reconstitution in February 2007, the ACC began working with renewed vigour and impetus duly acceding to the United Nation's convention against corruption that was adopted by the General Assembly on 31 October 2003.

2.4 Are firms required to certify during the procurement process that they have not bribed an official?

7. No. There are other laws and policies that forbid bribery.

2.4.1 What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

8. There are criminal and civil law sanctions/penalties that can be determined through legal proceedings on a case by case basis.

2.5 Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

9. Actions can be instituted by various Government departments under the existing legal system.

10. Bangladesh does not have a Competition Law or Authority at present.

3. Collusion

3.1 What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

11. Same as in other jurisdictions world-wide. There are no country specific factors in this regard

3.2 What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

12. There have been several *allegations* in sale of State-owned assets, purchase of staple products.

3.3 Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

13. Bangladesh does not have a competition law or other provisions dealing specifically with collusion. There are some provisions in other laws that could be invoked in this regard.

4. Fighting collusion and corruption

4.1 What cases from your jurisdiction have involved both corruption and collusion in public procurement?

14. As indicate above, there have been *allegations* of corruption and ‘syndication’ in some areas of provision of staple products but no cases have been prosecuted due to lack of sufficient evidence and lack of a competition law.

4.2 Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

4.3 What methods and techniques for fighting corruption would aid the fight against collusion?

15. The Government of Bangladesh is considering enacting a Competition Law with specific provisions against collusive activity

4.4 When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

16. No

5. Advocacy

17. Current experience in this area is limited and does not permit answers to the questions that follow below. Some questions do not apply to the current situation in Bangladesh…for example those pertaining to competition agency/advocacy. Under the new CPTU and e-government policy measures there has been increased transparency in the public procurement process in order to minimise opportunities for bribery and corruption.

CONTRIBUTION FROM BRAZIL

RECENT ACHIEVEMENTS ON FIGHTING COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Brazil --

1. The competition law and practice in Brazil is governed primarily by Law No. 8,884, of 1994, as amended in 2000 and 2007. The Brazilian Competition Policy System (BCPS) is composed of three agencies which are in charge for the enforcement of the Brazilian Competition Law at the administrative level – namely the Secretariat of Economic Law of the Ministry of Justice (SDE), the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), and the Council for Economic Defence (CADE).

2. SDE, through its Antitrust Division, is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with anticompetitive practices and merger review, after reviewing the opinions issued by the Secretariats.

3. Since 2003, the BCPS has passed through important changes aimed to improve competition and the enforcement of competition law and policy in the country. The focus has been to enhance – through better working methods, priority-setting goals and communication flow between the BCPS and other government authorities – the effectiveness of its efforts to improve the functioning of markets on behalf of consumers, focusing on anti-cartel enforcement and competition advocacy.

4. Fighting cartels is a top priority for the Secretariat of Economic Law (SDE). Since 2003, SDE has started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (dawn raids and leniency), and CADE began imposing record fines on companies and executives found liable for cartel conduct. Currently 75% of SDE's resources are devoted to cartel investigations. SDE is also increasingly cooperating with criminal authorities and foreign antitrust authorities, resulting in more effective investigations related to such anticompetitive practices.

5. Since 2007, SDE has also established fighting bid rigging as a priority. As determined by the Minister of Justice, a special unit within SDE was created for this specific purpose aiming at (i) investigating bid rigging in public procurement proceedings and (ii) developing knowledge with the purpose of helping procurement authorities to identify and avoid cartels in the tenders they promote.

6. The development of this unit counted with the valuable assistance of the Organisation for Economic Cooperation and Development (OECD), in the context of the "Project to Reduce Bid Rigging in Latin America". The two-year Project was launched at the "Latin American Competition Forum" in 2007 with pilot projects in Brazil and Chile. Within the Programme, the OECD prepared several briefs for SDE on a variety of topics, such as specific amendments to the Procurement Law and the Certificate of Independent Bid Determination (CIBD), which undoubtedly contributed to enhance the Brazilian enforcement against bid rigging. OECD also helped SDE to establish a close working relationship with representatives of key public bodies involved in public procurement in Brazil, as stated below.

7. Some recent achievements on fighting collusion in public procurement are presented below, as well as other positive results derived from the enhanced cooperation with anti-corruption authorities and criminal authorities in this area.

1. Introduction

8. In Brazil, mandatory bidding procedures are established by 1988 Brazilian Constitution. Its Article 37, item XXI, states that public bidding procedures must be followed in all public sector contracts of construction projects, services, acquisitions and property transfers, in order to ensure equal conditions to all participants, resulting in the best value for public resources.

9. Bidding proceedings are governed primarily by Law No. 8,666 of 1993 (The Public Procurement Law) and its amendments. It establishes a great variety of principles that must be observed in these proceedings, such as free competition, publicity, strict observance of the terms of the tender notification, objective judgment and compulsory awarding. However, the greatest of all principles is the supremacy of the public interest, which interacts with all of the other principles involved.

10. The Brazilian government has been making considerable efforts to promote competitive public tender practices by implementing more efficient contracting – such as the extensive use of electronic procurement[1] as well as enhancing transparency and its external and internal controls exercised by the authorities responsible for bidding procedures. Furthermore, the competition authorities are now devoting especial attention to preventing and prosecuting collusive practices among competitors in public tenders.

11. However, it is widely known that public procurement is a propitious scenario for cartels activities and other fraud schemes. Many factors contribute for it, such as that the government spends great amounts of resources to purchase goods and services required for its activities in a great variety of relevant areas, such as health services, education, public safety and infrastructure.

12. Additionally, in Brazil, where there is a great decentralisation of bids (each public agency or unit shall promote its own bids), the frequency of contacts between competitors can be quite significant and, as a consequence, it may increase the opportunity for collusion schemes.

13. In private contracts, buyers have more flexibility to respond or suspend a tender if they observe any sign of collusion between suppliers. However, due to the legal framework applicable to public tenders in Brazil, in general, the government is not able to timely react in such cases. Finally, the high number of bidding processes is a challenge that requires constant interaction among the agencies responsible for fighting collusion, frauds and corruption in public tenders.

14. Consequently, since 2007 SDE has made a major effort to build and enhance its relationship with those authorities who also work with public procurement in order to enlarge the effectiveness of their work. The BCPS is also spreading measures to enhance competition and prevent anticompetitive practices in public tenders, as stated below.

2. Enhanced Cooperation among Government Authorities

15. Since 2007 SDE has made a major effort to build a close working relationship with key officials of the Brazilian government who also deal with public procurement in Brazil. The main objective is to

[1] According to the Ministry of Planning, in 2008 only the federal government saved approximately R$ 3,8 billions (US$ 1,62 billion) by using the electronic procurement. Source: www.comprasnet.gov.br, access in December 24, 2009.

increase the effectiveness of Brazilian authorities in fighting bid rigging. This is a great priority for Brazil, especially in the context of the forthcoming World Cup in 2014 and Olympic Games in 2016, as stressed by the Brazilian President Luiz Inacio Lula da Silva during the second edition of the Anti-Cartel Enforcement Day, celebrated on October 8th, 2009.

16. As part of the OECD Project, the initial efforts focused on the Ministry of Planning, the Office of the Comptroller General and the Federal Court of Auditors. To encourage these agencies to fight bid rigging, SDE focused on explaining the significant cost of bid rigging to the government. Collusion cases from Brazil and other jurisdictions were used to illustrate this point and also that bid rigging conspiracies can often last many years. Work with these organisations progressed quickly, and after nearly three years of sustained engagement, considerable advances have been made.

17. SDE's joint work with the Ministry of Planning has focused on accessing data regarding public procurement and improving the detection of bid rigging. The Ministry of Planning is responsible for all information technology systems that support federal government procurement (such as ComprasNet, the e-procurement unit of the federal government). There are important initiatives within that Ministry for developing software tools which can more quickly identify suspicious patterns of behaviour by suppliers in bids.

18. As a practical result of this cooperation, the Ministry of Planning authorised SDE to access the Data Warehouse of *ComprasNet*, which is an aggregated data storage on federal government purchases applied for monitoring a number of indicators. It includes business intelligence tools, and allows SDE to extract and analyse data regarding public procurement at a federal level. It is a valuable tool for SDE to conduct consultations regarding suspicious bidding processes.

19. Furthermore, following a SDE recommendation, the Ministry of Planning issued in 2009 a regulation that makes mandatory for all participants in federal public bids to file a Certificate of Independent Bid Determination (CIBD). This important measure can be seen as the turning point in the fight against bid rigging in Brazil as will be further discussed below.

20. The work has also focused on the Office of the Comptroller General (*Controladoria Geral da União* – CGU), which is responsible for auditing the expenses of the federal executive branch. CGU is the internal audit unit and the anti-corruption agency of the Brazilian federal government. The joint work between SDE and CGU has focused on using existing methods for detecting fraud and corruption in public procurement to help identify possible bid rigging conspiracies (as bid rigging can occur when these other crimes occur). That cooperation was institutionalised by a cooperation agreement signed in 2009.

21. In addition, SDE has been using CGU's Public Expending Observatory (*Observatório da Despesa Pública – ODP*), which is a data-matching and a tracking system originally designed to detect fraud and corruption, to help the competition authorities identify bid rigging cases and patterns. It has enabled SDE to conduct sophisticated investigations of public tenders with the aid of electronic data. More information about ODP can be found on Annex I.

22. SDE has also established a positive relationship with the Federal Court of Auditors (*Tribunal de Contas da União* – TCU), which resulted in a cooperation agreement signed in 2008. TCU audits the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables, as well as the accounts of any person who may cause loss, misapplication, or other irregularities that may cause losses to the public treasury[2].

[2] http://portal2.tcu.gov.br/portal/page/portal/TCU/english/inside.

23. SDE and TCU have focused on outsourcing contracts, which was identified as a kind of contract highly vulnerable to fraud schemes. This joint work has enabled SDE to better investigate possible collusive practices in this sector.

24. Additionally, TCU, CGU and SDE have recently developed a typology concerning suspicious patterns applied to this contracts that will be spread among other authorities, especially the criminal ones, in order to better detect and prosecute bid rigging and corruption in this kind of contracts.

25. Furthermore, since 2007, SDE has focused its efforts on strengthening the cooperation with the criminal authorities, in order to increase the impact of its anti-cartel enforcement policy. In Brazil, cartel is both an administrative infringement and a crime, punishable with criminal fines or prison terms that may range from 2 to 5 years. The police and the Public Prosecutors Office – at the Federal and State levels – are in charge of the criminal prosecution, pursuant to Law No. 8137/90 (Economic Crimes Law) and Law No. 8.666/93 (Public Procurement Law).

26. The goal of this joint work with the criminal authorities was to explain the legal standards for a violation of the competition law, to raise awareness of anticompetitive practices, and to discuss penalties, given that bid rigging is also a criminal offence. Moreover, because bid rigging may occur alongside other crimes, such as fraud, money laundering, tax violations and corruption, it is important for public prosecutors and the Federal Police to be aware that additional penalties can be imposed. SDE also sought to deepen its connection with the Federal Police in order to increase the effectiveness of its investigative work. In 2009, for example, the Federal Police participated together with the SDE in a dawn raid in connection with an alleged bid rigging case regarding information technology services in the Federal District.

27. The competition authorities also participate in many inter-ministerial groups, in order to input competition enforcement in the policies conducted by the Brazilian government. Concerning public procurement issues, for instance, it is noteworthy that SDE integrates the National Strategy to Fight Corruption and Money Laundering (*Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro* - ENCCLA).

28. ENCCLA is composed by 70 agencies or bodies of the Executive, Legislative and Judiciary branches plus the Federal Prosecutor's Office, the Office of the Comptroller General and the Brazilian Court of Auditors among other authorities. It is a high level arena for discussions about fighting money laundering and corruption as well as other related crimes, as bribery and collusion in public procurement. In its 7th edition, on November 21, 2009, ENCCLA approved 21 actions to be conducted by its members in 2010. Among them, it is noteworthy the risk analysis of bidding processes related to outsourcing contracts and bidding processes associated to the forthcoming events of the World Cup (2014) and Olympic Games (2016) in Brazil.

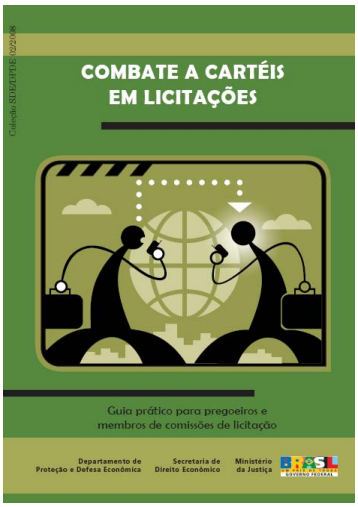
29. Concerning these important events to be held in Brazil, SDE will also integrate the Task Force conducted by the Federal Public Prosecutors Office to analyse the bidding processes related to the World Cup of 2014. The main objective is to prevent and effectively repress any evidence of illegal practices in the context of these processes, including collusive evidence.

3. SDE Materials on Fighting Bid Rigging

30. In 2008, SDE launched a brochure on preventing and fighting bid rigging, especially designed to procurement agents and authorities. It explains what bid rigging is, the antitrust laws, suspicious behaviour and bidding patterns, and how to contact the competition authority (especially through the SDE's e-tool "click here to report a violation").

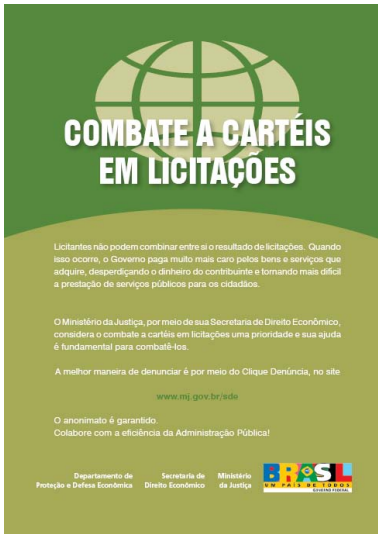
31. The document is based on OECD documents, such as the *Roundtable Report: Public Procurement – The Role of Competition Authorities in Promoting Competition* (2007).[3] It also presents some relevant tips on how design procurement processes in order to enhance competition and minimise the risks of bid rigging.

32. The brochure as well as the folder and posters about fighting bid rigging contributed to increase awareness of the harms caused by cartels that fraud competition in public bids, stressing that it is also a crime in Brazil. SDE handed out these materials in related-events and sent them all States of Brazil and to different audiences, including procurement authorities, business community, courts, prosecutors, consumers, and schools.

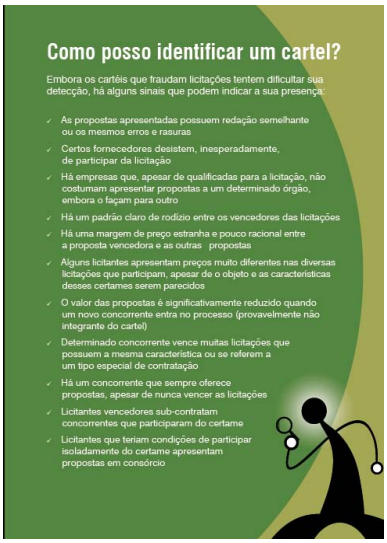


Brochure "Fighting Bid Rigging"

Poster "Fighting Bid-rigging" (back)



Folder "*Fighting Bid-rigging*" (front)



Folder "*Fighting Bid-rigging*" (back)

3 OECD Report, Public Procurement – The Role of Competition Authorities in Promoting Competition, http://www.oecd.org/dataoecd/25/48/39891049.pdf.

4. Outreach Programmes

33. In addition to these efforts, since 2007, there has been a significant increase in outreach to front-line public procurement agents. A significant goal of the outreach programme was to increase the willingness of procurement agents to report bid rigging.

34. There were two main elements to these outreach efforts. First, both general and customised events were held for important public procurement organisations. More general events simply involved inviting public procurement agents from a variety of agencies, and raising awareness about the harm from bid rigging as well as how to detect it. In August 2008, for example, around 200 public procurement agents from more than 40 agencies participated in a major event in Brasilia.

35. Outreach events for specific agencies have targeted SABESP (Sao Paulo basic sanitation company), the Ministry of Health and the National Agency for Terrestrial Transport, among others. In addition, the Transport Agency was also advised that it should take steps to increase the uncertainty about both the number and identity of the bidders during an upcoming tender process for an interstate bus transportation concession in order to reduce the chances of collusion.

36. Second, thousands of brochures, folders and other materials have been distributed to public procurement officials in order to increase awareness. Feedback from the distribution was very positive, and has led to many tips on possible anticompetitive practices (see below).

4.1. Road Show "Fighting Bid Rigging in Public Procurement"

37. In July 2009, as a conclusion of the "OECD Latin America Bid-Rigging Programme", SDE and OECD organised the event "Fighting Bid Rigging in Public Procurement", which received financial and technical support from the OECD. It took place in five Brazilian cities: Recife in the Northeast, Brasília in the Centre-West, Belém in the Northern Region, São Paulo in the Southeast and Curitiba in the South. It was fundamental to spread around the country the benefits of fighting collusion among competitors in public tenders.

38. The events consisted of two training sessions: one for procurement officials and another for criminal investigators responsible for fighting bid rigging in the criminal area. A senior-economist of the OECD Competition Committee, also participated in the Roadshow, which helped SDE to spread to prosecution and procurement authorities a valuable amount of knowledge, founded on the international best practices on fighting bid rigging. Over 600 public procurement agents and criminal enforcement officials attended the event and highly complimented the initiative. More than 2,500 copies of the "OCDE Guidelines for Fighting Bid Rigging" and the SDE's Brochure on Fighting Bid Rigging were handed out.

39. After that, a number of presentations in other cities were requested and provided by the SDE. In August 2009, SDE attended an event on how to prevent bid rigging to public prosecutors of the State of Rio de Janeiro. After, SDE attended an event in the State of Espirito Santo, where about a hundred of procurement officials of that State were updated on how to prevent and detect bid rigging in the public tenders they conduct.

40. Finally, in November 2009, SDE participated in the meeting of the National Council of the Brazilian Internal Controllers[4], which congregates the State authorities responsible for auditing the public

[4] Conselho Nacional dos Órgãos de Controle Interno dos Estados Brasileiros e do Distrito Federal (CONACI).

tenders around the country and, as a consequence, may also detect evidence of collusive behaviour among bidders during that process.

5. SDE's Opinion on Amendments to the Procurement Law

41. In the context of the OECD Project above mentioned, the Organisation prepared several briefs for SDE on a variety of topics, which undoubtedly contributed to enhance the Brazilian enforcement against bid rigging. For example, a short brief was submitted to SDE in February 2008 examining several proposed amendments to the procurement law which may impact the construction industry.

42. Based on this brief, SDE submitted a report to the Presidency of the Brazilian Republic[5] in March 2008 proposing significant modifications to the amendments, particularly regarding rules that facilitate the identification of bidders at early stages of the procurement processes and bid bonds and collaterals. In April 2009, a modified version of the report was sent to key congressmen involved in the Bill.

6. Guidelines for the Analysis of Complaints Involving Public Procurement and the Certificates of Independent Bid Determination (CIBD)

43. On July 3rd, 2009, SDE released its Guidelines for the Analysis of Complaints Involving Public Procurement (SDE's Ordinance No. 51 of 2009), together with a recommended Model of Certificate of Independent Bid Determination (CIBD), in order to help procurement agents fight bid rigging in public procurement and to encourage them to take steps to reduce the risk of collusion in the procurement process.

44. The Guidelines clarify the limits of the application of Brazilian competition law in public procurement proceedings, and also indicate how the Secretariat will analyse cases of anticompetitive conduct by bidders, such as bid rigging, facilitating practices by trade associations and some kinds of bid consortia. It is considered an important measure to SDE rationalises its works and it also grants predictability to the companies which may be investigated by the SDE.

45. By its turn, as suggested in the context of the OECD Project, SDE recommended in that Ordinance, a Model of CIBD, in order to assist procurement agents to increase deterrence of bid rigging in Brazil.

46. Based on this SDE's initiative, on September 17th, 2009, the Brazilian Ministry of Planning published the Regulatory Instruction No. 02 of 2009 that obliges participants in federal public bids to present the CIBD. As stated before, the Ministry of Planning is responsible for regulating the bidding processes in federal level as well as operating *ComprasNet*, which is the e-procurement unit for the Brazilian government. This important measure can be seen as the turning point in the fight against bid rigging in Brazil. As far as SDE is concerned, Brazil is the only country in the world to systematically require CIBDs in all federal procurement.

47. The CIBDs require each bidder or a consortium to sign a statement that it has not (i) agreed with its competitors about bids, (ii) disclosed bid prices to any of its competitors and (iii) attempted to convince a competitor to rig bids. There are a number of advantages in adopting the CIBDs: they not only inform

[5] The Presidency of the Brazilian Republic is the chief body of the Federal Executive Power. In the Presidency's structure, there is the Presidential Staff Office (Casa Civil), which is recognised as essential and works in the coordination and integration of governmental actions. This body is also in charge for analysing the merit and opportunity of the bills of law pending in the National Congress, according with the governmental guidelines.

bidders about the illegality of bid rigging, but they also make prosecution of bid riggers easier, adding other criminal penalties for the filing of a false statement by the conspirator.

48. Furthermore, in this context, in 2009 a Congressman presented a bill before Congress (Bill No. 5506/2009), which amends Brazil's Procurement Law (Law No. 8,886/93), making mandatory the signature of CIBDs in all government procurement (Federal, State and local levels). The bill is still pending before Congress.

7. Example of a Bid Rigging Case Condemned in Brazil

49. In October 2003, one of the members of a bid rigging cartel involving security service provider companies with activities in Rio Grande do Sul applied to the Brazilian Leniency Programme. The target of the cartel was a number of public tenders organised primarily by the Superintendência Regional da Receita Federal in Rio Grande do Sul and Secretaria Municipal de Saúde of Porto Alegre.

50. In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence of the bid-rigging, including employees' testimonies and audio records of telephone conversation held between the leniency applicant's employees and the other cartel participants.

51. The leniency applicant provided sufficient information to enable SDE and the Public Prosecutors to run simultaneous dawn raids in four companies and two trade associations allegedly involved in the bid rigging. Approximately 80 people were involved in the dawn raids, including officials from the Federal Police. Seized evidence showed that the defendants held weekly meetings to organise the outcomes of bids for public tenders.

52. There was an intense cooperation with the Public Prosecutor Office throughout the case and, as a result, criminal proceedings were also opened before the Judiciary against the individuals allegedly involved in the conspiracy, with exception to the beneficiary of the leniency agreement.

53. After reviewing SDE's investigation and conclusion for the existence of a hard-core cartel, CADE issued its decision in 2007. It imposed a fine on 16 companies ranging from 15 to 20 per cent of their 2002 gross turnover for cartel conduct. Executives of the condemned companies and three industry associations were also found guilty of cartel offense and fined by CADE. The total amount of fines imposed is in excess of R$40 million.

54. In addition to that, companies were prohibited to take part in bidding processes sponsored by the government and to engage in contracts with official financial institutions for the period of five years[6]. The decision had to be published in a major newspaper at Rio Grande do Sul State, at the expenses of the convicted trade associations and labour union.

55. At the same occasion, CADE recognised that the beneficiary of the leniency agreement fulfilled all the conditions imposed in the agreement with SDE and, therefore, no sanctions were imposed.

[6] Pursuant to Law No. 8,884/94, Article 24, besides fines, companies may be condemned as ineligible for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years.

8. Recent Bid Rigging Investigations

56. As stated above, a noticeably closer working relationship with important government agencies has been established. Thousands of procurement agents, public prosecutors, members of the Federal Police and other government officials have learned about bid rigging, why it is harmful, and how to report it.

57. Tips from procurement agents have provided solid leads and have led to numerous investigations.

58. For example, in two matters, anonymous tips and analyses of procurement data led to a dawn raid of four companies involved in providing information technology services to the Brazilian government and to a dawn raid of four companies providing services for public banks. Many other cases are currently under investigation.

9. Conclusions

59. As observed, the competition and criminal authorities, as well as the internal and external audits are investing in effective ways to prevent and detect fraud schemes in public procurement, especially collusion and corruption schemes. The enhanced cooperation has been very effective, and a number of cases have been initiated after SDE received leads from authorities involved in public procurement.

60. SDE's Antitrust Division has made important improvements on the mechanisms to analyse and better prosecute bid rigging cases, considering its peculiarities. Today SDE adopts more efficient analysis methodology, in cooperation with other authorities.

61. Furthermore, SDE has been promoting more competitive tenders by publicising steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. This includes explanations on how to design the tender process to effectively reduce communication among bidders and to maximise the participation of bidders. All these efforts will certainly result in saving significant government resources.

ANNEX 1: PUBLIC SPENDING OBSERVATORY - ODP (OBSERVATÓRIO DA DESPESA PÚBLICA): A TOOL AGAINST BID RIGGING[1]

1. In the last years, the Brazilian Federal Government has invested in new technologies to identify suspicious patterns of illegal behaviour in the context of public expenditure which were, at first glance, not perceived and, therefore, hidden. These tools have been developed and used to reveal cases of corruption, fraud and collusion in public procurement. The major focus of this initiative is on the Public Spending Observatory – ODP (acronym from the Portuguese *Observatório da Despesa Pública*), a newly created unit within the Office of the Comptroller-General - CGU (Controladoria-Geral da União).

2. The Office of the Comptroller-General (CGU) is a federal agency responsible for assisting directly and immediately the President of the Republic regarding matters related to the defence of public assets as well as increasing the transparency of administration. CGU's main focus is internal control through auditing and disciplinary actions against civil servants. In addition, CGU also devotes efforts to research and develop new techniques to prevent and fight corruption in Brazil.

3. This challenge requires CGU to monitor and detect potential frauds in relation to the use of federal public resources by devising solutions in order not only to expose current corruption cases, but also to prevent future events.

4. In 2008, CGU established the Public Spending Observatory - ODP, a permanent unit of intelligence, based on a modern and innovative concept: combine the practical knowledge and experiences of auditors with the use of advanced tools of information technology to speedily process an enormous volume of data.

5. The main goal of the ODP is to foresee fraud-risk situations. This knowledge-building exercise is quite useful in designing public policies aimed at preventing and combating corruption. Based on systematic information and periodic updates, the ODP provides CGU and some other government agencies with elaborated knowledge, analytical statements about the quantity and quality of public spending as well as with indications of sensitive areas of public spending, in terms of corruption risk.

6. The novelty of the ODP derives from the fact that it consolidates all the available public expenditure information - fragmented in several computerised systems from different bodies and constructed in a variety of technology platforms, from the oldest to the latest - in only one database. As a consequence, ODP transforms these disaggregated data into knowledge of high added value, contributing to the efficient management of public resources as it may help the authorities to identify, prosecute and prevent cases of misappropriation and other frauds.

7. ODP is built around a multi-disciplinary environment composed by auditors and IT staff. In addition, specific task forces are formed depending on the matter to be investigated, which might include other authorities other than CGU officials.

8. As an important example of the capabilities of the Observatory, it is noteworthy the use of its analysis tools to fight cartels and collusion schemes in public procurements.

[1] Annex I was prepared by the Office of the Comptroller-General.

9. Originally, the basic elements of a bidding process and its bidders were already available in a federal database. ODP processes and compares this information with other comprehensive databases maintained by other agencies, such as: tax administration system provides information about the corporate structure of bidder companies and its partners; family relationships and jobs are known by the social security service, and multiple databases register addresses.

10. Crossing these data, the ODP identifies "trails" indicating atypical situations, which do not a priori constitute evidence of misappropriation or irregularities, but do require further attention, such as: the participation of companies with common shareholders in the same procurement procedures, different bidders with the same address, family bonds and past and present employer-employee relationship between partners and directors of the bidder companies. Internal analysis of the procurement databases may also indicate suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme.

11. Those "trails" are automatically followed in a daily basis, resulting in "red" or "orange" warnings to the administrative or criminal authorities or even to the federal agency responsible for the problematic procurement process. Once detected a suspicious pattern, it is loaded in an OLAP (Online Analytical Processing) tool which results in reports and management review panels. The main objective is to analyse the distribution of bidding processes of a product or service by geographic area, government agency, amount of resources involved, per year during a certain period of time.

12. It is noteworthy that the work of the ODP has already been used in cooperation with the Secretariat of Economic Law (SDE) of the Ministry of Justice in some concrete cases still under investigation regarding alleged cartels in public procurement.

13. The joint work between CGU and SDE is presenting some quite positive results, especially concerning the exchange of valuable information and expertise in public procurement. Corruption prevention and fighting cartels are too complex and too broad to be dealt in a single front. The protection of public treasury cannot be separated of the discussion of efficiency and efficient purchases in public procurements. Bid rigging schemes make government spends more money than it should be necessary if the competition in public procurement was effective. Additionally, in some cases, the cartel may sponsor the corruption scheme. Consequently, if the authorities tackle the corruption, but not the cartel, the next procurement official or agency, for example, may be negatively influenced by the cartel.

14. Criminal punishment of corruption cases is quite important, but it is not enough. To deal with corruption in a modern way, comprehensive techniques are required, as long as a broad comprehension of this phenomenon. To this extent, the activities performed by state control agencies, like CGU, and competition authorities, like SDE, are essential to fighting cartels and corruption efficiently. Due to the impossibility of continuous human presence and overseeing on all fronts, modern technologies and initiatives to maximise the capabilities of these bodies, as the ODP, shall also be of paramount importance in this way.

CONTRIBUTION FROM CANADA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Canada --

1. Bid-Rigging in Canada

1. Bid-rigging is a serious crime that undermines competitive markets and has significant negative economic consequences for businesses and the public, costing taxpayers millions of dollars annually. It is a form of cartel activity that occurs when bidders secretly agree not to compete, or to submit bids that have been pre-arranged among themselves.

2. Under section 47 of the *Competition Act* (the "Act"), it is a criminal offence for two or more bidders, in response to a call or request for bids or tenders, to agree that one or more will refrain from bidding, to agree to withdraw a submitted bid, or to agree among themselves on bids submitted, without making the agreement known to the person calling for bids. In Canada, firms and individuals convicted of bid-rigging face fines in the discretion of the court and/or imprisonment for up to fourteen years.

3. The Competition Bureau (the "Bureau") is responsible for the enforcement of the Act, including the bid-rigging provision. In addition to active investigation and enforcement, the Bureau actively reaches out to stakeholders engaged in procurement to provide them with the tools and expertise necessary to detect and deter bid-rigging activities. Corruption does not fall under the purview of the Act, but rather the *Criminal Code* of Canada. As such, this submission will focus on collusion and, more specifically, bid-rigging activities in public procurement.

2. Scope and Scale of Public Procurement in Canada

2.1 Size of the Public Procurement Market

4. In Canada, the public sector undertakes a significant volume of procurement, most of which is conducted through competitive processes; however, the overall value of public procurement as a proportion of the Canadian economy is unknown.

5. The federal department of Public Works and Government Services Canada ("PWGSC") provides federal government departments and agencies with procurement services. It is the federal government's central purchasing agent and Canada's largest public purchaser of goods and services. PWGSC's purchases account for over 85% of the total value of federal government procurement, buying, on average, CAD$14 billion worth of goods and services each year, through approximately 60,000 transactions.[1]

2.2 Principal Public Procurement Policy Objectives

6. PWGSC plays a key role in assisting government departments define their requirements or scope of work, and to obtain the goods and services they need at competitive prices. PWGSC must procure goods

[1] Public Works and Government Services Canada's (PWGSC) Report on Plans and Priorities for 2009-2010. Available online at: http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/svc/svc01-eng.asp.

and services in a manner that enhances access and competition, treats industry fairly, and obtains the best value for Canadians. Every purchase is subject to Canadian laws, regulations and government policies, and must meet Canada's trade obligations. PWGSC purchases goods and services using a competitive procurement process whenever possible, while retaining the option of non-competitive processes in exceptional circumstances.[2]

3. Detecting and Prosecuting Bid-Rigging

3.1 Factors Facilitating Bid-Rigging

7. A number of factors facilitate bid-rigging in public and private procurement. In Canada's experience, the industries or industrial structures that are especially susceptible to bid-rigging often exhibit the following characteristics:

- Similar products or commodities: in markets where competitors' products may be readily substituted for one another, price is the most important element of competition and, because of the standardised nature of the product, price is the only variable upon which parties must agree. As a result, it is easier in these markets for firms to form a collusive agreement, such as bid-rigging;

- Products or services that are simple or straightforward, or are not subject to rapid technological advances or change: it is more difficult to maintain an arrangement if a product is rapidly evolving, or where there are features upon which firms may compete other than price;

- Products where there are few or no close substitutes: when purchasers cannot switch to an alternative to the product controlled by the agreement, they have fewer options and cannot turn to outside substitutes;

- A small number of competitors and sparse or no entry: the presence of these factors can make it easier to reach consensus on an agreement and can make it easier to observe whether someone is cheating on the agreement;

- Relatively few customers: in these circumstances, it is easier for suppliers to allocate markets;

- Facilitating organisations: while most trade associations operate legitimately, some provide the opportunity for members to form illegal agreements.[3]

3.2 Industries at Risk

8. The Bureau recently conducted a review of bid-rigging matters investigated since 1990. The review indicates that, while hardly the only industry trend to be active in criminal bid-rigging, the highest number of allegations of bid-rigging, between 1996 and 2009, related to the construction services sector. This finding is consistent with the experience of other OECD member states.[4] Approximately 40% of the

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2 How the Government of Canada Buys Goods and Services. Available online at: http://www.contractscanada.gc.ca/en/how-e.htm.

3 Competition Bureau obtains court order against the Saskatchewan Contractors Roofers Association. Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03085.html.

4 OECD Policy Roundtables: Construction Industry 2008. Available online at: http://www.oecd.org/dataoecd/32/55/41765075.pdf at page 9.

total number of cases investigated by the Bureau in that period involved the construction industry. By comparison, the next highest sector, transportation, represented only 11% of the cases investigated. The construction industry also ranked highest in terms of penalties imposed during this time period; more than half of the total amount of fines imposed resulted from convictions for participants in that sector. This review of Bureau investigations further revealed that most bid-rigging allegations involved government procurement at either the municipal, provincial or federal level.[5]

9. It is notable that the Bureau has been particularly vigilant since the federal government's announcement, in its Second Report to Canadians on its Economic Action Plan, that it was accelerating and increasing expenditure on infrastructure,[6] including CAD$12 billion in new stimulus funding announced in the January 2009 budget.[7] At the time, the Commissioner indicated that "bid-rigging...[is] an area [where] we reasonably fear [we] may see an up tick in bid-rigging activities in view of the likely significant increase in public infrastructure spending."[8]

3.3 Recent Case Examples

10. To take an example from the non-construction context, in February 2009, criminal charges were laid against 14 individuals and 7 companies accused of rigging bids to obtain Government of Canada contracts for information technology ("IT") services. The Bureau's findings supported these charges, indicating that several IT services companies in the National Capital Region had secretly co-ordinated their bids in an illegal scheme to defraud the government by winning and dividing contracts, while blocking out competitors.[9] The Bureau's investigation had found evidence of criminal activity in 10 competitive bidding processes for contracts worth a total of approximately CDN $67 million. The contracts all related to IT professional services provided to government departments (the Canada Border Services Agency, PWGSC and Transport Canada).[10]

11. In 2008, three construction companies and their presidents were charged with rigging bids submitted for the expansion and refitting of the emergency room at the Chicoutimi Hospital, and finishing

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5 This may, in part, be attributed to the fact that public procurement agencies are under some obligation to take action where they identify concerns to ensure sound expenditure of taxpayers' dollars. This concern is not as relevant for private entities engaged in procurement, owing to the fact that they may be able to pass on additional expenditures down the distribution chain; or they may simply decide to terminate the relationship with the vendor or vendors in question.

6 Canada's Economic Action Plan: A Second Report to Canadians (June 2009). Available online at: http://www.actionplan.gc.ca/grfx/docs/cap-eng.pdf at page 111.

7 Canada's Economic Action Plan: Budget 2009. Available online at: http://www.budget.gc.ca/2009/pdf/budget-planbudgetaire-eng.pdf at page 11.

8 Speaking notes for Melanie L. Aitken, Commissioner of Competition to the Northwinds Professional Institute 2009 Competitive Law and Policy Forum available online at: http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02994.html at page 5.

9 Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts. Available online at: http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02983.html.

10 To date, two individuals have pleaded guilty to a criminal charge of rigging bids. The charges against the other accused remain outstanding.

work to be performed at the Alcan smelter in Alma, Quebec.[11] After a preliminary hearing, the accused were committed on October 9, 2009 to stand trial on the charges.

3.4 Outreach

12. Procurement agencies have well-established steps that they can take to promote more effective competition in public procurement and to reduce the risk of bid-rigging. The Bureau has been a strong advocate in this regard by actively engaging with procurement agencies at the federal, provincial and municipal levels of government to encourage them to adopt measures to effectively prevent, deter and detect bid-rigging in public procurement.

13. The Bureau's outreach activities are aimed at providing a better appreciation of the risk of bid-rigging and the means to detect and minimise such activities. Over the past year alone, the Bureau has given approximately 50 outreach presentations to more than 1,700 government officials.

14. These activities have been welcomed by PWGSC, among many others. Currently, the Bureau and PWGSC are examining ways to formalise their collaborative efforts.

15. In addition, in association with the Treasury Board Secretariat, the federal government department responsible for setting Canada's procurement policy, the Bureau has been successful in incorporating anti bid-rigging material into educational programmes designed for federal government employees involved in procurement. The Bureau seeks to ensure that all courses relevant to federal procurement officers provide a comprehensive explanation of bid-rigging, are explicit about associated risks and outline the Bureau's bid-rigging mandate.

16. The Department of National Defence has also incorporated a chapter on bid-rigging into its Fraud Prevention Handbook, which is distributed to all Canadian Armed Forces.

17. Finally, a renewed online anti-bid-rigging presentation was launched in April 2008 on the Bureau's Web site, featuring greater interactivity and enhanced multimedia components, including surveillance video excerpts from an actual cartel in progress.[12] The presentation provides public and private organisations engaged in procurement with information to help them detect, prevent and report suspected incidents of bid-rigging.

3.5 Independent Bid Determination

18. To deter bid-rigging activity, the Competition Bureau (the "Bureau") has developed a model Certificate of Independent Bid Determination[13] ("CIBD"), attached as Appendix A, for use by tendering authorities when calling for bids, tenders or quotations. This document requires bidders to disclose, to the tendering authority, all material facts regarding any communications and arrangements between the bidder and its competitors in respect of a specific call for tenders. Accordingly, bidders are explicitly advised that the procurement agency is monitoring the bid process for any signs of collusion.

19. The Bureau strongly encourages public procurement agencies to adopt a CIBD, or a similar one of their own design, when buying goods or services through a competitive process. Take up is growing; for

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11 Quebec Construction Companies Charged with Bid-rigging Following Competition Bureau Investigation. Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02748.html.

12 Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html.

13 Available online at: http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html.

example, PWGSC has incorporated CIBD-type concepts in its Code of Conduct for Procurement, although it does not make use of a stand-alone CIBD.

20. Another example is the Vancouver Organising Committee ("VANOC") for the 2010 Vancouver Winter Olympics. VANOC included a "no collusion requirement" similar to the CIBD in its tender documents following discussions with Bureau representatives. The "no collusion requirement" stipulated that bidders must arrive at their bids independently and that communications with other bidders must be disclosed. VANOC also reserved the right to request a CIBD in addition to the "no collusion requirement" if it had reason to suspect that bids were not arrived at independently.

21. The Bureau has recently begun to track steps taken by procurement agencies to strengthen their processes in light of the Bureau's outreach activities. While data is only preliminary, it is nonetheless interesting to note that a number of procurement agencies in Canada have recently adopted CIBDs. The Bureau has also learned that implementing CIBDs has, in some cases, stopped bid-rigging in its tracks, as parties have realised the enhanced scrutiny that procurement agencies are applying to bidders' activities.

3.6 Immunity Programme

22. The availability of immunity from prosecution by the Crown under the Bureau's Immunity Programme provides a powerful incentive for parties engaged in bid-rigging to disclose the existence of the offence and to fully co-operate with the Commissioner and the Crown, who are in charge investigating and prosecuting the illegal activity. Accordingly, while challenging in practice, consistency between a jurisdiction's competition law immunity policy and public procurement policies pertaining to disqualification from future bidding (because of vendor malfeasance) should be given due consideration.

4. Collusion and Corruption

23. As noted previously, corruption does not fall under the Bureau's mandate as a competition law enforcement agency. However, in response to allegations of corruption and bid-rigging in the construction industry, police forces in the province of Quebec recently announced the creation of a unit comprised of 40 officers from various law enforcement agencies, including the Bureau, dedicated to investigating corruption and bid-rigging allegations. The Bureau's role is to provide advice and expertise on aspects falling within its enforcement responsibilities, such as bid-rigging.

5. Conclusion

24. In Canada, the Bureau's active enforcement and outreach activities with respect to bid-rigging demonstrate how serious we consider this criminal behaviour to be. To effectively detect and deter bid-rigging in public procurement, the Bureau has engaged in numerous collaborative efforts with organisations responsible for public procurement policy, practice and training. Shared "ownership" has been a key to success in promoting more effective competition in public procurement and in reducing the risk of bid-rigging.[14]

[14] See Management Response to IC Mid-Term Evaluation of the Competition Bureau's Anti Bid-rigging Activities recommendation 2. Available online at: http://www.ic.gc.ca/eic/site/ae-ve.nsf/vwapj/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf/$FILE/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf.

APPENDIX A

CERTIFICATE OF INDEPENDENT BID DETERMINATION

I, the undersigned, in submitting the accompanying bid or tender (hereinafter "bid") to:

_____
(Corporate Name of Recipient of this Submission)

for: _____
(Name and Number of Bid and Project)

in response to the call or request (hereinafter "call") for bids made by:

_____
(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: _____ that:
(Corporate Name of Bidder or Tenderer [hereinafter "Bidder"])

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
3. I am authorised by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
4. each person whose signature appears on the accompanying bid has been authorised by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
5. for the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organisation, other than the Bidder, whether or not affiliated with the Bidder, who:

   (a) has been requested to submit a bid in response to this call for bids;

   (b) could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;

6. the Bidder discloses that (check one of the following, as applicable):

   (a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor; ❑

(b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements; ❑

7. in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

   (a) prices;

   (b) methods, factors or formulas used to calculate prices;

   (c) the intention or decision to submit, or not to submit, a bid; or

   (d) the submission of a bid which does not meet the specifications of the call for bids;

   except as specifically disclosed pursuant to paragraph (6)(b) above;

8. in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorised by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;

9. the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

_____

(Printed Name and Signature of Authorised Agent of Bidder)

_____ _____

(Position Title) (Date)

CONTRIBUTION FROM CHILE

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Chile --

Introduction

1. The fight against corruption in Chile has traditionally been conducted separately from competition policy. The Competition Agency (Fiscalía Nacional Económica or FNE) has the duties of investigating and prosecuting competition infringement cases, and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or TDLC) is a judicial body that has the power to adjudicate and impose sanctions in competition matters. The final decisions of the Competition Tribunal are reviewed only by the Supreme Court. On the other hand, policies against corruption are in charge of other public bodies detailed in this document. The research for this contribution has generated an interesting opportunity to explore how an accurate co-ordination between these two policies may reinforce each other.

1. Size and policy objectives

1.1 What fraction of your economy does public procurement account for?

2. According to the OECD (2007),[1] public procurement accounts for about 15% of the GDP in OECD countries. In the case of Chile, the public current expenditure represents 20% of the GDP and public real investment about 2.5% of the GDP.[2] By mean of the e-procurement system, 5000 million USD were traded in 2008, representing about 50% of the addition of public current consumption of goods and services plus public real investment.[3] The Public Works Ministry is directly responsible for around 50% of public real investment.[4]

1.2 What are the principle policy objectives of public procurement?

3. The principle policy objectives of public procurement are contained in several statutes applicable to public administration in general and to public procurement in specific. The general legal framework for public administration accounts for the principles of responsibility, efficiency, effectiveness, co-ordination,

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1 OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

2 Dirección de Presupuestos, Ministerio de Hacienda, Chile, Estadística de las Finanzas Públicas 1999-2008, p. 130. Available at http://www.dipres.cl/572/articles-49739_doc_pdf.pdf. These percentages are for the year 2008 and include the central government, the regional government and the municipalities. Not all the items of current expenditure are necessarily relevant for corruption or collusion purposes. For example, salaries of civil servants accounts for 5% of GDP, pensions payments for about 5% of GDP and subsidies & state aids for about 6% of GDP.

3 Presentation of the Annual Report 2008 of the Head of Dirección de Compras Públicas (Chilean e-procurement public body) http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf.

4 Annual Budget of Public Works Ministry for the year 2008. Available at http://www.dipres.cl/574/multipropertyvalues-14552-15192.html.

probity, transparency and publicity, among others.[5] In regard to public procurement and, in particular, to contracts for the supplying of goods and services to the administration, the legal framework states the following policy objectives of procurement by auctions:

> *Tender conditions shall provide for requirements that allow the achievement of the most convenient combination between all the benefits of the good or service that will be procured and all its current and future costs, direct and ancillary ones. In the case of frequent supplying services procured by means of periodical tendering, better work and salary conditions provided by a bidder to its workers will be highly ranked. These requirements cannot arbitrarily discriminate among bidders and winning criteria cannot be the bidding price solely. [...] In any case, the Administration shall aim at performing procurement with effectiveness, efficiency and saving public funds.*[6]

2. Corruption

2.1 What is the cost of corruption?

4. There are no official statics or measures regarding the costs of corruption in Chile. International Transparency reports that for the year 2008 the Index on Perception of Corruption ranked Chile in 23rd position among 180 countries with a 6.9 score within a 0-10 scale.[7]

2.2 What factors facilitate corruption? Do some factors appear to be more important than others?

5. There are several factors that facilitate corruption among which it is worth mentioning the weakness of institutions and lack of co-ordination among different public bodies; the absence of effective control of government expenditures and of payments between public bodies or payments from public to private entities; the lack of transparency in government activities, the absence or incompleteness of accountability regarding projects and public investments; some established practices such as the tolerance by the community of minor acts of compensated favouritism by government officials. It is not easy to give more preponderance of any of these elements over another one, but pro-transparency reforms seem to carry good outcomes in the medium term.

2.3 How do transparency programs help fight corruption?

6. Transparency is a main instrument to fight corruption, since it allows civil society to have a complete access of most of government's decision-making proceedings and their grounds. When private entities interact significantly with public bodies, transparency is in addition a tool for deterring private incitations for corruption. Since a number of public decisions affect collective or public goods or general interests, transparency is a guarantee of their protection.

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5 Act on General Legal Framework for Public Administration (Ley de Bases Generales de la Administración del Estado), art. 3.

6 Act on Contracts for public procurment of goods and services, Art. 6 (Ley de Bases sobre Contratos Administrativos de Suministro y Prestación de Servicios) N° 19.886/2003. Some amendments to labor law in 2008 introduced in public procurement law this indirect way of enforcing labor rights, maybe inappropriately blending two different policies.

7 http://www.chiletransparente.cl/home/inst_indice.html.

2.4 What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

7. Training aimed at preventing corruption, within both the public and private sectors, is also fundamental.

8. The design of programs, jointly by government, civil society and business, which purpose is to fight corruption is also advisable. It is also recommended the drafting of codes of conduct setting standards of behaviour of individuals belonging to private and public entities, at the time of confronting the risk of corruption.

9. The development of interagency links and exchanges between different bodies interested in fighting corruption is also very important.

10. A well suited system for detection (*ex-officio* and complaints filling) and known proceedings for handling cases are significant requirements for a successful system. Complainants should be protected and should receive information of the different stages and of final outcomes of the investigation. The conclusions of the investigation should be publicised.

11. All public entities should comply with high accountability standards.

12. Developing indexes and other objective indicators of corruption seems to be also very important.

2.5 Are firms required to certify during the procurement process that they have not bribed an official?

13. Bidders in public procurement auctions and firms in public procurement in general are not required to sign any document, certificate or statement that they have not bribed civil servants.

2.6 What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in Chile?

14. A private individual who bribes or intends to bribe can be imprisoned up to 3 years.[8] If a fraud against government is proved, sanctions of imprisonment can be higher.[9] In addition, fines can be imposed up to 3 times the amount of the bribe offered or paid.[10] Besides that, as sanctions, the individual's right to practice its profession can be suspended up to 3 years, and he can be deprived of his capacity to become a civil servant temporary or definitively.[11] According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.[12] [13]

15. Firms that have engaged in corruption or bribery have traditionally been excluded from prosecution. A new law enacted in 2009 introduced in Chilean criminal law the possibility of firms to be

8 Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

9 Penal Code, art. 250 in fine, in connection with arts. 468, 473, 470 N°8.

10 Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

11 Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

12 Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

13 The prosecution of private individuals in corruption cases and the introduction of prison for bribing are the result of law amendments and changes in prosecution policies and jurisprudence of the last 10 years.

criminally sanctioned for the following crimes: money laundry, terrorism and bribery to national and foreign civil servants.[14] According to this new law, firms sanctioned for corruption can be punished with a fine; with a temporary suspension of its activities in whole or in part; with the deprivation of its legal entity or the order to dissolve the company; with the lost of public benefits such as subsidies; also an order to cease and desist of performing the kind of transactions that have been criminally judged.[15] According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.[16]

16. The sanctions for civil servants who have engaged in corruption are contained in the statute of civil servants (administrative liability - lower sanctions) and in the penal code (higher sanctions). Criminal sanctions are similar to those explained above for the case of a private individual involved in bribery.

2.7 Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

17. In general terms, every public entity has a disciplinary authority on its own officers. The lower chamber of the Congress (the chamber of the Deputies) also has a power to control the governmental acts of government. The competent authority with general powers to administratively prosecute corruption cases is the General Comptroller Office (Contraloría General de la República), a constitutionally independent body in charge of controlling *ex-ante* and *ex-post* the legality of the Administration's acts. The National Criminal Prosecutor (Ministerio Público), a constitutionally independent body is in charge of criminal prosecution of corruption before criminal judges. There is also a Prosecutor for the Fiscal Interest (Consejo de Defensa del Estado) that usually participates as a plaintiff in the prosecution of criminal corruption cases.

18. Recently, the Act for the Publicity of Public Information, N° 20.285/2008 created another public body, the Transparency Council. Its principal duties are to guarantee the respect of the principle of publicity of government activities and to legally enforce the duties of public entities in this field. It is an administrative body integrated by four prestigious professionals which nomination system assures the independence of the body's decisions. Its decisions can be challenged before courts.

19. Competition authorities do not have general authority to prosecute corruption cases beyond the disciplinary authority over their own officers.

3. Collusion

3.1 What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

20. A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This allows firms to easier achieve an effective collusive agreement. When these internal risks are combined with some characteristics of the product or service and of the industry, such as those detailed in the OECD Guidelines,[17] a strong scheme of incentives directs firms' behaviour towards collusive strategies.

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14 Act N° 20.393 December 2nd, 2009, on criminal liability of legal entities.

15 Act N° 20.393 December 2nd, 2009, on criminal liability of legal entities, art. 8.

16 Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

17 OECD Guidelines for Fighting Bid Rigging in Public Procurement.

3.2 What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

21. There have not been many punished bid rigging cases in Chile so far. An interesting case before the Competition Tribunal in 2006 involved the supplying of oxygen for public hospitals.[18] Another one in 2008 involved the asphalt for roads industry.[19] There are bid rigging cases pending before the Competition Tribunal involving ambulances[20] and advertisement agencies[21] sectors.

22. The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. The oxygen case is very interesting from the point of view of competitive improvements to a tendering process. Before the case was brought to the competition authorities, significant amendments had been made by a team of consultants in order to change the rules of tendering process and making them more competitive.[22] These amendments are very illustrative of a pro-competitive improvement and regularly used as a benchmark in FNE's presentations for outreach activities before public procurement entities. In a number of other cases involving tenders for concessions or tenders for the sale of an essential facility or a scarce input, the Competition Agency has challenged directly before the regulator or before the Competition Tribunal some of the tender requirements.

3.3 Does your country employ certificates of independent bid determination?

23. There is no general legal provision imposing this requirement. However, as part of the outreach activities performed by the competition agency, the instrument has been advocated before several public bodies and the FNE recently achieved to introduce this requirement in an important tender by the regulator of the pension funds management industry. The aim of the FNE is to continue to advocate on this matter to promptly disseminate the use of this important instrument to many industries, and expect results in the near future.

3.4 When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

24. No. This ancillary sanction was abrogated by a recent amendment to the Regulation of the Public Procurement Act.

4. Fighting collusion and corruption

4.1 What cases from your jurisdiction have involved both corruption and collusion in public procurement?

25. None of the cases above mentioned in paragraph 12 included corruption elements. However, since several collusion cases in the last year have been sent to the Competition Agency for investigation by

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18 Ruling N° 43, Competition Tribunal, September 7th, 2006, 4 firms condemned. Decision overturned by the Supreme Court.

19 Ruling N° 79, Competition Tribunal, December 10th, 2008, dismissed. Decision affirmed by the Supreme Court.

20 Case Number 163-08.

21 Case Number 177-08.

22 These include changes such as demand aggregation and reduction of the number of tenders (to only 3 in an industry with 4 firms), extending the contracting period to 5 years, and keeping reference price confidential, among others.

the General Comptroller Office - whose duties are closer to corruption than to collusion matters - some of these cases will likely include both wrongdoings. That is why it is currently relevant four our system to identify how corruption and collusion interact and how to co-ordinate the fight against them.

4.2 Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

26. There is no public information available to answer, regarding corruption cases. All collusion cases mentioned in paragraph 12 occurred at a national level.

4.3 What methods and techniques for fighting corruption would aid the fight against collusion?

27. A first method that deserves to be mentioned is the use of general audits performed by the General Comptroller Office. It is worth mentioning that several criteria regarding collusion detection were additionally incorporated by this public body in its audits during 2009. This was an outcome of the joint work with the Competition Agency.

28. The periodical performance of internal audits at national, provincial and local government levels is another useful technique for increasing detection of both, corruption and collusion. It is very important for effectiveness in detection to identify in the risk matrix, the risks associated to both kinds of wrong.

29. It is also important to develop methods and working practices that foster inter-agencies work, with joint sessions, exchanges of information, collaboration, reciprocal training, parallel investigations, etc. Chile has recently advanced along this road.

30. Training of public procurement officers is also an important duty of agencies in charge of fighting corruption and collusion in order to increase awareness of procurement officers of these wrongs and for helping them in the definition of standards of behaviour.

31. Dissemination of toolkits and guidelines for prevention and detection easy to be used by civil servants can also be very effective.

32. Signalling to the private sector that different agencies are working together in a co-ordinated way can also prove to be a very effective deterrent. The FNE efforts have pursued this effect by broadly publicising most of the initiatives undertaken in this area, such as the 2008 Competition Day, entirely focused on bid rigging, and by issuing press releases each time a collaboration agreement has been subscribed which was the case with the General Comptroller Office and with the Ministry of Public Works, among others.

4.4 When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in Chile?

33. There are no especial leniency rules for bribery or corruption crimes but the general Penal Code rules that provides for criteria for raising or diminishing the sanction.

5. Advocacy

5.1 How do regulatory or institutional conditions help facilitate bid rigging and corruption?

34. Several factors have been identified as corruption facilitators, such as the weakness or absence of controls of budgets expenditure or of transactions between different entities within the public sector or in

public-private rapports; the lack of transparency in government activities; and, the absence of clear career rules for civil servants regarding promotion, hiring and firing and inappropriate labour conditions.

35. A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This facilitates firms to achieve an effective collusive agreement. On the other hand, increasing the levels of transparency has been identified as a very good tool against corruption but it is well known that, at the same time, excessive degrees of transparency can give industry members too much predictability thus facilitating effective collusion.

36. The relevant question seems to be, depending on the context, whether to privilege pro-competition & anti-collusion strategies or pro-transparency & anti-corruption ones. As stated by the philosopher Sissela Bok, "*While all deception requires secrecy, all secrecy is not meant to deceive*".

5.2 In what ways can competition authorities work to improve efficiency of public procurement?

37. One of the main expertises of competition authorities seems to be the identification of concentrated markets, which are riskier from the point of view of collusion and to denounce unjustified entry barriers that can be facilitating this structure. Since these are the basic conditions for collusion, in the dissemination of a competition culture within the public sector, competition agencies should share this expertise for identifying such fundamental conditions. Only once a competition problem has been identified, alternative solutions can be evaluated with the support of competition experts. Should we change tendering processes in order to make future tenders more competitive by the mean of reducing entry barriers? Should we initiate audits of closed past tender proceedings in order to detect a wrong that ought to be investigated and prosecuted? Both strategies need a strong commitment by both, the public procurement body and the competition authority. Other efficiency improvements of public procurement can certainly be made but these are beyond the competition authorities' competences.

38. In summary, competition authorities should help in the identification of risky situations for collusion and once a risky situation is identified, help in the choice of a solution between the alternatives. In the preventative strategy, competition officers can collaborate in the design of changes oriented to introduce an incentives scheme for competition. In the ex–post strategy, competition officers should collaborate in developing detection mechanisms jointly with procurement entities.

5.3 What steps have been taken to improve the efficiency of the public procurement process in Chile? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

39. An important step towards a more efficient public procurement process was taken in 2004 with the establishment of a public body in charge of managing an electronic platform for public procurement. Significant resources have been saved because of e-procurement.[23]

40. Regarding measures aimed at reducing corruption, even though most of them aim at fighting corruption in general and not only confined to public procurement, it is worth mentioning the following.

[23] Savings of 70 million USD in 2005; 92 million USD in 2006; 118 million in 2007 and 140 million in 2008 are reported. http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf.

First, the subscription of international conventions concerning corruption prevention and detection.[24] Second, another public initiative has been the creation of Committees appointed by different Presidents of the Republic in order to tackle corruption issues: Comisión Nacional de Ética Pública (1994); Acuerdo Político-Legislativo para la Modernización del Estado, la Transparencia y la Promoción del Crecimiento (2003); and, the Agenda de Probidad y Transparencia (2006). Third, several amendments to different laws have been introduced oriented to increase transparency and to punish corruption conducts more severely. Finally, there have been some initiatives oriented to the identification and dissemination of best practices.

41. Regarding measures aimed at fighting collusion, in 2008 the Chilean Competition Agency, by the initiative of the OECD and the support of the OECD and the Competition Bureau of Canada, started a program oriented to increase awareness of public procurement officers and institutions of the problems of collusion and bid rigging and the relevance of a competitive tender design. This program has been a bridge between competition and public procurement worlds and resulted in the inclusion of the item 'fight against bid rigging' in the agendas of several public procurement bodies. Some amendments to tender procedures are beginning to be introduced and the number of investigation cases has been increasing, both as outcomes of these efforts.

5.4 When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

42. We have not had a significant experience for supporting an answer to this question. The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. However, some techniques such as certificates of independent bid determination are generating a raising interest among public procurement bodies; such was the case with the regulator of the pension funds management industry that effectively introduced the requirement in a tender, as reported in §13, supra.

5.5 Has your competition agency undertaken competition advocacy in this area?

43. In May 2008, the FNE brought together several public bodies and an association of public procurement officers, to a work team which was named *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller, the (E-) Public Procurement Bureau (body in charge of modernising the public contracting through electronic purchases), the Ministry of Public Works, and the Council for the Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group. This Interagency Taskforce has held 9 work meetings during 2008 and 2009.

44. Because of this initiative, seminars and training activities took place, as a result of bilateral links with the taskforce members and also as a byproduct of installing the risk of collusion among bidders in the agendas of such bodies. Nearly 1000 public procurement officers have attended these activities.

45. An ongoing market study on the construction sector is also expected to become a useful tool for advocating regulatory reforms in the Ministry of Public Works.

[24] The Inter-American Convention Against Corruption (1996); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

5.6 If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

46. As stated before, the competition agency does not have any competence for prosecuting corruption in general.

47. Regarding collusive tendering cases, remedies sought have commonly been fines to firms. In other cases involving tender design - but not necessarily collusive tendering cases - some remedies regarding tender conditions or requirements, aimed at making the tender more competitive, have been requested to the Competition Tribunal.

48. In October 12th an amendment to the Competition Act came into force introducing provisions for fighting cartels more effectively.[25] It is expected that higher fines will be requested against bid riggers in the near future.

[25] Law N° 20.361/2009 gave powers to conduct dawn raids, to wiretap, and to institute a leniency program. Among others, it also raised the maximum amount of fines up to USD 20 million approx.

CONTRIBUTION FROM COLOMBIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Colombia --

I. Size and policy objectives

1. 1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

2. According to the OECD (2007), public procurement accounts for about 15% of the GDP in OECD countries[1]. Public procurement accounts for a large percentage of Colombia's GDP, near 25% as an average estimation. It is also one of the most important activities regarding private participation in public programs, since the legal framework (especially Law 1150 of 2007) establishes that most of the provision of goods and services, and the development of national and local infrastructure, should be carried upon by public procurement processes.

3. The principle policy objectives of public procurement in Colombia are contained in provisions in the Constitution, mainly laws 80/1993, 1150/2007 and the decrees that develop them. They are the following:

- **Transparency**: every public procurement process should be visible to the public in general and to its participants. Every decision regarding the winners of public tenders and the like has to be publicly announced[2].

- **Agility**: administrative proceedings should be carried on with the least minimum requirements necessary to insure their adequacy and without undue delays[3].

- **Responsibility**: public officials and private contractors are held responsible for violating the applicable legal regime, thus producing injuries through their actions or omissions[4].

- **Economic and financial balance of public contracts**: the balance of duties and rights that result from a contract should be preserved, and a no-fault disruption creates a right for the affected party to ask for damages in order to restore the balance[5].

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1 OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

2 Law 80/1993, Art. 24. Also, from this principle stems the principle of objective selection of the contracting party, established in article 5 of law 1150/2007, according to which the contracting party should be selected according to the most favorable offer for the contracting administrative institution.

3 Law 80/1993, Art. 25. This principle is called, in Spanish, "Principio de Economía"

4 Law 80/1993, Art. 26.

5 Law 80/1993, Art. 27.

- ***Bona fide* interpretation of contracts**: those provisions regarding the selection of contracting parties as well as those that constitute the contracts themselves should be interpreted according to their purposes and the principles mentioned above[6].

4. Every Colombian public entity has to carry on a detailed procedure for contracting, that can be summarised in the following steps: 1) the contract has to be previously authorised by the entity (and by the rules that determine what the entity may do), 2) it has to be backed-up by a budgetary provision, 3) the selection of the contracting party has to draw from a database that presents and ranks the available contractors[7], 4) the institution has to choose among the different available contractors, 5) the contract has to be signed and, finally 6) published or given public notice in a nationwide media[8].

II. Corruption

1. What is the cost of corruption?

5. Corruption has many costs, both to the public administration and to the general population. Regarding the public administration has to assume a series of costs that it should not assume under an honest and transparent set of procurement processes. For example, it has to assume the acquisition of goods and services that do not meet the expected requirements, and thus are ill-suited for their purposes. Therefore, it has to afford the costs related to improve these goods and services in order for them to be adequate. It also has to afford the costs related to vigilance and punishment of corrupt officials and employees who benefit from corrupt practices. Recently, the Colombian Anticorruption Czar (see more below) stated that about $2 billion dollars (about 1.5% of the Colombian GDP) are lost annually in bribes and handouts for corrupt officials[9].

6. Regarding the population in general, corruption affects the people that depend upon government investments more than other groups of the population. In this sense, corruption is profoundly regressive, since it hinders the State from providing people with the goods and services that they need in order to overcome particular conditions related to poverty and deprivation. However, corruption also affects other segments of the population as well. It prevents both local and international actors from investing in the country, thus hindering the investments necessary for carrying through different economic activities that are both profitable and socially desirable.

7. These two types of costs are closely related, with corruption contributes to what are generally referred to as the traps of poverty. By obstructing the provision of social goods and services, the general population finds it harder to overcome their conditions of poverty; by hindering private investment, corruption impedes people and organisations from making investments both in the public and private sector that are socially beneficial. Thus corruption is a malaise that has to be fought upon with all the tools available to both individuals and the State.

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6 Law 80/1993, Art. 28.

7 According to article 6 of law 1150/2007, every eventual contractor has to register in a unique database of contractors administered by the State (referred to as "Registro Único de Proponentes"), in which they have to rank themselves in terms of experience, legal and financial capacity to subscribe contracts, and corporative organisation. The score that results from this ranking is taken as the maximum capacity to contract of each contractor registered.

8 Law 80 /1993, Art. 41.

9 http://www.anticorrupcion.gov.co/DiaContraLaCorrupcion.asp. Visited on: 15/01/2010.

2. What factors facilitate corruption? Do some factors appear to be more important that others?

8. There are many factors that facilitate corruption. Among the most relevant ones are the economic incentives that stem from engaging in corrupt practices both by individuals and by public officials. Private actors can, at a particular moment, decide to offer bribes and hand-outs as means to circumvent cumbersome regulations and achieve whatever purposes they seek. At the same time, public officials may accept these bribes and handouts as means to complement their wages and increase their incomes. In order to reduce these incentives, the Colombian government has expended considerable resources in increasing the penalties for engaging in corrupt practices and investigating the probity of administrative proceedings.

9. Another particular factor that facilitates corruption is that ineffective law enforcement allows interest groups to permeate state institutions and "seduce" the authorities so that certain agencies, like competition agencies, refrain from conducting investigations in particular markets. This particular manifestation of corruption does not necessarily require bribes or hand-outs, since it is usually done via political pressure from certain government institutions.

3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

10. Transparency programs help fighting corruption by making it harder for corrupt practices to go unnoticed by the supervising authorities. In this sense, transparency programs facilitate the detection of corrupt practices as they take place or after they have been committed. In the Colombian case, transparency programs are complemented with high sanctions, thus aiming at deterring effectively the occurrence of these practices.

11. Other policies that help fighting corruption are the creation and protection of independent and technical agencies that have capable personnel for the detection of corrupt practices. By remaining independent and having a technical staff, these agencies increase the probability of detecting these practices, for both independence and technical preparation are crucial for carrying forth successful investigations. Independence assures that the investigations are carried on without undue delays or obstacles, and that explore all the relevant details. In turn, a technical staff is better suited for understanding how the corrupt practices take place – a key element in terms of gathering evidence - and its possible implications.

12. Another important aspect is an effective judicial review of administrative decisions. Judicial review is based on the idea of an impartial analysis of the decisions taken by administrative agencies and individuals. Since corrupt practices may seem as jaundiced to an impartial reviewer, judicial review plays a key role in assessing whether the actions carried forth by both public officials and private parties in the procurement were legal. At the same time, this impartiality assures affected parties that their complaints and observations will not be discarded arbitrarily or as a result of undue political pressures.

13. Finally, criminal and administrative sanctions explained in point 4 below have proved to have an important deterrent effect on corruption practices.

4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.

14. In Colombia, firms are not obliged to certify that they have not bribed an official during a procurement process. However, there are administrative and criminal laws that severely punish both officials and private actors engaged in corrupt practices. Administrative sanctions include the prohibition of assuming public offices for an extended period of time (from five to twenty five years), the duty to

return any public resources that were unlawfully appropriated, and the payment of a fine proportional to the amounts appropriated. Criminal sanctions include a sentence of jail and the payment of a fine related to the amounts appropriated.

5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

15. In the Colombian legal system there are several authorities competent for prosecuting corruption cases. They are the following:

- **Procuradoría General de la Nación**: This agency has the objective of carrying forth all the proceedings required to establish the administrative and disciplinary responsibility of a public official in administrative proceedings that may violate the law. Its investigations can begin by its own initiative as well as by a claim presented by any citizen, and take place during visits after which briefs are made reporting any findings. This agency has the faculty to oversee all the public procurement processes carried out by public institutions and to intervene when a process seems suspicious. It also can intervene in judicial cases related to public procurement processes.[10]

- **Fiscalía General de la Nación (**Office of the *Attorney General*): This prosecuting agency has the duty of investigating any behaviour that amounts to a criminally relevant behaviour, including collusion and corruption in public contracting involving both individuals or public officials[11]. It may begin its investigations either by its own initiative or on behalf of a claim presented by any citizen, and depending on its merits, a final report is issued suggesting prosecution, which, in turn, is directed by a judge[12].

- **Contraloría General de la República**: This agency is responsible for controlling how public resources are spent through public contracts[13]. It exercises its control by having investigative offices at the different levels of territorial governance (at the national level, the department level, and at the town or "municipio" level) and through different procedures, some of which take place after the contract has been celebrated. This entity can review the proceedings undertaken once the contract is binding and in full force; after the payments stipulated in the contract have been done, and after the contracts have ended. Also, before the contract has ended – like when it supervises the expenditure record of the different state institutions at the different levels of governance[14] – or at any particular time of the contracting process – like when it issues a requirement to any public official and state employee to inform of their actions during any proceeding related with public procurement[15]. The Contraloría can also issue a report in which it certifies the probity of the

10 Constitución Política de Colombia, Art. 277.

11 As a matter of fact, there are several criminal law provisions that sanction different aspects of corrupt behavior from public officials and employees. For example, articles 405 &406 of law 599/2000 penalise any action or omission incurred by these that slows down a lawful duty or allows an action that goes against an established duty based on a promise of a reward. Articles 408 to 410 penalise any state contracted celebrated by a public official that ignore the regime of personal limitations, establishes a direct benefit for the official or is celebrated without de the due requirements.

12 Law 80/1993, Art. 66.

13 Constitución Política de Colombia, Articles 267 and following.

14 See Law 87/1993.

15 Law 80/1993, Art. 65.

actions undertaken. Furthermore, the Contraloría can carry on investigations against officials involved in corrupted practices and impose monetary fines.

- **Zar Anticorrupción** ("Anticorruption Czar"): The official in this post can ask for the prosecution of public officials or employees and private parties that are suspected of engaging in corrupt practices, since it has no power to judge or sanction administrative actions (or omissions) on its own. Also, the Anticorruption Czar regularly presents information regarding the costs and consequences of corruption in Colombia, and engages in ongoing campaigns related to these topics[16].

- **Superintendencia de Industria y Comercio (SIC)**: This agency, Colombia's sole competition authority, has the power to investigate collusion in public procurement proceedings as an anticompetitive practice. Its approach is very different from that of the aforementioned institutions. It focuses on how the behaviour of private contractors participating in public procurement processes (with or without the help of public officials or employees) resulted in an undue selection of a contracting party, which in turn may produce an inefficient assignation of the resources assigned via the contract. The SIC can impose fines for both the company and the directors involved up to USD 25 millions[17].

III. Collusion.

1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

16. The Colombian government considers that corruption in public procurement processes should be tackled by approaching the issues related to both private and public behaviour. In this sense, just as corrupt practices affect the state's budget, so does the collusive behaviour that renders prices higher compared to what otherwise would be the result of the competitive behaviour of rival participants. In this sense, collusive behaviour is also deeply regressive and as socially harmful as corruption is deemed to be.

17. The 2009 OECD Guidelines for preventing collusion in public procurement suggest several factors that facilitate this practice. Among the ones that have been perceived in Colombia are the standard character of certain goods and services, the reduced number of participants in some procurement processes, and the close communications rival bidders can have among themselves. Almost all industries that engage in frequent acquisitions of standardised goods and services and that face a reduced number of sellers or buyers are vulnerable to bid rigging. The State is no exception to behaviours that fall within this category.

2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

18. There are many sectors in the Colombian jurisdiction that have been affected by bid-rigging conspiracies in public procurement. Some of them include the acquisition of standardised goods, like cement and computer software for keeping school grades and medical records, while others include the construction of public infrastructure, like highway systems and State facilities.

19. As of the last months, the Colombian competition agency (SIC) has been actively participating with other authorities in the development of procurement process systems designed to minimise the risks of

[16] This institution was originally created by decree 2405/1998, and is currently governed by decree 519/2003.

[17] Collusive behaviour is sanctioned by article 47 of decree 2153/1992.

bid rigging. Also, this agency continues to work in preparing guidelines that will be given to the different State agencies that enter into contracts via public procurement processes in order for them to be alert regarding suspicious behaviour. These guidelines will be the joint result of the efforts underwent by SIC as well as by other very important institutions for this purposes like the Procuraduría General de la Nación, among others. The release of the guidelines will be accompanied with a training program of officials directly involved in public procurement and a follow-up scheme to evaluate the handout's impact.

3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

20. The Colombian laws regarding procurement processes do not require from their participants certificates of independent bid determination, since the applicable laws prohibit that rival bidders determine their bids in a co-ordinated manner. Also, when collusion takes place, the enforcement of the applicable laws may result in a prohibition from participating in successive procurement processes for an extended period of time. Furthermore, this prohibition applies to joint ventures expressly created for participating in a particular process, as well as to its members, thus preventing that bidders who have been condemned on grounds of bid-rigging circumvent the restrictions imposed to them.

IV. Fighting collusion and corruption.

1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

21. There are several cases in Colombia that have involved both corruption and collusion in public procurement. To name the most recent one, in December of 2009 the Anticorruption Czar suggested that the CEO of Colombia's social security agency, known as the "Seguro Social", was fired from his post after he awarded a contract to a private party in a procurement process in which several ex-employees of the aforementioned institution worked just after they were fired and participated in the bid. The Czar considered that the process presented several irregularities that merited its termination and renewal. This case showed what is considered today to be a common practice, that is, that former employees of a State institution or agency find jobs in participants in procurement processes, in order to take advantage of their connections and the knowledge of how decisions are taken within these institutions.

2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

22. Unfortunately, collusion and corruption cases and allegations are a general malaise of the different government levels. However, not much has been properly documented, and the available information is insufficient to warrant a detailed analysis.

3. What methods and techniques for fighting corruption would aid the fight against collusion?

23. There is a well known trade-off between transparency and collusive behaviour in both State and privately held procurement processes. Although transparency measures improve the accountability of the decisions taken by public officials and expose their behaviour both to the incumbent agencies and the people in general, they also facilitate co-ordination among bidding rivals, since it makes it easier for them to meet, make agreements and monitor their compliance given that more information, necessary for colluding strategies, is available. Therefore, most of the methods and techniques for fighting corruption would hinder instead of facilitate the fight against corruption.

24. However, certain approaches could be made to maintain transparency while making more difficult the occurrence of collusive behaviour. For example, public hearings in which the winner bids are chosen from all the available bids should be either replaced by private hearings in which impartial observers - like members of NGO's and research centres - guarantee the probity of the election, or modified so that all the bids are considered but only the winning bid is publicly announced. The key aspect to preserve from this hearings is that the winners are chosen fairly and in accordance to the established rules; in order to do this, not all the bids that were handed in have to be known to the public, or they could be held on reserve until a certain amount of time has passed.

4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

25. Yes. Individuals or firms that have engaged in bribery or corruption are able to receive leniency in the Colombian jurisdiction by the incumbent authorities, like the Fiscalía General de la Nación. The leniency figure is called "Principio de Oportunidad" and it is contained in the criminal law provisions – article 250 of Law 906/2004. Regarding the leniency regime in competition law, since it was founded only a couple months ago, the details regarding its implementation are still being discussed by the Colombian competition agency (SIC).

V. Advocacy

1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

26. It is a well-known fact that regulatory or institutional conditions could help facilitate bid rigging and corruption. In the case of the bid – rigging, the regulatory or institutional conditions may create artificial barriers of entry that diminish the number of participants willing or able to participate in procurement processes, thus facilitating that the remaining participants reach agreements for bid rotation and similar practices. Also, these conditions may establish particular conditions that are hardly met by all the available participants, enabling only a few to participate. In turn, these conditions can be about the required goods or services to be provided, or about certain conditions that have to be met along the procurement process itself. In the case of corruption, regulatory or institutional conditions may create incentives for participant firms to circumvent the requirements established by offering bribes or handouts to the officials in charge of the procurement processes. Also, they can create such an unviable atmosphere for doing business that honest, private actors decide to search somewhere else for friendlier environments, thus leaving dishonest, private actors as the only ones available for contracting. In either case, regulatory or institutional conditions may hinder both transparency and competition, thus creating more harm than benefits.

2. In what ways can competition authorities work to improve the efficiency of public procurement?

27. Competition authorities can work to improve the efficiency of public procurement in several fronts. One of them is through real time council and supervision regarding how public procurement processes as they take place. Another one involves advice and training in procurement processes, in order to prevent collusive behaviours before the aforementioned processes actually take place. A third possibility is through careful research about the behaviour of the firms that participate in particular markets in which public procurement processes are used in order to find patterns of bid rotation and the like. These three fronts are conceived as interventions that increase the probability of detection. A forth possibility is by increasing the sanctions imposed to colluding participants; this last front deals with the sanctions imposed. Together, these fronts may increase the deterring effect of the competition law regime, enabling it as a more effective tool for improving the efficiency of public procurement.

3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

28. So far, the approach that has been adopted by the Colombian government has consisted in making public procurement processes more transparent and raising the penalties and fines in order to discourage the occurrence of collusion in public procurement processes. Recently, and thanks to the enactment of Law 1340/2009, the Colombian competition agency is implementing advocacy programs and a leniency program. The advocacy programs have been conceived in order to reduce the anticompetitive effects that some regulatory and institutional conditions have on determined markets. Also, the advocacy programs include the development of guidelines about collusive practices in public procurement that is to be handed out to any agency or public institution that undertakes public procurement processes. On the other hand, the leniency program is being conceived as a mechanism that facilitates information regarding specific collusive behaviours that are taking place or that have done so in the past.

4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

29. The Colombian competition agency (SIC) is aware that measures adopted for reducing collusion and bid rigging in public procurement may have an impact on corruption. As mentioned above, the agency acknowledges that there is a trade-off between transparency and efficiency.

30. In this case, the trade-off suggests that to make public the full details about the merits of the selections implies making public information that facilitates future collusive behaviours and that allows monitoring its compliance. However, if public officials are not required to justify their decisions on the full merits of the bids and offers presented, it is likely that corruption will increase, since arbitrary considerations for selecting a winner will not be disclosed. Nevertheless, the agency considers that a sensible balance can be reached, in which transparency can be preserved while diminishing the risks of collusive behaviour, by for example modifying certain public hearings that allow rivals to monitor each others' compliance to their collusive agreement. Such modifications may include the participation of officials from agencies or entities different from the one conducting the procurement process and that vouch for its integrity.

5. Has your competition agency undertaken competition advocacy in this area?

31. The Colombian competition agency (SIC) is currently undertaking competition advocacy in this area, by approaching agencies that commonly undergo public procurement processes, and by drafting guidelines about collusive behaviours in public processes, and how to spot them.

6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

32. In the cases regarding procurement collusion that the Colombian competition agency (SIC) has prosecuted, different types of remedies were considered. The most common remedies in these cases have been conduct-based remedies, and more particularly, direct prohibitions regarding management and independent bid elaboration by rival bidders. However, the agency has not disregarded the possibility of using structural remedies as long as they seem more adequate given the particular conditions of the markets affected by collusive behaviour.

CONTRIBUTION FROM CROATIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Croatia --

1. Introduction

1. The Public Procurement Act (OG 110/2007, 125/2008; furthermore: PPA) of the Republic of Croatia, regulates the following: (i) public procurement procedures of all values, whereby contracting authorities and bidders conclude public works contracts, public supply contracts and public service contracts; (ii) the competencies of the competent authorities; and (iii) legal protection concerning public procurement procedures.[1] The PPA provides for protection of competition, within the entire scope of the public procurement process[2]. The detailed implementation of the competition statutes follow based on the Croatian Competition Act (2003), whereas the authority in charge for the competition protection issues, the Croatian Competition Agency, provides the implementing authorities for the public procurement supervision, on expert advises and instructions on how to rightfully assess the particular situation of public procurement.

2. Particular questions for consideration[3]

2.1. Size and policy objectives

1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

2. According to the latest data, based on notices on concluded contracts, public procurement in the period of Year 2009 amounts nearly 35 billion HRK (less than 5 billion EUR). The Principles of public procurement in the Republic of Croatia according the PPA (Art. 6), are following: (i) the principle of freedom of movement of goods; (ii) the principle of freedom of establishment the businesses and to provide services, as well as the principles deriving out of the mentioned; (iii) the principle of competition; (iv) the principle of efficiency; (v) the principle of equal treatment; (vi) the principle of non-discrimination; (vii) the principle of mutual recognition; (viii) the principle of proportionality and (ix) the principle of transparency.

1. Public Procurement Act (PPA -2008; consolidated version), Art. 1, item 1.

2. PPA, Art. 2(15e); Art. 6(1); Art. 10 (3); Art. 11(5), and others.

3. The responses on the questions under this section follow out of contribution from the side of the Ministry of Economy, Labor and Entrepreneurship of the Republic of Croatia, Office for Public Procurement (Dec. 29, 2009).

2.2. Corruption

2.2.1. What is the cost of corruption?

2.2.2. What factors facilitate corruption? Do some factors appear to be more important that others?

2.2.3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

3. The greatest risks and possible measures for the suppression of corruption and conflict of interest in public procurement, according to the phases of procedure are the following:

Planning, preparation and selection of public procurement procedures:

- The greatest risks for corruption are the following:
  - Unnecessary investments that do not add value to the enterprise;
  - Overestimated quantities;
  - Selection of the negotiated procedure without prior notice contrary to the prescribed conditions;
  - Tendering documentation could be structured in a discriminating manner and could lead towards favouring certain economic operators (e.g. conditions and requirements were not set in accordance to the procurement objective);
  - Failure to adhere to the terms of the public procurement procedures in line with estimated values and decreasing the value of procurement to prevent its coming within the scope of the prescribed procurement procedure;
  - The excessive specification of the type of goods that puts the bidder/manufacturer in the privileged position;
  - Technical specifications could be prepared by the potential bidders, which could produce difficulties for other bidders in order to ensure them equal positions during the bidding process;
  - Technical specifications could be prepared in a way that only certain economic operator could comply with the conditions set out on the tender.
- Furthermore, the possible measures for insuring increased transparency and responsibility are the following:
  - Publishing the contracting authorities' and/or entities' profile;
  - Publishing the annual procurement plan at contracting authorities' website, so that interested business entities, particularly small and medium sized entrepreneurs, could timely prepare for the participation in particular tenders;

- Establishing internal rules, in which obligations and authorities of all participants involved in preparation and execution of public procurement procedures and contracts would be specified. It would also be recommended that internal rules include the obligation to maintain records about all steps in the preparation and implementation of the procedures, so that conflicts of interest and corruptive practices could be more easily determined.

Implementation of public procurement procedures:

4. In mentioned phase, the greatest risks for corruption appear in connection with setting of the tenders, when could come to the consolidation of different forms of cartel agreements in order to influence the outcomes of tenders. There are three types of agreements, which could possibly occur: (i) the price fixing agreement; (ii) the delivery agreement; and (iii) the agreement concerning the best bid. The major formal and material indicators of cartel agreements were recognised as: (i) the formal one, whereas different tenders contain the same mistakes: the bids appear identical, the contracting authority determines that bidder maintained contact during the procurement procedure; and (ii) the material one, whereas the large discrepancies between the highest and the lowest bids could occur. Namely, unknown (new) bidder submits the bid with extremely high price, and the prices for other bids would be adjusted accordingly. Tender documentation could be purchased by various bidders, but only one valid bid would be submitted even though the market conditions would indicate that more business entities were able to comply with the terms of the tender. In case of the most economically advantageous tender, the selected bidder did not sign the contract regardless of the lost collateral.

Tender evaluation:

- Uneven evaluation of the bid components, excluding bidders or bids that meet the tender terms, or accepting bids that should not be accepted;
- Measures for increasing transparency and responsibility;
- Preparation of Internal reports on all public procurement procedure phases on a regular basis;
- Establishing rules for reporting irregularities;
- Division of functions within public procurement procedures (for instance, the same person cannot be responsible for both the preparation and control over the execution of contracts);
- If the contracting authority contacts a particular bidder, all other bidders must be informed about it in a way that could be proven;
- In addition to the publication in the Electronic Procurement Classifieds, all relevant documents (including contracts, except the classified components) should be published at the contracting authorities' website.

Contract execution; the greatest risks for corruption:

- Failure to fulfil the contract, especially in terms of quality, prices and deadlines;
- Material changes in the contracts' terms that are in contradiction to the undertaken public procurement procedure (the price, the technical content, the completion date, etc.);

- The procurement subject could be partially or entirely changed during the execution of the contract;

- Signing of the contract for smaller quantities of goods, works or services. Afterwards additional procurements could be obtained from the same economic operator without contract notice. Frequent risks are on award of public contracts on additional works or services without fulfilment of prescribed requirements or in the way that could not be coherent to the Law;

- Signing the public procurement contract, annulling the part of the contract, and then signing a new contract (without the notification) with the explanation that the contract's price did not exceed the estimated value for which the implementation of the public procurement rules were prescribed.

Measures for increasing transparency and responsibility:

- Publishing contracts at the contracting authorities' website;

- Division of functions (signing the contract and exercising control over the execution of the contract);

- External control over the execution of contract.

2.2.4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.

5. With regard to the qualification of suppliers to take part in the procedure, the Public Procurement Act (cons.vers.2008) prescribes three mandatory reasons for exclusion, among which are the following: the suppliers who had been subject of a conviction by final verdict for criminal acts of participation in a criminal organisation, corruption, fraud or money-laundering or corresponding acts in accordance with the legal provisions of the country where they had been established, would be obligatorily excluded from the tendering procedure.

2.2.5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

6. The institutional framework for the efficient identification, prosecution and sanctioning of the criminal offences of corruption is made up of the following: the National Police Office for the Suppression of Corruption and Organised Crime within the Ministry of Interior, the State Attorney's Office (USKOK), the Supreme Court, and county and municipal courts.

7. The Criminal Code regulates a number of criminal offences in corruption in the public and private sectors, thus enabling the sanctioning of all forms of corruption. A prison sentence is foreseen as a sanction for each criminal offence of corruption. Also, the Amendments of the Criminal Code from December 2008 (OF 152/2008) introduced the possibility of extended confiscation of property gains which were acquired by criminal offenses under the jurisdiction of the USKOK. It is assumed that the total property of the perpetrator was acquired as property gain of a criminal offense unless the perpetrator makes probable that their origin was legal. Consequently, the burden of proof that the property of the perpetrator of the criminal offense was acquired in a legal manner is "transferred" to the perpetrator.

2.3. Collusion

2.3.1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

2.3.2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

2.3.3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

2.4. Fighting collusion and corruption

2.4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

2.4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

8. Such cases are present at all levels, and it is hard to extract which one would be dominating.

9. For example, number of controls by Directorate for the Public Procurement (MELE) has been exercised over City of Zagreb, i.e., there have been frequent media cases related to public procurement procedures. However, the most publicly known case has been the one related to procurement of military trucks by the Ministry of Defence. USKOK has carried out inquiry on that case on October 28, 2009, and an indictment was issued for the former Minister of Defence and the Assistant Minister of Defence.

10. In the period from January 1, until December 1, of the year 2009, the Directorate has received 66 requests in total which were qualified as the prevention and instruction activities dossiers. The prevention and instruction activities were initiated:

- by anonymous application – 15;
- by application of concerted economic operator, citizen(s), councillor(s) (municipality, county, city level) – 32;
- by random check of the public procurement notices published Electronic classifieds – 2;
- by media articles -9;
- upon request by other state authorities: the State Attorney's office, the Ministry of Interior; Sector for Budget of the Ministry of Finance – 8;

11. The structure of dossiers according to the category of the contracting authority / entity is:

- State authorities – 8;
- Municipalities, cities, counties and the City of Zagreb – 13;

- legal persons established for specific purpose of meeting needs in the general interest, not having an industrial or commercial character referred to in Article 3, paragraph 1, item 3 of the PPA – 31;

- Utility companies – 14.

12. In 17 dossiers the Directorate had not exercise its powers due to the fact that the subject matter of the dossiers was not under the competencies of the Directorate or that candidate (the company in question was not on the list of entities bound by the PPA, the subject matter of the dossiers was not covered by the PPA, etc.) or the bidder requesting control in the public procurement procedure concerned had also initiated legal protection procedure before the State Commission for the Supervision of the Public Procurement Procedures.

2.4.3. What methods and techniques for fighting corruption would aid the fight against collusion?

13. In the year 2009, the Directorate for the Public Procurement System of the Ministry for Economy, Labour and the Entrepreneurship of the Republic of Croatia, had undertaken the activities directly focused on prevention of corruption and conflict of interest. Focus was put on ensuring of enforcement of Article 5 (c) of the PPA. The Article stipulates that contracting authorities shall not award public contracts to economic operators if the head of the body or a member of the management or supervisory board of the contracting authority concerned simultaneously; performs management duties in the economic operator concerned, or owns business shares, stocks or other voting rights by virtue of which he / she was involved in the management or the capital funds of the economic operator concerned in a share exceeding 20%.

14. Public contracts concluded contrary to the above mentioned provision shall be null and void. Contracting authorities shall publish a list of economic operators to which public contracts must not be awarded within the meaning of Art. 5 Paragraph 1, on their websites.

15. With the aim of rising awareness on obligation arising from the Article 5 (c), MELE submitted the reminder on this Article to the Association of Cities, the Association of Municipalities and the Croatian Counties Association (based on the Questionnaire submitted earlier in the first half of the year 2009) and those associations distributed it to their members (local and regional level). The reminder was also published on the Public Procurement Portal.

16. In addition, the Directorate drafted the short "Instruction on Conflict of Interest and Corruption Prevention in Public Procurement System". The major part of the Instruction was dedicated to reminder on obligation arising from the Article 5 (c) of the PPA and clarifications on certain aspects of its implementation. Reminder of the Instruction contains some basic information related to relevant documents (brochures, legislation) and the greatest risks and possible measures for the suppression of conflict of interest in public procurement procedures.

17. The Instruction was submitted by e-mail system of the Electronic Public Procurement Classifieds to all registered contracting authorities and entities at the beginning of December 2009. The Instruction was also published on the Public Procurement Portal. The results of above mentioned activities on awareness rising on obligation from the Article 5 (c) were instantly visible. Number of the contracting authorities had published the list in accordance with the Article 5 (c) on their websites.

18. Furthermore, the "Anticorruption Program for State-Owned Enterprises for the Period 2010-2012" was adopted at the first session of the Committee chaired by the Prime Minister held on November 23, 2009. Extract from the "Anticorruption Program for State-Owned Enterprises for the Period 2010-

2012" containing measures implementation of which is directly or indirectly related to public procurement procedures is given in the following text:

19. "Three main objectives of the Program are:

- Objective 1 – Improving integrity, responsibility and transparency;
- Objective 2 – Creating preconditions for the prevention of corruption at all levels;
- Objective 3 – Affirmation of the 'zero tolerance' approach for corruption".

Measures for the systematic elimination of the causes of corruption;

Objective 1. Improving integrity, responsibility and transparency:

20. Measure 1.1. Define and publish online: mission and vision statements; general and specific goals for the next 3 years period; basic organisational values and principles with regard to the relationship with third parties (customers, suppliers, government and other stake holders).

21. Expected execution date: February 2009.

22. Measure 1.2. Define and publish in form of a Guidelines, or incorporate in the already existing Rules of Internal Code of Conduct, specific values and rules for the prevention of corruption and ensuring the professional code of conduct with regard to: gifts and compensation given to or received from business partners; asset management; confidentiality and impartiality; engagement in and independent business practice; separation of private and business interests.

23. Expected execution date: February 2009.

24. Measure 1.3. Introduce the obligation to sign a "confidentiality and impartiality statement" for all employees, whose workplaces are perceived as highly risky in terms of corruption (public procurement employees, employees issuing documents necessary to earn certain rights, etc.). The statement in which the employees under material and criminal liability confirm that they performed their duties in accordance with the law and that they will do the same next year, which should be signed at the beginning of every year, no later than January 31.

25. Expected execution date: end of January each year, starting from January 2011.

26. Measure 1.4. Create and publish "Disciplinary Rules" for determining the types of disciplinary measures and procedures that can be undertaken in cases of violations of policies, procedures, and code of ethics for the purpose of enhancing the level of awareness about the issues and consequences of improper behaviour.

27. Expected execution date: end of September 2010.

28. Measure 1.5. For procurement of goods in excess of 6 Mio HRK (less than 1 Mio Euro), and for procurement of public works in excess of 12 Mio HRK, the bidders need to sign the "Integrity Statement", in which they guarantee the fairness of the procedure, promise to refrain from any illegal activities (corruption, fraud, offering, giving or promising improper benefits that might influence the behaviour of employees). By signing the Integrity Statement, the bidders agree that the procedure be audited by independent experts, and accept the sanctions (penalties, termination of the contract) following the violation of rules.

29. This measure implies ongoing execution, starting from the establishment of the action plan.

30. Measure 1.7. Publishing the information on the organisation's website, especially:

31. 1.7.3. Information related to public procurement procedures, in accordance with the Public Procurement Act, Annex 6, paragraph 2, item (a) (OG 110/2007, and 125/2008), including the announcement of public procurement, information about the tender and tendering documentation, information about the status of all ongoing public procurement procedures, and the notice on closed deals.

32. This measure implies ongoing execution. The information about the public procurement should be published on the organisations' website by September 2010.

Objective 2. Creating preconditions for the prevention of corruption at all levels.

33. Measure 2.2. Appoint the "Ethics Commissioner", who should be in charge of handling complaints from employees, citizens and other parties, with regard to unethical and possibly corruptive practices by the employees, and will promote ethical interpersonal relationships among employees.

34. Expected execution date: end of February 2010.

35. Measure 2.3. Establishment and / or improvement of the financial management and control system in accordance with the Act on Internal Financial Control System in Public Sector (OG Nr., 141/2006). It is necessary to ensure the ongoing implementation of all control mechanisms that would guarantee the control and supervision of business activities and management. This entails strengthening control mechanisms, identifying and minimising of the risk.

36. Expected execution date: because the implementation of this measure is administratively and functionally challenging, it is recommended that the preconditions (organisational, staff) for the establishment of the financial management and control systems would be in place by June 2010.

37. Measure 2.4. establishment and / or improvement of the internal audit in accordance with the Act on the Internal Financial Control System in Public Sector (OG, Nr. 141/2006). It is necessary to ensure the integrity of the audit process, and require that auditors and accountants perform their duties consistently and in accordance with the audit rules in cases of fraud and corruption.

38. Expected execution date: end of September 2010.

39. Measure 2.5. Establishment and / or improvement of the audit committees that supervise the financial reporting procedures, internal control systems, internal financial control systems, risk management systems and audit processes.

40. Expected execution date: end of September 2010.

41. Measure 2.7. Establishment of an efficient system for reporting irregularities by creating of the mechanisms that would allow prevention of irregularities, fraud and corruption by their early reporting. This entails establishing of the internal reporting system that will enable to the employees for reporting of the sources of the problem of corruption, without facing of the risk of retaliation. It is also necessary to provide an e-mail address, and appoint a person responsible for maintaining the register of irregularities and dealing with irregularities and frauds by utilising control mechanisms at his or hers disposal.

42. Expected execution date: end of May 2010.

Objective 3. Affirmation of the "zero tolerance" for corruption breaches.

43. Measure 3.2. Establishment of the training plans.

44. Expected execution date: end of February, each year.

2.4.4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

45. Yes.

2.5. Advocacy

2.5.1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

46. The described above shows that the great efforts have been undertaken by the Government and other stake holders, in order to improve legislative and institutional framework to prevent and sanction the frauds in tendering processes.

2.5.2. In what ways can competition authorities work to improve the efficiency of public procurement?

47. Croatian Competition Agency frequently provides advises to the Public Procurement authorities how to assess the different situations in connection to the bidding procedures, where the bid rigging and / or cartel cases could arise. Such advises are produced in a form of the expert opinions issued by the Croatian Competition Council, and are also frequently followed by the same authorities.

2.5.3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

48. As already described above there are undertaken numerous steps from the side of the Government in order to improve institutional framework and adopt the necessary legislation in order to penalise and before that prevent felonies and 7 or frauds during the public procurement processes.

2.5.4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

49. Yes.

2.5.5. Has your competition agency undertaken competition advocacy in this area?

50. Yes, along with the regular advocacy efforts concerning antitrust and state aids situations. For example, after the adoption of the expert opinions on particular public procurement cases on the Council sessions, the Croatian Competition Agency launches the communication in a form of the press releases to its web site. Such communication later on appears in media (news papers, other broadcasting).

2.5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

51. The full jurisdiction in such cases goes to the State Attorneys. Agency would have only advisory role, upon the requested of relevant authorities.

CONTRIBUTION FROM EL SALVADOR

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- El Salvador --

I. El Salvador´s experience

1. According to the Central Reserve Bank of El Salvador, for 2008 the current consumption expenses in the non financial public sector[1] totalled US$2,350.8 million dollars, equivalent to 11% of the economic activity level measured by the Gross Internal Product.

2. The governmental acquisitions and purchases in El Salvador are ruled by Administrative Law principles and by public honesty and competition criteria. Said principles are contained in the Law for Acquisitions and Contracts of the Public Administration (in Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública), and in its regulation. The aforementioned legal framework regulates purchase processes insuring the compliance of transparency requirements, as well as the efficient distribution of the State´s resources.

3. Bid rigging is an infringement of the Competition Law (CL) and consequently, the Competition Superintendence (CS) has recently carried out efforts to improve the institution´s capacity to prevent, detect and eradicate such practice.

4. As part of its Competition Advocacy activities, the CS has prepared a manual containing basic information in order to provide the officials directly involved in governmental purchases, the necessary tools to identify alert signals of possible bid rigging. Simultaneously, the CS is carrying out a permanent program of presentations where the institution´s personnel explain with more detail the contents of the aforementioned manual. It contains mainly, topics such as: what is bid rigging, the different ways this practice may be disguised and the detail of various conducts that might suggest the existence of bid rigging amongst the participants in a public tender.

5. With respect to this matter, the CS has developed a continuous communication channel with the procurement offices of the public institutions.

6. In 2009, the CS sanctioned four travel agencies for bid rigging in two public tenders carried out by two governmental institutions. The travel agencies had previously agreed on the commission prices to be charged for the issuance of airplane tickets, having filed identical economic bids. During the investigation, the CS did not find any valid economic explanation that could justify the identical bids, ergo, the Board of Directors of the CS found the travel agencies culpable of infringing Article 25 of the CL.

[1] This amount includes both the ones carried out through competitive processes (public tenders or auctions) and those carried out through direct purchases.

II. Corruption

7. The CS is responsible for cartel detection in all sectors of the Salvadoran economy. In that way, the institution examines public bids in order to detect two issues principally: (a) if the participants have arranged an agreement to fix or limit prices or other conditions in their proposals (bid rigging); or (b) if the terms of the bid designed by a public contractor reduce or limit competition in the bid procedure.

8. Therefore, it is important to mention that the CS does not develop investigations to unveil corruption in the public sector, since there are other authorities in the country in charge for them (Country's Attorney General in charge of criminal prosecutions [2] and the Government Ethics Tribunal[3]). In this way, the competition agency has no power or incidence in this area.

9. However, during an investigation or analysis of bid procedures, the CS may discover certain conducts that, even though do not involve anticompetitive conducts or restrictions to competition, indicate a corruption activity from public authorities. In these cases, the CS must notify to the authorities that investigate corruption cases so they can initiate the legal actions necessary to penalise the responsible personnel.

10. Therefore, even though the CS does not formally investigate corruption cases during bid procedures, it has the duty of contribution with the proper authorities, especially since the elimination of corruption and an increase in transparency contributes to a more competitive environment that promotes efficiency and benefit consumers.

III. Fighting collusion and corruption

11. As it was mentioned before, the CS is only responsible for investigating and fighting collusion in public procurement. However, the aforementioned does not mean that if the institution becomes aware of reasonable grounds of corruption, it is not liable for making the proper disclosure to the competent authorities.

12. In that sense, it is not possible to mention at this moment, examples of cases that involve both corruption and collusion in public procurement. The one case the CS filed for this infraction was already commented above and identified as the travel agencies investigation.

13. Regarding the level in which the collusion cases have developed, whether it has been locally, provincially or nationally it is important to mention that in El Salvador, the one case that has been cited as precedent on this matter occurred at the national level. However, there are many procurement processes that only involve local governments. In these cases, the Superintendence has not yet initiated an investigation, but it is possible that it will happen in the short or medium term.

14. On the topic of the methods and techniques for fighting corruption that would aid the fight against collusion, one of the most important issues on this matter is the communication and collaboration between the different procurement offices on the government, the country's Attorney General and the CS. It is vital that if one of the agencies senses that something is going wrong it requests the aid of the others so

[2] The Criminal Code establishes in Articles 325 to 334 that certain conducts constitute acts of corruption, such as: embezzlement, illegal negotiations and subornation. Such crimes are sanctioned by a Criminal Court with prison for the guilty.

[3] The Government Ethics Tribunal is an administrative authority that can impose fines or destitution to public authorities that commit any corruption conduct during a bid procedure.

that the unification of efforts can provide for a successful investigation. Amongst other things, it is also imperative that the records and documentations presented by the participants of the bid are examined and shared between institutions so there is a guarantee of full access to information.

15. Since there is a clear differentiation between the processes for corruption and collusion, there is no limitation on whether individuals engaged in bribery can receive leniency. The conditions that must be satisfied for leniency qualification are listed in article 39 of the CL and they have no relationship with corruption.

IV. Advocacy

16. On the issue of how regulatory or institutional conditions help facilitate bid rigging and corruption, it is imperative to mention that any flaw on transparency in the bidding procedure must be corrected by strengthening the regulatory and institutional framework. Therefore, it is most important to recognise the laws and institutions as the way to prevent and discourage collusion and corruption, either by providing elements that promote them or by establishing sanctions for transgressions.

17. In that way, competition authorities can execute relevant measures to improve efficiency in public procurement, which is done indirectly by reviewing the bidding processes for illegal conducts and providing for their elimination.

18. The CS is committed to prevent collusion in public procurement. Two approaches have been taken to achieve this goal. First, the agency is investigating cartels in this area having sanctioned one in 2009 that was mentioned before (travel agencies case); this action must deter others from committing such practice via the burden of high fines. Second, the institution has developed an intensive advocacy program to educate society on this matter, specifically publishing in 2009 a Guide to Detect and Prevent Bid Rigging aimed to the members of the procurement offices and to the public.

19. The CS believes that fighting against collusion and bid rigging in public procurement will contribute to diminish the risk of corruption, although the institution is aware that the latter is a complex problem that needs to be addressed from a numerous flanks.

APPENDIX

Superintendencia de Competencia
EL SALVADOR
Sanctioning procedure against the Salvadoran travel agencies: "Amate Travel", "U-Travel", "Inter-Tours", "Agencia de Viajes Escamilla", and "Hispana de Viajes"
Bid Rigging in Public Procurement Processes
Competition benfits consumers.

Superintendencia de Competencia
EL SALVADOR

Contents

1. Anticompetitive Agreements amongst Competitors
2. Investigated Facts
3. Sanctioning Procedure
4. Analysis of the Agreements amongst Competitors pursuant to Competition Law
5. Analysis of the Investigated Facts
6. Final Decision

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Superintendencia de Competencia
EL SALVADOR

Anticompetitive Agreements amongst Competitors

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Superintendencia de Competencia
EL SALVADOR

Anticompetitive Agreements amongst Competitors

Art. 25.- Anticompetitive practices among competitors are prohibited, these practices include the following, amongst others:

a) Establish agreements to fix prices or other purchase or sales conditions under any form whatsoever;

b) Fixing or limiting quantity output;

c) Fix or limit prices at auctions or in any other form bidding private or public, national or international, with the exception of the joint bids submitted by economic agents that are clearly identified as such in the documents submitted by the bidders; and,

d) Market allocation, either by territory, volume of sales or purchases, by type of good sold, customer or seller, or by any other means.

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Superintendencia de Competencia
EL SALVADOR

Investigated Facts

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Superintendencia de Competencia
EL SALVADOR
Investigated Facts
The possible existence of an agreement adopted amongst the investigated economic agents in order to alter the competition conditions in the service rendered to issue airline tickets in certain governmental procurement procedures since 2006:
1. Ministry of Economy DR-CAFTA No. 03/2008;
2. Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR") No. 02/2008;
3. Ministry of Foreign Relations DR-CAFTA No. 03/2007;
4. Ministry of Foreign Relations No. 04/2007; and,
5. Ministry of Internal Affairs No. 03/2007.
Examine the alleged commission of anticompetitive practices described in Article 25 letters a), c), and d) of the Salvadoran Competition Law.
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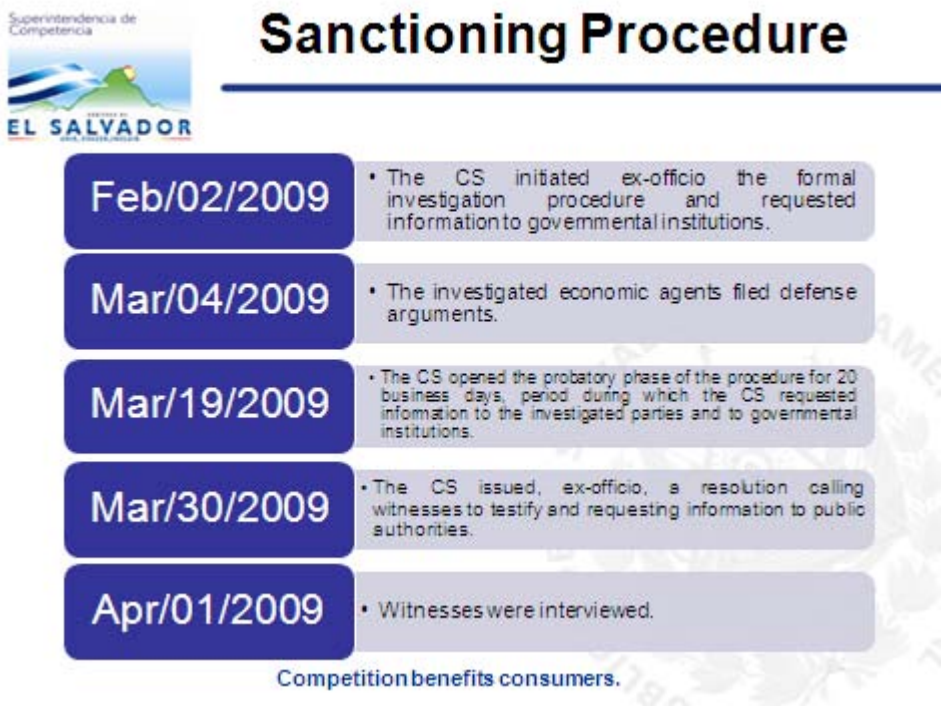
Superintendencia de Competencia
EL SALVADOR
Sanctioning Procedure
Competition benfits consumers.


Superintendencia de Competencia
EL SALVADOR
Sanctioning Procedure
Feb/02/2009
• The CS initiated ex-officio the formal investigation procedure and requested information to governmental institutions.
Mar/04/2009
• The investigated economic agents filed defense arguments.
Mar/19/2009
• The CS opened the probatory phase of the procedure for 20 business days, period during which the CS requested information to the investigated parties and to governmental institutions.
Mar/30/2009
• The CS issued, ex-officio, a resolution calling witnesses to testify and requesting information to public authorities.
Apr/01/2009
• Witnesses were interviewed.
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Superintendencia de Competencia
EL SALVADOR
Sanctioning Procedure
April/24/2009
• Probatory phase ended.
April/29/2009
• Resolution for the confidentiality hearing was issued.
May/05/2009
• Confidentiality term, prior to the hearing, concluded.
May/20/2009
• Confidentiality resolution issued; file integrated and sent to BD.
July/07/2009
• The BD issued the final resolution.
Aug/11/2009
• The BD overruled review recourses and confirmed final resolution.
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Superintendencia de Competencia EL SALVADOR

Analysis of Agreements amongst Competitors pursuant to Competition Law

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Superintendencia de Competencia EL SALVADOR

Analysis of Agreements amongst Competitors pursuant to CL

Said agreements are analyzed pursuant to the "*per se*" rule. Evidence of the agreement's existence is enough to determine the infringement.

- OCDE: "Damages Caused by Cartels and Imposing Effective Penalties";
- AMERICAN BAR ASSOCIATION: "Antitrust Law Developments (Sixth)";
- ICN: "Defining Hard Core Cartel Conduct. Effective Institutions, Effective Penalties";
- SUPREME COURT (USA): United States v. McKesson & Robbins, Inc.; United States v. Elmore Roy Anderson;
- CNDC (Argentina): pharmaceutical oxygen; and,
- CS: wheat flour; PDBESA.

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Superintendencia de Competencia EL SALVADOR

Analysis of the Investigated Practices

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Superintendencia de Competencia EL SALVADOR

Analysis of the Investigated Practices

A. Article 25 letter C) CL.

1. DR-CAFTA LA No. 03/2008 (Ministry of Economy) Public Procurement Process

Tender documents (economic bid format)

ANEXO 5

CUADRO DE OFERTA BÁSICO

Nº	SERVICIO	COSTO
11.	Costo por emisión de Boletos de ida y vuelta (costo por boleto NO por segmento) Tarifa de $1 - $500 Tarifa de $ 501 - $1,000 Tarifa mayor de $1,000	
12.	Reconfirmación de vuelo/boleto y constancia de reservación.	
13.	Trámite de Boletos premio	
14.	Anulación de boletos	
15.	Re-emisión de boleto	
16.	Emisión de boleto contra orden de canje (MCO)	
17.	Tramite de Reembolso de boleto no utilizado	
18.	Trámite de Reembolso de boleto extraviado	
19.	Reservación de tren	
20.	Servicio a domicilio dentro del área metropolitana	

EL COSTO DEBE INCLUIR IVA.

NOTA: Cualquier otro costo adicional que aplica la empresa, deberá incluirlo en este cuadro.

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Analysis of the Investigated Practices

SERVICES TO BE RENDERED	AMATE TRAVEL	AGENCIA DE VIAJES ESCAMILLA	U TRAVEL	INTER TOURS
Cost for issuing round trip tickets	US$39.55	US$39.55	US$39.55	US$39.55
Flight confirmations/ ticket and reservation voucher	Cost free	Cost free	Cost free	NA
Premium ticket procedure	Cost free	Cost free	Cost free	NA
Ticket annulment	Cost free	US$39.55	Cost free (the same day)	NA
Ticket re-issuance	US$39.55	US$39.55	US$39.55	US$39.55
Issuance of ticket against exchange order (MCO)	US$39.55	Cost free	US$39.55	US$39.55
Procedure for the reimbursement of non utilized tickets	Cost free	Cost free	Cost free	NA
Procedure for the reimbursement of lost tickets	Cost free	Cost free	Cost free	NA
Train reservation	Cost free	Cost free	Cost free	NA
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free	NA
Total	US$118.65	US$118.65	US$118.65	US$118.65

Competition benefits consumers.

Analysis of the Investigated Practices

Witnesses´ testimonies in the procedure:

U-TRAVEL: *"Asked if the identical service fee does not indicate anything to the company. Answers it is just a coincidence in calculation procedures, in the cost structure that one may have."*

AMATE TRAVEL: *"[The commission was calculated] on the basis of the 2003 experience, based on their clients´ consumption in that account, that is how they arrived to the US$35.00 + sales tax. In addition, there are many variables that affect their supply if calculated under the same principles, so their bids consider the fair cost and that is the way the calculations are made, on the basis prior experience with different institutions".*

Competition benefits consumers.

Analysis of the Investigated Practices

Witnesses´ testimonies in the procedure:

AGENCIA DE VIAJES ESCAMILLA: *"He can talk about the calculations made by Escamilla. He speculates they have the same program with the airline. He can talk about Escamilla´s costs. For him, it´s very difficult to speculate if those people have the same costs as Escamilla´s, if the airline has the same program".*

INTER-TOURS: *"The witness is asked again why, existing so many variables that influence in the preparation of the bids and being the companies so different, they all offer an identical charge to the cent. The witness answers he does not know how the others made their calculations but he analyzes the tender documents, sees where they are flying to, the services required, the number of them to be rendered, and then calculates his costs. He does not know the others´ costs, but this is the way he calculates them".*

Competition benefits consumers.

Analysis of the Investigated Practices

Even though each travel agency argued that the US$39.55 commission was independently calculated based on their costs, the depositions of the four travel agencies´ representatives did not explain how the calculations were made.

Average charged commissions

Travel agencies under investigation	To Private Sector	To Public Sector	Difference
Inter Tours	US$34.52	US$47.17	US$12.65
Amate Travel	US$13.42	US$45.39	US$31.97
U-Travel	US$13.22	US$24.75	US$11.53
Agencia de Viajes Escamilla	US$30.81	US$68.75	US$37.94

Competition benefits consumers.

Analysis of the Investigated Practices

History of public procurement processes carried out by the Ministry of Economy

Number	Date	Winning agent	Adjudicated Commission
01/2005	Feb/02/2005	Maya	US$15.00
01/2006	Aug/17/2006	Maya	US$14.00
02/2007	Feb/01/2007	U-travel	US$14.00
DR CAFTA LA 03/2008	Aug/12/2008	U-travel	US$38.55

Competition benefits consumers.

Analysis of the Investigated Practices

Structure information of the investigated agencies

Economic agent	Assets	Number of employees	Establishments
Amate Travel	US$679,605.43	22	1
U-Travel	US$2,094,406.26	35	1 and 2 mini establishments
Agencia de Viajes Escamilla	US$1,699,372.00	5	1
Inter-Tours	US$278,873.35	6	1

Competition benefits consumers.

Analysis of the Investigated Practices

Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS´ economic analysis carried out in similar cases, thus, the decision was issued in the aforementioned sense.

Competition benefits consumers.

Analysis of the Investigated Practices

A. Article 25 letter C) CL.

2. Public Procurement Procedure 02/2008 Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR")

Tender documents (economic bid format)

ANEXO V

CUADRO DE OFERTA BÁSICO

TARIFARIO DE SERVICIOS OFERTADOS

No.	SERVICIOS DE SUMINISTRO DE BOLETOS AÉREOS	Costo US$ Tarifa Bja (Iva Incluido)
1	Emisión de boletos aéreos en general	
2	Reconfirmación de vuelo	
3	Servicio a domicilio: Dentro del área metropolitana	
4	Trámite de boleto extraviado	
5	Anulación de boleto aéreos	
6	Reembolso de boleto no utilizado, en efectivo o en MCO emitido por la aerolínea, a favor de CORSATUR	
7	Envío de confirmación vía Internet, fax o teléfono	
8	Emisión de boletos fuera de horas laborales de la Agencia	
9	Emisión de boletos de Emergencia	
10	Emisión de boletos contra orden de canje (MCO)	
11	Asesorías a Pre-chequeos	
12	Cobro de boletos prepagados + IVA	
13	Reservación de auto/hotel	
14	Otros	

Competition benefits consumers.

Analysis of the Investigated Practices

Services to supply airplane tickets	U-Travel	Amate Travel	Inter-Tours
Issuance of airplane tickets in general (US$ fixed tariff, sales tax included)	US$56.50	US$56.50	US$56.50
Flight confirmation	Cost free	Cost free	Cost free
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free
Procedure for lost ticket	Cost free	Cost free	Cost free
Ticket annulment (in the same day)	Cost free	Cost free	Cost free
Reimbursement of ticket not used, in cash or in MCO issued by the airline to CORSATUR	Cost free	Cost free	Cost free
Sending information via fax, Internet, or telephone	Cost free	Cost free	Cost free
Issuance of tickets in non-business hours	Cost free	Cost free	Cost free
Issuance of emergency tickets	Cost free	Cost free	Cost free
Ticket issuance against exchange order (MCO)	Cost free	Cost free	Cost free
Pre-checking guidance	Cost free	Cost free	Cost free
Pre paid tickets charges + sales tax	Cost free	Cost free	Cost free
Hotel/car reservations	Cost free	Cost free	Cost free
Other services	Cost free	Cost free	Cost free

Competition benefits consumers.

Analysis of the Investigated Practices

Witnesses´ testimonies in the procedure:

U-TRAVEL: *"Answers that the same variables that existed in that moment in the market, the commercial elements, the interest to have that account or not were the elements considered when bidding".*

AMATE TRAVEL: *"AMATE TRAVEL based its bid in the experience with the account and they had worked with the institution years before (referring to the year 2003), hence, based on that element they made their cost calculations (...) The account´s behavior was analyzed for that year, consequently, they already knew or calculated the services to be rendered pursuant to the contract and based on this they calculated the percentage".*

Competition benefits consumers.

Analysis of the Investigated Practices

Witnesses´ testimonies in the procedure:

INTER-TOURS: *"He can talk about his costs. Ask the others or analyze their cost system (…) He makes his calculations based on his costs. In his calculations, the cost was forty eight twenty five".*

Notwithstanding the fact that they argued that the US$56.50 commission offered was independently calculated based on their costs, the depositions of the three travel agencies´ representatives did not explain how they made their calculations".

Competition benefits consumers.

Analysis of the Investigated Practices

Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS´ economic analysis carried out in similar cases, ergo, the decision was issued in the aforementioned sense.

Competition benefits consumers.

Superintendencia de Competencia EL SALVADOR

Final Decision

Competition benfits consumers.

Superintendencia de Competencia EL SALVADOR

Final Decision

Fines imposed for the agreement amongst competitors in the public procurement process DR-CAFTA LA No. 09/2008 carried out be the Ministry of Economy	Fines imposed for the agreement amongst competitors in the public procurement process No. 02/2008 carried out by CORSATUR	Communication to initiate the disabilitation procedure
• **AMATE TRAVEL**: 15 minimum monthly wages (US$203.10), (US$3,046.50) • **U-TRAVEL**: 15 minimum monthly wages (US$3,046.50) • **INTER-TOURS**: 15 minimum monthly wages (US$3,046.50) • **AGENCIA DE VIAJES ESCAMILLA**: 15 minimum monthly wages (US$3,046.50)	• **AMATE TRAVEL**: 15 minimum monthly wages (US$203.10), (US$3,046.50) • **U-TRAVEL**: 15 minimum monthly wages (US$3,046.50) • **INTER-TOURS**: 15 minimum monthly wages (US$3,046.50)	• Article 158 letter j) of the Public Administration Acquisition and Contracting Law (in Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública, "LACAP"): "The Institution will disable the contractor who commits any of the following conducts, from participating in administrative contracting procedures for a 5-year term: j) Having been sanctioned pursuant to Article 25 letter c) of the Competition Law". • Communicate this resolution to the Ministry of Economy and to the Minister of Tourism who chairs CORSATUR, for the respective effects.

Competition benefits consumers.

Thank you

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Competition benefits consumers.

CONTRIBUTION FROM THE EUROPEAN UNION (IMSDG)

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Internal Market and Services Directorate General of the European Commission --

1. This contribution only addresses the above issue specifically with regard to EU public procurement policy which falls under the responsibility of DG Internal Market and services. Other policy areas (criminal law, competition law) are not covered.

2. It must be highlighted that the EU public procurement directives only constitute a basic legal framework, which is implemented into national law by the EU Member States. Contracting authorities in the EU Member States do not apply the directives as such but the national rules transposing these directives. The implementing national law often contains additional rules and principles complementing those of the EU Directives, also with regard to measures to prevent and to fight corruption and collusion in public procurement. As the application of the rules is the primary responsibility of the EU Member States, questions on practical experience with the fight against corruption and collusion will not be dealt with by this contribution.

1. International Background

3. The EU is party to the United Nations Convention against corruption.

4. Annex II of the Council decision on the conclusion, on behalf of the European Community, of the United Nations Convention against corruption sets out those actions which are in the competence of the EU.

5. Among several other actions "*the Community points out that it has competence with regard to the proper functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, capital and services is ensured in accordance with the provisions of the Treaty establishing the European Community. For this purpose the Community has adopted measures to:*

- *Ensure transparency and equal access of all candidates for public contracts and markets of Community relevance, thereby contributing to preventing corruption.*"

2. The Role of the EU Public Procurement Directives in the Fight against Corruption

6. Public procurement in the EU accounts for 17% of EU GDP (around €2,000 billion). The awarding of contracts with values above certain thresholds (representing around 3.25% of EU GDP) is governed by the EU public procurement Directives 2004/17/EC and 2004/18/EC.[1] The goal of these directives is to implement the principles of the EC Treaty:

- Freedom of movement of goods

[1] Texts available under: http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

- Freedom of establishment
- Freedom to provide services
- Equal treatment
- Non-discrimination
- Mutual recognition
- Proportionality
- Transparency

7. The directives are designed to ensure the effects of these principles and to guarantee the opening up of procurement to competition. They set out basic procedural requirements for the procurement of goods, services and works in the EU Member States in order to guarantee free and non-discriminatory access of all European undertakings to public contracts.

8. The main contribution of the EU public procurement directives themselves to the fight against corruption consists in strict obligations for transparency at several stages of the procedure (2.1). Furthermore, the directives provide for a special mandatory exclusion of tenderers convicted of corruption (2.2). A remedies directive to ensure that efficient legal review of procurement decisions is available in all Member States completes the picture (2.3).

2.1 Transparency Requirements

9. The strict transparency obligations throughout the public procurement procedure as set out by the EU public procurement directives are an important safeguard against corruption. Transparency is specifically requested in several provisions of the directive, such as the following:

- The relative weighting of the award criteria has to be published in the contract notice and in any case before the submission of tenders;

- Minimum levels of economic and technical capacity used as criteria for selection of suitable candidates have to be set and published in the contract notice;

- Criteria or rules for reducing the number of candidates in restricted or negotiated procedures have to be set and published.

2.2 Exclusion of Tenderers Guilty of Corruption

10. Article 45(1) of EU public procurement directive 2004/18/EC provides for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain crimes enumerated in the directive. Amongst these, a conviction for corruption is listed as an obligatory reason for exclusion.

11. Contracting authorities shall, where appropriate, ask candidates or tenderers to supply documents specified in Article 45 (3), as evidence that no reasons for exclusion apply: an extract of a judicial record or an equivalent document, a declaration on oath or a solemn declaration before a competent authority.

12. If doubts exist concerning the personal situation of candidates or tenderers, contracting authorities can apply to the competent authorities to obtain any necessary information. If the candidate or

tenderer is established in a different country than the contracting authority, the latter may seek the co-operation of the competent authorities in the country of establishment.

13. If the documents specified in Article 45(3) are submitted, they have to be accepted as sufficient evidence of non-existence of the exclusion grounds under Article 45 (1).

14. The Directive explicitly leaves it to the Member States to specify implementing conditions for the rules of Article 45. However, Member States can only provide for derogation from the obligation to exclude the above indicated criminal participants if there are overriding requirements in the general interest.

2.3 Efficient Legal Review

15. Legal review procedures can help detect and sanction corruption in procurement procedures. The EU remedies directive 89/665/EEC, as amended by directive 2007/66/EC, which guarantees that efficient legal review procedures against illegal award decisions are available in all EU Member States, therefore contributes to the fight against corruption.

3. Collusion in Public Procurement

16. The transparent and non-discriminatory procurement procedures set out by the EU public procurement rules not only prevent corruption but also favour new market entries, reduce or prevent market concentration and therefore create a market environment less conducive to anti-competitive behaviour.

17. The EU public procurement rules do however not contain any specific rules dealing with the issue of collusion / bid-rigging.

18. Collusion between bidders can lead to an exclusion of the undertakings in question from the current and later procurement procedures. The already quoted Article 45 of directive 2004/18/EC provides in its paragraph 2 that any economic operator may be excluded from participation in a contract where he has been convicted of an offence concerning his professional conduct (lit. c) or has been guilty of grave professional misconduct proven by any means (lit. d).

19. Again, the implementing conditions of this exclusion ground (which is, contrary to the exclusion grounds of Article 45 (1) not mandatory but optional) have to be determined by the EU Member States. Depending on Member States' definition of the notions "offence concerning his professional conduct" and "grave professional misconduct" in their implementation of Article 45 (2), collusion between bidders can thus constitute a reason for exclusion.

20. The fact that the EU rules do not specifically address the issue of collusion in public contracts is due to the fact that it is not in the first place the legal framework for the procedure that encourages or discourages collusion, but the way that the rules are applied in practice: The way in which the procedure is managed may have a decisive influence on the tenderers' compliance with competition laws.

21. The "design" of the tendering procedure can make an agreement between competitors more or less easy. For instance, "ascending" auctions enable undertakings to communicate in a covert way during the auction and to identify and immediately sanction any breaches of the cartel. By contrast, procedures with sealed-bids, and award to the highest/lowest bid make it more difficult for tenderers to form a cartel and render breaches of the cartel more advantageous. The choice of relevant and proportionate selection criteria is crucial. Awarding the contract to the lowest price can simplify the agreement between competitors, whilst when there are several award criteria, this becomes more complex. Very specific

selection criteria may be a barrier to market access and, by discouraging the entry of new competitors, may enable undertakings present on the market to maintain existing agreements. Contracting authorities' stability and predictability of demand can make sharing of markets easier.

22. Certain tools in public procurement have to be handled with special care and on the basis of a good knowledge of the structure of the relevant market. Such tools are for instance the possibility to divide contracts into lots, subcontracting and the participation of temporary groups of undertakings. Especially in these cases, procurers' knowledge of market conditions, their awareness of cartels and of the effects of their own buying practices on short and long-term competition are extremely important to apply the rules in a manner that prevents collusion. For instance, when dividing a contract into lots, public authorities should if possible avoid creating lots which correspond, in quantity and content, to the number and activities of possibly interested market players, in order to avoid market sharing.

23. As the EU public procurement rules do not impose specific purchasing strategies, it is first and foremost the responsibility of contracting authorities to ensure that their procurement choices do not facilitate collusion among bidders, and the responsibility of Member States to help procurers in this task. We welcome initiatives to draft bid-rigging checklists in order to help procuring authorities detect bid-rigging and design procedures in a way that limits the risk of cartels, the sharing of best-practices among procurers and the dissemination of training manuals for public officials.

CONTRIBUTION FROM FRANCE

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- France --

Introduction

1. In France, public procurement is governed by a whole raft of regulations set out in the Public Procurement Code: the procurement process and procedures are each organised at every stage (decision to put out to contract, choice of procedure, choice of bidder and contract performance), significantly restricting the purchaser's room for manoeuvre. In addition to rules that apply specifically to public procurement, there are rules governing the activities of public bodies and of their agents: general principles (principle of legality, concept of public interest), statutory provisions, ethical rules (impartiality, probity, discretion, etc.).

2. This raft of regulations seeks through information transparency and procedural integrity to safeguard both efficiency in public procurement, including the proper use of funds, and the principles of equality in public burden-sharing and free competition and should allow us to approach the optimum in competition, where one firm should gain no advantage over another other than by its own merits.

3. Yet, collusion and corruption still go on in public procurement. For instance the French Central Service for the Prevention of Corruption (SCPC) notes that "*These numerous controls are there as checks and balances designed to ensure the legality of the procurement process... yet, public procurement in France, as in most other countries, is fertile ground for public corruption"*, hence "*the paradox of public procurement in France: on the one hand it is trammelled by red tape and controls while, on the other, public procurement contracts increasingly prime territory for anti-competitive practices.*"[1]

4. However, the paradox is only an apparent one and a closer analysis will provide a better understanding of the link between the distinct but closely related phenomena of collusion and corruption.

5. For instance, observers have noted that corruption is liable to spread wherever there is information asymmetry, which is often inherent in public procurement contracts: purchasers do not have a precise idea of their needs or of the characteristics of the product being proposed and call in a specialist, who takes on the position of intermediary agent/specifier, and acts as adviser to the purchaser or, purely and simply, as their authorised representative.[2]

6. This gives the intermediary agent/specifier power, a power that can potentially be corrupted and competition on the market concerned is likely to be hindered should the intermediary steer the choice of the public contracting authority not towards the best tender, but towards its own interests. From the bidder's point of view, corruption is a means of beating competing firms in order to win the contract.

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1 "L'audit de la corruption dans les marchés publics des collectivités publiques" Rapport annuel 2007.

2 See "Corruption et pratiques anticoncurrentielles" by F. Jenny, in Pratiques et contrôle de la corruption, Montchrestien, 1997.

7. However, corruption can also be the price that a number of firms colluding as a cartel have to pay in order to be able to operate the cartel and conceal its existence; in such cases, anti-competitive practice and corruption are very closely linked. Corruption offers solutions to a cartel's problems. The cartel has to guarantee that rents are shared out, ensure that all members play by the rules and discourage any potential defectors from leaving. Corruption is the basis for the distribution of rents and a means of retaliation against defectors as well as creating barriers to entry

8. Cartels organise a semblance of competition, the aim of which is to secure excess profits for every member of the coalition and to protect the intermediary agent/specifier who is keen to avert any suspicion.[3] They must rig bidding so that the chosen bidder as if it is the most competitive and other bids, termed "covering" bids, conceal the pre-arranged choice. Once in place on a market, one cartel naturally leads to another through a process of trade-offs and so that in exchange for submitting a cover bid each firm can take its turn at being the successful bidder for another public procurement contract.

9. The outcome of such concerted action in cartels involving corruption is excessive for public procurement costs, costs which are ultimately passed on to the taxpayer; the, seriousness of this problem is therefore a recurring cause for concern. In cases in which the loss to the government purchaser has been estimated, the figures for excess costs put down to the absence of competition range from 15 percent to 30 percent.

10. In Competition Authority litigation, the number of cases involving cartels in government procurement contracts shows how frequent collusive practices are, chiefly by means of communications between firms. Yet the fines imposed on the firms involved in such practices can be very large and may even be accompanied by a criminal conviction for those involved.

11. Since bribery of a procurement official and collusion between bidding firms in government procurement often go hand in hand, a combination of both criminal and administrative enforcement is necessary (1). To this end, the Competition Authority and the criminal courts make use of whatever instruments they have at their disposal for the prevention of collusion and corruption in public procurement (2) and interaction and two-way procedural channels between these bodies should help make for more effective enforcement(3).

1. Instruments to Prevent Collusion and Corruption in Public Procurement

1.1 Competition Law, a Weapon against Collusion and Corruption

12. Competition law sanctions collusive practices in public procurement; it can play a role in both deterrence and enforcement as well as making a useful contribution to the official rules on public procurement, under which failure to comply is sanctioned by rendering contracts null and void, by bringing liability proceedings and imposing criminal sanctions.

13. In the field of public procurement, the Competition Authority, the successor to the Competition Council, looks chiefly at the practices of bidders and leaves scrutiny of the behaviour of government procurement officials to the competent administrative, financial or criminal jurisdictions.

14. That said, irrespective of their ultimate administrative or even criminal liability, contracting authorities which have actively abetted the operation of a cartel through facilitation and which themselves conduct an economic activity on a market can be sanctioned for cartels in exactly the same way as firms

[3] See "*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas*", Jean Cartier –Bresson, Petites Affiches, 1 July 1999.

(Decision 05-D-61 of 9 November 2005). Those assisting contracting authorities and any other professional aiding and abetting a cartel may also be held liable for that cartel. This is what happened to a company providing assistance to the contracting authority in case 07-D-15 of 9 May 2007 concerning practices relating to public procurement contracts for schools in the Île de France, which was upheld by the Paris Court of Appeal on 3 July 2008 (Eiffage), (see also the judgment of the Court of First Instance of the European Communities, 8 July 2008, Treuhand AG).

15. While the Competition Authority is competent to assess the practices used by firms to distort competition under the rules of competition law, it is not competent to assess the lawfulness of a call for tender or the delegation of a public service, which can be examined only by the competent administrative review judge.

16. Actually, the administrative courts, whose role is to review the lawfulness of action taken by the administration, are no strangers to litigation on anti-competitive practices, with public entities stepping up their economic activities

17. It is the job of administrative review judges to review action taken by the administration, which is required to comply with the legal framework within which that action should be implemented. In point of fact, competition law and provisions on anticompetitive practices in particular all form part of the whole body of law: the rules of competition apply to the public authorities not only when they are providing economic services, but also when they are overseeing the organisation of those services.

18. In this capacity, an administrative judge hearing an appeal brought on *ultra vires* grounds contesting an act that is separable from a contract, or following referral by the Prefect for contracts put out to tender by local authorities and their public agencies, has the power to review the lawfulness of that act in the light of competition law and to order its annulment. This is a mechanism that enables a review of the choice of bid packages, for instance, or decisions to turn down or accept a tender application by a group or consortium on the grounds that its formation would infringe competition rules. These are mechanisms that can prevent the risk of cartel agreements arising from the procurement authority's choice of modalities in public procurement procedures.

19. Although administrative jurisdictions are unable to impose a sanction, they are still a crucial mechanism of intervention in this area.

1.2 Competition Authority Practice in Cases of Collusion in Public Procurement

20. An analysis of the decision-making practice of, first, the Competition Council, then the Competition Authority clearly shows that collusion in public procurement can affect the whole of government, including central government, local and regional authorities and the social security administration, and that it is the construction and civil works sector of the market that is the most affected. These practices generate a cost for the public and do real damage to the economy, which is why the Authority is working hard to prosecute and sanction this type of behaviour.

21. Each year between 16 and 28 percent of the sanctions imposed by the Authority in its litigation capacity are in cases involving public procurement, or an average of 13 cases per year from 2004 to 2008.

22. *Information exchanges*, on a more or less formal and organised basis is the first (and sometimes the only) step in setting up a cartel and it can seriously undermine the fairness of a call for tender and distort the free operation of competition. They may also be the only signs of a cartel agreement, since proof of market sharing may be lacking.

23. Only recently, the Competition Authority stressed that "on several occasions the Competition Council had pointed out that in public procurement contracts subject to tender, firms are deemed to have entered into an cartel agreement once proof is brought either that they have co-ordinated their bids or that they exchanged information prior to the date on which the outcome of the tender process is known or could be known."[4]

24. While certain practices may clearly be aimed at price fixing for the tenders to be submitted or at pre-designating the future contractor by ensuring that it appears to be the cheapest bidder, it is nonetheless true that *"simply exchanging information on any competitors there may be, their name, size, personnel or equipment availability, their interest or lack of interest in the contract in question, or the prices they are thinking of proposing, is also detrimental to free competition because it limits the independence of tenders."*[5]

25. The practice of *cover bids* (simulating competition by submitting bids deliberately designed so as not to be selected, hence ensuring that the contract will be awarded to the bid that they are covering) *and market sharing agreements* are the most successful, often related, forms of anti-competitive practice. In the case of complex invitations to tender, in particular, a cartel agreement is not feasible without *organised concerted action,* which requires meetings and trade-offs. It is accepted that proof can be constituted by a body of evidence, no one item of which taken singly would be proof by itself, but which is serious, accurate, and consistent enough when taken cumulatively to establish that such practice has taken place.

26. One case on an extraordinarily large scale warrants mention under this heading.

27. In a 2006 Decision regarding practices in the civil engineering sector in the Île-de-France Region, the Competition Council fined 34 construction firms EUR 48 million, for widespread cartels in public procurement contracts in the Île-de-France, a decision upheld by the Court of Appeal and the *Cour de Cassation*, France's highest appellate court.[6]

28. From 1991 to 1997, the leading firms in the sector had colluded to share out contracts for civil engineering works among themselves or their subsidiaries in the Île-de-France and had involved several other firms into the bargain. In all, invitations to tender for around 40 contracts were distorted. Under this widespread cartel, the major firms in the sector shared future work out among the companies in their group through "round tables" at which the managers of the firms met to express their interest in future contracts and see to it that the planned share-outs were adhered to. The share out of these contracts operated over a long period and was based on a very sophisticated allocation system; it was done by exchanging a steady flow of information and the practice of cover bidding. Adherence to the basis for the distribution of shares was ensured by keeping accounts of advances and delays for each company and by a system of compensation that might take the form of the payment of sums of money, the provision of sub-contract work officially or unofficially or the formation of jointly owned companies.

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4 Decision no. 09-D-18 of 2 June 2009 concerning the practice of setting up a temporary RTM-Veolia consortium with a view to its becoming a bidder for a delegated public service contract from the Urban Community of Marseille Provence Metropolis (CUMPM) for the operation of a tramway network in the city of Marseille and Decision no.09-D-34 of 18 November 2009 concerning civil works contracts for electricity and public lighting in Corsica.

5 Decision no. 09-D-25 of 29 July 2009 concerning the practices of firms specialising in railway construction work (the outcome on an appeal before the Paris Court of Appeal is pending).

6 Decision 06-D-07 of 21 March regarding practices in the civil engineering sector in the Île-de-France region, Paris Court of Appeal, order of 24 June 2008 (France Travaux), *Cour de Cassation*, order of 13 October 2009.

29. However, firms can also reach an agreement not to respond to an invitation to tender, in which case the *exchanges of information are aimed at abstaining from submitting a tender*. For instance, the Council fined five companies marketing implantable cardiac defibrillators a total of EUR 2.6 million for agreeing not to respond to a nation-wide invitation to tender launched in 2001 by 17 hospital centres which had grouped together to purchase their defibrillators over 2 years in order to secure the best price and terms of service.[7] The firms in question had met together several times, right from the announcement of the plan to issue a joint call for tender to two weeks prior to the deadline for submitting tenders, and had devised a joint strategy which was to abstain from replying to the invitation to tender and instead write to the contracting authority to raise technical points, each of them explaining why it had not taken up the invitation to tender. This cartel agreement caused the failure of the new joint purchasing procedure and deterred its future use for medical devices. This decision was upheld by the Court of Appeal.[8]

30. A point to note is that the Council had repeatedly reminded contracting authorities of the need to be vigilant and of their role in fostering competition, particularly in invitations to groupings and the subdivision of tenders into packages: they always have the option of rejecting a tender from a grouping if they so much as suspect that its aim is anti-competitive and "can always split up the contract proposed and draft the tender regulations to cover packages so that the largest number of firms can compete on an individual basis and so that they reserve the option to reject bids from grouping of firms in principle, in accordance with criteria which remain at their own discretion."[9]

31. The procurement authority is also responsible for seeing that the bidders all have equal access to the information available (particularly where a contract renewal or delegation is involved, so that the incumbent firm does not have too great a comparative advantage over other competitors). It is responsible for drafting the terms and conditions so that it does not give certain firms an advantage, primarily if it selects technical specifications which give their products or services an advantage[10] or has unclear tender regulations, which could lend themselves to discrimination among competitors.[11]

32. Administrative courts confirm that contracting authorities, local authority purchasers and other procurement bodies bear special responsibility for preventing cartel agreements between firms. They must set aside bids that they know to be the result of anti-competitive practices by bidders and, more generally, ensure effective compliance with the rules of free competition.[12]

33. Although it is not up to contracting authorities to take the place of competition authorities and the courts in establishing that unlawful practices are going on or to sanction them, they still have several ways of contributing to the prevention of cartels: they can prevent cartel agreements through their policies on invitations to tender, detect firms that have exchanged information and inform the Competition Authority, in liaison with government competition watchdog agents.

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7 Decision 07-D-49 of 19 December 2007.

8 Judgment of 8 April 2009.

9 Decision 05-D-19, 05-D-26 and 05-D-70.

10 Decision 92-D-62 of the Competition Council; Paris Court of Appeal, 7 May 1997 and *Cour de cassation*, 18 May 1999: Biwater case.

11 Decision 03-MC-01.

12 Judgment of 6 February 2003 of the Bastia *Tribunal administratif*, judgment of the *CE*, 28 April 2003, Fédération nationale des géomètres experts.

34. However, it should be stressed that, according to established practice in issuing decisions, the behaviour or inexperience of a contracting authority which issues an invitation to tender, even where it may facilitate the improper practices of firms, cannot frustrate the enforcement of competition law.

35. For instance, in a recent decision on the practices employed in the school and intercity coach transport sector in the Pyrénées-Orientales, the Competition Authority pointed out that "*according to case law, the practices employed by the contracting authority in issuing an invitation to tender, even if they facilitate improper practices, cannot frustrate the enforcement of the provisions of (…) Article L. 420-1 of the Commercial Code, if it is established that companies have conducted practices tending to distort the free play of competition (Commercial Chamber of the Cour de Cassation, 12 January 1993, SA Sogea.*)"[13]

36. The transport companies which had been accused of taking part in anti-competitive concerted action by forming one consortium for each package in order to share out the school transport market in the *Département* among themselves, had attempted to put forward the role played by the Principal, which had allegedly suggested that consortia should be set up to respond to the invitation to tender.

1.3 Tools for Criminal Prosecution in Public Procurement

1.3.1 Specific Offences: Anti-competitive Practices and Favouritism

Article L. 420-6 of the Criminal Code

37. Prior to 1986, all cartel agreements and abuses of dominant position were punishable by a prison sentence of up to 4 years.[14] The responsibility for the scrutiny and sanctioning such practices rested with the criminal courts. The Ordinance of 1 December 1986[15] largely decriminalised competition law, resulting in fewer criminal liability cases for anti-competitive practices. Henceforward, Article L. 420-6 of the Commercial Code provides for "*4 years imprisonment and a fine of EUR 75 000 for any natural person who fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L. 420-1 and L. 420-2".*

38. The ability to hold natural persons criminally liable is an indispensable adjunct to the powers of the Competition Authority, which itself has the power to sanction only legal persons.

39. However, criminal sanctions for this offence are still very common;[16] the fact that the practice has to be fraudulent in nature, which excludes straightforward negligence on the part of the person being prosecuted, for instance, actually makes it quite difficult to assess the facts of the case. This explains why convictions for this offence are handed down mainly for cartel agreements in public procurement contracts and when there is an accompanying charge of corruption, for instance, which makes it easier to establish the fraudulent nature of the offence.

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13 Decision 09-D-03 (appeal brought before the Paris Appeals Court, case pending).

14 Ordinances no.45-1483 and 45-1484 of 30 June 1945.

15 Ordinance no. 86-1243, 1 December 1986.

16 Nevertheless, over the past 8 years, for practices liable to criminal sanctions in public procurement (whether for 420-6 or favouritism), 22 cases per year on average are "referred" to prosecutors by the DGCCRF; given an average dismissal rate of 40 percent, that makes 13 different cases in the public procurement sector ruled on each year by criminal courts (the total number of criminal cases in the public procurement sector is actually higher than that as the procedure provided for under Article 40 of the CPP can be instigated by any civil servant).

40. The different elements that constitute a criminal offence are largely based on the same practices as the administrative offences punishable by the Competition Authority: the practices referred to in Articles L.420-1 (cartel) and L. 420-2 (abuse of dominant position) of the Commercial Code have to be established.

41. A point to note is that this offence is sometimes the key to prosecution for other criminal offences (corruption, favouritism, defalcation, etc.) given that cartel agreements in public procurement are often linked to such offences and often require "the passive or active complicity of administrative bodies which are capable of detecting, or at the very least suspecting, cartels"[17].

1.3.2 Favouritism as an Offence

42. The offence of "granting unfair advantage", more widely known as "favouritism**",** instituted en 1991[18] and punishable under Article 432-14 of the Criminal Code, currently accounts for the bulk of criminal litigation in the public procurement sector.

43. This is a criminal offence specific to public procurement law which serves to sanction breaches of competition law, particularly by public procurement officials.

44. Under the terms of this Article : "*An offence punishable by two years' imprisonment and a fine of EUR 30 000 is committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services*."

45. It applies, for instance, to granting privileged information to one bidder for the contract,[19] failing to divide the contract into packages (letting an entire contract when its lack of uniformity would have justified subdivision into packages, if competitive tendering was organised in such a way that the successful bidder was the only bidder in a position to tender for the contract),[20] inserting technical clauses into the conditions of contract which only one company can meet, to reissuing invitations to tender or declaring no bidder successful with the aim of enabling a particular bidder to secure the contract.[21]

46. Moreover, as well as constituting an offence under the legislation on favouritism the same practices may also constitute a breach of competition law.

47. Economic operators which have benefited from an offence under the legislation on favouritism or anti-competitive practices may also be prosecuted as an accessory after the fact to the offence of favouritism or to the offence referred to in L. 420-6 of the Commercial Code. A charge of complicity in these offences may also be brought against persons not charged with the predicate offence.

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17 Jean Cartier –Bresson, "*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas*", Petites Affiches, 1 July 1999.

18 Law no. 91-3 of 3 January 1991.

19 *Cass. crim*., 23 May 2007, no. 06-87.898.

20 *Cass. crim*., 20 May 2009, no. 08-87.354.

21 Id note23.

1.3.3 Corruption as an Offence

48. Furthermore, corruption is traditionally punishable under the Criminal Code as passive corruption, influence peddling[22] and active corruption, which are all offences.[23]

49. There are two sides to the crime of corruption: the first is the passive corruption of the person being bribed, who holds the power and accepts or solicits a gift or advantage of any kind in return for carrying out a service that is part of his/her mission for the benefit of the person offering the bribe; the second is the active corruption of the person offering a gift or advantage in exchange for services rendered by the civil servant, elected representative, manager, etc. One of the forms that the deal between the person accepting the bribe and the person offering may take is under-the-table payments to speed up the procedure for securing a public contract. The main distinction between this and the offence of favouritism is the notion of payment for services rendered

50. Influence peddling has a different purpose; the perpetrator is supposed to improperly use his/her real or supposed influence in order to secure a contract; such persons introduce themselves as the intermediary between the potential beneficiary and the victim of the improper behaviour. When a private individual takes the initiative and asks a person who has influence to make improper use of it, this is termed active peddling; when the person with influence takes the initiative, this is termed passive peddling.

51. With the very heavy sanctions risked, the sanctions for corruption and influence peddling are the stiffest penalties in the enforcement arsenal in the public procurement field.

52. There are also numerous other offences, chiefly financial, under ordinary law which can sometimes be applicable to breaches of competition law in public procurement: the unlawful taking of interest (Article 432-12 of the Criminal Code), breach of trust (Article 314-1 of the Criminal Code), fraud (Article 313-1 of the Criminal Code), misappropriation of funds (Articles L. 242-6 and L. 242-30 of the

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[22] Article 432-11 of the Criminal Code: "*The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of EUR 150 000 where it is committed either:*

1° *to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision."

[23] Article 433-1 of the Criminal Code: "*Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:*

1° *to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

2° *or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;*

is punishable by ten years' imprisonment and a fine of EUR 150 000.

The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2° above."

Commercial Code), forgery (Article 441-1 of the Criminal Code) or the subornation of witnesses (Article 434-15 of the Criminal Code), etc.

53. While a complex cartel may sometimes involve a mix of several criminal offences, breaches of competition law in public procurement do not always constitute offences under criminal law with the result that criminal law can only be applied on a case-by-case basis.

2. Interaction of Collusion Prevention and Corruption Prevention

2.1 Île de France High Schools Case

54. In a 2007 decision on practices employed in public procurement contracts for high schools in the Île de France,[24] the Council sanctioned a widespread cartel which shared out contracts for the region's high school renovation programme between the major French construction and civil engineering groups and their subsidiaries. The case involved 88 contracts with civil engineering firms over the period 1989 to 1997 in seven successive waves and a total of FF 10 billion.

55. This widespread cartel was formed right at the launch of the construction programme through meetings to allocate shares, direct contacts and the exchange of information between firms. It operated for 7 years under the aegis of Patrimoine Ingénierie, consultant to the contracting authority and always used the exact same operating method. Each of the firms, all pre-selected, either ensured that it would obtain the contract by letting its "competitors" know which contracts it had chosen and for what price, or ensured that it did not obtain the contract by submitting a bid that was deliberately higher (a cover bid). The smooth operation of this general share-out of contracts was ensured by Patrimoine Ingénierie, which gave the firms advance information about upcoming operations and afterwards ensured that the correct firm was indeed awarded the contract.

56. The Council stated, when handing down this decision, that the fact that the firms could show that this practice would not have had an anti-competitive impact (such as an increase in prices) in no way exonerated them from liability since, to impose a sanction, all that was required was to demonstrate that the aim of the agreement was anti-competitive, nor did the fact that the contracting authority was behind the arrangement or had actively participated in its operation, since the liability of the instigator and ring-leader did not absolve those who went along with the scheme, unless they could demonstrate duress.

57. Underlining the extreme gravity of the firms' behaviour and the particularly serious damage done to the economy, the Council imposed exemplary sanctions amounting to 5 percent of the turnover of the firms concerned – i.e. the maximum authorised by the legislation applicable at the time.

58. Alongside the Council proceedings, this case led to criminal proceedings and sanctions which illustrated, on an extraordinary scale, how the practices of collusion, favouritism and corruption could be closely interwoven and how, together, they had been instrumental in setting up a system of funding for political parties.

59. It appeared that the Regional Executive and its representatives had encouraged the cartel agreement between the subsidiaries of the leading civil engineering groups with a view to sharing contracts for work on high schools in the Île de France "fairly" between them and had demanded, in return, that the

[24] Decision 07-D-15 of 9 May 2007 concerning practices employed in public procurement contracts for high schools in the Île de France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, Société Spie.

firms provide kickbacks to finance the political parties represented at Region level, whose members sat on the Committee for Invitations to Tender.

60. This fraudulent scheme had operated at the price of breaching the rules of the Public Procurement Code (CPP), the rules on competition and criminal law.

61. It had been able to operate for a number of years chiefly because of the involvement of the consultancy firm, Patrimoine Ingénierie, (practices relating to the offence of favouritism made this latter firm the winning bidder for 170 contracting authority consultancy contracts out of the 214 let by the Regional Council), whose very broad brief (analysis of tender documentation drafted by the contracting authority and tender submissions, finalisation of contracts and organisation of contract performance, etc.) reflected "*the intent of the (Regional Council) to have (it as) a permanent assistant and to delegate to it a substantial share of its prerogatives so as to make it the (…) lynchpin of the fraudulent scheme*."[25]

62. Under the outward semblance of legality, the criminal courts had also noted, contrary to the rules applicable to public procurement contracts, that there had been systematic recourse to a special procedure for civil engineering contracts, which permitted restricted invitations to tender, as well as anomalies in the operation of the Committee for Invitations to Tender, which was found to have employed corrupt practices which had been a contributing factor to the entire scheme.

63. Firms that had benefited from public procurement contracts had taken concerted action and had obtained from the Office of the Regional Executive of the Île de France and the aforementioned mentioned consultancy privileged information on the provisional estimates for each operation, the names of other selected bidders or consortia and the prices they proposed, which had enabled them to align their bids accordingly, although remaining within the parameters of a broader share-out between the major groups in the sector, imposed by the Regional Executive itself. The aim of favouritism in this case was to operate a cartel among the affiliate firms of the big civil engineering and construction groups with a view to sharing public procurement between them.

64. Accordingly, the Court of Appeal found that the political parties had required an undertaking from firms to pay them a percentage of the price of the contracts obtained, as a condition of access to public procurement contracts.

65. It also found that the "cartel organised among the firms, with the assent of the contracting authority, had given the members of the Regional Executive and political parties greater powers to influence those firms, which felt that they "owed" the financial contributions that they were being asked to pay", thereby establishing the intent behind the pact as constituting corruption and influence peddling.

66. The executives and directors of the firms were convicted on charges of fraud, misappropriation of funds, corruption and illicit agreements to distort or restrict the free interplay of competition, the regional public officials and the Regional Council's delegate on charges of favouritism and breaches of the rules on free and equal access to public procurement contracts, lastly, the treasurers, fund collectors and elected representatives of political parties were found guilty of being accomplices and accessories to corruption and influence peddling.

67. A point to note is that when hearing this case, the *Cour de Cassation* stated that to be an accessory to corruption one did not have to have personally profited from non disclosure and upheld the conviction of a director of one civil engineering firm, pointing out that a cover bid that purported to be a

[25] Judgment, Paris Court of Appeal, 27 February 2007.

competitive bid in order to make another bidder seem cheaper, was indeed of a nature to hinder the free interplay of competition and likely to artificially inflate prices.[26]

2.2 The Seine-Maritime Asphalt Case

68. The Seine-Maritime asphalt case is emblematic of a situation involving collusion and corruption in the public procurement sector, both in that the practices in question went on for such a long time, almost 10 years, and in the overcosts to the community, which amounted to more than EUR 24.8 million over the period 1992 to 1998 (or a little more than 10 percent of the contract total) according to a conservative estimate.

69. In the late 1980s, the Seine-Maritime General Council decided to launch a vast programme to renovate 2 500 km of its road network. The contract required the pouring of 200 000 to 350 000 tonnes of asphalt and had an annual budget of EUR 23 to 38 millions.

70. On 14 March 1994, following information given by a plaintiff firm, the Ministry of the Economy requested the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) to conduct an enquiry into road works, particularly the supply of asphalt, in the Seine-Maritime Department.

71. With the authorisation of the presidents of the Rouen and Dieppe regional courts (*Tribunaux de grande instance*), the DGCCRF served warrants on the firms; it then proceeded to seize documents and interview senior company managers.

72. A report of the enquiry giving an account of the procedures and presenting the evidence gathered was then drafted.

73. After examining the case, the Competition Council convicted several civil engineering companies, most of them subsidiaries of large groups, on 15 December 2005. The Council fined the companies -- which had formed consortia to set up asphalt plants and respond to invitations to tender -- a total of EUR 33.66 million for breaches of the regulations on concerted action, cartels or coalitions, the aim or potential effect of which was to prevent, restrict or distort the free interplay of competition on a market.

74. The conviction was upheld and an appeal on a point of law was dismissed.

75. At the same time, an action was brought in order to establish any potential criminal liability of the natural persons who had fraudulently taken a personal and decisive part in the organisation of this cartel.

2.3 The asphalt market in Seine-Maritime

76. Professionals use two types of plants to manufacture asphalt. In both cases, these plants, which can have an impact on the environment, can only be established with authorisation by the prefect.

- A *portable plant*, used to provide a continuous flow of asphalt, is suitable for a specific work project that will use all of its production and which must therefore be large enough to make it cost-effective to install this type of plant.

[26] *Cass. Crim*, judgment of 20 February 2008.

- For an investment ranging between one and a half and four and a half million euros, a *fixed plant* can be used, which can store different qualities of asphalt and supply a variety of customers at work sites requiring lower tonnages than a mobile plant. This type of plant met the needs of the *Département* of Seine-Maritime, which signed a variety of contracts for asphalt involving multiannual purchase orders that consolidated orders of varying size across different geographical locations.

77. In its judgment of 11 September 2008, the Court of Rouen also pointed out that the costs of manufacturing and transporting asphalt accounted for 80 % and 10 % respectively of the cost of the work, which gave a "significant advantage" to civil engineering companies that were shareholders in plants, where they could source their supply at special rates.

2.4 The Collusive Behaviour of Asphalt Companies

78. In the 1990s, these civil engineering companies had agreed on a scheme for apportioning the tonnages of asphalt for the roads of Seine-Maritime for all contracts. They exchanged information on the tonnages delivered to ensure that everyone respected their quota and to correct any imbalance, if necessary by subcontracting.

79. The members of the cartel met regularly when the *Département* issued calls for tenders in order to determine which consortia of bidders would be awarded each package, while their competitors merely made cover bids; they then met again when the programmes of work were published at the beginning of the year in order to divide up the work among themselves according to the respective tonnages agreed for each of them.

80. They submitted their bids in consortia that lacked any economic or financial justification. These consortia distorted prices, which were no longer set through the free play of the market since the cover bids necessarily misled the contracting authority about the reality and extent of competition on the asphalt market.

81. These companies even went so far as to scheme against competitors who might disturb the cartel, for example by setting up bogus associations for the protection of the environment to prevent the construction of a rival asphalt plant.

82. These practices were able to continue for some time because of the support provided by government officials who enabled this system to survive through the action they took.

83. Two government officials in the *Département*'s infrastructure directorate had noticed that the same packages were awarded to the same consortia and that the prices of bids were the same from one call for tenders to another.

84. On this basis, they had concluded that there was a cartel agreement.

85. However, they did not do anything to prevent these consortia and did not alert elected officials, who nevertheless relied on them heavily because of their technical knowledge. They even went as far as to consolidate the cartel by their actions, firstly by requiring a deposit covering 100 % of the contract, which placed at a disadvantage small companies that might compete with the already established major companies, and secondly by including a clause requiring prospective bidders to have an operational plant at the date when they submitted their bids. Given the very short time between the publication of the call for tenders and the deadline for submitting bids, this requirement, of limited interest, could not be met by any bidder that did already not have a fixed plant in the *Département*.

86. These actions therefore favoured the companies that had been awarded the previous contracts, which already had asphalt plants. Consequently, there was a barrier to market entry of a contractual nature, which had been included in the specifications of the call for tenders.

87. Certain officials received benefits at the expense of civil engineering companies.

88. These two officials benefitted from having asphalt surfacing laid on their property free of charge. They were also given holiday trips for themselves and their families, the free loan of a car and payment for the hours of flight time required to maintain a valid pilot's licence.

2.5 Compensation for Damage

89. The Competition Council considered that the loss to the economy was the result of the long duration of the practices and the higher prices charged in the absence of competition during this period. According to a low estimate, it was calculated that the public purchaser overpaid, between 1992 and 1998, approximately three and a half million euros annually, and a 16.45 % overcharge was estimated in 1998 alone, i.e. 4.95 million euros.

90. The Competition Council is not able to compensate victims for the damage sustained. They must therefore gain redress in the courts.

91. The public purchaser therefore initiated civil proceedings in the *Tribunal de Grande Instance* against the natural persons responsible in the companies and the two officials in its procurement department. Eleven natural persons and seven companies were subsequently ordered to pay a total amount of 4.95 million euros in compensation for the material losses sustained.

92. With regard to non-material damage, the court awarded the public purchaser symbolic damages of one euro to be paid by both of the public officials involved.

2.6 Criminal Convictions

93. The natural persons convicted of playing a key personal role in organising the cartel were given suspended sentences of up to 18 months imprisonment and a 40 000 euro fine, for a total of 144 months of imprisonment with suspended sentences and 269 000 euros in fines. This system of criminal convictions reinforces the system of sanctions against anti-competitive practices in France.

94. This cartel agreement between companies in public procurement contracts lasted for years thanks to the support of public officials who had technical knowledge and a privileged position in advising elected officials as to the choice of bidders.

95. This example highlights the close relationship between the anti-competitive practices of companies and the development of practices that are criminally publishable as forms of corruption. The continuation of an anti-competitive practice over a number of years is obviously facilitated by the presence of accomplices inside the procurement department.

96. The role played by accomplices can guide investigation officials in a programme aimed at detecting potential anti-competitive practices.

97. It is always difficult to detect the existence of a cartel without special information that makes it possible to target a specific procurement department in order to analyse carefully the results of calls for tenders. However, it may be easier to look for whether any "compensation" is being provided to accomplices by companies involved in a cartel.

98. In the case studied, this compensation took the form of services rendered by outside providers that billed their customers for these services. In such cases, a systematic search on the basis of copies of these bills can target the corporate customers of these providers that are regularly awarded public procurement contracts. For some of these services, the individual recipients can be identified for security-related reasons – this is the case for travel and vehicle rental services. At this stage, the investigators need only to search whether public procurement officials and even elected officials are on these lists of recipients.

99. The final stage of this specific targeting consists of identifying the procurement department to which these recipients of services belong, which makes it possible to look for any signs of anti-competitive practices in the results of calls for tender and then obtain search warrants to collect evidence of the suspected practices.

100. Thus far, this method has been implemented on an experimental basis. The initial results have been inconclusive. Nevertheless, this type of search should be continued, for the detection of anti-competitive practices through specific targeting can never be successful without perseverance.

101. This case of asphalt provision in the *Département* of Seine-Maritime might have been prevented if the public procurement department had been careful to change regularly the officials assigned to these sensitive positions, since keeping officials in these jobs for many years creates a close relationship with companies that can facilitate practices of passive corruption by the officials involved.

3. The Interaction Between the Criminal and Administrative Procedures

3.1 The Communication of Documents from Criminal Cases to the Competition Authority and the Use of these Documents as the Basis for Charges Brought

102. Under Article L.463-5 of the Commercial Code: "Investigating authorities and courts may forward to the Competition Authority, at its request, court records, investigation reports and other documents from criminal proceedings having a direct relationship with matters that have been referred to the Authority."

103. The Competition Council has used this procedure on a number of occasions, under the supervision of the Paris Court of Appeal and the *Cour de Cassation*, which interpreted the terms of Article L.463-5 flexibly, thereby ensuring that it is genuinely effective.

104. Three cases concerning respectively public roadwork in Seine-Maritime, public procurement in Île-de-France and high schools in Île-de-France, which involved cartel agreements in the field of public procurement, illustrate quite clearly how the coercive power of the criminal procedure (searches, wiretapping, police custody, etc.) can used by the Competition Authority in the most serious cases in which the natural persons behind cartel agreements have been identified.

105. By a decision of 15 December 2005, the Competition Council imposed a fine of 33.6 million euros on 6 civil engineering companies specialised in asphalt provision for having engaged in a complex and ongoing cartel in various contracts for *public road work in Seine-Maritime* from 1992 to 1998.[27]

106. These companies had reached an agreement on a scheme for apportioning the tonnages of asphalt for all contracts with the central government and General Council and had regularly exchanged

[27] Decision 05-D-69 of 15 December 2005 concerning anti-competitive practices detected in the road work sector in Seine-Maritime.

information on prices before submitting bids. The main evidence on which the Competition Council based its analysis was derived from the criminal proceedings being held at the same time.

107. The Court of Appeal and the *Cour de cassation* each rejected the requests for annulment and the appeals lodged against this decision.[28]

108. Regarding whether it is valid to use documents from criminal proceedings and whether the Competition Council can base its accusation on such documents, the *Cour de cassation* confirmed that documents from the criminal file could be validly be used as evidence against parties, without the "equality of arms" principle being compromised. Although the companies argued that, since they were not all involved in the criminal proceedings and therefore did not have access to the criminal file, they were unable to ensure that any exonerating documents might not have been removed by the Council's *rapporteur*, the Court considered that the parties' rights had been sufficiently protected by the fact that the charges were based on documents from criminal proceedings for which a list had been compiled, all of which had been cited and included in the file and made available to be consulted and challenged by the parties.

109. It was also considered permissible for the *rapporteur* to go to the office of the investigating magistrate and consult the entire criminal file under this magistrate's supervision, without violating the confidentiality of the investigation or the rights of the defence, since all of the incriminating evidence selected was contained in the file.

110. In the case of the *cartel in public procurement in Île-de-France*,[29] the Competition Council took up this case on its own initiative in follow up to criminal proceedings brought against a number of natural persons in 1994, and which had concluded with dismissal of the case in November 2002 because the statute of limitations had expired. The Council based its decision to impose sanctions on the evidence and documents transmitted to it by the investigating magistrate.

111. The *Cour de cassation* specified that the tie established between the criminal and administrative procedure was limited to recognising that any interruption of the statute of limitations for the former also applied to the statute of limitations for the latter, but that these two procedures, which concerned different types of persons – natural persons for the former and legal persons for the latter – and pursued different objectives, remained clearly separate. This being the case, the continuation of the administrative procedure and the running of the statute of limitations for administrative action were in no way affected by the fact that the criminal procedure had been dismissed on 26 November 2002 by the investigating magistrate, who had ruled that the statute of limitations had expired following the decision by the Versailles Court of Appeal to annul two counts of the indictment.

112. It was also on documents drawn from criminal proceedings that the Council based its decision concerning the *high schools of Île-de-France* mentioned above.[30]

113. In the case of public procurement in Île-de-France and the case of the high schools of Île-de-France, the appeals to the *Cour de cassation* were aimed at challenging Article L. 463-5 in the light

28 Judgment of the Paris Court of Appeal of 30 January 2007 Le Foll TP, Judgment *Cass. Com*, 15 January 2008, Colas Île de France (D 05-D-69).

29 Decision 06-D-07 of 21 March 2006 on practices used in the public works sector in the Île-de-France Region, Judgment of Paris Court of Appeal, Judgment of 24 June 2008 (firm *France Travaux*), *C. Cass*. com, Judgment of 13 October 2009.

30 Decision 07-D-15 of 9 May 2007 on practices used in public procurement concerning the high schools of Île-de-France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, firm Spie.

of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, on grounds that this procedure violated the "equality of arms" principle.

114. In its two judgments the *Cour de cassation* rejected this analysis and broadly approved that of the Court of Appeal and the Competition Council. Firstly, it considered that "*the fact that, under Article L. 463-5 of the Commercial Code, the Council alone is entitled, acting at the request of the rapporteur vested with the investigative powers conferred upon him by Article L. 450-1 of said Code, to request that the investigating magistrate, who alone may decide to grant or deny this request, communicate court records or investigation reports directly related to matters that the Council is considering, is not in itself contrary to the principle of equality of arms and impartiality stemming from Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms.*"

115. Secondly, it considered that "since, after they were notified of the charges, the companies involved had had the opportunity to debate before the Council and then before the Paris Court of Appeal both the conditions under which elements of the criminal investigation were communicated, the legality of which can be challenged by the persons concerned, and the content of all the documents drawn from the criminal file that the investigating magistrate allowed to be communicated to the *rapporteur*, and to present any documents that they considered useful, the judgment was correct in indicating that the provisions of Article L. 463-5 of the Commercial Code are not contrary to Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms".

116. Regarding the methods used to communicate the documents of criminal proceedings, the Court pointed out that no particular form was specified by the text.

3.2 The Influence of the Competition Authority on the Criminal Procedure

3.2.1 The Authority's Opinions

117. The Competition Council – now the Competition Authority – advises the criminal courts on practices in the cases that they hear, under Article L. 462-3 of the Commercial Code. Consequently, since 1986, the Council has responded to 46 requests for opinions from all courts (civil and criminal).

118. Since the core of the criminal offence is constituted, as was shown earlier, by practices of cartels and abuse of dominant position defined by the Commercial Code, this "bridge" is welcome, even though the Authority's opinion does not bind the court, which does, however, take it into account in practice.

3.2.2 Provision of Information by the Competition Authority to Criminal Courts; Transmission of Information to the Public Prosecutor

119. The second paragraph of Article L.462-6 of the Commercial Code specifies that when the facts appear to warrant the application of Article L.420-6, the Authority shall send the file to the public prosecutor.

120. The Council has made a moderate use of this provision, having sent ten files to the public prosecutor since 1994, although the frequency has increased somewhat since 2000. Most of these cases involve cartel agreements in public procurement or price cartels.

121. For example, in a decision of 3 December 2008, the Council imposed sanctions on companies for having submitted separate bids at the time of tenders for a number of public contracts for maintenance work involving joinery and locksmith work, although these companies belonged to the same group and prepared their bids in a centralised manner. Having learned that the chief executive of the two companies involved, because of his lengthy experience with public procurement, was perfectly well informed of the

applicable rules of competition, which he had deliberately ignored, the Council decided that the acts could be considered as criminal under the provisions of Article L. 420-6 of the Commercial Code and sent the entire file to the public prosecutor at the *Tribunal de Grande Instance* of Créteil.[31]

122. The action taken subsequently on the basis of this information is up to the public prosecutor concerned. Nevertheless, the fact that it can forward a file to the public prosecutor's office gives the Authority a strong tool of dissuasion because of the publicity generated, and enables it to stigmatise the most serious practices and make its views known, even though it is up to the public prosecutor to decide whether the case should be prosecuted and the courts are not bound by the Authority's decisions.

123. In recent years, lawmakers have shown their determination to improve the effectiveness of this procedure and of criminal prosecution more generally by ensuring better co-ordination with the administrative procedure; for example, they passed legislation to ensure that acts that interrupt the statute of limitations for the Authority also do so for public action to prosecute the offense covered by Article L.420-6 of the Commercial Code,[32] and they then introduced a reciprocal rule in Article L. 462-7.[33]

124. By doing so, the lawmakers put an end to what legal theory and practitioners presented as an obstacle to the implementation of Article L. 420-6 and criminal prosecution, for example in cases in which the statute of limitations for the practices constituting the criminal offence had already expired when the file was transmitted to the public prosecutor.

125. In addition, the general rules of the Code of Criminal Procedure concerning the communication of documents applies to documents held by the Competition Authority: the public prosecutor, the judicial police officer or the investigating magistrate may require that any documents of interest to their enquiry or investigation be handed over to them.[34]

3.2.3 Co-ordination of Criminal and Administrative Action in the Case of Leniency Programmes

126. Although criminal sanctions for natural persons can be a major tool of dissuasion and enforcement against the most serious offences, they must be reconciled and co-ordinated with the action of authorities such as the Competition Authority that impose administrative sanctions on companies.

127. For example, when a clemency programme was introduced, it did not immediately lead to better co-ordination between the two categories of action. As a result, the exemption from sanctions that the Competition Authorities can grant to companies under the leniency programme does not guarantee natural persons immunity from sanctions in a criminal court, which can discourage them from using the leniency procedure.

128. Admittedly, the consequences of this situation should not be overstated since there is in fact no known case of anyone undergoing criminal prosecution after their company had requested leniency from the Council. In addition, the practice of the Council, and now of the Authority, has been not to transmit to the public prosecutor those files in which the persons covered by leniency programmes seem to be liable to criminal prosecution.

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31 Decision 08-D-29 of 3 December 2008 concerning practices detected in the sector of public contracts for maintenance work involving joinery, metalworking and locksmith work.

32 Law n°2001-420 of 15 May 2001, paragraph 3 of Article L. 420-6.

33 Ordinance n°2008-1161 of 13 November 2008.

34 Articles 60-1 and 99-3 of the Code of Criminal Procedure.

129. Nevertheless, as this situation is not satisfactory, a bill is being drafted aimed at enabling the managers of companies who have provided key evidence enabling their companies to qualify for a leniency programme to then be eligible for a provision by which the criminal court will cancel their sentence or reduce it by half.

130. Public procurement remains a high-risk sector both with regard to the rules of competition and the possible corruption of public officials.

3.3 The Role and Activities of the Central Corruption Prevention Service (Service Central de Prévention de la Corruption, SCPC)

131. The *sector of government contracting*, and of *public procurement* more generally, has always and everywhere been the sector of predilection for corruption and anti-competitive practices.

132. According to some estimates, in the construction and civil engineering sector, the amounts misappropriated are in the range of 3% to 5% of public contracts in Western Europe.

133. Paradoxically, the fact that there are particularly precise procedures and regulations and sometimes exacting administrative controls does not always make it possible to guarantee transparency, competition or the equal treatment of bidders, etc.

134. What is more, the people behind fraudulent schemes often have *sufficient technical knowledge* and advice to make it appear that their operations are in compliance with the legislation and procedures.

135. At the same time, the risk factors have not disappeared and are even on the rise.

136. The high level of complexity of legislation and the frequent changes that have characterised it in recent years are creating *additional risks* of unintentional irregularities, but also of deliberate acts of non-compliance.

137. Beyond the legal aspects, *public procurement and its environment* are undergoing profound changes and are increasingly frequently out of step with traditional administrative practices.

138. On the one hand, public procurement has both expanded and become more complex; with the trend towards the *liberalisation* of the economy combined with the broader responsibilities given to local and regional governments, areas that were previously governed in a sovereign and centralised manner have now shifted to the contractual and private sphere, as has happened, for example, with telephone services, rail transport, gas and electricity supply, etc., and with the new sectors developing through Internet.

139. At the same time, *changes* have affected the economic, social and policy environment of public procurement. At the national level, the most significant changes concern the *modernisation* of public spending and the easing of central government controls. The opening up of borders and the development of international trade have also given rise to new risks that the national legislative and regulatory framework often finds it difficult to take into account.

140. Lastly, technological changes, such as Internet, create new opportunities but also invariably lead to the emergence of new "grey areas"[35].

[35] For example, the piracy of unprotected data.

141. At the same time that it develops and becomes more complex, public procurement itself is tending to become an activity fraught with risk.

142. Even before the principle of the *accountability* of public procurement officials was affirmed by reformers in 2006, there was an underlying trend in recent years towards increasingly holding public procurement authorities liable both in court cases and through complaints to administrative bodies.

143. Public procurement has not escaped from the trend towards litigation that now affects all activities of governments at all levels. It is striking to see that it is now occurring *increasingly earlier* in the procedure, as unsuccessful competitors and adversely affected citizens are increasingly willing to seek redress against decision-makers suspected of having failed to carry out their procurement duties properly. This is why pre-contract referral arrangements are now a full-fledged component of public procurement disputes. The *Conseil d'Etat* has itself contributed to increasing this trend by broadening the channels of appeal open to claimants[36].

144. Another recent development, which emerged in the 1990s, is the "*criminalisation of public procurement law.*[37]*"* Even though this development is largely due to the creation of the offence of favouritism and should not be overstated[38], it shows that there is a trend towards greater legal risk in public procurement activities; depending on the seriousness of their misjudgement, any elected or public official involved in any capacity in the public procurement chain will be able to be held criminally liable. This explains the feeling of uncertainty, insecurity, instability and even of "loneliness[39]" that is now experienced by many public procurement officials, not to mention the obvious risk of manipulation.

145. This being the case, steps should be taken to strengthen the systems aimed at preventing any problematic developments that may affect procurement practices.

146. Enforcement policy now seems to have reached its limits,[40] and in many countries most of the cases of corruption punished in courts involve public procurement.

147. In France, the *means of enforcement* are wide ranging. They apply to both natural and legal persons and can be used to punish any lack of integrity in public procurement in France or abroad.

148. The legal treatment of public procurement has admittedly undergone some major developments in recent years and has to some extent contributed to preventing these practices, in particular through the introduction of the offence of favouritism.

149. The existing prevention systems are only of limited effectiveness, and until now this prevention has mainly been ensured through various forms of *monitoring* that are carried out at each stage of the procedure:

- Internal monitoring: managerial oversight, inspections, specialised commissions, etc.

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36 Its most recent case law (*CE Assemblée 16 juillet 2007, Société Tropic Travaux Signalisation*) gives unsuccessful competitors the possibility of requesting the cancellation of a contract after it has been concluded**.**

37 To use the title of the doctoral thesis of Catherine Prébissy Schnall (LGDJ 2001).

38 The author of this thesis only counted 60 convictions for favouritism between 1991 and 2001.

39 Cf. Article on public procurement in the SCPC's report for 2005.

40 For example, the number of convictions for favouritism remains virtually stable (at between 25 and 50 convictions per year).

- External monitoring:[41] review of legality, government audits, judicial review, etc.

150. These different types of monitoring act as safeguards to ensure the regularity of the public procurement process, and they can, if used properly, help to detect certain cases of fraud.

151. However, as currently organised, they also have certain limitations that can reduce their effectiveness.

152. The initial limitation resides in the fact that these forms of monitoring, whether internal or external, are rarely conducted systematically. This is the case for the review of legality carried out by the prefecture's services, which only covers a small portion of the contracts awarded by local and regional governments; for understandable reasons, this cannot always be carried out under optimum conditions due to a lack of time and quite often a lack of resources and sometimes of available skills. Here, *a technical expertise factor* combined with the *volume factor* adds to the difficulty of this monitoring.

153. Even more importantly, these forms of monitoring have until now been designed as *means of monitoring compliance* – compliance with laws and regulations, procedures, budget rules, etc. In this kind of system, any misconduct by a manager is only detected if an action or behaviour formally fails to comply with a standard. However, fraud and corruption sometimes take a form that it is difficult to reduce to a specific, immediate breach of a rule or principle, and that nothing in the various stages of the procurement process would make it possible to detect. In other words, administrative activity and the compliance with rules that it entails leave a certain leeway, a degree of freedom that defrauders do not hesitate to use if they have the technical skill required and are bold enough to do so.

154. This priority given to formal compliance also has the effect of narrowing the focus of the officials performing the monitoring, and can lead, at least initially, to neglecting certain types of behaviour and irregularities that can undermine the entire procedure.

3.4 The Need to Strengthen Prevention Mechanism

155. The effort to prevent infringements of the rules of integrity and competition, and fraud in public procurement more generally, must adopt a *proactive approach*, i.e. one based on *forward thinking* in order to define and implement a *system of organisation* and *working methods* aimed at preventing fraud.

156. This approach has three components:

- Raising the awareness of public procurement actors;
- Developing detection mechanisms;
- Devising investigation methodologies.

3.4.1 Raising the awareness of public procurement actors:

157. This component must pursue the following objectives:

[41] Mention should be made in this regard of the system of "competition watch" in public procurement that consists of assigning officials from the Directorate for Competition, Consumption and Fraud Prevention (some 150 officials nationwide) to work alongside staff in public procurement departments; this system, unique in an OECD country, is an effective means of ensuring both prevention (through advice given to public procurement officials) and enforcement (most cases of favouritism reported to criminal courts were detected through this system).

- To remind officials of the need to *comply with rules and procedures*, but also of the legal consequences if they fail to do so;

- To set up a system for *reporting information* to managers and monitoring bodies;

- To ensure the promotion of *good practices.*

158. This awareness raising can be carried out in *various ways*:

- Through training and/or communication initiatives;

- In a more advanced stage, through a *code of professional behaviour or ethics* aimed at:

  - Defining the *department's position* with regard to conflicts of interest, appropriate contacts with suppliers and confidentiality of information;

  - Setting *standards of behaviour* (declaration of conflicts of interest, mobility requirement, etc.)*;*

  - Specifying the *measures that will be taken* if these standards are not upheld.

3.4.2 Developing Detection Mechanisms

159. The use of audit-based methods to identify corrupt or anticompetitive practices can fill gaps in existing forms of monitoring, through a renewed approach to public procurement that would no longer be focused exclusively on ensuring the proper functioning of the procurement process, but on *identifying and explaining any anomalies detected in this process.*

160. Normally, a fraud or corruption audit comprises four phases:

- A *specific targeting of objectives*: expectations, scope, tools (mapping of risks, IT systems, commercial management and accounting, etc.);

- An *analysis of the existing situation*, through documentary analysis, interviews, etc. It is at this stage that certain indicators of any risks of corruption can be identified;

- A *diagnostic phase*, focusing on assessing the strengths and weaknesses of the organisation and its functioning, the division of tasks and responsibilities;

- A *recommendation* phase: preventive measures, support strategy, good practices, etc. During this stage, *cases may be referred to the prosecuting authorities*.

161. The SCPC, in its 2007 report, presented a *proposal for a methodological guide for an audit to detect corruption in public procurement* intended for public procurement departments within the various levels of government.

3.4.3 Devising an Investigation Methodology

162. This investigation methodology is an extension of the detection methodology described earlier.

163. It is aimed at helping decision-makers to identify and trace the path of corruption or fraud in public procurement within their administration. Like the audit, it is a tool for *internal monitoring* (by mayors and monitoring officials in local and regional governments) and external monitoring (by auditors, outside officials or departments of the Ministry of Financial Affairs). Similarly, if the investigation brings to light a suspected infraction, the decision-maker may use Article 40 of the Code of Criminal Procedure to bring the case to the attention of the judicial authorities. The judicial phase will make it possible to carry out more in-depth investigations, involving measures such as the confiscation of hard disks or software (to extract data on suppliers, purchasers, etc.), hearings, policy custody, searches, etc.

164. In its 2008 report, the SCPC presented the different stages of this methodology and a computerised analysis of fraud in public procurement, a complementary tool made available to investigators in order to facilitate their work of analysing information and gathering evidence on corruption.

4. Conclusion

165. Cartel agreements in public procurement often rely on the active complicity of public procurement officials, in the form of corruption. However, different authorities are responsible for enforcing the laws punishing the criminal offence of corruption and anti-competitive practices.

166. The steps taken to improve the co-ordination of criminal and administrative enforcement efforts and the greater severity of sanctions in recent years show that there is a new awareness of the interaction between these mechanisms and a determination to dissuade these kinds of behaviour as effectively as possible.

167. In addition, as the Central Corruption Prevention Service recently pointed out in proposing an investigation methodology for identifying corruption in public procurement: "*It seems desirable that public decision-makers should themselves be able to identify and trace the path of corruption or fraud in their administrations, in sufficiently effective and secure conditions to be able to report it*."[42]

168. In this regard, the publication of the Competition Authority's decisions imposing sanctions in the field of public procurement, their broad coverage in the specialised press and the provision of information about these decisions to public procurement officials can only contribute to disseminating a competition

[42] 2008 Report by the Central Corruption Prevention Service "Investigation in public procurement".

CONTRIBUTION DE LA FRANCE

COLLUSION ET CORRUPTION DANS LES MARCHÉS PUBLICS

-- France --

Introduction

1. En France, les marchés publics reposent sur une réglementation abondante, détaillée dans le code des marchés publics : la procédure et la mise en œuvre des achats sont organisées à chacune de leurs étapes (décision de passer un marché, choix de la procédure, choix du titulaire, exécution du marché), restreignant significativement les marges de manœuvre de l'acheteur. Aux règles propres à la commande publique s'ajoutent les règles qui régissent l'activité des collectivités publiques et celle de leurs agents : principes généraux (principe de légalité, notion d'intérêt général), dispositions statutaires, règles déontologiques (désintéressement, probité, discrétion...).

2. Ce foisonnement de règles, dont l'objectif est d'assurer, par la transparence de l'information et l'intégrité des procédures, tant l'efficacité de la commande publique et la bonne utilisation des deniers publics, que l'égalité des citoyens devant les charges publiques et la libre concurrence, devrait permettre de s'approcher de l'optimum concurrentiel, aucune entreprise ne devant être avantagée pour des raisons autres que ses mérites propres.

3. Pourtant, collusion et corruption continuent d'exister dans les marchés publics. Ainsi, le Service central de lutte contre la corruption observe-t-il que « *Ces multiples contrôles constituent autant de garde-fous destinés à garantir la régularité du processus d'achat... ... pourtant, les marchés publics restent, en France comme dans la plupart des pays, le support privilégié de la corruption publique* », d'où la « *situation paradoxale qui est faite aux marchés publics en France : d'un côté, la commande publique se caractérise par la lourdeur de la réglementation et des contrôles, de l'autre, on constate que les marchés publics restent plus que jamais le lieu de prédilection de pratiques déviantes* »[1].

4. Ce paradoxe n'est cependant qu'apparent et l'analyser permet de mieux comprendre le lien entre ces phénomènes distincts mais étroitement liés que sont collusion et corruption.

5. Il a ainsi pu être observé que la corruption était susceptible de se développer sous l'effet d'une asymétrie d'information souvent propre aux marchés publics : le demandeur n'a pas une connaissance précise de ses besoins ou des caractéristiques du produit qui lui est offert et fait appel à un spécialiste, en position d'intermédiaire prescripteur, par qui il est conseillé ou qui devient purement et simplement son mandataire. [2]

6. Le prescripteur détient alors un pouvoir potentiellement corruptible et la concurrence sur le marché concerné est susceptible d'être entravée, l'intermédiaire orientant le choix du demandeur public

[1] « L'audit de la corruption dans les marchés publics des collectivités publiques » Rapport annuel 2007.

[2] Voir « corruption et pratiques anticoncurrentielles » par F. Jenny, in Pratiques et contrôle de la corruption, Montchrestien, 1997.

non pas vers l'offre la plus performante mais en fonction de son propre intérêt. Du point de vue de l'offreur, la corruption est le moyen d'évincer les entreprises concurrentes pour l'obtention du marché.

7. Mais la corruption peut aussi constituer le prix à payer par plusieurs entreprises membres d'une entente pour pouvoir faire fonctionner et dissimuler cette dernière ; en ce cas, pratique anticoncurrentielle et corruption sont particulièrement liées. La corruption apporte des solutions aux problèmes des cartels. Le cartel doit en effet garantir le partage des rentes, s'assurer du respect des règles par tous ses membres et dissuader d'éventuels déviants de sortir du cartel. La corruption fournit des clés de répartition des rentes, des moyens de rétorsion contre les déviants et crée des barrières à l'entrée.

8. L'entente organise un simulacre de concurrence qui vise la réalisation de surprofits pour chaque membre de la coalition et la protection du prescripteur qui cherche à échapper au soupçon [3]. Il s'agit alors de faire en sorte que l'offreur choisi apparaisse comme le plus compétitif, et que d'autres offres, dites de « couverture » dissimulent le choix préétabli. Mise en place sur un marché, une entente mène naturellement à une autre par un processus de compensation et pour que chaque entreprise effectuant une offre de complaisance, puisse à son tour, en contrepartie, bénéficier d'un contrat sur un autre marché public.

9. Il résulte de ces ententes concertées dans un contexte de corruption un surcoût de la commande publique qui se répercute finalement sur les contribuables ; la gravité de ce phénomène est donc un sujet de préoccupation récurrent. Dans les affaires où le préjudice de l'acheteur public a été estimé, le surcoût estimé dû à l'absence de concurrence varie de 15 % et 30 %.

10. Dans le contentieux de l'Autorité de concurrence, le nombre d'affaires relatives à des ententes dans le cadre de marchés publics démontre la fréquence des pratiques collusives, notamment par échanges d'informations. Pourtant, les amendes infligées aux entreprises y participant peuvent être très lourdes voire assorties d'une condamnation pénale pour les personnes impliquées.

11. La fréquente coexistence de la corruption de l'acheteur et des collusions entre entreprises soumissionnaires dans les affaires de marchés publics rend nécessaire le cumul de la répression pénale et administrative (1). A cet effet, l'Autorité de la concurrence et les juridictions pénales mettent en œuvre les instruments de lutte contre la collusion et la corruption dans les marchés publics dont elles disposent (2) et les interactions et passerelles procédurales entre ces instances doivent permettent d'accroître l'efficacité de la répression (3).

1. Les instruments de lutte contre la collusion et la corruption dans les marchés publics

1.1 Le droit de la concurrence, arme contre la collusion et la corruption

12. Le droit de la concurrence sanctionne les pratiques d'entente en matière de marchés publics ; il peut jouer un rôle à la fois dissuasif et répressif et prendre une place utile entre les règles formelles relatives aux marchés publics, dont le non-respect est sanctionné par la nullité des contrats, les actions en responsabilité, et la sanction pénale.

13. Dans le domaine de la commande publique, l'Autorité de la concurrence, qui a succédé au Conseil de la concurrence, s'intéresse presque exclusivement aux pratiques des offreurs et laisse aux juridictions administratives, financières ou pénales le soin d'examiner les comportements des demandeurs publics.

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[3] Voir « *Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas* », Jean Cartier –Bresson, Petites Affiches, 1er juillet 1999.

14. Toutefois, indépendamment de leur éventuelle responsabilité administrative, voire pénale, les maîtres d'ouvrage qui ont activement contribué à la mise en œuvre d'une entente par fourniture de moyens et qui exercent une activité économique sur un marché peuvent être sanctionnés pour entente anticoncurrentielle au même titre que les entreprises (décision 05-D-61 du 9 novembre 2005). Des assistants au maître d'ouvrage ou tout professionnel apportant son aide à la commission de l'entente pourraient aussi être retenus comme responsables de l'entente. Tel a été le cas d'une société d'assistance à la maîtrise d'ouvrage dans l'affaire 07-D-15 du 9 mai 2007, relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France confirmée par l'arrêt de la Cour d'appel de Paris du 3 juillet 2008 (Eiffage) (voir aussi arrêt du TPICE, 8 juillet 2008, Treuhand AG) .

15. Si l'Autorité de la concurrence est compétente pour apprécier, au regard des règles du droit de la concurrence, les pratiques mises en œuvre par des entreprises visant à fausser la consultation, elle ne l'est pas pour apprécier la légalité d'un appel d'offres, ou d'une délégation de service public, dont seul le juge administratif compétent peut être saisi.

16. En effet, les juridictions administratives, dont le rôle consiste à contrôler la légalité des actes administratifs, ne sont pas exclues du contentieux des pratiques anticoncurrentielles, eu égard à l'intensification des interventions économiques des personnes publiques.

17. Les juges administratifs ont vocation à contrôler l'action administrative, qui doit respecter le cadre légal dans lequel elle doit être mise en œuvre ; or le droit de la concurrence et en particulier les dispositions relatives aux pratiques anticoncurrentielles font partie du bloc de légalité : les règles de concurrence s'imposent aux pouvoirs publics non seulement quand ils assurent des prestations économiques mais également quand ils en supervisent l'organisation.

18. A ce titre, le juge administratif saisi d'un recours pour excès de pouvoir à l'encontre d'un acte détachable d'un contrat ou par le biais d'un déféré préfectoral pour les marchés des collectivités territoriales et de leurs établissements publics, peut contrôler la légalité de celui-ci au regard du droit de la concurrence et en prononcer l'annulation. C'est par ce mécanisme que peut être contrôlé, par exemple, l'allotissement retenu, une décision de refus ou d'acceptation de la candidature d'un groupement au motif que sa constitution violerait des règles de concurrence. Il s'agit donc de mécanismes qui permettent de prévenir les risques d'ententes du fait des choix du pouvoir adjudicateur dans les modalités des procédures de passation des marchés publics.

19. Même si la juridiction administrative ne peut prononcer de sanction, elle constitue donc un rouage essentiel d'intervention dans ce domaine.

1.2 La pratique de l'Autorité de la concurrence s'agissant de la collusion dans les marchés publics

20. L'analyse de la pratique décisionnelle du Conseil puis de l'Autorité de la concurrence permet de constater qu'en matière d'entente dans les marchés publics toutes les administrations publiques peuvent être concernées, administration centrale de l'État, collectivités territoriales, administrations de sécurité sociale, et que c'est le secteur des marchés relatifs à la construction et aux travaux publics qui est le plus affecté ; ces pratiques engendrent un coût pour la collectivité et un réel dommage à l'économie, c'est pourquoi l'Autorité s'attelle à poursuivre et à sanctionner avec détermination ce type de comportement.

21. Ainsi, chaque année, entre 16 et 28 % des sanctions prononcées par l'Autorité, au titre de ses fonctions contentieuses, concernent des affaires de marchés publics, soit une moyenne de 13 affaires par an entre 2004 et 2008.

22. Les *échanges d'information*, plus ou moins formalisés et organisés, constituent la première (et parfois la seule) phase de la mise en œuvre d'une entente et peuvent gravement perturber la loyauté d'un

appel d'offres et fausser le jeu de la concurrence. Ils peuvent aussi constituer les seuls indices d'ententes, les preuves d'une répartition de marchés faisant défaut.

23. Récemment encore, l'Autorité de la concurrence soulignait qu'« à de multiples reprises, le Conseil de la concurrence a rappelé qu'en matière de marchés publics sur appel d'offres, il est établi que des entreprises ont conclu une entente dès lors que la preuve est rapportée, soit qu'elles sont convenues de coordonner leurs offres, soit qu'elles ont échangé des informations antérieurement à la date où le résultat de l'appel d'offres est connu ou peut l'être »[4].

24. Si certaines pratiques peuvent clairement avoir pour objet de fixer des niveaux de prix auxquels seront faites les soumissions ou de désigner à l'avance le futur titulaire du marché en le faisant apparaître comme le moins disant, il n'en demeure pas moins que *« de simples échanges d'informations portant sur l'existence de compétiteurs, leur nom, leur importance, leur disponibilité en personnel ou en matériel, leur intérêt ou leur absence d'intérêt pour le marché considéré, ou les prix qu'ils envisagent de proposer, altèrent également le libre jeu de la concurrence en limitant l'indépendance des offres »*[5].

25. Les pratiques *d'offres de couverture* (simulation de concurrence par la présentation d'offres rédigées de telle sorte qu'elles ne seront pas sélectionnées au profit de l'offre qui doit être couverte) *et les accords de répartition des marchés* constituent les formes les plus abouties, souvent liées, de comportements anticoncurrentiels. En particulier, dans le cas des appels d'offres complexes, l'entente n'est pas réalisable sans une *concertation organisée* nécessitant réunions et arbitrages. Il est admis que la preuve soit rapportée par un faisceau d'indices, éléments non susceptibles de constituer une preuve à eux seuls, mais dont la gravité, la précision, l'accumulation et la concordance permettent de considérer la pratique comme établie.

26. Une affaire d'envergure exceptionnelle peut être signalée à ce titre.

27. Dans une décision de 2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France le Conseil de la concurrence a sanctionné, à hauteur de 48 millions d'euros, 34 entreprises de BTP pour entente généralisée sur les marchés publics d'Île-de-France, décision confirmée par la Cour d'appel et la Cour de cassation [6].

28. De 1991 à 1997, les principales entreprises du secteur se sont entendues pour répartir les marchés de travaux publics d'Île-de-France, entre elles ou entre leurs filiales, entraînant avec elles de nombreuses autres entreprises. Au total, ce sont les appels d'offres d'une quarantaine de marchés qui ont été faussés. Dans le cadre de cette entente générale, les grandes entreprises du secteur répartissaient les travaux à venir entre les sociétés de leur groupe en procédant à des "tours de table", réunions au cours desquelles les responsables des entreprises se réunissaient, exprimaient leurs vœux pour les chantiers futurs, et veillaient au respect des attributions prévues. Le partage des marchés a fonctionné sur une longue période et reposait sur un système très élaboré de répartition ; sa mise en œuvre s'est traduite par un courant habituel

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4 Décision n° 09-D-18 du 2 juin 2009 relative aux pratiques mises en œuvre à l'occasion de la constitution du groupement momentanée d'entreprises RTM-Veolia en vue de sa candidature à la délégation de service public de la CUMPM pour l'exploitation du réseau de tramway de la ville de Marseille et Décision n°09-D-34 du 18 novembre 2009 relative à des marchés de travaux publics d'électricité et d'éclairage public en Corse.

5 Décision n° 09-D-25 du 29 juillet 2009 relative à des pratiques d'entreprises spécialisées dans les travaux de voies ferrées (décision ayant fait l'objet d'un appel devant la Cour d'appel de Paris, affaire pendante).

6 Décision 06-D-07 du 21 mars2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France, Cour d'appel de Paris, arrêt du 24 juin 2008 (société France Travaux), Cour de cassation, arrêt du 13 octobre 2009.

d'échanges d'informations et par la pratique d'offres de couverture. Le respect de la clé de répartition était garanti par la comptabilisation des avances et retards de chaque entreprise et par un système de compensations qui pouvaient consister dans le versement de sommes d'argent, l'octroi de travaux en sous-traitance officielle ou occulte ou encore par la constitution de sociétés en participation.

29. Mais, les entreprises peuvent aussi s'entendre pour ne pas répondre à un appel d'offres, les *échanges d'information visant alors à s'abstenir de soumissionner.* Le Conseil a ainsi sanctionné, à hauteur de 2,6 millions d'euros, cinq entreprises commercialisant des défibrillateurs cardiaques implantables pour s'être entendues afin de ne pas répondre à un appel d'offres national lancé en 2001 par dix-sept centres hospitaliers qui s'étaient regroupés pour acheter leurs défibrillateurs sur deux ans, afin de bénéficier de meilleures conditions de prix et de service.[7] Les entreprises s'étaient réunies à plusieurs reprises, dès l'annonce du projet d'appel d'offres groupé et jusqu'à deux semaines avant la date limite de dépôt des offres et avaient défini leur stratégie commune consistant à ne pas répondre à l'appel d'offres, à écrire au maître d'ouvrage pour soulever des points techniques, et à expliquer individuellement leur absence de réponse. L'entente a mis en échec la nouvelle procédure d'achats groupés et l'a découragée pour l'avenir, concernant les dispositifs médicaux. Cette décision a été confirmée par la Cour d'appel[8].

30. Il convient de noter que le Conseil a, à plusieurs reprises, rappelé la vigilance nécessaire des maîtres d'ouvrage, et leur rôle dans l'animation de la concurrence, notamment dans l'appel au groupement et dans la constitution des lots : ils ont toujours la faculté de refuser l'offre d'un groupement sur le seul soupçon que son objet serait anticoncurrentiel et ont « toujours la possibilité de diviser le marché offert et de fixer le règlement des appels d'offres en constituant des lots tels que le plus grand nombre d'entreprises puissent individuellement y concourir, et en se ménageant la possibilité de refuser a priori, selon des critères dont ils sont juges, que les entreprise se groupent »[9].

31. Le pouvoir adjudicateur a aussi la charge de veiller à l'égal accès des soumissionnaires aux informations disponibles (notamment en cas de renouvellement d'un marché ou d'une délégation, afin que l'entreprise sortante ne dispose pas d'un avantage comparatif trop important par rapport aux concurrents), à rédiger le cahier de charges de façon à ce qu'elle n'avantage pas certaines entreprises, notamment par le choix de spécifications techniques qui avantagent leurs produits ou services[10] ou encore le manque de clarté du règlement de consultation se prêtant à une discrimination entre concurrents[11].

32. Les juridictions administratives confirment que maîtres d'ouvrage, collectivités acheteuses ou autres entités adjudicatrices ont une responsabilité particulière dans la prévention des ententes entre entreprises. Ils doivent écarter les offres dont ils savent qu'elles résultent de pratiques anticoncurrentielles des soumissionnaires et de façon plus générale, veiller à ce que les règles de libre concurrence soient effectivement respectées[12].

33. Ainsi, bien qu'il ne revienne pas aux maîtres d'ouvrage de se substituer aux autorités de concurrence et aux juridictions pour établir l'existence de pratiques illicites et les sanctionner, ils peuvent

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7 Décision 07-D-49 du 19 décembre 2007.

8 Arrêt du 8 avril 2009.

9 Décisions 05-D-19, 05-D-26 et 05-D-70.

10 Décision du Conseil de la concurrence 92-D-62 ; Cour d'appel de Paris, 7 mai 1997 et Cour de cassation, 18 mai 1999 : affaire Biwater.

11 Décision 03-MC-01.

12 Arrêt du 6 février 2003 du Tribunal administratif de Bastia, arrêt du CE, 28 avril 2003, Fédération nationale des géomètres experts.

contribuer à la lutte contre les ententes de plusieurs façons : en prévenant les ententes par leur politique d'appels d'offres, en détectant les entreprises qui ont échangé des informations et en saisissant l'Autorité de la concurrence, en liaison avec les agents de l'État chargés de veille concurrentielle ».

34. Il faut toutefois souligner que, selon la pratique décisionnelle constante, le comportement, ou l'inexpérience, du maître de l'ouvrage, à l'occasion d'un appel d'offres, même s'il est susceptible de faciliter les pratiques irrégulières des entreprises, ne peut faire échec à l'application des règles de concurrence.

35. Ainsi, dans une récente décision relative à des pratiques mises en œuvre dans le secteur du transport scolaire et interurbain par autocar dans le département des Pyrénées-Orientales, l'Autorité de la concurrence a relevé que « *selon la jurisprudence, les pratiques utilisées par le maître de l'ouvrage à l'occasion d'un appel d'offres, même si elles facilitent les pratiques irrégulières des entreprises, ne peuvent pas faire échec à l'application des dispositions de (…) l'article L. 420-1 du code du commerce, dès lors que sont établies à l'encontre des sociétés des pratiques tendant à fausser le jeu de la concurrence (chambre commerciale de la Cour de cassation, 12 janvier 1993, SA Sogea*) ». [13]

36. Les sociétés de transport auxquelles il était reproché d'avoir pris part à la concertation anticoncurrentielle, en utilisant la constitution d'un seul groupement par lot pour procéder à une répartition du marché des transports scolaires du département, avaient en effet tenté de mettre en avant le rôle joué par le donneur d'ordre, qui aurait lui-même suggéré la formation de groupements pour répondre à l'appel d'offres.

1.3 Les outils de la répression pénale en matière de marchés publics

1.3.1 Les délits spécifiques : délit de pratiques anticoncurrentielles et favoritisme

L'article L. 420-6 du code pénal

37. Avant 1986 tout fait d'entente ou d'abus de position dominante était puni d'un emprisonnement pouvant aller jusqu'à quatre ans.[14] La compétence pour contrôler et sanctionner ces pratiques relevait donc des tribunaux répressifs. L'ordonnance du 1er décembre 1986[15] a procédé à une large dépénalisation du droit de la concurrence et a marginalisé les hypothèses de mise en jeu de la responsabilité pénale en cas de mise en œuvre de pratiques anticoncurrentielles. Désormais, l'article L. 420-6 du code de commerce dispose: « *Est puni d'un emprisonnement de quatre ans et d'une amende de 75000 euros le fait, pour toute personne physique de prendre frauduleusement une part personnelle et déterminante dans la conception, l'organisation ou la mise en œuvre de pratiques visées aux articles L. 420-1 et L. 420-2* ».

38. Cette possibilité d'incrimination des personnes physiques constitue un complément indispensable des pouvoirs de l'Autorité de la concurrence, qui, elle, ne peut sanctionner que les personnes morales.

39. Cependant les sanctions pénales à ce titre sont encore très fréquentes[16] ; le caractère frauduleux de la pratique, qui exclut par exemple la simple négligence de la personne poursuivie, rend en effet

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13 Décision 09-D-03 (décision ayant fait l'objet d'un appel devant la Cour d'appel de Paris, affaire pendante).

14 Ordonnances n°45-1483 et n° 45-1484 du 30 juin 1945.

15 Ordonnance n°86-1243, 1er décembre 1986.

16 Néanmoins, sur les huit dernières années, concernant des pratiques pénalement sanctionnables dans la commande publique (indifféremment 420-6 ou favoritisme), les parquets sont « saisis » en moyenne par la DGCCRF de 22 affaires par an ; compte-tenu d'un taux moyen de classement de 40 %, ce sont plus de 13 affaires différentes dans le domaine de la commande publique qui sont jugées chaque année par les

l'appréciation des faits délicate, ce qui explique que les condamnations à ce titre soient prononcées principalement dans les cas de cartels en matière de marchés publics et lorsque les faits dénoncés s'accompagnent par exemple de corruption, le caractère frauduleux étant alors aisé à démontrer.

40. Les éléments constitutifs de l'infraction pénale reposent en grande partie sur les mêmes pratiques que les infractions administratives que réprime l'Autorité : il faut caractériser les pratiques visées aux articles L.420-1 (entente) et L. 420-2 (abus de position dominante) du code de commerce.

41. Il est à noter que cette infraction sert parfois de clé d'entrée pour la poursuite d'autres infractions pénales (corruption, favoritisme, abus de biens sociaux …), les ententes dans les marchés publics étant souvent liées à ces infractions et nécessitant souvent « la passivité ou la complicité active des organes administratifs qui sont capables de détecter les ententes ou tout du moins les subodorent »[17].

1.3.2 Le délit de favoritisme

42. Le délit d'«octroi d'avantage injustifié », plus connu sous le nom de « favoritisme **»,** institué en 1991[18] et réprimé par l'article 432-14 du code pénal, forme aujourd'hui l'essentiel du contentieux pénal des marchés publics.

43. Il s'agit d'une infraction pénale spécifique au droit de la commande publique, susceptible de sanctionner des atteintes au droit de la concurrence, en particulier par les acheteurs publics.

44. Aux termes de cet article : « Est puni de deux ans d'emprisonnement et de 30000 euros d'amende le fait par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public ou investie d'un mandat électif public ou exerçant les fonctions de représentant, administrateur ou agent de l'État, des collectivités territoriales, des établissements publics, des sociétés d'économie mixte d'intérêt national chargées d'une mission de service public et des sociétés d'économie mixte locales ou par toute personne agissant pour le compte de l'une de celles susmentionnées de procurer ou de tenter de procurer à autrui un avantage injustifié par un acte contraire aux dispositions législatives ou réglementaires ayant pour objet de garantir la liberté d'accès et l'égalité des candidats dans les marchés publics et les délégations de service public. »

45. Il en va ainsi par exemple, de l'octroi d'informations privilégiées accordées à un candidat au marché[19], du défaut d'allotissement (passation d'un marché global, alors que l'hétérogénéité des fournitures aurait justifié l'allotissement, dès lors que la mise en concurrence a été organisée de telle manière que la société adjudicataire était seule en mesure de répondre au marché)[20], de l'insertion dans un cahier des charges de clauses techniques qui ne peuvent être satisfaites que par une seule entreprise ou le fait de procéder à des reconsultations ou déclarations d'infructuosité dans le but de permettre à un candidat déterminé d'être attributaire d'un marché[21].

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tribunaux de l'ordre pénal, (le nombre total des affaires pénales dans la commande publique est des les faits supérieur dans la mesure où la procédure de l'article 40 du CPP peut être initiée par tout fonctionnaire).

17 Jean Cartier –Bresson, « *Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas* », Petites Affiches, 1er juillet 1999.

18 Loi n°91-3 du 3 janvier 1991.

19 Cass. crim., 23 mai 2007, n° 06-87.898.

20 Cass. crim., 20 mai 2009, n° 08-87.354.

21 Id note23.

46. Ces pratiques relevant du délit de favoritisme peuvent d'ailleurs constituer parallèlement une violation du droit de la concurrence.

47. Les opérateurs économiques ayant bénéficié du délit de favoritisme ou des pratiques anticoncurrentielles peuvent en outre être poursuivis de recel de délit de favoritisme ou pour recel de l'infraction prévue à l'article L. 420-6 du code de commerce. Le chef de complicité de ces délits peut également être retenu à l'encontre de personnes qui ne seraient pas visées par le délit principal.

1.3.3 Le délit de corruption

48. Par ailleurs, la corruption est traditionnellement réprimée par le code pénal à travers les délits de corruption passive et de trafic d'influence[22] et de corruption active[23].

49. La corruption est ainsi un délit à deux facettes : d'une part, la corruption passive du corrompu qui est celui qui détient le pouvoir et accepte ou sollicite un don ou un avantage quelconque en contrepartie d'un acte entrant dans sa mission et qu'il accomplit favorablement pour le corrupteur et, d'autre part, la corruption active du corrupteur qui est celui qui remet ou propose le don ou l'avantage en échange du service rendu par le fonctionnaire, l'élu ou le gestionnaire vénal. Le pacte passé entre le corrompu et le corrupteur prend notamment la forme d'une rémunération sous forme de pots-de-vin qui permet de faire accélérer une procédure pour obtenir un marché public. Cette notion de contrepartie entre deux personnes différencie principalement ce délit du délit de favoritisme.

50. Le trafic d'influence a une finalité différente ; son auteur est supposé abuser de son influence réelle ou supposée en vue de faire obtenir un contrat ; il se présente donc comme un intermédiaire entre le bénéficiaire potentiel et le destinataire de cet abus. On parle de trafic actif lorsque l'initiative est prise par

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22 Article 432-11 du code pénal : « *Est puni de dix ans d'emprisonnement et de 150 000 euros d'amende le fait, par une personne dépositaire de l'autorité publique, chargée d'une mission de service public, ou investie d'un mandat électif public, de solliciter ou d'agréer, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques pour elle-même ou pour autrui :*

1° Soit pour accomplir ou s'abstenir d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat ;

2° Soit pour abuser de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable. »

23 Article 433-1 du code penal : « *Est puni de dix ans d'emprisonnement et de 150 000 euros d'amende le fait, par quiconque, de proposer, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques à une personne dépositaire de l'autorité publique, chargée d'une mission de service public ou investie d'un mandat électif public, pour elle-même ou pour autrui, afin :*

1° Soit qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat, ou facilité par sa fonction, sa mission ou son mandat ;

2° Soit qu'elle abuse de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable.

Est puni des mêmes peines le fait de céder à une personne dépositaire de l'autorité publique, chargée d'une mission de service public ou investie d'un mandat électif public qui sollicite, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour autrui, afin d'accomplir ou de s'abstenir d'accomplir un acte visé au 1° ou d'abuser de son influence dans les conditions visées au 2° »

un particulier qui demande à la personne influente d'en abuser et de trafic passif lorsque l'initiative est prise par la personne influente.

51. Les sanctions encourues, très lourdes, font de la corruption et du trafic d'influence l'arsenal répressif le plus grave en matière de commande publique.

52. Par ailleurs, il existe de nombreux autres délits, notamment financiers de droit commun, dans le champ d'application desquels peuvent parfois entrer les atteintes au droit de la concurrence dans les marchés publics : la prise illégale d'intérêt (article 432-12 du code pénal), l'abus de confiance (article 314-1 du code pénal), l'escroquerie (article 313-1 du code pénal), l'abus de biens sociaux (articles L. 242-6 et L. 242-30 du code de commerce), le faux en écriture publique (article 441-1 du code pénal) ou la subornation de témoins (article 434-15 du code pénal)…

53. Si une entente complexe peut parfois impliquer la combinaison de plusieurs infractions pénales, les violations du droit de la concurrence dans les marchés publics ne recoupent pas systématiquement les éléments constitutifs de ces délits pénaux, si bien que l'application du droit pénal ne peut se faire qu'au cas par cas.

2. L'articulation de la lutte contre la collusion et contre la corruption

2.1 L'affaire des lycées d'Île de France

54. Dans une décision de 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France[24], le Conseil a sanctionné une entente générale de répartition des marchés entre les grands groupe du BTP et leurs filiales, concernant le programme de rénovation des lycées d'Île de France, portant sur 88 marchés d'entreprises de travaux publics passés de 1989 à 1997 en sept vagues successives pour un montant total de 10 milliards de francs.

55. Cette entente générale a été conclue dès le lancement du programme de construction par le biais de réunions de répartition, de contacts directs entre les entreprises ou d'échanges d'informations ; elle a fonctionné pendant 7 ans sous l'égide de Patrimoine Ingénierie, assistant du maître d'ouvrage, selon un mode opératoire toujours identique : chaque entreprise, présélectionnée, faisait en sorte, soit d'obtenir l'attribution du marché en indiquant à ses « concurrents » les marchés sur lesquels ses choix s'étaient portés et en leur communiquant ses prix, soit d'y renoncer en déposant une offre de prix délibérément majorée (offre de couverture). La bonne exécution de ce partage général des marchés était garantie par Patrimoine Ingénierie, qui, en amont, donnait des informations aux entreprises sur les opérations à venir, et, en aval, veillait à ce que l'entreprise pressentie obtienne bien le marché.

56. Le Conseil a énoncé aussi, à l'occasion de cette décision, que n'exonère pas les entreprises de leur responsabilité le fait de démontrer que la pratique n'aurait pas eu d'effets anticoncurrentiels (comme une hausse de prix), puisque qu'il suffit pour prononcer une sanction de démontrer que l'accord avait un objet anticoncurrentiel, ni que le maître de l'ouvrage était à l'origine de l'entente et a participé activement à sa mise en œuvre, puisque la responsabilité de l'incitateur et du meneur n'exclut pas celle des suiveurs, sauf à démontrer une contrainte irrésistible.

[24] Décision 07-D-15 du 9 mai 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France- Cour d'appel, 3 juillet 2008, Eiffage- Cour de cassation, 13 octobre 2009, société Spie.

57. Soulignant l'extrême gravité du comportement des entreprises et le dommage particulièrement grave causé à l'économie, le Conseil a prononcé des sanctions exemplaires, à hauteur de 5 % du chiffre d'affaires des intéressées - soit le maximum autorisé par la législation alors applicable.

58. Parallèlement à la procédure suivie devant le Conseil de la concurrence, cette affaire a donné lieu à des poursuites et à des condamnations pénales; elle a montré, dans une ampleur exceptionnelle, comment peuvent s'imbriquer les pratiques de collusion, de favoritisme et de corruption, le tout ayant contribué à la mise en place d'un système de financement de partis politiques.

59. Il est ainsi apparu que l'exécutif régional et ses représentants avaient favorisé l'entente entre les filiales des grands groupes de travaux publics en vue d'une répartition « équitable » entre elles des marchés des lycées d'Île de France, et avaient exigé en contrepartie des entreprises qu'elles financent, par des rétrocessions de prix, les partis politiques représentés à la Région et dont les membres siégeaient notamment à la commission d'appels d'offres.

60. Ce dispositif frauduleux a ainsi fonctionné au prix de violations des règles du code des marchés publiques, des règles de concurrence et de la législation pénale.

61. Il a pu opérer pendant plusieurs années notamment par l'intervention du bureau d'études Patrimoine Ingénierie (cette société étant elle même attributaire, par des procédés relevant du délit de favoritisme, de 170 marchés d'assistance à maîtrise d'ouvrage sur les 214 conclus par le conseil régional), dont la mission très étendue (analyse des dossiers d'appels d'offres établis par le maître d'œuvre et des candidatures, mise au point des marchés et organisation de leur exécution…) traduisait « *la volonté du (conseil régional) d'(en) faire son assistant permanent et de lui déléguer une part importante de ses prérogatives pour en faire (...) le pivot du dispositif frauduleux.* »[25]

62. Sous une apparente régularité formelle, les juridictions pénales ont en outre constaté un recours systématique, contraire aux règles relatives aux marchés publics, à la procédure particulière du marché d'entreprise de travaux publics, qui permet des appels d'offres restreints, ainsi que des anomalies du fonctionnement de la commission des appels d'offres au sein de laquelle ont été constatées des pratiques de corruption qui ont contribué à l'ensemble du dispositif.

63. Les entreprises bénéficiaires des marchés publics se sont concertées et ont obtenu, du cabinet de l'exécutif régional d'Île de France et du bureau d'études précité, des informations privilégiées sur les estimations prévisionnelles de chaque opération, les noms et les prix des autres candidats ou groupements retenus lors de la sélection, ce qui a permis un alignement des offres, et ce dans le cadre d'une règle de répartition plus large entre les grands groupes du secteur imposée par l'exécutif de la région lui même. Le délit de favoritisme visait donc à garantir la mise en œuvre de l'entente entre les entreprises affiliées aux grands groupes du BTP en vue de se répartir la commande publique.

64. La Cour d'appel a ainsi jugé que les partis politiques ont imposé aux entreprises, comme condition de leur accès à la commande publique, l'engagement de leur rétrocéder un pourcentage du prix des marchés obtenus.

65. Elle a conclu également que « l'entente organisée entre les entreprises, avec l'accord du maître de l'ouvrage, renforçait le pouvoir d'influence des membres de l'exécutif régional et des partis politiques sur les entreprises qui se sentaient « redevables » des contributions financières qui leur étaient réclamées », caractérisant le pacte de volonté constituant le délit de corruption et de trafic d'influence.

[25] Arrêt Cour d'appel de Paris 27 février 2007.

66. Les cadres et dirigeants de ces entreprises ont été condamnés des chefs d'abus de confiance ou d'abus de biens sociaux, de corruption et d'ententes illicites pour fausser ou restreindre le jeu de la concurrence , les fonctionnaires territoriaux et le délégataire du conseil régional pour favoritisme et atteinte à la liberté et à l'égalité d'accès dans les marchés publics, enfin, les trésoriers, collecteurs de fonds et élus des partis politiques pour complicité et recel de corruption et de trafic d'influence.

67. On peut noter que la Cour de cassation a notamment précisé, à l'occasion de l'examen de cette affaire, que le recel de corruption n'exige pas que le receleur ait tiré un profit personnel des choses recelées, et a justifié la décision de condamnation d'un dirigeant d'une entreprise de travaux public en relevant qu'une offre de couverture simulant une proposition concurrente pour faire apparaître une autre entreprise comme mieux-disante est bien de nature à entraver le libre jeu de la concurrence et susceptible de provoquer une hausse artificielle des prix.[26]

2.2 L'affaire des enrobés bitumeux du département de Seine-Maritime

68. L'affaire des enrobés bitumeux du département de Seine-Maritime est emblématique d'une situation de collusion et de corruption dans les marchés publics, tant par la durée des pratiques en cause, près de dix années, que par le montant du surcoût pour la collectivité qui s'est élevé, selon une hypothèse basse, à plus de 24,8 millions d'euros de 1992 à 1998 (soit un peu plus de 10 % du montant du marché).

69. A la fin des années 1980, le Conseil général de Seine-Maritime a décidé de lancer un vaste programme de rénovation de son réseau routier portant sur 2 500 km de routes. Le marché nécessitait l'épandage de 200 000 à 350 000 tonnes d'enrobés pour un budget annuel de 23 à 38 millions d'euros.

70. Le 14 mars 1994, grâce à des informations communiquées par une entreprise plaignante, le ministre de l'Économie demandait à la Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) une enquête sur la situation des travaux routiers, notamment la fourniture d'enrobés bitumineux, dans le département de Seine-Maritime.

71. Sur autorisation des présidents des Tribunaux de grande instance (TGI) de Rouen et Dieppe, la DGCCRF est intervenue dans les entreprises avec des pouvoirs de perquisition ; elle a procédé à des saisies de documents et des auditions de responsables des sociétés.

72. Un rapport d'enquête relatant le déroulement de la procédure et présentant les éléments probants recueillis a ensuite été rédigé.

73. Saisi du dossier, le Conseil de la concurrence a condamné, le 15 décembre 2005, plusieurs sociétés de travaux publics, filiales pour la plupart de grands groupes. Le Conseil a ainsi sanctionné ces entreprises qui s'étaient regroupées pour constituer des centrales de fabrication d'enrobés bitumineux et répondre aux appels d'offres pour infractions à la réglementation sur les actions concertées, ententes ou coalitions lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, pour un montant total de 33,66 millions d'euros.

74. Cette condamnation a été confirmée en appel et le recours en cassation a été rejeté.

75. Parallèlement, une action a été entreprise afin rechercher d'éventuelles responsabilités pénales de la part des personnes physiques ayant pris une part personnelle frauduleuse et déterminante dans l'organisation de cette entente.

[26] Cass. Crim, arrêt du 20 février 2008.

2.3 Le marché des enrobés en Seine-Maritime

76. Pour la fabrication des enrobés, les professionnels utilisent deux types de centrale. Dans les deux cas, la création de ces centrales qui peuvent engendrer des répercussions sur l'environnement requiert une autorisation préfectorale.

- La *centrale mobile*, utilisée à flux continu, est adaptée à un chantier ponctuel qui monopolise sa production et qui doit donc être suffisamment important pour rentabiliser son installation

- Pour un investissement compris entre un million et demi et quatre millions et demi d'euros, l'utilisation d'une *centrale fixe* autorise le stockage d'enrobés de qualités différentes, l'approvisionnement de clients multiples, pour des chantiers mettant en œuvre des tonnages moindres que la centrale mobile. Ce type de centrale était adapté aux demandes du département de Seine-Maritime, lequel recourait, pour la mise en œuvre des enrobés, à des marchés fractionnés à bons de commande pluriannuels, regroupant des commandes d'importance variée et géographiquement dispersées.

77. Dans son jugement du 11 septembre 2008, le tribunal de Rouen note par ailleurs que les coûts de fabrication et de transport des enrobés représentent respectivement 80 % et 10 % du montant des travaux, ce qui permet aux entreprises de travaux publics actionnaires de centrales où elles peuvent s'approvisionner à un tarif privilégié, de jouir d'un « avantage non négligeable ».

2.4 Le comportement collusif des entreprises d'enrobés bitumeux

78. Dans la décennie 1990, ces entreprises de travaux publics s'étaient entendues sur une clé de répartition des tonnages d'enrobés destinés aux routes de Seine-Maritime, pour l'exécution de l'ensemble des marchés. Elles échangeaient des informations sur les tonnages mis en œuvre de façon à s'assurer que chacune respecte son quota et rétablir tout déséquilibre, le cas échéant en recourant à la sous-traitance.

79. Les membres de l'entente se rencontraient régulièrement lors des appels d'offres du département afin de déterminer les groupements attributaires de chaque lot, leurs concurrents se contentant de faire des offres de couverture ; lors de la publication des programmes de travaux en début d'année afin de se répartir les chantiers en fonction des tonnages auxquels chacun pouvait prétendre.

80. Elles concouraient en groupements dépourvus de justification économique ou financière. Ces groupements faussaient les prix, lesquels n'étaient plus fixés par le libre jeu du marché dès lors que les offres de couverture trompaient nécessairement le maître d'ouvrage sur la réalité et l'étendue de la concurrence sur le marché des enrobés.

81. Elles allaient même jusqu'à intriguer contre les concurrents susceptibles de perturber l'entente, constituant, par exemple, des pseudo-associations de défense de l'environnement pour empêcher la construction d'une centrale d'enrobés rivale.

82. Ces pratiques ont perduré grâce au soutien de fonctionnaires qui par leurs actions ont pérennisé le système en place.

83. Deux fonctionnaires en poste à la direction départementale des infrastructures avaient constaté que les mêmes lots étaient attribués aux mêmes groupements et que les prix étaient reconduits d'un appel d'offres à l'autre.

84. Ils en avaient conclu qu'une entente existait.

85. Or, ils ne se sont pas opposés aux groupements et n'ont pas alerté les élus, auprès desquels ils avaient pourtant un poids prépondérant du fait de leurs connaissances techniques. Ils sont même allés jusqu'à pérenniser l'entente par leurs actions : en premier lieu, en exigeant une caution couvrant 100 % du marché ce qui défavorisait les petites entreprises susceptibles de venir concurrencer les majors déjà en place et en second lieu, en insérant une clause exigeant des candidats la possession d'une centrale opérationnelle à la date de remise des offres. Compte tenu des délais très courts entre la publication et la remise des offres, cette clause, à l'intérêt restreint, rendait impossible son respect pour tout candidat ne disposant pas d'une centrale fixe dans le département.

86. Ces actions ont ainsi favorisé les sociétés attributaires des marchés précédents, déjà en possession de centrales d'enrobés. Il y avait donc une barrière à l'entrée sur le marché d'ordre contractuel, insérée dans le cahier des charges des appels d'offres.

87. Des fonctionnaires ont bénéficié d'avantages au préjudice d'entreprises de travaux publics.

88. Ces deux fonctionnaires ont bénéficié, de la réalisation de travaux de recouvrement d'enrobés bitumeux à titre gratuit dans leur propriété. Ils se sont vus également offrir des voyages d'agrément pour eux-mêmes et leur famille, d'un prêt gratuit de véhicule et le financement d'heures de vol nécessaires au maintien d'une qualification.

2.5 La réparation des préjudices

89. Le Conseil de la concurrence a considéré que le dommage à l'économie résultait de la durée importante des pratiques et de la majoration des prix, hors concurrence, pendant cette période. Selon une hypothèse basse, l'acheteur public aurait été victime, de 1992 à 1998, d'un surcoût annuel de l'ordre de trois millions et demi d'euros, sur la seule année 1998 un surcoût de 16,45 % a été estimé, soit 4,95 millions d'euros.

90. Le Conseil de la concurrence n'a pas la possibilité d'indemniser les victimes de leur préjudice. Celles-ci doivent donc obtenir réparation devant une juridiction de l'ordre judiciaire.

91. L'acheteur public s'est donc constitué partie civile devant le tribunal de grande instance, à l'encontre des personnes physiques responsables des entreprises et des deux fonctionnaires de son service achat. Onze personnes physiques et sept sociétés ont ainsi été condamnées solidairement à réparer le préjudice matériel pour un montant de 4,95 millions d'euros.

92. Au titre du préjudice moral, le tribunal a accordé à l'acheteur public un euro symbolique que devront verser solidairement les deux fonctionnaires territoriaux. .

2.6 La condamnation pénale

93. Les personnes physiques ayant pris une part personnelle frauduleuse et déterminante dans l'organisation de l'entente ont été condamnées à des peines allant jusqu'à 18 mois de prison avec sursis et 40 000 euros d'amende soit au total 144 mois de prison avec sursis et 269 000 euros d'amendes. Ce système de condamnation pénale renforce le dispositif de sanction des pratiques anticoncurrentielles en France.

94. Cette pratique d'entente entre entreprises dans le cadre d'un marché public a perduré pendant des années et ce, grâce à l'appui de fonctionnaires en place qui bénéficiaient des connaissances techniques et d'une position privilégiée afin de conseiller les élus dans le choix des candidats.

95. Cet exemple est révélateur de la relation étroite qui peut exister entre la pratique anticoncurrentielle des entreprises et le développement de pratiques pénalement sanctionnables qui sont assimilables à de la corruption. La poursuite d'une pratique anticoncurrentielle sur plusieurs années est à l'évidence facilitée par la présence de complices au sein du service acheteur.

96. Ce constat peut guider les services de contrôle dans un programme de détection ciblé de pratiques anticoncurrentielles potentielles.

97. Il est toujours difficile de détecter l'existence d'une entente sans information particulière permettant de cibler un service d'achat spécifique afin d'analyser avec attention les résultats aux appels d'offres. En revanche, il peut être plus aisé de rechercher l'existence des « compensations offertes » par les entreprises parties à l'entente à leurs complices.

98. Dans le cas étudié, ces compensations se matérialisaient sous la forme de services rendus par des prestataires extérieurs qui facturaient leurs interventions. Dès lors, une recherche systématique à partir des doubles de factures permet de cibler chez ces prestataires les entreprises clientes habituellement présentes dans la commande publique. Selon les prestations, les bénéficiaires individuels sont identifiés pour des questions tenant à la sécurité ; il en est ainsi des prestations de voyage ou de la location de véhicules. Il suffit à ce stade de rechercher dans ces listes de bénéficiaires la présence éventuelle de fonctionnaires des services achats, voire d'élus.

99. La dernière étape de ce ciblage particulier consiste à identifier les services d'achat auxquels ces bénéficiaires de prestations appartiennent, ce qui permet de rechercher l'existence d'indices de pratiques anticoncurrentielles dans les résultats d'appels d'offres et ainsi obtenir des autorisations de perquisition aux fins d'établir les preuves des pratiques suspectées.

100. A ce jour, cette méthode a été mise en œuvre à titre expérimental. Les premiers résultats n'ont pas été concluants. Toutefois, ce type de recherche doit être poursuivi ; la détection de pratiques anticoncurrentielles à partir d'un ciblage spécifique n'est jamais couronnée de succès sans persévérance.

101. Cette affaire des enrobés bitumeux du département de Seine-Maritime aurait pu être évitée si l'acheteur public avait pris le soin de changer régulièrement les fonctionnaires en place sur ces postes sensibles**.** En effet, le maintien d'agents à ces postes pendant des années suscite une proximité avec les entreprises qui peut faciliter des pratiques de corruption passive de ces derniers.

3. L'interaction entre la procédure pénale et la procédure administrative

3.1 La communication de pièces pénales à l'Autorité de la concurrence et le fondement des griefs sur des pièces pénales

102. Aux termes de l'article L.463-5 du code de commerce : « Les juridictions d'instruction et de jugement peuvent communiquer à l'Autorité de la concurrence, sur sa demande, les procès-verbaux, rapports d'enquête ou autres pièces de l'instruction pénale ayant un lien direct avec des faits dont l'Autorité est saisie ».

103. Le Conseil de la Concurrence a appliqué cette procédure à plusieurs reprises, sous le contrôle de la Cour d'appel de Paris et de la Cour de Cassation, qui ont interprété avec souplesse les termes de l'article L.463-5, lui conférant ainsi une véritable efficacité.

104. Trois affaires relatives aux travaux publics routiers en Seine-Maritime, aux marchés publics d'Île-de-France et aux lycées d'Île de France, qui portent sur des ententes en matière de marchés publics, sont à cet égard particulièrement représentatives de ce que le caractère coercitif de la procédure pénale (par les

perquisitions, écoutes, garde à vue…) peut être mis au service de l'Autorité de la concurrence dans les cas les plus graves où sont identifiées les personnes physiques à l'origine des cartels.

105. Par une décision du 15 décembre 2005, le Conseil de la concurrence a sanctionné, à hauteur de 33, 6 millions d'euros, 6 entreprises de BTP spécialisées dans la fourniture d'enrobés bitumineux pour s'être livrées à une entente complexe et continue, lors de la passation de divers marchés de *travaux publics routiers en Seine-Maritime,* de 1992 à 1998[27].

106. Ces entreprises s'étaient entendues sur une clé de répartition des tonnages d'enrobés bitumineux pour l'exécution de l'ensemble des marchés de l'État et du Conseil général et avaient échangé régulièrement des informations relatives aux prix, antérieurement au dépôt des offres. Les principaux indices sur lesquels s'est fondé le Conseil de la concurrence résultaient notamment de la procédure pénale parallèlement ouverte.

107. La Cour d'appel et la Cour de cassation ont rejeté respectivement les recours en annulation et les pourvois contre cette décision.[28]

108. S'agissant de l'opposabilité des pièces issues de la procédure pénale et de la faculté, pour le Conseil de la concurrence, de fonder son accusation sur des pièces pénales, la Cour de cassation a confirmé que les pièces issues du dossier pénal pouvaient être valablement opposées aux parties, sans que le principe d'égalité des armes ne soit compromis. Alors que les entreprises faisaient valoir que n'étant pas toutes concernées par la procédure pénale et n'ayant donc pas toutes accès au dossier pénal, elles étaient dans l'incapacité de s'assurer que des pièces éventuellement à décharge n'avaient pas été écartées par le rapporteur, la Cour a estimé que les droits des parties avaient été suffisamment protégés par le fait que les griefs étaient fondés sur des pièces pénales dont il avait été dressé inventaire, qui avaient toutes été citées, versées au dossier et soumises à la consultation et à la contradiction des parties.

109. Il a été admis, en outre, que le rapporteur ait pu se rendre dans le cabinet du juge d'instruction, et, éventuellement consulter l'entier dossier pénal sous le contrôle du juge, sans violer ni le secret de l'instruction, ni les droits de la défense, dans la mesure où tous les éléments retenus à charge figuraient au dossier.

110. Dans l'affaire *d'entente dans les marchés publics d'Île-de-France*[29] le Conseil de la concurrence s'était autosaisi dans le prolongement d'une procédure pénale, dirigée contre plusieurs personnes physiques, ouverte en 1994, et qui s'est terminée par un non-lieu en novembre 2002 en raison de la prescription de l'action publique. C'est sur la base des pièces et documents qui lui ont été transmis par le juge d'instruction que le Conseil a fondé sa décision de sanction.

111. La Cour de cassation précise que le lien établi entre la procédure pénale et la procédure administrative se limite à la reconnaissance d'un effet interruptif de prescription des actes de l'une à la

27 Décision 05-D-69 du 15 décembre 2005 relative à des pratiques anticoncurrentielles relevées dans le secteur des travaux routiers en Seine-Maritime.

28 Arrêt Cour d'appel de Paris du 30 janvier 2007 Le Foll TP, arrêt Cass. Com, 15 janvier 2008, Colas Île de France (D 05-D-69).

29 Décision 06-D-07 du 21 mars2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France, arrêt C. App de Paris, arrêt du 24 juin 2008 (société France Travaux), C. Cass. com, arrêt du 13 octobre 2009.

prescription de l'autre mais que ces deux procédures, visant des personnes distinctes, physiques d'un côté, morale de l'autre et poursuivant des fins différentes demeurent clairement distinctes. Dès lors, n'est d'aucun effet sur la poursuite de la procédure administrative et donc sur le cours du délai de prescription de l'action administrative le fait que la procédure pénale se soit achevée par une ordonnance de non-lieu, rendue le 26 novembre 2002 par le magistrat instructeur constatant la prescription de l'action publique par suite de l'annulation, par la Cour d'appel de Versailles, de deux actes de la procédure d'instruction.

112. C'est également sur des pièces tirées de la procédure pénale que le Conseil a fondé sa décision déjà évoquée plus haut sur les *lycées d'Île de France.*[30]

113. Dans l'affaire des marchés publics d'Île-de-France et dans celle des lycées d'Île de France, les pourvois devant la Cour de cassation ont visé à remettre en cause l'article L. 463-5 au regard de l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, au motif que cette procédure violerait le principe d'égalité des armes.

114. Dans ses deux arrêts la Cour de cassation a écarté cette analyse et validé pour l'essentiel celle de la Cour d'appel et du Conseil de la concurrence. En premier lieu, elle a jugé que « *le fait que la faculté de demander à la juridiction d'instruction, qui seule peut en décider, communication des procès-verbaux ou rapports d'enquête ayant un lien direct avec des faits dont le Conseil est saisi, n'appartient, aux termes de l'article L. 463-5 du code de commerce, qu'au Conseil, qui met ainsi en œuvre la demande du rapporteur investi des pouvoirs d'enquête que lui confèrent l'article L. 450-1 du même code, n'est pas, en lui-même, contraire aux principes d'égalité des armes et d'impartialité résultant de l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* ».

115. En second lieu, elle a jugé « les entreprises mises en cause disposant, après la notification des griefs, de la possibilité de débattre contradictoirement, devant le Conseil puis devant la cour d'appel de Paris, tant des conditions de la communication d'éléments de l'instruction pénale, pièces dont la régularité peut être contestée par les personnes concernées, que du contenu de l'intégralité des pièces issues du dossier pénal dont le juge d'instruction a autorisé la communication au rapporteur, et de présenter toutes pièces qu'elles estiment utiles, c'est à juste titre que l'arrêt retient que les dispositions de l'article L. 463-5 du code de commerce ne sont pas contraires à l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales »

116. En ce qui concerne les modalités de la communication des pièces pénales, la Cour a rappelé qu'aucune forme particulière n'est imposée par le texte.

3.2 L'influence de l'Autorité de la concurrence sur la procédure pénale

3.2.1 Les avis de l'Autorité

117. Le Conseil, devenu l'Autorité, donne son avis aux juridictions pénales sur les pratiques dont celles-ci sont saisies, en vertu de l'article L. 462-3 du code de commerce. Depuis 1986, le Conseil a ainsi traité quarante-six demandes d'avis, toutes juridictions confondues (civiles et pénales).

118. Le cœur de l'infraction pénale étant, comme on l'a vu plus haut, constitué par des pratiques d'entente et d'abus de position dominante définies par le code de commerce, cette « passerelle » est bienvenue, même si l'avis de l'Autorité ne lie pas la juridiction, qui, en pratique cependant en tient compte.

[30] Décision 07-D-15 du 9 mai 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France- Cour d'appel, 3 juillet 2008, Eiffage- Cour de cassation, 13 octobre 2009, société Spie.

3.2.2 L'information du juge pénal par l'Autorité de la concurrence : les transmissions au parquet

119. Le deuxième alinéa de l'article L.462-6 du code de commerce dispose que lorsque les faits lui paraissent de nature à justifier l'application de l'article L.420-6, l'Autorité adresse le dossier au procureur de la République, cette transmission interrompant la prescription de l'action publique.

120. Le Conseil a fait une application modérée de cette disposition, dix dossiers ayant été communiqués au parquet depuis 1994, avec cependant, une certaine intensification depuis 2000. La plupart de ces affaires sont relatives à des ententes dans les marchés publics ou à des cartels sur les prix.

121. Ainsi dans une décision du 3 décembre 2008, le Conseil a sanctionné des sociétés pour avoir déposé des offres distinctes lors de la passation de plusieurs marchés publics d'entretien en menuiserie et serrurerie, alors que ces sociétés faisaient partie du même groupe et élaboraient leurs offres de manière centralisée. Ayant relevé que le président des deux sociétés en cause, par sa longue fréquentation des marchés publics, était parfaitement informé des règles de concurrence applicables, qu'il avait donc sciemment méconnues, le Conseil a décidé que ces faits étaient susceptibles de recevoir une qualification pénale en vertu des dispositions de l'article L. 420-6 du code de commerce et a transmis l'ensemble du dossier au procureur de la République près le tribunal de grande instance de Créteil.[31]

122. Les suites données à ces transmissions dépendent du parquet concerné. Néanmoins la transmission d'un dossier au parquet fournit à l'Autorité un outil de dissuasion fort par la publicité qui en est donnée, et lui permet de fortement stigmatiser les pratiques les plus graves et de faire connaître son analyse, quand bien même le parquet dispose de l'opportunité des poursuites et que le juge n'est pas lié par les décisions de l'Autorité.

123. Le législateur a affiché ces dernières années sa volonté de renforcer l'efficacité de cette procédure, et plus généralement celle de la répression pénale en l'articulant mieux avec la procédure administrative ; il a ainsi prévu que les actes interruptifs de prescription devant l'Autorité sont également interruptifs de la prescription de l'action publique pour la poursuite du délit de l'article L.420-6 du code de commerce[32] puis institué une règle réciproque à l'article L. 462-7.[33]

124. Ce faisant, le législateur mettait un terme à ce que la doctrine et les praticiens présentaient comme un obstacle à la mise en œuvre de l'article L. 420-6 et à la répression pénale, dans l'hypothèse par exemple où les pratiques à la base du délit pénal étaient déjà prescrites au moment de la transmission du dossier au Parquet.

125. Par ailleurs les règles générales du code de procédure pénale relatives aux communications de pièces s'appliquent aux pièces détenues par l'Autorité de la concurrence : le procureur de la République, l'officier de police judiciaire ou le juge d'instruction peut requérir la remise de tout document susceptible d'intéresser l'enquête ou l'instruction.[34]

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31 Décision 08-D-29 du 3 décembre 2008 relative à des pratiques relevées dans le secteur des marchés publics d'entretien de menuiserie métallerie serrurerie.

32 Loi n°2001-420 du 15 mai 2001, alinéa 3 de l'article L. 420-6.

33 Ordonnance n°2008-1161 du 13 novembre 2008.

34 Articles 60-1 et 99-3 du code de procédure pénale.

3.2.3 L'articulation des actions pénale et administrative en cas de programme de clémence

126. Si l'existence de sanctions pénales pour les personnes physiques peut constituer un outil majeur de dissuasion et de répression des infractions les plus graves, celles-ci doivent cependant être conciliées et articulées avec l'action des autorités qui, comme l'Autorité de la concurrence, imposent des sanctions administratives aux entreprises.

127. Or, l'introduction d'un programme de clémence n'a pas conduit immédiatement à une évolution de l'articulation entre les deux catégories d'actions. Ainsi, les exonérations de sanctions que l'Autorité de la concurrence peut accorder aux entreprises au titre du programme de clémence ne garantissent pas aux personnes physiques une immunité de sanction devant le juge pénal, ce qui peut dissuader le recours à la procédure de clémence.

128. Certes, il convient de relativiser les conséquences de cette situation puisque de fait aucun cas de poursuite pénale après sollicitation de la clémence devant le Conseil n'a été signalé. En outre la pratique du Conseil, puis de l'Autorité, a été de ne pas transmettre au procureur de la République les dossiers dans lesquels le ou les bénéficiaires de la clémence paraissent susceptibles de faire l'objet de sanctions pénales.

129. Pour autant, cette situation n'étant pas satisfaisante, un projet de loi est en cours de rédaction, visant à permettre au responsable de l'entreprise ayant apporté des éléments déterminants permettant à son entreprise de bénéficier d'un programme de clémence de bénéficier à son tour devant le juge pénal d'une disposition le dispensant de peine ou réduisant de moitié la peine encourue.

130. Les marchés publics restent un secteur à risques élevés tant au regard des règles de la concurrence que des atteintes à la probité.

3.3 Le rôle et l'action du Service Central de Prévention de la Corruption (SCPC)

131. Le *secteur des marchés publics*, et plus généralement de la *commande publique*, est, de manière constante et quasi universelle, le secteur de prédilection de la corruption et des pratiques anticoncurrentielles.

132. Selon certaines estimations, dans le secteur du Bâtiment-Travaux publics, les sommes détournées représenteraient de l'ordre de 3 à 5 % des marchés publics en Europe occidentale.

133. De façon paradoxale, l'existence de procédures et de règlementations particulièrement précises et de contrôles administratifs parfois tatillons, ne permettent pas toujours de garantir la transparence, la concurrence et l'égalité de traitement des candidats…

134. Bien plus, les instigateurs des montages frauduleux disposent souvent d'une *technicité suffisante* et des conseils pour donner à leurs opérations une apparente conformité aux textes et aux procédures.

135. Dans le même temps, les facteurs de risques n'ont pas disparu et ont même tendance à s'accroître.

136. La très grande complexité de la réglementation et l'instabilité qui la caractérise depuis quelques années créent des *risques supplémentaires* d'irrégularités involontaires, voire de déviances délibérées.

137. Au-delà des aspects juridiques, *la commande publique et son environnement* connaissent eux-mêmes de profondes mutations et se trouvent de plus en plus souvent en décalage avec les pratiques administratives traditionnelles.

138. D'une part, on constate que l'achat public s'est à la fois étendu et complexifié : le mouvement de *libéralisation* de l'économie conjugué à l'extension des compétences des collectivités territoriales a fait basculer dans le champ contractuel et dans la sphère privée des domaines qui auparavant étaient régis selon un mode régalien et centralisé : c'est le cas, par exemple, des secteurs de la téléphonie, du transport ferroviaire, de la fourniture de gaz et d'électricité...des secteurs nouveaux sont entrés dans la sphère d'Internet par exemple.

139. Parallèlement, des *mutations* ont affecté son environnement économique, social et politique. Au plan national, les évolutions les plus marquantes concernent la *modernisation* de la dépense publique et l'allègement des contrôles de l'État. L'ouverture des frontières et le développement des échanges internationaux fait également apparaître de nouveaux risques que le cadre législatif et réglementaire national peine souvent à prendre en compte.

140. Enfin, les évolutions technologiques, tel que Internet, créent de nouvelles opportunités mais suscitent également et à juste titre de nouvelles « zones grises »[35].

141. En même temps qu'elle se complexifie et se développe, l'activité d'achat public tend elle-même à devenir une activité à risques.

142. Avant même que le principe de *responsabilisation* des acheteurs n'ait été affirmé par les réformateurs de 2006, une tendance lourde de ces dernières années a été celle de l'engagement plus fréquent de la responsabilité des acheteurs publics devant les tribunaux judiciaires comme devant les juridictions administratives.

143. La commande publique n'échappe pas au mouvement de « juridiciarisation » qui affecte aujourd'hui l'ensemble des activités de l'État et des collectivités territoriales. Il est frappant de constater qu'elle intervient *de plus en plus tôt* dans la procédure : les concurrents évincés et les citoyens lésés hésitent de moins en moins à demander des comptes aux décideurs soupçonnés d'avoir failli dans leur fonction d'achat. C'est ainsi que le référé précontractuel occupe aujourd'hui une place à part entière dans le contentieux des marchés publics. Le Conseil d'État a lui-même contribué à alimenter ce mouvement en élargissant les voies de recours ouvertes aux requérants[36].

144. Un phénomène récent, apparu dans les années 1990, est aussi celui de la *« pénalisation du droit des marchés publics[37] »* Même si ce phénomène tient beaucoup à la création du délit de favoritisme et doit être relativisé[38], il témoigne d'une tendance à l'aggravation du risque juridique lié aux activités d'acheteur public: selon son plus ou moins grand degré de maladresse, l'élu ou l'agent public intervenu, à un titre ou à un autre, dans la chaîne de l'achat public pourra voir sa responsabilité engagée au plan pénal....Cela explique le sentiment d'incertitude, d'insécurité, d'instabilité, voire de « solitude »[39] qui est aujourd'hui ressenti par de nombreux acheteurs publics, sans parler du risque évident de manipulations...

145. Dans ce contexte, un renforcement des dispositifs destinés à prévenir les dérives susceptibles d'affecter le processus d'achat est souhaitable.

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35 Par exemple, le piratage de données non protégées.

36 Sa jurisprudence la plus récente (CE Assemblée 16 juillet 2007, Société Tropic Travaux Signalisation) ouvre la possibilité aux concurrents évincés de demander l'annulation d'un marché après qu'il ait été conclu**.**

37 Pour reprendre l'intitulé de la thèse de doctorat de Madame Catherine Prébissy Schnall (LGDJ 2001).

38 L'auteure de la thèse précitée recense seulement 60 condamnations pour favoritisme entre 1991 et 2001.

39 Cf. article sur la commande publique dans le Rapport du SCPC pour l'année 2005.

146. La politique répressive semble aujourd'hui avoir atteint ses limites[40] : dans de nombreux pays, la plupart des affaires de corruption sanctionnées par les tribunaux interviennent à l'occasion de la passation de marchés publics.

147. En France, *l'arsenal répressif* est particulièrement étoffé. Il s'applique aux personnes physiques comme aux personnes morales, et permet de sanctionner l'ensemble des atteintes à l'intégrité commises à l'occasion de la passation d'un marché public en France et à l'étranger.

148. Le traitement judiciaire des marchés publics a certes connu, ces dernières années, d'importants développements, et a, dans une certaine mesure, contribué à juguler ces pratiques, notamment à travers le délit de favoritisme.

149. Les dispositifs de prévention déjà existants n'ont qu'une efficacité limitée : cette prévention s'exerce, jusqu'à présent, principalement à travers des *contrôles* qui s'exercent à chacune des étapes de la procédure :

- contrôles internes : contrôle hiérarchique, inspections, commissions spécialisées...
- contrôles externes[41] : contrôle de légalité, du comptable public, juridictionnels...

150. Ces multiples contrôles constituent autant de garde-fous destinés à garantir la régularité du processus d'achat... Ils peuvent, pour peu qu'ils soient correctement effectués, contribuer à mettre à jour certaines fraudes.

151. Mais ils se heurtent aussi, dans leur configuration actuelle, à des *limites* qui peuvent en freiner l'efficacité.

152. La première limite réside dans le fait que ces contrôles, qu'ils soient internes ou externes, sont rarement exercés de manière systématique. Ainsi en est-il du contrôle de légalité exercé par les services préfectoraux : ce contrôle ne s'exerce que sur une faible partie des marchés des collectivités territoriales, et on conçoit aisément qu'il ne puisse pas toujours être effectué dans de bonnes conditions, faute de temps, et bien souvent faute de moyens et parfois de compétences disponibles : *l'effet technicité*, qui se cumule avec *l'effet volume*, ajoute à la difficulté des contrôles.

153. Bien plus, ces contrôles ont, jusqu'à présent, été conçus comme des *contrôles de conformité*, conformité aux textes, aux procédures, aux règles budgétaires...Dans ce dispositif, la faute éventuelle du gestionnaire ne se perçoit que par un acte ou un comportement qui ne correspond pas formellement à la norme. Or, la fraude et la corruption revêtent parfois des formes qu'il est difficile de ramener à la violation précise et immédiate d'une règle et d'un principe, et que rien dans le déroulement du processus d'achat ne permettrait de laisser supposer. Autrement dit, l'activité administrative et le respect des prescriptions qu'elle implique laissent subsister un *jeu*, une marge de liberté que n'hésitent pas à s'approprier les fraudeurs pour peu qu'ils disposent de la technicité et de l'audace nécessaires.

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40 On observe par exemple une quasi stabilisation du nombre des condamnations prononcées pour favoritisme (entre 25 et 50 condamnations par an).

41 On peut citer à ce stade le dispositif de veille concurrentielle dans la commande publique qui consiste à positionner aux côtés des acheteurs publics des agents de la concurrence de la consommation et de la répression des fraudes (au nombre de 150 sur tout le territoire national) ; ce dispositif inédit pour un pays de l'OCDE permet d'agir avec efficacité à la fois au titre de la prévention (conseil à l'acheteur public) et au titre de la sanction (la majeure partie des affaires de favoritisme portées à la connaissance du juge pénal ont été détectées grâce à ce dispositif).

154. Par ailleurs, cette priorité donnée au formalisme a pour effet de réduire le champ de vision des contrôleurs. Elle conduit, au moins dans un premier temps, à négliger certains comportements ou certaines déviances qui pourtant sont de nature à pervertir l'ensemble d'une procédure.

3.4 Les mécanismes de prévention doivent être renforcés

155. La lutte contre les atteintes aux règles de probité et de concurrence, et plus généralement la fraude dans les marchés publics, doit s'inscrire dans une *démarche « proactive »*, c'est-à-dire une démarche qui, à partir d'une *réflexion en amont*, conduit à définir et mettre en œuvre une *organisation* et des *méthodes de travail* destinées à éviter des situations de fraude.

156. Cette démarche comporte trois volets :

- la sensibilisation des acteurs de la commande publique ;
- le développement de mécanismes de détection ;
- l'élaboration de méthodologies d'investigation

3.4.1 La sensibilisation des acteurs de la commande publique :

157. Elle doit avoir pour objectifs de:

- rappeler aux agents le *respect des règles et procédures*, mais aussi les conséquences juridiques qui s'attachent à leur non-respect;
- mettre en place un système de *remontée d'informations* (reporting) vers la hiérarchie et les corps de contrôle;
- d'assurer la promotion des *bonnes pratiques.*

158. Cette sensibilisation peut s'effectuer selon *différentes modalités* :

- actions de formation et/ou de communication ;
- à un stade plus élaboré, à travers un *code de déontologie ou d'éthique* destiné à:
- Afficher la *position du service* face aux conflits d'intérêts, sollicitations des fournisseurs, à la confidentialité de l'information;
- Donner des *normes de comportements* (déclaration des conflits d'intérêts, obligation de mobilité…)*;*
- Indiquer les *mesures applicables* en cas de violation.

3.4.2 Le développement de mécanisme de détection

159. Les méthodes dérivées de *l'audit* et leur application à l'identification des pratiques corruptrices ou anticoncurrentielles sont susceptibles de combler les lacunes des contrôles existants, par une approche renouvelée de la commande publique, qui ne serait plus exclusivement centrée sur le bon déroulement du

processus d'achat, mais sur *l'identification et l'explicitation des anomalies constatées à l'occasion de ce processus.*

160. De façon classique, un audit de fraude ou de corruption comporte quatre phases :

- Un *cadrage précis des objectifs*: attentes, périmètres, outils (cartographie des risques, systèmes informatiques, gestion commerciale et comptabilité…);

- Une *analyse de l'existant*, au moyen de l'analyse documentaire, des entretiens…C'est à ce stade que certains indicateurs de présence des risques de corruption peuvent être identifiés ;

- Une *phase de diagnostic*, qui porte sur l'évaluation des points forts et des points faibles de l'organisation et de son fonctionnement, la répartition des tâches et des responsabilités;

- Une phase de formulation de *recommandation*s: mesures conservatoires, stratégie d'accompagnement, bonnes pratiques… Cette étape peut déboucher sur la constitution de *plaintes au plan pénal*

161. Le SCPC a, dans son rapport 2007, explicité une *proposition de guide méthodologique de l'audit de la corruption dans les marchés publics* destiné aux acheteurs des collectivités publiques.

3.4.3 L'élaboration d'une méthodologie d'investigation

162. Cette méthodologie d'investigation s'inscrit dans le prolongement de la méthodologie de détection développé précédemment.

163. Elle est destinée à aider les décideurs publics à identifier et à établir le chemin de la corruption ou de la fraude dans les marchés publics au sein de leurs collectivités. Elle constitue, comme l'audit, un outil de *contrôle interne* (maires ou contrôleurs des collectivités) ou de contrôle externe (commissaires aux comptes, contrôles externes ou services du ministère des finances). De la même façon, cette investigation peut, lorsqu'une suspicion d'infraction existe, conduire le décideur à utiliser l'article 40 du code de procédure pénale pour saisir l'autorité judiciaire. La phase judiciaire permettra, quant à elle, d'entreprendre des investigations plus approfondies, telles que la saisie des disques durs ou des logiciels (extraction des données fournisseurs, acheteurs…), les auditions, gardes à vue, perquisitions…

164. Le SCPC a, dans son rapport pour 2008, présenté les différentes étapes de cette méthodologie ainsi qu'une analyse informatisée des fraudes dans les marchés publics, outil complémentaire mis à disposition des enquêteurs afin de faciliter leur travail d'analyse des informations et de collecte des preuves de la corruption.

4. Conclusion

165. L'existence des ententes dans les marchés publics rend souvent nécessaire la complicité active des acheteurs, sous forme de corruption. Cependant la répression de l'infraction pénale de corruption et celle de la pratique anticoncurrentielle relèvent d'autorités différentes.

166. L'amélioration de la coordination de la lutte pénale et de la lutte administrative et la sévérité accrue des sanctions au cours des dernières années marquent la prise de conscience de l'imbrication de ces mécanismes et la volonté de dissuader le plus efficacement possible ces comportements.

167. Par ailleurs, comme l'a relevé récemment le Service central de lutte contre la corruption en proposant une méthodologie d'investigation susceptible d'identifier la présence de corruption dans les

marchés publics « *il apparaît souhaitable que les décideurs publics soient eux-mêmes en mesure d'identifier et d'établir le chemin de la corruption ou de la fraude au sein de leurs collectivités, et ce dans des conditions d'efficacité et de sécurité suffisantes pour être en mesure d'en faire le signalement*. »[42]

168. A cet égard, la publication des décisions de sanctions de l'Autorité de la concurrence dans le domaine de la commande publique, leur médiatisation dans la presse spécialisée et l'information des acheteurs publics ne pourra que contribuer à la diffusion auprès de ces derniers d'une culture de concurrence pouvant les inciter à se comporter en tant qu'acteur du marché à part entière.

[42] Rapport 2008 du Service central de lutte contre la corruption « L'investigation dans les marchés publics. »

CONTRIBUTION FROM GABON

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Gabon --

1. Competitiveness as a Corollary of Free Competition

1. The economy in general and consumers in particular have much to gain from healthy competition in the market because, first, it enables enterprises to operate efficiently and, second, it offers consumers a wider selection of better-priced goods.

2. From the economic standpoint, competition is a mechanism that allows price formation in a market merely through the interplay of supply and demand.

3. The rationale behind free competition in Gabon is that freedom of competition is the best way – but not the only way – to ensure economic progress. This is the theory of competition as a means to end, in which competition is simply a tool used to meet a number of objectives: economic progress, but also the protection of consumers and, in particular, wage-earners.

4. However, when competing for larger market shares, enterprises at times adopt uncompetitive behaviour which hinders the free play of competition.

5. Some enterprises use corruption to obtain a competitive advantage, rather than allowing the free play of competition. This involves "offering, giving, accepting or requesting, directly, anything of value with a view to unduly influencing the actions of a party".

6. This leads to collusion, or "arrangements between two or more parties to achieve an undue aim, and notably to unduly influence the actions of another party".

7. There is more than one level of corruption; in the course of daily activities, it is known as minor corruption, while in the establishment, the public sector or decision-making bodies it is treated as major corruption. Systemic corruption involves both minor and major corruption, and constitutes the greatest barrier to efficiency in the field of development.

8. There are substantial differences between the private and the public sector, since private enterprise is generally subject to competition.

2. Indicators of Suspected Corruption in Respect of Competition

2.1 Bid-rigging

9. The purpose of a bidding process is to promote impartiality and ensure the lowest prices, but bid-rigging calls into question the whole process of competitive bidding. It can take several forms:

10. At the pre-award stage: it may involve bid suppression, or bogus tenders, i.e. collusion between bidders so that the same enterprise is often or always successful, while the same competitors continually fail to win contracts.

11. Frequency of open or restricted calls for bids, which are said to have failed and are eventually negotiated.

12. A fall in tendered prices when a bid is submitted by a new or unfamiliar bidder.

13. An abnormally long lead time between the award of a contract to a particular firm and the actual signature of the contract or service order (suspected corruption).

14. Existence of links between the decision-maker (or person in the same department) and the successful bidder (suspected unlawful conflict of interest).

15. Bid rotation: competitors arrange to take turns at winning contracts; the others submit higher bids, then one firm withdraws what would or could have been a successful bid and is subsequently employed as a sub-contractor by the successful bidder.

16. At the post-award stage: substitution of poorer-quality goods/services than those specified in the contract; fraudulent invoices (bogus, duplicate or overcharged) for undelivered goods/services or before payment is authorized; invoicing more than the price bid, and making numerous amendments to the contract.

3. Effects of Corruption on the Economy

	In Microeconomic Terms	**In Macroeconomic Terms**
Private sector	Ineffective and inefficient project-execution Private investment undermined by distorted competition Corporate relocations Poorly distributed talent, propensity of firms to look for activities that produce guaranteed income rather than productive activities	Long-term decline in investment Decline in competitiveness Decline in economic growth Decline in private savings Capital flight Rise in unemployment
Public sector	Government inefficiency Distorted sectoral priorities (Health and Education lose out to sectors such as Defence) Decline in tax revenue	Rise in inequalities Rise in inflation Decline in public revenue Rise in public debt Decline in the balance of payments Rise in poverty Worsening of budget deficits Payments in arrears

4. Avenues to be Explored

4.1 Gabon's Experience

17. There is a vital need, in the new economic environment that the authorities intend to set up, for Gabon to become an "emerging" economy. Some major incentives should be introduced to combat corruption with effective solutions. The legal framework has been in place since the adoption of Act No. 002/2003 of 7 May 2003 introducing a regime to prevent and curb illicit enrichment in the Republic of Gabon, and Act No. 003/2003 of 7 May 2003 establishing the CNLEI (*Commission nationale de lutte contre l'enrichissement illicite)*, an Independent Government Authority (AAI), to "enable it effectively to exercise its functions "free of any influence". Although Act No. 20/2005 of 3 January 2006 reaffirms that an AAI acts on behalf of the State in particularly sensitive fields without reporting to any member of Government, it must be said that much of the work done by the CNLEI since its inception has

been confined to preventative measures, since no dossier has yet reached the judicial phase resulting in legal sanctions that could serve as an example in the fight against corruption.

18. Amongst the definitions set out in this legislation, illicit enrichment is described as follows: "…for any public servant, the act of making or endeavouring to make personal profit or obtain any advantage…. through an illicit practice in respect of expropriation, or of obtaining contracts, concessions or import/export licences".

19. Initiatives to ensure that the CNLEI operates optimally and effectively are under way.

4.2. Other Possible Solutions

20. In addition to political stability, the fight against corruption requires solid and effective public institutions.

21. It is still crucial to raise the awareness of business leaders about the importance of ethics as a decisive key to competitiveness which highlights the reality of their situation and hence the economic performance of their enterprise.

22. Higher moral standards in public life require new, exemplary measures to curb acts of corruption.

23. Collaboration between competition regulators and the judicial authorities is more than vital to build capacity in the fight against corruption. This is because the institutions set up by Governments are often targeted at "any public servant" whereas competition is being distorted by corruption; there is a need for joint initiatives; the competition authorities should institute proceedings against economic operators guilty of corruption and introduce effective disincentives. This would discourage such practices, the ultimate aim being to make competitiveness the sole criterion in the bidding process.

CONTRIBUTION DU GABON

COLLUSION ET CORRUPTION DANS LES MARCHÉS PUBLICS

-- Gabon --

1. La compétitivité, corollaire de libre concurrence

1. L'économie en général et les consommateurs en particulier ont beaucoup à gagner d'une concurrence saine sur le marché ; en effet, d'abord elle permet aux entreprises d'opérer efficacement et ensuite, elle offre aux consommateurs un plus grand choix de produits à des meilleurs prix.

2. Sous son aspect économique, la concurrence apparaît comme un mécanisme permettant, sur un marché déterminé, la formation des prix par le simple jeu de l'offre et de la demande.

3. Le fondement de la libre concurrence au Gabon est de considérer que la liberté de la concurrence est le moyen privilégié d'assurer le progrès économique mais qu'il n'est pas le seul, c'est la théorie de la concurrence - moyen. Elle fait de la concurrence un simple instrument d'intervention au service d'objectifs multiples : progrès économique, protection des consommateurs, et des salariés notamment.

4. Cependant, sn se faisant concurrence en vue d'acquérir des plus grandes parts de marché, les entreprises adoptent parfois des comportements anticoncurrentiels qui entravent le libre jeu de la concurrence et font obstacle au libre jeu de la concurrence.

5. Il arrive que les entreprises utilisent la corruption afin d'obtenir des avantages concurrentiels au lieu de laisser la concurrence se jouer librement. Il s'agit « d'offrir, de donner, d'agréer ou de solliciter, directement, toute chose ayant une valeur dans le but d'influencer indûment les actions d'une partie ».

6. Ceci conduit à des collusions, c'est-à-dire le fait d' « un arrangement entre deux ou plusieurs parties pour atteindre un but indu, notamment influencer indument les actions d'une autre partie ».

7. Il existe différents niveaux de corruption, celle qui intervient dans les différentes activités quotidiennes, c'est la petite corruption, celle qui existe au sein de l'Institution ou dans le secteur public ou au niveau des instances décisionnelles, c'est la grande corruption. La corruption systémique se produit lorsqu'il y a à la fois petite et grande corruption, elle constitue le plus grand obstacle à l'efficacité en matière de développement.

8. Il existe des différences majeures entre les secteurs privés et le secteur public, en effet, l'entreprise privée, elle, est généralement soumise à la concurrence.

2. LES INDICATEURS DE SOUPÇON DE CORRUPTION DANS LA CONCURRENCE

2.1. La manipulation d'appels d'offres

9. Le processus d'appel d'offres vise à promouvoir l'impartialité et à assurer que les prix les plus faibles sont obtenus, la manipulation des offres remet en cause ce procédé de promotion de la concurrence. Elle se manifeste de plusieurs manières :

10. Lors de la phase avant attribution : elle peut consister en une suppression des enchères : les offres factices - accords entre soumissionnaires avec pour conséquence que la même entreprise commerciale gagne souvent/toujours les appels d'offres, les mêmes sociétés concurrentes soumissionnent continuellement en présentant des offres jamais retenues.

11. Fréquence des procédures d'appels d'offres ouverts ou restreints déclarées infructueuses et se concluant par une procédure négociée.

12. Les prix offerts diminuent quand un nouveau ou inhabituel offreur soumet une offre.

13. Allongement anormal des délais entre la désignation du titulaire du contrat et la signature effective du contrat ou de l'ordre de service (soupçon de corruption).

14. Existence de liens entre le décideur (ou personne de son service) avec le titulaire du marché (soupçon de prise illégale d'intérêts).

15. La rotation des offres : les concurrents s'arrangent pour remporter les contrats à tour de rôle, les autres soumettant des offres élevées une société retire son offre, gagnante ou potentiellement gagnante, et est contractée à posteriori avec l'adjudicataire en sous traitance.

16. Au cours de la phase après attribution : substitution des produits ou qualité inferieure des services prévus dans les spécifications contractuelles ; facturation frauduleuse (fausse, dupliquée ou surfacturée) de biens ou services non délivrés ou avant d'être autorisés pour paiement ; facturation plus chère que le prix qui avait été offert, ainsi que de multiples amendements apportés au contrat.

3. Les effets de la corruption sur l'économie

	Sur le plan microéconomique	**Sur le plan macroéconomique**
Secteur privé	Exécution inefficace et inefficiente des projets Nuisance à l'investissement privé à cause de la distorsion introduite dans la concurrence Délocalisation des entreprises Mauvaise répartition des talents, propension des entreprises à rechercher des activités de rentes plutôt que des activités productives	Baisse des investissements à long terme Baisse de la compétitivité Baisse de la croissance économique Baisse de l'épargne privée Fuite des capitaux Hausse du chômage
Secteur public	Inefficacité de l'Administration Fausses priorités sectorielles (les secteurs de la santé et de l'éducation sont relégués au second plan par rapport à des secteurs comme la Défense) Baisse des impôts et taxes prélevés	Accroissement des inégalités Accroissement de l'inflation baisse des recettes publiques hausse de la dette publique détérioration de la balance des paiements augmentation de la pauvreté accroissement des déficits budgétaires apparition des arriérés de paiement

4. Les pistes de réflexion

4.1. L'expérience du Gabon

17. La nécessité est vitale dans le nouveau contexte économique que les autorités entendent mettre en place pour faire du Gabon un pays « émergent ». Des mesures de stimulations très importantes doivent être mises en en œuvre afin de lutter contre la corruption par des solutions efficaces. En effet, bien que le cadre juridique existe depuis par l'adoption de la loi 002/2003 du 7 mai 2003 instituant un régime de prévention et de répression de l'enrichissement illicite en République Gabonaise ainsi que la loi 003/2003 du 7 mai 2003 qui met en place la CNLEI qui est une Autorité Administrative Indépendante (AAI) afin de « lui

permettre d'exercer efficacement ses fonctions à l'abri de toute influence ». Bien que la loi n°20/2005 du 03 janvier 2006 ait réaffirmé qu'une AAI agit au nom de l'État dans des domaines particulièrement sensibles, sans pour autant relever de l'autorité d'un membre du Gouvernement, force est de constater que depuis sa mise en place, l'essentiel des activités de la CNLEI est réservée aux mesures de prévention aucun dossier n'a encore connu un épilogue judiciaire aboutissant sur des sanctions judicaires devant servir d'exemple dans la lutte contre la corruption.

18. Ces textes définissent entre autres, l'enrichissement illicite comme le fait de « …le fait pour tout dépositaire de l'État, de réaliser ou de tenter de réaliser des profits personnels ou d'obtenir tout avantage… au moyen d'une pratique illicite en matière d'expropriation, d'obtention de marché, de concession, ou de permis d'exportation ou d'importation… ».

19. Des actions visant un fonctionnement efficace et optimal de la structure sont entrain d'êtres entreprises.

4.2. Les autres solutions envisageables

20. La lutte contre la corruption a besoin, en plus de stabilité politique, d'institutions publiques solides et efficaces.

21. Il demeure primordial de sensibiliser les chefs d'entreprise quant à l'importance de l'éthique comme facteur déterminant de compétitivité qui fait ressortir la réalité et donc la performance économique de leurs entreprises.

22. La moralisation de la vie publique passe par la mise en place des mesures exemplaires de répression des actes de corruption.

23. La collaboration entre les institutions chargées de réguler la concurrence et les autorités judiciaires est plus que vitale ceci ayant pour but un renforcement des capacités dans la lutte. En effet, les institutions mise en place par les Gouvernements visent souvent « tout dépositaire de l'État », alors que la concurrence se trouve faussée du fait de la corruption ; il est souhaitable que les actions soient conjuguées, les autorités en charge des questions de concurrence doivent poursuivre les opérateurs économiques coupables d'actes de corruption en prenant des mesures efficaces de dissuasion. Ceci aurait pour effet de décourager ceux qui s'adonnent à ces pratiques l'objectif final étant que la compétitivité soit le seul critère d'obtention des marchés.

CONTRIBUTION FROM GERMANY

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Germany --

1. Introduction: The Process of Public Procurement and its Review

1. Public procurement is a factor of key significance in the German economy, as in many developed as well as developing economies around the world. The volume of public procurement (all contracting authorities combined) in Germany amounted to almost 270 billion Euros in 2007, which constituted a share of roughly 11% of GDP[1]. For the entire EU, the volume of public procurement is estimated at 1.500 billion Euros, which is a share of 16% of GDP.[2]

2. A contracting authority in Germany that places a call for tenders has to respect certain basic principles in the process leading to its procurement decision, namely and most importantly, transparency, non-discrimination and competition. The aim is, ultimately, to make sure that the contract is awarded to the economically most advantageous offer so that public funds are used in the most efficient way. Furthermore, procurement law is seen as an instrument for integrating the European market and for controlling the exercise of any market power by the state. The relevant principles are specified, in more detail, in the law governing public procurement.[3] Among these principles are a timely announcement of the procurement procedure and non-discrimination in drafting the tender documents and in assessing the bids.

3. The contracting authority placing a call for tenders is obliged to make sure that its tendering procedure is in accord with these principles, and it is this entity which is responsible for assessing the submitted bids. In this process, the contracting authority is called upon to be aware of and look out for any possible anti-competitive behaviour of bidders and to exclude any such bid.

4. To ensure that the key principles of public procurement law are respected it is of great importance that, at least for procurement projects exceeding certain thresholds[4], procurement procedures and decisions can be reviewed by an independent instance in an effective manner. Companies participating in a public procurement procedure have a right to demand that the contracting authority respects the relevant provisions of public procurement law. Therefore, under certain conditions, companies can request a formal review of the procurement procedure and decision. Such a formal review of a procurement decision, under public procurement law, can only be triggered by a company that can demonstrate its interest in the relevant public contract. This implies, in particular, that a review cannot be initiated *ex*

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1 The total value of public procurement stated is based on statistics of the Federal Office of Statistics (*Bundesamt für Statistik*) and the budget plans of ministries.

2 Cf. http://ec.europa.eu/youreurope/business/profiting-from-eu-market/benefiting-from-public-contracts/index_de.htm and http://ec.europa.eu/internal_market/publicprocurement/index_de.htm.

3 The relevant legal provisions are to be found in Sections 97 – 129 of the Act against Restraints of Competition (ARC) for procurement above certain thresholds. For procurement below those thresholds, budgetary law is applicable (for thresholds cf. below, FN 4).

4 The thresholds differ according to the kind of procurement, ranging from 4,845,000 Euros in construction down to 193.000 Euros for other products and services. The thresholds are regularly adjusted.

officio. The relevant authorities in Germany to conduct the review initiated by a bidding company are the public procurement tribunals of the federal administration, as far as procurement projects of a federal contracting authority are concerned, and the public procurement tribunals of the federal states (*Länder*), for procurement projects of those contracting authorities under the jurisdiction of the federal states or municipalities.

5. The public procurement tribunals are independent in their legal review of procurement decisions. Their decisions can be appealed, typically, to the relevant Higher Regional Court (*Oberlandesgericht*). A request for the review of a procurement decision can be put forward by any company that has an interest in the awarding of the contract and whose rights have been infringed because the rules of procurement have been violated and that has therefore suffered, or will suffer, damages.

2. General Issues of Collusion and Corruption in Public Procurement

6. Collusion among bidders is, arguably, a perennial problem in bidding processes, and particularly so in tenders placed by government entities. Strategies of collusion can be executed in a number of ways, among them cover bids (i.e., submission of a bid that is known and designed, by the colluding firms, to be too high) or non-bidding (i.e., refraining from bidding or withdrawing a submitted bid). These strategies serve to make sure that, among the colluding firms, a specific company is awarded the contract. The underlying rule for allocating contracts among the colluding firms can be, e.g., rotation (i.e., over time each one of the colluding firms is awarded a contract), allocating customers (i.e., a specific customer is "reserved" for a specific cartel member) or allocating geographic markets.

7. Although bidding processes seem to be, on the face of it, particularly competitive procedures, they have certain weaknesses from an anti-collusion point of view. The fact that, at a given point in time and with a given deadline, interested firms are asked to submit bids for products or services according to precise specifications conveys information to market participants that is typically not available in non-bidding procurement situations. Collusion among potential contracting firms is facilitated if certain market characteristics prevail, e.g., a small number of market participants, little or no market entry, repetitive bidding.[5]

8. In the case of governmental tendering procedures, certain additional factors may further heighten the risk of collusion. Among these factors, in Germany, is typically a ban on re-negotiating a bid that has been submitted in a formal bidding procedure (*Nachverhandlungsverbot*).[6] This may have the effect of stabilising a cartel, since the colluding firms – once they have executed their scheme of collusion and their bids have been filed – do not have to be concerned that any subsequent bilateral negotiation of the contracting authority with bidders will endanger the result. In this sense, a legal provision that aims at protecting the bidding companies *vis-à-vis* the contracting authority may have the unintended side effect of facilitating anti-competitive behaviour. Other specifics of public procurement may further facilitate collusion, e.g., systems of co-financing by different public entities which may necessitate an early enquiry about the product, giving firms more lead time for colluding.[7]

9. The system for review of public procurement, as described above, is designed to make sure that the intricate rules for bidding processes are respected and that individual bidders who see their rights infringed can have effective legal recourse. However, detecting bid-rigging is not the primary concern of a specific review procedure. This is not what the system is designed to do. In this context it is important to

5 Cf. OECD, Guidelines for Fighting Bid Rigging in Public Procurement, pp. 2-3.

6 Cf. Section 24 VOB/A.

7 Cf. below.

stress that the review of procurement looks at an individual bidding process and considers whether the rules of public procurement have been adhered to. It is not intended to look at a sequence of tenders, which would be necessary to identify suspicious patterns of bidding that only become apparent over time. Furthermore, only a small percentage of procurement cases are potentially subject to formal review that can be initiated by one of the bidders. The value of most public tenders is below the relevant thresholds. [8]

10. Another problem area in public procurement, besides collusion among bidding firms is corruption, e.g., in the form that a person within the contracting authority calling for tenders engages in improper communication with one (or more) of the bidding companies and transmits crucial information that helps the companies design the winning bid. Collusion and corruption may go hand in hand in bid-rigging scenarios. However, the Bundeskartellamt has no statistics on the significance of these violations, and on the significance of both practices occurring jointly.

11. While the competition authorities in Germany are responsible for prosecuting undertakings engaging in bid-rigging according to the ARC, the persons involved in bid-rigging are, in principle, prosecuted by the public prosecutor's office according to criminal law. The competition authorities have no jurisdiction in corruption matters. This is the exclusive responsibility of the public prosecutor.

3. Cases of collusion in the practice of the Bundeskartellamt

12. The Bundeskartellamt has prosecuted cases of bid-rigging (collusion) – whether in procurement by public entities or non-public entities – in a wide range of sectors, and there is no strict focus on any sector or industry. Some of the sectors where bid-rigging has occurred are:

- Building materials (concrete);[9]
- High voltage power transformers;[10]
- Large steam generator vessels;[11]
- Specialised vehicles;[12]
- Combat boots;[13]
- House-moving services for military personnel;[14] and
- Waste collection services (*Grüner Punkt*).[15]

8 Cf. above, FN 4.

9 Cf. Bundeskartellamt, *Tätigkeitsbericht* (hereinafter: Activity Report) 2005/2006.

10 Ongoing procedure.

11 Ongoing procedure.

12 Ongoing procedure.

13 Cf. Activity Report 1999/2000, p. 42, p. 94.

14 Cf. Activity Report 2005/2006, p. 33, p. 149.

15 Cf. Activity Report 2007/2008, p. 153.

13. Cases were typically triggered by customer complaints, whistle-blowers, or by internal reviews conducted by contracting authorities. In one case, a news magazine that had been contacted by a whistle-blower informed the Bundeskartellamt about an ongoing cartel.

14. A case that is currently being prosecuted concerns bid-rigging in the procurement of certain specialised vehicles. In this case, it is suspected that the relevant producers operated a quota arrangement. The specific rules of public procurement in this sector may have been conducive to operating the cartel. Although the vehicles are ultimately procured by local authorities, they are typically subsidised by the respective federal state. This system entails that in the procurement process an initial round of market investigation takes place to determine the approximate price level in order to establish the amount of co-financing by the relevant state. This might give the producers additional lead time to operate the cartel. The Bundeskartellamt's investigation was triggered by several strands of information, among them one originating from the state authority involved in co-financing, another originating from a local contracting authority.

15. There is a good theoretical case to argue that collusion and corruption in bid-rigging cases go hand in hand. However, actual cases which provide empirical evidence are rather few and far between, in the Bundeskartellamt's experience.

16. One such case investigated by the Bundeskartellamt concerned the procurement of combat boots for the German Armed Forces. An employee of the Armed Forces Procurement Agency was bribed by colluding firms and passed on confidential information that facilitated collusion among producers supplying the armed forces with combat boots. An internal review by the procurement agency detected irregularities, and the state prosecutor's office prosecuted for corruption. The relevant information on collusion among the producers was given to the Bundeskartellamt. The investigations of the Bundeskartellamt confirmed the suspicion of quota agreements for four tendering procedures involving six companies. Based on the information that was revealed to them by the bribed official, the companies submitted their bids in such a way that the contracts had to be awarded according to the quotas that the companies had collusively agreed on. The Bundeskartellamt issued fines for infringing the ban on cartels against the companies and their chief executives.[16]

4. Conclusion

17. Although the system of public procurement is intended to be competitive, certain characteristics of public procurement may facilitate bid-rigging. With the rules on reviewing procurement decisions in place, the competitive nature of procurement procedures can be monitored at least to some degree. However, these review procedures by the procurement tribunals are not aimed, primarily, at identifying bid-rigging, and cannot accomplish this in a systematic way. The main responsibility for avoiding bid-rigging – e.g., by designing procurement procedures accordingly – and for being sensitive towards indicators of bid-rigging lies with the contracting authorities. The cases taken up by the Bundeskartellamt indicate the practical significance that this vigilance has for prosecuting bid-rigging.

[16] Cf. Activity Report 1999/2000, p. 94.

CONTRIBUTION FROM INDIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- India --

1. Public procurement can be defined as procurement made by utilising public funds to fulfil needs and requirements of a public authority. Procurement is a key economic tool available with the governments for execution of developmental programmes including delivery of socially important goods & services like Public health, Education, Public Transport etc. Public procurement plays an important role in facilitating use of private sector for public sector goals and acts as a catalyst towards development of particular societal groups and regions.

2. The primary objective of any effective procurement policy is to obtain goods, works and services with a view to shunning mismanagement, avoiding waste of public funds and in process getting the best value for money. Competition among supplier firms would enable governments accomplish this objective and therefore it is imperative that the procurement process is not affected by any endeavour to embrace practices such as collusion, bid rigging, fraud and corruption. While strict enforcement of competition law is crucial, advocacy in terms of informing and educating public procurement agencies about the needs and benefits of competition would help in designing efficient procurement processes and in turn bring down the cost of procurement at desirable level.

3. It is estimated that public procurement constitutes about 15% -20% of GDP in developed and developing jurisdictions. Public procurement is estimated at approximately 20% of Gross Domestic Product in OECD countries[1]. In India, public procurement has been estimated to constitute about 30% of GDP[2]. Under the constitutional provisions of India, Union List, State List, and the Concurrent List govern the legislative functions of the central and state governments. State procurement does not figure in any of the lists as a distinct subject and therefore the Union Parliament has the exclusive power to make any laws on the subject of procurement. However, Parliament has not enacted any specific legislation on the subject and hence Public Procurement is performed through Government Policies.[3] The matter of procurement is primarily covered by General Financial Rules 1963 (amended in 2005) which are set of executive instructions framed by the Ministry of Finance and the Delegation of Financial Powers Rules 1978. The Department of Expenditure, Ministry of Finance has also issued three separate Manuals on Procurement of Goods, Services and Works as guidelines to all central government departments in the matters of procurement. Further, the Directorate General of Supplies & Disposals (DGS&D) and the Central Vigilance Commission (CVC) have also issued guidelines prescribing the procurement procedure to be followed by all Central Ministries.

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1 The Size of Government Procurement Markets, OECD, 2001.

2 "Enhancing value in public procurement", special address by Shri Pratyush Sinha, Central Vigilance Commissioner, Conference on Competition, Public Policy and Common Men, 16th November 2009 organised by Competition Commission of India in Delhi. Although an Article by Vivek Srivastava, Titled, "India's accession to the Government Procurement Agreement: Identifying Costs and Benefits", published in 'India and WTO' by Aditya Mattoo and Robet M. Stern published in 2003 had estimated it at 20%.

3 Tamil Nadu and Kamataka, have recently enacted Acts on 'Transparency in Public Procurement'.

4. Procurement of goods and services in India is carried out by the Ministries, Departments, Local Bodies, Statutory Corporations and Public Undertakings both at Central and state level. The Ministry of Finance at the Centre and the Department of Finance in the States lay down broad rules in the matters of government expenditures including expenditure on the procurement of goods, works and services. The procuring agencies may issue elaborate guidelines based on these rules. The office of Comptroller and Auditor General of India (CAG) carries out ex-post audit of government expenditures and publish annual and special reports highlighting instances of irregular and wasteful expenditures.

5. As public procurement in India is decentralised, all States/PSUs have their own procurement organisations. There is no Central Procurement Authority though Central Purchase Organisations like the Directorate General Supplies and Disposal (DGS&D) and state level purchase organisations are associated with the process of rate contracts (akin to framework agreements) with registered suppliers.

6. There are three types of tenders prescribed in the rules: Advertised Tender Enquiry (ATE); Limited Tender Enquiry (LTE) and Single Tender Enquiry (STE). The general rule in procurement is that any tender above a value of Rs. 25,00,000 must be through invitation by public advertisement. Restricted or limited tenders are prescribed for procurement of goods exceeding Rs.1 lakh but below Rs. 25 lakh or in exceptional circumstances and single tenders are prescribed in the case of exceptional circumstances like urgency and proprietary items. The basic procedural framework, therefore, is no different from World Bank Guidelines or UNCITRAL model law or the other good models of public procurement and it can be said that there is a reasonably good framework of rules, procedures and documents in place.

7. The Defence Procurement Procedure - 2008[4] provides comprehensive policy guidelines for all capital acquisitions undertaken by the Ministry of Defence, Defence Services, Indian Coast Guard, Defence Research and Development Organisation (DRDO), and the Ordinance Factory Board (OFB). Defence Procurement Manual governs the procedure for revenue procurement in these organisations. The Government of India has also evolved special procedures and guidelines for procurement of PPP Projects.

8. The basic guiding principles of public procurement in India, inter alia, include maximising economy, efficiency and effectiveness, fairness, competition among suppliers for supply of goods/services to be procured and transparency in the procedures. The rules governing public procurement are binding only on the State as defined in Article 12 of the Constitution of India. The expression "State" is widely defined and interpreted to include not only the Government but also agencies and other autonomous bodies directly or indirectly controlled by it. Hence private bodies not under the control of the Government are not bound by the procurement procedures prescribed under the rules prescribed by the Government.

9. The tendering authority has to proceed in accordance with the limitations contained in the tender document or in the applicable Manuals or Rules. The general rule is that the tender is awarded to the lowest bidder (L-1). Post tender negotiations are severely discouraged and even L-1 post tender negotiations are not permitted except for reasons to be recorded in writing. Judicial review of administrative action is vested in the high courts**.** A tenderer shall have a right to be heard in case it feels that the proper tendering process has not been followed or that its bid has been wrongly rejected. The general rule prescribed by Courts, is that any person having a conflict of interest will not be part of the bid evaluation or award process.

[4] The Defence Procurement Procedure – 2002 (DPP- 2002) came into effect from 30 December 2002. The scope of the same was enlarged in June 2003 to include procurements flowing out of 'Buy and Make through Imported Transfer of Technology (TOT)' decisions. This procedure was reviewed in 2005 and later in 2006. The Defence Procurement Procedure – 2006, was again reviewed and revised based on experience gained in implementation and DPP 2008 came into existence with effect from August 2008.

10. The procurement by the Central Government Ministries and Departments by and large works satisfactorily using fair and reasonable procedures. However, cases of corrupt practices, instances of bid – rigging and collusive bidding have also come to fore.

11. The problem of corruption is rooted in substituting public welfare by the personal interest of employees. Personal payoffs result out of anti-competitive practices giving rise to poor quality and higher costs of public procurement. Anti-competitive procurement manifests in practices like specifications which could be chosen either to favour some suppliers or as entry barriers for others or procurement of non standard items. Bureaucratic hurdles can also be effectively used to erect entry barriers selectively. Annual worldwide bribery of about US $1 trillion[5] has been estimated on account of corrupt practices in procurement.

12. While anti-competitive procurement policies can be used effectively by the public officials to engage in corrupt practices, anti-competitive behaviour by the supplier firms can also generate benefits for them. By colluding with the public officials, the suppliers can form informal cartels to create entry-barriers. In Indian context, public works contracts are prime examples of such collusion. Unlawful gains through public procurement become the main objective of many individuals.[6]

13. Collusion between the supplier and the procurement agency to maximise payoffs is major problem with public procurement which may take various shapes; viz quantity variations or changes in specification, paying for fictitious work, accepting poor quality product or work etc.

14. Corruption affects the allocation of public resources since projects more likely to provide opportunities to illegal gratification are preferred and in process many socially desirable schemes may get neglected. Corruption leads to a different process of allocation of contracts compared to a genuine competitive process. Corruption either gives rise to a situation where the contract is not awarded to the lowest bidder but rather to the firm who has offered a bribe or to a situation in which there are fewer bidders than would otherwise have been the case, thus, distorting the competitive process. There is complementarily in corruption and anti-competitive practices as corrupt procurement officials may ask the supplier firm to ensure (through bid-rigging) that its bid will be the lowest bid. Other competing firms may simply agree either in exchange of some consideration or out of promise of sub-contract of main work. There are possibilities of tacit exchange in sense that if the competing firms collude, markets can later on be allocated, giving gains to all the firms which are parties to this arrangement.

15. Central Vigilance Commission (CVC)[7] was set up in India in 1964 to guide the central government and its agencies in tackling corruption by public officials. It supervises investigations under the Prevention of Corruption Act, 1988.The CVC has also issued guidelines and instructions to curb corruption in procurement. Each Ministry or Department has its own vigilance machinery which looks into the procurement related misdemeanours. CVC has issued 'Standard Operating Procedure' laying guidelines for adoption of Integrity Pact and role of independent external monitor in respect of all major procurements. Department of Personnel and Training_has suggested to all State Chief Secretaries to consider IP adoption in respect of State Public Sector Undertakings (PSUs) as outlined by CVC. Ministry of Defence in its 2008 Procurement Policy has proposed to adopt IP in all defence deals of Rs 100 crore and above. So far, 38 Central PSUs have committed to adopt IP.

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5 Interview by Director, World Bank Institute Global Governance, Daniel Kaufmann http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html (accessed on 23.12.2009).

6 Many such individuals also try their luck in politics by using ill-gotten funds at their disposal.

7 Details may be seen at (www.cvc.nic.in).

16. State Vigilance Commissions have also been set up in some states. Besides, Lokayuktas or ombudsmen have been put in some states to investigate charges of corruption against public servants, politicians and officers. The Right to Information Act, 2005 with its objective of arming citizens with right to get information marks a benchmark in transparency and accountability in governance.

17. *Section 3(3) of Competition Act, 2002* specifically provides that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, *which directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition*. Since the concerned section has been notified only in May 2009 the results of enforcement actions have not yet been fructified. However, significant steps have been taken towards advocacy on the issue of public procurement. Several conferences and workshops have been organised for the benefit of public procurement officers and other stakeholders. A seminar on "Public Procurement Reforms for Better value for Money" was held recently in New Delhi. Another conference was organised in November on "Competition and Public Procurement Policy" in which many eminent experts had the occasion to put across their view points.

18. Currently, many countries are in the process of evolving ways to save costs by preventing corruption in government procurement. Korea's experience demonstrates that using IT can be one of the most effective policy tools in this direction. Proper adoption of an e-procurement system can expand transparency in the procurement market and also contribute to the prevention of corruption. Towards this, Department of Expenditure, Ministry of Finance, Govt. of India has taken significant steps by issuing instructions to all Govt. Ministries/ Departments/Organisations to switch over to e-procurement regime.

19. Corruption induces lack of competition which leads to the neglect of innovation. More potential suppliers in market not only results in additional competition giving rise to lower prices, innovations, better quality goods & services but also translates into reduced tax burden. The governments also in the process find more funds at their disposal for delivering public goods.

20. Collusion in public procurement may be reduced by careful consideration of the various features of the bid process. Procurement tenders are required to be designed in such a way that the bidders' ability to reach collusive arrangements is significantly reduced. Competition authorities need to make efforts to increase awareness of the cost of bid-rigging to the government and to the taxpayers by way of educating and training procurement officials and government investigators and take exemplary actions against firms involved in bid-rigging and other illegal conduct which undermines competition. Competition authorities can develop check lists to help procurement agencies in detecting instances of possible collusion.

21. A stronger antitrust and anti-competition agency with strong co-ordination with other law enforcement agencies will contribute to reducing the corruption in public procurements. Systematic exchange of information between the antitrust bodies and anti-corruption bureaus is highly desirable in this regard. Drive against corruption and steps towards enforcement to eliminate anti-competitive practices are complementary in nature since improvement in the procedure by which the tender documents are designed and the bidders are ultimately selected will not only reduce corruption but also enhance competition in the procurement market.

CONTRIBUTION FROM INDONESIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Indonesia --

1. Introduction

1. Corruption has become a chronic problem in Indonesia and kept mushrooming in spite of the reformation and regional autonomy era. Practices of collusion and nepotism towards corruption have also expanded and involved central and regional public officials, business actors, and the public. Corruption is not only related to business activities that regulate licensing, concessions, procurement, *et cetera*, but has expanded to such other matters as the handling of resident identity cards, driver's licenses, travelling documents, and the like.

2. A number of efforts have been put to eradicate corruption in Indonesia, particularly since 1998, when the waves of reformation began to roll on. A variety of social organisations have kept growing and actively demanding corruption eradication. Apart from its shortcomings, reformation has successfully resulted in a number of laws to stimulate democratic values in the fields of politics and economy followed by good, clean, transparent, and accountable government. Among others are laws on general election, laws on prohibition against monopolistic practices and unfair business competition, and laws on corruption eradication.

3. However, those efforts are still not enough. Corruption practices that have been systemic and deeply rooted in Indonesia require more serious, systematic, simultaneous, and co-ordinated eradication efforts. Corruption eradication has to be a national People's Movement by involving all elements and layers of the society. Both the system and the actors have to be good. Without exception, efforts for law enforcement on competition have to bring about positive impacts to efforts for corruption eradication. At least, with law enforcement on competition, the climate of fairer business competition will grow, so that business actors will be encouraged to set more competitive prices with nearly normal/reasonable level of profit. With smaller profit, the potency of corruption will also be reduced.

4. From the perspective of the development of the economic system, the position of business competition is very strategic in that it is an essential need of the nation. Indonesian founding fathers have inherited *Pancasila*[1] and the Constitution of 1945 as constitutional grounds for living as a nation and a state. Therefore, Indonesia's economic system must be source from Indonesia's own national constitution, not from various theories, let alone from the constitutions of other nations. According to *Pancasila* and the Constitution of 1945, the objective of economic development is to realise a just and prosperous (affluent) society in addition to a distributive mechanism of economic resources that is also regulated in more detail in Article 33 of the Constitution of 1945.

5. It is explicitly stated that a state can control or at least intervene market mechanism if it is related to specific business lines that are important for the state and the people. Control in any form, however, is

[1] Consists of five key elements, namely (1) Believe in the one end only God; (2) Just and Civilized humanity; (3) The unity of Indonesia; (4) Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people; (5) Achieving social justice for all the people of Indonesia.

basically very limited, as the state must be able to show that the people's prosperity would improve. Otherwise, the state's intervention can be abusive and distortive, thereby increasing burden/hardship on the people. Therefore, Indonesia's constitution provides enough room for the market mechanism to allocate economic resources. In line with the development of globalisation, the demand towards market economy system is unavoidable.

6. Theoretically, negative impacts of market economy can be corrected by the state's intervention. However, it may be complicated if the state concerned is included as one of the states most infiltrated by corruption in the world.

7. In Indonesia's case, it is important to understand its history to understand how why corruption is such a large issue and how the drive for improvements and reform have emerged. In the past, Indonesian economy had been developed in centralistic manner for more than 30 years and not based on economic democracy as outlined in *Pancasila* and the Constitution of 1945. Through centralised policies, a very small number of business actors had gained extraordinary benefits, especially those who were close to policy makers. Finally, the economic structure became more unbalanced, where 20% of business actors controlled more than 80% of economic assets, whereas the remaining 80% of business actors competed to obtain the remaining assets that were less than 20%. As a result, with monetary crisis beginning in Thailand in mid-1997, the economy that had been built for more than 30 years was ruined.

8. The reformation has rolled on massively since 1998. It has put *Pancasila* and the Constitution of 1945 to be understood more progressively with the spirit to affirm democratic principles in the fields of politics and economy as well as good, clean, and accountable government. The law on business competition was one of the solutions being offered at that time.

2. Business Competition and Corruption Eradication

9. Corruption has been one of the biggest enemies of Indonesia. The issuance of law on corruption eradication, Anti-Corruption Court, and the establishment of anti-corruption institutions indicates the state's commitment to accelerate corruption eradication. In this case, various measures of prevention and action have been taken by law enforcement agencies. However, corruption will not be successfully eradicated if it is dealt with by law enforcement agencies only, let alone by anti-corruption institutions only.

10. Therefore, the law on business competition should be enforced also as efforts for corruption eradication, at least as efforts for corruption prevention. This is very possible as the potency of corruption with bigger scale may be attributable to business actors who have some funds from their profits, which are very potential to be granted as illegal fees or bribes or other forms to policy makers.

11. One of the characteristics of a government with high corruption level is strong relationship between those in power and business actors. Business actors who have access to power are usually provided with exclusive rights and other facilities with proportional compensation to the related officers. The business actors can then freely exploit consumers by excessive pricing in order to gain supernormal profits.

12. It is through these supernormal profits that business actors are able to set aside some quite big funds potential for corruption practices in order to maintain status quo or even business expansion. As such, those rogue officers will be stronger and richer by the grants of related business actors. Policies and regulations are used as tools to enrich themselves and maintain their power. It goes on with win-win principle to be a vicious circle that is not easy to break.

13. Based on survey results, corruption level in Indonesia always relatively ranks as one of the highest in the world. The result of a Transparency International (TI)'s survey in 2009 showed that Indonesia was ranked the 111th (with index of 2.8) out of 180 states. Indonesia is part of the ASEAN grouping of South East Asian countries and initiatives associated with its membership of this organisation is important for the country's further development. Several other ASEAN states were much better with Singapore in the 3rd rank (with index of 9.2), Malaysia in the 56th rank (with index of 4.5), and Thailand in the 84th (with index of 3.4).

14. The following table also describes the ranks of competitiveness in terms of several ASEAN member states. With regard to corruption index, we know that Indonesia's competitiveness index ranked the 55th (with index of 4.25), far below Singapore that ranked the 5th (with index of 5.53), Malaysia that ranked the 21st (with index of 5.04), and Thailand that ranked the 34th (with index of 4.6).

15. At a glance, there is a pattern that the better the corruption rank of a state, the better its competitive rank. This can be explained that with tough climate of competitiveness, the business world must try hard to improve efficiency and competitiveness and avoid wasting. The profits gained are also reasonable instead of supernormal. As a result, the potency for corruption becomes lower.

Table 1. Comparison of Corruption and Competitiveness Indices in 2009

	Corruption		Competitiveness	
States	Index	Rank out of 180 states	Index	Rank out of 134 states
Singapore	9.2	3	5.53	5
Malaysia	4.5	56	5.04	21
Thailand	3.4	84	4.6	34
Brunei	5.5	39	4.54	39
Indonesia	2.8	111	4.25	55
Vietnam	2.7	120	4.1	70
Philippines	2.4	139	4.09	71

Source: Processed from various sources.

16. In connection with the matter mentioned above, in a World Bank's publication titled "*Redesigning the State to Fight Corruption*", Ross-Ackerman (1996) formulates a hypothesis that in general, various efforts to improve competitiveness would reduce incentives for corruption. The conceptual framework is based on illegal fees that are often found in a condition where there is a lack of competition (Celentani and Ganuza, 2001).

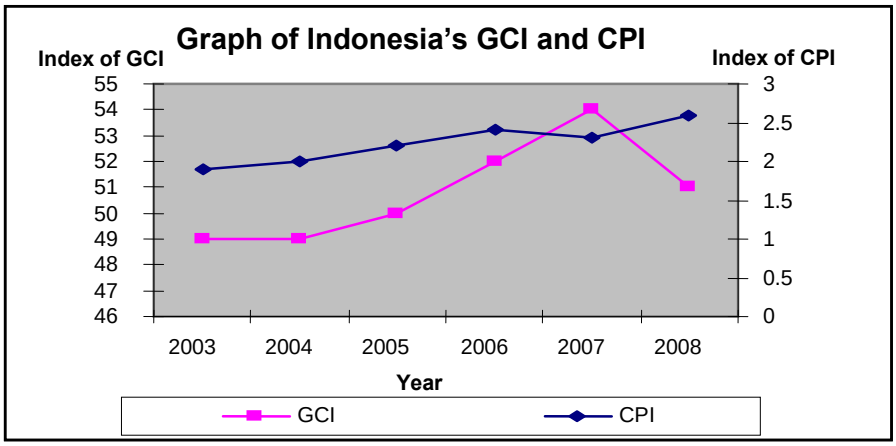
17. A model is plainly outlined that the level of corruption is often represented in the form of bribes and illegal fees. In connection with the procurement of goods and services for the government, a bribe may be in the form of a kickback and/or a token of gratitude in the form of gratification. The question is: How can business actors (tender winners) have enough funds to provide various forms of bribe and other legal fees? The answers may vary.

18. From the perspective of business competition, however, excessive pricing that results in supernormal profits is one of potential sources of funds for companies to finance various corruption related activities. This is in line with the concept that in a condition where there is a lack of competition, business actors would have market power and be very potential to misuse such power to gain supernormal profits. Market power can come either from the dominance of individual firms or collectively through a collusive arrangement. Like a vicious circle, the accumulated supernormal profits will then become potential sources of funds for business actors to put illegal fees and other forms of bribery into practice, particularly with the objective to protect the interest of companies in the future from various regulations, policies and other

provisions that may affect business operation. In such a condition, a potential corruption is begun in the formulating process of a regulation/policy and discussion between an interest group (lobbyists) and policy makers.

19. Based on some literature, significant relationships between (potential) corruption and competition climate cannot be confirmed yet. Admittedly, various factors that affect competition conduct may be different from those that affect corruption conduct. Therefore, there is not always correlation between competition index and corruption index.

20. Research that was conducted by Celentani and Ganuza (2001) and Allen and Qian (2007) showed that the relationship between competitiveness and corruption is not easy to comprehensively explain. Moreover, the research of Straub (2005) concluded that competition can actually result in welfare improvement, but at the same time corruption may increase as well. Such an ambiguous condition may also be perceived when we compare corruption perception data (CPI) and competitiveness data (GCI) in Indonesia as follows:



21. The above CPI graph shows that the higher the CPI index, the lower the corruption perception (prevalence); on the contrary, GCI index shows that the lower the index, the higher is the competition.

22. The above graph shows that during the period of 2003-2006, Indonesia's CPI and GCI increased, implying that the corruption level was declining but at the same time the competitiveness was weakening. Negative relationship (as expected between corruption and competitiveness) was only perceived a little in 2007-2008 where there was increasing competitiveness in line with decreasing corruption perception.

23. Several other researches have tried to describe the relationship through parameters that affect corruption level and competitiveness level such as the number of business actors who participate in bidding process (Celentani and Ganuza, 2001) and in the procurement of goods and services for the government (Allen and Qian, 2007). The pattern of goods and services procurement for the government was chosen in that it is one of vulnerable points for interaction between government officials and business actors that is tinged by corruption practices.

24. In spite of ambiguity in the relationship pattern, this at least constitutes a future challenge for researchers and academicians to explain the relationship between the level of corruption and the competition climate more accurately.

3. Business Competition Supervisory Commission (*KPPU*) and Efforts for Corruption Prevention in Public Procurement

25. In the framework of law enforcement, *KPPU* of the Republic of Indonesia that was established pursuant to Law No. 5/1999 has duties and authorities to prevent and take action against violation of law on competition and provide the government and related state agencies with recommendations and considerations.

26. Notwithstanding various constraints, *KPPU* has made a variety of efforts to enforce the law on competition in Indonesia. Moreover, with its relatively young age (9 years), a UN institution, i.e. UNCTAD, has granted an award as appreciation to *KPPU* for its relatively good performance and effectiveness.

27. Within the nine-year period upon its establishment, *KPPU* has shown ever increasing outputs of law enforcement. The data shows that in terms of report handling, *KPPU* received two types of report, i.e. 2,824 written reports and written information; whereas in this year of 2009, up to the second week of December, *KPPU* has received 730 reports from various regions. Those reports consist of 201 written reports and 529 written information, meaning there is an increase compared to last year's 707 reports.

28. From the perspective of alleged articles being reported, the reports that go to *KPPU* were still dominated by reports about tender conspiracy, i.e. 84% or 169 out of 201 written reports. In the last three years, the types of report have tended to be more various. This shows that the public has been more aware that *KPPU* is not an institution that only supervises tender conspiracy. This is evident from reports on merger, consolidation, acquisition, share ownership, dual position, monopsony, closed agreement, and so on.

29. Meanwhile, in terms of case handling, during the period from January up to the second week of December 2009, *KPPU* has handled 33 cases, covering 28 cases originating from reports of the public and 5 initiative cases. As at December 2009, *KPPU* is handling 20 cases that are still in investigation stage.

30. The relationship between the law on competition and corruption conduct in Indonesia lies on the application of prohibition against conspiracy in tender as referred to in Article 22 of Law No. 5/1999. In the Article, business actors are prohibited from committing tender conspiracy with other parties (including the government) in winning certain business actors. Vertical conspiracy between business actors and tender committees cannot be separated from corruption efforts. It is less impossible that if there are facilities from a tender committee (the government) to a certain business actor, it is without involving bribery or corruption.

31. The main idea of the corruption in the procurement process is agreeing that the bid committee arranges conditions or specifications for a certain bid participant to win, in which the bid committee shall guarantees to all the conspirators that the person they have agreed should win a bid actually is awarded that bid. In some case, the collusion involving several bid participants and the bid committee. This pseudo-competition (cartel) is hard to manage, especially when not involving the certainty for the loser to get a subcontract from the bid winner. One way to ensure this cartel succeeds is that when any of the colluding bidders tries to cheat on the cartel by putting in a lower price, the bid committee will tell the other members of the cartel or even find a reason to award the contract to the person who the conspirators agreed would be the winner, such as revising the requirement and evaluation criteria.

Box 1. Example of collusive tender Cases:
Case of Vertical and Horizontal Conspiracy in a Shares and Bonds Tender

PT. A, acting as a financial advisor on behalf of X, and B, announced in 2 newspapers that it would sell B's entire shareholding in C and the entire bonds issued by B and X. The sale of C's shares and bonds were done through a tender with a sales process in accordance with the provisions made in the Procedure for the Submission of Bids, which included sale structure, binding bid, submission of bids and selection of the winning bidder and closing of the transaction. Among the criteria of tender participant were that it was a partner, or principal, or a subsidiary of a partner including a colleague of a subsidiary, a car distribution company, other auto companies and financial advisor or in essence they had to be bona fide companies.

The implementation of tender for the sale of shares by PT. A did not follow the implementation schedule of the tender for the sale of C's shares made by X as intended in the TOR. PT. A invited 135 companies but only 16 companies signed the confidentiality agreement as required by the procedure. Afterwards, the companies that submitted final bid documents and then participated in the tender were D, E and F. D was finally declared as the winner of the divestment tender.

In this case of sale of shares by tender there is a vertical and horizontal conspiracy, because it involved the owner, the work owner, and the tender participant. Based on its investigation, KPPU discovered that the conspiracy in this case was done by conducting adjustments, comparing tender documents prior to submission, the creation of a pseudo-competition, and the granting of an exclusive chance to a certain tender participant by committing various acts that violated the stipulated procedures.

The indication or signs of conspiracy in the above case came from these discoveries:

- The implementation schedule of the sale of shares tender was very short, namely 14 days, while the tender was related to huge sums of money and a complex company structure;
- There were similar tender documents among the tender participants, namely in the choice of words, the form of the letter, and the syntax on the cover letter;
- There were almost similar bidding prices submitted by two tender participants, namely F and E. The value only differs 5% from the highest bidding price submitted by D;
- There was an effort by two tender participants, namely PT ASI and D, to compare the tender documents before submitting the final bid documents. The matter was discovered following the similarities in the choice of words, the form of the letter, and the syntax in the cover letter submitted during the final bid;
- There was an effort to create a pseudo-competition following the discovery that a tender participant, E, did not seriously attempt to complete and meet the requirements asked by the selling party as included in the procedures for the submission of bid;
- There was an effort to give an exclusive chance to a certain tender participant by committing various violations on the stipulated tender procedure. One of them is by giving a time extension of the final bid submission window and there were no objections on the extension by the punctual tender participants. In addition, it was also discovered that the tender committee had accepted a tender participant that did not meet the requirements stipulated in the procedures of the submission of bid, among them were that it was not invited, it never sent a letter of interest and warranty letter, and it did not sign the confidentiality agreement.

32. In coping with corruption in public procurement through enforcement of law on business competition, *KPPU* uses several approaches. Firstly, through co-operation with the Anti Corruption Commission. Law in Indonesia mandates the anti corruption commission, the police, and the attorney general's office to co-ordinate in preventing and taking action against corruption conduct. Since corruption may also be related to the enforcement of the said Article 22, *KPPU* has initiated a formal co-operation with the institution. The co-operation is focused on exchange of data and information, joint socialisation related to prevention of conspiracy in tenders, and delegation of conspiracy cases that involve corruption.

With such co-operation, if *KPPU* finds that a government element is involved in a corruption, *KPPU* may delegate the corruption case to a more competent institution. In addition, *KPPU* would also recommend administrative actions against the officers concerned to those with higher position in their organisation.

Box 2. Co-operation between the KPPU and the Corruption Eradication Commission

Co-operation between the Corruption Eradication Commission (KPK) and the Commission for the Supervision of Businesses Competition (KPPU) was agreed on February 6th 2006. The co-operation is aimed to build co-ordination within the nation's supervisory institution, understanding that there is a correlation within corruption practices and unfair businesses competition, especially those related to tender conspiracies. The scope of co-operation were involving inter institution access on data, information, and co-ordination related to respective case findings. If there is indication of corruption in any cases handled by KPPU, then KPPU could apprehended the corruption aspect to the KPK, while KPPU continues with the collusion aspect and vice versa.

During the implementation, KPPU apprehended several big cases involving corruption. One of the biggest is a bid rigging case for an auction of Very-large Crude Carrier (VLCC) which involving one of the State-owned Enterprises in Indonesia. While, the KPK once apprehended a bid rigging case on the procurement of helicopter by Indonesian Police. Apart from law enforcement, the co-operation also established precaution activities through joint dissemination programme to the national stakeholder on the tender conspiracy.

33. From advocacy side, most discussion topics in those activities include conspiracy in public tenders. In order to enhance understanding of the stakeholders that include the government, business actors, academicians, journalists, legal practitioners, and the public, *KPPU* conducts advocacy activities through dissemination programmes for the stakeholders. Throughout the year of 2009, the dissemination is more intensive than that of the previous years. There are 78 activities including mass media network development (journalist forum), competition forum development at national level, joint workshop between the parliament and the government, seminar for business competition in regions, formulation of advocacy subject matters, intensive public education in media, joint workshop with judges, joint workshop with public institutions, discussion fora in Regional Representative Offices, and business competition seminars in regions. Throughout this year, there are 1,916 participants who have participated in the activities held by *KPPU*. They include journalists, academicians, business actors, the government, the parliament, judges, and the public. Most discussion topics in those activities include conspiracy in public procurement.

34. Experience has shown that those approaches have not resulted in sufficient deterring effects, so that *KPPU* is currently putting another effort into the punishment of administrative sanctions to tender committees or principals. This is applied based on the definition of business actors in Law No. 5/1999, where in public procurement, a tender committee acts as the purchaser and therefore it can be classified as a business actor and imposed with sanctions.

35. This might be different by practice in other countries such developed country. The idea that not to frighten the tender committee, but to educate them to comply with competition law and assisting us in supervising bid participants and other member of the bid committee or principal not to breach the law. Therefore in the guideline published by the KPPU, several cartel indications are mentioned as a warning sign to the related parties. Other government institutions also published their own publication in detecting misconduct and corruption on public procurement.

36. In prevention efforts, various activities of business competition advocacy are always carried out. Those activities are conducted by publishing manual for prevention of conspiracy in tenders and holding various seminars and workshops with the government, business actors, and other stakeholders in regard of Law No. 5/1999 and particularly conspiracy in tenders.

Box 3. Guideline on the Prohibition of Tender Conspiracy

The guideline defines tenders as the bids submitted to contract certain work, for the procurement of goods or the provision of services. This article does not mention any number of parties submitting bids (either by several business actors or by one business actor in case of direct appointment/selection). Such definition of tender includes bids submitted (1) to contract or carry out a certain work, (2) to procure goods and or services, (3) to purchase goods and or services, and (4) to sell goods and or services. Based on the aforementioned definition, the basic scope of the application of Article 22 of Law No. 5/1999 shall be tenders or bids that can be submitted through Open Procurement, Limited Procurement, Public Auction, and Limited Auction. Based on this basic scope, direct selection and direct appointment that constitute parts of tender process is also included in the application of Article 22 of Law No. 5/1999.

Conspiracy in tenders in the Guideline is classified into three categories, namely horizontal conspiracy (amongst business actors), vertical conspiracy (between the tender committee and business actor) and combination of vertical and horizontal conspiracy.

In order to discover the existence of a conspiracy in a tender, the Guideline explains various indications of conspiracy in a tender. These indications ranged from planning activity until the contract implementation. However, the Guideline also views that an Investigation Team or the Commission Council of KPPU must still prove the form or manner of the conspiracy or the existence of conspiracy through an investigation.

4. Closing

37. Collusion and corruption in public procurement have been a chronic and spreading disease in Indonesia. A variety of efforts have been put into corruption eradication. However, corruption cannot be eradicated only by enforcement of corruption criminal law. Corruption eradication has to be a national people's movement by involving all layers of the society, including through competition policies.

38. From the perspective of economics, the practices of monopoly and unfair business competition are very potential to fertilise collusion and corruption. Cartels, misuse of dominant positions, merger and acquisition, and other forms of anti competitive behaviour are conducted by business actors with expectation to gain supernormal profits. In bid rigging case, the supernormal profits could be expected by the bid participants and or the bid committee who guarantee certain bid participant to get the contract.

39. Despite only expectation to win a tender, business actors would be please to provide any parties (other bid participants and or bid committee) with some funds to realise it. Moreover, if a supernormal profit has ever been gained through a mark-up in contract value, a quite significant funding would be available to ensure their winning on the next procurement, maintain profits or even make their market expansion. As such, the relationship of corruption and unfair competition would form a vicious circle that is all the longer the harder to break.

40. The enforcement of law on fair business competition contributes to realising the aim of obtaining a level playing field. Government policies and regulations would also put more attention on accessibility, treatment, equal opportunities for business actors without discrimination. The society would certainly be more prosperous in that they would be able to save their income and make rational choices in the market. Meanwhile, the business world would be able to grow significantly if the competition climate is healthier as competition would help promote efficiency, productivity, and competitiveness. Business actors would keep gaining profits but at reasonable and sustainable levels. Thereafter, with profits limited to reasonable levels, business actors would have less ability to provide kickbacks or bribes to dishonest officials.

CONTRIBUTION FROM IRELAND

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Ireland --

1. Public Procurement Objectives and Policy

1. Anticompetitive conduct in public procurement is a particularly insidious violation of the competition rules. Price fixing, bid-rigging, market and customer allocation on public contracts limit supply and raise prices on the tender which is the subject of the collusion. The inflated price may become an artificial benchmark or competitive floor on which similar contracts are evaluated in the future by public authorities. As such, the effect of collusion on a particular contract or group of public contracts may reach beyond the specifics of a single instance of collusion.

2. In Ireland, offences under Section 4 of the Competition Act 2002 and Article 101 TFEU (ex. Article 81) are made criminal by Section 6 of the Competition Act 2002. Undertakings and individuals convicted on indictment are subject to fines not exceeding either €4 million or 10 percent of turnover in the year preceding sentencing and to a term of imprisonment of up to five years.[1]

2. Organisation of Public Procurement in Ireland

3. The value of public contracts in Ireland represents a substantial expenditure of revenue from taxpayers. In 2007 it was estimated by Eurostat[2] that the Irish public procurement market accounted for approximately €26 billion per annum, or 13.67 percent of Irish GNP.[3]

4. In Ireland public procurement is highly decentralised. Individual departments and agencies function independently but within the framework of EU and national laws and guidelines. The Department of Finance in Ireland is the Government Department responsible for public procurement. In 2002 the National Public Policy Procurement Unit (NPPPU) was established in the Department of Finance to "develop public service procurement, policy and practice through a process of procurement management reform".[4] This reform process involves training and education of staff involved in public procurement and aggregation of procurements.

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1 Section 8, Competition Act 2002.

2 This data is available from Eurostat's website: http://nui.epp.eurostat.ec.europa.eu/nui/setupModifyTableLayout.do.

3 At page 3 of its report, Ensuring Value through Public Procurement, November 2008, IBEC noted that €16 billion or 10% of Ireland's GDP was spent on public procurement in 2008. <http://www.ibec.ie/IBEC/DFB.nsf/vPages/Public_sector~Resources~public-procurement---ensuring-value-28-11-2008/$file/Ensuring_Value_Through_Public%20Procurement.pdf.>

4 National Public Procurement Policy Framework, (NPPPU, Department of Finance), April 2005, at page 1.

5. In conjunction with the Department's Government Contracts Committee (GCC), the NPPPU is responsible for developing best practices for public procurement in Ireland.[5] Procurement regulations, guidelines and other information concerning public tenders are available on the *e-tenders* website.[6]

6. In 2004, the NPPPU published new Public Procurement Guidelines – Competitive Process (Public Procurement Guidelines).[7] The Public Procurement Guidelines make contracting authorities responsible for guarding against corrupt or collusive practices. "*To safeguard against improper or unethical practices contracting authorities must also take measures to separate functions within the procurement cycle, by ensuring that, for example, ordering and receiving of goods and services are distinct from payment for services*."[8] Additionally, the Guidelines state: "*Contracting authorities should be aware of potential conflicts of interest in the tendering process and should take appropriate action to avoid them*."[9]

7. The Public Procurement Guidelines also alert contracting authorities to the potential for collusive tendering and what to do about suspected collusion:

> *Contracting authorities should watch for anti-competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority: telephone (01) 8045400*.[10]

8. This clear guidance and unequivocal requirement about reporting suspected collusion affirms the commitment of the Government to uncovering and reporting suspected anticompetitive activities by bidders on public sector contracts.

9. In April 2005, the NPPPU, in consultation with the GCC, issued a National Public Procurement Policy Framework (Framework).[11] The core principles of the public procurement policy as stated within the Framework are: to be accountable, competitive, non-discriminatory; to provide for equality of treatment, fairness and transparency; and, to be conducted with probity and integrity. The Framework underlines the importance of purchasing decisions by public bodies and the need for strategic management of the public procurement process.

10. The Framework applies to central government departments and bodies, commercial and non-commercial state bodies and local and regional authorities and promotes open and transparent competition. It underlines the need to maximise competition in the market for goods and services purchased by the State. Policy and actions are focused on compliance with EU and national legal requirements. The Framework notes that compliance with such requirements is vital to encourage competition.

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5 Circular 40/02: Public Procurement Guidelines – revision of existing procedures for approval of certain contracts in the Central Government sector dispensed with the need for approval by the Government Contracts Committee (GCC) of contracts exceeding €25,000 in value and provided that such contracts should be reviewed within a Government Department, preferably by the Internal Audit Unit. The new arrangement was designed to allow the GCC to advise the Government on procurement issues of general concern and, in conjunction with the NPPPU, to develop best practices for public procurements within the State.

6 http://www.etenders.gov.ie.

7 Public Procurement Guidelines http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=2745. The 2009 Guidelines, which where drafted by the NPPPU in conjunction with the Government Contracts Committee, update the so-called "*Green Book"* procurement regulations promulgated in 1994.

8 Public Procurement Guidelines at paragraph 3.1.

9 Public Procurement Guidelines at paragraph 3.6.

10 Public Procurement Guidelines at paragraph 3.8 (Emphasis supplied).

11 National Public Procurement Policy Framework, (NPPPU, Department of Finance), April 2005; http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1103.

11. National legislation in Ireland has implemented the two EU Directives on procurement. The European Communities (Award of Public Authorities' Contracts) Regulations 2006, S.I. No. 329 of 2006, implemented Directive 2004/18/EC.[12] In 2007, S.I No. 50, The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 implemented Directive 2004/17/EC.[13]

3. Ethics and Standards in Public Office

12. The Irish Competition Authority has no remit with respect to the detection, investigation or prosecution of corruption involving public procurement. Nor does it have any expertise with respect to the application of the legislation on corruption. What follows is simply an outline of the current legislation.

13. The Ethics in Public Office Act 1995, and Standards in Public Office Act 2001, provide for disclosure of interests, including any material factors which could influence a Government Minister or Minister of State, a member of the Houses of the Oireachtas or a public servant in performing their official duties.

14. The Standards in Public Office Act 2001 establishes the wide scope of persons covered by the provisions, including employees, public servants, Members of the Oireachtas, the Attorney General, the Comptroller and Auditor General, the DPP, judges, members of foreign parliaments, foreign office holders, members and officials of EU institutions and members of local authorities. It makes it an offence to seek or receive any benefit, whether for oneself or another person, in return for action or refraining from acting in accordance with one's position, or to give or offer any benefit for a like purpose.

15. A Civil Service Code of Standards and Behaviour[14] was drawn up and promulgated by the Minister for Finance on 9 September 2004 pursuant to Section 10(3) of the Standards in Public Office Act 2001 and published by the Standards in Public Office Commission (revised edition) in September 2008 pursuant to Section 10(11) of the Standards in Public Office Act 2001.

16. The Prevention of Corruption Acts 1889-2001 (Corruption Acts) make the acceptance of bribes by public officials a criminal offence punishable by imprisonment or fine or both. Section 16.3 of the Civil Servant's Code of Conduct[15] references the Prevention of Corruption Acts 1889 to 2001 (as amended by the Ethics in Public Office Act 1995), and notes that the corrupt giving of gifts to or receipt of gifts by civil servants is a criminal offence punishable by imprisonment or fine or both. The Corruption Acts provide that money, gifts or other consideration received by a civil servant from a person holding or seeking to obtain a contract from a Government Department/Office is deemed to have been received corruptly unless the contrary is proved.

17. In June 2005, the NPPPU and GCC issued Ethics in Public Procurement: General guidance to assist public sector buyers to conduct purchasing in a way that satisfied probity and accountability (Ethics Guidance).[16] The Ethics Guidance notes:

> *Contracting authorities must be cost effective and efficient in the use of resources while upholding the highest standards of integrity. Procurement practices are subject to audit and*

12 http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1481.

13 http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1481.

14 http://www.sipo.gov.ie/en/CodesofConduct/CivilServants/File,727,en.pdf.

15 http://www.sipo.gov.ie/en/CodesofConduct/CivilServants/Name,718,en.htm.

16 Ethics in Public Procurement; http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=601.

scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and Accounting Officers are publicly accountable for expenditure incurred.[17]

18. The Ethics Guidance contains detailed provisions concerning disclosure of conflicts of interest, acceptance of gifts and hospitality by those involved in public procurement.

3.1 Conflicts of Interest

19. The Ethics Guidance requires disclosure of "*any form of personal interest which may impinge, or might reasonably be deemed by others to impinge, on a public official's impartiality in any matter relevant to his or her duties .....*" (Emphasis supplied). Personal interest includes an interest of a relative or connected person.[18] Disclosure of the personal interest is required to be made in writing to line management. Line management must then decide if the exercise should be dealt with by another member of staff or seek further advice.

3.2 Gifts

20. In respect of the solicitation or acceptance of gifts, the Ethics Guidance states unequivocally:

Public officials should not accept benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity. The actions of public officials must be above suspicion and not give rise to any actual or potential conflict of interest and their dealings with commercial and other interests should bear the closest possible scrutiny.[19]

21. The following activities are specifically prohibited: [20]

- Gifts must never be solicited, directly or indirectly;
- Cash, gift cheques or any vouchers that may be exchanged for cash may not be accepted regardless of amount;
- Public purchasers must never solicit sponsorship for social, sporting, charitable or similar organisations or events from contractors, suppliers or service providers;[21]

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17 Comptroller And Auditor General (Amendment) Act, 1993 (No.8/1993) .

18 A connected person is defined in (2) (a) of the Ethics in Public Office Act, 1995 as follows:

Any question whether a person is connected with another shall be determined in accordance with the following provisions of this paragraph (any provision that one person is connected with another person being taken to mean also that that other person is connected with the first-mentioned person):

(i) a person is connected with an individual if that person is a relative of the individual;

(ii) a person, in his or her capacity as a trustee of a trust, is connected with an individual who or any of whose children or as respects whom any body corporate which he or she controls is a beneficiary of the trust;

(iii) a person is connected with any person with whom he or she is in partnership;

(iv) a company is connected with another person if that person has control of it or if that person and persons connected with that person together have control of it;

(v) any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.

19 Ethics in Public Procurement at paragraph 3.3.

20 Ibid.

21 "*Where such sponsorship is offered, it may only be accepted when expressly approved in writing by management*." *Ibid.*

- Public purchasers must not seek or accept special facilities or discounts on private purchasers from contractors, suppliers or service providers with whom they have official dealings;

- Subject to local rules, an official may accept and retain gifts of low intrinsic value. Any gift of more significant value should be refused. . . Particular care should be taken in relation to offers of gifts from donors who stand to derive a personal or commercial benefit from their relationship with the contracting authority concerned.

3.3 Hospitality

22. While recognising that normal business practices may justify accepting "routine/modest" hospitality from suppliers, the Ethics Guidance notes that particular care should be taken with suppliers who are in the process of tendering and there "should be no acceptance of gifts or hospitality" from those involved in a current tendering process.[22] Additionally, the Civil Service Code of Standards and Behaviour that applies to central government offices and departments, states that offers of hospitality should be reported to management.

3.4 Violations of the Ethics Laws, Regulations and Guidance

23. There have been no cartel investigations or cases in Ireland that have involved allegations or violations of the corruption or ethics requirements of Irish law.

24. Activities that would constitute violations of the Ethics laws, regulations and guidance are subject to investigation by An Garda Síochána (the national police force). Prosecution of ethics offences is within the discretion of the Director of Public Prosecutions. The Competition Authority has no role or involvement in the investigation of corruption in public tendering and would be aware of investigations and prosecutions solely from public information and reports in the press.

4. Collusion in Public Procurement

25. There have been no convictions in Ireland for collusive tendering or other anticompetitive practices involving public tendering and procurement.[23] Charges are presently pending in the Central Criminal Court against two individuals and one company for alleged collusion in connection with a tender for vegetation removal by Iarnród Éireann (Irish Rail).[24]

4.1 Designing Procurements to Minimise Collusion

26. The Competition Authority does not design procurement systems or regularly review them for departments or agencies. However, as part of its functions of the Authority is periodically asked to provide input on the design of specific procurements. Additionally, in speeches and presentations certain practices that may facilitate collusion are highlighted.

27. Practices facilitating collusion in public procurement have been identified at hearings of the OECD and in its publications, to which Ireland has contributed. Among the practices which facilitate collusion are:

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22 Ethics in Public Procurement at 3.4.

23 In June 2009, five individuals and three companies were acquitted of charges of customer and market allocation that allegedly occurred in conjunction with a joint tender by them for waste collection services in County Mayo. Following an eight day trial, all individuals and companies were unanimously acquitted of the charges by a jury. *DPP-v-Stanley Bourke and others.*

24 *DPP-v- John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon & Oliver Dixon (Hedgecutting & Plant Hire) Limited.*

- A long lead-in period between pre qualification to be invited to tender and award of contract;
- Small number of competitors;
- Identical or simple product or service;
- No significant technological changes;
- Active trade association;
- The product has few or no close substitutes.

28. For example, pre-qualification criteria that are not tailored to each competition can result in the stagnation of the list of parties who can qualify for various competitions. Their effect can be to reduce the number of undertakings who can respond to a call to tender and over time allow those parties to identify each other and potentially coordinate their behaviour in relation to subsequent public procurements in that market. The Authority has consulted with procurement agencies concerning the benefits of devising tenders with competition in mind. Tender criteria that allow clients to obtain the benefits from increasing the number of responses to their tender and that contain only restrictive criteria necessary to achieve their purpose are among the pro-competitive results from well-crafted tenders. The Authority endorses the use of procurement practices which allow more potential suppliers to respond to a tender.

29. It is beneficial for public procurement officials to have a clear understanding of the competition law which may be of assistance when designing and undertaking a tender. Activities related to a tender may unwittingly create situations that facilitate rather than discourage collusion on a tender. Bid-rigging training provided by the Competition Authority emphasises the importance of well considered criteria and clear procedures before, during and after competitions.

30. The Competition Authority has also provided assistance to government departments and public bodies in relation to specific proposed procurement activities. Where concerns have arisen regarding potential anti-competitive effects the Competition Authority has made itself available to provide information on the possible or probable detrimental effects the proposed schemes or services could have on markets. The advice offered is non-binding and informal. It does not constitute legal advice and is designed to assist agencies in identifying portions of procurement that might unwittingly or inadvertently give rise to anticompetitive practices. In some instances it may be the long-term effect of practice in divulging information to competitors or allowing them to reverse engineer costs or prices that raise the potential for collusion and raise anticompetitive concerns.

4.2 Membership on the Government Construction Contracts Committee

31. As a result of the regular consultations between the NPPPU and the Competition Authority concerning competition and collusion in public tendering, in 2009 the Government Construction Contracts Committee (GCCC) requested the Competition Authority to become a member of the GCCC. The GCCC is a regular forum, chaired by the NPPPU that explores the procurement of government construction contracts and allows all the public bodies and agencies involved in public disbursements an opportunity to trade experience and knowledge. Members of the GCCC regularly make more formal presentations to this group as means of raising awareness within the group membership of EU and national procurements they are involved in and what their experience and learning has been.

32. The Manager of the Cartels Division was selected by the Authority as the representative on the GCCC. The request reflects the commitment of the Government to competitive procurements and the continuing, positive relationship that has developed between the NPPPU and the Competition Authority on matters involving competition in public procurement.

4.3 Certificates of Independent Bid Determinations

33. Since October 2008, representatives of the Competition Authority and the National Public Procurement Policy Unit (NPPPU) of the Department of Finance (the government department which oversees public procurement activities within Ireland), have been engaged in periodic discussions about public procurement and cartel detection.

34. During the course of the discussions with public bodies such as the NPPPU the Competition Authority has raised the prospect of introducing a certificate of independent bid determination (CIBD) into Ireland's tendering process.

35. The Competition Authority is of the view that public procurement bodies could obtain substantial benefits from the introduction of a CIBD. First, a CIBD can serve as a continuous reminder of the obligation in public tenders to comply with both the procurement rules and the applicable competition laws. Second, properly crafted so as to require signature by an officer or director of an undertaking, a CIBD serves as a commitment by the undertaking and its principals about the bona fides of their tender. Third, a CIBD provides an added incentive for undertakings and their principals to ensure that all managers and employees are made aware of competition prohibitions through regular compliance training programmes and understand that their actions and violations may be imputed to the undertaking.

5. Fighting Collusion and Corruption

36. To date there have been no corruption charges or convictions involving both corruption and collusion in public procurement in Ireland. The Competition Authority is unaware of any cases in Ireland involving both collusion and public corruption. Instances of corruption of public officials, that have been through the Irish courts, have to date related to the bribing of publicly elected representatives of both central and local government, public sector employees involved in planning and bribing Gardaí (police).

6. Advocacy

37. Regulatory or institutional conditions can help facilitate bid-rigging. As noted above, the Department of Finance Procurement Guidelines provide clear guidance about contacting the Competition Authority in instances where suspected collusive tendering has taken place. That advice has resulted in procurement agents reporting allegations of suspected bid-rigging and collusive tendering to the Authority.

38. Likewise, the Competition Authority regularly receives complaints from individuals of alleged anticompetitive activities associated with tenders, and in appropriate circumstances would investigate such allegations. Complaints have been received from undertakings who find themselves precluded from competitions due to regulatory requirements or the inclusion of particular qualifying criteria that they feel are not always relevant or necessary for the purposes of a particular competition.

39. In 2009, the Authority published four information booklets for the public on competition enforcement, including a booklet on collusive tendering:

- The Detection and Prevention of Collusive Tendering;
- Competition Benefits Everyone;
- Guide to Competition Law and Policy for Consumers;
- Guide to Competition Law and Policy for Businesses.

40. These booklets are available on the Competition Authority website.[25]

41. Additionally, the Competition Authority has undertaken proactively to offer assistance to procurement bodies in identifying anticompetitive practices and potential collusion involving tendering. To that end, the Competition Authority has offered training opportunities to the Department of Finance NPPPU, other central government departments and bodies, commercial and non commercial state bodies and local and regional authorities.

42. In the past year the Competition Authority has increased its outreach activities to make government agencies and procurement officers aware of the Competition Authority and collusive tendering. The Authority has been asked to present a module on cartels and bid-rigging as part of an eight day public procurement training course sponsored by Public Affairs Ireland, an organisation dedicated to on-going training and education about the public sector in Ireland. The Authority has developed a "Bid-Rigging Road Show", which is designed to alert contracting officers to bid-rigging schemes and collusive practices. To date, training on identifying and combating cartels and collusion involving tendering has been presented to approximately 90 procurement officials from over 40 departments, agencies and local authorities in Ireland. We intend to increase the number of presentations in 2010.

43. This training has assisted public procurement agencies by increasing staff awareness of the harm caused by collusion, the reasons for and benefits of healthy competition and informed them of the steps they can take to avoid opportunities for collusion arising on public procurement competitions. Given the requirements on procurement staff to ensure the integrity all aspects of the tender process, it is important that they have an awareness of the benefits of competition to their procurements, and knowledge of the role and functions of the Competition Authority. Training builds beneficial relationships between procurement staff and the staff of the Competition Authority. It informs staff of the resources available from the Competition Authority and stresses the opportunity for procurement officials to consult with the Authority before, during and after competitions, if they have concerns about competition aspects of their tender procedures or believe they may have been the victim of collusive behaviour.

44. As a result of our regular meetings with the NPPPU and with individuals involved in various committees of the Department of Finance, the Authority has been consulted on specific issues surrounding competition in public contracts. The Competition Authority obtained and included comments from the NPPPU in responses to the OECD Bid-Rigging Publications in 2008. Similarly, in February 2009, the NPPPU sought input from the Competition Authority in order to respond to a questionnaire from the EU Advisory Committee on Public Contracts, DG Internal Markets, on Public Procurement and Antitrust Law.

45. Government agencies contemplating issues that might arise in respect of public procurements have consulted with staff of the Advocacy and Enforcement Divisions of the Competition Authority in advance of their tenders. Whilst such consultations are undertaken with the clear caveat that the Competition Authority does not provide legal advice or give advisory opinions, the consultations have permitted agencies to explore the types of questions or issues that might arise in respect of competition from certain proposed courses of action.

Conclusion

46. To date, the Competition Authority has not uncovered any instances of corruption in conjunction with its investigations of alleged cartel activities involving procurements. While it is impossible to rule out such behaviour, strong laws, regulations and guidance can serve as clear disincentives to corruption involving public contracts. Programmes that offer regular training, that stress the requirements of integrity on the part of public procurement officials and that create an affirmative duty to report suspected collusion to the Competition Authority all may serve to discourage and minimise illegal and anticompetitive activities.

[25] http://www.tca.ie/EN/News--Publications/Information-Booklets.aspx.

CONTRIBUTION FROM ISRAEL

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Israel --

1. Introduction

1. Cases of collusion and corruption in public procurement are particularly sensitive as conspiracies like these take away resources from the purchasers and the taxpayers, diminish public confidence in the competition process and undermine the benefits of a competitive market. Some markets and industries rely heavily on public procurement and hence maintaining competition in those markets is of great importance to governments and competition agencies in particular. Defence products, energy and infrastructure markets usually involve a significant role for public procurement.

2. For several years now the Israel Antitrust Authority (hereinafter – IAA) has focused on the promotion and the protection of competition in public procurement: the former is done through targeted advocacy efforts whereas the latter through rigorous enforcement.

3. This report illustrates the experience of the IAA in protecting and promoting competition in public procurement. Issues pertaining to corruption are being handled by the National Fraud Investigation Unit of the Israeli Police and as such, the IAA does not have the power to investigate such offences, unless they constitute a violation of the Restrictive Trade Practices Act (herein – RTPA). However, in recent years the IAA has come across cases where an antitrust offence covered up fraud. In these cases, the IAA investigators can apply to the Minister of Public Security for a special permit to investigate fraud. The Attorney General can issue a special permit to the IAA legal department so that the fraud offence can be prosecuted by the IAA.

2. Public Procurement in a Small Island Economy

4. Due to Israel's relatively small size and unique characteristics, its economy is generally referred to as a small island economy. The smallness of the market is both in terms of population and land. With just over seven million inhabitants, the local market features limited demand and insufficient capacity to accommodate a large number of competitors in various sectors of the economy, particularly with respect to nationwide infrastructures. The island factor stems from a combination of elements, including geographic remoteness from main trading partners, limited degree of trade with close neighbours, language barriers, cultural and historic differences, and substantial reliance on foreign trade. Subsequently, and despite the higher openness to trade in recent years, there are still challenges to competition. Israel’s small size and relative high entry barriers often make it less attractive to entry by foreign competitors. Subsequently, the shortage of immediate potential competition from neighbouring markets alleviates competitive constraints on local incumbents.

3. Enforcement Activity

5. Enforcement efforts break down to two main elements, namely enforcement against collusion and bid-rigging and enforcement through the IAA review process of mergers and applications to approve

restrictive arrangement. This section offers some examples for enforcement activity that relates to the protection of competition in public procurement.

4. Merger Control

6. The IAA has recently opposed a merger between two companies, Ackerstein Ind. and Netivey Noy Ltd., in the business of designing and installing curb stones and edge stones used for public streets. These products are typically procured by public bodies such as government offices and municipalities.

7. Ackerstein asked to merge with its competitor Netivey Noy by buying off all of its technical equipment which would have resulted in decreasing the number of competitors in the market from four to three. Upon examination, the IAA found that the market in question has oligopolistic features and that the level of prices did not match up with the relatively low costs of production and instalment. The merger was blocked after the IAA concluded that it would significantly harm competition which would result in public procurement bodies paying supra competitive prices.[1]

5. The Envelope Manufacturers Cartel[2]

8. The "Envelope Manufacturers Cartel" is a key example of a public procurement process falling victim to cartel activity that included price fixing, market allocation and abuse of taxpayer's money through governmental bids and tenders.

9. Three envelope manufacturers were indicted and convicted of bid rigging offences between the years of 1995-2002. The market share of the three defendants was estimated at 80-90% during the cartel activity. The government purchased and then distributed the envelopes among the various ministries and governmental agencies.

10. A former employee of one of the three manufacturers contacted the IAA and revealed substantial information that kick-started the cartel investigation. During the investigation, a major source of information and documentation was the government which provided the IAA with data relating to the different bids and details of the rigged offers submitted by the defendants.

11. The information provided evidence about the structure and conduct of the cartel: for example, a large number of bidders were disqualified for alleged technical flaws where in fact the bidders used this method to divide the market. This, however, could not be proven in court and thus the defendants could not be indicted on these charges.

12. Testimonies taken by IAA investigators showed that some government officials suspected that a collusion or bid-rigging might be taking place due to suspicious rotation patterns among the leading manufacturers of winning the public tenders and due to identical tenders submitted to the government. No government official, however, disclosed his or her suspicions due to insufficient experience in recognising cartel activity and due to lack of empirical evidence.

13. The District Court convicted the three envelope manufacturers and their executives in July 2007 of violations of the RTPA because of their participation in a cartel during the years of 1995-2002. The Court ruled that the cartel activity led to a division of market amongst the manufacturers, the coordination of tender submissions and the bribery of an envelope importer in order to protect the market from other imports. In December 2007, the defendants were sentenced to periods of compulsory public work ranging

[1] Ackerstein Ind. Ltd. - Netivey Noy Ltd. (Objection to Merger); Publication Number 5001526.

[2] Criminal case 377/04 (District court Jerusalem) State of Israel v. Gvaram *et al*.

from 6 months to 60 days; the companies were fined between 180,000 NIS to 250,000 NIS while the executives paid tens of thousands of NIS in fines.

14. In March 2008 the IAA appealed to the Supreme Court against the District Court's ruling. The IAA appealed the light sentence for the defendants as well as their acquittals with respect to the charges that they had violated the RTPA under aggravated circumstances.

15. The IAA argued that in light of the manufacturers' share and position in the envelopes market, which as mentioned above constituted 80-90% of the market and the seven year long period of continuous cartel activity, the envelope cartel was able to cause substantial damage and harm to competition. Therefore, the District Court should have convicted the defendants of having committed the offenses under aggravated circumstances.

16. The IAA further argued in its appeal to the Supreme Court that the penalties and fines imposed on the cartel are significantly more lenient than those that should have been imposed. The sentence deviated from the clear policy established in the Supreme Court's case law according to which antitrust offenders face imprisonment and substantially larger fines. The IAA asked the Supreme Court to impose actual prison sentences and substantially larger fines.

17. The Supreme Court only partially accepted the IAA's appeal: the fines were raised to 375,000 NIS and compulsory community service time was prolonged. The Supreme Court's main argument against imprisonment of the defendants was that too much time, namely seven years, had passed between the discovery and cessation of the cartel (2002), and the Supreme Court's verdict (2009). Other reasons as to why imprisonment was not an appropriate punishment, according to the Supreme Court, were due to more personal objections with regards to the main defendant. The private reasons were not disclosed to the public and thus the IAA has no detailed knowledge of the defendant's argumentation.

18. During the proceedings the IAA and the Civil Division of the State Attorney's office considered the possibility to sue the cartel members for damages on behalf of the State. This would have been an unprecedented action in Israel. However, the amount of quantitative and numerical evidence of the State's loss due to the cartel's activity did not suffice to support such a claim before court.

6. The Traffic Lights Cartel[3]

19. The following example demonstrates a highly complex and problematic relationship between the public procurers and the bidding parties from a competition policy standpoint. The case is known as the "Traffic Lights Cartel".

20. In 1992 the Haifa municipality, the third largest city in Israel, issued a bid for the instalment and maintenance of traffic lights across the entire city. Before the municipality published the bid, they attempted to apply for an exemption from publishing a public bid. In Court the representatives of Haifa municipality claimed that for safety reasons only one company, namely "Menorah", can install and maintain the traffic lights. The municipality argued that only Menorah has the technical know-how to connect the traffic lights to the newly established control centre. Therefore, the exemption from publishing a public tender should be granted. "Ariel" is a major electricity and traffic light company and is also Menorah's main competitor. Ariel appealed to the court against the municipality with the claim that they can provide the same services with the same technical know-how as Menorah. Consequently, the Court ordered the municipality to publish a public bid for the tender.

[3] Criminal appeal (Supreme Court) 7829/03 State of Israel v. Ariel *et al*.

21. A few days before the deadline of the public tender, however, the CEOs of Menorah and Ariel reached an agreement in which Ariel committed to concede from the bid in return for 1 million NIS and the subcontractor rights for maintaining the traffic lights in Jerusalem. After the agreement, Menorah won the municipal tender which it priced at over 1 million NIS and thus exceeded the estimated cost of the Haifa municipality.

22. Both parties and their CEO's were charged for conspiring in bid-rigging offences. Menorah and its CEO paid 900,000 NIS after having signed a plea bargain; the CEO paid an additional 100,000 NIS in fines and was indicted to three months of community service. The District Court acquitted Ariel and its CEO with the reasons that competition is restricted in this industry due to technical barriers related to the traffic control centre. The IAA appealed the ruling of the District Court on the grounds that it was mistaken when considering the alleged technical barriers as reasons for restricting competition through bid-rigging as it is an offence under any circumstances. The Supreme Court accepted the IAA's appeal and convicted Ariel and its CEO. Additionally the ruling stated that the municipality's reluctance to publish a public tender was detrimental to competition and did not serve the public interest. The Supreme Court added that the agreement between the defendants harmed competition and did disservice to the public and the tax payers. The ruling of the Supreme Court emphasised the severity of the offences that were made in relation to a public tender published by a municipality. The bid-rigging offence, according to the Supreme Court's decision, deserves to be treated harshly through imprisonment sentences that reflect a clear and deterring message against those who try to extract "easy profits" on the expense of tax payers. The Supreme Court accepted the IAA's appeal over the sentences imposed by the District Court, and decided to impose harsher sanctions on the undertakings and individuals involved.

7. The Snowplough Cartel[4]

23. Another case of bid-rigging, known as the "Snowploughs Cartel", saw the involvement of several firms colliding together between the years of 1997 and 1998 into a cartel when bidding for tenders published by the Ministry of Defence and the Jerusalem Municipality. The Government has no choice but to publish its tenders for the purpose of public procurement and therefore in 2001 the Court ruled that bid rigging offences in the public procurement process need to be treated with extra severity and punished with firm rulings.

8. The Defence Industry

24. As stated above, certain industries are based on public procurement; one of such examples is the defence industry. This industry has a substantial degree of state involvement and its structural framework is a key factor for concerns for competition in public procurement. For these reasons, the IAA devotes a considerable amount of time and effort to advocate the importance of competition in the defence industry market through frequent discussions with officials in charge of public procurement.

25. The Ministry of Defence (hereinafter – MOD) is the single most substantial buyer of locally produced defence products. It is also in charge of regulating the procurement process of the industry. The MOD is the authority to grant the sales and export permits and regulates the security matters with regards to the industries' operations. In addition to all that, three out of the four major defence industries are state owned.

26. Although a considerable amount of revenue is collected from exports, the defence industry is nonetheless very dependent on the local market, especially when launching a new product. The MOD believes that local knowledge for development and production of the defence system is a fundamental

[4] Criminal case 1131/00 (District court Jerusalem) State of Israel v. Motorgrader *et al*.

requirement that cannot be compromised. As a result of this, defence products produced abroad by competitors are not regarded as substitutes for the locally produced products. The MOD claims that the local quality and the technical advantage are superior to products from abroad and therefore procurement of the local defence industry is vital. Other arguments brought forward by the MOD are the minimisation of the dependence of foreign supplies and the greater investment in R&D among local companies.

27. In recent years the IAA was asked to approve joint ventures between major defence industries with the aim to develop high quality technology products. The MOD was in favour of joint ventures as a combination of expertise, skills and the knowledge of each party will yield optimal technological solutions in an even shorter time span. Recent cases included a joint venture in 2007 between "Elbit" and "Ness" in order to develop an information technology for the air force and a venture in 2009 between the Israel Aerospace Industries and "Refael" in order to develop an electro-optic system tracing ballistic missiles. The IAA however, expressed concerns that large scale ventures would undermine competition in the product market and would therefore decrease the overall intensity of competition. The IAA voiced a concern over a possible anti-competitive spill over effect due to convergence of economic interest among competitors. Sharing commercial information between the parties to a joint venture may have a detrimental effect on competition.

9. Joint Venture between Elbit Ltd. and Israeli Aircraft Industries Ltd.

28. In 2007 the IAA examined a joint venture between "Elbit Ltd." and the Israeli Aerospace Industries Ltd. who sought to develop an advanced military vehicle. The MOD issued an urgent demand for the product. The IAA understood the operational importance of allowing joint ventures to develop the product but insisted on a few important conditions. The IAA demanded that the joint development was limited to specific functions of the product and that all other functions were developed separately. In addition to that, limitations on information transferral between the parties had to be guaranteed as well as that ownership of information developed by the parties had to remain in their possession. The IAA approved the joint venture under the condition that each party would be entitled to use the knowledge developed during the joint venture in other fields of operation without the need for consent from the other party.

10. Promoting Competition in Public Procurement through Advocacy

29. In addition to the sensitivity of the public procurement process, often public procurers give a different priority to the notion of competition as understood by the competition agency itself. Certain circumstances, according to public procurers, may allow balancing competition with other considerations in the procurement process.

30. For instance, public procurers may be under time pressure that requires a fast paced decision making which does not include careful planning of the competitive aspects associated with the procurement process. In some cases, procurers may consider objectives which reflect other facets of the public interest. The relationship between the IAA and public procurers is one of the issues exemplified in this report. A few prominent examples are given that demonstrate the experience and involvement in promoting and protecting competition in public procurement through advocacy and enforcement activity.

11. Awareness to Bid Rigging in Public Procurement

31. In light of the exposure of the public procurement process to anti-competitive practices, the IAA has embarked on a targeted awareness and advocacy campaign. In the first stage of the campaign the IAA's Director General and the Government's General Accountant which oversees and supervises the public procurement process, jointly issued a letter to all government procurers sending a strong message to

enhance and strengthen competition. In addition to the letter, the OECD Anti-Bid-Rigging Guidelines were summarised in Hebrew and distributed to all the government procurers. The letter from the IAA's Director General and the Government's General Accountant underscored the importance of protecting competition in the public procurement process and emphasised the potential economic harm associated with bid rigging. It went on to say that from a legal perspective, bid rigging is an illicit restrictive arrangement prohibited by the antitrust law. The letter outlined that the IAA investigates bid rigging offences and handles criminal cases against undertakings and business people who are alleged offenders. According to the antitrust law the maximum penalty for bid rigging offences is a five year imprisonment. In addition to the government's efforts to fight bid rigging offences through enforcement, the government sees great importance in raising awareness about the topic especially to the public procurement officials. A greater awareness may help the procurement body to decrease the risk of bid rigging amongst suppliers, ex ante and increase the chances to detect illicit bid rigging activity, ex post. The letter stated that the OECD Anti-Bid Rigging Guidelines should be considered with relevant adjustments to the Israeli legal framework.

32. The second stage of the campaign aims to raise awareness about bid rigging and collusion. Currently the IAA is preparing the seminars and workshops which will be carried out in early 2010. The IAA organises workshops which are based on the aggregated experience of the IAA as well as other competition agencies and on the OECD Anti-Bid-Rigging Guidelines. The IAA workshops will be attended by public officials that deal with public procurement on different levels, from government offices to municipalities and other public institutions. The seminars are designed to inform those who are involved in the public procurement process of the potential risks involved with bid rigging and their legal implications. In addition, these seminars will provide the public officials with the necessary tools to detect bid rigging attempts and instruct them how to respond to these situations.

12. Conclusion

33. The different examples demonstrated above permit to deduce a twofold conclusion. Firstly, in order to promote competition in the public procurement process, it is necessary to take a proactive approach which is based both on advocacy alongside a tough enforcement activity. The combined strategy, encompassing both approaches, will yield better results and will have a more effective impact on the promotion of competition. The second factor that needs to be taken into consideration is the strong impact on the level of competition in the public procurement process because of the specific market characteristics and the role of the procurer. The competition authority, therefore, must identify the areas that are structurally problematic and give a special attention to specific needs of public procurement entities.

CONTRIBUTION FROM JAPAN

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Japan --

1. The JFTC's Strict and Proactive Enforcement of the Antimonopoly Act against Bid Rigging

1. Bid rigging is typical cartel behaviour and one of the most serious breaches of the Antimonopoly Act ("AMA"). Therefore, the Japan Fair Trade Commission ("JFTC") has been strictly and proactively taking actions based on the AMA against bid rigging. In FY 2008, the JFTC ordered companies that violated the AMA to pay surcharges of 27.03 billion yen in total, including those of 2.89 billion yen for bid rigging cases. For the past five years, the JFTC ordered 913 companies that were involved in bid rigging to pay surcharges of 38.89 billion yen in total.

Table 1.

Fiscal Year	2004	2005	2006	2007	2008
Amount of Surcharge (billion yen)	11.15	18.87	9.27	11.29	27.03
For Bid Rigging (billion yen)	3.45	18.80	6.38	7.37	2.89
Number of Companies Surcharged	219	399	158	162	87
For Bid Rigging	194	392	137	132	58

2. This strict and proactive enforcement against bid rigging has served to maintain and promote fair and free competition in public procurement markets, thereby creating economic benefits such as a decline in contract prices. For example, following the initiation of investigations by the JFTC, the rate of contract prices to expected prices decreased by 18.6% on average in 22 bid rigging cases in which legal measures were taken between 1996 and March 2003.[1]

3. The amendment of the AMA, which increased the surcharge rates and introduced a leniency programme and criminal investigative powers for the JFTC, came into effect in January 2006. Deterrent against violations of the AMA, including bid rigging, were strengthened and the amended AMA has shown successful results so far; for example, the leniency system[2] is being actively used in bid rigging cases and the JFTC has referred bid rigging cases to the prosecution agency by conducting criminal investigations.

4. In addition, another amendment of the AMA, which raised the surcharge rates for a party that has played a leading role in a violation, increased the maximum number of leniency applicants, extended the Statute of Limitations, increased the maximum jail term, etc., was approved by the Diet on June 3, 2009,

1 The data was prepared based on materials and other items submitted by the procurement agencies during the investigations.

2 The leniency programme in Japan does not stipulate exclusion of application when any persons or corporations are involved in bribery or corruption. However, if there are any facts demonstrating persons or corporations forced other parties to commit violations or hindered them to discontinue violations, the leniency programme cannot be applied. (Paragraph 17 of Article 7 (2) of the AMA).

and came into effect on January 1, 2010. The amendment aims to further enhance deterrent effects against violations of the AMA, including bid rigging.

2. The JFTC's enforcement of the "Involvement Prevention Act" against malfeasance by procurement agencies

2.1 Enforcement when procurement agencies are involved in bid rigging

5. Recently in Japan, there have been cases where the officials of procurement agencies were involved in bid rigging. (This kind of bid rigging is called "*Kansei-dango"* (i.e., bid rigging initiated by government officials).) While the AMA is applied to entrepreneurs and trade associations (including their executives), procurement agencies are normally regarded as the victims of violating actions of the AMA as bid rigging causes them to have no choice but to contract at a higher price than usual, etc. However, when procurement agencies are involved in bid rigging, measures taken against them can be as follows:

- In the case when entrepreneurs and their employees are accused of and prosecuted for being involved in bid rigging as a criminal case (Article 89 of the AMA), the procurement officers can be accused and prosecuted as conspirators;

- In the case when administrative measures (cease and desist orders or surcharge payment orders) are taken against a bid rigging case, as a general rule, the JFTC cannot take measures against procurement agencies based on the AMA. However, when the JFTC recognises certain kinds of involvement by the officials of procurement agencies, it may demand the procurement agencies to implement improvement measures based on the Act on Elimination and Prevention of Involvement in Bid Rigging, etc., and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. ("Involvement Prevention Act"). The Involvement Prevention Act was revised in December 2006, to introduce a criminal penal provision on the officials of procurement agencies and expand the scope of conducts that fall under illegal involvement in bid rigging, etc., as well as the types of procurement agencies to which the act applies.

6. The contents of the Involvement Prevention Act are as follows:

2.2 Outline of the Involvement Prevention Act

2.2.1 Improvement measures by the procurement agencies (Article 3)

7. When the JFTC recognises that the officials of procurement agencies[3] have been engaged in "involvement in bid rigging, etc.,"[4] in which they are involved to a certain extent, it may demand that the heads of the procurement agencies implement improvement measures based on the Involvement Prevention Act and will also implement elimination measures against companies based on the AMA. When the procurement agencies receive a demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

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[3] The procurement agencies to which the Act applies are 1) the national government, 2) local government and 3) a corporation in which the government or local governments have equity of 50% or more, etc. (Paragraphs 1, 2 and 3 of Article 2 of Involvement Prevention Act).

[4] "Involvement in bid rigging, etc.," is specified in the Involvement Prevention Act (Paragraphs 5 of Article 2) as the following 4 types of conduct: (1) express indication for bid rigging; (2) indication that a specific party is preferred as the counterparty to the contract; (3) disclosure of secret information about ordering; and, (4) aiding a specific act of bid rigging, etc.

8. Although the above investigation and improvement measures are voluntary actions taken by the procurement agencies, they shall notify the results of the investigation and the contents of the improvement measures to the JFTC. When the JFTC finds it particularly necessary in such cases as there being significant discrepancies between the results of the investigations taken by the JFTC and by the procurement agencies, etc., it may express its opinion.

2.2.2 Claim for damage (Article 4) and disciplinary actions (Article 5)

9. The procurement agencies shall make the necessary investigation if the employees involved in bid rigging, etc., are liable to the government for damage, etc., and shall demand compensation for the damage promptly when the employees have caused damage due to wilful or gross negligence. And the procurement agencies shall perform the necessary investigation if it is possible to impose disciplinary actions upon the employees and shall publicise the results of these investigations.

2.2.3 Penalty for employees who harm the fairness of bidding, etc. (Article 8)

10. If an employee, in respect of concluding an agreement by bidding, etc., by public procurement, has conducted any acts that harm the fairness of such bidding, etc., by inciting any entrepreneur or person to conduct bid rigging, informing any entrepreneur or person the target price or any other secret concerning such bidding, etc., or by any other method, in breach of his/her duties, such employee shall be sentenced to imprisonment with labour not exceeding five years or punished with a fine not exceeding 2.5 million yen.

2.3 Cases to which the Involvement Prevention Act was applied

11. So far, the JFTC has demanded improvement measures concerning six cases based on the Involvement Prevention Act (see annex about the improvement measures by the procurement agencies).

2.3.1. The JFTC's demand to Iwamizawa City (January 30, 2003)

12. It was found that before putting a contract to tender, the employees of Iwamizawa City, with the consent or complicity of their supporting executives, had fixed the target amount for annual order placements allotted to each company, designated potential bid winners for each construction project to almost ensure the target amount for annual order placements and communicated the name of an expected bidder, as well as the rough amount of a contract, to the board members of trade associations, who then transferred the tip-off to each expected bidder. Based on the provisions of the Involvement Prevention Act, the JFTC demanded the mayor of Iwamizawa City to take necessary measures to confirm the elimination of the involvement in bid rigging, etc., in the procurement of the city's construction projects.

2.3.2. The JFTC's demand to Niigata City (July 28, 2004)

13. It was found that the employees of Niigata City continuously disclosed the expected construction prices, which should have been kept confidential, before bidding was conducted in response to the requests of companies who were selected by the bidders as the designated winner. The JFTC also found that a copy of the explanatory materials of proposals submitted to the contractor designation committee, which should have remained secret, had continuously been leaked to certain bidders who tendered for the order for jacking work and open-digging work. Therefore, the JFTC demanded the mayor of the city to implement improvement measures.

2.3.3. The JFTC's demand to the Japan Highway Public Corporation (September 29, 2005)

14. It was found that the employees of the Japan Highway Public Corporation (i) accepted the submission of "allocation tables," which showed the expected successful bidders for competitive bids of

construction projects for the upper part of steel bridges, from the retirees of the corporation and approved the allocation tables on each occasion, (ii) placed split orders for the construction projects, for which a bulk order had been originally planned, at the request of the retirees, and (iii) lowered the standard for order placement from 1.5 billion yen or more in the past to 1.0 billion yen or more at the request of the retirees. The purpose of these (i) to (iii) activities was to secure reemployment for retirees from the corporation, and the employees not only gave tacit approval to and authorised bid rigging, but also encouraged companies to engage in it. In addition, the employees were found to have disclosed unpublished information, such as the expected timing of placing orders. Therefore, the JFTC demanded the president of the corporation to implement improvement measures.

2.3.4. The JFTC's demand to the MLIT (March 8, 2007)

15. It was found that the employees of the Ministry of Land, Infrastructure and Transport (MLIT) indicated their intentions regarding the expected successful bidders for floodgate projects to companies, which were referred to as "co-ordinators," and enabled the cartel to be conducted smoothly, before ordering the projects. The JFTC demanded the Minister of Land, Infrastructure and Transport to implement improvement measures.

2.3.5. The JFTC's demand to the City of Sapporo (October 29, 2008)

16. It was found that the employees of the City of Sapporo communicated their selection of the successful bidders to those designated as successful bidders for most of the special electric equipment construction ordered by the City of Sapporo before the bidding, and thereby had the participants in the bidding arrange the bid rigging. The JFTC demanded the mayor of the City of Sapporo to implement improvement measures.

2.3.6. The JFTC's demand to the MLIT (June 23, 2009)

17. It was found that the employees of the MLIT provided unpublished information, such as the names of the designated entrepreneurs for the applicable bidding or the names of the office where the applicable bidding was planned, etc., before the designation notices for annual designated competitive bidding for the applicable vehicle management jobs. The JFTC demanded the Minister of Land, Infrastructure, Transport and Tourism to implement improvement measures.

3. The JFTC's promotion to improve ordering systems for public procurement

18. Many aspects of public procurement systems are related to bid rigging. The JFTC has conducted questionnaire surveys, etc., regarding bidding systems, targeting procurement agencies, such as local governments, about the situation of reforms for the bidding systems and the measures to improve compliance between FY 2003 and FY 2008. The JFTC has compiled the results and published its views regarding ideal public procurement from the viewpoint of competition policy.

3.1 Report concerning the study group on public procurement and competition policy

19. In 2003, the JFTC held a study group on public procurement and competition policy from the viewpoint of creating a more competitive environment for public procurement and aiming at the effective prevention of bid rigging. The study group identified problems with bidding and contracting systems for public procurement and examined measures to improve the problems with the aim of enhancing competition in public procurement. The JFTC published a report summarising the results of the study in November 2003.

20. The report said that it was important to ensure as much competition as possible based on the basic idea of "value for money," which means purchasing the most valuable with a certain amount of cost, for public procurement by the national and local governments. The report recommended (i) the use of bidding procedures in consideration of prices, technologies and qualities as specific measures (comprehensive evaluation bidding methods), (ii) the expansion of the scope of general competitive bidding (open tendering) and (iii) the improvement of ordering systems.

3.2. Survey report on actual approaches, etc., to prevent bid rigging in public procurement.

21. The JFTC conducted a questionnaire survey targeting 1) local governments (320 governments) and 2) government-sponsored corporations in which the national government had equity of 50% or more (210 corporations) to ascertain actual conditions surrounding efforts to prevent bid rigging as of July 2005. Based on the results of the survey, the JFTC published a survey report in October 2005.

22. The report proposed (i) to strive toward full dissemination and training of employees to prevent bid rigging, (ii) to formulate compliance manuals, (iii) to establish systems for organisationally examining bid rigging information and (iv) to improve the management of bid information.

3.3. Survey Report on the Actual State of the Tendering and Contracting System in Public Procurement

23. The JFTC conducted a questionnaire survey targeting local governments and government-sponsored corporations, in which the national government had equity of 50% or more with the aim of understanding (i) reforms of the bidding and contracting systems at procurement agencies and (ii) measures to improve the compliance of the officials of procurement agencies as of July 2006. Based on the results of the survey, the JFTC published a survey report in October 2006.

24. The report recommended that (i) in order to deal with complicated paperwork and difficulties in the elimination of bad/unqualified companies, which resulted from the growth of the general competitive bidding method, measures such as the rationalisation of paperwork through the introduction of information technology or the implementation of spot inspections against the companies may be effective, and (ii) efforts need to be made step-by-step where the national government and other large-scale procurement agencies gradually implement a comprehensive evaluation method, accumulate implementation experiences and then transfer their know-how to small-scale procurement agencies for the overall dissemination of such methods, etc. (see also (5) below).

3.4. Report concerning the Study Meetings on the Measures and Promotion of Reform in Public Procurement

25. The JFTC held meetings referred to as "Study Meetings on the Measures and Promotion of Reform in Public Procurement" (hereinafter referred to as "the Study Meetings") beginning in November 2007. The aim of the Study Meetings is to exchange information concerning the status of efforts made by procurement agencies for enhanced compliance and reforms of bid tendering systems, by inviting officials in charge at national and prefectural governments, etc., and to further promote effective measures by studying the issues and problems that the procurement agencies faced in the course of implementing their reform measures, through discussions including outside experts. The JFTC compiled the results of the meetings into a report and published it in May 2008.

26. The report proposed (i) to enhance compliance in procurement agencies, (ii) to implement a comprehensive evaluation method so that participating bidders do not have any suspicions that the evaluation was arbitrarily conducted or suchlike, (iii) to ensure competition in setting regional

requirements and (iv) to take measures to make bidding more competitive concerning the issue of participation by only one bidder or failure of bids to materialise.

3.5. Relationship between measures based on the AMA and nomination suspension[5] by procurement agencies

27. The above mentioned report published in 2003 recommended that "Concerning suspension from bidding measures, it is important that significant differences do not exist among procurement agencies and it is appropriate to take nomination suspension measures after the final judgments by the JFTC are issued", etc.

28. Moreover, the report published in 2006 showed that while almost all prefectures, etc., took nomination suspension measures at the point when cease and desist orders, etc., were issued, other local governments did not do so. Because cease and desist orders as administrative measures will be issued in case violations of the AMA are found, it was recommended in the report that it is appropriate to take nomination suspension measures, as a general rule, at the point when cease and desist orders were issued and it is desirable to improve the process of nomination suspension measures accordingly.

29. The above mentioned report in 2006 also pointed out that, in response to the introduction of a surcharge leniency programme, about 90% of prefectures, etc., and about 50% of other parties had stipulated or were planning to stipulate a provision to shorten the suspension period of the entrepreneurs' nomination. Based on this result, the report stated that it was advisable to work to ensure consistency between the surcharge leniency programme and nomination suspension measures for the promotion of bid rigging prevention by the government as a whole through the initiative of both national and local governments.

4. The JFTC's efforts to prevent bid rigging

30. From the viewpoint that the effort of procurement agencies is very important to prevent bid rigging, the JFTC has held meetings for the procurement officers of procurement agencies, co-operated in dispatching lecturers to and providing materials for seminars for procurement officers, which are held by the national and local governments, and has held seminars for procurement officers of public corporations. The JFTC formulated and published the "Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids" ("Public Bids Guidelines") to promote the correct understanding of the AMA in related industries. See Japan's contribution to the breakout sessions of COLLUSION and CORRUPTION in PUBLIC PROCUREMENT for further details.

[5] Nomination suspension is a measure taken by procurement agencies concerning public procurement to suspend entrepreneurs from bidding for a certain period, because those entrepreneurs are disqualified from accepting construction orders for falling under certain conditions, such as involvement in bid rigging, etc.

ANNEX - MEASURES TAKEN BY ORDERING ORGANISATIONS UNDER THE ACT ON ELIMINATION AND PREVENTION OF INVOLVEMENT IN BID RIGGING, ETC.

City of Iwamizawa	City of Niigata	Japan Highway Public Corporation
Request Date: 30 January 2003	28 July 2004	29 September 2005
Submission Date: 11 June 2003	28 April 2005	16 February 2006
Main Contents of Improvement Measures • To prepare, disseminate and enforce the "Manual to prevent the introduction of bid rigging" so as to thoroughly reform the consciousness of the staff • To separate the project dept. and bidding dept. to construct an effective system and organisation for appropriate bidding • To largely extend the designation suspension period for the enhanced supervisory system for any violation against the Antimonopoly Act • To increase competitive bidding so as to assure fair and free competition in bidding • To restrict entrepreneurs' access to the sections involved in ordering • To restrain the retired city staff from working for companies in the related industries	• To prepare and disseminate a compliance manual and to provide training so as to reform the consciousness of the staff and organisation culture • To assure a recording and publication system of upcoming bids and to establish an organisation in charge of compliance so that compliance is observed and staff ethics are maintained • To extend the designation suspension period and cancel the qualification for bidding as enhanced measures to prevent bid rigging • To cover a wider range of bids with competitive bidding methods and to abolish regional requirements so that the transparency and competitiveness of the bidding and contract system are assured • To restrict entrepreneurs' access to the sections involved in ordering • To restrain the retired city staff from working for companies in the industries concerned and to prohibit them from approaching city officials	• To make the ethical standards of behaviour stricter and provide lectures so that the consciousness of the officers and staff members is improved • To collect written oaths on compliance from the officers and staff for higher compliance consciousness and to establish a compliance committee and in-house consultation desk • To largely extend the designation suspension period and raise the amount of penalties • To increase the use of competitive bidding, to abolish designated bidding in principle and to improve and enhance comprehensive evaluation methods • To request the entrepreneurs to restrain from promotional activities • To restrain the retired staff from working for companies in the related industries and to review the custom of early retirement
Claim for Damages According to the report, a civil expert said (March 2003), "There was no damage to the City of Iwamizawa," so no claim for damages was made against any staff member.	At present, no claim for damages has been made against any staff member.	In July 2008, damages of about 8,683 million yen in total were claimed as a joint and several obligation with the entrepreneur, against two executives of the corporation at the time who were found to be involved in bid rigging
Disciplinary Measures The top 3 municipal officers and 18 of the city's executives were punished (by reducing the mayor's salary to 1/10 (for 4 months), etc.)	The top 3 municipal officers, executives and other staff found to have been involved in bid rigging (70 persons in total) were punished (by reducing the mayor's salary to 50/100 (for 3 months), etc.)	The corporate division manager, branch manager and other staff found to have been involved in bid rigging at that time (53 persons in total) were punished (by suspending the Director-General of the Toll Road Dept. at that time from duty for 3 months, etc.).

Note: The Japan Highway Public Corporation was privatised on October 1, 2005, and divided into three highway corporations (East/Central/West Nippon Expressway Company Limited).

(As of July 31, 2009)

Ministry of Land, Infrastructure, Transport and Tourism	**City of Sapporo**
Request Date: 8 March 2007	29 October 2008
Submission Date: 18 June 2007	1 July 2009
(Main Contents of Improvement Measures) • To prepare, disseminate and enforce the "Manual to maintain the law of the land for ordering parties" and to provide training courses and lectures • To establish "Compliance Desks" inside and outside and to record the contents of inappropriate approaches from outside and publish measures taken • To strengthen measures such as the suspension of business activities under the Construction Business Act and designation suspension as the ordering party • To adopt various ordering methods; increase the use of competitive bidding; enhance the general evaluation system; and introduce bidding bonds for higher competitiveness, transparency and fairness in bidding and contract procedures • To restrain the staff in charge of bidding and contracts from working at the same post for a long time • To restrain the staff from working for any corporation that has been involved in a bid rigging case	• Proper ordering of drainage work: Improvement of estimation method of design, review of qualification for bidding, strict information management in designing and adding-up, establishing of a committee to enforce discipline and improvement of the work environment • Enhanced supervising system: Strengthening whistle-blowing system, investigation on the relation between the bid rigging initiated by the government officials and parachuting of retired officials • Enhanced restraint of retired staff from working for related industries • Improved staff culture: Training courses on compliance, personnel transfer to prevent the negative influence of working at the same post for a long time • Organisation improvement: Establishing a compliance committee (tentative title) and establishing a section in charge of compliance promotion
Claim for Damages At present, no claim for damages has been made against any staff member.	At present, no claim for damages has been made against any staff member.
Disciplinary Measures The Deputy-Director of the Kanto Regional Development Bureau at the time of the involvement in bid rigging was suspended from duty for 2 months, and 7 other staff members, including a vice-minister, were punished (reprimand, admonition and oral warning).	Salary and regional benefits were reduced by 50% for the mayor, 30% for the vice mayor in charge of the construction bureau and 20% for other vice mayors for one month respectively.

CONTRIBUTION FROM KOREA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Korea --

1. Bidding System for Government Construction Contracts: Centring around Design-Build System

1) Objectives of Government Construction Bid System

1. Government construction projects pursue two objectives; saving national budget and building high-quality and safe public facilities. The two objectives, however, are contradictory[1] in nature, so it is difficult to devise a bid system that accomplishes both of the objectives. For that reason, complementary measures are taken in each bid system to satisfy the two objectives. For instance, in the lowest tender system that saves national budget and achieves the objective of price competition, review on appropriateness of bid prices is made to prevent the possible problems caused by excessively low bid prices - poor quality of the constructed facilities and the deteriorating financial condition of the construction company.

2) Concept of Design-Build System

2. A Construction company conducts both designing and building in a design-build project[2] unlike in other general government constructions where the building companies are responsible only for construction based on an architectural design plan made by the government. That is, in a bid for design-build contract, the government provides only basic plans of the bid and RFP (Reference for Proposal) and the bidders, i.e. construction companies, submit architectural drawings, application and other bidding documents. Then, finally, the awarding authority, i.e. the government, chooses a winning bidder based on review of what bidders submit.

3. Since design plan is made by construction companies themselves, the companies face more risk under design-build system. This system, however, ensures higher efficiency of the construction work by shortening the construction work period and minimising management work for the government and enabling the construction company to utilise their new technology.

3) Design-Build & Bid Rigging

4. Design-build is usually limited to government construction projects for facilities requiring advanced technology and construction methods such as bridges, dams, ports, railways, sewage treatment plants, waste incineration plants or CHP plants (combined heat and power plants). Therefore, a small

1 The emphasis on "budget-saving" means engaging as many companies as possible in bidding for price competition while "safe and high-quality facilities" can be better secured when just a few eligible companies participate in bidding for quality competition.

2 Design-Build is also called "turn key," because all that an employer of the turn key project does is just turning a key to the completed building that is both designed and constructed by a contractor.

number of companies, two to five at most with high-level technology, participate in a tender for design-build contracts, which results in higher possibility of bid rigging, at least in terms of the number of bidders, than in tenders for other construction work[3].

2. Conditions Facilitating Bid Rigging in Design-Build System

1) Favourable Environment for Large Construction Companies[4]

5. Since design-build system is usually used in large-scale construction projects[5] for bridges, dams or ports that require enhanced technology, large construction companies with advanced equipment and labour force are in an advantageous position in a tender for design-build contracts compared to small- and mid-sized enterprises ("SMEs"). High costs incurred for a design drawing also put SMEs in a disadvantageous position, because the costs will not be reimbursed even if the company fails to win the contract[6].

6. Generally when government prepares design-build contracts, it hires architectural design firms to make basic plans of the bid and RFP (Request for Proposal). The problem is that from the point of commissioning of the work, the information on the tender tends to be leaked out to large construction companies which have maintained close relationship with those design firms. In this case, the information helps the construction companies prepare for the tender in advance, which serves as another advantage for the large companies.

7. In short, the possibility of bid rigging in design-build contracts is heightened due to the small number of the participants and a superior position of a few large companies in labour force, technology, financial condition and information.

2) Information Exchange between Construction Companies

8. Employees of construction companies tend to maintain close relationship with those in other competing companies, have meetings or contact each other on a regular basis to exchange information on tenders or architectural design.

9. Sometimes information on, for example, which construction company hires which design firm to prepare for a tender is shared even before the bid announcement. This can be regarded as legitimate information exchange for sales, but lead to restricted actual competition in the bidding for the construction contract.

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3 For example, at least 20~30 companies participate in a bid for construction work where the contract is awarded to the lowest bidder.

4 There is no precise definition of large construction companies, but six companies are currently regarded as large construction companies in design-build projects. (The six companies account for 30.9% of the total orders placed in 2008.)

5 In Korea, construction work of the estimated cost of 30 billion won or more is considered as a large-scale construction.

6 In fact, the government pays compensation for companies whose bids are not accepted in a tender, but the amount is far short of the cost incurred for the bidding.

3. Types of Bid Rigging Schemes in Design-Build Projects

1) Bid Rotation

10. Bid rotation occurs usually when several tenders for design-build projects are announced in a short period. Under the scheme, each conspirator, mostly large company, is designated to be the successful bidder on certain contracts. This way, the conspirators get their "fair share", avoiding competition and easily securing contracts they are interested in.

11. Some companies argue bid rotation is inevitable, citing that the scheme helps maintain construction costs at an appropriate level, averting cut-throat price competition and the consequent shoddy construction. The scheme, however, apparently is a bid-rigging conspiracy in that it restricts competition among bidders in the beginning.

2) Complementary Bidding

12. Complementary bidding occurs usually between large companies and SMEs while bid rotation scheme is used by companies of similar sizes. In complementary bidding, a company generally of large size asks a small company to submit a cover bid to avoid a situation where its bid is unsuccessful, because no other companies participate in the bidding.

13. It could be seen that the requested company has no reason to participate in the tender considering incurring costs in design drawing, management and others. In the long run, however, participating in the bid is not an economic loss for the requested company, since compensation is made for the participation. The large company, for example, may compensate its conspirator by inviting the company to be a member of consortium bidding for other construction projects later on.

3) Cartel in Architectural Design

14. A successful bidder can be chosen in several ways in a tender for design-build contracts. Among them is frequently used the method of adding up the scores allocated to each category of architectural design and bid prices-60% and 40% of the total evaluation respectively in most cases- and awarding the contract to the bidder of the highest score.

15. Although rigging bid prices is the most common form of bid-rigging conspiracy, cartel on architectural design can also occur in a bid for design-build projects. That is because the rate of architectural design is higher in the evaluation than bid prices unlike the lowest tender system where the bid prices naturally become the target of collusive act. Since the ultimate goal of bid rigging is designating the winning bidder in advance or restricting competition in a tender, there is no need to limit collusion only to bid prices.

16. Cartel on architectural design can be conducted in the two ways in general.

17. One of them is designating the successful bidder in advance and ensuring the acceptance of the designated bidder by intentionally making other conspirators get poor evaluation in their design plans. In general, bidders hire architectural design firms for architectural designing since the architectural drawing has to be submitted shortly after the bidding announcement, usually in 60 or 90 days. Therefore cooperation from the hired design firms is needed to deliberately lower the score of design plans by satisfying only basic requirements or intentionally excluding necessary parts in their drawings.

18. In other cases, the bid rigging participants do not designate who will win the bid but agree on inclusion or exclusion of some parts in drawings. For example, they get together with competitors to agree

to exclude certain parts in the drawings in order to save drawing costs. This scheme is not a traditional way of bid rigging where a successful bidder is designated in advance, but it apparently constitutes cartel conduct in that competition in the architectural design is restricted in the bid. Bidders have to compete not only in bid prices but also in quality of architectural drawings.

4. Sanctions against Bid Rigging

A) Relevant Laws

19. The Korea Fair Trade Commission (KFTC) has the exclusive authority to regulate cartel conduct, but bid rigging conspiracy by construction companies is governed by several laws other than Monopoly Regulation and Fair Trade Act (MRFTA), the competition law enforced by the KFTC.

1) Monopoly Regulation and Fair Trade Act

20. On August 3, 2007, the KFTC revised[7] the MRFTA to stipulate that bid-rigging conspiracy is an act of collusively determining the successful bidder, bid prices, winning bid price, bid-winning probability, architectural design or construction method or other competitive factors in a bid or auction.

21. Construction companies which engaged in bid-rigging conspiracy stipulated in the MRFTA may face corrective order, surcharges up to 10% of the contract price or imprisonment of three years or less or fines not exceeding 200 million won. Since the revision, the KFTC imposed corrective orders and surcharges on construction companies for nine bid-rigging cases. The bid-rigging case of Seoul subway extension work will be explained later.

2) Framework Act on the Construction Industry

22. In the case where a person earns illegitimate proceeds or rigs bid prices to restrict competition in a bid for construction contract, the person faces prison terms not exceeding five years or fines of 50 million won or less in accordance with Article 95 (Penalty) of the Framework Act on the Construction Industry.

23. This law, however, has limitation in that it does not regulate cartel on architectural design in a bid for design-build contract, which is sanctioned under the MRFTA.

3) Act on Contracts to Which the State is a Party

24. Article 76.1.(3) of the Enforcement Decree of the "Act on Contracts to Which the State is a Party" provides that Public Procurement Service shall prevent a company violating the regulations of the MRFTA from bidding for government construction contracts for a period it sets of one month or longer not exceeding two years in the case where the KFTC makes such request. Such restriction in bidding for future government construction contracts can be seen as severer than corrective order, surcharge or punishment since it could have significantly adverse impact on the turnover of the construction company.

[7] It does not mean that bid rigging was not regulated before the revision. Before the revision, the KFTC had enforced against bid rigging in design-build projects by recognising bid- prices rigging as "an act of fixing, maintaining or changing prices" and cartel on architectural design as " an act of restricting types or specifications when producing or trading goods or services."

4) Criminal Law

25. According to Article 315 (Disturbance of Auctions or Tenders) of Criminal Law, a person who undermines fairness of a tender by using deceptive means or force faces imprisonment up to two years or fines not exceeding seven million won.

26. The provision of the criminal law, however, stipulates only collusive agreement leading to the actual conduct is subject to sanctions unlike the MRFTA, which recognises an agreement itself among construction companies to restrict competition as cartel conduct without the consideration whether the agreement actually result in the action.

A) Case Summary: Bid Rigging for Seoul Subway Line No.7 Extension Work

27. The case is a typical example of bid rotation for design-build projects. As Seoul city announced a basic plan on tenders for design-build contracts on six sections of work construction to extend Seoul Subway Line No.7 in December 2003, six large construction companies[8] secretly agreed to participate in the bidding, allocating each section of work to each company of them. Their concern is that without the agreement more than one company could bid for the same section, leading to failure to win the bid. On July 11, 2007, the KFTC held a full-member committee meeting and decided to impose corrective order and surcharge of 22.1 billion won and file a complaint against the six companies with the prosecution.

5. Efforts to Eliminate Collusion in Public Procurement

1) Advocacy Targeting Private Companies

28. Bid rigging is one of typical hard-core cartel conduct. It is particularly distinguished from other cartel conspiracy in that it is considered antisocial since the conduct wastes national budget and undermines the effort to ensure safety and high quality in public facilities.

29. Considering there are quite many tenders for government construction work, the problem for the competition authority, KFTC, is that it cannot prevent the problems of budget waste and poor-quality public facilities just with detection of the cartel conduct which already happened. In that sense, the Commission recognises the need to establish a round-the-clock monitoring system to better detect the conspiracy and prevent conditions conducive to bid rigging by construction companies with systematic approach.

30. As part of such efforts to prevent collusion, the KFTC's officials attended the briefing sessions of some bids for large-scaled construction to explain to the bidders the harms of bid-rigging as well as the potential sanctions and inform them of the reward program for complainants and the leniency program.

2) Co-operation with Public Procurement Agencies

31. Besides advocacy program targeting bidders, close cooperation is needed between the KFTC, the regulator of cartel conduct, and public procurement agencies given that the latter are in direct contact with the bidders and thus in better position to prevent and detect collusion.

32. In order to train the procurement officials, the KFTC issued a Big-Rigging Prevention Manual in early 2008 that explains in easy terms about what is bid-rigging and its various kinds, what costs and harms it causes, how to detect it, etc. The Manual was distributed to major agencies in charge of procurement. To

8 They are the six large construction companies mentioned in the footnote 4.

promote the use of the manual, the KFTC held a seminar in July 2008 for the procurement officials on 'prevention of bid-rigging' and 'private lawsuit for the damages caused by bid-rigging'.

33. In connection with the training, the KFTC built and operates "the Bid Rigging Indicator Analysis System" for effective and systematic detection and notification of collusion, which will be further explained below.

34. Also, the KFTC is planning to clearly stipulate in bid announcements the sanctions for collusion or in contracts the expected compensation amount (which will be 10~20% of contract prices) through close consultation with public procurement agencies.

35. Meanwhile, Public Procurement Service, the largest public orderer, operates its own unlawful bid indicator analysis system, based on which it requests the KFTC to investigate suspicious bidders, introduced fingerprint identification system for e-bidding and rewards complainants for possible collusion.

3) Bid Rigging Indicator Analysis System (BRIAS)

36. Bid Rigging Indicator Analysis System automatically and statistically analyses bid-rigging indicators based on data[9] concerning bids placed by public institutions. With the data delivered online from the public institutions, the analysis system calculates the probability of bid rigging by giving weightings to various indicators like bid-winning probability, the number of bidders, bid prices, competition methods, the number of unsuccessful bids and hikes in reserve prices, transition into private contracts, etc.

37. Since October 1997, the KFTC conducted manual analysis on bidding documents obtained from some public agencies, and then in September 2006 it set up the analysis system for bid-rigging monitoring. At first, it was applied to information provided by Public Procurement Service, but the Commission had expanded the application of the system into more public bodies and all the public bodies[10] started to provide information for bid-rigging indicators analysis in 2008. In particular, the KFTC secured a legal ground in the MRFTA for mandating all the public bodies to provide bid-related information for the KFTC starting from January 1, 2009.

38. The analysis system helps the KFTC better uncover bid rigging conspiracy by enabling it to monitor tenders of the public sector chronologically and conduct on-site investigation into those with significant indication of bid rigging. It also prevents national budget waste caused by bid rigging and helps establish fair competitive order. Furthermore, the system makes companies voluntarily stay away from bid rigging by sending a signal that the KFTC is keeping an eye on every bid for public work.

9 The Analysis is not limited to public construction work and includes all the G2B transactions of goods and service on the condition that bids prices of construction works is worth more than five billion won or more and bid prices for goods and service worth more than 500 million won or more.

10 The totals of 322 public agencies are currently participating including central administrative agencies, local governments and government-owned companies.

CONTRIBUTION FROM LATVIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Latvia --

1. Size and policy objectives

1.1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

1. The data is not known. The main policy objectives are to provide transparency, free competition among the suppliers, equal and fair attitude to the all suppliers, to provide the effective application of financial resources of state and local government due to reduce utmost the risk for demanders.

2. Corruption – Corruption prevention and combating bureau (KNAB) was invited to give the answers to this part of inquiry

2.1. What is the cost of corruption?

2. No in-depth research has been made to estimate the total cost of corruption. However there have been several announcements from authorities and NGOs about the cost of corruption or the extent of shadow economy. For example, the Latvian Chamber of Commerce and Industry has recently announced that the firms willing to win have to pay bribes in procurements that constitute 15-20% of the total cost of procurement contract. However, it should be noted that traditionally it is perceived that about 25% of procurement contracts are connected with corruption.

2.2. What factors facilitate corruption? Do some factors appear to be more important than others?

3. Corruption occurs as a result of complex changes in society and institutions – the level of corruption is affected by overall economical situation, lack of specific internal control measures, insufficient transparency, mutual long term relationship between firms and public officials, etc. Appearance of corruption is also possible when provisions or regulations are very complicated and time consuming.

4. Complaints received by the Corruption Prevention and Combating Bureau (Bureau) and results of examinations carried out by the Bureau show increasing tendency of illegal activities in public tenders when procurements of large amounts are divided into several parts in order not to apply open competition procedure.

5. The spheres that are more subject to corruption in public procurement are health, construction, insurance, education and defence.

2.3. How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

6. The anticorruption policy is defined in the medium term policy paper - Corruption Prevention and Combating Programme 2009-2013. The Programme combines tasks for greater transparency,

strengthening internal control and ethics, improvement of regulations and educational activities in the public sector, i.e. it also covers the public procurement.

7. The Law on Public Procurement sets strict rules regarding the transparency of the procedure depending on the amount of money to be spent, but these rules are not always properly implemented.

8. The Bureau uses a twofold strategy that corresponds to its name – not only does it investigate and combat crimes, but it also offers educational seminars and methodological materials to public officials, thus preventing them from acting illegally. Preventative work covers also the improvement of regulations, for example, amendments made to the Law on Prevention of Conflict of Interest in Activities of Public Officials make this law now applicable also to members of procurement commission. The purpose of this law is to ensure that the actions of public officials are in the public interest, to promote openness regarding the actions of the public officials and their liability to the public, as well as public confidence regarding the actions of public officials. It sets certain restrictions and obligations to public officials.

2.4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

9. No, there is no such demand. Nevertheless it is sometimes the case in big, socially and culturally important projects. For example the rules for applicants to the construction of the National Library included the provision that the applicants that have been involved in bribery cases are excluded.

10. However, members of the procurement commission and invited experts have to sign declaration stating that they have no interest in awarding a contract to any of tender participants.

11. The contracting authority may exclude proposals submitted by tender participants who have been found guilty by the court in corruption/fraud offences or other violations of the law.

12. In accordance with the Criminal Law (CL) both corruption and bribery are subject to sanctions. In the private sector punishment shall be imposed for unauthorised receipt of benefits (Article 198, CL) and commercial bribery (Article 199, CL).

13. The applicable sentence for commercial bribery is deprivation of liberty for a term not exceeding three years, custodial arrest, community service, or a fine not exceeding fifty times the minimum monthly wage. In case of aggravating circumstances the applicable sentence is deprivation of liberty for a term not exceeding five years, community service, or a fine not exceeding one hundred times the minimum monthly wage.

14. Public officials can be held criminally liable for accepting bribes (Article 320, CL), misappropriation of a bribe (Article 321, CL), intermediation in bribery (Article 322, CL) and giving of bribes (Article 323, CL).

15. Giving of bribes is subject to deprivation of liberty for a term not exceeding six years. In case of aggravating circumstances the applicable sentence is deprivation of liberty for a term of not less than five and not exceeding fifteen years, with confiscation of property, and with police supervision for a term not exceeding three years.

16. The following coercive measures can be applied to legal persons: liquidation; limitation of rights; confiscation of property; or monetary levy. The following additional coercive measures may be specified: confiscation of property; and compensation for harm caused. Confiscation of property may also be applied to a legal person as an additional coercion measure, if as a result of the offence by the legal person it has

gained a material benefit and as basic coercion measures limitation of rights or monetary levy has been applied to it.

2.5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

17. In Latvia prosecution of corruption crimes and all criminal offences is within jurisdiction of Prosecutor's office. Investigation of corruption cases involving public officials is the responsibility of the Bureau.

18. Competition authority (Competition Council of Latvia (CCL)) is not responsible and competent in this sphere.

3. Collusion

3.1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

19. From our point of view factors facilitating collusion in procurement are:

- Objects for the tenders that are big for Latvia may be regarded as small for international market. Therefore possible profit of participation in regional or national level procurements may be not sufficiently attractive in comparison with the necessary input. All this leads to the situation when due to the lack of foreign competitors local companies feel themselves very comfortable regarding the participation in procurements;

- Many top managers of competing companies have graduated the same universities and know each other. Corporate and even private contacts are very strong. This creates comfortable conditions for collusion, when nothing is agreed in writing, and therefore no direct evidences can be found;

- Also the transparency in the public procurement procedure facilitates the collusion. One of the stages in the procurements procedure in the construction (determined in the Public procurement law) is the visitation of the place where the object is planned to be built. Representatives of the pretenders are invited to the visitation and they have the possibilities to learn which companies are the competitors.

20. CCL had not analysed which industries are especially vulnerable to bid rigging, but it is supposed that these industries are with less market participants, high profit possibilities, less import alternatives, and where the industrial association exists.

3.2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to optimise the risk of bid rigging?

21. According to the statistics the majority of infringements occurred in the construction, road construction and road up-keeping markets. Results of anonymous poll[1] show that 44% respondents confirmed their participation in collusive riggings in the bids. Also contractors are more or less responsible for creation of the favourable environment for collusion. It seems that in one third of the established bid rigging cases probably existed also some indications on corruption, including situations when contractors

1. Performed within the framework of survey on competition in construction market (2006).

somehow were not able to espy self-evident evidences of collusion, that offers of different pretenders were not prepared independently.

Table 1: The Statistics on Bid Rigging (Collusion) Cases in 2002-2009

Year	2002	2003	2004	2005	2006	2007	2008	2009
Number of investigated bid rigging collusion cases	1	1	1	1	4	3	5	1
Number or established infringements	0	0	0	1	3	3	3	1
Number of penalised market participants	0	0	0	3	9	10	19	2
Volume of fines Ls/EUR	0	0	0	76 672/ 109 095	403 670/ 574 374	77 750/ 110 629	197 081/ 280 423	69 733/ 99 222
Industries	Road construc-tion	Constr-uction	Road construc-tion	Constr-uction	Supply of oil products, construction	Marketing services, supply of equipment for metal works, road up keeping	Road construction, up keeping, landscape services	Road up keeping

3.3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

22. Our legislation does not require mentioned certificates as opinion prevails that such measure is unnecessary administrative burden for candidates as well as naïve as while there is not clear impression on regular cartel opening and unavoidable punishment any psychological pressing like certificate or leniency will not work. If firms are "caught" in the collusion they should be eliminated from procurement procedures. Prohibition to participate in public procurements is set now for 12 months, previously it was 3 years however practical application of it was limited due to the uncertainty of its application and actually impossible if decision was appealed in court, as the term was counted from the moment when infringement has occurred. At this moment disqualification term is counted from the moment when the decision becomes final, in such a way excluding possibility to avoid disqualification due the long investigation by CCL and later appellation process in court.

4. Fighting collusion and corruption

4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

23. Corruption and collusion was established in one case. It was initiated by CCL on the basis of information made public by KNAB as a result of their investigation. On request of CCL KNAB gave CCL access to the evidences in this criminal case initiated for the investigation of a corruption case. The transcripts of overheard phone conversations, taken by KNAB, were also used as evidence in the competition case. From the phone conversation it was clear that the official of a municipality gave instructions to the representatives of the undertakings concerned how to participate in the planned bid for supply of oil products and that the representatives agreed, on prices that should be included into the financial offers of each bidder, the sum of procurement and remuneration for each pretender after the bid. Three undertakings were involved into the bid rigging. The phone conversations were between natural persons, two of them formally were not related to the companies they represented. CCL had to prove the

link between relevant natural persons and according bidders. While analysing the offers CCL also established that the prices mentioned in the phone conversations and prices shown in the offers were the same. Besides the information on the bidders transactions on oil product supply market were analysed and it was established that the "planned winner" in the relevant bid offered a price that was approximately by 10% higher than other his prices in similar supplies. Other bidder at the time of procurement did not deal dealt with supplies of oil products at all. CCL established the infringement and imposed fine. This is the only case when CCL used the information (transcripts of the overheard phone conversations) from the criminal case investigated by other authority. Investigation of this case was a good example of good co-operation between competition and corruption prevention authorities fighting against bid rigging in public procurement.

4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level or national level?

24. Competition Council mostly has detected collusion at local level government level.

4.3. What methods and techniques for fighting corruption would aid the fight against collusion?

25. Wider powers to use also methods used in criminal process would be suitable, for example competition authorities could also have rights to overheard phone conversations under certain conditions.

4.4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

26. Our legislation does not contain prohibition to receive leniency for firms engaged in bribery or corruption.

5. Advocacy

5.1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

27. Good balance between the transparency in the public procurement procedure and collusion prevention has to be found as any possibility for firms representatives to meet one another for example in public opening of tender offers facilitates later collusion. Also requirements for minimal number of offers at certain procurement types may promote collusion to ensure that procurement may proceed.

5.2. In what ways can competition authorities work to improve the efficiency of public procurement?

28. As the Competition Council is competent to investigate cases and impose fines for collusion activities, supervising markets in order to establish competition problems, it can give recommendations to the public authorities how to improve control over the procurement procedures due to identify collusion cases or to advert to the competent authorities the identified problems. Anyway the co-operation among Public procurement office, Anti-Corruption office (KNAB) and competition authorities can give additional advantages in combating against collusion and corruption.

5.3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

29. CCL has provided educational seminars for the main contracting state and municipalities enterprises and authorities. No other particular steps with exception of initiative to clarify regulation on prohibition to participate in procurement if the collusion has established. Disqualification from the procurement as a result of collusion can be regarded as effective deterrent if they are used in practice.

5.4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risk of corruption?

30. Legislative measures usually are estimated to find the compromise of both collusion and corruption prevention. However any impact may be estimated only theoretically and not based on facts. Regarding previously mentioned measures it is expected that it will diminish the risk of the corruption.

5.5. Has your competition agency undertaken competition advocacy in this area?

31. To raise the awareness of the other surveillance authorities as well as contracting authorities on possible antitrust violations in procurement several educational seminars were provided for the main contracting state and municipalities enterprises and authorities, however these measures were not enough to significantly increase awareness and educational work regarding possible antitrust violations in procurement in future has to be continued and extended in respect of all contractors in the state and municipalities level.

5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

32. In every decision taken on the case of collusion CCL impose fines. No other particular remedies were imposed. Disqualification from procurement process is applied by contracting authority of particular procurement.

CONTRIBUTION FROM MEXICO

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Mexico --

1. This note summarises Mexico's experience in public procurement contracts from a competition policy prospective. Section 1 describes the relevance of public procurement in Mexico, while section 2 outlines the corresponding regulatory framework. Section 3 identifies competition and corruption concerns associated with this regulation. Section 4 summarises some bid rigging cases and their potential relationship with public procurement regulation and corruption. Finally, section 5 presents some concluding remarks.

1. Relevance of public procurement[1]

2. Public sector activities play a substantial role in the Mexican economy. In 2008, for example, they accounted for 18.4% of GDP with the following distribution among different government entities: public enterprises, 8.7%; state and municipal governments, 5.5%; federal government, 2.9%; and social security, 1.3%.

3. In 2008, the Ministry of Public Administration registered 70,230 federal public procurement contracts adding up to USD59 billion.[2] The acquisition of goods and services represented 65.2% of this value and the contracting of public works 34.8%.

4. Five government entities concentrate 71.8% of public federal procurement: Pemex, the state oil monopoly, contributes with 45.6%; CFE/LFC, the state electricity monopolies, with 11.3%; IMSS, the provider of health and social security services to private sector employees, with 6.6%; SCT, the ministry of transportation and communications, responsible for contracting most federal transportation and communication infrastructure, with 4.8%; and ISSSTE, the provider of health and social security services to federal government employees, with 3.6%.

5. The regulatory framework (see section II) provides for three alternative mechanisms to allocate public procurement): i) *public auctions*; ii) *auctions by invitation* with at least three invitees; and iii) *direct allocations*. In 2008, the shares of these mechanisms in the total amount contracted were: 61%, 14%, and 25%, respectively. Also, these mechanisms can be either domestic (open only to nationals) or international (open to both nationals and foreigners). In 2008, domestic procedures accounted for 65.4% of total federal government procurement.

2. Regulatory framework

6. The Mexican Constitution (article 134) states that public procurement shall assure the best available terms and conditions for the State. To accomplish this purpose it establishes, as a general rule, that public procurement shall be allocated through *public auctions* based on *sealed solvent bids* that are

1 The data in this section was obtained form www.inegi,org.mx and www.funcionpublica.gob.mx.

2 USD amounts for 2008 were obtained using an exchange rate of 11.13 pesos per dollar.

publicly opened. It also provides that secondary laws shall establish alternative procedures for circumstances where the above general rule does not ensure the best terms and conditions.

7. The Law of Public Sector Acquisitions, Leasing and Services (Acquisition Law) regulates federal procurement of goods and services, while the Law of Public Works and Related Services (Public Work Law) regulates federal public works. Procurement by state and municipal governments is regulated by corresponding local laws, except for contracts funded with federal resources, where federal laws apply.

8. Both the Acquisition and Public Work laws establish non discriminatory *public auctions* as the main mechanism to allocate contracts, but under special circumstances they allow for either *auction by invitation* with at least three invitees or *direct allocation* without the need of an auction.

9. These laws and their corresponding regulations set out the following general auction rules:

- *Lowest-price sealed-bid auctions*. Bids are secret and contracts are awarded to the lowest bids;[3]
- *Public opening of bids*. Bids are publicly opened (bidders, among others, can be present);
- *Multiple provision.* Contracts may be granted to two or more bidders if their bids do not differ by more than 10% with respect to the lowest bid and to the extent that it does not restrict free participation. The winning bidder would be awarded a 50% share or more of the contract and the other participants would be granted the shares previously specified in the auction rules*;*
- *Joint bids*. Two or more firms may offer joint bids without incorporating into a single firm;
- *Reference prices*. Government entities may set a maximum price, as a reference for bidders to offer discounts;
- *Prohibition of bids below cost or a "convenient" price level*. Entities calling auctions may dismiss tenders if they consider bids are below cost. They may also dismiss bids that are below a given percentage of the average of the main bids offered;
- Domestic auctions. Most public procurement contracts are reserved for nationals;
- *International auctions*. Auctions can be open to foreigners in two variants: i) international auctions under FTAs, i.e. those open only to Mexicans *and foreigners from* countries with which Mexico has FTAs with public procurement provisions; and ii) those open to all foreigners. The former are called when it is so mandated by FTAs or if no participants turned out or qualified in a previous domestic auction or their bids were not acceptable (in excess of acceptable levels). Auctions are open to all foreign bidders when no participants turned out or qualified in a previous international auction under FTA or their bids were not acceptable; or if it is so stated in foreign financing contracts granted to the federal government. In the case of the Acquisition Law domestic bids are granted a 15% preferential margin;
- *Reserves.* Under FTA provisions, the Mexican government has the right to set aside a maximum amount of public expenditures from *international auctions*.

[3] In the procurement of services, multiple criteria may be used (e.g. price and quality), by applying an index where price has a 50% weight.

10. Furthermore, the Law of Transparency and Access to Public Federal Information requires federal government entities to make available to the general public detailed information related to procurement contracts. Specifically, this regulation allows any citizen to obtain general information on public procurement as well as specific information on each auction and contract, including copies of corresponding documents.

11. Finally, the Federal Law of Economic Competition (FLEC) typifies bid rigging as a *per se* prohibited anticompetitive conduct subject to a maximum sanction of USD6.6 million; recidivists are subject to a double sanction or to a sanction equivalent to 10% of their assets or annual sales.

3. Regulation, Competition and Corruption

12. Although the Constitution mandates that public procurement procedures must guarantee that the State obtains the best available terms and conditions, in practice regulations focus too much on transparency and protection of domestic suppliers and too little on assuring a competitive outcome. In general, regulations lack the incentives to promote competition. This situation, in turn, may create extraordinary rents and increase the probability of corruption.

3.1 Barriers to Competition and Incentives to Collude

13. Several aspects of public procurement regulation and practice introduce incentives to collude in markets that are highly concentrated, particularly where auctions are restricted to domestic suppliers:

- Full transparency of auction outcomes (winning bids and bidders) facilitates the implementation of collusive agreements, as it makes it easy to identify and punish cheaters;

- The practice of fragmented and repeated auctions facilitates market allocation, reduces incentives to deviate from collusive agreements and facilitates punishment in case of cheating;

- Multiple provision contracts may limit price competition and lay the groundwork for collusive agreements. In extreme cases, bidders can agree to present identical bids and obtain an equal share of the contract. In concentrated markets, multiple contracts should be used only if strictly necessary to secure supply. Due to these concerns, in these cases the calling entity is required take into account any recommendations issued by the competition authority;

- Joint bids may constitute a simple mechanism to collude. In concentrated markets, joint bids should be allowed only if they do not deteriorate competition: for example, if bidders with complementary capabilities join forces;

- Relatively high maximum prices may be used as an easy reference for bidders to collude on prices. Reference prices should be included only when market information is available to assure their level is not only feasible, but also competitive;

- The prohibition of bids below cost or a convenient price level may eliminate competition from low price bidders, and limits the power of auctions as an efficient mechanism to reveal market information. This prohibition entails a more stringent approach than the predatory price prohibition envisaged under the competition legislation, which is subject to a rule of reason analysis.

3.2 Barriers to International Competition

14. Restrictions on international auctions reduce competition and increase prices. These restrictions may explain to a great extent why international procedures only account for 34.6% of public procurement, even though a much larger portion could be supplied under competition from international suppliers. Markets for inputs, equipment, machinery, engineering and construction services, etc…, required by industries like oil, electricity, construction and health services normally have an international dimension. Although these industries account for a large majority of public procurement in Mexico, government entities only take limited advantage of international competition in these markets.

15. International auctions are the default alternative only when a FTA mandates so; even in those cases, the government has the option to reserve for nationals a portion of the associated procurement. In most cases domestic auctions are the default alternative, so procurement officials tend to choose it to avoid not only the need to justify calling for an international auction, but also pressure from domestic suppliers.

16. International competition would improve terms and conditions of public procurement even in those cases where domestic supply turns out to be the winner, since it increases incentives for domestic suppliers to present internationally competitive bids.

17. Finally, the discriminatory 15% margin in favour of nationals unnecessarily increases prices and makes it more difficult for procurement officials to justify international auctions.

3.3 Lack of Incentives for Competitive Supply

18. Procurement regulations and their supervision focus on auction procedures, but do not take into account the competitiveness of the outcomes. For example, procurement officials may have incentives to undertake a domestic auction even when domestic supply is highly concentrated and international supply is competitive. A domestic auction under these circumstances would increase prices above the competitive level and create extraordinary rents for domestic suppliers. However, a potential audit of this procedure would find it fully legal regardless of the uncompetitive outcome. Thus, domestic providers have incentives to lobby (through legal o illegal means) for a domestic auction, and officials may respond positively without facing much risk. On the other hand, if procurement officials open auctions to international competition and lower the price, they or their entity may not receive any recognition from doing so.

19. Similar arguments may apply for the use of multiple provision, auction fragmentation and high reference prices, especially when markets are highly concentrated. Incumbent suppliers have incentives to strongly lobby for multiple provision and against consolidating procurement contracts or aggressive reference prices, while procurement officials would not face relevant risks if they respond positively to this lobbying.

4. Bid-Rigging Cases

20. In spite of the general rule that mandates public tendering in government procurement, several auction rules inhibit competition and facilitate collusive conduct. Thus, in practice, government entities tend to organise frequent and fragmented auctions instead of aggregating purchases into fewer and larger contracts. In many instances, they even divide the national market and hold a series of regional auctions instead of having a single auction for the whole market. These practices turn what could be a one-shot game into a series of games, which facilitate collusive (implicit or explicit) pricing and market segmentation.

21. The following cases illustrate the issues mentioned above. These cases involve procurement contracts in the public health sector, since it is the sector the Federal Competition Commission (CFC for its initials in Spanish) has studied the most.

4.1 Surgical Sutures[4]

22. In 2000, following a complaint by Sutinmex, the CFC investigated the behaviour of bidders in nearly 90 auctions held during 1999 for the supply of different types of surgical sutures to IMSS and ISSSTE. These auctions were reserved to nationals and included multiple provision clauses.

23. The CFC identified a collusive agreement among four bidders, which was characterised by identical or similar bids in a significant number of auctions and a clear pattern of market segmentation.

4.2 X-Ray Materials[5]

24. In 2000, following a complaint by Reliable, an international supplier of x-ray materials, the CFC investigated the behaviour of bidders in nearly 250 auctions held during 1998-2000 for the supply of these materials to (mostly) IMSS. These auctions were reserved to nationals and included multiple provision clauses.

25. The CFC identified a collusive agreement among the three bidders who were the only participants (Kodak, Juama y GPP), which was characterised by identical bids and market shares in the great majority of auctions (almost 100%).

26. After these findings, IMSS opened procurement of these materials to international competition, which resulted in a dramatic reduction in prices. The following table compares some of the outcomes: in the domestic auctions, the three national suppliers presented high identical bids which assured them identical market shares; meanwhile, in the international auction, an overseas supplier won 100% of the contracts with bids that, on average, were 32.4% lower than winning bids in the domestic auctions.

Table 1.Auction to Purchase X-Ray Material
Winning bids*

	International auction	***Domestic auctions with multiple provision***		
Product	*Reliable*	*Kodak*	*Juama*	*GPP*
1	*100*	*222*	*222*	*222*
2	*100*	*124*	*124*	*124*
3	*100*	*144*	*144*	*144*
4	*100*	*123*	*123*	*123*
5	*100*	*128*	*128*	*128*
Average	*100*	*148*		

** Indexes relative to the lowest winning bid for each product.*

***Kodak, Juama y GPP presented identical bids for each product in 17 domestic auctions.*

4 CFC file: DE-003-2000.

5 CFC file: DE-57-2000.

4.3 Chemical Developers for X-Ray[6]

27. In 2001, the CFC investigated the behaviour of bidders in 64 auctions held during 1997-2001 for the supply of chemical developers for x-ray to IMSS and ISSTE. These auctions were reserved to nationals and included multiple provision clauses.

28. The CFC identified a collusive agreement between the two only bidders (Juama and GPP), which was characterised by identical bids and market shares in all auctions.

4.4 Generic Pharmaceuticals

29. The CFC recently developed a database with the outcomes of the auctions called by IMSS during 2003-2007 for the procurement of generic pharmaceuticals. This effort was undertaken with the purpose of evaluating the possible presence of bid-rigging in the markets involved. IMSS is by far the largest provider of health services in Mexico and accounts for about 90% of total procurement of generic pharmaceuticals by public health institutions. In 2008, for example, it spent USD 1.5 billion.[7]

30. The database includes information from approximately 400 auctions for each of nearly 250 different generic pharmaceuticals purchased by IMSS during this period. Preliminary analyses of this database provide us with many examples of competition (and possibly corruption) concerns. Some examples are presented below. For confidentiality reasons, the examples omit absolute prices and names of bidders and products.

4.4.1 Product 1

- Four domestic auctions during the same year; lowest-price sealed-bid; and multiple provision rules.

Table 2. Bids*

	Auction			
Bidder	1	2	3	4
A	100.13	100.13	100.09	101.51
B	100.06	100.09	NB	100.13
C	100.09	NB	100.00	100.09
D	102.2	100.06	100.13	100.06

**Lowest bid =100*
Winning bid: ☐
NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each contract is divided among three bidders; each bidder wins a share in three out of four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

6 CFC files: DE-10-2001.

7 www.imss.gob.mx.

4.4.2 Product 2

- Four domestic auctions during the same year; lowest-price sealed-bid; and single provision rule.

Table 3. Bids*

	Auction			
Bidder	1	2	3	4
A	Nb	nb	nb	100.21
B	105.49	nb	100.00	nb
C	100.21	100.21	nb	nb

**Lowest bid =100*

Winning bid: ☐

NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each bidder wins at least one of the four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

4.4.3 Product 3

- Four domestic auctions during the same year; lowest-price sealed-bid; and multiple provision rule.

Table 4. Bids*

	Auction			
Bidder	1	2	3	4
A	100.00	nb	nb	nb
B	nb	100.14	nb	100.14
C	103.79	103.79	100.00	100.00
D	nb	100.00	nb	nb
E	100.07	102.00	100.07	101.86

**Lowest bid = 100*

Winning bid: ☐

NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each contract is divided among two bidders; each bidder wins a share in at least one of the four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

4.4.4 Product 4

- Four domestic auctions during the same year; lowest-price sealed-bid; single provision rule.

Table 5. Bids*

	Auction			
Bidder	1	2	3	4
A	100.00	nb	nb	100.00
B	nb	100.00	100.00	nb

**Lowest bid = 100*

Winning bid: ☐

NB: no bid was presented

- Potential competition concerns: winning bids identical among bidders; each bidder wins two of the four contracts; bidders get a similar share of annual purchases; bidders seem to take turns in participating (or winning).

4.4.5 Competitive Bidding

31. In all the examples above, as well as in many others omitted because of space constraints, a more competitive design of the auctions could have increased competition and reduced the prices paid by IMSS. This hypothesis was validated by the outcomes of a more competitive procurement strategy implemented by IMSS in 2007. Specifically, between 2003 and 2006, procurement of generic pharmaceuticals was based on domestic and fragmented auctions: there was an average of nearly 100 auctions per product per year, as each consuming area (region or general hospital) held its own auctions separately and, in some instances, several times a year for the same product. Additionally, many of these auctions included multiple provision rules and relatively high reference prices. In contrast, in 2007 IMSS implemented a strategy based on using international auctions more extensively, consolidating purchases into one (or a few) annual national contract per product, including aggressively low maximum prices based on market research, and eliminating multiple provision. As a result, similarity of bids and market allocation among bidders disappeared and winning bids decreased dramatically: 18 of the 20 most important products, which represent 42% of purchases, registered an average price decrease of 20%.

32. This example illustrates the extent to which the design and implementation of truly competitive auctions can enhance the competitiveness of public procurement. The new bidding procedures clearly reduced the space for corruption, since extraordinary rents tend to disappear as prices approach their competitive levels. Unfortunately, the efforts undertaken by IMSS are still an exception and do not necessarily derive from an integral government strategy to improve the competitiveness of public procurement.

33. The new bidding procedures were developed and implemented by a few central IMSS officials, who had to overcome many obstacles. Domestic manufacturers and distributors of generic pharmaceuticals, individually or through their associations, opposed formally and informally to these changes. They presented formal complaints before the Ministry of Public Administration, responsible for supervising and auditing federal public procurement, arguing the lack of justification for international auctions, procurement consolidation and aggressive price references. They also lobbied intensively against these changes before officials of different government entities: they even approached the CFC arguing these changes were anticompetitive because they would displace or exclude domestic providers.

34. Finally, the integration and analysis of this database has provided elements not only for the design of more competitive auctions, but also to identify possible illegal bid-rigging. Base on these elements, the CFC undertook formal investigations in several markets to identify additional (direct or indirect) evidence to validate or reject this hypothesis. These investigations are currently underway.

5. Concluding Remarks

35. Competition law and policy can play a key role in promoting competitive public procurement. In achieving this goal, it also contributes to the fight against corruption by eliminating extraordinary rents that may be the source of corruptive actions. Unfortunately, in Mexico public procurement regulations and practice focus too little on promoting a more competitive environment. In most government entities the procurement strategy is characterised by unnecessary barriers to entry and fragmentation, high reference prices, multiple provision, and full transparency of auctions outcomes, among other elements. This environment restricts competition and facilitates collusion in domestically concentrated markets, which in turn creates extraordinary rents and introduces incentives for incumbents to lobby in favour of the status quo.

36. Nevertheless, the examples presented in the public health sector are important precedents in the efforts the CFC is undertaking to fight bid rigging and promote competitive outcomes in public procurement. The Commission will continue to integrate and analyse databases similar to the one on generic pharmaceuticals to identify and further investigate cases where a hypothesis of illegal collusive behaviour can be reasonably developed. The fight against bid rigging would be easier as the CFC identifies and sanctions more cases and cartel members have more incentives to apply to the leniency programme that has been recently implemented in Mexico. On the other hand, the CFC is collaborating with different government entities to promote pro-competitive procurement strategies and auction designs. In this regards it is promoting the *Guidelines for Fighting Bid rigging in Public Procurement* issued by the OECD Competition Committee in 2009. The CFC has also issued several opinions regarding the need to develop more pro-competitive public procurement regulations.

CONTRIBUTION FROM MOROCCO

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Moroccan Central Anti-Corruption Agency --

1. Public procurement is an essential component of the Moroccan economy, firstly because of the scale of the State's expenditure commitments every year, which amount to around 15% of GDP, and secondly because of the strategic importance of such expenditure for the country's development. Over the past decade, Morocco has launched a large number of structural and development projects in which public procurement has a determining role to play in ensuring the rational and efficient distribution of public expenditure.

2. In view of the large sums of money involved, the diversity of actors and the large number and complexity of rules and regulations, public procurement is an area that is exposed to the risk of fraud, favouritism, misappropriation of funds and other kinds of unlawful practices. The latter fall under two main headings:

- Corruption (or capture), which consists in a coalition between the buyer (the State or one of its subdivisions) and one or more suppliers (bidders) in order to favour the latter over other competitors;

- Collusion, which generally describes the behaviour of enterprises which reach an agreement, collude or act in concert to take market decisions, in most cases with regard to their prices, in order to restrict, impeded or distort the free play of competition.

3. These illegal practices have adverse consequences such as:

- Wastage of public funds due to their irrational and inefficient allocation;

- Supply of poor quality products or work, which can cause serious accidents and in some cases deaths;

- Wastage of resources due to orders having to be placed a second time or work being carried out twice because it had not been performed properly the first time;

- Delays in or even the cancellation of a number of large infrastructure and development projects.

4. These various dysfunctions prevent public procurement from being managed rationally on the basis of the rules of Act, free and fair competition, transparency and integrity.

5. This paper will begin by presenting the legal, regulatory and institutional framework governing public procurement in Morocco. The last two sections will then explore the main thrusts of the reform of public procurement and present the main types of action pursued by the ICPC in this regard.

I. Legal and Regulatory Framework Governing Public Procurement in Morocco

6. Public procurement in Morocco is governed by a body of texts which organise and regulate the actions of the institutions participating in this process and which guarantee compliance with the rules of fair competition, good management and integrity.

7. These legislative texts include:

- Decree 2-06-388 of 5 February 2007 setting conditions and terms for the award of government contracts and certain rules relating to their management and control;
- Decree 02-07-1235 of 5 November 2008 regarding the auditing of State expenditures;
- Act 54-05 regarding the delegated management of public services;
- Dahir (Act) 1-02-25 of 3 April 2002 promulgating Act 61-99 on the responsibility of public auditors and accountants;
- General administrative terms and conditions approved under Decree 2-01-2332 of 4 June 2002.

8. The Decree of 5 February 2007 nonetheless remains the main reference text for public procurement. The aims that this Decree is designed to meet lie mainly in the following areas:

- Strengthening of the rules encouraging the free play of competition through the promotion of wider competition between bidders;
- Introduction of tools that will ensure transparency in the preparation, award and performance of contracts;
- Adoption of the principle of equal treatment of bidders in all stages of the contract award process;
- Requirement that the contracting authority provide all competing bidders with adequate and fair information in the various stages of contract award procedures;
- Strengthening of the rules on administrative ethics and morality by introducing measures designed to reduce the scope for fraudulent or corrupt practices;
- Eliminating the use of paper in procedures and making it mandatory for contracting authorities to publish certain information and documents on the electronic portal for government contracts;
- Introduction of procedures for lodging appeals and for the amicable settlement of disputes relating to the award of contracts.

II. Main Institutional Actors in the Management and Monitoring of Public Procurement in Morocco[1]

Expenditure Commitment Auditor (CED)

9. The CED is represented on the Bid Adjudication Committee in a monitoring capacity and is charged primarily with the task of ensuring the budgetary compliance of expenditure made on behalf the State.

10. The checks carried out as part of this oversight, as laid down in the applicable Decrees, are designed to:

- Ensure that proposed expenditure commitments, notably contracts, are based on available funds;
- Ensure that such proposals comply, in terms of their purpose, with the budgetary heading to which it is proposed to assign them;
- Ensure that these proposals have been accurately costed;
- Ensure that the proposed expenditure commitments comply with legislative texts and regulations;
- Ensure that the proposed commitments relate to the entire expenditure for which the Administration will be liable during the budgetary year;
- Examine the possible implications of the commitment with regard to the use of funds for year in progress or previous years.

11. After carrying out these checks, the auditor decides whether to approve the contract by adding a number of conditions with which the contracts officer must comply; to approve the contract by setting out a number of conditions which the contracts officer must take into account, but which do not constitute grounds for suspending payment of the contract; or lastly, to refuse approval on the grounds that the contract proposed for commitment is not compliant. This situation may prompt the contracts officer to request arbitration in the event of disagreement over the CED's decision.

12. The contracts officer, or the sub-contracts officer, must notify the suppliers or enterprises awarded the contract of the references given in the auditor's approval of the expenditure commitments before they start to perform the services covered by the contract. This notification, which ensures that the procedure complies with regulations and that funding is available, is sent after the contract has been signed and before its execution.

13. In the case of local authorities, the public accounting officer, whose is appointed under an Order issued by the Minister of Finance, audits expenditure commitments.

14. In the case of public establishments, the audit is carried out by government auditors assigned to public establishments and enterprises, depending upon their legal nature. Their role is to ensure compliance with the legislation on the award of contracts, notably the settlement of contracts relating specifically to individual bodies. These bodies are obliged to use competitive bidding procedures, unless exceptions can

[1] Excerpts from a research thesis for the award of a Master's in Public Administration by the ENA, France (2007-2008), submitted by Mr. Mohamed Abdelmouhcine HANINE, pages 47-49.

be justified, in order to ensure the transparency, equality of access to contracts and the efficiency of expenditure.

15. Lastly, it should be noted that the auditing of government expenditure commitments has been placed under the responsibility of the General Treasury of the Kingdom and the competencies of the General Auditor of government expenditure commitments have been transferred to the General Treasurer of the Kingdom under Decree 02-06-52 of 13 February 2006. This major change was made as part of the reform of public expenditure initiated by Ministry of Finance.

General Treasury of the Kingdom (TGR)

16. The General Treasury of the Kingdom of Morocco is one of the most important administrations in the Ministry of Economy and Finance, through which all the financial and accounting flows of the State and local authorities are routed.

17. It is also at the heart of an institutional network comprising public administrations, public establishments, local authorities and other major financial institutions, all of which are concerned with managing public funds.

18. The main remit of the TGR is to:

- **Collect Public Debts**

19. The TGR uses its vast network of public accountants to collect tax and non-tax revenues, primarily by:

  - Managing administrative and legal claims regarding tax collection and providing assistance to tax collectors in their work;

  - Taking charge of revenue orders under the general budget of the State and Treasury ancillary and special budgets;

  - Centralising payments and collection of revenues from fines and financial penalties;

  - Managing the accounts for loans and advances granted by the Treasury and working capital provided by financing bodies for public projects;

  - Compilation of statistics on the situation regarding the collection of public debts.

- **Auditing and Payment of Public Expenditure**

20. The TGR is responsible for auditing and payment of public expenditure. The TGR's network is therefore charged with the task of verifying the compliance of commitments for practically all State expenditures. It manages the payment of the said expenditures through its network of accountants. The TGR's departments settle the State's debts in response to the proposed commitments and payments orders forwarded by accredited contracting authorities.

21. The TGR also audits and pays the salaries of around 650 000 civil servants through the National Pay Centre (CNT).

- **Management of Local Finances**

22. The TGR manages the budgets of 1659 local authorities, 86 associations of local authorities and 41 districts through its network of communal treasurers and tax collectors.

23. The TGR collects their receivables, settles their expenditures and pays the wages of their staff.

24. The TGR also makes use of its expertise by providing local authorities with necessary advice and assistance. This advice may be of a legal and financial nature and relates, among other things, to accounting procedures, financial analyses and the preparation of management charts.

- **Management of Treasury Deposits**

25. The TGR is responsible for managing Treasury deposits. This activity gives it a role in financing the State treasury in that it manages the accounts of public enterprises and establishments which are under the obligation to deposit their funds in the Treasury. This activity also extends to the management of deposits by legal persons or private bodies.

- **Production of Financial and Accounting Information**

26. The TGR centralises the accounting operations of the State and local authorities and, in consequence, provides a reference for the production and exploitation of accounting data relating to the State and local authorities.

27. The accounting information generated can thus be used to:

  - Precisely describe budgetary and financial operations;
  - Rapidly provide the reliable information needed for decision-making;
  - Draft documents relating to statements of accounts.

General Inspectorate of Finances (IGF)

28. The IGF is entrusted with the task of carrying out random checks on the departments in the Ministry of Finance and other Ministries, local authorities and public establishments.

29. The inspectors of finance verify the compliance of transactions recorded by contracting authorities, including public procurement.

30. The IGF can also audit the procedures for the award and execution of contracts financed by external bodies.

31. Lastly, the auditing of the said inspection is subject to the provisions of Dahir 1-59-269 of 14 April 1960 on the General Inspectorate of Finances.

General Inspectorates Established in Individual Ministries

32. The organisation chart for each Ministry contains a General Inspectorate reporting to the Minister concerned which is placed under the Minister's responsibility and whose role is to carry out inspections in the central and external departments of the said Ministry. Public procurement is one of the areas covered by such inspection work.

Procurement Committee

33. This Committee is placed under the authority of the General Secretary of Government. It includes members of almost all Ministerial Departments in addition to the General Treasurer, the Expenditure Commitments Auditor and the Head of the Legislation Department in the Government's General Secretariat. All members of the Committee are entitled to vote. The Committee can also call upon other persons to act in an advisory role.

34. The Committee has two main types of function. The first is to issue opinions on draft legislation or regulations on public procurement, on issues of all kinds relating to the preparation, award, execution and payment of contracts, disputes arising from contracts and draft contracts or supplementary clauses on which it is consulted by the contracts officer. The second is to propose provisions to supplement legislation and improve contracting departments and to launch studies to improve the conditions for awarding orders and government contracts.

35. The Committee simply acts in a consultative or advisory capacity and has no real competence to monitor contracts. However, the opinions it issues are important in view of the fact that local authorities, Ministerial departments and public establishments make use of them to resolve certain practical or legal issues raised in the course of awarding, executing of paying contracts.

36. Matters are referred directly to the Committee by the Prime Minister and the Secretary-General of the Government, contracting authorities and the general inspector of expenditure commitments. The Committee's deliberations are not published systematically. The recent creation of an internet site for the General Secretariat of the Government[2] now allows some opinions to be consulted on-line. The main function of the Committee is to issue opinions on disputes or in cases of where complicated situations arise through ignorance or incorrect application of the legislation.

37. In addition, the permanent Secretariat of the Committee maintains a general inventory of contracts for work, supplies, services and studies awarded on behalf of the State. The Committee draws up an activities report annually.

Court of Auditors and Regional Courts of Auditors

38. These courts exercise oversight of a jurisdictional nature in accordance with Act 62-99 constituting the code of financial jurisdictions of 13/06/2002.

39. The Court of Auditors is entrusted with a wide range of tasks. It verifies the compliance of the revenue and expenditure transactions of bodies subject to its oversight under the Act, assesses their management and punishes any shortcomings. It has a jurisdictional function with regard to budgetary and financial discipline (Articles 54, 55 and 56). This latter competence concerns all government officials from the officers awarding contracts to inspectors, public accountants or civil servants working under their supervision and all civil servants such as managers or officials working in public bodies and managers or officials working in any other bodies subject to inspection by the Court.

40. A wide variety of infringements may be prosecuted. In accordance with Article 54 of Act 62-99 the contract awarding officer may be prosecuted if he infringes contracting regulations. According to Article 55 of Act 62-99, the inspector may be liable for sanctions if he fails to carry out the checks he is obliged to perform, notably with regard to the compliance of the planned contract with regulations regarding the award of public contracts. This may consist, for example, in failure to produce the

[2] Internet site of the General Secretariat of the Government: www.sgg.gov.ma.

administrative certificate or report presenting the contract which justifies the choice of procedure for awarding the contract, failure of the contract for work or supplies or services to comply with the rules on competitive bidding applicable to the body concerned.

41. The Court's audits may also be performed after the management audit missions have been completed (Article 75). The aim is to assess the quality of the services supplied and suggest possible ways of improving methods and increasing effectiveness and efficiency. The audit addresses the compliance and sincerity of the operations carried out as well as the reality of the services or goods supplied and the work carried out.

42. The nine Regional Courts of Auditors have the same competences with regard to local authorities and the bodies of the latter. They are located in the following towns in the Kingdom of Morocco: Laâyoune, Agadir, Marrakech, Settat, Casablanca, Rabat, Fès, Tanger, Oujda.

Competition Council[3]

43. The Competition Council was set up under Act 06-99 on the freedom of prices and competition, promulgated under Dahir 1-00-255 of 5 June 2000. It is charged with advisory functions for the purposes of providing advice and recommendations and, in addition to the Chairman, comprises twelve (12) members:

- A representative of the Minister of Justice;
- A representative of the Minister of the Interior;
- A representative of the Minister of Finance;
- A representative of the Secretary General of Government;
- A representative of the Minister of Planning;
- Three (3) members chosen for the competence in legal matters, economics, competition or consumption, appointed by the Prime Minister;
- Three (3) members who exercise or have exercised their activities in the manufacturing, distribution or services sector, appointed at the proposal of the Chairmen of the Federation of Chambers of Commerce, Industry and Services, the Federation of Chambers of Crafts, the Federation of Chambers of Agriculture and the Federation of Chambers of Maritime Fisheries.

44. Scope and means of action:

- Ensure that the free play of competition is respected within the framework of the market economy, in order to guarantee the competitiveness of the national economic fabric and a good cost-quality ratio for the welfare of the consumer;
- Act, at its initiative, to:
  - Inform and raise the awareness of the public and economic and social actors (symposia, seminars, conferences);

3 Taken from the internet site of the Competition Council: http://www.conseil-concurrence.ma.

- Study the degree to which competition can be created between different sectors and branches of activity;

- Draw up the annual report and submit it to the Prime Minister.

- Intervene, when formally called upon, in the event of:

  - Anti-competitive cartels which might prevent, restrict or distort the free play of competition (price fixing, geographical sharing of markets, etc.);

  - Abuse of a dominant position or situation of economic dependency (tied sales, refusal to sell, etc.);

  - Concentration liable to damage competition.

- Who consults the Council?

  - The Government on any competition-related issue;

  - Standing Parliamentary Committees on any draft legislation covering areas relating to competition;

  - Competent jurisdictions regarding matters concerning anti-competitive practices that are referred to them;

  - Regional Councils, urban communities, chambers of agriculture, crafts or maritime fisheries, union and professional organisations and consumer organisations recognised to be of public utility. The replies by the Council are restricted solely to opinions on matters of principle.

Central Anti-Corruption Agency (ICPC):

45. The Central Anti-Corruption Agency, reporting to the Prime Minister, was established under Decree 02-05-1228 of 13 March 2007. Its members were appointed on 2 December 2008 and the first meeting of its Plenary Assembly was held on 6 January 2009.

46. In addition to its Chairman and Wali Al Madhalim (mediator), the Central Agency has 43 members representing government, professional organisations (including unions), civil society and universities, which constitute its Plenary Assembly.

47. The three main missions of the ICPC are to:

- Co-ordinate anti-corruption policies;

- Oversee policies and monitor their implementation;

- Compile and disseminate information relating to corruption.

48. To this end, it is charged in particular with the task of:

- Proposing to government the main directions of a corruption prevention policy, particularly with regard to co-operation between the public and private sectors to combat corruption;

- Proposing measures to raise public awareness and organising information campaigns for that purpose;

- Contributing, in co-operation with the administrations and bodies concerned, to the development of international co-operation in the prevention of corruption;

- Ensuring the follow-up and assessment of measures taken to implement government policy with regard to corruption and making recommendations to administrations, public bodies, private enterprises and all other actors in corruption prevention policy;

- Providing the administrative authorities with opinions on measures that might be taken to prevent corrupt transactions;

- Collecting all types of information relating to corruption and managing the related database;

- Informing the competent judicial authority of all the facts brought to its attention in the course of its work which it feels might constitute acts of corruption punishable by Act.

49. With regard to public procurement, the ICPC acts as an advisory body by issuing opinions on different reforms and by making practical recommendations on how to improve the process. Furthermore, recognising the paramount importance of public procurement for the development of the country and the considerable risks of corruption in this sector, the ICPC has set up a working party to analyse issues relating to such procurement in order to continue proposing improvement measures.

III. Reform of Public Procurement in Morocco

50. Over the past few years Morocco has embarked on a major reform of public procurement primarily aimed at improving procurement management and promoting greater integrity and transparency. The following section presents a summary of the main features of this reform.

51. The reform of public procurement is part of the major raft of reforms aimed at modernising the Moroccan administration and adapting it to changes in progress and to Morocco's commitments to its partners.

52. It is with this aim in mind that a new Decree setting conditions and terms for the award of government contracts as well as certain rules relating to their management and control, was published in April 2007, thereby amending the Decree of 30 December 1998 on public procurement.

53. This reform, introduced less than ten years after the Decree was issued in 1998, was the outcome of the public authorities' desire to give greater responsibility to departments awarding contracts, and at the same time greater freedom and flexibility, in order to achieve efficient and effective public expenditure, coupled with the determination of those public authorities to combat all types of fraud and corruption. Transparency was therefore presented as one of the main challenges of the reform.

54. The will to achieve transparency is apparent in several of the new Decree's provisions. The demands of modernisation, good governance and economic openness are incentives to introduce regulations on contracts which take account of the objective of consolidating transparency and the interests of the Administration and the private sector within the framework of a balanced partnership, with a view to

ensuring higher quality services at lower cost. In addition, the new Decree was designed in line with the new approach to the management of public finances based on the increased empowerment of contracts officers, efforts to improve performance and the placing of relations between central administrations and their decentralised departments on a contractual basis. In short, the 2007 Decree expresses the determination of the public authorities to introduce a framework for the award of public procurement contracts that is irreversibly linked to compliance with the principles of free access to public procurement, equal treatment of bidders, transparency and the streamlining of procedures.

55. Moreover, it should be noted that work is currently proceeding on an overhaul of the 2007 Decree. This reform is primarily aimed at increasing transparency and at combating all types of fraud and corruption. The need for such a reform is all the more pressing in that contracts are the main way in which the needs of the Administration are met.

56. The main innovative thrusts of this planned reform consist in:

- Enshrinement of the unity of the regulations applicable to public procurement;
- Simplification and clarification of procedures;
- Increased use of competition and greater fairness in the treatment of bidders;
- Consolidation of transparency measures and introduction of ethical principles into the management of public procurement;
- Modernisation of public procurement procedures;
- Improved guarantees for competing bidders and introduction of appeals mechanisms.

57. However, this planned reform still contains several provisions which should really be reconsidered to ensure that the reform will effectively help to build a system for management public procurement contracts that is transparent, fair and efficient.

IV. Observations by the ICPC on the Reform of Public Procurement

58. The Central Anti-Corruption Agency was consulted by the TGR about the new planned reform of the 2008 Decree and made a number of comments regarding appeals, inspections, audits, increased transparency, the exceptions granted to the National Defence Administration and the discretionary power of the contracting authority.

I. Appeals

59. With regard to appeals, the ICPC felt that complaints should be dealt with by an independent, diligent body with real decision-making power, notwithstanding the use of legal channels for appeals. However, the planned reform maintained the same approach to the handling of appeals as that taken in the legislation currently in force, as well as a hierarchical appeals procedure in which it was possible for an appeal to be lodged directly with the contracts committee despite the fact that the latter remains an advisory body.

II. Monitoring and Auditing

60. The provisions regarding monitoring and auditing are among the major innovations introduced in the 1998 reform. The auditing of contracts worth more than MAD 5 million (and MAD 1 million for local authorities) is assumed to cover the preparation, awarding and execution of contracts. However, in the ICPC's opinion, the reference made in the second paragraph of Article 110[4] of the draft Decree on public procurement would seem to be seeking to focus the audit on the obligation to draw up and publish the various documents stipulated in the Decree, which considerably restricts the scope of this important provision.

61. In the opinion of the ICPC, in order to make this provision both operational and effective would require terms of reference for the audit to be specified beforehand. These terms of reference would have to cover at least the following: timeliness, appropriateness of the contract specifications, compliance of the operations relating to the award of the contract, management of deadlines, compliance of the supply and payment of contracts.

III. Increased Transparency

62. With regard to increased transparency, the ICPC considered that the planned reform did indeed include advances in this area, notably through the use of the national portal. However, this effort needed to be stepped up in at least two areas: the dissemination of audit reports and the publication of the contracting authority's estimate.

63. Publishing the audit report or the results of the audit will indeed make it possible to ensure that this provision is implemented and will provide the public, and in particular unsuccessful bidders, with information about how the procedure was executed. Instead of publishing the entire report, consideration might also be given to publishing excerpts.

64. In addition, the ICPC saw no interest in preserving the confidentiality of the contracting authority's estimate; firstly because the estimate is an essential guide to bidders when drawing up their bids, and secondly because there is a danger that this information might be made available, illegally, to some bidders to the detriment of others.

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4 Draft Decree setting out the conditions and formalities for the award of public procurement contracts as well as certain regulations regarding their management and auditing: Article 110 Internal controls and audits.
Besides the checks provided for in general legislation regarding public expenditure, contracts and their supplementary clauses are subject to internal controls and audits laid down by decisions by the Minister concerned.
These controls and audits relate to the preparation, award and execution of contracts, and in particular compliance with the obligation to draw up and publish the various documents specified in the present Decree.
Checks and audits are mandatory for contracts worth more than five million (5 000 000) dirhams and must be presented in a report submitted to the Minister in charge of public procurement or to the Director of the public establishment concerned in the case of contracts for public establishments.
In the case of local authorities and associations of local authorities, controls and audits are mandatory for contracts worth more than one million (1 000 000) dirhams and must be presented in a report submitted to the Minister of the Interior.
However, the provisions of the present Article do not apply to contracts regarding the national defence administration.

IV. Exceptions Regime Applicable to the National Defence Administration

65. While it is perfectly understandable that security-related procurement by the National Defence Administration should be granted exceptions to the public procurement code, the ICPC does not see any particular reason why the everyday procurement by this department should be covered by the many exceptions provided by in the Decree.

V. Discretionary Power of the Contracting Authority

66. The ICPC noted that the detailed provisions introduced under the reform make it clear that the contracting authority retains full control over the choice of contract award procedure and the establishment of specifications.

67. In the opinion of the ICPC, it is not so much the power given to the contracting authority which poses a problem, since the latter is held to represent the general interest, but the risk of that power being misused for personal gain. Accordingly, a framework needs to be provided for this power. If there is no framework, compliance with the procedure will be meaningless if a determining tool such as the contract specifications makes it possible to steer the choice towards the supplier benefiting from the favours of those in charge of placing the order.

68. Besides these observations, the ICPC also voiced reservations about certain provisions, and in particular:

- Introduction of the call for an expression of interest, which duplicates the pre-qualification procedure and which may be diverted from its original purpose;
- Maintenance of firm prices for supplies and services, regardless of delivery schedules. This provision may well affect the aim of producing balanced contracts;
- Maintenance of the procedure for depositing samples, which presents the major risk of revealing the list of bidders a day before the bids are opened.

69. Various inspection missions are reports drawn up by regional Courts of Auditors revealed major dysfunctions in the management of the contracts awarded local authorities. These dysfunctions may be attributable to the lack of a legal framework properly adapted to the realities and nature of the missions entrusted to these authorities. A draft Decree dealing specifically with this issue is currently being finalised. This draft is aimed at:

- Making the regulations more accessible to elected local representatives;
- Streamlining the procedures with a view to activating local development projects;
- Introducing effective internal management control mechanisms;
- Putting in place bodies to audit and monitor local public procurement contracts;
- Consolidating the requirements for transparency and spending efficiency;
- Transforming local public procurement into a genuine vector for local development;
- Contributing to promote local good governance.

70. The ICPC has been asked by the General Directorate for Local Authorities to give an opinion on this draft. The Central Anti-Corruption Agency made the following comments:

71. In general, the draft Decree retains the structure, principles and procedures for the award of public procurement contracts set out in the Decree of 5 February 2007. The additions and improvements mentioned in the outline of the reasons for preparing the said draft, of which there are admittedly a large number, do not make any fundamental changes to the original text. In particular, the ICPC noted that no effort had been made to simplify the text in order to make it more accessible to local authorities with limited managerial resources or to small local enterprises which were unaccustomed to bidding for local procurement contracts.

72. However, a number of innovations in the draft do merit special mention:

- Creation of a monitoring committee which plays an advisory role in the management of public procurement;
- Creation of a national database for local public procurement;
- Mandatory display of the value of contracts and orders placed by each local authority.

The comments made by the ICPC relate to the following four points:

I. Substantial Discretionary Powers of the Contracting Authority

73. The contracting authority retains full control over the choice of contract award procedure, the drafting of specifications and the setting of selection criteria.

74. It is not so much the fact that the contracting authority has been given this power which poses a problem, given that the latter is assumed to represent the general interest, but the risk of it being misused for personal gain. It therefore needed to be given a proper framework. Without such a framework, compliance with the procedure will be meaningless if a determining tool such as the specifications allows the choice to be steered towards the supplier favoured by those in charge of placing the order.

II. Appeals

75. Article 127 establishes a monitoring committee with a dual remit: the first is to improve the management of public procurement by local authorities, and the second relates to the follow-up of applications from actors involved in the award and execution of an order.

76. The text appears to allow competing bidders and/or contractors to submit grievances directly to the committee. The latter has the power to order the procedure to be suspended should it be deemed necessary.

77. The committee is composed of eleven members and no indication is given of its composition, apart from its chair.

78. Although these advances are indisputably positive, it nonetheless remains that an appeals body must be independent of the administrative structures of the contracting authority.

79. The committee's composition, were it to be widened to include personalities from outside the Administration, could, to a certain extent, remedy this lack of independence. In this respect, securing the participation of the ICPC would be a welcome move.

III. Audits and Inspections

80. The audit requirement applies to contracts worth more than one million dirhams rather than the 5 million dirhams specified in the Decree. Terms of reference, and not just a simple formulation, must first be specified for the audit before this provision is implemented. The nature and powers of the body in charge of this audit must also be specified.

81. The second condition to ensure the effectiveness of the audit is to publish the audit report or at least ensure its wide dissemination.

IV. Excessive Formality

82. The draft Decree that is supposed to streamline procedures for awarding contracts has maintained a level of formality that jeopardises the transparency and integrity of the procedure in that a minor shortcoming could be used as a pretext for rejecting a competitor's bid.

83. This risk is clearly illustrated by the list of documents that competing bidders are required to submit. The list of documents to be produced such as the tax statements and CNSS statement given in the draft Decree could perhaps be simplified.

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84. In conclusion, while admittedly Morocco has made considerable progress in the management of public procurement over the past decade, shortcomings still remain and a constant effort will have to be made to ensure better governance in this area. Aware of the importance attached to public procurement as a lever for the development of the country, the ICPC has made promoting the integrity and transparency of public procurement one of its priority strategic directions.

CONTRIBUTION DU MAROC

COLLUSION ET CORRUPTION DANS LES MARCHES PUBLICS

-- Instance Centrale de Prévention de la Corruption du Maroc --

1. Les marchés publics constituent une composante essentielle de l'économie marocaine, d'une part pour les montants importants engagés par l'État chaque année et qui constituent environ 15% du PIB et, d'autre part, pour l'importance stratégique de ces dépenses pour le développement du pays. En effet, le Maroc a connu lors de la dernière décennie le lancement d'un grand nombre de projets structurels et de développement dans lesquels les marchés publics jouent un rôle déterminant, en termes de répartition rationnelle et efficiente de la dépense publique.

2. De par les montants importants en jeu, la diversité des intervenants ainsi que la multiplicité des règles et leur complexité, les marchés publics constituent un domaine exposé au risque de fraude, de favoritisme, de malversations et autres sortes de pratiques illicites. Ces pratiques peuvent être regroupées en deux grandes catégories :

- La corruption (ou capture) qui consiste en une coalition entre l'acheteur (l'État ou l'un de ses démembrements) et un ou plusieurs offreurs (soumissionnaires) afin de les favoriser par rapport aux autres concurrents ;

- La collusion qui qualifie d'une manière générale le comportement d'entreprises qui passent des accords, s'entendent, ou se concertent pour prendre des décisions de marché, le plus souvent concernant leur tarification, dans le dessein de limiter, d'entraver ou de fausser le libre jeu de la concurrence.

3. Ces pratiques illégales ont des répercussions néfastes notamment :

- Le gaspillage des fonds publics dû à leur allocation irrationnelle et inefficiente ;

- La réalisation de produits ou de travaux de qualité inférieure, ce qui peut causer de graves accidents, parfois mortels ;

- Le gaspillage des ressources dû au renouvellement des commandes ou au dédoublement des travaux lorsque ces derniers sont mal exécutés ;

- Le retardement, voire l'annulation, de plusieurs grands projets d'infrastructure et de développement.

4. Ces différents dysfonctionnements empêchent une gestion rationnelle des marchés publics, basée sur les règles de droit, de concurrence libre et loyale, de transparence et d'intégrité.

5. Ce document présentera, dans un premier temps, le cadre légal, réglementaire et institutionnel régissant et organisant les marchés publics au Maroc. Les deux dernières sections exploreront, ensuite, les grandes lignes de la réforme des marchés publics et présenteront les différentes interventions de l'ICPC à ce sujet.

I. Le cadre légal et règlementaire régissant les marchés publics au Maroc :

6. Les marchés publics au Maroc sont régis par un ensemble de textes qui organisent et régulent l'intervention des institutions participant à ce processus et qui garantissent le respect des règles de bonne concurrence, de bonne gestion et d'intégrité.

7. Parmi ces textes figurent :

- Le décret n° 02-06-288 du 05 février 2007 fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et leur contrôle ;
- Le décret n° 02-07-1235 du 05 novembre 2008 relatif au contrôle des dépenses de l'État ;
- La loi N° 54-05 relative à la gestion déléguée des services publics ;
- Le Dahir (loi) n° 1-02-25 du 3 avril 2002 portant promulgation de la loi n° 61-99 relative à la responsabilité des contrôleurs et des comptables publics.
- Le Cahier des Clauses Administratives Générales approuvé par le décret n° 2-01-2332 du 4 juin 2002.

8. Le décret du 5 février 2007 reste, cependant, la principale référence dans le domaine. Les objectifs escomptés à travers ce décret s'articulent autour des principaux axes suivants :

- Le renforcement des règles encourageant le libre jeu de la concurrence, en favorisant une compétition plus large entre les soumissionnaires ;
- La mise en place d'outils permettant de garantir la transparence dans la préparation, la passation et l'exécution des marchés ;
- L'adoption du principe d'égalité de traitement des soumissionnaires dans toutes les phases de passation des marchés ;
- L'obligation pour le maître d'ouvrage d'assurer à tous les concurrents l'information adéquate et équitable dans les différentes phases des procédures de passation des marchés ;
- Le renforcement des règles de la déontologie administrative et de la moralisation en introduisant des mesures de nature à réduire les possibilités de recours à des pratiques de fraude ou de corruption ;
- La dématérialisation des procédures et l'obligation faite aux maîtres d'ouvrages de publier certaines informations et documents sur le portail électronique des marchés de l'État ;
- L'institution de voies de recours et de règlement à l'amiable des litiges portant sur la passation des marchés.

II. Les principaux intervenants institutionnels dans la gestion et le contrôle des marchés publics au Maroc[1] :

Le Contrôleur des Engagements de Dépenses (CED) :

9. Le CED est un organe de contrôle représenté dans la commission de jugement des offres et dont l'objectif principal est d'assurer la régularité budgétaire des dépenses pour l'État.

10. Les vérifications effectuées dans le cadre de ce contrôle telles que prévues dans les décrets qui l'organisent sont :

- S'assurer que les propositions d'engagements de dépenses, notamment les marchés, sont faites sur des crédits disponibles ;
- S'assurer que ces propositions sont conformes, quant à leur objet, à la rubrique budgétaire sur laquelle il est proposé de les imputer ;
- S'assurer de l'exactitude des calculs de ces propositions ;
- S'assurer que les propositions d'engagement de dépenses sont régulières au regard des dispositions des lois et règlements ;
- S'assurer que les engagements proposés portent sur la totalité de la dépense à laquelle s'oblige l'administration durant l'année budgétaire ;
- Examiner les répercussions éventuelles de l'engagement sur l'emploi des crédits de l'année en cours et des années ultérieures.

11. Après avoir effectué ces contrôles, le contrôleur décide soit de viser le marché en formulant ses observations à l'ordonnateur qui doit les satisfaire, soit de viser le marché en lui faisant des observations à satisfaire, à charge pour l'ordonnateur d'en tenir compte, sans que ce visa ne suspende le paiement du marché, soit enfin de formuler le refus du visa en motivant sa décision par l'irrégularité que présente le marché proposé à l'engagement. Cette situation peut donner lieu à une requête d'arbitrage par l'ordonnateur en cas de désaccord avec la décision du CED.

12. L'ordonnateur, ou le sous-ordonnateur, est tenu de notifier aux fournisseurs, prestataires ou entrepreneurs attributaires du marché, les références du visa du contrôle des engagements de dépenses avant qu'ils n'entament l'exécution des prestations objet du marché. Cette notification, qui constitue une assurance de la régularité de la procédure et de la disponibilité des crédits, intervient après la signature du marché et avant sa mise en exécution.

13. En ce qui concerne les collectivités locales, le contrôle des engagements de dépenses est exercé par le comptable public. Celui-ci est désigné par arrêté du Ministre chargé des Finances.

14. Pour les établissements publics, le contrôle est exercé par des contrôleurs d'État ou des commissaires de gouvernement placés auprès des établissements et des entreprises publics en fonction de leur nature juridique. Leur rôle est de s'assurer du respect des textes sur la passation des marchés, notamment le règlement des marchés propres à chaque organisme. En effet, ces organismes sont tenus de

[1] Extraits du mémoire de recherche pour l'obtention du diplôme de Master en Administration Publique de l'ENA France (session 2007-2008) de M. *Mohamed Abdelmouhcine HANINE, pages 47-49.*

faire appel à la concurrence, sauf exception justifiée, afin d'assurer la transparence, l'égalité d'accès aux commandes et l'efficacité des dépenses.

15. Enfin, il est à noter que le contrôle des engagements de dépenses de l'État a été rattaché à la Trésorerie Générale du Royaume et que les compétences du contrôleur général des engagements de dépenses de l'État ont été transférées au Trésorier général du Royaume en vertu du décret 02-06-52 du 13 février 2006. Cette importante action s'inscrit dans le cadre de la réforme de la dépense publique initiée depuis quelques années par le ministère chargé des Finances

La Trésorerie Générale du Royaume (TGR) :

16. La Trésorerie Générale du Royaume constitue l'une des administrations les plus importantes du Ministère de l'Économie et des Finances à travers laquelle transite l'ensemble des flux financiers et comptables de l'État et des collectivités locales.

17. Elle est également au centre d'un maillage institutionnel constitué d'administrations publiques, d'établissements publics, de collectivités locales et d'autres grandes institutions financières, tous concernés par la gestion des deniers publics.

18. Les principales missions de la TGR sont :

- **Le recouvrement des créances publiques :**

19. La TGR assure, par le biais de son vaste réseau de comptables publics, la perception des recettes fiscales et non fiscales, à travers notamment :

  - La gestion du contentieux administratif et judiciaire relatif au recouvrement et l'assistance des percepteurs en la matière;

  - La prise en charge des ordres de recettes au titre du budget général de l'État, des budgets annexes et des comptes spéciaux du Trésor;

  - La centralisation des prises en charges et des recouvrements au titre des amendes et condamnations pécuniaires ;

  - La gestion des comptes de prêts et d'avances accordées par le Trésor et de «fonds de roulement» consentis par des organismes de financement des projets publics;

  - L'élaboration des statistiques concernant la situation du recouvrement de créances publiques.

- **Le contrôle et le paiement des dépenses publiques :**

20. La TGR assure le contrôle et le règlement des dépenses publiques. Ainsi, le réseau de la TGR est chargé de contrôler la régularité des engagements de la quasi-totalité des dépenses de l'État. Elle assure à travers son réseau de comptables, le règlement desdites dépenses. En effet, au vu des propositions d'engagement et des ordres de paiement transmis par les ordonnateurs accrédités, les services de la TGR procèdent au règlement des créances de l'État.

21. La TGR assure également, par le biais du Centre Nationale des Traitements (CNT), le contrôle et le traitement de la paie de près 650.000 fonctionnaires.

- **La gestion des finances locales :**

22. A travers son réseau de trésoriers et receveurs communaux, la TGR assure la gestion des budgets de *1659* collectivités locales, de 86 groupements et de 41 arrondissements,

23. En effet, la TGR procède au recouvrement de leurs créances, au règlement des leurs dépenses et à la paie de leur personnel.

24. La TGR met à contribution également son expertise en offrant le conseil et l'assistance nécessaires aux collectivités locales. Ce conseil qui est de nature juridique et financière, concerne, entre autres, la modernisation des procédures comptables, l'analyse financière et l'élaboration des tableaux de bord.

- **La gestion des dépôts au Trésor :**

25. La TGR assure la mission de gestion des dépôts au Trésor. Elle participe à travers cette activité au financement de la trésorerie de l'État. A ce titre, elle gère les comptes des entreprises et établissements publics qui sont soumis à l'obligation de dépôt de leurs fonds au Trésor. Cette activité est étendue également à la gestion des dépôts d'autres personnes morales ou privées.

- **La production de l'information financière et comptable :**

26. La TGR assure la centralisation des opérations comptables de l'État et des collectivités locales et, de ce fait, elle constitue une référence en matière de production et de valorisation de l'information comptable de l'État et des collectivités locales.

27. La production de l'information comptable permet ainsi de :

  - Décrire précisément les opérations budgétaires et financières ;
  - Restituer rapidement une information fiable et indispensable à la prise de décision ;
  - Préparer les documents relatifs à la reddition des comptes.

L'Inspection Générale des Finances (IGF) :

28. L'IGF est chargée d'effectuer les vérifications inopinées des services du Ministère des Finances et des autres ministères, des collectivités locales et des établissements publics.

29. Les inspecteurs des finances s'assurent de la régularité des opérations enregistrées par les ordonnateurs, incluant les marchés publics.

30. L'IGF peut également auditer les procédures de passation et d'exécution des marchés financés par des organismes extérieurs.

31. Enfin, le contrôle de ladite inspection est organisé par le Dahir n° 1-59-269 du 14/4/1960 relatif à l'Inspection Générale des Finances.

Les Inspections Générales placées auprès de chaque ministre :

32. L'organigramme de chaque ministère contient une inspection générale auprès du Ministre concerné qui est placée sous son autorité et qui a pour rôle d'exécuter des missions d'inspections dans les

services centraux et extérieurs dudit ministère. Les marchés publics sont parmi les domaines concernés par cette inspection.

La Commission des Marchés :

33. Cette Commission est placée auprès du Secrétaire Général du Gouvernement. Elle comprend des membres de presque tous les départements ministériels en plus du Trésorier Général, du Contrôleur des engagements de dépenses et du chef de service de la législation au secrétariat général du gouvernement. Tous ont voix délibérative. La commission peut faire appel à d'autres personnes à titre consultatif.

34. La commission a deux grandes catégories d'attributions. La première consiste à émettre des avis sur les projets de textes législatifs ou réglementaires sur les marchés publics, sur les problèmes de toute nature relatifs à la préparation, passation, exécution et règlement des marchés, les contestations résultants des marchés et sur les projets de marché ou avenants sur lesquels elle est consultée par l'ordonnateur. La seconde à proposer des dispositions pour compléter la législation et perfectionner les services de marchés et lancer des études pour améliorer les conditions de placement des commandes et des marchés de l'État.

35. La Commission n'a qu'un rôle consultatif et de conseil, et n'a pas une réelle compétence de contrôle des marchés. Toutefois, les avis qu'elle émet sont importants compte tenu du fait que les collectivités locales, les départements ministériels et les établissements publics y ont recours pour résoudre certains problèmes de fait ou de droit soulevés lors de la passation, de l'exécution ou du paiement d'un marché.

36. La Commission est saisie directement par le Premier Ministre et par le Secrétaire Général du Gouvernement, les ordonnateurs et le contrôleur général des engagements de dépenses. Les travaux de la Commission ne sont pas systématiquement publiés. La création récente du site Internet du Secrétariat général du gouvernement[2] a donné la possibilité de consulter certains avis en ligne. La principale attribution qu'elle exerce est d'émettre des avis en cas de litiges ou en cas de situations compliquées induites par la méconnaissance des textes ou leur mauvaise mise en application.

37. En outre, le secrétariat permanent de la Commission fait un travail de recensement général des marchés de travaux, fournitures, de services et d'études passés pour le compte de l'Etat. La commission prépare annuellement un rapport d'activités.

La Cour des Comptes et les Cours Régionales des Comptes :

38. Ces cours exercent un contrôle de type juridictionnel organisé par la loi n°62-99 formant code des juridictions financières du 13/06/2002.

39. La Cour des comptes est dotée d'attributions très larges. Elle exerce un contrôle de la régularité des opérations de recettes et de dépenses des organismes soumis à son contrôle en vertu de la loi, apprécie leur gestion et en sanctionne les manquements. Elle exerce une fonction juridictionnelle en matière de discipline budgétaire et financière (articles 54, 55 et 56). Cette dernière compétence touche tous les agents de l'État que ce soit les ordonnateurs, les contrôleurs, les comptables publics ou les fonctionnaires travaillant sous leurs ordres et tout fonctionnaire, responsable ou agent d'un organisme public et tout responsable ou agent de tout autre organisme soumis au contrôle de la Cour.

[2] Site Internet du Secrétariat général du gouvernement : www.sgg.gov.ma.

40. Les infractions qui peuvent faire l'objet de poursuite sont diverses. D'après l'article 54 de la loi n°62-99, l'ordonnateur peut être poursuivi s'il enfreint la réglementation des marchés. D'après l'article 55 de la loi n°62-99, le contrôleur est passible de sanctions s'il n'exerce pas les contrôles qu'il est tenu de faire notamment sur la conformité du projet de marché à la réglementation relative à la passation des marchés publics. Il peut s'agir, par exemple, de la non production du certificat administratif ou du rapport de présentation du marché qui justifie du choix du mode de passation du marché, de la non conformité du marché des travaux ou de fournitures ou de services aux règles d'appel à la concurrence applicables à l'organisme concerné…

41. Le contrôle de la Cour peut intervenir aussi suite aux missions de contrôle de la gestion (article 75). Le but est d'apprécier la qualité des prestations et de formuler des suggestions sur les moyens susceptibles d'améliorer les méthodes et accroître l'efficacité et le rendement. Le contrôle porte sur la régularité et la sincérité des opérations réalisées ainsi que sur la réalité des prestations fournies, des fournitures livrées et des travaux effectués.

42. Les neuf Cours Régionales des Comptes exercent les mêmes compétences sur les collectivités locales et leurs organismes. Elles sont réparties dans les villes suivantes du Royaume : Laâyoune, Agadir, Marrakech, Settat, Casablanca, Rabat, Fès, Tanger, Oujda.

Le Conseil de la Concurrence[3] :

43. Le Conseil de la Concurrence a été créé en vertu de la loi 06-99 sur la liberté des prix et de la concurrence, promulguée par le dahir 1-00-225 du 5 juin 2000. Il détient des attributions consultatives aux fins d'avis, de conseils ou de recommandations et est composé, outre le président, de douze (12) membres dont :

- Un représentant du Ministre chargé de la justice ;
- Un représentant du Ministre chargé de l'intérieur ;
- Un représentant du Ministre chargé des finances ;
- Un représentant du Secrétaire Général du Gouvernement ;
- Un représentant du Ministre chargé des affaires générales du gouvernement;
- Un représentant du Ministre chargé du plan;
- Trois (3) membres choisis en raison de leur compétence en matière juridique, économique, de concurrence ou de consommation, nommés par le Premier ministre;
- Trois (3) membres exerçant ou ayant exercé leurs activités dans les secteurs de production, de distribution ou de services, nommés sur proposition des présidents de la fédération des chambres de commerce, d'industrie et de services, de la fédération des chambres d'artisanat, de la fédération des chambres d'agriculture et de la fédération des chambres des pêches maritimes.

44. Son champ et ses moyens d'action :

[3] Extrait du site Internet du Conseil de la Concurrence : http://www.conseil-concurrence.ma/.

- Veiller au respect du libre jeu de la concurrence dans le cadre de l'économie de marché, afin de garantir la compétitivité du tissu économique national et assurer un bon rapport qualité prix pour le bien être du consommateur.

- Agir, à son initiative, pour :

  – Informer et sensibiliser l'opinion publique et les acteurs économiques et sociaux (Colloques, séminaires, conférences,...) ;

  – Étudier la concurrentiabilité de différents secteurs et branches d'activité ;

  – Élaborer le rapport annuel et le soumettre au Premier Ministre.

- Intervenir, quand il est saisi, en cas :

  – D'ententes anticoncurrentielles pouvant empêcher, restreindre ou fausser le jeu de la concurrence (fixation des prix, partage géographique du marché...) ;

  – D'abus de position dominante ou de situation de dépendance économique (ventes liées, refus de vente,...) ;

  – De concentration de nature à porter atteinte à la concurrence.

- Par qui est-il consulté ?

  – Par le Gouvernement pour toute question concernant la concurrence ;

  – Par les commissions permanentes du Parlement pour toutes les propositions de lois couvrant une dimension relative à la concurrence ;

  – Par les juridictions compétentes dans les affaires dont elles sont saisies sur les pratiques anticoncurrentielles ;

  – Par les Conseil de régions, les communautés urbaines, les chambres d'agriculture, d'artisanat, de pêches maritimes, les organisations syndicales et professionnelles et les associations de consommateurs reconnues d'utilité publique. Les réponses du Conseil se limitent uniquement à des avis sur des questions de principe.

L'Instance Centrale de Prévention de la Corruption (ICPC):

45. L'Instance Centrale a été instituée auprès du Premier Ministre en vertu du décret n° 02-05-1228 du 13 mars 2007. Ses membres ont été installés le 2 décembre 2008, et la première réunion de son Assemblée Plénière a eu lieu le 6 janvier 2009.

46. L'instance Centrale compte, hormis le Président et Wali Al Madhalim (le médiateur), 43 membres représentant le gouvernement, les organismes professionnels (incluant les syndicats), la société civile et les universités, qui constituent son Assemblée plénière.

47. Les trois missions principales de l'ICPC sont :

- La coordination des politiques de prévention de la corruption ;
- La supervision des politiques et le suivi de leur mise en œuvre ;
- Le recueil et la diffusion des informations dans le domaine de la corruption.

48. A cet effet, elle est notamment chargée de :

- Proposer au gouvernement les grandes orientations d'une politique de prévention de la corruption, notamment en matière de coopération entre le secteur public et le secteur privé pour lutter contre la corruption ;
- Proposer des mesures de sensibilisation de l'opinion publique et organiser des campagnes d'information à cet effet ;
- Contribuer, en coopération avec les administrations et les organismes concernés, au développement de la coopération internationale en matière de prévention de la corruption ;
- Assurer le suivi et l'évaluation des mesures prises pour la mise en œuvre de la politique gouvernementale en la matière et adresser des recommandations aux administrations, aux organismes publics, aux entreprises privées et à tout intervenant dans la politique de prévention de la corruption ;
- Donner aux autorités administratives des avis sur les mesures susceptibles d'être prises pour prévenir des faits de corruption ;
- Collecter toutes informations en relation avec le phénomène de la corruption et gérer la base de données y afférentes ;
- Informer l'autorité judiciaire compétente de tous les faits portés à sa connaissance à l'occasion de l'exercice de ses missions, qu'elle considère être susceptibles de constituer des actes de corruption punis par la loi.

49. En ce qui concerne les marchés publics, l'Instance joue le rôle de conseiller en donnant son avis sur les différentes réformes et en émettant des recommandations concrètes afin d'améliorer ce processus. En outre, reconnaissant l'importance primordiale des marchés publics pour le développement du pays et les risques considérables de corruption dans ce secteur, l'Instance a créé un groupe de travail dédié à l'analyse des problématiques liées auxdits marchés afin de continuer à proposer des mesures d'amélioration.

III. La réforme des marchés publics au Maroc :

50. Le Maroc s'est engagé depuis quelques années dans une importante réforme des marchés publics portant principalement sur l'amélioration de la gestion et sur la promotion de l'intégrité et de la transparence. La section suivante présente un résumé des points importants de cette réforme.

51. La réforme des marchés publics s'inscrit dans le cadre des grands chantiers de réformes visant la modernisation de l'Administration marocaine et son adaptation aux changements en cours et aux engagements du Maroc vis-à-vis de ses partenaires.

52. C'est dans cet esprit qu'un nouveau décret fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et leur contrôle a été publié en avril 2007, amendant ainsi celui du 30 décembre 1998 sur les marchés publics.

53. Cette réforme survenue moins de dix ans après la publication du décret de 1998, a été dictée par la volonté des pouvoirs publics de responsabiliser davantage les services ordonnateurs tout en leur accordant plus de liberté et plus de souplesse, afin d'aboutir à une dépense efficiente et efficace, ainsi que par la détermination des pouvoirs publics à lutter contre toutes les pratiques de fraude et de corruption. La transparence est ainsi présentée comme l'un des enjeux de la réforme.

54. La volonté de transparence se manifeste par plusieurs dispositions du nouveau décret. En effet, les exigences de modernité, de bonne gouvernance et d'ouverture économique encouragent à se doter d'une réglementation des marchés qui tient compte de l'objectif de consolidation de la transparence et des intérêts de l'Administration et du secteur privé dans le cadre d'un partenariat équilibré, en vue d'assurer des prestations de meilleure qualité et à moindre coût. En outre, le nouveau décret a été conçu en adéquation avec la nouvelle approche de la gestion des finances publiques basée sur la responsabilisation accrue des ordonnateurs, la recherche de la performance, ainsi que sur la contractualisation des rapports entre les administrations centrales et leurs services déconcentrés. En somme, le décret de 2007 exprime la détermination des pouvoirs publics d'inscrire, de manière irréversible, la passation des marchés de l'Etat dans une logique de respect des principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats, de transparence et de simplification des procédures.

55. Par ailleurs, il convient de mentionner qu'un projet de réforme du décret de 2007 est actuellement en cours. Ce projet vise principalement à renforcer la transparence et à lutter contre toutes les pratiques de fraude et de corruption. Cette exigence est d'autant plus nécessaire que les marchés constituent le principal moyen de satisfaction des besoins de l'Administration.

56. Les Principaux axes d'innovations de ce projet de réforme sont :

- La consécration de l'unicité de la réglementation en matière de marchés publics;
- La simplification et la clarification des procédures ;
- Le renforcement du recours à la concurrence et de l'égalité de traitement des concurrents ;
- La consolidation du dispositif de transparence et de la moralisation de la gestion de la commande publique ;
- La modernisation de la gestion de la commande publique ;
- L'amélioration des garanties des concurrents et des mécanismes de réclamation.

57. Toutefois, ce projet comporte encore quelques dispositions qui mériteraient d'être reconsidérées afin qu'il puisse contribuer efficacement à la construction d'un système de gestion des commandes publiques transparent, équitable et efficace.

IV. Observations de l'ICPC concernant la réforme des marchés publics :

58. L'Instance Centrale de Prévention de la Corruption a été consultée par la TGR à propos du nouveau projet de réforme du décret de 2007 et elle a émis un certain nombre d'observations portant

notamment sur le recours, le contrôle, l'audit, le renforcement de la transparence, le régime dérogatoire de l'Administration de la Défense Nationale et le pouvoir discrétionnaire du maître d'ouvrage.

I. Recours :

59. S'agissant du recours, L'ICPC considère que le traitement des plaintes devra être assuré par une structure indépendante, diligente et ayant un véritable pouvoir de décision, nonobstant l'usage des voies de recours judiciaires. Or, le projet garde la même logique de traitement des plaintes que le texte actuel en vigueur et un recours hiérarchique avec une possibilité de saisine directe de la commission des marchés qui reste un organe consultatif.

II. Contrôle et audit :

60. Les dispositions sur le contrôle et l'audit sont parmi les innovations majeures introduites par la réforme de 1998. L'audit des marchés supérieurs à 5 MDH (et 1 MDH pour les collectivités locales) est censé couvrir la préparation, la passation et l'exécution des marchés. Or, pour l'ICPC, la mention apportée par le deuxième alinéa de l'article 110[4] du projet de décret relatif aux marchés publics semble vouloir focaliser l'audit sur l'obligation de l'établissement et de la publication des différents documents prévus par le décret. Ce qui réduit considérablement la portée de cette importante disposition.

61. Aux yeux de l'Instance, le fait de rendre opérationnelle et effective cette disposition suppose, au préalable, la définition des termes de référence de l'audit. Ces derniers doivent couvrir au moins : l'opportunité, l'adéquation des cahiers des charges, la régularité des opérations de passation, la gestion des délais, la conformité des réalisations et la liquidation des marchés.

III. Renforcement de la transparence:

62. Pour ce qui est du renforcement de la transparence, l'ICPC considère que le projet marque certes des avancées dans ce domaine, notamment par l'utilisation du portail national. Toutefois, cet effort devrait être renforcé dans au moins deux domaines : la diffusion des rapports d'audit et la publication de l'estimation du maître d'ouvrage.

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[4] **Projet de décret fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et à leur contrôle : Article 110: Contrôle et audit internes**

Les marchés et leurs avenants sont soumis, en dehors des contrôles institués par les textes généraux en matière de dépenses publiques, à des contrôles et audits internes définis par décision du ministre concerné.

Ces contrôles et audits internes portent sur la préparation, la passation et l'exécution des marchés et notamment le respect de l'obligation de l'établissement et de la publication des différents documents prévus par le présent décret.

Les contrôles et audits sont obligatoires pour les marchés dont les montants excèdent cinq millions (5.000.000) de dirhams et doivent faire l'objet d'un rapport adressé au ministre concerné pour les marchés de l'État ou au directeur de l'établissement public concerné pour les marchés des établissements publics.

Pour les collectivités locales et leurs groupements, les contrôles et audits sont obligatoires pour les marchés dont les montants excèdent un million (1.000.000) de dirhams et doivent faire l'objet d'un rapport adressé au ministre de l'intérieur.

Toutefois, les dispositions du présent article ne sont pas applicables aux marchés de l'administration de la défense nationale.

63. En effet, la publication du rapport d'audit ou de ses résultats permettra, d'une part, de s'assurer de la mise en application de cette disposition et mettra à la disposition du public et en particulier des concurrents non retenus des informations sur la manière dont s'est déroulé le processus. A défaut de publier intégralement le rapport d'audit, il peut être envisagé d'en publier un extrait.

64. En outre, l'Instance ne voit aucun intérêt à garder confidentielle l'estimation du maître d'ouvrage. D'abord, parce que l'estimation est un élément d'indication essentielle aux concurrents pour la confection de leurs offres et ensuite, il y a risque qu'une telle information soit mise à disposition, par des moyens illégaux, de certains concurrents au détriment des autres.

IV. Régime dérogatoire de l'Administration de la Défense Nationale :

65. Il est parfaitement compréhensible que les achats de l'Administration de la Défense Nationale ayant un rapport avec la sécurité dérogent aux dispositions du code des marchés publics, mais l'Instance ne voit pas de raison particulière à ce que les achats courants de ce département, bénéficient des nombreuses dérogations prévues par le texte.

V. Pouvoir discrétionnaire du maître d'ouvrage :

66. L'ICPC relève que les éléments de précision introduits par le projet, le maître d'ouvrage reste totalement maître du choix de la procédure de passation et de la rédaction du Cahier des Charges.

67. Pour l'Instance, ce n'est pas tant ce pouvoir conféré au maître d'ouvrage qui pose problème, puisqu'il est censé représenter l'intérêt général, mais le risque de son détournement à des fins personnelles. De ce fait, il s'avère nécessaire d'encadrer ce pouvoir. A défaut, le respect de la procédure n'aura aucune valeur, si un outil déterminant tel que le cahier des charges, permet d'orienter le choix vers le prestataire bénéficiant des faveurs de ceux qui ont la charge de passer commande.

68. Hormis ces observations, l'Instance a également émis des réserves par rapport à certaines dispositions. Il s'agit en particulier de :

- L'introduction de l'appel à manifestation d'intérêt qui fait double emploi avec la procédure de pré-qualification et qui risque d'être détourné de sa finalité ;

- Le maintien du caractère ferme des prix pour les fournitures et les services, quel que soit le délai de livraison. Cette disposition risque en effet d'affecter l'objectif de l'équilibre des contrats ;

- Le maintien de la procédure de dépôt des échantillons, qui présente le risque majeur de dévoiler la liste des concurrents un jour avant l'ouverture des offres.

69. En ce qui concerne les marchés passés par les collectivités locales, les différentes missions d'inspection effectuées ainsi que les rapports dressés par les cours régionales des comptes ont permis de constater des dysfonctionnements importants dans leur gestion. Ces derniers peuvent notamment s'expliquer par l'absence d'un cadre juridique adapté aux réalités et à la nature des missions qui sont dévolues à ces collectivités. Un projet de décret spécifique est en cours de finalisation. Ce projet vise à :

- Rendre la réglementation plus accessible aux élus locaux ;

- Simplifier les procédures en vue d'activer l'exécution des projets de développement locaux ;

- Introduire des mécanismes internes de contrôle de gestion efficaces ;

- Mettre en place des instances d'audit et de suivi des commandes publiques locales ;
- Consolider les exigences de transparence et d'efficacité de la dépense ;
- Ériger la commande publique locale en véritable vecteur de développement local ;
- Contribuer à la promotion de la bonne gouvernance locale.

70. L'ICPC a été sollicitée par la Direction Générale des Collectivités Locales pour donner son avis sur ce projet. Les observations émises par l'Instance Centrale sont les suivantes :

71. De manière générale, le projet de décret reprend la structure, les principes et les processus de passation des marchés publics fixés par le décret du 5 février 2007. Les rajouts et améliorations cités dans l'exposé des motifs dudit projet, qui sont certes nombreux, ne constituent pas des changements fondamentaux par rapport au texte de référence. En particulier, l'ICPC n'a pas relevé d'effort de simplification pour rendre le texte accessible à des collectivités à faible encadrement ou à des petites entreprises locales n'ayant pas l'habitude de participer à des marchés publics.

72. Quelques innovations du projet méritent, toutefois, d'être soulignées :

- La mise en place d'un comité de suivi qui assure un rôle consultatif dans la gestion des commandes publiques ;
- La création de l'observatoire national de la commande publique locale ;
- L'obligation d'afficher les prix des marchés et bons de commande passés par chaque collectivité.
- Les observations émises par l'ICPC portent sur les quatre points suivants :

I. Fort pouvoir discrétionnaire du maître d'ouvrage :

73. Le maître d'ouvrage reste totalement maître du choix de la procédure de passation et de la rédaction du Cahier des Charges et la fixation des critères de sélection.

74. Ce n'est pas tant ce pouvoir conféré au maître d'ouvrage qui pose problème, puisqu'il est censé représenter l'intérêt général, mais le risque de son détournement à des fins personnelles. De ce fait il y a nécessité de l'encadrer. A défaut, le respect de la procédure n'aura aucune valeur si un outil déterminant tel que le cahier des charges permet d'orienter le choix vers le prestataire bénéficiant des faveurs de ceux qui ont la charge de passer commande.

II. Recours :

75. L'article 127 institue un comité de suivi qui a une double mission : la première relative à l'amélioration de la gestion de la commande publique des collectivités locales et la seconde se rapporte au suivi des requêtes émanant des intervenants dans la passation et l'exécution d'une commande.

76. Le texte semble donner la possibilité aux concurrents et/ou contractants de saisir directement le comité pour exposer leurs doléances. Celui-ci dispose du pouvoir d'ordonner la suspension de la procédure s'il le juge nécessaire.

77. Le comité est composé de onze membres et aucune indication n'est donnée sur sa composition, mis à part la présidence.

78. Bien que ces avancées soient incontestablement positives, il n'en demeure pas moins qu'une instance de recours doit être indépendante des structures administratives du maître d'ouvrage.

79. La composition du comité, si elle est élargie à des personnalités en dehors de l'Administration pourrait, dans une certaine mesure, remédier à ce défaut d'indépendance. A cet égard, la participation de l'ICPC à cette instance serait tout à fait indiquée.

III. Audit et contrôle :

80. L'obligation d'audit couvre les marchés au delà de 1 MDH au lieu de 5 MDH dans le décret 2007. La mise en application de cette disposition doit, au préalable, être précédée par l'élaboration des termes de référence de cet audit et ne peut se contenter d'une formulation générale. Il faudrait également préciser la qualité et le positionnement de l'organe qui est en charge de cet audit.

81. La deuxième condition de son effectivité est de rendre public le rapport ou du moins à en assurer une diffusion plus large.

IV. Excès de formalisme :

82. Le projet de décret qui était censé simplifier les procédures de passation a maintenu un niveau de formalisme qui peut être préjudiciable à une procédure transparente et intègre. En effet, un défaut mineur peut être pris comme prétexte pour évincer l'offre d'un concurrent.

83. Les documents à fournir par les concurrents illustrent bien ce risque. Le projet peut envisager des simplifications sur des documents à produire tels que l'attestation fiscale et l'attestation CNSS.

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84. En conclusion, le Maroc a certes connu des avancées considérables dans la gestion des marchés publics lors de la dernière décennie, toutefois des lacunes demeurent et appellent des efforts constants en vue d'une meilleure gouvernance en la matière. Consciente de l'importance qui s'attache aux marchés publics en tant que levier de développement du pays, L'ICPC a fait de la promotion de l'intégrité et de la transparence dans la commande publique, l'un de ses axes stratégiques prioritaires.

CONTRIBUTION FROM NORWAY

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Norway --

1. Over the past couple of years, there has been an increase in the number of criminal cases regarding corruption in Norway. In 2004, there were 2 cases registered whilst in 2007 there were 32 cases.[1] In 2009, Norway dropped from number 8 to number 14 on Transparency International's list ranking which ranks the least corrupt countries in the world. Could this fall in rank be interpreted as a rise in corruption in the Norwegian society?

2. One of the questions in the annual survey carried out by Transparency International is if the population considers the government's efforts against corruption to be effective. In the last survey, 61 % of the Norwegians in the sample assessed this effort to be ineffective (TI survey in the Norwegian population about corruption).[2] The natural question to pose is: Do the results of the survey give a correct assessment of corruption in Norway or is the rise in criminal corruption cases, as described above, a result of a more aggressive and/or more effective governmental approach towards corruption?

3. The development of legislation and prosecution procedures against corruption must be seen in connection with the legislative efforts made to enhance the awareness of civil servants on how to effectively and ethically carry out public procurement. As described below, this field of public activity has undergone an extensive reform in Norway.

4. In this report, The Norwegian Competition Authority (NCA) will present the Norwegian public bodies involved in fighting collusion, corruption and infringements of the Public Procurement Act. We will also present the mainline of legislation in the three areas and the tools used to uncover and sanction infringements.

1. Public Procurement: Enforcement and Legislation

5. The Norwegian Complaints Board for Public Procurement (KOFA) has been empowered to enforce infringements of the Norwegian Act on Public Procurement and ancillary secondary legislation.[3] KOFA has mainly power to give advisory decisions in infringements on the public procurements rules. However, where the public authority has failed to notify the procurement (illegal direct procurement) and shown intent or gross negligent in performing the illegal direct procurement, KOFA may issues fines up to 15 percent of the contract value.

6. KOFA[4] was established in 2003 and the administration has since 2005 been embedded administratively in the Norwegian Competition Authority (NCA). The main purpose behind the

1 Cases regarding Norwegian penal code section 276 a-c).

2 See www.transparency.no.

3 Lov av 16. juli 1999 nr. 69 og Forskrift av 7. april 2006 nr. 402 and Forskrift av 7. april 2006 nr 403.

4 For more information on KOFA and the decisions, look to www.kofa.no.

establishment of KOFA was to offer an efficient and cheap way to solve conflicts for suppliers in procurement matters. KOFA publish approximately 200 decisions every year and strive to maintain (on average) a three months case handling time for complaints without allegations of illegal direct procurement, and four months time for complaints with allegations of illegal direct procurement. The latter complaints follow a more comprehensive process and thus demand longer time to be handled.

7. The Act on Public Procurement over the EU threshold values is an implementation of the EU public procurement directives. Under the threshold values we have national legislation. There are currently no provisions in the procurement rules which sanctions corruption performed by the public authority/its officials in a public procurement process. Thus, the prosecution of financial crime is the responsibility of the Public Prosecutor in Norway, through provisions in the Criminal Act.[5]

8. In Norway the public sector has a total expenditure of public procurement of more than 380 billion NOK each year.[6] Public procurement constitutes more than 15 percent of the gross national product in Norway (BNP).The main legislative rationale behind the public procurement rules is that, competition gives more value for money in the public sector and that the rules ensure more efficient use of public expenditure.[7] The requirement of competition also reduces the risk of financial crime as this enhances transparency in the spending of public money. As competition reduces the risk of corruption, the issuing of fines for illegal direct procurement may be considered an important remedy to prevent corruption in the public sector.

9. The Norwegian public procurement legislation impose a duty on the public authority to notify procurements over 500 000 NOK.[8] KOFA has authority to issue fines to public authorities up to 15 percent of the contract value for illegal direct procurement. Since 1st January 2007, KOFA has issued 12 fines to various public authorities. Fines have been issued to the Norwegian Defence Estate Agency , the Norwegian Public Roads Administration, the Norwegian Collection Agency, the Norwegian Correctional Services region east, various municipalities (Storfjord kommune, Askøy kommune, Troms fylkeskommune, Hadsel kommune) and health authorities (Helse Nord RHF, Sykehuset Innlandet HF). The highest fine issued is 1.75 million NOK. This represents 8.3 % of the contract value (Askøy kommune).

10. The power to issue fines for illegal direct procurement was introduced and implemented as a consequence of the National Audits Office' identification of illegal direct procurement in the public sector. The statistics on DOFFIN,[9] the national database for public procurement, showed that public authorities did not always comply with the statutory demand to notify. The government established a select committee (The AUDA committee) which in 2003 issued a report that recommended introducing a fine to combat illegal direct procurement. In the report, illegal direct procurement was considered to be the most serious breach of the legislation on public procurement due to the lack of competition. The existing sanctions were not sufficient to prevent the public authorities, gross negligently or with intent, setting the rules aside. However, it was also stated that the main reason for non compliance was lack of knowledge about the rules.

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5 Lov av 22.mai 1902 nr. 10 §§276 a og 276 b.

6 Data from expenditure in 2008,See www.ssb.no.

7 There are also other reasons behind the rules, ie. fair and equal treatment of tenderers, transparency, predictability.

8 Norwegian procurement regulation § 8-1/19-1.

9 See www.doffin.no for more information.

11. The interesting question in the aftermath of the implementation of the powers to fine for illegal direct procurement is whether the fine has had the desired effect in preventing breach of the rules. To the best of our knowledge[10] there has not yet been carried out an analysis regarding the effect of the fines. However, the media has given the fines great attention and there are numerous examples of political parties/elected representatives demanding that public authorities increase their knowledge of the rules and improve their routines in handling public procurement. There are also examples of public authorities expressing in the media, after being fined, that the fine has been taken seriously and that there will be a greater focus on better and more efficient procurement routines. In addition, a recent search has shown that, there has been a considerable increase in the number of notifications of procurements after KOFA got the powers to fine. Whilst there were approximately 12000 notifications in 2006 there were 15500 in 2009. The rather huge increase in notifications may also be due to other factors such as increase in public expenditure, but we believe that a significant cause is the underlying threat of fines and the related publicity the fine/ infringement is given through

12. The liability for fines lies on the public authority and there is no personal liability for illegal direct procurement in the public procurement legislation. One may argue that, as long as there is no personal liability for illegal direct procurements, the threat will not have substantial deterrent effects as the added expenditure resulting from the fine can be retrieved easily by increasing the public budget or by transferring the costs to another public authority. However, this is not our experience so far. Our impression is that, the deterrent effect is linked to the publicity and shame of not having complied with the rules, and the underlying suspicion that there may be corruption involved at another level.

13. The Norwegian experience with corruption in public procurement is so far linked to criminal cases where the main issue for the investigation has been suspicions of fraud, embezzlements or similar crimes. Some cases have led to an investigation into the suspect's role in public procurement, but this has then been at a later stage in the investigation and not as a systematic search for the corruption itself.

2. Collusion: Enforcement and Legislation

14. Fighting collusion in Norway is done in two tracks as collusion is made a felony punishable by jail as well as an infringement of the Norwegian Competition Act where the NCA can issue fines. Section 10 of the Norwegian Competition Act is an implementation of article 101 in the treaty for the function of the EU.

15. The NCA can perform investigations if there is reason to believe that undertakings collude. The investigation can span from taking statements from people in key positions in the undertakings involved to performing dawn raids and confiscating evidence in any form.

16. The NCA has an investigation department which carries out much of the technical side of the investigation. However, the entire organisation participates in the task of uncovering and pursuing cartels and collusion. Unveiling and curtailing cartel activity is one of the NCA's highest priorities.

17. The NCA has a *"collusion hot line"* to receive tip offs and information on possible infringements on the Competition Act. There is also an active leniency programme shaped much in the same design as in the EU. However, this programme is not effective in the criminal track. There will have to be made deals on a case by case basis with the prosecution authority on the leniency issue.

[10] See also study by Professor Luitzen de Boer and post doc Ottar Michelsen at NTNU on assignment from Norwegian Federation Enterprise (NHO), which estimated that 30 to 60 percent of the public procurement was not notified according to the rules.

18. As part of its work to combat collusion, the NCA can stage preliminary investigations and studies irrespective of whether it has received complaints. To inform the public about these tools a webpage[11] is used in addition to other information campaigns.

19. Certain important markets are undergoing continuous scrutiny. This means that the NCA tries to maintain up to date knowledge of the trade (sectors), events and the key actors in the market, their market shares and the structure of the business performed and relevant legislature for the markets.

20. There has so far not been discovered any corruption or infringements of the public procurement Act as result of an NCA investigation. The discovery of either corruption or infringement of the Public Procurement Act would have to be turned over to the police or KOFA, as NCA has no jurisdiction to investigate anything but infringements on the Competition Act.

21. One important element in the struggle to uncover collusion is a constant (persistent) information campaign towards public procuring entities. As the administration of KOFA is embedded in NCA, NCA personnel join KOFA on information campaigns to make sure that public procurers know about the dangers of falling victim to collusion. The OECD bid-rigging check list is promoted actively. This has made results. Two cases of collusion were uncovered last year. The first case involves two entrepreneurs who colluded on a bid for repair work on a number of bridges. In the second case all the taxis in a region colluded on a joint bid for a long term contract on driving patients from the local hospitals.[12] Both these cases were discovered due to tips from procurers contacting the NCA.

22. As mentioned above, collusion is a crime. However, the police rarely perform its own investigation in these cases until after the NCA has finished its investigation. After the implementation of the two-track system, no police investigation has been carried out in a case regarding the Competition Act.

3. Corruption: Enforcement and Legislation

23. Norway has entered and signed the OECD conventions against bribery and the UN convention against corruption, and thus pledged itself to facilitate adequate legal framework.

24. When it comes to corruption, the regulations were partly there before the said conventions, but were fragmented and quite unpractical with inexplicable differences in conditions for criminality and sentencing framework. The law was limited to cover bribery of domestic civil servants (maximum penalty 1 year imprisonment) or for civil servants receiving bribes (maximum penalty 5 years if the bribe affected the officials choice of actions, otherwise maximum penalty was imprisonment for 6 months).

25. These regulations were unchanged in the Norwegian penal code from its passing in the parliament in 1902 until 2003. The notable exception was the amendment of revisions in existing regulations in 1998 as a result of Norway's signing of the OECD convention of 1997 on combating bribery of foreign public officials in international business transactions.

26. During these years up until the 1990s, the cases brought to court on corruption were quite few and far between. With a few exceptions, the said cases also seemed to be about petty bribes. Though serious in itself, this did not bring much attention to the issue, and because of the fragmented nature of the

11 http://www.konkurransetilsynet.no/.

12 The decisions can be found at www.kt.no
http://www.konkurransetilsynet.no/ImageVault/Images/id_1987/ImageVaultHandler.aspx
http://www.konkurransetilsynet.no/ImageVault/Images/id_1847/ImageVaultHandler.aspx.

legislation, it was not possible to extract statistical material on this. The fact is that, we do not know exactly how many criminal cases of this kind there were in the penal system in the period preceding 2003.

27. As for the development of legislation and public awareness on this issue, this has been studied and reported on in the OECD phase 2 report[13] and its follow-up report as a part of the process following the 1997 convention against bribery. Norway has implemented the Working Group on Bribery's recommendations on legislation. We have also enhanced the institutional framework for investigation. Increased awareness among public procurement officers has been achieved through advocacy schemes. The legislation on this field is now completely revised and reflects the demands in the convention completely. A number of public institutions such as the tax authorities, the Auditor General, The National Authority for Investigating and Prosecuting Economic and Environmental Crime, and many more, have been encouraged to increase focus on detecting corruption. As one can see from the phase 2 reports, this has resulted in several cases where Norwegian companies and individuals were investigated and prosecuted for actively bribing foreign public officials. There have also been some cases of domestic corruption.

28. As the sentencing frame for severe corruption is now 10 years imprisonment, all the regular investigative tools in the Norwegian penal process, including communication-control, except electronic room surveillance, are available in police-investigation in severe cases of corruption.

4. Cross Over Effects: Do They Exist?

29. Public procurement is no doubt an area particularly vulnerable to corruption.[14] As one can see, much effort has been put into combating corruption, collusion and infringements of the regulation on public procurement. Thus, the statistics showing an increase in the number of corruption cases and in cases of infringement of the Public Procurement Act must be seen in this light. An increase in the number of cases should not necessarily be alarming if this is a result of an increased effort to uncover such cases. However it is understandable that the general population gets the opposite impression based on the numbers alone.

30. Norway is obliged to implement the new remedies directives on public procurement.[15] The Norwegian government has established a committee[16] which is scheduled to submit its proposal in March 2010. The proposals will then be sent on a public hearing and through the usual legislative process. The mandate of the committee is to suggest how the review procedure should be implemented in Norway, and the result will affect the future role of KOFA. One of the essential questions is: Which body should be given the powers of the new directives?

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13 OECD Norway Phase 2 report on the application of the Convention on Combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions.

14 OECD recommendation on Enhancing Integrity in public procurement (2008).

15 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

16 "Håndhevelsesutvalget" led by Francis Seiersted.

CONTRIBUTION FROM PAKISTAN

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Pakistan --

1. Size and policy objectives

1.1. What fraction of your economy does public procurement account for? What are the principal policy objectives of public procurement?

1. In most developing countries public procurement amounts on average to between 15% and 30% of GDP[1]. In some cases it has also been quoted at 50% of GDP.[2] In Pakistan, while the exact figure is not determined, public procurement would be towards the lower end of the range for developing countries given the country's low tax-GDP ratio.

2. The principal policy objectives of public procurement in Pakistan are documented in the Public Procurement Rules, 2004, which emphasise fair and open competition[3] leading to quality, efficiency, economy and value for money for the procuring agencies and ensuring proper and prudent use of public money.[4] The Procurement Rules discourage specific or popular brands and encourage a wider participation among suppliers that brings in new entrants[5] and smaller competitors to take the opportunity of open competition and grow as per their potential.

2. Corruption

2.1. What is the cost of corruption?

3. While the precise figures of the costs of corruption are not known, kickbacks in public contracts are estimated to constitute approximately 25% of the relevant project or procurement budget.[6] Similarly, it has been estimated that corruption in the procurement process alone[7]came to about 15% of Pakistan's development budget for 2007-8. This would amount to over Rs.150 billion (US$1,772 million).[8]

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1 Handbook for Curbing Corruption in Public Procurement, Transparency International. See also Fighting cartels in Public Procurement, OECD, 2008.

2 William E. Kovacic, "Competition Policy, Consumer Protection, and Economic Disadvantage" (2007) 25 Washington University Journal of Law & Policy 101.

3 Rule 10 & 20 of the Public Procurement Rules, 2004 available at http://www.ppra.org.pk/doc/rules.pdf.

4 Rule 4 of the Public Procurement Rules, 2004.

5 Rule 10 of the Public Procurement Rules, 2004.

6 Transparency International, 2008.

7 Assessment of the Pakistan Infrastructure Implementation Capacity, 2008. A joint collaboration of World Bank and Planning Commission of Pakistan.

8 Amount in rupee converted into dollars at the rupee-dollar rate US$1 = PKR 84.30) prevalent on 6th January, 2010.

4. The National Corruption Perception Survey 2009[9] carried out by Transparency International shows that the quantum per transaction of bribe is highest in tendering and procurement. The average quantum of bribe per transaction in nine sectors surveyed has been calculated at US$876, whereas in tendering alone the average quantum of bribe amounts to US$849.[10]

2.2. What factors facilitate corruption? Do some factors appear to be more important that others?

5. The National Anti-Corruption Strategy (NACS) 2002[11] notes that need and greed, combined with opportunity when there is little fear of detection and/or punishment are the basic factors that facilitate corruption. NACS further elaborates these factors as follows:

- inadequate pay and pensions and having to support large families;
- political instability and intermittent military rule that have weakened public institutions;
- complex and cumbersome laws and procedures; and
- selective access to justice, which is itself slow.

6. At the institutional level three factors have proved to be highly damaging: (i) abuse of power or discretion, which has enabled officials to make arbitrary decisions; (ii) low levels of transparency that have made it difficult for officials to hold each other accountable; and (iii) lack of job security, which has made it less likely for officials to resist political interference in administrative matters and made it more likely for them to collude with others in corrupt acts.

7. In all the above-mentioned factors, the most compelling one is the lack of accountability. Ineffective detection and absence of deterrent punishment has left public procurement in the hands of weak and/or corrupt public officials who consequently have wreaked havoc on it.

2.3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

8. The Public Procurement Regulatory Authority (PPRA) has been bestowed with the power to lay down a code of ethics for public procurement.[12]

9. Pakistan's Public Procurement Rules, 2004 are aimed at encouraging transparency in procurement. For procurements over Rs. 10 million (US$ 118,623), all procuring agencies are required to sign an Integrity Pact with their suppliers.[10]

10. Wide participation[13] in tenders is encouraged to avoid tender failure, which would then result in direct contracting and typically increase the scrutiny of procedures. For procurement work up to

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9 http://www.transparency.org.pk/documents/NCPS%202009/NCPS%202009%20%20Report.pdf.

10 Ten sectors were surveyed in the report that include Judiciary, Land administration, Taxation, Custom, Police, Health, Local Government, Power, Education, and tendering and contracts. Report shows that quantum per act of corruption in public tendering is 49% of all 10 sectors.

11 Page 14, National Anti-Corruption Strategy, 2002, National Accountability Bureau. Available at http://www.nab.gov.pk/Downloads/Doc/NACS.pdf.

12 Section 5(2)(d) of the Pakistan Public Procurement Regulatory Authority Ordinance, 2002.

13 Rule 10 of the Public Procurement Rules, 2004.

Rs. 2 million (US$ 23,724) an advertisement is required on the website of the PPRA. Tenders exceeding that amount need to be advertised in the print media.

11. As soon as a contract has been awarded, the procuring agency is required to make all documents related to the evaluation of the bid and award of contract public[14] and also post contract awards of over Rs.50 million (US$ 593,119) on the website of the PPRA.[15] Apart from this, citizens can access government documents under the Freedom to Information Ordinance, 2002.

2.4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

12. Firms are required to sign an integrity pact as explained above under question (3) section II. Corruption is a criminal offence under Pakistan's Penal Code and is punishable with imprisonment of up to 7 years or a fine or both.

2.5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

13. Pakistan has two anti-corruption agencies at the federal and four at the provincial level and three sets of courts. The relevant organisations are:

i) the Federal Investigation Agency;

ii) the National Accountability Bureau (NAB), with offices both at the federal level and at the provincial level. The NAB is the main anti-corruption body in Pakistan, which is endowed with comprehensive powers to investigate and prosecute cases relating to corruption.

iii) Special Accountability Courts set up under the NAB Ordinance and the Central and Provincial Special Courts established under the Criminal Law Amendment Act 1958.

14. The Competition Commission of Pakistan does not have power to investigate corruption cases in public contracting.

3. Collusion

3.1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

15. In most of the procurement cases, the number of competitors is limited and this facilitates collusion among the bidders. Collusion is also more likely where the competitors know each other well. Trade associations are the platform utilised by undertakings in Pakistan to discuss their business activities with each other, which has helped facilitate bid rigging and collusion.

16. The construction industry is the most vulnerable to bid rigging. In Transparency International's international surveys, "corruption was most prevalent in the Rs.272 trillion ($3.2 trillion) construction

14 Rule 47 of the Public Procurement Rules, 2004.

15 Regulation 7 of the Public Procurement Regulations, 2008.

sector and plagued both the developed and developing worlds"[16]. In Pakistan, too, bid rigging seems to be widespread in government construction contracts.

3.2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

17. Sectors providing utility services like water and power, health, education, privatisation, infrastructure and BOT projects as well as development aid have been greatly affected by collusion in procurement or bidding. The Competition Commission of Pakistan came into existence in November 2007 and has not had the opportunity to design procurement systems that minimise the risks of bid rigging.

3.3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

18. No such certificates of independent bid determination are required in Pakistan. The procuring agencies are required to specify a mechanism and manner to permanently or temporarily bar [suppliers and contractors who are found to be indulging in collusion[17]] from participating in their respective procurement proceedings. The PPRA website also list national and international firms that have been placed on the banned list.

4. Fighting collusion and corruption

4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

19. Generally, government construction projects, hiring of consultants and the pre-qualification process for purchase of goods by many procuring agencies have involved both corruption and collusion in Pakistan.

4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

20. Procurement is done at all levels of government, from municipalities and towns, to provinces and the Federal Government. While contracting at the Federal or National level is larger in terms of value per contract, local government contracting is also significant in terms of volume and its local impact. There is no clear evidence at what level collusion and corruption cases predominantly occur**.**

4.3. What methods and techniques for fighting corruption would aid the fight against collusion?

21. Presently, public procurement in Pakistan is treated mainly as a downstream, largely clerical, buying and selling function and therefore does not attract professional and competent staff to deal with the process. There is a lack of integrity and transparency and no real desire to minimise the misuse of meagre resources. Capacity-building of staff and officials involved in public contracting would be helpful to fight against collusion as well as the methods and techniques mentioned under question number 3 of section II.

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16 Excerpt quoted from the news published in Daily Dawn, Pakistan, March 2005, on the occasion of publication of Global Corruption Report, Dr Peter Eigen, founding Chairman of TI spoke on Corruption in Procurement.

17 Rule 19 of the Public Procurement Rules, 2004.

4.4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

22. Yes, before the commencement of any enquiries or related proceedings, if the accused voluntarily returns to the NAB any gains acquired through corruption and discloses the full particulars relating thereto, the Chairman NAB may grant leniency or release the accused person with the permission of the accountability court.[18]

23. At any stage of the investigation or inquiry, the Chairman NAB may also give a full or conditional pardon to a person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence, including the names of the persons involved therein.[19]

5. Advocacy

5.1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

24. Competition in procurement markets is limited by regulatory or other barriers to participation by alternative suppliers and complex and ambiguous laws can also affect transparency in the procurement process. These might include licensing or other restrictions on entry or participation in markets that unnecessarily make it more difficult for firms to compete. This, in turn, enhances the likelihood/feasibility of collusion by limiting the number of competitors.

25. In Pakistan the procedure for the evaluation of bids requires that the lowest evaluated bid has to be accepted unless this results in a conflict with laws, rules, regulations or policies of the Federal Government.[20] This clause can be interpreted in varying manner and the decision to award could become less transparent. Similarly, a bidder could be disqualified from participating in a single tender for submitting incomplete information.[21] Further, individual procuring agencies define their own procedures for debarment[22] and such provisions of law may themselves lead to an abuse of the process and eliminate competitors (though otherwise qualified) from the procurement process.

26. Discretionary powers of the public officials involved in procurement can seriously hamper the process. Members of departmental evaluation committees under the present tendering system have assumed vast discretionary powers, prescribed under the authority of a clause in evaluation procedure that "provided that a bid is substantially responsive, the purchaser may waive any non-conformity or omissions in the bid that does not constitute a material deviation."[23] Such discretionary power could be abused for reasons which can be ultimately be detrimental for the procurement process.

5.2. In what ways can competition authorities work to improve the efficiency of public procurement?

27. Corruption and collusion both restrict the right to compete among suppliers and increase the price of the goods or services procured and result in wastage of public funds. A competition agency is better equipped to deal with collusive practices than the procuring body and for this reason, public procurement

18 Section 25 of the NAB Ordinance, 1999.

19 Section 26 of the NAB Ordinance, 1999.

20 Rule 38 of the Public Procurement Rules, 2004.

21 Rule 18 of the Public Procurement Rules, 2004.

22 Rule 19 of the Public Procurement Rules, 2004.

23 EU-Asia Urb Project, Preventing Corruption in Public Contracting: Capacity Building and Networking for Civil Society and Local Governments. Public Contracting Handbook – TI Pakistan Section.

could be brought under the jurisdiction of the competition agency. A close relationship between both the procurement authority and the competition agency at the pre- and post-bidding stages might help to minimise the risks of corruption and collusion.

28. Another possible way would be to give additional powers to the competition agency to investigate and take action against the decisions of public administrative bodies that affect fair public procurement adversely. For example, the competition agency can help in assessing important documents such as the independent determination of bids and in the vetting of other bid documents.

29. A competition agency can also contribute through advocacy to improve the efficiency of public procurement. Advocacy measures can entail educating public procurement officials on the possible harm and cost of fraud and collusion. Similarly, outreach programs can also help educate public procurement officials about what they should look for in order to detect bid rigging and various types of fraud associated with government procurement and what they can do to protect themselves from corruption and bid rigging.

5.3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

30. A detailed discussion on the measures taken to reduce corruption and collusion and improve efficiency of the public procurement in Pakistan has been given under question 3 section II above. These measures have proved fruitful in terms of saving costs. For example, the Integrity Pact was applied and the evaluation criteria for short-listing were made transparent in the Greater Karachi Water Supply Scheme Phase-V, Stage-II , 2nd 100 MGD Project K-III. These measures helped to reduce costs in the contract. In fact, the project was reported as a model for Transparent Procurement Procedures in the report prepared by the Working Party of the Trade Committee of OECD on the Transparency in Government Procurement.[24]

5.4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

31. No, the Commission has not adopted measures to reduce collusion and bid rigging in public procurement and ergo, has not taken into account any potential impact of such measures.

5.5. Has your competition agency undertaken competition advocacy in this area?

32. The Competition Commission of Pakistan is also mandated to ensure and promote free competition; it has also been conferred authority to promote competition using various advocacy measures.[25] An advocacy approach was utilised in the matter of the Tractors Subsidy Scheme (2008-09) launched by the Government of Punjab. The CCP received complaints from a number of manufacturers and importers of tractors who claimed that only two local tractor manufacturers had been invited by the Agriculture Department, Government of Punjab to supply tractors under the Scheme. The CCP took cognisance of this apparent exclusion of all other manufacturers, dealers/importers of tractors and informed the concerned authorities of the provincial Government that this action ran afoul of competition principles. The situation was rectified and the provincial Government started negotiations with rest of the manufacturers and importers of the tractors for the supply of tractors under the Scheme.

[24] Transparency International, 2002.

[25] Section 29 of the Competition Ordinance, 2007.

33. Another example of competition advocacy in public procurement was the recommendation given by the CCP to the Federal Government to rectify the policy of the Trading Corporation of Pakistan (TCP) to purchase sugar from the members of Pakistan Sugar Mills Association (PSMA) only, as this could be considered a prohibitive agreement.

5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

34. The CCP took its first action in public contracting in the matter of Karachi Port Authority (KPT) in 2008. A comprehensive inquiry was conducted on complaints filed by TransGlobal Services (Pvt.) Limited (TransGlobal) and Pakistan International Container Terminals Ltd (PICT), against Hutchison Port Holding (HPH), Karachi International Container Terminals (KICT) and KPT. In both complaints, it was alleged that KPT had been engaged in collusive bidding with HPH while granting concessions for the establishment of a new container terminal and had granted HPH concession for more than 80% of the container handling capacity at KPT. A comprehensive inquiry was conducted and Show Cause Notices were issued to KPT and HPH for alleged violations of the Competition Ordinance. However, Show Cause Notices were challenged before the High Court and the matter is *sub judice*. The Commission, has, therefore, not been able to consider appropriate remedies.

CONTRIBUTION FROM PAPUA NEW GUINEA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Papua New Guinea --

1. Size and Policy Objectives

1. Papua New Guinea has a relatively small economy in global terms and is very much a developing economy and society. The Papua New Guinea population is one of the least urbanised in the world, with a large proportion of the people living in small and often isolated village locations.

2. Accordingly, government involvement in the economy and in the supply of goods and services beyond the village subsistence economy is very significant, much more so than in richer, developed economies. It is estimated that about 70% of the procurement of goods and services in Papua New Guinea is government procurement of one sort or another. This procurement activity is undertaken by all three levels of government, at the national, provincial and local level.

3. Because of its significance in the overall domestic economy in PNG, government procurement and how it is organised is of critical importance. Many firms in many industries throughout the country are heavily dependent on government customers, in some cases government being their only major customer. This may have positive effects in requiring firms to be cautious that they do not alienate their government customers through trying to charge higher prices by colluding with competitors, but at the same time there may be negative effects with the close commercial relationship between private firms and government, and the dependence on government as a customer, leading to corruption between the supplier and the acquirer of goods and services.

2. Corruption

4. Papua New Guinea has significant problems with corruption; it ranks poorly in international comparisons made in the Transparency International Corruption Index. Anti-corruption measures and institutions are operating widely throughout Papua New Guinea (the Ombudsman Commission, in particular, is very active and has a high profile) but these efforts have not been able to stem the occurrence of corrupt practices. Not surprisingly, that is particularly so in government procurement, where the sums of money involved can be significant. The Ombudsman Commission has in recent years frequently been frustrated, through blocking or delaying legal action or otherwise, in its efforts to prosecute corruption. The Independent Consumer and Competition Commission (ICCC), the national competition regulator, has no direct role in investigating or prosecuting corruption matters.

5. Corruption in PNG can arise, or remain unchecked, for a number of social, cultural and economic reasons. As far as corruption in government procurement is concerned, the strong social custom of “wantok” can provide opportunities for unscrupulous persons to subvert the procurement process through corrupt conduct. The wantok system is a longstanding tradition of mutual assistance for extended family or village groups, whereby a person is obligated to assist his family member, or wantok, to the maximum extent that he can, and in whatever way, while the wantok has a similar obligation to other family members. This cultural tradition, very important in traditional village life where outside support may be unavailable, has not translated well to a modern economy where it can lead to nepotism or corruption.

6. Corruption in the form of political patronage can also occur in the use of government funds. Most government infrastructure projects and other major government spending is required, by law, to be arranged by competitive tender through the Central Supply and Tenders Board (CSTB) or Provincial Supply and Tenders Board (PSTB), whose procedures are designed to be transparent and avoid corruption. However, each member of the National Parliament is given a substantial amount of money each year, which has increased dramatically in the last couple of years, to be spent on projects benefitting the member's electorate.

7. While those funds are supposed to be acquitted fully and openly to the national government and, in respect of amounts over 300,000 kina (about US$110,000) to be allocated through the CSTB or PSTB tender processes, this acquittal often does not occur; the funds are allocated personally and directly by the Member of Parliament to individuals or firms within the electorate. There is anecdotal evidence of such funds being used corruptly, as would inevitably be the case where the allocation of money is within the personal gift of an individual, and proper procedures for fairness and transparency are bypassed.

8. Further opportunities for corruption occur in the procurement of goods and services by provincial and local level governments, who are supposed to use CSTB procedures and processes, but frequently do not. With such a lack of transparency, it is difficult to conclude that those procurement contracts are fair and provide value for money.

3. Collusion

9. In an economy the size of that of Papua New Guinea, most sectors of the market have either very small businesses (e.g. in retailing and distribution) or a relatively small number of larger firms participating in the market. Often that may be limited to three firms or less competing in a particular market, which makes collusion much more likely than in a vigorously competitive market with many participants. The range of firms that are large enough to tender for government goods or services is likely to be even further limited.

10. Also, where CSTB processes are not followed in government procurement (see above), the opportunity for collusion to go undetected or unremarked is greater. In such situations there is often no great desire to ensure that the government is getting the best value for money from that procurement.

11. The ICCC, when it identified the likelihood of collusion and bid rigging in government procurement, engaged with the CSTB to make the CSTB and its staff aware of the risks of collusive bid rigging and how it can occur. The CSTB, as part of that process, sought the ICCC's assistance to introduce in the CSTB's Standardised Bidding Documents (SBD) mention of corruption and collusion in government procurement. The SBD contract conditions (which are still in draft form) specify clearly to contractors that where corrupt, fraudulent, collusive, coercive or obstructive practice is detected, the contract will be terminated by the procuring agency. The ICCC's discussions with the CSTB are ongoing.

12. Papua New Guinea, through the CSTB, does not require a Certificate of Independent Bid Determination (CIBD), though the current tender documents require certification of no conflict of interest. Following the discussions at the 2010 Global Forum on Competition, the ICCC will consider the desirability of introducing a form of CIBD into the tendering process.

4. Fighting Collusion and Corruption

13. Over the years there have been quite a number of investigations into alleged corrupt practices, by politicians and others, though only a proportion of them relate to government procurement. These investigations have been carried out by, typically, the Ombudsman Commission,

the police Fraud Squad and, on occasion, by specially created commissions of inquiry or Royal Commissions. Such inquiries are strongly transparent, with public hearings which are widely reported. Some of these investigations have resulted in prosecutions, while others have not.

14. Investigations into corruption have typically concentrated on that issue and have not also examined possible collusion as well. The ICCC has alerted the CSTB to the tell-tale signs of bid rigging, but to date the CSTB has not brought forward any particular matters to the ICCC for investigation.

15. The ICCC has been trying to publicise the dangers and destructive effects of collusive conduct and the broader issue of cartel behaviour, without limiting this to government procurement, but for the whole of industry. Part of that publicity has been to highlight the detriment such conduct can cause to the victims of collusion or cartel conduct, requesting them to report their suspicions to the ICCC for investigation. This publicity is an ongoing process which may last for a long time.

5. Advocacy

16. In 2009 the ICCC, and the CSTB, in conjunction with a number of government departments, conducted a series of Joint Central Supply and Tenders Procurement Forums in selected urban areas in Papua New Guinea. These forums brought a measure of awareness to departmental procurement officers around the country and highlighted the harm which collusive tendering and bid rigging can cause. This will form a basis for the ICCC's continuing advocacy for stamping out collusive bidding and anti-competitive behaviour generally; this advocacy will always continue as an important part of the ICCC's charter.

17. As part of its recognition of the detriment caused by collusion and corruption in public procurement, the Papua New Guinea Government's Procurement Manual identified corruption, fraud and conflict of interest as three main areas of concern. "Conflict of interest" should probably be broadened to include all collusive practices, which have a seriously bad effect on trying to have government procurement as transparent, fair and producing value for money. These efforts to stamp out such corruption and collusion will continue for the foreseeable future.

CONTRIBUTION FROM PERU

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT[1]

-- Peru --

1. Introduction

1. This paper presents an overview on the Peruvian policies against collusion and corruption in public procurement. It has been written to be presented as a country contribution to Session V of the IX Global Forum on Competition, organised by the OECD Competition Committee.

2. Public procurement in Peru accounts for approximately 11% of the Peruvian GDP and the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement. Taking this into account, corruption constitutes a very important issue for policymakers. In fact corruption is a matter of concern for the whole society. According to a survey by Ipsos APOYO Opinión y Mercado S.A. for Proética[2] in the year 2008, corruption of officials and authorities is seen by more than half of the head of households interviewed as a major problem of the Peruvian State, especially in Lima. Furthermore, the majority of the people interviewed considered that the government and other institutions of the State are not committed to combat corruption.

3. Although important legal reforms have been introduced in order to deter corruption in all areas of the government, these reforms have not specifically addressed the linkages between collusion and corruption in procurement. There is little interaction between the Competition Authority (the Defence of Competition Commission of the National Institute for the Defence of the Competition and the Protection of Intellectual Property Rights - INDECOPI), the Public Procurement Agency (the Supervisory Body of State Contracting - OSCE) and other anti-corruption entities in Peru and there have been only few cases sanctioned by the Competition Authority that specifically involved collusion in public procurement (and none of these cases were related to corruption).

4. The aforementioned indicates that a more collaborative approach between the different government entities in charge of prosecuting corruption and collusion is needed in order to tackle the problem of collusion/corruption in public procurement.

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The opinions expressed herein are those of the authors and do not necessarily represent the position of the Management Board and/or the Commissions within INDECOPI.

[2] Proética is a non for profit civil association that aims at contributing to combat corruption, its causes and manifestations in Peru. See: http://www.proetica.org.pe/.

2. Size and Policy Objectives

2.1 What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

5. Public procurement amounted PEN 41 851 876 628 (approximately, USD 14 303 443 824 or EUR 9 724 941 409) in 2008, which represents 11.08% of the Peruvian GDP of that year.[3]

6. Public procurement is regulated by the State Procurement Law (approved by Legislative Decree Nº 1017) and its Regulations (approved by Supreme Decree Nº184-2008-EF). Article 4 of the Regulations establishes the following policy objectives of public procurement:

- *Promotion of Human Development:* Public procurement shall contribute to human development in the country according to universally accepted standards on the matter.

- *Morality:* Public procurement shall be subject to the rules of honesty, truth, justice and probity.

- *Free Competition:* Public procurement processes shall include regulations or processes that encourage the most comprehensive, objective and impartial competition, as well as pluralism and participation of bidders.

- *Impartiality:* The agreements and decisions of officials and areas in charge of the procurement process shall be adopted in strict application of the law. In addition, technical criteria shall be considered in order to provide a fair treatment to bidders and contractors.

- *Reasonableness:* Contracts in public procurement shall be reasonable in both quantitative and qualitative terms in order to meet the public interest and the expected result.

- *Efficiency:* Public procurement contracts shall include conditions for the best price, quality and delivery time, as well as the best use of resources. Contracts shall consider criteria of speed, economy and efficacy.

- *Advertising:* Public procurement processes shall be advertised and disseminated adequately and appropriately in order to guarantee the concurrence of potential bidders.

- *Transparency:* All procurement shall be based on objective criteria and qualifications; they shall have a purpose and be accessible to the bidders.

- *Economy:* Criteria of simplicity, austerity and saving shall be applied in all stages of the selection process and in the agreements and resolutions about them, avoiding unnecessary and costly requirements.

- *Technological impacts:* Goods, services and the execution of public works shall be of suitable quality and delivered using modern technologies so that they can effectively fulfil the purposes for which they are required, from the moment they are hired, and for a specific and predictable period of time, with the possibility of being adapted, integrated and boosted if necessary.

[3] Source: http://www.seace.gob.pe/.

- *Fair and Equal Treatment:* All bidders shall have participation and access to contract with government entities under similar conditions. The existence of privileges and advantages is prohibited.

- *Equity:* Benefits and rights of the parties shall keep a reasonable relationship of equivalence and proportionality, without affecting the powers that belong to the State in the defence of the general interest.

- *Environmental Sustainability:* Criteria to ensure environmental sustainability shall be applied in all procurement processes, while avoiding negative environmental impacts according to the rules about the matter.

3. Corruption

3.1 What is the cost of corruption?

7. The Ministry of Justice estimates that the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement; i.e. around PEN 12 555,56 millions in 2008 (approximately, USD 4 291,03 millions or EUR 2 917,48 millions).[4] Furthermore, Kaufmann et.al (2008) report that Peru ranks 106th among a sample of 208 countries when considering the control of corruption.

3.2 What factors facilitate corruption? Do some factors appear to be more important than others?

8. According to a study by the Ministry of Justice, three major factors that enable the emergence of corruption can be identified: formal factors, cultural factors and material factors.[5]

9. Among the *formal factors*, the following are mentioned:

- The lack of a clear separation between the public and private spheres;

- The existence of a legal system that is not adequate to the national reality;

- The practical ineffectiveness of public institutions.

10. Some of the most important *cultural factors* identified are:

- The wide social tolerance for the enjoyment of privileges due to a prevalence of private gain versus civic morality;

- The existence of a widespread culture of illegality as a way of functioning in which there is social tolerance towards a corrupt environment;

- The lack of change in the organisational and regulatory systems despite the evolution of States.

11. And among the *material factors* mentioned, we have:

- The gap between the resources of public administration and social dynamics;

4 Ministerio de Justicia del Perú (2007).

5 Ibid.

- The gap between actual and formal responsibility of public officials;
- The gap between actual social power and formal access to political influence.

12. Additional factors that might help corruption mentioned in the same study are the following:

- The low probability of detecting corrupt acts, the slight punishment for corrupt activities and the absence of social sanctions for corrupt individuals;
- The lack of independence of judges responsible for monitoring political corruption and the lack of respect for judicial decisions;
- The weak credibility of the institutional order, which is caused mainly by the inability to effectively address social problems;
- The lack of a public career which promotes sound institutions and the compliance of the duties of public employees;
- The informality that characterises the Peruvian economy, which is closely related to the high cost of complying with the law.

13. Finally, the lack of transparency in the management of financial resources in regional and local governments (which is possible due to the fact that regional and local governments are not obliged by law to publish their financial accounts) is an additional factor that might facilitate corruption in public procurement. This situation is exacerbated by the fact that people who work in regional and local governments is not properly trained and some of them are not familiarised with the State Procurement Law, especially in local governments.[6]

3.3 How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

14. Transparency programmes certainly help fight corruption since they make it possible to monitor the development of the procurement processes, thereby helping anti-corruption officials to uncover illegal conducts. In Peru, several reforms have been implemented in order to increase transparency in procurement. One of the most important initiatives in this regard is the implementation of the National Plan to Combat Corruption[7], which includes several provisions to increase transparency in the government functions. The plan includes seven goals and other various strategies which are summarised next:[8]

3.3.1 Goal 1: Promoting the strengthening of the System to Combat Corruption

- Improving and strengthening mechanisms that promote accountability, access to information, promotion of ethics and transparency in public administration;
- Administrative simplification as a strategy for combating corruption;

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6 According to Juan Carlos Rivera, official of the Presidency of the Council of Ministers and member of the Multi Sectoral Working Group monitoring the National Plan to Combat Corruption, interviewed on 14 December 2009.

7 Established by Supreme Decree Nº 004-2006-JUS, issued on 25 January 2006.

8 Presidencia del Consejo de Ministros (2008).

- Strengthening the human resources system for the prevention of corruption;
- Strengthening the State procurement system in order to prevent corruption;
- Developing strengths in the supervisory and control bodies.

3.3.2 Goal 2: Institutionalising good governance practices, ethics, transparency and the fight against corruption in public services

- Strengthening a National Coordinated System to Combat Corruption;
- Coordinating and monitoring multi-sectoral policies against corruption, at regional and local levels.

3.3.3 Goal 3: Articulating an effective and comprehensive legal strategy against corruption

- Strengthening and modernising the judicial system;
- Improving transparency in the administration of justice;
- Implementing and optimising the supervisory bodies of the judicial system to strengthen the fight against corruption;
- Establishing an effective legal framework to combat corruption.

3.3.4 Goal 4: Promoting practices in the business sector to combat corruption

- Developing a culture of ethics in the business sector;
- Establishing measures which encourage practices that prevent corruption in the business sector.

3.3.5 Goal 5: Promoting the active participation of media in combating corruption

- Ensuring the independence of the media and strengthening its role in spreading ethical values.

3.3.6 Goal 6: Obtaining the commitment of society to actively participate and monitor the fight against corruption

- Developing an anti-corruption culture in society, reinforced by ethical values;
- Facilitating citizen surveillance in the fight against corruption;
- Setting up a social-political alliance against corruption.

3.3.7 Goal 7: Developing concerted international efforts to combat domestic corruption.

- Applying international agreements referred to the fight against corruption in the national legislation;
- Promoting the strengthening of reciprocity and judicial cooperation between countries.

15. As a result of the application of the National Plan, several laws have been enacted in the last few years.[9] Among the preventive measures, the following laws have been enacted:

- Supreme Decision Nº 160-01-JUS (11 April 2001), which creates the working group of National Anti-Corruption Initiative;
- Law Nº 26850, State Procurement Law;
- Law Nº 27482, Law governing public statements of income and assets of State officials;
- Law Nº 27806, Law of Transparency and Access to Public Information;
- Law Nº 27815, Ethics Code and its Regulations;
- Law Nº 28024, Law of Management of Interests;
- Nepotism Law;
- Mechanisms for transparency and citizen participation;
- Creation of committees of ethics and transparency;
- Creation of the Special Commission for Comprehensive Reform of Justice Administration (CERIAJUS);
- Measures proposed by the Presidency of the Council of Ministers;
- Creation of a fund to manage the money recovered from illegal activities against the State (FEDADOI).

16. Among the sanctioning measures, the following laws have been enacted:

- Creation of the Directorate of Police Corruption, by Ministerial Resolution1000-2001-IN/PNP;
- Law Nº 27978, Law of Leniency;
- Establishment of six corruption anti-courts and six anti-corruption chambers;
- Establishment of Decentralised Anticorruption Public Prosecutor's Offices;
- Establishment of the Anti-Corruption Subsystem;
- Appointment of an Ad-Hoc Attorney for the Fujimori/Montesinos cases.

[9] Ministerio de Justicia del Perú (2007).

3.4 Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

17. Firms are not required to certify that they have not bribed an official during the procurement process. Nonetheless, they are required to submit a sworn statement in which they declare under oath that:

- They are not prevented from participating in public procurement processes according to what is established in Article 10 of the Public Procurement Law;
- They know, accept and submit to the terms, conditions and procedures of the selection process;
- They are responsible for the veracity of the documents and information presented by them in the selection process;
- They promise to maintain their bids during the selection process and to sign the contract in case they win the process;
- They know and understand the sanctions contained in the Public Procurement Law, its Regulations and Law Nº 27444, General Administrative Procedure Law.

18. Regarding the sanctions that can be applied to individuals who have engaged in corruption or bribery (either as perpetrator or as participant in the offense) Article 28 of the Penal Code establishes that the following sanctions:

- Imprisonment;
- Restriction of freedom;
- Limitation of rights;
- Fine.

19. It should be mentioned that the length of imprisonment depends on the offense described in each particular case. For instance, in the case of collusion, the sentence of imprisonment shall be neither less than three years nor more than 15 years[10]; while in other cases, the sentence of imprisonment shall be neither less than four nor more than six years[11]. Furthermore, according to the provisions of Article 92 of the Penal Code, together with the sentence, the aggrieved party is entitled to initiate civil proceedings against the offender in order to claim for civil damages.

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[10] According to Article 384 of the Penal Code, the official or public servant who, in contracts, supplies, auctions, price competitions or other similar transaction in which he is involved because of his office or because he is part of a special committee, defrauded the State or any State entity or agency, according to the law, arranging with stakeholders in agreements, adjustments, liquidations or supplies shall be punished by imprisonment of not less than three nor more than 15 years.

[11] According to Article 399 of the Penal Code, the official or public servant who improperly, directly or indirectly or through a simulated act, is concerned, for oneself or a third party, by any contract or transaction in which he is involved because of his office, shall be punished by imprisonment of not less than four or more than six years and disqualification as established under subsections 1 and 2 of Article 36 of the Penal Code.

20. Finally, regarding the sanctions that can be applied to firms that have engaged in corruption or bribery, Article 105 of the Penal Code establishes that the Judge should apply all or some of the following sanctions:

- Closure of premises or facilities, temporarily or permanently. The temporary closure will not exceed five years;
- Dissolution and liquidation of the firm;
- Suspension of the activities of the firm for a term which does not exceed two years;
- Prohibition on the firm to perform in the future activities of the class of those in whose practice the crime was committed, aided or concealed.

3.5 Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

21. In Peru, there are Special Criminal Courts in charge of prosecuting crimes against public administration and bribery of officials. These courts are also in charge of prosecuting offenses committed by public officials engaged in a public procurement processes.[12]

22. The Peruvian Competition Authority does not have any power in the prosecution of corruption cases.

4. Collusion

4.1 What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

23. In addition to the factors identified in economic theory, such as concentration, the existence of barriers to entry, cross-ownership and other links among competitors, regularity and frequency of orders, low buyer power, the existence of a stable demand, product homogeneity, symmetry among firms, etc.,[13] additional factors that might facilitate collusion in procurement processes in Peru are the following:

- *Difficulty in monitoring bidders and their actions*. While in principle, detailed information about the procurement process (such as the bidder's name, number of bidders, bids, etc.) should exist in the records of the procurement process; this information is not always readily available for the Competition Authority and/or third parties. Furthermore, if the Competition Authority needs this sort of information, it should make a formal requirement to the Public Procurement Agency and it is not clear whether the information will be easily to process for the Public Procurement Agency;
- *Supply concentration*. The average number of bidders in public procurement processes is small, which according to economic theory facilitates collusion. In addition, given that the procurement processes are frequent, interaction between the bidders is constantly repeated over time. For

12 Administrative Order No. 024-2001-CT-PJ, which was issued on 31 January 2001.

13 Motta (2004), pp. 142 – 166.

example, it has been detected that many bidders are repeated in some processes under different names and items;[14]

- *Corruption*. As it is widely recognised, corruption could also facilitate collusion in public procurement, which is particularly worrying considering the high percentage of corruption in of the Peruvian GDP;

- *Legal limits (caps) on the price offered by bidders according to the State Procurement Law.* In the case of construction works, the State Procurement Law establishes that bids shall not be lower than 90% of the reference price nor exceed it by more than 10%. According to the Competition Authority, this legal provision ultimately reduces competition and could even facilitate collusion because all bidders know that nobody will place a bid above or below the limits established by the law. In fact, we can assume that a bidder that wishes to win the procurement process will respect the limitations specified in the law. However, if bidders want to collude, they can either agree to bid the lowest value allowed by the law (which is not a punishable conduct by the Competition Authority since the bids respect legal specifications) or some of them can agree to deliberately bid below or above the limits so they are disqualified from the tender, thereby enabling the remaining bidders to win the process.[15]

4.2 What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?

24. Since INDECOPI's inception in 1993, only three cases of bid rigging in public procurement have been effectively detected and sanctioned. None of these cases involved a case of corruption.

- *Bid rigging in the procurement of oil barrels*
  The Competition Authority sanctioned two local producers of 55 gallon barrels for bid rigging in a procurement process organised by a State-owned refinery. Rheem Peruana S.A and Envases Metálicos S.A. were two local producers of oil barrels. Petroperu is a state-owned refinery and one of main buyers of oil barrels sold by the above mentioned companies.
  Between the years 1995 and 1996, both Rheem Peruana S.A. and Envases Metálicos S.A. offered equal prices and almost equal quantities of barrels to Petroperu in three different procurement processes. The Competition Authority considered that the exact matching of prices and quantities was an important element to presume the existence of an agreement, especially taking into account that in the previous years the companies offered different prices and the total amount of barrels requested by Petroperu;

- *Bid rigging in the tender for public works and the construction of a electricity distribution network*
  The Competition Authority sanctioned five construction firms (Villa Rica S.A. Contratistas Generales; E y R S.A. Contratistas Generales; J & J Ingenieros Asociados S.A.; JERRSA Contratistas Generales and Contratistas antares S.A.) for bid rigging in the public tender organised by a municipality for the renewal of a local road.
  In this case, the Competition Authority considered four events as evidence of the collusive agreement: (i) all firms presented a budget for the works with uniform amounts of direct costs and profits; (ii) similarity of details in the filling of the formats of the proposals, such as the letter

14 According to Santiago Antúnez de Mayolo, former Executive Chairman of the Supervisory Body of State Contracting – OSCE, interviewed on 15 December 2009.

15 INDECOPI (2004a, 2004b, 2004c, 2005).

fonts and punctuation marks; (iii) evidence that the tender documents were acquired by the bidders in consecutive order and on the same date, and (iv) some of the bidders rented their equipment and machinery from other bidders, which might be considered as an unusual behaviour among supposed competitors.
Similar events were considered by the Competition Authority in the analysis of a procurement process organised by Electro Sur Este (a state-owned electricity distribution company) for the construction of distribution network in the downtown area of Puerto Maldonado. In this case, three firms (Inti, Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas) were sanctioned for colluding in the process described above.

4.3 Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

25. Certificates of independent bid determination are not employed in public procurement processes in Peru.

26. If firms have engaged in collusion, they can be sanctioned by Competition Authority. Sanctions imposed by it depend on whether the conduct is qualified as minor, severe or very severe. Sanctions may include fines as well as other corrective measures, such as the cessation of activities.

27. In addition, according to Article 237 of the Regulations of the State Procurement Law, the State Procurement Court may impose additional sanctions to providers, participants, bidders and contractors if they participate in practices that restrict free competition, including the following:

- Temporary prohibition to participate in State procurement processes. This prohibition cannot be less than six months nor more than three years;

- Permanent prohibition to participate in the State procurement processes.[16]

28. Furthermore, Article 105 of the Penal Code states that if a Criminal Judge verifies that a person or his organisation has been used for committing or concealing a crime, he is obliged to impose a sanction to this entity, which may include the prohibition to conduct activities similar to those in which the crime was committed. Thus, assuming that a company was found liable in a process linked to the commission of a crime (not necessarily the corruption of officials) for events directly related to a public procurement or acquisition process, the Judge may prohibit that company from participating in such activities for a time period (not exceeding five years) or permanently.

4. Fighting Collusion and Corruption

4.1 What cases from your jurisdiction have involved both corruption and collusion in public procurement?

29. There has not been any prosecuted case involving both corruption and collusion in public procurement in Peru.

[16] It should be mentioned that the Court will also impose this sanction when a person, within a period of four years, has received two or more sanctions which together add 36 or more months of temporary prohibition.

4.2 Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

30. In the cases sanctioned by the Competition Authority (see see Section III, question 2), the sectors involved in bid rigging of procurement tenders were: public works (construction of a local road and construction of an electricity distribution network) and provision of oil barrels to a State-owned refinery. It should also be mentioned that the Competition Authority is currently investigating an allegation of bid rigging in the public procurement processes organised by ESSALUD (the Peruvian social health insurance company) for the acquisition of medical oxygen between January 1999 and June 2004. Furthermore, there have been five investigations of bid rigging in public procurement processes which were later dismissed by the Competition Authority: three involving local government contracting agencies and two involving state-owned companies.[17]

4.3 When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

31. According to Peruvian legislation, leniency schemes may benefit individuals or firms who have committed criminal offenses using public resources or with the intervention of officials or public servants. In this sense, individuals or public officials who have engaged in bribery or corruption may obtain benefits such as the exemption from punishment or suspension of the execution of the penalty, among others.[18]

5. Advocacy

5.1 What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction?

32. Within the framework of implementing the trade promotion agreement signed with the United States, a new State Procurement Law was issued in November 2008. The new law aims at establishing standards designed to maximise value for taxpayer money used in the public procurement of goods, services and works, in a timely manner and with the required levels of prices and quality.

33. Among the most important changes introduced by the new law, the following can be mentioned:

- Corporate purchasing and reverse auction, where appropriate, will be preferred. Furthermore, contracting entities will contract directly through the Catalogue of Framework Agreements;
- Guidelines for the preparation and updating needs of the reference value are determined;
- Special schemes for micro and small enterprises are maintained;
- Infringements of suppliers, participating bidders and/or contractors that deserve sanctions are established;
- Additional functions of OSCE are incorporated. Examples of such new functions are the promotion of the reverse auction and the need to inform the National Control System about the

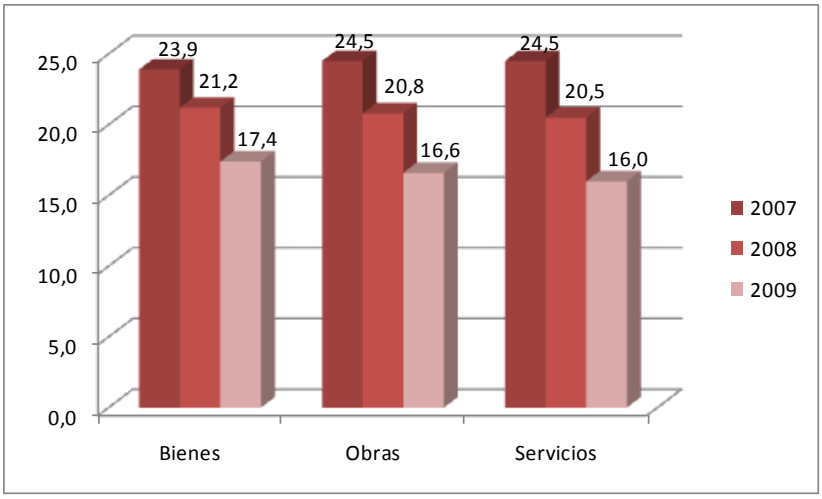
[17] The above statistics are a very limited sample of the potential cases that might exist in other sectors and therefore should not be considered as a definite indication of the potential scope of allegations of collusion and corruption in public procurement.

[18] See Subsection 1 of Article 1 of Law Nº 27378, issued on 21 December 2000.

cases in which rules of public procurement are violated, as long as there are reasonable causes to believe that State resources were mismanaged or a crime was committed.

34. The changes introduced appear to be promoting positive results, such as the reduction in the average duration of the public procurement processes (see Figure 1).

Figure 1. Average Duration of Public Procurement Processes (in days)



Source: OSCE.

35. Furthermore, a new software has been recently installed in OSCE which will help the organism monitor public procurement processes online. For instance, the software detects if a contracting entity purchases a specific item at a significantly higher price than the one offered for the same item to another contracting entity.

5.2 If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

36. The cases that have been sanctioned by the competition Authority of INDECOPI are related to collusion between bidders only (see Section III, question 2). No analysis of corruption was made by the Competition Authority since it has no power to prosecute this type of offenses.

37. In all these cases, the only sanctions implemented were fines ranging from 0.5 tax units per firm (approximately, USD 414 or EUR 388) in the case of a local municipality against five firms devoted to civil construction activities and 20 tax units per firm (approximately, USD 18 018) in the case of Petroperu against Rheem Peruana S.A. and Envases Metálicos S.A.[19]

[19] The value of the tax units, as well as the exchange rates corresponds to the year in which the sanctions were imposed (1999 and 1997, respectively).

ANNEX 1. REFERENCES

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CONTRIBUTION FROM POLAND

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Poland --

1. Size and Policy Objectives

1. In the recent years the value of the public procurement market in Poland has been systematically growing accounting for a large share of the public expenditure. This is particularly due to the boom in the infrastructure projects, often financed from EU funds. Undoubtedly, efficient functioning of this market, with the value of contracts awarded in 2008 amounting to 109.5 billion PLN, which constituted 8.6% of GDP (in 2006 it was approx. 7.5%),[1] is very important for the Polish economy.

2. The system of public procurement in Poland exists since 1994. Since then the law has been repeatedly changed. In 2004 a new Act on Public Procurement[2] (hereinafter APP) was passed and, in accordance with the EU requirements, opened the Polish public procurement market. It specifies the procedures for awarding public contracts, which are designed to protect fair competition and stimulate the free market.

3. According to the current rules institutions having public funds at their disposal are obliged to organise tenders if the procurement exceeds EUR 14 thousand. This way they can choose the best bid, which most often means the cheapest one. The annual reports concerning contracts awarded between 2006-2008 show that the biggest group of awarding entities (more than 90%) were the public finance sector units, followed by self government administration and independent public health institutions.

4. Safeguarding efficient, transparent and competitive procedures of public bids is the main objective of the policy determined in the APP. The principal rules of the Polish Procurement Law encompass:

- Equal treatment of economic operators;
- Open and fair competition;
- Openness and transparency of award procedures;
- Primacy of open and restricted tendering procedures;
- Impartiality and objectivity.

5. Nevertheless, even the most competitive procedures which are designed to underpin the pillars of transparency and fairness do not always entirely secure the elimination of corruption phenomenon in

[1] Annual Report on activities in 2008 of the Polish Public Procurement Office.

[2] Act of 29 January 2004 Public Procurement Law, Journal of Law of 2007 No 223, item 1655 (Dziennik Ustaw z 2007r. Nr 223, poz. 1655).

public tenders. Public procurement is one of the key areas where the public and the private sector interact financially, so the risk of corruption or bribery is high. Moreover, due to the secret character of collusive agreements, manipulation is hard to detect and can be hard to prove.

2. Corruption

6. According to the 2008 report of Transparency International year after year a significant decline in corruption in Poland is observed. In the ranking of the least corrupted countries Poland rose by nine places in 2008.

7. In Poland there are several agencies mandated to combating corruption. As regards prosecuting corruption cases in public procurement, the responsible bodies include: the Public Prosecutor Offices, the Police, the Public Procurement Office, the Supreme Chamber of Control, the Central Anti-Corruption Bureau and the Regional Chambers of Audit. Public Procurement Office controls and ensures the effective expenditure of public funds by supervising the completion of public contracts ordered by the State.

8. The most important documents designed to help fight corruption in Poland, also in public procurement, are the *Corruption Control Programme - Anti-corruption Strategy* and its implementing document: *2nd Implementation Phase 2005 – 2009*. The main task of the latter was to carry out actions aimed at preventing corruption and developing appropriate attitudes towards corruption. Strategic objectives of the Programme were to co-ordinate efforts aimed at adherence to anti-corruption legal regulations; to reduce social tolerance for corruption phenomena by awareness raising activities and providing transparent and citizen-friendly public administration structures by the open information society standards. There is also an 'anti-corruption shield' – a mechanism aiming at protecting the processes of privatisation and public procurement against corruption.

9. The APP provides for measures that aim at reducing corruption in public procurement. The Act specifies entities who are excluded from contract award procedures, *inter alia*: natural persons and partnerships whose partner or a member of the management board have been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in an organised crime group or in a union aimed at committing an offence or treasury offence. Therefore, in contract award procedures the awarding entity may request from economic operators declarations confirming their lack of criminal record by means of information from the National Register of Criminal Records.

10. Moreover, the APP reads that persons performing actions in connection with the contract award procedures shall be subject to exclusion if they have been legally sentenced for an offence committed in connection with contract award procedures, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profit.[3]

3 They shall also be subject to exclusion if they: are competing for a contract; remain in matrimony, consanguinity or affinity in direct line or consanguinity or affinity in indirect line up to the second degree, or is related due to adoption, legal custody or guardianship with economic operator, his legal deputy or members of managing or supervisory bodies of economic operators competing for a contract; during the three years prior to the date of the start of the contract award procedure they remained in a relationship of employment or service with the economic operator or were members of managing or supervisory bodies of economic operators competing for a contract; remain in such legal or actual relationship with the economic operator, which may raise justified doubts as to their impartiality.

11. Persons performing actions in connection with a contract award procedure shall provide a written statement, under the pain of penal liability for making false statements, about the absence or existence of the mentioned circumstances. Furthermore, actions in connection with the contract award procedure undertaken by a person subject to exclusion after they became aware of these circumstances shall be repeated, except for the opening of tenders and other factual actions having no influence on the outcome of the procedure

12. The competences of the Office of Competition and Consumer Protection are regulated in the Act of 16 February 2007 on competition and consumer protection[4] which does not cover corruption offences. (See point III).

3. Collusion

13. The process of rivalry during the tendering procedure can be distorted due to collusion. Therefore, apart from the Act on Public Procurement the issue is regulated by the Act on competition and consumer protection. Its Art. 6.1.7 prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market, *inter alia*, agreements consisting in collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

14. Furthermore, bid-ridding is enumerated among the most serious and detrimental anticompetitive practices, reckoned as *hardcore cartels*, and it is excluded from the *de minimis* doctrine. As fraudulent tendering may cause enormous harm to the economy, it is of a great importance to combat this kind of pathologies. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay above market rates. Antitrust protection of tender proceedings against illicit agreements aims at protecting the regularity of the economy in a free market economy. Simultaneously, in the case of public procurement it contributes to the improvement of public property management.

15. Under the Polish law, tender conspiracies are also criminal offences. According to the article 305 of the Criminal Code the person who, in order to gain material benefits, thwarts or impedes a public tender or concludes an agreement to the detriment to the owner of property or a person or an institution on whose behalf the tender is made, is liable to a punishment of imprisonment for up to 3 years.

16. While collusion can occur in almost any industry, it is more likely to occur in some of its branches than in others. Particularly, it is likely to be encountered in the engineering and construction industry, where firms compete for significant contracts. The problem is inherent in sectors where there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or market share. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are marginal sellers who control only a small part of the market. The probability of conspiracy increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured. The more homogenous a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or

[4] Act of 16 February 2007 on competition and consumer protection, Journal of Law of 2007 No 50, item 331 (Dziennik Ustaw z 2007r. Nr 50, poz. 331).

service. Bid rigging is more likely to occur on markets, where the competitors know each other well through social connections, trade associations or business contacts.

17. While some market features prompt collusions, paradoxically procurement regulations also may facilitate collusive arrangements. Pursuant to art. 26.3 of APP the awarding entity shall call on economic operators, who did not submit required declarations or documents, or the economic operators who did not submit plenipotentiaries, or the economic operators who submitted declarations or documents, that contain errors or those who submitted defective plenipotentiaries, to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary (…).[5] The law allows complementing the documents after the opening of the offers. Economic operators take advantage of this provision. It happens that they deliberately submit an incomplete bid, but then after the opening of the offers and analysis of the bids of competitors, they assess their own position and depending on the situation, they complete documents or not. Three enterprises from Silesia used this provision, so that the company whose offer was the most expensive could win. The basis for the UOKIK operations was a request submitted by Parexbud Multitrade Company. It accused three enterprises – Impex Trade, "Fornit" Furniture Factory and L&L – of concluding an illegal agreement while submitting bids in the tender. The enterprises bid for a public procurement contract for the delivery and assembly of the equipment of the buildings on the border crossing in Dorohusk.

18. The proceedings showed that the participants of the collusion had agreed the conditions of their bids – including the prices. Moreover, they agreed to undertake common actions consisting in a deliberate failure to remove formal defects in the submitted documents. During the antitrust proceedings UOKIK also found out that the three enterprises had had mutual business relations and had exchanged information on a regular basis (Decision No. RKT-22/2007).

19. Similarly, in other decision issued by the UOKIK President, the bidders taking part in the public tender for street cleaning in Poznan concluded an illegal agreement, which affected the course and the result of the tender. They agreed on price conditions of the offers and intentionally failed to submit required documents. Examining the case, the President found that companies, which submitted the most attractive offers, did not complete the formal documentation deficiencies, thus enabling the enterprise with the most expensive offer to win the contract.

20. Joint bidding may enhance competition in the public procurement process thanks to the synergies arising from bidding consortia that enable companies to combine resources and remove barriers to entry. However, it might also be used as a cover for collusive tendering.

21. Art. 23 of APP allowing joint bidding may also facilitate conspiracies. Bidding consortia are a good solution when bidding is costly or if a minimum size of business is necessary to carry out the contract. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. However, a bidding consortium should not be

[5] Article 26.3 of the APP : "*The awarding entity shall call on economic operators who did not submit declarations or documents, referred to in Article 25 paragraph 1, or the economic operators who did not submit plenipotentiaries, or the economic operators who submitted declarations or documents referred to in Article 25 paragraph 1, that contain errors or those who submitted defective plenipotentiaries to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary. The declarations or documents, submitted on request of the awarding entity, shall confirm that the economic operator satisfies the conditions for participation in the award procedure and shall confirm the fulfillment by supplies, services or works of conditions specified by the awarding entity, not later than on the day when the time limit for submission of the requests to participate in the contract award procedure expires.*"

allowed if each firm in the consortium has the economic, financial and technical capacities to carry out the contract on its own. Therefore, in order to maintain a high level of competition on the market, it should be considered to limit joint bids and sub-contracting in cases when consortia may lead to competition restriction.

22. The Polish CA raised doubts as to the joint bidding in July 2009 when the President of the Office initiated antitrust proceeding to determine whether two businesses operating in Bialystok that prepared a joint bid in order to increase their chances of winning the tender had entered into an illicit agreement. UOKIK questioned the conditions on which the enterprises entered into the tender for the removal of municipal waste. The information possessed by UOKIK indicates that in this case, the business collaboration could lead to restriction of competition and market sharing (the proceeding is pending). The Office does not oppose the right of businesses to form bidding consortia. However, this co-operation must result from either the inability to effectively make a bid by a single trader (e.g. very large volume of orders, lack of some of the required equipment), or the significant benefits it can bring to consumers (e.g. lower prices resulting from the increased efficiency of the undertaking, additional cost savings or technological progress). Otherwise, co-operation where entrepreneurs able to compete individually exclude competition among themselves by agreeing to a joint bid, may be found contradictory to the law of competition.

4. Fighting Collusion and Corruption

23. One of the main objectives stipulated in the *Competition policy for 2008-2010* is better detection of anticompetitive practices and in particular better elimination of prohibited practices on the local markets, since such irregularities, although hardly noticeable from the perspective of the entire economy, are very detrimental for consumers. Collusive tendering is very damaging to local markets and it is difficult to gather convincing evidence that will be accepted by the court and proving that the tender process was distorted by an illegal agreement. Therefore, UOKIK's Branch Offices carefully monitor both the unusual behaviour of firms operating on local markets, which may be the result of the conclusion of collusion, as well as local procurement processes.

24. Most of the bid rigging cases reviewed by UOKIK regarded providing services to public institutions, e.g. cleaning services, supply of foods, and delivery of equipments and occurred on the national market. The problem of corruption has not been involved. As mentioned above, the Office of Competition and Consumer Protection has limited competences as for prosecuting criminal offences, including bribery. Pursuant to article 304 paragraph 2 of the Criminal Procedure Code state or local government institutions which in connection with their activities have been informed of an offence prosecuted *ex officio*, shall be obligated to immediately inform the state prosecutor or the Police thereof.[6] Following this provision the President of UOKIK is responsible to report crimes encountered while conducting proceedings.

25. Measures, which could aid the fight with collusions in public procurement, should involve a more restrictive approach towards infringements. High fines are an effective tool when it comes to discouraging other companies from participating in such profitable undertakings as bid-rigging.

26. If an enterprise fulfils conditions indispensable to obtain leniency (i.e. has been the first, amongst the participants of the agreement, to provide the President of the Office with information concerning the existence of a forbidden agreement, is fully co-operating with the President of the Office, has ceased

[6] In addition they are obligated to take steps not amenable to delay, until the arrival of the officials of an agency authorised to prosecute such offences, or until that agency issues a suitable ruling in order to prevent the effacing of traces and evidence of the offence.

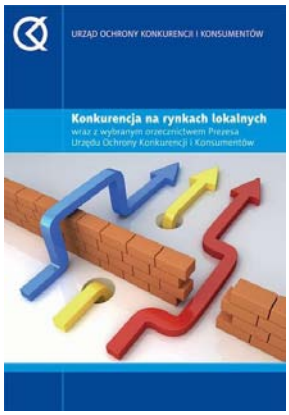
participating in the agreement and was not the initiator of the agreement and did not induce other undertakings to participate in the agreement) the fact of its engagement in bribery or corruption would not affect granting the immunity or reduction of fine. Hence, undertakings can avoid fine, but on the other hand, individuals will be legally responsible for the crime (bribery, corruption) committed.

5. Advocacy

27. Increasing the effectiveness of the UOKiK activities is one of the priorities of the government strategy 'Competition Policy for years 2008-2010' implemented by the Office. We recognise that making the wider public (i.e. other institutions, line ministries, businesses, consumers) aware of our mission and goals, and winning their support and legitimacy for our ideas and initiatives will be crucial to achieve this goal. That is why while carrying out education and information actions on a large scale, e.g. through publications, workshops and seminars intended for e.g. entrepreneurs, we pay great attention to conveying our ideas in the most compelling and accessible ways.

28. We also try to reach the local authorities for which we have recently carried out a series of workshops on competition law. Local governments, particularly municipalities, face competition law in several different ways. On the one hand they often breach the law, when playing a double role of utility services providers (directly or via their affiliates) and also of local law legislators who limit the access to the market for local companies or impose oppressive terms which such companies must fulfil in order to carry out local economic activity. On the other hand because of insufficient knowledge of competition law works local governments fall victim of anticompetitive practices of businesses, namely tender collusions. Thus, adequate education of these market participants is of a crucial importance. Therefore, from June until September 2009 UOKIK organised a series of events promoting competition law on the local markets. Ten widely attended training sessions for representatives of local authorities were convened in different cities in Poland. Additionally, the Office published a leaflet describing the most popular practices of local authorities that might raise competition law concerns.

29. According to the results of a survey carried out in 2009, only 69% of the biggest businesses (with 250 employees or more) are aware that bid-rigging is illegal (88% in 2006). Therefore, UOKiK published a brochure (*Bid-rigging*)[7] describing in detail what kind of behaviour is considered collusive tendering, why it is illegal, what sanctions can be imposed, what are the basic types of bid-rigging and reminding about the leniency programme. To better present the problem each description is illustrated with a short case-study. The brochure also gives examples of factors suggesting that collusive tendering may be taking place, e.g. the same errors in bids submitted by different companies.



[7] http://www.uokik.gov.pl/pl/informacja_i_edukacja/publikacje/ochrona_konkurencji/#pytanie28.

30. Furthermore, in order to increase efficiency of law enforcement and restore competition it is of utmost importance for UOKIK to co-operate with other public authorities. The Office influences the state of competition on the market by participating in the legislative process. Each year we provide opinion on ca. 2 thousand draft legal acts as part of inter-ministerial consultations, taking into consideration their impact on competition.

31. In 2009 UOKIK presented its opinion on the draft amendment to the Act on Public Procurement. The Office pointed out that the proposed provisions could worsen the efficiency of the procedures for awarding public contracts. Namely, the President of the Office was a strong opponent of a change in the open tendering procedure that would enable the awarding entity (after having placed the contract notice in the Public Procurement Bulletin and in the Official Publications of the European Communities) to directly contact the economic operators, that it is aware of, and inform them about the tender commencement. According to the legislators this provision was designed to enhance the competitiveness of the procedures for procurement by opening it to small businesses. However, it was stressed by the Office that such a provision could have quite the opposite effect – it could facilitate corruption and give an opportunity to distort competition. The Office argued that the provision would entail the awarding entity to have a database of small businesses (including data of their financial and technological resources) in order to be able to send them information on the procurement. Consequently, there was a risk that tender contracts would be prepared for a particular small entrepreneur. Due to the above mentioned reasons the proposed provision was opposed by UOKIK.

32. Another amendment to the APP contested by the President of the Office referred to the repeal of the Act's article setting forth that the awarding entity shall retain the deposit together with interest, if in response to the call the economic operator, did not submit declarations or required documents, unless it proved that it was due to reasons not laying on his part. The draft Act stated that that the provision was excessively rigorous for the contractors and that its objective could be achieved in a less severe way. It was also indicated that the provision was being repealed in order to eliminate or at least lessen the risk of collusion. UOKIK was of the opposite opinion arguing that there is an alternative way to achieve the same goal. It was stressed that reducing the financial burden imposed on the contractors should not be a priority when it comes to protection against unfair competition. Moreover, in the light of this provision, the establishment of the rule of law without the sanction could lead not only to the lack of its effective implementation, but also to the distortion of the substance of the tender. All of the UOKiK's remarks were taken into account and reflected in the final version of the amended Act on Public Procurement.

6. Conclusion

33. The market of public procurement which accounts for 8.6 % GDP in Poland requires an in-depth analysis and observation by all involved institutions. Taking into account its susceptibility to manipulation, the difficulties in detecting violations such as collusive tendering and their negative impact on the economy, it is vital to carefully monitor the ongoing processes. The role of competition authority is crucial when it comes to adopting and enforcing effective measures to combat bid-rigging and increasing public awareness of the benefits of competition. Also appropriate sanctions and UOKiK's strict approach to fining enterprises for competition infringements aim at deterring collusive behaviour.[8] While promoting competition culture UOKiK not only aims at educating all market participants but also actively takes part in the legislative process and closely co-operates with other institutions.

[8] http://www.uokik.gov.pl/en/press_office/press_releases/art143.html *Guidelines on setting fines for competition-restricting practices.*

CONTRIBUTION FROM ROMANIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Romania --

1. Size and Policy Objectives

1. Public procurement plays a major role in most economies. In OECD countries, public procurement accounts for 15% of GDP and in the new EU member states like Romania the number is approximately 16%.

2. The most important objectives which may be identified in Romanian legislation concerning public procurement, namely OUG 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts are the following:

- Promoting the competition between the economic operators;
- Guaranteeing equal treatment and non-discrimination of economic operators;
- Ensuring transparency and integrity of the public procurement process;
- Ensuring the efficiency and the efficient use of public funds

3. Given the extent and complexity of public procurement, this activity is particularly vulnerable to abuse.

2. Corruption

4. Corruption discourages investment, lowers efficiency and erodes democracy. There are many things that can disable an economy but perhaps nothing is more damaging than corruption. Emerging economies particularly are easy targets because they are in a transition state and thus in continuous transformation.

5. Paolo Mauro[1] found out that corruption is more likely to appear where governments have unlimited powers to grant privatisation and extraction rights and to exercise price controls.

6. Daniel Teodorescu[2] and other researchers surveyed local public administration officials in 2005 and with a error margin of +-1.2% found out the following causes of corruption in Romania: lack of consistency in applying the reform system (i.e. privatisation), lack of traditions that support a market economy, present administration system reluctant to change, low salaries in the public sector, lack of financial discipline in the public system, and fluctuations in the number of civil servants.

[1] Mauro, Paolo. Corruption and growth, The Quarterly Journal of Economics, 110(3), 1995.

[2] Daniel Teodorescu, Romanian Journal of Forecasting 4/2007.

7. Several key success factors are required to fight corruption in public procurement. The OECD's *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, issued by the OECD Anti-Corruption Division (Directorate for Financial and Enterprise Affairs) highlights three factors in particular:

- Design and implement the right procurement and anti-corruption legislations, enhance enforcement, clear rules on sanctions and penalties are crucial;

- Develop networks of experts with judicial and technical skills to improve prevention and detection within public procurement administration;

- Generate awareness building among staff of procurement administrations and society (private sector) of the effects of bribery and how to apply procurement rules and control mechanisms;

8. Moreover, transparency, accountability, control and professionalism are key factors in promoting integrity and fight corruption in public procurement.

9. In the Romanian Competition Council (hereinafter referred to as RCC)'s view, the anti-corruption provisions which can be found in the Romanian public procurement law (e.g. blacklisting of companies previously involved in corruption) contribute to enhance the transparency and integrity of public procurement. Conflict of interest provisions for civil servants that can be found in the Romanian public procurement law are also important measures to detect and prevent corruption.

10. In addition, the 2006 amendments brought to the Romanian legislation in public procurement in order to eliminate any interference between the different types of public procurement and align the laws to the European Community Directives led to the creation of a well functioning single public procurement authority, namely the National Authority for the Regulation and Monitoring of the Public Procurement (hereinafter referred to as NARMPP), with clear responsibilities in this field, which include monitoring and control of contract allocation.

11. Publication of the awarding contracts to guarantee transparency and to uncover possible irregularities in the awarding of public contracts is also extremely useful.

12. Moreover, in order to fight abuse in public procurement, Romania put the introduction and implementation of e-procurement on the top of its list of priority reforms. As a result, since January 2007, all public procurement announcements of the Romanian government have to be published on the national portal "e-Licitatie'' (www.e-licitatie.ro) and are transferred to the EU Official Journal. It has hence become easier and faster for companies in Romania to participate in public procurement by simplifying access to information and to the bidding process, which is especially important for SMEs.

13. The legislation relating to public procurement provides for the possibility to exclude any enterprise or supplier from participation in the tendering process who has been convicted in the last 3 years of an offence concerning professional ethics, has been found guilty of grave professional misconduct, or it was convicted, in the last 5 years, by definitive court judgement, for participation in a criminal organisation, for corruption, for fraud and/or for money laundering proven by any means which the contracting authority can justify.

14. Actually, all competitors for a project are required to give a written statement on their own liability subject to the sanctions enforced upon the act of forgery in public documents that they have not been convicted in the last 3 years by definitive court judgement, for an act that does not correspond with the professional ethics or for a grave professional misconduct and that they have not been during the last 5

years, sentenced under final judicial ruling of a court for having participated in activities of criminal organisations, for corruption fraud and/or money laundering respectively.

15. In the case of malfeasance of procurement officials, sanctions under criminal law are possible: under section 254 (taking a bribe), section 255 (offering a bribe) and section 256 (promising or receiving undue advantages) of the Criminal Code.

16. For taking a bribe, the procurement official may be punished with imprisonment from 3-12 years and the interdiction of certain rights while in the case of offering a bribe, an individual may be punished with imprisonment from 6 months to 5 years. In the case of promising, offering or giving money, gifts and other benefits, directly or indirectly, to a person who has influence or induces the believe that has influence over an official, that specific official is punished with imprisonment from 2 to 10 years.

17. The prosecutor's offices attached to the courts of law or the National Anticorruption Department may be entrusted to investigate corruption cases according to the dispositions of the Criminal Procedure Code and the Law no. 78/2000 with the subsequent amendments and completions. In general, all cases of high-level corruption fall under the competence of the National Anticorruption Directorate, which is established as a legal entity within the Prosecutor's Office at the High Court of Cassation and Justice (HCCJ). The Romanian Competition Council has not any competence in criminal suits.

18. Moreover, in May 2007, the National Integrity Agency (ANI) was set up, an independent anti-corruption agency designed to remedy shortcomings in the monitoring of conflicts of interest and public officials' assets. The law no. 144/2007 establishing the agency provides that penalties for illicit enrichment, conflict of interest and incompatibilities are beyond the agency's competence, so files would be forwarded to the Prosecutor's Office, disciplinary commissions or fiscal authorities. The ANI can impose fines only for failure to submit documents or for overstepping deadlines for submitting declarations.

3. Collusion

19. Cartels are forbidden by the Romanian Competition Law no. 21/1996. Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violations of the competition, such as:

> *[…] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:*
>
> - *Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, mark-ups, as well as any other terms of trading;*
> - *Limiting or controlling production, distribution, technological development or investments;*
> - *Allocating distribution markets or supply sources according to territorial criteria, sales and purchase volume or other criteria;*
>
> *[…]*
>
> - *Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.*

20. Moreover, the "*de minimis*" threshold for agreements between competitors is not applicable to the agreements regarding prices, sharing the markets and the procurements.

21. Usually, the industries characterised by fringe competitors, high barriers to entry in the respective bidding market, the presence of industry associations, little or no innovation are especially vulnerable to bid-rigging schemes. In addition, more predictable procurement schedules, the regularity of public purchases, few if any alternative products or services that can be substituted for the product or service that is being purchased are preeminent factors that could facilitate collusion in public procurement.

22. In Romania, it appears that the most vulnerable public sector to bid-rigging practices was the health sector. Thus, in 2008, the RCC sanctioned with fines of approximately Euro 22.6 million four pharmaceutical companies for sharing the publicly funded section of the insulin market in the context of a national tender organised in 2003 by the Ministry of Health. The collusive practice in this case aimed at sharing the diabetes product portfolio of a drug manufacturer between 3 distributors.

23. In another important case, 3 distributors who participated in a bid-rigging on the relevant market of dialysis products and equipment in the context of the electronic national tender organised by the Ministry of Health and the National Health Insurance House in 2003 were sanctioned in 2008 with fines exceeding in aggregate Euro 1.5 million.

24. In both cases, the RCC issued a recommendation to the Ministry of Health to conduct annual tenders, under the National Diabetes Programme, respectively the Nefrology-Dialysis Programme as the legal framework provides so that the access of the existing or potential undertakings to the markets is allowed.

25. At present, Romanian rules on public tendering do not require a certification of independent bid determination or a statement of non-collusion to accompany the tender.

26. However, the RCC's participation as an observer in the OECD Competition Committee's *Roundtable: Public Procurement – The Role of Competition Authorities in Promoting Competition* (2007) was very positive since has led to many tips on possible anticompetitive practices.

27. For instance, one lesson we learnt from the 2007 OECD roundtable discussions relates to the usefulness of Certificates of Independent Bid Determination (CIBD) and their application in the fight against bid rigging within certain OECD member countries.

28. Acknowledging the importance of introducing such a certificate, the RCC advocated for the introduction of such an obligation in a letter sent by the president of the RCC to the president of NARMPP in the summer of 2009. On that occasion, several strengths of such a document have been highlighted by the RCC such as (i) its informative role about the illegality of bid rigging among the bidders, (ii) prosecution of bid riggers potentially easier, (iii) possibility to apply additional penalties, including possibly criminal penalties, for the filing of a false statement by a conspirator, and (iv) prosecution of a firm that attempts to rig bids becomes possible, even when other bidders do not agree to the proposed scheme.

29. Following recent discussions between high level officials of the RCC and NARMAPP that took place at the RCC's headquarters about the ways and means to strengthen the inter-institutional co-operation, NARMAPP is now considering using a CIBD in procurement efforts due to bid rigging concerns. Also, the discussions resulted in a mutual agreement with respect to the content of the draft of Memorandum of Co-operation.

30. Finally, because bid rigging may occur alongside other crimes, such as fraud, money laundering, tax violations and public corruption, efforts have been made to strengthen the relationship between the RCC, public prosecutors and the Ministry for Home Affairs. The goal of this strand of work was to explain the legal standards for a violation of the competition law and to raise awareness of indicators of bid rigging.

31. Yet, the RCC signed a Memorandum of Co-operation with the Ministry for Home Affairs that creates incentives also for the effectiveness of the RCC's investigative work, especially with regard to conducting dawn-raids.

4. Fighting Collusion and Corruption

32. Fighting cartels is a high priority within the RCC. Currently 75% of the RCC's resources are devoted to cartel investigations.

33. The Romanian legislation in the competition field provides high sanctions in the case of cartels, including bid-rigging schemes. These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to the undertaking part of the cartel. These are culpable of committing a contravention.

34. However, there are situations which permit the sanctioning of an individual, when they participate with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1), which includes bid-rigging practices. These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined. The criminal action starts following the Competition Council's notification.

35. To improve the capacity to detect cartels, including bid-rigging, the RCC has improved the transparency of the leniency programme and introduced the marker system following the ECN leniency model. Moreover, at the end of 2009, the RCC set up the Leniency Unit that now represents the legal contact point between the RCC and possible whistleblowers.

36. In the corruption area, individuals engaged in bribery or corruption, are also able to receive leniency. According to the Law 78/2000 on preventing, discovering and sanctioning corruption, the perpetrator is not punished if he/she denounces to authorities the deed before the criminal investigation body is notified for that specific deed.

37. Yet, only one bid-rigging case gave rise to corruption suspicions and consequently to an opening of a criminal file by the Romanian Anticorruption Body. Ultimately, however, the proceedings were discontinued due to lack of sufficient evidence.

5. Advocacy

38. One way to ensure the efficiency of public procurement by a national competition authority is to exercise an active role within the public procurement procedures and in particular, in the auction design.

39. The intervention of the Romanian Competition Council may be *ex officio* or upon notification by or complaint of a natural or legal person who wishes to ensure the protection and stimulation of competition, a normal competitive environment and promotion of consumers' interest on the public procurement market.

40. Over the past 3 years, the RCC has increasingly been active in the public procurement area in terms of its enforcement and advocacy activities.

41. In terms of its advocacy activity, in several occasions, the RCC pointed out that what matters in order to reduce the risk of collusive practices are the procedures that the public contractors follow when calling for a tender. In particular, the calls do not have to contain unjustified restrictions that would automatically exclude on a discriminatory basis some companies.

42. For instance, in 2006, the Competition Council was asked for a point of view regarding a public procurement procedure for the award of a public supply contract i.e. the acquisition of office equipment consumables. Actually, a group of 8 producers and distributors of rechargeable /compatible consumables and the European Toner & Inkjet Remanufacturers Association (ETIRA) brought to the attention of the Council that in several cases, the terms of the tender dossier did not allow for the participation in the auction of remanufacturers, since only the original brand products were considered acceptable.

43. In analysing the substitutability of the relevant products, the Competition Council found that the equipment manufacturers do not impose the mandatory use of original consumables. This means the users may replace used consumables with remanufactured or compatible ones without breaching the clauses of the service contract with the OEM.

44. Therefore, the terms of the tender dossier were not justified and were considered restrictive from the competition point of view. Requiring from the potential bidders a compatibility certificate for the consumables in question may represent an entry barrier, thus restraining potential bidders from participating in the auction and not granting equity of chances for all.

45. This point of view of the Competition Council was transmitted to the producers' group and professional association in question, as well as to the contracting authorities. It was also made publicly available, through the Competition Council's website. As a result, the design of the auctions was improved, restoring free competition on the relevant market and providing fairness of opportunity for all potential tenderers.

46. More recently, in two other cases, namely the Romanian oncology products market and the paraclinical medical investigation services market, the RCC initiated investigations in order to review a potential breach by the public authorities with duties in the health field of article 9 of the Romanian Competition Law which prohibits any actions of the local or central public administrative bodies that have as their object or may have as their effect the restriction, prevention or distortion of competition. Based on these investigations, the RCC issued several important recommendations aimed at restoring the competitive environment.

47. In the case of the oncology products market, the RCC recommended the Ministry of Health to enforce the removal of the B3 form from the standard documentation for the drafting and presentation of bids within the public procurement for the national health programmes in order to allow the occurrence of real competition between distributors within tenders. The B3 form which actually represents a document issued by the producer and attesting the authorisation of the distributor in view of the delivery of products may have represented an instrument at the hand of the producer, which could have chosen to authorise only certain distributors by discriminating others, a situation that would remove the competition among distributors. The Competition Council recommended also the amendment of chapter III - Sole Source Negotiation Procedure of the Regulations on public procurement conducted in the sanitary field in view of redefining the sole source in the sense that the sole source should refer not only to the situation in which not only there is a sole producer, but also the situation in which there is a single distributor of a certain drug on the Romanian market. The final recommendation was that there should be ensured an annual conduct of tenders for the prevention and control programme of oncology pathology with a view to opening the market not only for the existing producers and distributors, but also for those that have entered the market recently.

48. In the investigation concerning the paraclinical medical investigation services market, the RCC noted that the Ministry of Health and the National Health Insurance House created a competitive advantage to the Euromedic Romania SRL imaging reference centre, thus disadvantaging the other paraclinical medical investigation centres operating on the market by means of a discriminatory regulatory framework and by undertaking some specific obligations towards Euromedic, based on documents concluded by Euromedic such as promoting and recommending the medical services provided by Euromedic so that Euromedic received a substantial amount of work; granting medical or non-medical support; maintaining the exclusivity of Euromedic for the supply of imaging diagnosis services within the Fundeni Clinical Institute.

49. Noting the breach of the transparency, equal treatment of all bidders and the principle of free competition, RCC expressly requested the Ministry of Health and the National Health Insurance House to take actions for the removal of the undertaken obligations that granted a competitive advantage to Euromedic.

50. One important recent initiative taken by the RCC in order to increase the awareness of collusion in public procurement consisted in sending official letters signed by the president of the RCC to all contracting authorities with the purpose of disseminating the Guidelines for Fighting Bid Rigging which were approved by the OECD Competition Committee in February 2009. The main objective followed by the RCC with that occasion was to get procurement officials more engaged in detecting bid rigging, to help them better understand what evidence to look for, and what steps they might take to prevent bid rigging from occurring. The key message the RCC sent through this dissemination activity was that contracting authorities should watch for anticompetitive practices such as collusive tendering and any evidence of suspected collusion in tendering should be brought to the attention of the RCC. The checklist is now placed prominently on the RCC's website portal.

51. Another initiative of the RCC for improving the efficiency of the public procurement process envisages the creation in 2010 of a special unit within the RCC for the specific purpose of fighting bid rigging in public procurement. An important early goal of the unit will be to establish a close working relationship between officials within the RCC and key officials within other parts of the Romanian government with attributions in public procurement.

52. Moreover, as part of its outreach programme, the RCC will organise this spring a number of presentations for officials from Governmental Departments including Ministry of Finance officials responsible for procurement policy, state bodies and agencies. The presentations will focus on two particular issues: "Bid-rigging: When it is likely to happen? How is it investigated" and "The relationship between procurement policy and competition policy" aiming at fostering a better understanding of how procurement processes may impact on competition and value-for money. The main idea behind these advocacy activities which will be carrying on in the upcoming period is to increase the awareness of cartel behaviour and to foster a working relationship between procurement officials and the RCC.

CONTRIBUTION FROM
THE RUSSIAN FEDERATION

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Russia --

1. The public procurement system in the Russian Federation is regulated by the Federal Law no. 94-FZ of July 21, 2005 "On placement of orders to supply goods, carry out works and render services for meeting state and municipal needs" and the Federal Law no. 135-FZ of July 26, 2006 "On Protection of Competition". This legal basis establishes rules and procedures aimed at ensuring equal economic area on the territory of the Russian Federation when placing public procurements, effective use of budget funds and non-budget funding sources, prevention of corruption and other abuses in the field of public procurements. Besides, this legal basis ensures openness and transparency of public procurement placement that can be proved by the fact that $27 billion out of $133 billion of the total amount of public procurements in the Russian Federation is won by the small businesses in 2009.

2. As a result of the universal introduction of tender and auction procedures for public procurement the state economised considerable budget funds at all levels. Thus, the economy of budget funds on public procurement in 2008 made up about $9.7 billion compared to $6.7 billion in 2007 and $4.3 billion in 2006.

3. Nevertheless, this sector is considered to be one of the most corruptional ones. The biggest amount of financial violations can be seen in this sphere. According to experts' estimates the Russian budget looses approximately from $5 billion to $7 billion as a result of absence of proper control over public procurement. Besides, there is a sphere of corporate procurements, carried by the Russian industrial and commercial companies. The corruption problem is also topical in this sphere because the national economy losses here are not less than budget ones.

4. The "National Plan on Fighting against Corruption" no. 1568 of July 31, 2008 approved by the President of the Russian Federation contains specific provisions related to the public procurement issues. In accordance with the implementation of this Plan the amendments to the Federal Law no.94-FZ of July 21, 2005 "*On placement of orders to supply goods, carry out works and render services for meeting state and municipal needs*" were made in 2009.

5. These amendments aimed to increase quality and transparency of public procurement placement, provide for the following:

- *Creation of single Russian-wide portal* for public procurement placement in 2011 that will help monitoring authorities to ensure proper control over published information. Availability of single information source considerably reduces risks connected with the unauthorised adjustment of information on the web sites or its unplacing, allowing creation of unified system of automatic control over procedures violations when placing public procurements;

- *Introduction of electronic auctions*. Usage of internet service for public procurements placement will provide for an opportunity to solve the corruption problem more effectively. The advantage of the electronic auctions is the opportunity to track the current price level on the market, almost excepting the possibility of participation of maximum number of suppliers regardless their geographical location in purchasing tenders that give the great opportunity to choose the most

profitable co-operation conditions due to natural initiation of competition between the suppliers. Introduction of electronic auctions is aimed at development of fair competition as well as prevention of corruption and other abuses in the field of public procurements. Electronic auction is one of the most effective instruments of fighting against "home" tenders. It eliminates possibilities of "face to face" direct negotiations of public authorities and specific companies. Along with that, trend for the electronic auctions may allow to save more that 50% of budget funds on a number of cases.

6. The measures indicated above contribute to the reduction of corruption risks during the public procurement placement.

7. With regard to the antimonopoly control of public procurement, the Article 11 of the Federal Law no. 135-FZ "On Protection of Competition" provides for "*per se*" prohibition of bid-rigging, which is one of the types of hard-core cartels and one of the major problems in the field of public procurements. There are two types of bid-rigging that can block businesses to enter public procurement process:

- Collusion between tender participants;
- Collusion between tender participants and a customer.

8. When considering claims by the participants of public procurement and carrying out inspections of customers the FAS Russia reveals the following major industries where bid-rigging prevails:

- Construction of large objects, including roads;
- Medicine (procurement of pharmaceuticals and medical equipment);
- Research scientific works.

9. The administrative responsibility for bid-rigging is provided for in the Code on Administrative Violations of the Russian Federation.

10. The amendments made to the Criminal Code of the Russian Federation in 2009 provide for more efficient application of Article 178 of this Code. It establishes imprisonment for the period of up to 3 years, inter alia, for bid-rigging. However, there is a possibility for gaining immunity under the leniency programme.

11. During the first half of 2009 the FAS Russia conducted the following:

- Considered 8319 claims and as a result of its consideration issued 3780 directions;
- Initiated 6010 case proceedings on administrative violations;
- Issued 1487 decisions on imposing fines for the amount of $3 million.

12. Hereby as a result of the reform in the field of public procurements, measures taken to control over the observance of the Law and prevention of violations in the field of public procurements, in 2008 the amount of $7 billion of the Russian budget was saved.

CONTRIBUTION FROM SINGAPORE

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Singapore --

Introduction

1. The Singapore government procures a substantial amount of goods and services annually. In 2008, the government purchases amount to an estimated S$10 billion (€5 billion) which is approximately 4% of the country's GDP (S$257 billion) (€128.5 billion).

The Three Principles

2. Three principles underpin Singapore's public procurement process:

i) Transparency – An open and transparent procurement regime across all stages of the procurement lifecycle where the government's procurement objectives, criteria and procedures would, as far as possible, be made known to suppliers.

ii) Open and fair competition - This will encourage suppliers to give their best offers and suppliers are given equitable access opportunities and compete on a level playing field; and

iii) Value for money – This is based on overall cost-effectiveness and efficiency. Value for money is derived from the optimal balance of benefits and costs on the basis of total cost of ownership. As such, value for money does not necessarily mean that the tender is offered to the lowest bidder.

3. Singapore's Ministry of Finance constantly reviews the procurement guidelines based on the principles listed above and makes enhancements to the procurement system whenever necessary.

Transparency

4. Singapore is party to the World Trade Organisation's 1994 Agreement on Government Procurement ("WTO-GPA") and implements the WTO-GPA in its national laws in the form of the Government Procurement Act, Government Procurement Regulations, Government Procurement (Challenge Proceedings) Regulations and the Government Procurement (Application) Order (the "GPA Laws"). The procurement framework applies to all government ministries including specified statutory boards. Depending on the estimated value of the intended government procurement, the procurement procedure adopted could be by way of a small value purchase, quotation or tender. Goods and services of up to S$3000 (€1500) in value are considered small value purchases which can be purchased directly from businesses or off the shelf. All government procurement of above S$70,000 (€35,000) must adopt tendering procedures. For goods of value between S$3001 to S$70,000 (€35,000), these will be purchased via a quotation system.

5. Additionally, the Ministry of Finance is empowered under the law to establish regulations regarding a wide scope of procurement aspects, such as pre-qualification and award procedures. The public

have free access to the Government Procurement Act and also government procurement policies and procedures via the internet.

6. In order to keep corruption in check there is a need for a strong national governance structure based on accountability and transparency, a framework which has the effect of minimising motivation and opportunity for corruption and facilitating its detection. Clear and comprehensive regulations for the conduct of public procurement are a fundamental tenet to curbing corruption in public procurement. Government procurement activities in Singapore are decentralised to individual government procurement entities that make their own arrangements on procurement except for centralised purchasing carried out for common goods and services. In order to maintain uniformity and rigor in the process, these entities must adhere to guidelines issued by the Ministry of Finance. Further, all government officials are required to declare conflict of interests, if any, at every stage of the procurement process. Officers responsible for procurement are rotated from time to time and different officers supervise different stages of work where practicable. Members of a tender evaluation committee and those in the tender approving authority are kept different. Such separation of responsibilities avoids insulation of procurement staff and also ensures greater control through independent scrutiny. This is to ensure integrity in the procurement process.

Open and Fair competition

7. Open and fair competition is achieved through Government Electronic Business ("GeBIZ") (http://www.gebiz.gov.sg), an e-procurement web portal for the whole of government where all procurement operations from the announcement of a tender to the award of the contract are conducted. All tender notices published online will contain information on the procuring entity, description of products, services, or works to be procured, dates of tender opening and closing, and venue for the collection of tender documents. The content of information which tender documents must contain is prescribed by law. The selection criteria are defined and set out in the invitation to tender and the award of the tenders are announced on the GeBIZ website. Under the GPA Laws, tendering methods may be Open, Selective or Limited. Open tendering is the default option. Selective tenders limit suppliers who satisfy the conditions for participation on grounds such as financial solvency, experience and capability and limited tendering may only be used in exceptional circumstances. Procurement in respect of some security-sensitive purchases may be exempt from the application of procurement regulations. As GeBIZ is on the internet, it ensures the widest reach for the tender and hence encourages vigorous competition.

8. All government entities generally adopt standard conditions of contracts and instructions to tenderers in their tender documentation. The set of standard conditions of contract contains a specific clause on corruption; bidders face the possibility of a termination of the awarded contract and the prospects of lawsuits and damages via the breach of standard conditions of contract with government agencies if they had been corrupt in obtaining or executing the contract. The GPA Laws also provide that technical specifications cannot be used as barriers to international trade and must be in terms of performance rather than design or descriptive characteristics. They must also be based on the international standard or, if no such standard exists on the applicable standard in Singapore.

9. Small and medium enterprises ("SMEs") in Singapore have benefitted from the public procurement process through the following measures

a) SMEs no longer need to have track records to pre-register for potential tenders;

b) SMEs can receive immediate approval through an Expenditure and Procurement Policies Unit in the Ministry of Finance which performs automatic online processing;

c) The rule for the amount of security deposit from suppliers has been relaxed; and

d) SMEs will be allowed to form consortiums to bid for projects to overcome larger value tenders where small suppliers may not be able to meet the financial and operational requirements on their own.

Value for Money

10. Government agencies accept proposals/quotations on the basis that they are the most advantageous to the Government, that is, that meet the requirements and offer the best value. Best value does not necessarily mean the cheapest option but the optimal balance of benefits and costs on the basis of total cost of ownership.

11. Evaluation of public procurement is done in a structured way that meets critical evaluation criteria and proposals should be evaluated on a like-for-like comparison wherever possible. High value projects should be subject to more quantifiable evaluation methods to reduce subjectivity and to provide more robust assessments.

12. Negotiation is permitted only in situations where there is limited competition, and where it is advantageous for the government agency to obtain better value for money purchases. However, in carrying out the negotiations, the agency should adopt the safeguards in line with the fundamental principles of incorruptibility, fairness and transparency.

Enforcing the principles

Sanctions against bidders

13. In addition to a comprehensive system of administration, enforcement also plays an important role in preventing corruption and collusion in public tenders. The risk of being caught and punished acts as a strong deterrent. It follows that an essential tool to protect the procurement process is to put in place effective sanctions to deter both bidders and procurement officers from engaging in corrupt and/or collusive conduct.

14. Section 34 of the Competition Act (Chapter 50B) (the "Act") prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore. By their very nature, CCS regards collusive tendering or bid-rigging arrangements as restrictive of competition to an appreciable extent. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that tenderers prepare and submit bids independently. Any tenders submitted as a result of collusion or co-operation between tenderers will, by their very nature, be regarded as restricting competition appreciably.

15. CCS may, where it has made a decision that an agreement has infringed the section 34 prohibition, impose on any party to that infringing agreement a financial penalty not exceeding 10% of the turnover of the business of such party in Singapore for each year of infringement, up to a maximum of 3 years. In 2008, six pest control companies were found to have colluded to support one another in tendering projects, two of which related to public procurement, and subsequently fined for bid rigging.

16. Corruption offences arising out of the procurement process are investigated by the Corrupt Practices Investigation Bureau of Singapore (CPIB). Suppliers who corruptly procure a withdrawal of tenders or corruptly offer gratifications to a public officer in relation to a government contract shall be guilty of an offence and liable on conviction to a fine not exceeding S$100,000 or imprisonment for up to at term not exceeding 7 years or both. In addition, a court may make a confiscation order against a person

convicted of a corruption offence in respect of benefits derived by him from the criminal conduct. There are also related offences of money-laundering for accomplices.

17. Suppliers convicted of a criminal offence related to the conduct of their business or profession may also be debarred by individual procurement entities from future government tenders. There is also the Standing Committee on Debarment ("SCOD"), comprising representatives from various government bodies, which is the authority that decides on all cases of debarment of defaulting contractors. In general, the debarment period should be commensurate with the financial or material losses suffered by the government agency and the need to protect other government agencies from the infringing persons. The debarment action has a wide application, imposing sanctions on the following:

a) The contractor or any of its employees, directors, partners or its sole proprietor who had bribed a public sector officer or another person, in connection with a government agency or contract;

b) Directors/partners/sole proprietors of the debarred companies/business who are involved in corruption/rigging and recommended by CPIB for debarment;

c) Other companies/businesses on which blacklisted directors/partners/sole proprietors sit; and.

d) Existing and new subsidiaries of the principal offending company (companies in which the principal offending company has 50% or more ownership directly or indirectly).

18. Debarred directors/partners/sole proprietors are allowed to appeal to the Permanent Secretary (Finance) against sanctions against them if they have good reasons not to be held personally responsible directly or indirectly, for the default.

19. In cases where concurrent infringement of the two jurisdictions (Competition Act and Prevention of Corruption Act) occurs, both CCS and CPIB will collaborate to handle the case. To avoid confusion, the working approach in such instances will be one agency to be the lead agency to handle dealings with the public. Both agencies will update each other on the developments in their respective investigations, subject to the confidentiality obligations under the respective Acts.

20. For information lodged by a complainant to either agency, the receiving agency will assess if the complaint is under its purview. If it is not, the receiving agency will, with the consent of the complainant, refer the information to the relevant agency accordingly. The referring agency will also send an interim reply to the information provider that the information has been directed to the referred agency which will then follow up with the information provider henceforth.

Sanctions against procurement officers

21. Provisions are also put in place to bolster the integrity of procuring agency staff and bidders. Procurement officers are required to report attempts by suppliers to undermine the impartiality and independence of action through the offer of bribes, benefits or other forms of inducement under Section 32 of the Prevention of Corruption Act, Chapter 241(the "PCA").

22. To underline the priority of integrity in government procurement in Singapore, penal sanctions against procurement personnel found guilty of fraudulent practices such as accepting or soliciting bribes in relation to government contracts are particularly harsh; up to seven years imprisonment or a fine not exceeding S$100,000 or both, may be imposed for active or passive bribery in government procurement. Such criminal penalties are compounded by civil proceedings which can be initiated against a corrupt public official even after a conviction in court for corruption. Under Section 14(1) of the PCA, an officer

may also face civil sanctions such as recovery of a civil debt by the principal against the procurement personnel.

Other safeguards

23. To ensure the proper sanctioning of any attempt to undermine procurement regulations, anyone who has suffered or reasonably risks suffering loss or damage as a result of a breach of a contracting authority's duty is entitled to bring a challenge before the Government Procurement Adjudication Tribunal (the "Tribunal"). The Tribunal may order any decision or action taken by the contracting authority concerned to be set aside and take action in accordance with the applicable regulations in place of that which have been set aside; or in the event that the contract for procurement has already been awarded, to order the contracting authority to pay to an applicant costs reasonably incurred for the purposes of the procurement.

24. Other checks include regular mandatory internal and external audits of the procurement process at least once every year by the Government's Auditor-General. These Audit reports by the Auditor General Office are made available to the public. Documentation regarding the procurement proceedings has to be kept by the procuring entity for a minimum of three years.

Advocacy

25. Singapore also recognises the importance of continuously raising the awareness of procurement officers of competition issues in public procurement. Procurement officers are often the frontline staff best placed to identity problematic situations and alert competition authorities of their suspicion. Therefore, a regular series of monthly seminars and workshops are conducted by CCS to procurement officers across government agencies. These sessions are compulsory for all new public procurement officers. It is envisaged that by building their knowledge of bid-rigging practices in their scope of work and equipping the officers with skills to spot bidding patterns and practices that suggests the possibility of bid rigging, these officers will be alert to these bid rigging dangers in the course of their daily work and in the long run, serve as an invaluable asset in the fight against bid rigging.

26. In this regard, the OECD Design and Detection checklist approved by the OECD Competition Committee in February 2009 will be an invaluable tool for such advocacy efforts.

27. Further, another tool used in the education strategy is to teach people how to react in situations that can give rise to corrupt conduct. This is where codes of conduct such as the civil service codes of conduct have an important function in imbibing the public service values of integrity, service and excellence. Public officers who can be held to account for corrupt conduct are also informed of the relevant laws and consequences.

The issue of signalling

28. An e-procurement web portal such as the GeBIZ website improves the efficiency of the public procurement process as it provides a common electronic platform for suppliers and procurers across international boundaries with streamlined electronic processes. This web portal helps reduce costs, increase deal/contracting speed, improve transparency and provide costs savings through bulk purchasing. Although it is recognised that the efforts to streamline processes and improve transparency is a useful tool to curb corruption, it may be argued that there is a risk that information transparency such as readily available information on identity of successful bidders and awarded bid prices increases the risks of collusion and anti-competitive behaviour as it has a price signalling effect.

29. However, these risks are alleviated to a certain extent by the structure of the tender system itself. GeBIZ as a web portal allows for the maximisation of potential participation of competing bidders worldwide; it encourages both local and foreign participation in procurement, reduces the costs of bidding and put in place participation requirements that do not unreasonably limit competition and thereby reduces the possibility of collusion. Further, the government allows smaller firms to form a consortium and tender for bigger projects to allow more firms, including small and medium enterprises to participate in such tenders. Transparency on prices also allows benchmarking across firms and therefore facilitates competitive bidding. Moreover, the easy availability and access to information via an electronic forum by which tender and award information is provided allows for ease of monitoring and policing by the authorities. Competitors can request for information on tender selection to review evaluation results and competition authorities can detect bid rigging activities via analysis of bid history patterns and other bid data.

Conclusion

30. The introduction of the electronic medium for public procurement has brought about many benefits such as greater efficiency, transparency, cost savings and opportunities for small and medium businesses. However, e-procurement is but a tool and is underpinned by Singapore's three principles of transparency, open and fair competition and value for money. These principles govern the public procurement process in Singapore and are vigorously enforced by comprehensive laws and procedural safeguards.

CONTRIBUTION FROM THE SLOVAK REPUBLIC

COLLUSION AND COLLUSION IN PUBLIC PROCUREMENT

-- Slovak Republic --

1. Size and policy objectives

1.1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

1. The aim of public procurement is to simulate competition, where it could be weakened – in situations where public sector is a buyer. Within public procurement to which private and public sector participate, the procurer does not decide on its own, but on public funds and discretion power exists. It may cause that the best bid is not chosen, but it will be affected by corruption, or procurer will be not sensitive to the fact, that through collusion a price for state may increase. Considering the fact that state – *principal* buys through *agents* – procurers from private firms, this creates known *agent-principal* problems, area for corruption on procurers` side and collusive incentives on undertakings' side, among others.

2. Corruption

2.1. What is the cost of corruption?

2. Apart from negative impacts on ethics and morals of the society corruption causes the following problems:

- Decisions, made in public interest, are affected by internalities (by private incentives of people who are authorised to adopt decisions in public interest). Subsequently, it causes that there is interest to maintain or to extend scope of activities, where it is decided on "other people's money", there is pressure on extension of regulations, redistribution. Labyrinth of various regulation interventions together with discretion power in decision making creates area for corruption. Higher involvement of the state in economy has at the same time a potential to distort competition.[1]

- If it is decided on public funds on a basis of private motives, sources are not allocated optimally and competition is distorted. Inefficient transfers may occur; sources are shifted from efficient subjects and activities to advantage of inefficient ones. Allocation efficiency of economy is worsening. It means that the best entrepreneurs are not supported, conditions for their increase are not created, but advantages are given to entrepreneurs, which have the strongest "lobby".

[1] Tanzi (1998) states many examples, where opportunity for corruption is connected with excessive regulation. For example he states that the harder is to understand tax laws the easier is to corrupt, because there is higher discretion power for decision makers. Similarly, Zemanovicova and collective (1998) introduces many regulation barriers in conditions of transition economies, which distort competition conditions.

Undertakings are focused on rent seeking, not on profit seeking. Thus, not the creation of wealth but its redistribution is supported. It results in decrease of all wealth of a country.[2]

- Corruption, non-transparent rules cause higher transactions costs. The environment is favourable for corruption if rules are unclear, ambiguous and complicated. This, at the same time, creates barriers for undertakings in the form of transactions costs. Analysis of licenses, permits, concessions, subsidies and grants shows that rules for their granting are not defined clearly. This provides discretion power in decision making on one hand and creates uncertainty for undertakings on other hand. Moreover, if rules are unclear, uncertainty induces undertakings to gain advantage and certainty by bribe.

- Uncertainty of the manner how rules will be applied increases investment risk, creates barriers to entry market. If undertakings are not sure that rules and acts are respected and enforced or if they are coming to such an environment where the run of the business need giving bribes, their investment risk increases. Undertakings consider high degree of corruption as a barrier to entry to the market in the given country.

- Corruption causes that economy does not use its potential and thus consumer gets less than he/she could get at given level of sources. Prices increase and on other hand quality and availability of goods and services decrease in environment of corruption. For example an undertaking which gets public contract by bribe, includes bribe into the price paid by consumer. Estimates show that it may come to surcharge of public contracts up to 30% in environment of corruption.

- Corruption may affect extent and structure of public expenses. For example according to some studies[3] corruption tends to increase extent of public investments, to reduce their efficiency and affects structure of public expenses.

- Apart from economic and social consequences it is necessary to consider also wider political impacts. In environment of corruption citizen loses confidence in state, rule of law; equality before law as well as democracy itself are questioned and moral decreases. Corruption also causes inequality of citizens according to the fact whether they have sources for bribe or not, what separates citizens into ones which have access for example to education, quality health services. However, also into triable and non-punishable according to the fact whether they can ensure "favourable" settlement of legal process by bribe for themselves.

2.2. What factors facilitate corruption? Do some factors appear to be more important that others?

3. According to R. Klitgaard corruption formula may be framed:

Corruption = Monopoly + Discretion power – Transparency.

4. Corruption flourishes in situation where profit from corruption is high and risk of detection is low. It relates to formal and informal rules.

5. As for formal rules an area for corruption arises, if there is imbalance between supply and demand, there is monopoly. Also if rules do not exist, if they are unclear or unpredictable. Those facts

[2] Many researches (for example Wei, 2001) indicate that negative correlation between extension of corruption and economic increase exists.

[3] Tanzi and Davoodi (1997).

allow discretion power and subjectivism. Also if the rules are not enforced, if legislation in force and law enforcement cause that risk of detection and withstanding of consequences is negligible or low comparing to benefit. Not only repression is important, but also prevention, thus such system changes, which restrict area for corruption.

6. Also informal rules are very important, because softer rules, moral system and acceptance of ethics and moral values also act as regulator of conduct. If tolerance of citizens for corruption is high, effective pressure on change does not exist. Public pressure may create political will and may lead to system changes, which restrict area for corruption and ensure both detection corruption and effective punishment. Experience shows that corruption prospers less in the countries with the active civil society.[4] Creation of informal rules is long-lasting process, which is affected by historic, cultural, economic conditions. Informal rules unlike formal rules cannot be changed quickly; they have their own natural inertia.

2.3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

7. Transparency is the one of the most effective and the cheapest tools of restriction of corruption. In the Slovakia context, for example adoption of the Act on Free Access to Information in the year 2000 has significantly changed system of public administration, which had been closed until then.

8. To restrict corruption the changes in prevention area are required:

- Transparency of rules, processes, institutions, funding of political parties;
- As well as reforms for example in health care, education, because corruption prospers in imbalance between supply and demand.

9. Functioning control and repression systems are also important, namely control systems, police, prosecutor's office and courts.

10. Within informal rules it is important to increase awareness of citizens to corruption issues, interest in public affairs, to introduce issues relating to public administration, ethics, corruption and anticorruption programs to education, etc. Anticorruption strategy is spiral movement, when public pressure arouses required reaction of politicians towards acceptance of system changes restricting area for corruption and making repression more effective.

Public opinion – > political will – > rules –> implementation- > control –> public opinion[5]

2.4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.

11. Bidders in a given tender do not officially certify that they have not bribed.[6]

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4 See, for example Putman (1993).

5 For further information see Zemanovicova, D., Beblava, E.: Krajinka rovnych a rovnejsich, Kalligram (Country of the Equals and the More Equals), 2003.

6 From incentive of non-governmental organisation the Anticorruption Charter was prepared, having been signed by more than 30 firms and having been supported by business associations. It includes also

12. In the Slovak Republic corruption (taking as well as offering bribes) can be prosecuted on the basis of the Criminal Code, the Commercial Code and the Act on Public Procurement. For example depending on the gravidity of the conduct an imprisonment up to 15 years may be imposed for corruption. The Commercial Code considers bribery to be the one of the forms of unfair competition (§49). The Act on Public Procurement in the article 26 states that corruption behaviour constitutes barrier to participate in public procurement (in conditions of participation relating to personal status it is stated that bidder must prove that he/she or his/her statutory body was not convicted of corruption).

2.5. Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

13. In the Slovak Republic, corruption constitutes in the meaning of the Criminal Code delict, which is investigated by law-enforcement agencies. The competition authority has no powers in prosecuting corruption cases.

3. Collusion

3.1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

14. Factors, which facilitate collusion in procurement, are namely:

- High market concentration – relatively few subjects operate in the market and it is easy to identify competitors, or when the number of firms is rather great, but small group of important suppliers exists here and other ones are "marginal" operating only in the small part of market;

- Repetitive bidding - competitors repeatedly meet within more tenders, which allows for them to agree on a "win-win" solution for all in a certain timetable. Environment is favourable for collusion, if competitors meet each other and have created also platform for regular contacts, for example on the association ground;

- Product character – if product is homogeneous, not liable to frequent innovation, technological changes;

- Relatively high barriers to entry;

- High level of market transparency exists – although obligatory publishing of information allows better orientation in the market for competitors, detection of corruption, but it may also support collusion, because it eases control of the fact whether "agreed action" is met and whether someone is not "cheating".

15. Investigation of the Office focuses mainly on sectors, where products are homogeneous, in the market operate a small number of companies, there are a repetitive bidding and barriers to entry, stable market conditions and no dynamic technological changes. Sectors which may be affected by this practice are mainly the ones, where volume of public contracts is high, for example transport infrastructure. According to study by J. Pavel (2009) investments into transport infrastructure in the Slovak Republic have been stabilized during the years 2001 – 2007 at level of 1,7% GDP.

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commitment not to offer bribes and not to coordinate bids within public procurement; sanctions for breaching the commitment are agreed in it.

3.2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimize the risks of bid rigging?

16. The Office has not dealt with many cases of bid rigging so far.

17. In the year 2006 it issued decision concerning of bid rigging and imposed a total fine in the amount of 1 349 290 000,- SKK (44 788 222 EUR) to the six building companies for coordinating their bids in tender for realization of a section of the motorway D1**.** The decisive proof was the price bids concordance (of the indexes of unit prices of particular items) of particular participants to this tender, which is marked, non-standard and it has not been possible objectively to explain otherwise. This fact has been proved by many independent sources – the procurer standpoint, expert standpoint, economical analysis of bids in similar tenders and their comparison with this tender. And also no participant to the proceedings submitted any relevant proofs, which would logically explain this concordance.

18. The Regional Court cancelled the decision of the Council of the Office for reasons, which the Office considers to be non-consistent with the European jurisprudence – it obliged the Office in the case of agreement restricting competition to state place, time and manner of conclusion of an agreement in the operative part of the decision so the act could not be confused with another one. The Office submitted an appeal to the Supreme Court claiming that the act in the decisions of the Office (definition of participants, relevant market, description of conduct and time period) is identified sufficiently not to be confused with another one.

19. Apart from decision-making activities the Office has actively commented drafts of amendments of the Act on Public Procurement.

3.3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

20. Certificates of independent bid determination (CIBD) have not been used in the Slovak Republic so far.

21. Pursuant to the Act on Public Procurement only bidders who have not been convicted of breaching professional obligations within last three years can participate in tenders. Mainly participation in agreement restricting competition in public procurement and other serious breach of the law or serious breach of contractual obligations, which may be proved by final decision of relevant public power body, are considered to be serious breach of professional obligations. Time period begins on the day, when a decision becomes final. Real impact is doubtful because the courts are deciding on appeal even several years.

4. Fighting collusion and corruption

4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

22. We have not dealt with cases, where corruption and collusion in public procurement have been reviewed in parallel in the Slovak Republic. The biggest case in the matter of bid rigging is mentioned in point 3.2.

4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

23. Empirical data indicate that perception of corruption in public procurement is very high. According to survey realised by FOCUS agency of March 2006 in the Slovak Republic 60% of respondents think that corruption behaviour in public procurement occurs often, 22% nearly always, 10% only exceptionally and only 1% thinks that it never occurs. According to surveys corruption occurs in the Slovak Republic both at the central and also local level.[7]

4.3. What methods and techniques for fighting corruption would aid the fight against collusion?

24. Both collusion and also corruption have serious anticompetitive impacts. While collusion is realised horizontally and its aim is to manipulate bids of undertakings in the manner that the best bid from value for money view would not win, but that "win-win" solution for participants to cartel would be agreed. Thus the winner is agreed in advance and compensations for the others may be various – for example win in next tenders, subcontracts, financial compensations. The result is inefficient use of public funds (estimates point to surcharge up to 20%[8]) and distortion of competition conditions.

25. As for corruption it is vertical relation between procurer and one of bidders, which causes that unbiased selection of the best bid will not happen, but undertaking determined in advance will acquire contract. The manners of preferring may be various – setting the criteria favouring bidder, limited information on tender, applied tender method, selection criteria, provision of further information, or agreed conclusion of supplements to contracts. Alike, the result is inefficient use of public funds (estimates point to surcharge up to 30%) and distortion of competition.

26. In the markets, where corruption and cartel behaviour are applied in the long time period it may come to the fact that firms with correct behaviour cannot operate in the market and it may act also as barrier to entry.

27. There are some techniques that can help to fight corruption and also collusion:

28. Increase of number of bids may hinder both corruption transactions and also cartel agreements and their stability. According to many studies higher number of bids means also decrease of price for public sector.[9] Study by J. Pavel[10], which analysed contracts in transport infrastructure area in the Slovak Republic during the years 2005 – 2009 confirmed inversely related relation between number of bids and price. Each additional bid brings in participation of two to five subjects within tender price decrease within 5 – 8% of anticipated price.[11]

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7 For further information see www.transparency.sk. .

8 A. Capobianco: *OECD Guidelines for Fighting Bid Rigging in Public Procurement, International Seminar on Competition Enforcement*, Bratislava, 2009.

9 For example, Kuhlman – Johnson (1983): *The number of Competitors and Bid Prices*. Southern Economic Journal. 1983, vol. 50. No. 1., Gomez-Lobo-Szymanski (2001): *A Law of Large Numbers: Bidding and Compulsory Competitive Tendering for Refuse Collection Contracts*. The Review of Industrial Organisation. 2001. vol. 18, No. 1.

10 J. Pavel: *Ako ovplyvnuje pocet uchadzacov o verejnu zakazku cenu?* (How does the number of bidders for public contract affect the price?) Transparency International Slovakia, 2009.

11 It is significantly more than it was identified in USA (2%) and about same also in the Czech Republic.

29. Clear, non-discriminating requirements and specifications focused on outputs and outcomes rather than description of concrete product extend number of bidders and at the same time hinder corruption transactions.

30. Joint procurement may hinder conclusion of collusion. Although, higher contract value provide an incentive for firms to offer bribes and for officials to take them, various anti-corruption and anti-collusion tools may be concentrated on big procurements, for example CIBD, Integrity pacts and other control mechanisms. Big tenders are usually more monitored by media.

31. E-procurement may have anti-corruption and anti-collusion effects; Slovakia has not had many experiences in it.

32. Efficient control system of use of public funds would motivate procurers to find savings through intensive competition of bids without corruption and collusion. Active cooperation with competition authorities in disclosure of cartels can be assumed. For example, according to survey,[12] which was focused on measures, which have been accepted by procurers, in which the Supreme Audit Office and the Office for Public Procurement found breach of the Act on Public Procurement, it was found out that only 64% of subjects react to findings of control bodies by appointment of responsible person and even less (53%) adopt remedies, which would prevent from breaching the Act on Public Procurement in the future.[13]

4.4. When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

Yes. Conditions of leniency are regulated only by the Act on Protection of Competition and it does not set such condition (that it cannot be bribery, corruption). The Office has not dealt with such case so far.

5. Advocacy

5.1. How do regulatory or institutional conditions help facilitate bid rigging and corruption?

33. Formal rules that facilitate corruption and bid rigging are described in 2.2 and 2.3.

34. If control of efficiency of public funds expenditure is only formal, it does not motivate procurers to cooperate in disclosure of collusive conduct, which increase price of public contracts. Alike, there is not pressure on procurers to set tenders in the manner, that they minimize price through maximizing the competition (for example extension of number of bidders, application of competition procurement methods).

35. As it is difficult to prove corruption and collusion in public procurement, we consider it important that relevant institutions can ensure effective disclosure and sanctioning, thus that risk of disclosure of such dangerous conduct is high and real. For example in the Slovak Republic there is a problem with the judicial review of the Office's decisions. For example, if real sanctions for collusion do not impend, because the judicial review requires the standards of criminal law, then this creates conditions facilitating bid rigging, because risk of sanctioning is very low.

36. Low transparency, non-existence of accountability mechanisms and low public control hinder disclosure of corruption cases and do not act as prevention. As corruption cases in big public contracts are

[12] Realised by Transparency International Slovakia of the year 2009.

[13] For further information see Efficiency of Functioning of Control Systems of Public Procurement in Slovakia, Transparency International Slovakia, 2009.

connected also with financing political parties it is necessary that clear political message to disclosure and sanctioning corruption is sent.

5.2. In what ways can competition authorities work to improve the efficiency of public procurement?

37. Competition authorities may actively participate in creation of public procurement legislation. For example in 1991 the Office initiated the Governmental Resolution on Establishment of Public Procurement. The Office actively comments submitted amendments to the Act on Public Procurement.

38. Interventions against bid rigging are the main tool of competition authorities.

5.3. What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

39. In the Slovak Republic for example joint procurement of some items was tested through pilot projects, some goods and services are procured in this manner nowadays. The Office pressed the fact that it should be opened system, thus if procurer finds more favourable bid comparing to conditions within general contracts, it could procure independently.

40. In the Slovak Republic on a basis of incentive particularly by non-governmental organisation many analyses relating to public procurement[14] were realised and many anti-corruption tools in this area[15] were suggested. Integrity Pacts – agreements concluded by procurers with bidders, aim of which is to ensure transparency and exclusion of anticompetitive conduct in the tender, were the one of the suggested measures. Both undertakings and also procurers commit themselves not to offer or take bribes. Apart from other commitments bidders commit themselves that they made and will make no agreements or other forms of coordinated conduct with other participants to given tender. Commitments are accepted both by procurers and also bidders, they agree also on sanctions for not meeting them (for example rejecting contract before its ratification, exclusion from next procurements organised by the same procurer).

41. Problem in the Slovak Republic is that information how public procurement system could be improved exist, but it is not used and is not enforced and supported by politicians and procurers. Hence, it would be appropriate to discuss establishment of certain obligatory minimal standards for public procurement area at international level from anti-corruption and anti-collusion effects view.

5.4. When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?

42. As it was stated, both corruption and collusion lead to inefficient use of public funds and restrict competition; therefore it is necessary to find balanced solutions. Requirement of maximal transparency is key issue to fight against corruption efficiently. Important indications of corruption are additional increase of contractual price, protraction of fulfilment, conclusion of supplements to contracts, non-enforcement of contractual penalties, what constitute information, which is not so sensitive from collusion view. To

14 For example studies How to Proceed within Public Procurement, Monitoring Public Procurement at Local Level, Transparency of Public Procurement Market in the Slovak Republic, Assessment of Transparency Rate of Public Procurement, Efficiency of Functioning of Control Systems of Public Procurement, Information Minimum of Public Procurement Process, Ethical Code in Public Procurement. Transparency International Slovakia.

15 For further information see for example www.transparency.sk.

prevent from publishing information, which may ease collusion it is possible to consider, which information and in what form will be provided to participants to tender and to the public. For example, it can be considered that information, which is sensitive from collusion view, would be accessible in individualized form to control institutions (in the Slovak Republic, for example the Office for Public Procurement, the Supreme Audit Office) and publicly accessible in modified form, which allows control of corruption. In this respect it would be appropriate to create best practices in this area.

5.5. Has your competition agency undertaken competition advocacy in this area?

43. Office has prepared Indications of Anti-Competitive Conduct of Undertakings within Public Procurement, which has been published on its website and sent to all relevant procurers with request to cooperate. The Office presented this topic at many conferences focused on public procurement area. The Office has offered also cooperation to the Office for Public Procurement. However, the Office has received no incentive on suspicious conduct within public procurement from procurers or the Office for Public Procurement; it has not received information on the fact that some procurer would like to consult non-standard situations. Lack of interest and low motivation of procurers are the problem.

5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

44. The Antimonopoly Office of the Slovak Republic is authorised to proceed only in collusions, it is authorised to prohibit such conduct and to impose sanction up to 10% of turnover.

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CONTRIBUTION FROM SOUTH AFRICA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- South Africa --

1. Introduction

1. Given that public procurement accounts for between 11 and 15% of GDP[1], the South African government actively utilises public procurement as a policy instrument to promote economic development to the benefit of those who had been discriminated against during apartheid.

2. The South African Constitution specifically provides that a preference system to advance previously disadvantaged individuals be located within a "fair, competitive, transparent and cost-effective procurement system". Consequently, there has been a flurry of activity in policy-making and law-making to give effect to these principles. Although these policies and laws do not make specific references to bid rigging, in the antitrust sense, they are based on principles that recognise the value of competition in bringing down prices, improving quality and ensuring 'value for money', .

3. Collusive tendering is a *per se* prohibition in South Africa's Competition Act (1998). In the recent past, the authorities have seen a significant increase in bid rigging cases. This is partly due to the prioritisation of enforcement in the construction sector, where the practice appears most prevalent.

4. There has also been greater use of the corporate leniency policy (CLP). During January 2010, the Commission was considering 66 applications for corporate leniency, 59 of which involved collusive tendering. A further 122 marker applications, the majority in construction, had been received. Three cases involving bid-rigging are currently being prosecuted before the Competition Tribunal. These, and a fourth case which was settled, are briefly discussed below. The next section will outline government policy and legislation on procurement, and the paper concludes with a discussion of the Commission's advocacy work.

2. Government Policy and Legislation

- The *Green Paper on Public Sector Procurement Reform (*1997), still referenced today by policy makers, sets the framework for subsequent policy and legislation. The Green Paper emphasised continuous monitoring and vigilance by government departments to eliminate and counter corruption.

- The *Public Finance Management Act* (1999) seeks to ensure transparency, accountability and sound management in government spending. It designates the heads of government departments and agencies as "accounting officers" who are legally obliged to ensure good governance in financial management. Accounting officers are specifically required to put into place fair

[1] Department of Environmental Affairs and Tourism, United Nations, and United Nations Environment Programme. 2008. Final report of the national roundtable on sustainable consumption and production. Available from URL http://www.environment.gov.za/Services/documents.html#.

tendering procedures that safeguard against corruption. The *Municipal Finance Management Act* (2003) does same for local authorities.

- The *Preferential Procurement Policy Framework Act* (2000) sets out criteria and procedures to ensure transparency in awarding tenders using a preference points system that favours firms owned by previously disadvantaged individuals. Regulations to this *Act*, published for comment in 2009, include a signed declaration that the information in tender documents is true and correct; and requires bidders to provide proof on request.

- A *Policy Strategy to Guide Uniformity in Procurement Reform Process in Government* (2003) provides for Treasury to set standards and publish guidelines and practice notes to ensure uniform and competitive tender procedures at all levels of government.

- *General Procurement Guidelines* proclaims "Five Pillars of Procurement": value for money, open and effective competition, ethics and fair dealing, accountability and reporting, and equity.

- The *Framework for Supply Chain Management (*2003) prescribes a governance framework for awarding government contracts and appointing consultants. It requires separate bid adjudication and bid evaluation committees in the tender process. Members of bidding committees have to declare conflicts of interest. Firms that appear on the list of restricted suppliers do not qualify as bidders and bids from firms who have engaged in corrupt practices may be rejected.

- Treasury publishes and manages a *List of Restricted Suppliers*. Accounting officers are required to check the prohibition status of bidders prior to awarding contracts. Treasury also maintains a *List of Tender Defaulters*, which is a statutory obligation in terms of *The Prevention and Combating of Corrupt Activities Act* of 2004. This act provides that companies convicted of tender fraud may be restricted from doing business with the public sector for up to 10 years.

- In July 2009, the government established a *Ministerial Task Team* to "scrutinise public expenditure trends and propose cost-cutting measures as part of the government's response to the economic meltdown and the negative impact of the current recession on the national fiscus." Its objectives include preventing fraud and corruption, although it makes no specific mention of bid-rigging. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre.

3. Competition Commission Cases

3.1 Concrete Infrastructural Products

5. A CLP application revealed a cartel in the supply of pre-cast concrete infrastructural products to mainly government institutions and municipalities. The Commission found[2] that cartel members co-ordinated their quotations and agreed to share and allocate contracts amongst themselves to maintain agreed-upon market shares not only in South Africa but also for the Southern African region. There was also evidence of collusive tendering for contracts with two state owned entities, namely, Portnet, which controls commercial ports, and Gautrain, a government initiative to introduce a rapid rail link system in the Gauteng province of South Africa. In one instance, competitors sought to share the market by collectively

[2] The Competition Commission vs Rocla, Infraset, Empowa, Grinaker-LTA, Southern Pipelines, Concrete Units, Craig Concrete, Cobro, Cape Concrete, DND Concrete, Concrite Walls and Grallio (Case number: 2008Mar3595).

bidding through "the railway sleepers' joint venture" in circumstances where they could have bid independently

6. The holding company of one of the parties, Aveng, settled with the Commission with an administrative penalty of ZAR46.3m (€4,1m). It also undertook to put into place a compliance programme and agreed to co-operate with the Commission's investigation. The case against the remaining members of the cartel is currently pending before the Tribunal.

3.2 Pharmaceutical Supplies to Public Hospitals

7. The Commission initiated an investigation[3] into collusion over State Tender Contract RT299, for the supply of large volume intravenous solutions and related products to public hospitals across South Africa. One of the parties subsequently applied for corporate leniency and provided detailed information about its role and the role of its competitors in the collusive tendering. The competitors had collaborated and agreed on prices prior to the submission of their respective tenders. The firms also agreed that winning firms would cede portions of their business arising from Contract RT299 to one or other of the losing firms in certain proportions.

8. All the members of this cartel have settled with the Commission with admissions of guilt and administrative penalties totalling ZAR55m (€4,9m). In addition the parties have agreed to implement compliance programmes.

9. This case drew the attention of the Department of Health to the losses it could incur through bid-rigging. The department's representative at the Tribunal hearing was keen to claim damages in terms of the Competition Act, but this has not been pursued. The experience did, however, prompt the department to review its procurement processes.

10. Contract RT299 was put to tender again in 2009, and interestingly the Department of Health allowed members of the cartel to bid. The department's view was that the exclusion of the firms would have been counterproductive as it would dampen competition in an oligopolistic market. One of these firms, which subsequently won part of the tender, voluntarily informed the Commission of measures it had taken, in terms of its compliance programme, to ensure an independent bidding process.

3.3 Buyers of Scrap Metal

11. The Commission initiated an investigation[4] into possible collusion in the scrap metal industry following its prohibition of a horizontal merger in the industry in February 2006. The merger documentation implicated parties in anti-competitive behaviour in the collection and supply of ferrous and non-ferrous scrap metal. The Commission found evidence of collusive tendering in the 2007 auction of wagons, coaches, and tankers by state owned rail transport entity, Spoornet (now known as Transnet Freight Rail).

12. There was a general understanding amongst competitors to not push up the purchase prices at local auctions or to bid against each other. The evidence indicated that the cartel had also enlisted the co-operation of an insider in Spoornet.

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3 The Competition Commission vs Adcock Ingram Critical Care (AICC), Tiger Food, Fresenius Kabi South Africa (FKSA), Thusanong Health Care (Thusanong) and Dismed (Criticare) (2005Jan1404 and 2007Nov3376).

4 The Competition Commission vs The New Reclamation Group (Reclam), Aberddac Group, Amalgamated Metals Recycling, Ben Jacobs Metals, Power Metals, SA Metal and Universal Recycling (2007Aug3121).

13. The acquiring firm to the merger that triggered the investigation, Reclam, has since settled with the Commission, with an administrative penalty of ZAR146m (approximately €13m), representing 6% of its annual turnover in the affected markets. Reclam also agreed to implement a compliance programme and co-operate in the Commission's prosecution of the remaining members of the cartel. This case will be referred to the Tribunal for adjudication.

3.4 Plastic Pipes for Water and Sanitation

14. Another collusion case[5] which emerged from a merger review was in the market for plastic pipes used mainly by municipalities in the provision of water and sanitation. The acquiring firm to the merger has also since applied for corporate leniency and has furnished the Commission with evidence of the existence of collusion in the markets for the pipe products. The alleged collusion involved price fixing, collusive tendering and the allocation of markets or customers. In allocating contracts between themselves, the cartel considered pre-existing market shares and their pre-existing relationships with customers. This matter was referred to the Tribunal for adjudication in February 2009 and the hearing is pending.

4. Interaction with Government

15. The Commission has engaged in advocacy at various levels of government to create awareness of bid rigging. It works closely with National Treasury which is the custodian of policy for public procurement. The Commission has made submissions to National Treasury proposing the incorporation of a *Certificate of Independent Bid Determination* (CIBD) in its procurement processes. This is currently under consideration.

16. The Commission has also held workshops with state owned electricity utility, Eskom, which had identified bid rigging as one of its key risks. Eskom is currently undertaking a major infrastructure expansion programme. On the Commission's recommendation, Eskom is now using CIBDs in its tender processes.

17. Several presentations and workshops to identify, detect and report bid rigging have been held with a total of 235 procurement officials and bid adjudicators from national and provincial government departments. The Commission plans to expand its advocacy work with government departments, including a joint project with the OECD.

[5] The Competition Commission vs DPI Plastics, Petzetakis Africa, Marley Pipes System, Swan Plastics, Amitech South Africa, Flo-Tek Pipes & Irrigation, Macneil Agencies, Andrag and Gazelle Plastics (Case number 2008Mar3596).

CONTRIBUTION FROM SWEDEN

CARTELS, CORRUPTION AND PUBLIC PROCUREMENT

-- Sweden --

1. Corruption causes markets to function ineffectively. Where there is corruption cartels may occur, and where cartels exist there is an increased risk of corruption. The definition of corruption is wide but at the centre of corruption is the abuse of a position of power. Research has shown that corruption may occur as well in developed as in less developed economies and that the relationship between corruption and GNP is less evident when it comes to corruption in the tendering process. May it be that the risk of corruption is greater than what has previously been estimated?

2. The Swedish Competition Authority is currently giving high priority to the fight against bid-rigging cartels in public procurement. In this context, the Authority commissioned the Swedish National Council for Crime Prevention to elaborate a report on the subject of cartels and corruption. The report, called Cartels and Corruption – Unlawful Influence on Public Procurement, was presented in December 2009.

3. The purpose of the study has been to identify risks for cartels and corruption in connection with public procurement and the main questions it aimed to answer were:

- Which are the reasons for cartels and corruption in connection with public procurement;
- At which steps of the process are these risks present;
- Which actors, professions and sectors in particular risk being involved in cartels and corruption;
- Which similarities and differences are there between cartels and corruption;
- What can be done in order to neutralise cartels and corruption?

4. The Swedish National Council for Crime Prevention has conducted interviews with individuals who have great knowledge of public procurement, representing supervising authorities, public procurers and tendering undertakings. For obvious reasons it has focused on identifying where the risks for cartels and corruption are present and not where infringements actually occur.

5. It is clear from the report that cartels and corruption in connection with public procurement is an issue that has to be taken seriously. Despite the importance of public procurement in the Swedish economy, there is a great lack of knowledge of competition law and cartels among practitioners.

6. Further, the report shows that sectors facing particular risks in this regard include construction, pharmaceuticals, IT, medical equipment, transport, cleaning services, travel, stationery, provisions and laundry sectors, and that the motives behind unlawful business methods are complex. However, this report shows that some infringements may be based upon “good intentions”.

7. Procurers have been pointed out as running the greatest risk of being exposed to unlawful influence. The most obvious situation where there is a risk of corruption in the sense of favouring local undertakings is where the purchase is conducted directly without a previous tender.

8. As stated above, the main purpose of the report has not been to reveal ongoing cartels, but to identify risks for cartels and corruption with regard to public procurement. The purpose was also to discuss which counter measures could be taken in order to fight this unlawful behaviour. In this regard, the report has contributed to the Competition Authority's continuous efforts to raise awareness of competition law, fight cartels and promote an effective tendering process.

CONTRIBUTION FROM CHINESE TAIPEI

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Chinese Taipei --

1. Chinese Taipei's Fair Trade Act was enacted in 1992. The Act covers a wide range of issues related to antitrust as well as unfair competition. The antitrust part of the Act includes the abuse of dominant market position; mergers; horizontal agreements; resale price maintenance; and vertical restraints which are likely to restrain competition or obstruct fair competition.

2. Based on its enforcement experience, the Fair Trade Commission (FTC) has disposed of over 30 cases involving public procurement complaints from 1994 to 1998, for which the types of violations included bid-rigging and illegal collaborative bidding. After taking into consideration the likelihood that the Government Procurement Act would be enacted in May 1999 by the competent authority, i.e., the Public Construction Commission (PCC), the FTC consulted with the PCC regarding the application of the Fair Trade Act and the Government Procurement Act on competition issues related to government procurement on 21 December 1998, and the results were as follows:

1. Following the enforcement of the Government Procurement Act, any competition issues to do with government procurement that are regulated under the Government Procurement Act are to be handled by the competent authority in regard to the Government Procurement Act or by other regulatory authorities in accordance with the Government Procurement Act.

2. Following the enforcement of the Government Procurement Act, government agencies that plan or authorise infrastructure, such as transportation, energy, environmental protection and travel facilities, shall implement the procedures for selecting bid winners under the Government Procurement Act if the enterprises are given permission by the regulatory authorities to invest in and build such infrastructure. The Government Procurement Act's applications may, however, be excluded in deference to other regulatory authorities when other relevant laws govern.

3. If the actions of the bid winner and other subcontractors related to the competition regulation are not regulated under the Government Procurement Act, such actions should still comply with the Fair Trade Act.

3. In other words, the FTC will intervene in the procurement conduct of government authorities only when the disputes among the bid winner and other subcontractors are related to the Fair Trade Act, following the enforcement of the Government Procurement Act on 27 May 1999. In regard to other disputes related to government procurement, the competent authority in relation to the Government Procurement Act or other regulatory authorities will be responsible for those practices based on the above consultations. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act, which is implemented by the PCC.

1. Size and policy objectives in Chinese Taipei

1.1 What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

4. According to the PCC statistics regarding government procurement awards, the average yearly total of the contract awarding reached 1,275.5 billion New Taiwan Dollars (NTD) from 2007 to 2009, and this amount was about 10% of GDP in Chinese Taipei.

5. Article 1 of the Government Procurement Act provides that "this Act is enacted to establish a government procurement system that has fair and open procurement procedures, promotes the efficiency and effectiveness of government procurement operation, and ensures the quality of procurement." In other words, the policy objectives of public procurement are fairness, openness, efficiency, quality, and incorruptibility.

2. Corruption

2.1 What factors facilitate corruption? Do some factors appear to be more important than others?

6. The factors that facilitate corruption are mainly incorrect thoughts and strategies of enterprises, and the ethical conduct of each of a minority of public servants.

2.2 How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

7. The Government Procurement Act has been launched to establish a government procurement process that is open and transparent. This Act stipulates that information with respect to invitations to tender and awards of contract should be made available on the information network. It also provides a protest and complaint system for bidders, a system to avoid conflicts of interest, as well as penal provisions for illegal acts. All those approaches help fight against corruption. In regard to the details regarding the avoidance of conflicts of interests, Article 15 of the Government Procurement Act provides the following:

> *"Former procurement personnel and procurement supervision personnel shall be prohibited from contacting the entity that they previously worked for either for their own sake or on a supplier's behalf for three (3) years following their resignation for matters related to their former duties within five (5) years prior to their resignation.*
>
> *The procurement personnel and procurement supervision personnel shall withdraw themselves from procurement and all related matters thereof if their spouses, relatives by blood or marriage within three degrees, other relatives who live and share the property with them have interests involved therein.*
>
> *Upon finding that any of the procurement personnel or procurement supervision personnel failed to withdraw themselves for any cause of withdrawal provided for in the preceding paragraph, the head of the entity shall order such an official to withdraw and reappoint another official for replacement.*
>
> *A supplier shall not participate in the procurement of a procuring entity in the event that the relationship between the head of the procuring entity, and the supplier itself or its person involves the situation as that mentioned in Paragraph 2. This requirement may be waived provided that the enforcement of it is against fair competition or public interests, and that an approval for such a waiver has been obtained from the responsible entity.*

The procurement personnel and the procurement supervision personnel of an entity shall report their properties status pursuant to relevant requirements of the Act Governing the Property-Declaration by Public Officials."

2.3 Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.

8. The PCC formulated and published the "Sample Declaration for Suppliers Participating in a Tender." Paragraph 2 of Article 59 of the Government Procurement Act provides the circumstance regarding whether or not a supplier did, does, or will induce the procuring entity to sign a contract by giving others a commission, percentage, brokerage, kickback, or any other benefits. The Public Construction Commission had this circumstance listed in the sample declaration as one of the items that must be reported when a supplier participates in a tender.

9. With regard to illegal acts that affect the fairness of procurement, such as corruption, the Government Procurement Act includes provisions on punishments against these acts. The relevant provisions on punishments are Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), and Articles 101 to 103 (Refusal of tenders involving offending enterprises).

10. Moreover, Article 122 of the Criminal Law and Article 11 of the Anti-Corruption Statute provide imprisonment and fines for any person who offers, promises, or gives a bribe or other improper benefits.

2.4 Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

11. The judicial authorities are responsible for prosecuting corruption cases in Chinese Taipei. However, the FTC has no jurisdiction in this area.

3. Collusion

3.1 What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

12. The main factor that facilitates collusion in procurement is that, in cases involving large amounts of money and high profits, enterprises may attempt to use improper means to bid. Therefore, cases involving the construction industry seem especially vulnerable to bid rigging.

3.2 What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

13. With respect to the procurement systems that guard against collusion (bid rigging), there already are relevant provisions in the Government Procurement Act. These provisions include: Article 27 (Publishing a Notice of invitation to tender), Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), Articles 87 and 92 (Punishments of acts involving bid rigging), Article 93-1 (Electronic receipt of tender documentation and submission of tender), and Articles 101 to 103 (Refusal of tenders against offending enterprises).

3.3 Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

14. We all know that the bidders are required to disclose Certificates of Independent Bid Determination when they submit a bid or tender. The bidders declare relevant information in this document, such as they bid independently, and had no contracts, agreements, or other forms of mutual understanding with other competitors. In Chinese Taipei, to draw the attention of bidders to these things and prevent disputes from occurring, the PCC formulated and prepared documents regarding "Possible Legal Responsibilities for Participation in Public Construction Projects by Enterprises" and the related format of affidavit. In addition, the PCC sent letters and informed each government agency that the agency was to provide these items to enterprises as it handles bids. This approach allows enterprises to state by themselves that they have already understood relevant legal liabilities, such as criminal and civil liabilities, and that they are willing to comply with laws with certainty.

15. If a procuring agency finds that the enterprises meet one of the circumstances provided in each subparagraph of Paragraph 1 of Article 101 of the Government Procurement Act and the results of said circumstances, it will refuse tenders against those enterprises, and these enterprises may be prohibited from participating in tendering, or being awarded or subcontracted for a period of one to three years. The circumstances, for example, are where "the supplier allows any others to borrow its name or certificate to participate in a tender" (Subparagraph 1); "the supplier borrows or assumes any other's name or certificate or uses forged documents or documents with unauthorised alteration to tendering, contracting, or performing a contract" (Subparagraph 2); "the supplier has committed any of the offenses prescribed in Articles 87 to 92 hereof, and has been sentenced by a court of the first instance" (Subparagraph 6); or a contract is rescinded or terminated by the procuring agency (Subparagraph 12).

4. Fighting collusion and corruption

4.1 What methods and techniques for fighting corruption would aid the fight against collusion?

16. Information regarding invitation to tenders and awards of tenders in government procurement should be open and transparent. Such an approach can assist in combating corruption and collusion.

5. Advocacy

5.1 In what ways can competition authorities work to improve the efficiency of public procurement?

17. Through the establishment of the special law, the Government Procurement Act, public procurement procedures are regulated in detail in regard to the invitation to tender, awards of contracts, administration of contract performance, inspection and acceptance, and protest and complaint procedures. It also stipulates punishments for illegal acts, such as unfair contracts; jointly monopolised bids through mutually binding actions; bid rigging; and where the bidder lends (borrows) a license to participate in the bidding project. The enforcement of the Act reduces abuses in public procurement, and improves the efficiency of public procurement through clear regulations.

5.2 What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?

18. Chinese Taipei adopts relevant measures to improve the efficiency of the public procurement process, including electronic procurement, the information network, and cooperative supply contracts. Please refer to the explanations in Part II and Part III mentioned previously for relevant measures concerning the reduction of collusion and corruption in public procurement.

CONTRIBUTION FROM TUNISIA

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Tunisia --

Introduction

1. Because of its economic and financial importance, public procurement is a sensitive area which is given special attention by the Tunisian Government, which has provided the sector with double protection through a particular regulatory mechanism which has been amended repeatedly (Decree No. 2002-3158 of 17 December 2002).

2. This decree lays down three fundamental principles: equality, transparency and competitive procurement.

3. Implemented through stringent competitive procurement rules, these foundations reflect the authorities' determination to ensure optimal competition.

4. In putting these principles into action, public buyers take responsibility not only for efficient procurement but also for the competitive operation of a significant share of the national economy.

5. But it is not always easy to chart a competitive course, especially in a sector in which the characteristics of demand, which is limited in both time and space, are apt to prompt businesses to adopt anticompetitive behaviours. The realm of public procurement is not exempt from the competition legislation that seeks to protect overall market equilibrium.

6. This dual protection is further consolidated by the standard legislative arsenal applicable to the persons responsible for public procurement - an arsenal that includes laws on corruption and the obligations of State civil servants.[1]

7. In addition, any civil servant or official of the State, public administrative institutions or local government, or any director, officer or employee of a public company who commits a management offence against an ordinary legal entity that is subject to public accounting rules, or against a public company, shall be held accountable to the Court of Suppression of Fraud. As a rule, a management offence may be deemed to be any act of management that is committed in violation of any law, decree or regulation

[1] Section 87 bis of the Tunisian Criminal Code provides that "*Any civil servant or comparable official who unlawfully obtains for himself or for any another person, either directly or indirectly, any gifts or promises of gifts or presents or advantages of any sort with a view to granting another person an unjustified advantage by means of an act that is contrary to legislative or regulatory provisions instituted to ensure freedom of participation and equal opportunity in procurement by public establishments, public enterprises, offices, local authorities or companies in which the State or local authorities hold a direct or indirect equity interest, shall be subject to five years in prison and a fine of five thousand dinars*."

governing the revenue collection or expenditure of the State, a public administrative institution or a local government (which encompasses public procurement).[2]

8. This contribution will focus essentially on the rules against collusion in public procurement as stipulated in the decree on public procurement and the law on competition and prices.

1. The Decree Regulating Public Procurement: A Guarantee of Procedural Compliance

9. The attribution of government contracts is governed by the principles of equality of candidates in public procurement as well as equal opportunity, procedural transparency and competitive procurement.

10. These principles are implemented through compliance with rules of non-discrimination between bidders, adherence to clear and detailed procedures at all steps of the contract attribution process, timely information to bidders about those procedures and widespread disclosure of replies and explanations in response to bidders' comments and requests for clarification.

1.1 At the Level of Stipulating Requirements

11. Contract specifications must:

- State the purpose of the contract and the terms for carrying it out;
- Establish the conditions for participation, selection criteria and the weighting thereof;
- State the obligations and the rights of all parties concerned;
- State the allocation rule: "In formulating contract specifications, the public buyer must take account of the capacities of entrepreneurs, producers, service providers and design engineers."

12. Services must be stated clearly:

- They must be set forth in reference to pre-established technical specifications and any explicitly designated national or international standards that may apply;
- Any indication of brand names or of any other elements apt to limit competition or steer an order towards a given product is forbidden.

1.2 At the Level of Selecting Contract Attribution Procedures:

- Contracts must be in writing;
- It is forbidden to split public procurement contracts. It is formally prohibited to split orders so that they are no longer subject to:
  - The written contract requirement;

[2] See the judgements of the Court of Suppression of Fraud on the website of the Tunisian Court of Accounts http://www.courdescomptes.nat.tn/indexsite.php (Judgement No. 192 of 25 November 2005; Judgement No. 193 of 25 November 2005; Judgement No. 194 of 25 November 2005; Judgement No. 196 of 30 December 2005**;** Judgement No. 252 of 23 June 2006.)

- Review by the competent contracts committee.

13. Calls for tender constitute the general rule for public procurement. Nevertheless, contracts may also be awarded through either an expanded consultation process or a negotiated contract, subject to prior authorisation:

- By decree in respect of contracts under the jurisdiction of the High Contracts Committee;
- By order of the Minister concerned in respect of contracts under the jurisdiction of other contracts committees.

14. Such authorisation is granted on the basis of a duly justified report and upon the advice of the competent contracts committee.

15. Contracts may be awarded through competitive procurement in the form of the expanded consultation procedure only in such cases as are listed on the decree.

16. In cases where the expanded consultation procedure is used, public buyers must consult with the maximum number of suppliers, depending on the purpose of the contract, and adhere to a written procedure that ensures equality amongst participants, equal opportunity and transparency in selecting the supplier.

17. Negotiated contracts may be used only for the procurement of work or supplies of goods, services or research that may be performed exclusively by a particular supplier or service provider. The public buyer must adhere to a written procedure.

1.3 At the Level of Reception and Opening of Bids

- Notification of a call for tender is published at least 30 days prior to the deadline for receiving bids;
- In an emergency, the deadline may be shortened to 15 days;
- Technical bids must be submitted by registered post or by express post;
- Financial bids are submitted directly by bidders whose technical bids have been accepted.

1.4 At the Level of the Joint Control Exercised by the Various Committees

1.4.1 Opening bids: a guarantee of transparency

- A standing committee:
  - Appointed by the public buyer;
  - A maximum of five members including the Chair (auditor of public expenditure/State auditor).
- Bid-opening sessions are open to the public;
- The bid-opening committee meets a first time to open bids containing technical bids;

- After a review of the report on the opening of technical bids by the competent contracts committee, the bid-opening committee meets a second time to receive and open bids containing financial bids submitted directly by bidders whose technical bids have been accepted;

- Bidders are invited to submit their bids ten business days before the meeting is held.

1.4.2 Reviewing bids and selecting the supplier: the important role of audit bodies

18. The bid-opening committee checks bids against contract specifications and then analyses them, referring to stated criteria, and proposes which firm should be awarded the contract:

- Ordinary services: the lowest bidder;

- Complex services: the best bidder.

19. In the event of obvious collusion between the bidders, or between some of them, it is imperative that the call for tender be declared unsuccessful and a new bidding process undertaken, unless this is materially impossible or in the event of an utmost emergency, in which case the expanded consultation process is used.

20. In addition, the public buyer must inform the minister for trade of the financial bids eliminated because of excessively low pricing in distortion of fair competition. In this case, the minister for trade may file a complaint with the Competition Council regarding the tenderers of these bids, pursuant to the provisions of Act No. 91-64 of 29 July 1991 on competition and prices.

21. In an emergency, the minister for trade may require that provisional measures be taken.

1.4.3 The role of the contracts committees

22. Contracts committees examine the compliance of competitive-procurement and contract-attribution procedures, as well as the fairness and transparency of procurement procedures.

23. They also ensure that administrative, financial and technical conditions are acceptable.

24. Prior advice from the contracts committees is required regarding:

Before competitive procurement:

- Draft contract specifications in respect of open calls for tender, invitations for proposals and consultations;

- Members of the jury and of bid-opening committees in respect of procurement under the jurisdiction of the High Contracts Committee;

- Terms of reference and pre-selection reports in respect of calls for tender preceded by pre-selection.

After bids have been opened:

- Bid-opening reports and reports by proposal juries;

- Draft contracts in the event of a negotiated contract or insertion of any (even partial) amendment to one or more clauses of a contract in respect of which a bid-opening report was first submitted to the committee for review.

During and after the contract period:

- Proposed amendments;
- Final settlement proposals;
- Any problem or dispute involving the formulation, attribution, fulfilment or settlement of contracts under its jurisdiction.

1.4.4 Role of the Public Procurement Monitoring and Investigating Committee

25. The Public Procurement Monitoring and Investigating Committee, set up to report to the Prime Minister:

- Monitors compliance with the basic principles governing contract attribution, including equality of bidders before public procurement, procedural transparency, competitive procurement and public disclosure;
- Reviews information concerning contract fulfilment that could materially alter the factors taken into account when the contract was awarded;
- Investigates contracts, including amendments and final settlement dossiers, primarily on the basis of data collected by the public procurement observatory;
- Reviews petitions from any person concerned by the attribution of public procurement contracts or compliance with the relevant procedures;
- Deals with contract amendments that could increase the aggregate amount of a contract by more than 50%;
- Studies a sample of awarded contracts accounting for at least (10%) of the number of dossiers reviewed by the various contracts committees, as well as any dossier that the committee deems it advisable to review for any reason whatsoever (compliance with deadlines, competitive analysis, concentration index, etc.).

2. Application of Competition Law to Public Procurement; Additional Protection beyond Procedural Compliance Alone

26. Contracts committees play an important role by reviewing contract attribution rules, in particular to ensure compliance with the three stated principles. But this procedural watch does not provide an absolute guarantee against the risk of anticompetitive practices.

27. Under competition law, the matching of a call for tender and bidders' responses thereto constitutes a market in and of itself (the "relevant" market). Here, the conditions for healthy competition do not necessarily exist simply because there has been formal compliance with the rules for attribution.

28. The Directorate-General for Competition and Economic Surveys (DGCEE), which is represented on the majority of contracts committees, has adopted its own method for combating collusion in public procurement by detecting evidence of anticompetitive practices and formulating investigative reports that can be submitted to the Competition Council.

29. A number of choices that public buyers must make regarding the conditions for competitive procurement and the use of procedures may in fact run counter to the desired end of optimal competition and, without appearing to do so at first, restrict free competition. The buyer must exercise vigilance with regard to any evidence of concertation amongst bidders. The Tunisian competition authorities are also empowered by law to intervene in accordance with their methods to combat anticompetitive practices in public procurement.

30. The investigations carried out by the DGCEE begin by looking at any dysfunction stemming from the behaviour of certain businesses, but they make a distinction between such dysfunction and the potential dysfunction resulting from procedures implemented by public buyers, and they deploy technical or economic means that might explain apparent evidence of anticompetitive practices.

2.1 Dysfunction Stemming from the Behaviour of Certain Businesses

31. In contrast to other sectors of activity, public procurement features a single price submission mechanism that does not allow a bidder to position, calibrate or adjust itself vis-à-vis the competition in successive steps.

32. This aspect constitutes an additional element of uncertainty for operators who might be tempted to reduce the uncertainty, e.g. by exchanging information.

33. Exchanges of information promoting concertation between businesses for the purpose of dividing up contracts or eliminating a competitor are prohibited by Act No. 64-91 on competition and prices, as amended.

34. Section 5 (new) provides that "Concerted actions, collusion and express or tacit agreements shall be prohibited if they have an anticompetitive purpose or effect, or if they seek to:

- Thwart the determination of prices by free interaction between supply and demand;
- Limit the market access of other businesses or the free exercise of competition;
- Limit or control production, sales outlets, capital investment or technical progress;
- Divide up contracts or sources of supply..."

35. Public buyers therefore have a paramount position in the mechanism for detecting collusive practices.

36. In this regard, their role in many cases involves merely examining the bids and behaviour of bidders, and on occasion it can involve extensive analysis of market structures and the strategies deployed by businesses.

37. In most cases, the evidence likely to be uncovered can take the following forms:

- Evidence relating to bid amounts:

- Following a misunderstanding in the exchange of information, firms submit identical pricing proposals;

- There are linear coefficients of increase or decrease between the unit prices of different bidders in cases where cover bids are established by the same person;

- Each bidder submits a competitive bid for one lot and non-competitive bids for the other lots, whereas all lots are technically identical and based solely on a geographical criterion;

- The price proposed by a group is significantly below the estimate – a practice that may well reflect a desire to eliminate a new entrant or a competitor who is especially aggressive on a commercial level.

Box 1. Practices Used in Connection with a Call for Tender to Supply Bread

Practices Noted:

Presentation of cover bids.

Proof:

It comes from the financial proposals submitted by bidders:

- In respect of the proposal's appearance: use of the same handwriting and fonts (documents filled out by one and the same person);
- In respect of the proposal's substance: the substance of the proposal is as follows:
  - One bid proposes a price that is lower than the two other bids (pre-designated bidder),
  - Two cover bids propose identical prices higher than those of the pre-designated bidder,
  - Hearing minutes.

IV-DECISION OF THE COUNCIL: Decision No. 2145 of 25 December 2003

Pursuant to Section 34 of Act No. 91-64 on competition and prices, the Competition Council fined the three parties concerned by the illegal agreement practice defined in Section 5 (new) of the Act.

- Evidence based on the project owner's price estimate:

  - All proposed prices exceed the administrative estimate except for one, which is slightly lower;

  - The price proposed by a group is significantly below the estimate (evidence of an eviction practice);

  - A firm enjoying a dominant position in the market proposes excessively low prices (potential evidence of predatory pricing).

Box 2. Practices Noted in Public Procurement Involving the Supply of Red Meat to a Public Establishment

Target of Investigation: Eviction pricing and cover bid practices in calls for tender involving the supply of red meat to educational institutions for the 2006/07 school year.

Parties Involved: Three bidders (red-meat merchants)

Practices Noted:

- Abuse of dominant position by bidder 1 (B1) on the relevant market;
- Collusion amongst bidders: cover bids from bidder 2 (B2) and bidder 3 (B3) to deceive the public buyer as to the level and intensity of competition.

Decision of the Competition Council No. 81159 of 31 December 2008:

- The Council imposed **fines** totalling 25 000 dinars (approximately EUR 14 700) broken down as follows:
  - 15 000 dinars for B1;
  - 5 000 dinars for B2;
  - 5 000 dinars for B3.

38. All of these practices suggest the need to explore the ability of a project owner or lead contractor to estimate the cost of the work involved.

- Evidence relating to the content of a bid:
  - Bids having similar appearance (page layout, font, spacing between thousands and units in the presentation of prices);
  - Identical additions of a service not mentioned in the contract specifications;
  - An identical and erroneous change to the contract specifications by more than one bidder;
  - Bids featuring identical errors in prices and quantities;
  - Substantial price variances for items usually characterised by fairly similar market prices (such as concrete and steel);
  - Only the lowest-bidding firm completes all items on the price sheet, "forgetting" all sorts of materials (administrative documents, certificates, etc.) which make the bid unacceptable.
- Evidence stemming from bidders' attitudes:
  - Disproportionate number of bids submitted in relation to the number of applications taken out;
  - Absence of bids from pre-selected firms in connection with a restricted call for tender;
  - Withdrawal of a firm after applications are taken out, after bidders are selected or after bids are submitted, citing an error in calculation or any other argument;
  - Undisclosed legal and economic ties between firms having the same officers;

- Bidders who for the most part belong to the same group and submit independent pricing bids;
- Systematic formation of groups for low-value contracts;
- A single bid received from a group with high prices relative to the estimate whereas a number of firms in the group would be capable of performing the work on their own;
- Absolute stability in the attribution of lots when a contract is renewed.

- Evidence stemming from how work is performed:
  - Groups of which one company alone performs all of the work;
  - The winner of a contract subcontracts the bulk of the work to a rival bidder.

39. Nevertheless, technical or economic factors may explain such empirical evidence.

40. After taking stock of apparent failures of competition on the part of various players in the public procurement sector, the findings should be tempered by the realisation that the behaviours observed may in some cases be the result of technical or economic factors.

41. If this is the case, then the observed practices are not in fact anticompetitive.

2.1.1 Explanations in the realm of prices

42. It is sometimes observed that a firm will propose very different prices for an identical service, depending on the geographical sector for which it is bidding. Such a situation may be explained by the following reasons:

- Knowledge of a particular location or economic environment (delivery of the initial tranche, manager of the facility, holder of a related contract);
- The timetable set by the public buyer may constitute a constraint and generate a higher cost for which some bidders intend to charge;
- A company's backlog of orders may also prompt it to submit "aberrant" bids in the sense that it comes forward to bid but does not wish to win the contract because of its work load and contracts in progress (this may be the case in the summertime, when economic activity slows and demand for work is high);
- The heterogeneous nature of soil in respect of work requiring general excavation work;
- Constraints related to the tourist season in some areas;
- The urban or peri-urban environment of the work;
- Time needed to access the site;
- Economic conditions for supplying the site.

2.1.2 Systematic re-appointment of previous contractors and stability in the attribution of lots

43. When some contracts come up for renewal, it may be noted that firms are the lowest bidders for lots that they had previously been attributed.

44. This renewal situation may constitute an anticompetitive practice if the bidders had held a concertation meeting before bids were submitted.

45. However, re-attribution may be explained by the following reasons:

- Economies resulting from knowledge of the field on the part of outgoing suppliers;
- The size of personnel and materials costs stemming from the distance from the contract locations;
- Even if firms are of nation-wide scale, they are not always in a position to bid systematically on all lots.

2.2 Dysfunction Stemming from Procedures Implemented by Public Buyers

46. In many cases, a well-intentioned buyer may nonetheless restrict competition or foster collusive behaviours on the part of firms as a result of the following practices:

- An excessively specific definition of needs (contract specifications too specific) or, conversely, an inadequate definition which dissuades companies from bidding or gives an advantage to firms already in place;
- Firms are required to have excessive technical qualifications unjustified by the type of contract involved;
- Concentration by all public buyers in a given sector of their purchases at the same time of the year (a practice generally fostered by budget procedures);
- Inappropriate allotment or consultation in respect of excessively large lots apt to cause some firms to abandon the idea of bidding;
- Call by the project owner for the formation of groups, whereas the technical or economic features of the contract do not require it;
- Substantial penalties in the event contract completion is delayed;
- Excessively short deadlines for studying a complex dossier or for completing the work.

3. Conclusion

47. The Tunisian legal and institutional framework provides strong protection for public procurement through specific legislation guaranteeing the institution of optimal competition and horizontal legislation (the law on competition and prices) which seeks to prohibit anticompetitive practices, including cartels and abusively low pricing practices. Ordinary and criminal law also establish rules against corruption in public procurement. The Tunisian competition authorities play an important role in combating collusion, and the DGCEE has adopted its own investigative method to detect evidence and successfully carry out its mission.

48. The Ministry of Trade and Handicrafts, which is represented on all tender committees, through the Directorate-General for Competition and Economic Surveys and the Regional Trade Directorates in particular, is available to public buyers for any advice regarding procedural optimisation or competitive procurement clauses, and to examine and act upon any evidence of collusive concertation or restriction of competition.

CONTRIBUTION DE LA TUNISIE

COLLUSION ET CORRUPTION DANS LES MARCHÉS PUBLICS

-- Tunisie --

Introduction

1. En raison de son poids économique et financier, les marchés publics constituent un domaine sensible qui bénéficie d'une attention particulière de la part du gouvernement tunisien qui a procédé à une double protection de ce secteur par une réglementation spécifique qui a subi multiples modifications (le décret n° 2002-3158 du 17 décembre 2002).

2. Ce décret énonce trois principes fondamentaux à savoir l'égalité, la transparence, le recours à la concurrence.

3. Déclinés à travers des règles de mise en concurrence très strictes, ces fondements expriment la volonté du pouvoir public d'assurer, une mise en concurrence optimale.

4. Les acheteurs publics, dans la mise en œuvre de ces principes, portent non seulement la responsabilité d'un achat efficace, mais aussi celle du fonctionnement concurrentiel d'une partie conséquente de l'économie nationale**.**

5. Mais la recherche d'un comportement concurrentiel n'est pas toujours facile, notamment dans un secteur où les caractéristiques de la demande, circonscrite dans le temps et l'espace, sont susceptibles d'engendrer de la part des entreprises, des comportements anticoncurrentiels. Le domaine des marchés publics n'échappe pas à l'application de la législation de la concurrence visant la protection de l'équilibre général du marché.

6. Cette protection double est en outre consolidée par les règles de droit commun applicables aux responsables des achats publics relatives notamment à la corruption et aux obligations des fonctionnaires de l'État.[1]

7. En outre, tout fonctionnaire ou agent de l'État, des établissements publics administratifs et des collectivités publiques locales, tout administrateur, dirigeant ou agent des entreprises publiques, auteur de fautes de gestion commises au détriment des personnes morales de droit public soumises aux règles de la comptabilité publique et au détriment des entreprises publiques, est justiciable de la Cour de Discipline financière. Et d'une manière générale, peut être considéré comme faute de gestion, tout acte de gestion

[1] L'article 87 bis du code pénal tunisien prévoit : « est puni de cinq ans d'emprisonnement et d'une amende de cinq mille dinars , tout fonctionnaire ou assimilé qui aura agrée , sans droit, soit pour lui-même , soit pour autrui, directement ou indirectement , des dons ou promesses de dons ou présents ou avantages de quelques nature que ce soit en vue d'octroyer à autrui un avantage injustifié par un acte contraire aux dispositions législatives et réglementaires ayant pour objet de garantir la liberté de participation et l'égalité des chances dans les marchés passés par les établissements publics, les entreprises publiques , les offices, les collectivités locales et les sociétés dans lesquelles l'État ou les collectivités locales , participent directement ou indirectement a son capital. »

passé en infraction à des lois, décrets et règlements applicables en matière d'exécution des recettes et des dépenses de l'État, des établissements publics administratifs et des collectivités locales (le cas des marchés publics).[2]

8. Cette contribution portera essentiellement sur les règles réprimant la collusion dans les marchés publics à travers le décret relatif aux marchés publics et la loi relative à la concurrence et aux prix.

1. Le décret réglementant les marchés publics ; une garantie de respect des procédures

9. La passation des marchés publics est régie par les principes de l'égalité des candidats devant la commande publique et l'égalité des chances, la transparence des procédures et le recours à la concurrence.

10. Ces principes sont consacrés à travers le respect des règles de non discrimination entre les candidats, le suivi de procédures claires et détaillées de toutes les étapes de conclusion du marché et l'information des candidats de ces procédures à temps, et la généralisation de la communication des réponses et explications quant aux observations et éclaircissements demandés par les candidats.

1.1. Au niveau de la définition des besoins

11. Les cahiers des charges doivent **:**

- définir l'objet du marché ainsi que les conditions de son exécution ;
- fixer les conditions de participation, les critères de choix et leur pondération ;
- indiquer les obligations et les droits des parties concernées;
- définir la règle de l'allotissement : « L'acheteur public doit, lors de l'élaboration des cahiers des charges relatifs au marché, prendre en considération la capacité des entrepreneurs, des producteurs, des prestataires de services et des bureaux d'études ».

12. Les prestations doivent être clairement exprimées :

- elles doivent être définies par référence à des spécifications techniques préalablement établies et éventuellement à des normes nationales ou internationales nommément désignées ;
- toute indication de marque ou d'éléments susceptibles de limiter la concurrence ou d'orienter la commande vers un produit déterminé est interdite.

1.2. Au niveau du choix de la procédure de passation :

- obligation de passer un marché écrit ;
- interdiction du fractionnement de la commande publique : Il est formellement interdit de fractionner les commandes de façon à les soustraire :

[2] Voir les arrêts de la cour de discipline financière disponible sur le site de la Cour des comptes tunisienne http://www.courdescomptes.nat.tn (Arrêt n°192 du 25 novembre 2005 ; Arrêt n°193 du 25 novembre 2005 ; Arrêt n°194 du 25 novembre 2005 ; Arrêt n°196 du 30 décembre 2005 **;** Arrêt n°252 du 23 juin 2006.)

- à la passation de marchés écrits,

- à leur examen par la commission des marchés compétente.

13. L'appel d'offres constitue la règle générale de passation des marchés publics. Toutefois, il peut être passé des marchés soit par voie de consultation élargie soit par voie de marché négocié, et ce, après autorisation préalable :

- par décret pour les marchés relevant de la compétence de la Commission Supérieure des Marchés ;

- par arrêté du ministre concerné pour les marchés relevant de la compétence des autres commissions des marchés.

14. Cette autorisation est accordée sur la base d'un rapport dûment justifié et après avis de la commission des marchés compétente.

15. Il peut être passé des marchés après mise en concurrence par voie de consultation élargie uniquement dans des cas dont la liste est indiquée par le décret.

16. L'acheteur public doit, dans les cas où il est fait recours à la procédure d'une consultation élargie, consulter le maximum de fournisseurs selon l'objet du marché et observer une procédure écrite garantissant l'égalité des participants, l'équivalence des chances et la transparence dans le choix du titulaire du marché.

17. Il ne peut être passé de marchés négociés que pour les marchés de travaux, de fournitures de biens ou services et de recherche dont l'exécution ne peut être confiée qu'à un fournisseur ou prestataire de services déterminé. L'acheteur public doit observer une procédure écrite.

1.3. Au niveau de la réception et de l'ouverture des plis

- L'avis d'appel à la concurrence est publié 30 jours au moins avant la date limite fixée pour la réception des offres

- En cas d'urgence 15 jours

- Les offres techniques doivent être envoyées par la poste et recommandées ou par rapide poste

- Les offres financières sont remises directement par les candidats dont les offres techniques ont été acceptées.

1.4. Au niveau du contrôle collégial exercé par les différentes commissions :

1.4.1 L'ouverture des plis : une garantie pour la transparence

- Une commission permanente :

  - désignée par l'acheteur public,

  - maximum 5 membres dont le président (contrôleur de dépenses publiques/ contrôleur d'État).

- Les séances d'ouverture des plis sont publiques

- La commission d'ouverture des plis se réunit une première fois pour l'ouverture des plis contenant les offres techniques

- Après examen du rapport de dépouillement des offres techniques par la commission des marchés compétents, la commission d'ouverture se réunit une deuxième fois pour la réception et l'ouverture des plis contenant les offres financières remis directement par les candidats dont les offres techniques ont été acceptées

- Les candidats sont invités à remettre leurs offres 10 jours ouvrables avant la tenue de la séance.

1.4.2 L'examen des offres et du choix du prestataire : rôle important des organismes de contrôle

18. La commission de dépouillement examine la conformité des offres aux Cahiers des Charges et procède à l'analyse de celles-ci en se référant aux critères annoncés et propose l'entreprise attributaire :

- prestations courantes: moins-disant ;

- prestations complexes: mieux-disant.

19. Dans le cas d'entente manifeste entre les participants ou certains d'entre eux, il y a lieu de déclarer impérativement l'appel d'offres infructueux et de procéder à une nouvelle mise en concurrence, sauf cas d'impossibilité matérielle ou d'urgence impérieuse, il est fait recours à la consultation élargie.

20. En outre, l'acheteur public informe le ministre chargé du commerce des offres financières éliminées en raison des prix excessivement bas entachant la concurrence loyale. Dans ce cas, le ministre chargé du commerce peut saisir le conseil de la concurrence d'une requête à l'encontre des soumissionnaires de ces offres conformément aux dispositions de la loi n° 91-64 du 29 juillet 1991 relative à la concurrence et aux prix.

21. En cas d'urgence, le ministre chargé du commerce peut requérir la prise de mesures provisoires.

1.4.3 Rôle des commissions de marchés

22. Les commissions de marchés examinent la régularité des procédures de recours à la concurrence et de l'attribution des marchés et la sincérité et la transparence dans les procédures de passation des marchés.

23. Elles s'assurent également du caractère acceptable des conditions administratives, financières et techniques.

24. Sont soumis à l'avis préalable des commissions de marchés :

Avant l'appel à la concurrence :

- les projets des cahiers des charges des dossiers relatifs aux appels d'offres ouverts, aux appels d'offres avec concours et aux consultations ;

- la composition du jury et des commissions de dépouillement pour les dossiers relevant de la compétence de la commission supérieure des marchés ;

- les termes de références ainsi que les rapports de présélection relatifs aux appels d'offres précédés de présélection.

Après dépouillement des offres :

- les rapports de dépouillement et les rapports de jury de concours ;

- les projets de contrats de marchés en cas de recours à la passation d'un marché négocié ou en cas d'insertion d'une quelconque modification même partielle d'une ou de plusieurs clauses du projet du marché dont le rapport de dépouillement a été soumis au préalable à l'examen de la commission.

Au cours et après l'exécution du marché :

- les projets d'avenant ;

- les projets de règlements définitifs ;

- tout problème ou litige relatif à l'élaboration, la passation, l'exécution et le règlement des marchés relevant de sa compétence…

1.4.4 Rôle du Comité de suivi et d'enquête sur les marchés publics

25. Le Comité de suivi et d'enquête sur les marchés publics crée auprès du Premier Ministre est chargé de :

- suivre le respect des principes de base régissant l'attribution des marchés et notamment l'égalité des candidats devant la commande publique, la transparence des procédures, le recours à la concurrence et la publicité ;

- examiner les données relatives à l'exécution des marchés qui sont de nature à altérer les éléments ayant été pris en compte lors de l'attribution du marché ;

- enquêter sur les marchés y compris les avenants et les dossiers de règlement définitifs, principalement sur la base des données collectées par l'observatoire des marchés public ;

- examiner les requêtes émanant de toute personne concernée pour l'attribution des marchés publics et le respect des procédures y afférentes ;

- les avenants aux marchés qui sont de nature à engendrer une augmentation du montant global du marché de + 50 % ;

- étudier un échantillon de marchés conclus représentant au moins (10%) du nombre des dossiers examinés par les différentes commissions des marchés ainsi que tout dossier que le comité juge opportun d'examiner pour quelque motif que ce soit (Respect des délais, analyse concurrentielle, indice de concentration,…)

2. L'application du droit de la concurrence aux marchés publics ; une protection complémentaire au delà du simple respect des procédures

26. Les commissions de marchés jouent un rôle important à travers l'examen des règles de passation, notamment pour assurer le respect de trois principes énoncés. Mais cette veille procédurale ne constitue pas une garantie absolue contre le risque de pratiques anticoncurrentielles.

27. Au sens du droit de la concurrence, le croisement d'un appel d'offres et des réponses de candidats constitue un marché par lui-même (marché « pertinent »). Sur celui-ci, les conditions d'une saine concurrence ne sont pas nécessairement réunies, du simple fait du respect formel des règles de passation.

28. La direction générale de la concurrence, représentée dans la majorités des commissions des marchés, a adopté sa propre méthode de lutte contre la collusion dans les marchés publics en détectant les indices des pratiques anticoncurrentielles et en élaborant des rapports d'enquêtes qui peuvent être soumis au conseil de la concurrence.

29. Mis a part un certain nombre de choix, auxquels l'acheteur public est amené à procéder, quant aux conditions de la mise en concurrence, et à l'utilisation des procédures, pouvant, aller à l'encontre du but recherché qui est la mise en concurrence optimale et restreindre, sans qu'il y paraisse au premier abord, le jeu concurrentiel. La vigilance de l'acheteur s'exerce à l'égard de tout indice de concertation entre soumissionnaires. Les autorités de concurrence tunisiennes sont aussi légalement habilitées à intervenir selon leurs méthodes pour lutter contre les pratiques anticoncurrentielles dans les marchés publics.

30. Les enquêtes menées par la DGCEE partent des dysfonctionnements liés aux comportements de certaines entreprises tout en distinguant ces dysfonctionnements de ceux liés aux procédures mises en œuvre par les acheteurs publics et en employant des éléments techniques ou économiques susceptibles d'expliquer les faits observés au stade de l'indice.

2.1. Les dysfonctionnements liés aux comportements de certaines entreprises

31. Contrairement aux autres secteurs d'activités, les marchés publics se caractérisent par une remise de prix unique ne permettant pas à un soumissionnaire de se positionner et de s'étalonner ou s'ajuster par approches successives par rapport à ses concurrents.

32. Cet aspect constitue une incertitude supplémentaire pour les opérateurs qui pourraient être tentés de la réduire en procédant notamment à des échanges d'informations.

33. Ceux qui ont pour objet une concertation des entreprises dans un but de se répartir les marchés ou d'évincer un concurrent sont prohibés par la loi n°64-91 modifiée relative à la concurrence et aux prix.

34. L'article 5 - (nouveau**)** prévoit que « sont prohibées, les actions concertées, les collusions et les ententes expresses ou tacites ayant un objet ou un effet anticoncurrentiel, et lorsqu'elles visent à :

- faire obstacle à la fixation des prix par le libre jeu de l'offre et de la demande;
- limiter l'accès au marché à d'autres entreprises ou le libre exercice de la concurrence;
- limiter ou contrôler la production, les débouchés, les investissements, ou le progrès technique;
- répartir les marchés ou les sources d'approvisionnement… »

35. Les acheteurs publics détiennent donc une position de premier plan dans le mécanisme de détection de pratiques collusives.

36. Leur rôle, à cet égard, relève fréquemment d'un simple examen des offres de prix et du comportement des soumissionnaires, occasionnellement d'une analyse approfondie des structures de marché et des stratégies mises en œuvre par les entreprises.

37. Le plus souvent les indices susceptibles d'être détectés peuvent prendre les formes suivantes :

- Les indices relatifs au montant des offres

  - A la suite d'incompréhensions dans l'échange d'information, les entreprises remettent des propositions de prix identiques

  - Coefficients linéaires de majoration ou de minoration entre les prix unitaires des soumissionnaires dans le cas où les offres de couverture sont établies par la même personne

  - Chaque candidat propose une offre compétitive pour un lot et des offres non concurrentielles pour les autres lots, alors que tous les lots sont identiques techniquement et fondés uniquement sur un critère géographique

  - Offre de prix d'un groupement sensiblement inférieure à l'estimation. Pratique susceptible de constituer une volonté d'évincer un nouvel entrant ou un concurrent particulièrement agressif sur un plan commercial.

Box 1. Pratiques mise en œuvre dans le cadre d'appel d'offre relatif à la fourniture de pain

Les pratiques relevées :

La présentation d'offres de couverture.

Les preuves :

Elles concernent les offres financières émanant des candidats :

- au niveau de la présentation de l'offre : utilisation de la même écriture et police de caractère (documents remplis par la même personne) ;
- au niveau du contenu de l'offre : le contenu des offres se présente comme suit :
  - une soumission qui présente une offre de prix moindre que les deux autres soumissions (soumissionnaire pré désigné),
  - deux soumissions de couverture qui présentent des offres de prix identiques plus élevés de l'offre du soumissionnaire pré désigné,
  - les pv d'audition.

IV-DECISION DU CONSEIL : Décision n° 2145 du 25 décembre 2003

Sur la base de l'article 34 de la loi n° 91-64 relative à la concurrence et aux prix le conseil de la concurrence a infligée des amendes pécuniaires aux trois parties concernées par la pratique d'entente illicite édictées à l'article 5 (nouveau) de la loi.

- Les indices fondés sur l'estimation de prix du maître d'ouvrage

  - Ensemble des propositions de prix supérieures à l'estimation administrative à l'exception de l'une d'entre elles légèrement inférieure

  - Offre de prix d'un groupement sensiblement inférieure à l'estimation (indice de pratique d'éviction)

  - Offres de prix excessivement basses déposées par une entreprise bénéficiant d'une position dominante sur le marché (indice pouvant être la manifestation d'un prix prédateur).

Box 2. Pratiques constatées dans le cadre d'un marché public d'approvisionnement d'un établissement public en viande rouge

Objet de l'indice: Pratique de prix d'éviction et offres de couverture par des soumissionnaires dans les appels d'offres relatifs à la fourniture de viandes rouges pour des établissements d'enseignement pour l'année scolaire 2006-2007 .

Parties concernées: Trois soumissionnaires (commerçants de viandes rouges)

Les pratiques relevées:

- Abus de position dominante du soumissionnaire 1(S1) sur le marché pertinent ;
- Collusion entre soumissionnaires : offres de couverture des soumissionnaires 2 (S2) et 3 (S3) pour tromper l'acheteur public sur le niveau et l'intensité de la concurrence.

Décision du C.C n 81159 du 31/12/2008 :

- Le conseil a infligé des **sanctions pécuniaires** s'élevant au total à 25 milles dinars (environ 14,7 Milles Euros) et se répartissant de la manière suivante :
  - 15 000 dinars pour S1,
  - 5 000 dinars pour S2,
  - 5 000 dinars pour S3.

38. Cet ensemble de pratiques nécessite une réflexion sur l'aptitude du maître d'ouvrage ou d'œuvre à évaluer le montant des travaux.

- Les indices relatifs au contenu de l'offre

  - Présentations similaires de l'offre (mise en page, police de caractères, espacement entre les milliers et les unités dans la présentation des prix)

  - Rajouts identiques d'une prestation non prévue par le cahier des charges

  - Modification identique et erronée du cahier des charges par plusieurs soumissionnaires

  - Offres présentant des erreurs identiques dans les prix et les métrés

- Importants écarts de prix pour des postes caractérisés habituellement par des prix de marché assez semblables (béton, acier)

- Seule l'entreprise moins disante remplit sérieusement tous les postes du bordereau de prix des "oublis" de toute nature (documents administratifs, attestations…) rendant l'offre inacceptable.

- Les indices relatifs à l'attitude des soumissionnaires

  - Disproportion entre le nombre de dossiers retirés et les offres déposées

  - Absence de soumissions de la part d'entreprises présélectionnées dans le cadre d'un appel d'offres restreint

  - Entreprise se désistant après le retrait des dossiers, après la sélection des candidats ou après la remise des offres en invoquant une erreur de calcul ou tout autre argument

  - Liens juridiques et économiques non déclarés pour des entreprises ayant les mêmes dirigeants

  - Les soumissionnaires appartiennent pour la plupart à un même groupe et remettent des offres de prix indépendantes

  - Constitutions systématiques de groupements pour des marchés de faible montant

  - Une seule offre reçue d'un groupement avec des prix élevés par rapport à l'estimation alors que plusieurs entreprises de ce groupement ont la capacité de réaliser seules les travaux

  - Stabilité absolue dans l'attribution des lots à l'occasion du renouvellement d'un marché.

- Les indices relatifs aux modalités d'exécution des travaux

  - Groupements pour lesquels la totalité des travaux est réalisée par une seule entreprise

  - L'attributaire d'un marché sous-traite la majeure partie des travaux à un concurrent soumissionnaire.

39. Toutefois il y a des éléments techniques ou économiques susceptibles d'expliquer les faits observés au stade de l'indice.

40. Après avoir recensé les dysfonctionnements de concurrence émanant des différents intervenants du secteur des marchés publics, il convient de nuancer en précisant que les comportements observés peuvent dans certains cas s'expliquer par des considérations techniques ou économiques.

41. Dans cette hypothèse les pratiques constatées ne revêtent pas un caractère anticoncurrentiel.

2.1.1 Explications dans le domaine des prix

42. Quelquefois il est observé qu'une entreprise remet des prix très différents pour une prestation identique selon les lots géographiques auxquels elle soumissionne. Cette situation peut s'expliquer par les raisons suivantes :

- connaissance des lieux ou de l'environnement économique (réalisation de la première tranche, gestionnaire de l'installation, titulaire d'un marché connexe) ;

- le calendrier fixé par l'acheteur public peut constituer une contrainte et engendrer un coût plus élevé que certains soumissionnaires entendent faire payer ;

- le carnet de commandes des entreprises peut également les conduire à remettre des offres "aberrantes", dans le sens où elles se portent candidates mais ne souhaitent pas obtenir le marché compte tenu de leur charge de travail et des marchés en cours (c'est éventuellement le cas en été, où l'activité économique est moindre et les besoins en travaux importants) ;

- la nature hétérogène des sols pour des travaux nécessitant un terrassement ;

- les contraintes liées à la saison touristique dans certaines zones ;

- l'environnement urbain ou périurbain des travaux ;

- le temps d'accès au chantier ;

- l'importance économique du chantier ;

- les conditions économiques d'approvisionnement du chantier.

2.1.2 Reconduction systématique des anciens titulaires et stabilité dans l'attribution des lots

43. Lors du renouvellement de certains marchés il peut être constaté que les entreprises sont les moins disantes pour les lots dont elles étaient précédemment attributaires.

44. Cette situation de reconduction d'une entreprise est susceptible de constituer une pratique anticoncurrentielle, lorsqu'une réunion de concertation des soumissionnaires s'est tenue préalablement à la remise des offres.

45. Cependant la reconduction peut également s'expliquer par les raisons suivantes **:**

- les économies résultant de la connaissance du terrain dont bénéficient les entreprises sortantes ;

- l'importance des coûts en personnel et en matériel tenant à la distance des lieux d'intervention ;

- même si les entreprises sont de dimension nationale, elles ne sont pas toujours en mesure de soumissionner systématiquement à l'ensemble des lots.

2.2. Les dysfonctionnements liés aux procédures mises en œuvre par les acheteurs publics

46. Souvent par souci de bien faire, l'acheteur peut restreindre le jeu de la concurrence ou favoriser des comportements collusifs de la part des entreprises, lesquels résultent notamment des pratiques suivantes :

- une définition trop pointue des besoins (cahiers des charges trop précis) ou inversement une définition insuffisante qui dissuade les entreprises de soumissionner. ou donne un avantage aux entreprises déjà en place ;

- la demande aux entreprises d'une qualification technique trop pointue alors que la nature du marché ne l'exige pas ;

- la concentration par tous les acheteurs publics d'un même secteur, de leurs achats, à une même période de l'année (pratique favorisée en général par les procédures budgétaires) ;

- un allotissement inadapté ou une consultation concernant des lots trop importants susceptible de conduire certaines entreprises à renoncer à soumissionner ;

- la sollicitation par le maître d'ouvrage de la constitution de groupements, alors que les caractéristiques techniques ou économiques du marché ne l'exigent pas ;

- la fixation de pénalités importantes dans l'hypothèse d'un retard dans l'exécution des travaux ;

- la fixation de délais trop brefs pour étudier un dossier complexe ou de délais trop courts pour la réalisation des travaux.

3. Conclusion

47. Le cadre juridique et institutionnel tunisien assure une protection rigoureuse des achats publics à travers une législation spécifique garantissant une mise en concurrence optimale et une législation horizontale (loi relative à la concurrence et aux prix) visant l'interdiction des pratiques anticoncurrentielles notamment les ententes et l'offre ou la pratique des prix abusivement bas. Le droit commun et notamment pénal prévoit aussi des règles réprimant la corruption en matière des marchés publics. Les autorités de concurrence en Tunisie jouent un rôle important dans la lutte contre les collusions, la DGCEE a adopté sa propre méthode d'enquêtes afin de détecter les indices et de bien mener sa tache.

48. Le Ministère du Commerce et de l'Artisanat, à travers notamment la Direction Générale de la Concurrence et des enquêtes économiques et les Directions Régionales du Commerce, présent dans toutes les commissions d'appels d'offres, est à la disposition des acheteurs publics pour tout conseil en matière d'optimisation des procédures ou clauses de mise en concurrence et pour examiner et prendre en charge tout indice de concertation collusive ou de restriction de la concurrence.

CONTRIBUTION FROM TURKEY

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Turkey --

1. Introduction

1. Public procurements hold a privileged position in the economies of all countries. Various reasons may be listed for this importance. First of all, financial policies, in addition to monetary policies also have an important role to play in the economic policies of countries. When the fact that monetary policies are generally carried out by the independent central banks is taken into account, financial policies become the most important tool that governments can use. Within the scope of financial policies, income policies and cost management can be seen as two fundamental elements. The first, consisting of taxes, is mainly under the control of a few state institutions charged with gathering income, while in the cost management area many institutions may intervene. This is due to the fact that goods and services procurements by public institutions and organisations are not carried out centrally; instead, each institution or organisation makes its purchases within its allocated appropriation, in accordance with its relevant legislation. Consequently, in public procurements, the state acts as a buyer within the economy and directly intervenes in the economy. In other words, public procurements have an important place in the economic lives of nations, since they are financial policy instruments which may be characterised as direct interventions in the economy.

2. Secondly, public procurements are important because they involve the use of the taxes collected from the citizens for their funding. It is a requirement of democracy that governments spend properly the taxes they collect from their citizens based on their sovereign rights. This is because expenditures are made on behalf of the citizens and citizens decide, through the members of the parliament, on where the money should be spent. For that reason, public procurements, which are funded by the taxes paid by the citizens, must be made in an efficient manner.

3. Another point that reflects the importance of public procurements is their share within the economy. Statistically, public procurements constitute 15% of the Gross Domestic Product (GDP) in OECD states, while this ratio is even higher in other countries. Some numbers from Turkey may be beneficial in explaining why public procurements are important. According to the Public Procurement Authority (PPA) (2009) report[1], public procurements of about 84 billion TL were made in 2008. This corresponds to around 8.8% of the GDP of Turkey for the year 2008, which was listed as approximately 950 billion TL in the Turkish Statistical Institute (TSI) (2009) data[2], and it demonstrates more clearly the importance of public procurements for the country's economy. According to another piece of data from PPA[3], annual sum of public procurements in Turkey corresponds to about 10% of the GDP.

1. PPA, Public Procurements Monitoring Report 2008.

2. TSI, News Bulletin, Issue 52.

3. http://www.tbmm.gov.tr/develop/owa/dosya_p.indir?pDosyaAdi=F1902048463_pbk23112009.pdf, p.9, paragraph 4.

4. Considering they use a significant portion of the country's income, lightening the burden of public procurements on the state budget and ensuring their efficiency is closely related to the establishment and protection of competition. As a matter of fact, Article 5 of Act no 4734 (Public Procurement Law) lists the basic principles to be followed in public procurements as follows: transparency, competition, equal treatment, reliability, secrecy, public supervision, meeting the needs under fair terms and in a timely manner, and efficient use of resources.

5. Ensuring competition in public procurements depends on properly analysing the product and market conditions and designing the tender in a way most appropriate for the existing conditions. Also, obtaining an efficient result in the tender process depends on absolute prevention of competitors from engaging in anti-competitive agreements during the tender processes. In other words, preventing collusive bidding by the competitors is very important in order to obtain the expected benefits of the tender. This is because it is beneficial for public welfare to ensure competition in a market that corresponds to at least 10% of the country's GDP.

2. Tender Markets and Competition in Turkey

6. Collusive bidding has a very significant place in competition law. When collusive practices which are among the gravest infringements of competition occur, especially in public procurements, their damage extends to the society at large. Therefore, worldwide competition authorities watch tenders more vigilantly. Likewise, the Turkish Competition Authority (TCA) works with an aim to protect competition in public procurements as well and has made important decisions. Below some decisions by the Competition Board, the decision making body of the TCA, will be given, together with a discussion of their implications.

2.1. Medical Consumables Decision[4]

7. In the said decision of 2007, the fact that the undertakings selling miscellaneous medical consumables refrained from participating in tenders opened by hospitals was deemed as setting of supply conditions outside of market. This is because, when hospitals opened tenders to purchase consumables, undertakings operating in the market were concerned that the tender procedure would lower prices and decrease their profits, and they consequently decided to boycott the tenders. In compliance with the boycott decision, the undertakings did not bid in the tenders and the hospitals faced difficulty in purchasing their urgent needs. Hence it becomes clear that, collusive bidding may not only damage the economy but also, more importantly, human life and health.

2.2. Medical Laboratory Decision[5]

8. The decision taken during the last days of 2008 involves many of the infringements of competition that may occur in tender markets. The allegations that the undertakings that were found to have infringed the Competition Act by this decision were engaged in:

- Making collusive bids while determining the estimated cost prior to a tender;
- Submitting "cover bids" in favour of one another in tenders[6];

4. Competition Board Decision dated 16.3.2007 and numbered 07-24/236-76.

5. Competition Board Decision dated 19.12.2008 and numbered 08-74/1180-455.

6. Cover bid is a concept frequently used by undertakings that participate in a tender. It suggests that, a bidding undertaking asks another undertaking that is normally not going to participate in the tender or does

- Making collusive bids in tenders;
- Entering into subcontracting agreements among themselves after winning contracts;
- Participating in the tender both on their own behalf and on behalf of another undertaking which they jointly own, were examined and there were findings that substantiated these allegations.

9. One thing in common between this decision and the previous one is the assistance received from the prosecutors' offices. The most important evidence used in both of the cases was based on the information and documents obtained by the prosecutors' offices during prosecutions for bid rigging offenses[7]. It must be said at this point that competition authorities, public procurement authorities and prosecutors' offices should work in close co-operation. In fact, in every case, information from the public authorities that lay down regulations in the market concerned by the tender is also very helpful. For instance, in the Medical Laboratory decision, the information obtained by the Ministry of Health Inspection Committee during their investigation on the matter was also used by the TCA.

2.3. Medicine Decision[8]

10. Similar to the Medical Consumables decision, undertakings boycotting the tenders by hospitals for purchasing medicine and serum were found to violate the Competition Act and were imposed fines. With respect to this decision, it should be emphasised that undertakings that decide to boycott tenders that are vital for patients' life and health do not create only economic harm.

11. As it is seen, the three decisions mentioned above are related to the health sector. Although there are many undertakings party to those decisions, the number of participants in the tenders that are the subjects of the decisions decreases and there are usually three or four participants in the tenders.[9] The most important reason for this is the fact that the number of undertakings reduces at the regional level. In other words, few undertakings participate to hospital tenders in various regions, however as the number of regions increases, the number of undertakings also increases. Moreover, it should be noted that the number of manufacturers is limited in the tenders especially in medicine, consumables and laboratory equipment, in the health sector. The dealers of those manufacturers participate to the tender; consequently, the number of competing brands at the tender base is limited. Therefore, one of the most important reasons for the difficulties in the health sector is the oligopolistic structure.

12. As of the beginning of the year 2009, the TCA examined 34 files related to tenders. 17 of those files were subject to investigation whereas 12 of them were closed after the preliminary inquiry stage. Most of the investigations are carried out in the health sector (medical device, medicine, laboratory equipment and consumables). Cement, ready-mixed concrete, refractory, transportation, fertiliser, accumulator, bread, traffic signalisation, milk and automotive can be listed among other sectors.

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not intend to win the contract, to submit an artificial bid to give the impression that there is competition in the tender. Thus, the first undertaking submits a so-called competitive bid by offering a lower bid than the cover bidder.

7. Besides being an infringement of competition under the Competition Act, collusive bidding also constitutes a bid rigging offense under the Turkish Penal Code (numbered 5237) (Article 235, (2), d.).

8. Competition Board Decision dated 19.1.2007 and Numbered 07-07/43-12.

9. http://www.rekabet.gov.tr/dosyalar/images/file/Ekonomi/pamukkale2009/ucar_aygun.ppt#283,27, Sonuç ve Öneriler [Conclusion and Recommendations]. In a study on the health sector (laboratory equipment), the number of participants is less than three in 237 of 310 tenders.

3. Corruption

13. Corruption is often encountered in public procurement tenders. Many researches show that corruption is a widespread phenomenon in public procurement along with customs, licences, and construction (Acar and Emek, 2008).[10] The Public Procurement Law contains significant provisions on probity and anti-corruption. It already contains the mandatory exclusion requirements of the latest EC Directives on selection, and also defines and prohibits other forms of bribery and corruption in a separate article. The Public Procurement Law also provides for sanctions and penalties in the event of discovery, which apply to both individuals and companies and can lead to temporary or permanent disbarment, depending on the severity or frequency of the crimes. In the event of criminal activity, the Public Procurement Law provides for action by the public prosecutor and the criminal authorities (SIGMA, 2009). Allegedly corrupted contracts of procurement have been investigated by independent inspection boards which are embedded and widely distributed in the administrative system. These boards are related to various entities such as Turkish Parliament, Presidency, Prime Ministry and line ministries.

14. The public procurement has long been singled out by the public and its officials as one of the most corruption-prone areas in need of an urgent and comprehensive reform.[11] Arguably, the EU decision to grant Turkey candidate status during Helsinki Summit in 1999 and the economic reform program 'Strengthening the Turkish Economy', which was put into implementation right after 2000-2001 financial crisis, significantly contributed to the hands of the reformers desiring to enhance anti-corruption efforts, including preparation and adaptation of a new Public Procurement Law (Acar and Emek, 2008). As stated in the Ninth Development Plan: 'new procurement law with competitive and transparent tender rules and in conformity with international norms aims, among others, to increase effectiveness and to prevent corruption' (SPO, 2006: 28).

15. Although the TCA does not have any authority to investigate corruption, it is required to notify the relevant authorities, which are mainly the prosecutor or the inspection departments of the relevant government agencies in case it obtains any findings on corruption. For instance, in the Medical Laboratory decision mentioned above, because the information received by the TCA also included allegations of corruption they were sent to the prosecutors.

16. Corruption in tenders usually occurs while the tender specifications document is prepared. Existence of terms that seems to restrict competition in the tender specifications document, which determines the characteristics of those who could participate in the tender, may sometimes be the result of corruption. In other words, tender specifications may be prepared in such a way that they may designate a certain undertaking aimed to be the winner as a result of the tender via a secret agreement between the authorised personnel of the undertakings and the public officials. The public official, who prepares the tender specifications document in favour of the relevant undertaking, may obtain illegal advantages. The prosecutors and other government agencies carry out examinations about the public official and the authorised personnel of the undertakings under these circumstances. Moreover, the relevant tender may also be cancelled. According to Article 12 of the Public Procurement Law, tender specifications document should not include terms that restrict competition or designate a specific brand or model or specify features

10. According to Ministry of Construction in Turkey quoted in an OECD study "[u]ntil the enactment of the new Public Procurement Law in 2003, Turkey has suffered exceptionally high construction costs by international comparison. For instance, the cost of construction for 1 km of highway was US$ 10 million in Turkey, compared to international reference price of a US$ 4 million' (Gönenç et al., 2005).

11. For example, the Seventh Development Plan envisioned in 1995 that "public procurement legislation would be changed to provide competition and transparency …, and would be harmonised with EU Directives" (SPO, 1995).

or definitions indicating any brand or model. For instance, PPA decided in a decision[12] taken in 2003 that the fact that a certain model had been designated in the tender specifications document was unlawful.

17. Moreover, the Public Procurement Law sets out appropriately the content of tender documents and tender notices. In this respect, Public Procurement Law's qualification criteria largely reflect those of the EC Directives, including the more recent mandatory exclusion provisions. Besides, under the Public Procurement Law, the open procedure is the basic procedure; other procedures restricting competition such as restricted and negotiated procedures may only be applied when special conditions for their use have been fulfilled. Although there are concerns about the compatibility of the Public Procurement Law with the current EU legislation, as highlighted by SIGMA (2009) it is fair to say that the current Public Procurement Law has many significant similarities with EU procurement legislation on which it was closely modelled.

4. Conclusion and Suggestions

18. As it is known, collusive bidding is a subject seriously emphasised in competition law. There are many studies which only discuss the analysis of collusive bidding according to competition rules. A market corresponding to 15% of the GDP in average for OECD countries and approximately 10% of the GDP for Turkey deserves being monitored in detail by competition authorities. Thus, competition authorities whose task is to protect competition spend significant amount of work for preventing the restriction of competition by undertakings in tenders in every country.

19. Support by other institutions and agencies is also important in terms of tender markets to which competition authorities devote considerable time. Public procurement authority of the country and judicial authorities should be the primary institutions with which the competition authorities should co-operate. Especially, competition authorities that do not have the power to wiretap should get support from agencies that have such power. Most of the evidence is collected by judicial agencies in tenders where the most secret cartels are formed in Turkey as well. Providing competition authorities with access to data concerning tenders plays an important role in fighting with collusive bidding. Accordingly, the TCA and PPA concluded a co-operation protocol on 14.10.2009.[13] The said protocol aims to increase the co-operation between two agencies that work for establishing and protecting competition in tenders. Moreover, the TCA provides training in public institutions and agencies as well as in the private sector in order to prevent possible competition infringements in tenders. In addition to this, a guideline, which public institutions and agencies can easily comprehend and benefit from, is currently under preparation within the TCA.

20. Consequently, the TCA closely examines tenders in order to prevent collusive bidding. There are important decisions on this subject. Moreover, it co-operates with public authorities, particularly with PPA and the public prosecutors' office.

12. Decision dated 5.1.2003 and numbered 2004/UK.Z-10 is available via http://vatandas.ihale.gov.tr/karargoster.asp?k=393&metin=.

13. http://www.rekabet.gov.tr/dosyalar/images/file/RK-K%C4%B0K%20Protokol%2014%2010%202009.pdf.

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CONTRIBUTION FROM THE UNITED STATES

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- United States --

Outreach and Training Programmes

1. In the United States, attorneys at the U.S. Department of Justice Antitrust Division (DOJ) have for many years spent considerable time conducting outreach and training programmes for public procurement officials and government investigators, including investigators who work for other government agencies that solicit bids for various projects. These outreach programmes help develop an effective working relationship between the DOJ officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. DOJ officials advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and DOJ attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

2. This paper provides an overview of the Antitrust Division's public procurement outreach and training programmes. Part 1 sets forth the purposes of these programmes. Part 2 describes the use of publications – brochures, newsletters – as tools of outreach programmes. The key features of an effective outreach presentation are laid out in Part 3. Part 4 describes the Certificate of Independent Price Determination, a critical tool in preserving competition in public procurement, and Part 5 notes the relationship between corruption and bid-rigging violations. Part 6 describes a recent DOJ training initiative aimed at safeguarding the ongoing economic stimulus programme, and Part 7 concludes.

1. Purposes of Public Procurement Outreach and Training Programmes

3. Public procurement outreach and training programmes serve a number of purposes. First, these programmes help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers.

4. Second, outreach programmes help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, resulting in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial

evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 15 below.

5. Third, outreach programmes educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Antitrust agency officials provide advice about techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract. DOJ attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 17-18 below.

6. Fourth, outreach programmes help develop a close working relationship between public procurement officials, government investigators, and antitrust agency officials. This is a critical goal of an outreach programme. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for its occurrence on their watch. During outreach programmes, antitrust agencies should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy that was carried out in secret without their knowledge; procurement offices and antitrust agencies have the same interest in trying to prevent and prosecute bid rigging. The statistics indicate that the joint efforts of public procurement officials, government investigators, and DOJ attorneys have reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the proportion and total number of bid-rigging prosecutions has declined.

7. Finally, as will be discussed more fully below in paragraphs 19-20, sometimes public procurement officials are in fact involved in bid rigging and other illegal conduct that undermines competition, in the form of kickbacks or other remuneration received from companies that submit bids. Outreach programmes serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

2. The Use of Publications to Make an Outreach Programme More Effective

8. Brochures – In the United States, DOJ attorneys provide brochures to public procurement officials and government investigators to make outreach programmes more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For" ("Bid Rigging Brochure") can be found at http://www.justice.gov/atr/public/guidelines/211578.pdf; and "An Antitrust Primer For Federal Law Enforcement Personnel" can be found at http://www.justice.gov/atr/public/guidelines/209114.pdf.

9. Newsletters – Offices within the Antitrust Division publish newsletters that discuss certain cases that have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. For example, a four-page, colour newsletter published by the Chicago Field Office in the fall of 2008 was distributed to about 1,700

recipients, including federal, state, and local public procurement officials and government investigators.

3. Key Features of an Effective Outreach Presentation

10. Explain the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the *agreement* to rig bids is the crime. In other countries, the legal standard may be different, but it is important for antitrust agency officials to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand this, they will not know what to look for and report to the authorities. In U.S. outreach programmes, DOJ attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

11. Explain how antitrust investigations are conducted – During outreach programmes, antitrust agency attorneys explain the procedures used to conduct an investigation. In the United States, these procedures include taping conversations with the assistance of co-operating witnesses, using search warrants and wiretaps, conducting unannounced "drop-in" interviews, and using grand jury subpoenas for documents and testimony. Also, DOJ attorneys discuss the Corporate Leniency Policy which may enable a co-operating company to avoid prosecution.

12. Discuss Penalties for Bid Rigging and Other Antitrust Violations – Outreach programmes provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

13. Discuss Indicators of Bid Rigging – A key part of U.S. outreach programmes is a discussion of factors suggesting that bid rigging may be taking place. For example, a pattern where company A wins a contract one year, and company B wins the next year, with each taking turns in subsequent years, may reveal that the companies are engaged in a bid-rotation scheme. Another indicator of bid rigging occurs when the same errors (misspelled words and typographic or arithmetic errors) are evident in bids submitted by allegedly competing companies. This, of course, suggests the companies prepared the bids in concert. Yet another indicator involves the situation where a new company enters the bidding unexpectedly, and at a much lower price than the bids of the other companies that traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging their bids and winning contracts at high, non-competitive prices.

14. Encourage procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report their suspicions that illegal conduct is occurring. Antitrust agency officials should encourage procurement officials and investigators to contact them if procurement officials or investigators have *any* concerns that bid rigging or other procurement violations may be occurring. Antitrust agency officials should also assure procurement officials that they are always willing to talk about procurement concerns. Sometimes antitrust agency officials will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

15. Give examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of

public procurement officials. This will demonstrate to procurement officials that action will be taken when they report their suspicions. Each country will have its own examples to use, but in the United States, DOJ attorneys have used the following examples in outreach programmes:

- Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies co-ordinated their bidding such that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their concerns, and after an investigation by the DOJ, the companies and their executives were successfully prosecuted for bid rigging;

- Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: "Please give us a call **us** if you have any question." The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations;

- The government sought to buy four types of gloves: 1) women's dress gloves; 2) women's outdoor gloves; 3) men's dress gloves, and 4) men's outdoor gloves. The government intended to award four contracts, one for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. Following a DOJ investigation, the companies and culpable individuals were successfully prosecuted for bid rigging.

16. Discuss Other Crimes Which May Be Prosecuted – In U.S. outreach programmes, DOJ attorneys explain to public procurement officials and government investigators that the DOJ prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the procurement process, such as kickback schemes, may not be violations of U.S. antitrust laws; such conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when the DOJ investigates these schemes it may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement is discussed in more detail below in paragraphs 19-20.

4. Certificate of Independent Price Determination – What It Is and Why It Is Important?

17. A Certificate of Independent Price Determination has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Basically, this document requires each company that submits a bid to sign a statement under oath that it has neither agreed with its competitors about the bids which it will submit nor disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids. The key part of the certificate states:

- The offeror certifies that –

- The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered,

- The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law, and

- No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

18. Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on who would win the project for which bids were submitted.

5. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials

19. In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may not be clear whether the companies involved are also engaged in bid rigging. However, in a number of cases DOJ attorneys have developed evidence that corrupt procurement officials were paid off to facilitate a bid-rigging scheme.

20. It is important to determine whether corrupt procurement officials are assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official. These types of cases are important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is legitimate.

6. Proactive Initiative to Safeguard Large Government Expenditures: Antitrust Division Programme to Protect Economic Recovery Stimulus Programmes from Fraud, Waste, and Abuse

21. In May 2009, the Antitrust Division announced the details of an initiative aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009. The Recovery Act, a multi-billion dollar economic stimulus programme, was signed into law by President Obama on Feb. 17, 2009 as an effort to jumpstart the economy and to create or save jobs. The Antitrust Division's Recovery Initiative involves training procurement and grant officials, government contractors, and agency auditors and investigators, on techniques for identifying the "red flags of collusion" before stimulus awards are made and taxpayer money is unnecessarily wasted. The initiative makes available to agencies Antitrust Division competition experts who can evaluate procurement and programme funding processes. These Division experts make recommendations on "best practices" that may be adopted by the agencies to further protect processes from fraud, waste and abuse and maximise open and fair competition. Finally, the initiative commits the Antitrust

Division to playing a significant role in assisting agencies to investigate and prosecute those who seek to or succeed in defrauding the government's efforts to maximise competition for stimulus funds.

22. The Antitrust Division's Recovery Initiative has had a significant impact. Since March 2009, in partnership with agency Inspector Generals handling stimulus funds, the Antitrust Division has already assisted in training thousands of federal and state procurement, grant and programme officials nationwide, with thousands more scheduled to be trained in the coming months. The Antitrust Division has also launched a Recovery Initiative Web site through which consumers, contractors and federal, state and local agencies, can review information about the antitrust laws and the Division's training programmes, request training, and report suspicious activity. The Web site is located at http://www.justice.gov/atr/public/criminal/economic_recovery.htm. This Web site is linked to www.recovery.gov, the official website of the Recovery Accountability and Transparency Board. The board is responsible for overseeing federal agencies to ensure that there is transparency and accountability for the expenditure of Recovery Act funds.

7. Summary and Conclusion

23. A comprehensive outreach and training programme for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist antitrust agencies in investigating and prosecuting bid rigging. In order for that to happen, antitrust agency attorneys need to educate procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Antitrust agency officials also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

24. The ultimate goal of an outreach and training programme is to encourage public procurement officials, government investigators, and antitrust agency attorneys to work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programmes.

CONTRIBUTION FROM THE UNITED KINGDOM

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- United Kingdom --

1. This paper provides responses from the UK Office of Fair Trading (OFT) to the questions set for the roundtable discussion on Collusion and Corruption in Public Procurement. It should be noted at the outset that the OFT does not investigate corruption cases and more attention has therefore been given to answering the questions on collusion in public procurement.

2. The OFT works closely with the police and the Serious Fraud Office (SFO) on criminal investigations, concerning both competition and consumer issues. The SFO is the lead agency in the UK for investigating and prosecuting cases of domestic and overseas corruption and fraud. If the OFT were to receive any information suggestive of corruption in public procurement during the course of its own competition enforcement investigation, it would notify the matter as appropriate.

1. Executive Summary

3. The UK government devotes a large share of public spending to public procurement– with an estimated £221bn[1] spent on public procurement in 2008/2009 for the purchase of goods and services from road building to housing. The 2008 Julius Review[2] found that in 2007/8 the UK public service industry[3] had a turnover of £79 billion, generating £45 billion in direct value added and employing over 1.2 million people. It also indicated that, over a 12 year period to 2007, the public service industry grew at an average annual rate of over 5 per cent in real terms.

4. Collusion in public procurement can therefore have significant detriment for the procuring public authority, including government and public authorities, and ultimately for taxpayers.

5. The Office of Fair Trading (OFT) has alerted government to the risk of collusion in public procurement, and has worked with procurement officials in an effort to fight bid-rigging more effectively. The OFT, together with the UK public body responsible for the provision of advice on public procurement, the Office of Government Commerce (OGC), has therefore provided guidelines for public procurement officials to help them identify any signs of potential collusion. In addition, the OFT has worked with the UK government in promoting a better understanding of how bidding procedures can be designed in order to make it more difficult for competitors to collude. There may however be a tension - certain formal public procurement measures which seek to minimise the risk of corruption can increase the risk of collusion. For example, information on the terms and conditions offered by winning and losing bidders is sought to ensure the fair treatment of bidders and provide information on expenditure of public funds. However, collusion is more easily sustained where there is greater transparency about potential bidders and details of bids. The OFT has previously advised how the risk of collusion can be mitigated.

1 See the Public Expenditure Statistical Analysis, 2009 http://www.hm-treasury.gov.uk/pespub_pesa09.htm.

2 www.berr.gov.uk/files/file46965.pdf.

3 The term ‘public service industry’ refers to firms involved in providing public services on behalf of the UK government.

6. In addition, the OFT's report on *Government in Markets*[4] and its market study *Assessing the impact of public sector procurement on competition*[5] provide advice to policymakers on how public procurement can affect the structure of the market and the incentives of firms to compete in the long run. The purpose of these reports is to highlight how an effective procurement policy can promote efficiency and can ensure that those who offer best 'value for money' are awarded contracts, thus avoiding mismanagement of public funds.

7. At the same time, the OFT has successfully pursued instances of collusion in public and private procurement by pursuing civil competition law infringements, most recently in the *Construction* case which resulted in the imposition of financial penalties totalling £129.2 million on one hundred and three companies found to have engaged in bid-rigging activity including associated 'compensation payments' in relation to building projects worth in excess of £200 million. At the time the decision was published, the OFT together with the OGC, provided further advice on how procurement officials can detect bid rigging and design procurement processes so as to minimise the risk of collusion. This included providing reference to recent OECD guidelines on these issues.

8. In addition, the UK has seen its first criminal cartel convictions for bid-rigging and other cartel activity in the *Marine Hose* case which involved both public and private contracts.

9. Through these cases, and previous OFT decisions into bid-rigging, the OFT has sent a clear message that collusion in procurement is a serious breach of competition law attracting substantial penalties for the companies and individuals involved.

10. The OFT's increased enforcement action, along with education of procurement officials in detecting signs of collusion, is designed to have a significant deterrent effect.

11. In addition, to its enforcement and advocacy work the OFT is seeking to understand how more compliance can be achieved. The OFT is currently working with business and their lawyers to understand the drivers of compliance and non-compliance, to identify current best practices in competition law compliance and to identify further steps which the OFT could take to encourage compliance.

12. One of the early themes that are emerging from this project is that businesses have integrated compliance agendas which are part of an overall business ethics and corporate responsibility approach. By working with business and their lawyers in identifying best practices, greater compliance generally can be achieved including compliance in competition law and anti-corruption.

2. Competition Enforcement - Bid Rigging

13. Since the UK Competition Act 1998 came into force in 2000, the OFT has investigated a number of civil competition infringements involving bid rigging affecting both public and private procurement.

14. The OFT's most recent bid rigging investigation into the construction industry is described in detail below.

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4 See the OFT website: www.oft.gov.uk/shared_oft/business_leaflets/general/OFT1113.pdf.

5 See the OFT website for a copy of the market study: http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/procurement.

2.1 The OFT Construction Investigation

15. On 21 September 2009 the OFT issued an infringement decision imposing fines of £129.2 million (after reductions for leniency) on 103 companies for bid rigging comprising predominantly 'cover pricing' in the construction industry in England including associated 'compensation payments', following one of its largest ever investigations[6].

16. Cover pricing describes a situation where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract. The tendering authority, for example a local council or other customer, is not made aware of the contacts between bidders, leaving it with a false impression of the level of competition and this may result in it paying inflated prices. The associated compensation payments that were uncovered involved the successful bidders paying an agreed sum of money to the unsuccessful bidders.

17. The firms were found to have engaged in illegal anti-competitive bid-rigging activities on one hundred and ninety nine tenders during the period 2000 to 2006. The OFT found that in eleven tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, and which is likely to have resulted in the client having unknowingly paid an inflated price. The OFT also found six instances where successful bidders had paid compensation payments of £2,500 to £60,000, which were facilitated by the raising of false invoices.

18. The infringements affected building projects across England worth in excess of £200 million including building projects for schools, universities, hospitals, and numerous private sector projects including the construction of apartment blocks and housing refurbishments. Eighty six out of the one hundred and three firms received reductions in their penalties because they admitted their involvement in cover pricing prior to the OFT's infringement decision. Thirty three of the companies received reductions for leniency.

19. The OFT's investigation originated from a specific complaint in the East Midlands in 2004, but it quickly became clear from the evidence that the practice of cover pricing was widespread. The industry itself described the practice as 'endemic' and the OFT's investigation included dawn raids on fifty seven companies in the period from November 2004 to March 2006. The range of infringements therefore included the East Midlands as well as neighbouring areas Yorkshire and Humberside and other areas in England.

20. The OFT also received evidence of cover pricing implicating many more companies on thousands of tender processes, which presented challenging case management issues and a call for innovative solutions. The OFT prioritised and focused its investigation to a more limited number of infringements by using objective prioritisation criteria, with a view to reaching a decision comparatively swiftly, while still ensuring that the scale and scope of the investigation reflected the 'endemic' nature of the practices in question so as to maximise the deterrent effect of its investigation. The OFT's case strategy and management is discussed in further detail in the two textboxes below.

21. Following the OFT investigation, the UK Contractors Group and National Federation of Builders jointly launched a competition law code of conduct to help avoid breaches of competition law by the construction industry. Although the OFT has not formally endorsed the code of conduct, it is a welcome initiative in response to the OFT's investigation.

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6 Further information including the OFT's Decision can be found on the OFT website: www.oft.gov.uk/shared_oft/business_leaflets/general/CE4327-04_Decision__public_1.pdf.

Box 1. Case Strategy and Case Management: Prioritisation

The OFT narrowed the scope of the case by firstly categorising the initial evidence according to 'evidential weight' in order to focus on those parties where evidence of bid rigging was greatest and strongest.

Secondly, the OFT proceeded to investigate only those companies where there were reasonable grounds to suspect their involvement in bid rigging on at least five tenders.

This resulted in a range of suspected infringements and parties that reflected the endemic nature of the practices in question, in that it covered:

- A broad spread of companies, in terms of size (with turnover ranging from around £100,000 to over £2.5 billion);
- A broad spread of companies in terms of location (with companies operating from various different regions of England, as well as nationally).

In addition, it was necessary to pursue both companies that had and companies that had not received leniency to ensure that companies are not deterred from coming forward as leniency applicants (with 70 companies that had not applied for leniency as well as the 33 that had applied).

For each of these companies, the OFT selected five tenders for further investigation and then proceeded to interview witnesses (estimators and managers employed by the leniency applicants) in respect of those tenders. The OFT also contacted the procurers to ensure that it based its investigation on accurate information regarding the bids made for each tender.

Box 2. Case Strategy and Case Management: Availability of Leniency and 'Fast Track' Offers

In order to limit and focus its investigation, the OFT also decided in the beginning of 2007 to close the door to any further leniency applications so as to keep the investigation manageable and to proceed in an efficient and timely manner. At the same time the OFT launched a 'Fast Track Offer' to those companies that had not applied for leniency but remained under investigation.

If other companies had applied for leniency, it would not have been possible for the OFT to progress the investigation in an efficient and timely manner due to the need to investigate fresh allegations and to make a further selection of tenders and companies for investigation.

Notwithstanding the decision to close the door to further leniency applicants, the OFT nevertheless wished to put the non-leniency parties on notice that they were under investigation, to inform them of the tenders in respect of which they were suspected of engaging in bid rigging activities, and as part of its ongoing investigation to give them an opportunity to provide a voluntary admission of liability. In exchange for any admissions, the parties were offered a 25 per cent reduction of any financial penalty that the OFT ultimately imposed in respect of any suspect tenders for which admissions were received. This constituted the OFT's 'Fast Track Offer'.

The OFT did not provide the non-leniency companies with the evidence against them at this stage, but the companies were given the opportunity to provide the OFT with the identity of the companies with whom they had engaged in bid rigging on each tender, thereby providing independent corroboration of the OFT's existing evidence.

Of the eighty five non-leniency Parties that were sent Fast Track Offer letters by the OFT, forty five admitted engaging in bid rigging activities in all or some of the suspect tenders identified by the OFT. This led to significant procedural efficiencies and resource savings for the OFT's investigative team, allowing it to conclude the investigation more efficiently and comparatively quickly.

3. Roofing Investigations

22. Prior to the OFT *Construction* investigation the OFT investigated collusion in the roofing industry in various parts of the UK. The OFT issued several decisions between 2004 and 2006 fining companies for cover pricing and provision of compensation payments in the roofing industry, as follows:

- March 2004 – West Midlands flat roofing – fines of £300k after leniency imposed on 9 companies[7]. This decision was appealed to the Competition Appeals Tribunal, which upheld the OFT's decision on liability in its entirety but made a small reduction to the penalty imposed on one of the parties;

- March 2005 – North East flat roofing – fines of £470k after leniency imposed on 7 companies[8];

- March 2005 – Scottish roofing – fines of £87k after leniency imposed on 4 companies;[9]

- July 2005 – Scottish roofing II – fines of £138k after leniency imposed on 6 companies;[10]

- February 2006 – Mastic asphalt – fines of £1.55 million after leniency imposed on 13 companies throughout England and Scotland[11]. This decision was appealed to the Competition Appeals Tribunal, which upheld the OFT's decision on liability in its entirety.

23. The UK has also seen its first criminal cartel convictions for bid-rigging and other cartel activity in the *Marine hose* case which involved both public and private contracts.

4. Marine Hose Cartel[12]

24. In 2008 three UK businessmen were sentenced to between 20 and 30 months' imprisonment for cartel offences under the Enterprise Act 2002. All three were also disqualified from acting as company directors for periods of between five and seven years. In addition over £1m were confiscated under the Proceeds of Crime Act 2002.

25. These are the first convictions for a cartel offence since criminal prosecution powers were given to the OFT under the Enterprise Act 2002 which makes it a criminal offence for two or more individuals dishonestly to agree to make or implement (or cause to be made or implemented) cartel arrangements between two or more undertakings which fix prices, divide markets or customers, limit or prevent production or supply, or rig bids, in each case in relation to supplies in the UK. Unlike the civil regime, the criminal cartel offence is therefore targeted at individuals rather than businesses.

26. The offence carries a maximum sentence of five years' imprisonment and/or an unlimited fine. In addition, where an offence has been committed in connection with the management of a company, the offender may be disqualified for up to 15 years from being a company director or in any way concerned in the management of a company. Further, in cases where the offender has benefitted financially from the

7 www.oft.gov.uk/shared_oft/ca98_public_register/decisions/westmidlandsroofing.pdf.

8 www.oft.gov.uk/shared_oft/ca98_public_register/decisions/ner.pdf.

9 www.oft.gov.uk/shared_oft/ca98_public_register/decisions/scot.pdf.

10 www.oft.gov.uk/shared_oft/ca98_public_register/decisions/scotroof.pdf.

11 www.oft.gov.uk/shared_oft/ca98_public_register/decisions/flatroof.pdf.

12 For more information, see the OFT website: http://www.oft.gov.uk/news/press/2008/72-08.

offence, the court may order the confiscation of assets under the Proceeds of Crime Act 2002 up to the value of the benefit or, where less, the value of the available assets.

27. The three individuals pleaded guilty to dishonestly participating in a worldwide cartel involving all the major manufacturers of marine hose, in which the global market was divided among the manufacturers according to agreed market shares and bids on individual contracts were rigged, by reference to a common price list. In addition, it was also agreed that contracts emanating from a manufacturer's 'home territory' should be reserved to that manufacturer.

28. It was accepted by the defendants that the cartel is likely to have resulted in higher prices for customers in the UK. These included a UK government department, the Ministry of Defence, who had used public procurement processes.

5. Exclusion from Bidding in Public Procurement Auctions

29. As a general principle, the OFT considers that, where this is lawful to do so, excluding companies found guilty of illegal bid-rigging from public procurement auctions for a period of time, would act as an additional deterrent to such conduct, and could therefore strengthen efforts to eradicate such illegal activity.

30. Notwithstanding this, the OFT concluded, following extensive consultation with the OGC, that automatically excluding the parties found to have engaged in bid rigging would not be appropriate in the particular circumstances of the *Construction* case.

31. The endemic nature of the practice within the UK construction industry suggested that many other companies were likely to have been involved in bid rigging, even though such activity remained undetected. For this reason, it cannot be assumed that the parties to the investigation were the only companies that may have engaged in such activity. In those circumstances, the OFT and the OGC recommended in a note to procurers[13], issued at the time of the issue of the OFT's infringement decision in September 2009, that the parties should not be excluded automatically from future tenders, on the grounds that they were parties to the OFT decision, or be the subject of similar adverse measures making it more difficult for them to qualify for such tenders. Rather, it was a matter for individual procurers to decide what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

32. Public authorities were advised to consider the specifics of their procurement, as well as the points outlined below, in deciding the most appropriate course of action on a case by case basis, namely that:

- The parties to the OFT's infringement decision had received significant financial penalties appropriate to the infringement findings in the OFT's infringement decision;
- It would be wrong automatically to assume that construction companies that were not named in the decision had not also been involved in bid rigging;
- As a result of the OFT's investigation, the parties could be expected to be particularly aware of the competition rules and the need for compliance and, if anything, are more likely to be compliant; and

[13] www.oft.gov.uk/shared_oft/business_leaflets/general/Information-Note2.pdf.

- Many of the parties had co-operated fully with the OFT's investigation and a significant proportion had taken measures to introduce or reinforce formal compliance programmes and to ensure that their staff are aware of their competition law obligations.

33. The OFT added for the avoidance of doubt, however, that this recommendation was only intended to apply to this case and that it should not be assumed that the OFT would take a similar view in future cases.

6. Wider Advocacy Efforts to Improve Efficiency of Public Procurement

34. Our experience in the UK is that competition authorities can play an active advocacy role in advising other parts of government on procurement. They can assist in at least three ways:

- *Advice on designing public procurement processes:* First, they can provide a framework for identifying how different procurement approaches might affect competition, and hence provide general advice on designing public procurement processes. For example, they can contribute to overall procurement guidance issued by central government.

- *Detailed analysis of particular markets:* Second, competition authorities can carry out more detailed analysis of particular markets, giving specific advice on procurement approaches in those sectors. This is likely to be more appropriate in cases where new markets are being opened up to private sector involvement, or where there are particular competition concerns.

- *Guidance and training to public procurers involved in running procurement processes:* Third, they can provide guidance and training to public procurers involved in running procurement processes, to help identify particular competition problems – particularly the possibility of bid rigging and collusion.

35. The following paragraphs give more detail on the first two points.

6.1 General framework advice: 2004 market study

36. The OFT market study *Assessing the impact of public sector procurement on competition*[14] aimed to provide a framework for analysing the effects of procurement on competition and markets. At a high level, it identified three broad ways in which procurement processes can affect competition:

- *Short term effects*, relating for example to the level of participation in a tender, the similarity of bidders and the ability of bidders to engage in tacit collusion. In general, more bidders imply higher competition. However, there may be valid reasons for restricting competition if evaluating bids is costly, or if a large number of bidders lead to higher prices when participants bid more cautiously. Competition is likely to be stronger when bidders are similar, for example where they are similar in terms of size, cost structures, ownership, degrees of vertical integration etc. It is easier to sustain collusion if bids are transparent, bidders interact periodically, and demand is stable and predictable.

- *Long term effects*, capturing changes in investment, market structure and technology as a result of procurement decisions. Public procurement can have long term consequences for example by changing the number of firms in the market, increasing the gap between market leaders and other

[14] See the OFT website for a copy of the market study: http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/completed/procurement.

suppliers and creating incumbency advantages for contractors, thus eroding competition. Such concerns might suggest strategies such as awarding multiple contracts and selecting a different bidder for each of these contracts, or by helping new entrants become established in other ways.

- *Knock-on effects*, where the public sector's procurement decisions affect other buyers in the market. For instance, if public sector contractors gain advantages over firms that do not supply to the public sector, this can lead to restricted or distorted competition for other (non-public sector) buyers and low prices for the public sector.

37. The market study then applied these general principles to some specific procurement practices that affect potential bidders. These included:

- *Restrictions on participation and increased participation costs:* It was found that formal public sector procurement practices can reduce participation by and increase participation costs for, small bidders. For example, this might be through excessive information requirements, restricted communication of contract opportunities or overly narrow qualification criteria. It is important for the public sector to strike a balance between the costs and benefits of increasing participation.

- *Contract aggregation:* Public sector procurement often involves contract aggregation, which is bundling contracts into fewer larger contracts that are tendered less frequently. This entails savings in the cost of conducting and managing tenders as well as lower prices due to economies of scale and scope. But, it can dampen competition by excluding small firms that cannot meet all the requirements, removing in-contract competition by moving demand between contractors at the margin, and amplifying incumbency advantages. There may also be a risk that discussions between sub-contractors on a large contract might facilitate collusion. On the other hand, it may promote competition by reducing the scope for tacit collusion through repeated interaction, helping firms overcome entry barriers by assuring demand to the bidder and stimulating investment.

- *Self-supply:* Often the public sector has the option to self supply rather than procure. This can affect competition as the decision not to procure externally limits the size of the market for other buyers. The public sector needs to ensure that self supply is indeed the cheaper option, but price comparison may not be easy in a non-competitive market. Thus there is a danger that self-supply is favoured when in fact this would be inefficient due to an incorrect evaluation or assessment of the costs underlying self-supply.

38. Overall, the OFT found that the competition effects of procurement are complex and depend on the particular procurement settings. However a general framework can provide a useful basis for a more specific and detailed analysis. One of the results of the study was to identify areas of public procurement that might raise particular competition concerns, which then allowed us to follow up with more specific advice.

6.2 Specific Advice: 2006 Report on Waste Procurement

39. Following the 2004 procurement report, the OFT sought to identify certain key sectors where it might be able to offer specific advice on the procurement method being applied. One of these was waste procurement. Local authorities at the time were required to devise new waste management strategies in order to meet the government's landfill reduction targets. The OFT, together with the OGC and the Department for Environment Food and Rural Affairs (Defra), produced a report on public procurement and competition in the municipal waste management sector.

40. The report made a number of recommendations to enhance competition at various stages of waste management which are described in the textbox below.

Box 3. Advice on Procurement Methods: Waste Management

- The length of contracts for waste collection services should be set to enable suppliers to recover sunk costs and a reasonable return on their investment, but no longer (and generally no longer than five years);
- Procurement should be open, free from overly restrictive criteria in order to encourage more bids;
- Procurement should ensure fair competition between self-supply and private sector bidders (see paragraph 29 above);
- Joint procurement of collection with other waste management services must be carefully considered and the risks of collusion should be recognised.

Waste disposal is more capital intensive than collection, and often large private firms are seen to supply integrated waste management services. The report therefore recommended that local authorities should remain open to the option of consortia bids including smaller firms with relevant experience, and should try to arrange sites and planning permission prior to tendering so as not to deter bidders, however the risk of collusion should be recognised in order to be able to identify instances of collusion. Fair competition between private and public bidders should be maintained and care should be taken when aggregating contracts. Waste treatment facilities that meet the needs of local authorities as well as private demand should be considered.

7. Regulatory or Institutional Conditions that can help Facilitate Bid Rigging and Corruption

41. The 2004 OFT market study on public procurement found that the design of public procurement processes can affect the likelihood of collusion.[15] Accordingly, there may be steps that procurement authorities can take to reduce the risk of bid rigging in particular cases.

42. The market study noted that it is more difficult to sustain collusion as the number of bidders increases, and as bidders become more dissimilar (for example in terms of size, cost structure, ownership, degrees of vertical integration). Other factors that may impact on the likelihood of collusion include:

- *Transparency:* Collusion is more easily sustained if bidders can observe when other firms are trying to charge prices below the collusive level. The more likely such under-bidding would be detected, the more effective is the threat of retaliation by other firms which ultimately sustains the collusive outcome. This means that increased transparency such as information about the terms and conditions offered by winning and losing bidders in a competitive tender may increase the risk of collusion. What might be considered beneficial for other public policy grounds (minimising the risk of corruption and ensuring fair treatment of bidders, information on expenditure of public funds) can in fact increase the risk of collusion.
- *Frequency of interaction:* Collusion is more easily sustained when bidders interact repeatedly, either in the same market over time, or in different markets, because repeated interaction allows for more effective punishment of firms trying to charge prices below the collusive level. This means that splitting up a contract across multiple tenders can increase the risk of collusion.

[15] OFT (2004), paragraph 1.22.

- *Stability of demand:* Collusion is more easily sustained in markets where demand is relatively stable and predictable. This is because demand volatility makes it more difficult to detect attempts by firms to grab a larger share of the market by charging lower prices, and the incentives to under-bid competitors are larger if demand is large at present, but expected to fall in the future. This means that a constant, predictable flow of demand from the public sector may increase the risk of collusion.

43. It follows that, for example, greater transparency about potential bidders and details of bids, might facilitate collusion or bid rigging. More generally there might be a tension between measures to avoid corruption by ensuring fair treatment of bidders, and measures to increase competition.

44. Formal rules governing public procurement which are designed to avoid any abuse of discretion by the public sector in selecting and evaluating bids can make communication among rival companies easier, promoting collusion among bidders.

45. In some cases, procurers may be able to design procurement processes to influence some of these factors and hence reduce the risk of bid rigging. For example, the OFT report considered the likely competition impacts of including a self-supply option in a procurement contest (see paragraph 0 above). The report found that a self-supply option could sometimes provide an effective fall-back position for the public sector to purchasing from external suppliers. This can impose a competitive constraint, and allow the public procurer to benchmark private bidders and possibly make it easier to identify bid rigging. For example, in a case study on procurement of contracts for building and operating prisons, it was found that having a 'public sector comparator' which allows the procurer to consider whether bids are significantly above the likely cost, could be a good way of undermining collusion incentives.[16]

46. As discussed in the report, there could be other negative consequences of having a self-supply option, particularly for example if there is not perceived to be a level playing field between the in-house bid and external competitors. For example, because the self-supply bid does not fully take into account all possible costs which should properly be allocated to the self-supply bid. In these cases, allowing self-supply can deter entry to the procurement process and hence reduce the overall level of competition. In practice therefore, there are complex trade-offs that need to be made. However, the overall message is that the approach to procurement can have an impact on incentives for collusion, and indeed on wider competition in the market.

8. Certificates of Independent Bid Determination

47. Many procurers use certificates of independent bid determination of their own accord in the UK. There is no prescribed format for such certificates although the OFT has made available templates to any company that requests it. In 2006 the OFT worked with the OGC to issue guidance on maximising competition in procurement[17]. This guidance included advice on detecting and preventing bid rigging, including at paragraph 58 the following advice:

> *"Think of using non-collusion clauses and/or certificates of independent bids (self-certification by the supplier that they have not colluded with others, containing warnings exposing those who make false declarations to legal action: OFT can provide recommended text."*

48. The OFT has provided templates to several procurers since the publication of this document. The OFT considers that self-certification alone may not be sufficient to deter parties from bid rigging, unless it

16 OFT (2004), paragraph 5.39.

17 See www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf.

is accompanied by the threat of effective enforcement action by the competition authority. During the investigation into bid rigging in the construction industry the OFT found numerous instances where such certificates had been completed and yet the companies had engaged in bid rigging. However, they can potentially open up, under civil or criminal law, an alternative or complementary ground for parties to recover damages, and if used can increase the deterrence.

9. OFT's Drivers of Compliance Project

49. In addition, to its enforcement and advocacy work the OFT is seeking to understand how more compliance can be achieved. The OFT is currently working with business and their lawyers to understand:

- The drivers of compliance and non-compliance;
- Identifying current best practices in competition law compliance; and
- Further steps which the OFT could take to encourage compliance.

50. By working with business and their lawyers on these issues, greater compliance could be achieved generally, including in the areas of competition law and anti-corruption.

51. The OFT does not expect to find simple patterns of compliance and non-compliance driven by a small number of factors but rather we expect to see multiple factors to be driving compliance. Below we have set out some of the themes that are emerging from our project, including some 'drivers of compliance' that have been identified.

- Many businesses have integrated compliance agendas that are part of an overall business ethics and corporate responsibility approach.
- Business place great importance to their company image and reputation. Businesses that trade fairly can help their companies win business.
- Strong and unambiguous commitment to compliance is needed from senior management. Where support is not strong, individuals may take compliance risks in order to meet business objectives.
- Some companies have emphasised the positive benefits of knowing the 'rules of the game' so that they have the benefit of competing vigorously without falling foul of rules.
- Individual sanctions have been identified as important. This can include internal disciplinary sanctions, criminal sanctions and director disqualifications.

52. Current best practices that are emerging include:

- Conducting a risk audit to assess appropriate activity in order to mitigate against risks. This could include an evaluation of risk where staff hold roles which require contact with competitors or customers, new staff (especially if they previously worked for a competitor), trade association meetings, and business units that have been the subject of previous investigations.
- Regular evaluation of activities for example by re-testing employees.

53. Examples of some activities that are being undertaken include:

- Formal competition compliance programmes;
- Bespoke competition law compliance training;
- Written materials providing to employees;
- Help-lines run by in-house or external lawyers;
- Mock dawn raids;
- Competition law compliance audits;
- Internal whistle-blowing facilities;
- Internal procedures designed to pick up and escalate possible risks;
- E-compliance tools developed by law firms in conjunction with behavioural psychologists.

54. The OFT will draw on its findings on what drives compliance and non-compliance, and on any current best practices in order to determine what action it should take to encourage competition law compliance. A report on its project is due to be published later this year.

CONTRIBUTION FROM BIAC

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Business and Industry Advisory Committee (BIAC) --

1. BIAC has always been concerned about corruption in international markets and especially public procurement, has strongly supported the development of the OECD Anti-Bribery Convention and has assisted in ensuring its implementation including through consultations in the context of OECD country reviews. We welcome this opportunity to present BIAC's views on this important and sensitive subject to the Global Forum on Competition.

2. The business community is fully conscious that corruption, the abuse of entrusted power for private gain, is a major obstacle to economic growth and social development in the world. Obviously, the principal victims are the consumers and taxpayers of the countries – often the poorest - where corruption is most rife. But corruption goes also directly against the interests of the business entities, which in most corruption cases are subjected to plain extortion.

3. Corruption goes against the long-term interests of the business community, because it affects overall economic growth[1]. It undermines the acceptance of free trade, democracy and the rule of law, which OECD countries believe are the necessary conditions for sustained economic development. In particular, it distorts markets, both because the business itself is not rewarded on the normal basis of price, quality and innovation criteria, but also because companies operating from jurisdictions which do not have a strong legal framework for fighting corruption in foreign countries (or do not seriously enforce it) have an unfair competitive advantage over those based in countries which do.

4. Corruption is not confined to the public procurement area. As pointed out by Transparency International in its latest yearly global report focusing on Corruption in the Private Sector: "for business, [corruption] means more than the perceived need to bribe public officials […] but it also includes, for example, the bribing of purchase officers to win business at other companies' expense (commercial bribery)[2]." Companies which engage in "active" bribery, and their shareholders, may also become victims of their own practices as these "foster a culture of moral ambivalence and reckless opportunism that undermines the overall commitment to integrity and opens the door for other corrupt acts" including to the detriment of the company itself; moreover, "the very strategies and mechanisms used to circumvent internal or external controls and cover up a specific corrupt activity can also provide the infrastructure for other corrupt acts"[3], for example to conceal financial risks or manipulate earnings.

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1 According to a document entitled "Clean Business is Good Business" published by ICC, Transparency International, the United Nations Global Compact and the World Economic Forum in 2009, "estimates show that the cost of corruption equals more than 5% of global GDP (US $2.6 trillion), with over US $1 trillion paid in bribes each year; corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries; moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business".

2 Transparency International, Global Corruption Report 2009, p.7.

3 *Ibid.*, p.8.

5. However, public procurement is one of the sectors where the issues related to corruption are the most apparent, and perhaps the most harmful. First because of its sheer volume: as noted in the Chairman's call for country contributions, it is estimated to account for approximately 15% of the gross domestic product in OECD countries and more in non-OECD countries. It concerns sectors that play a key role in the economy, such as infrastructure, health and education. Ethically, corruption in public procurement is particularly reprehensible because it harms not only consumers but also citizens, because it benefits those who have been elected or selected to act for the common good.

6. Public procurement is generally subject to bidding procedures to ensure that the public entity obtains value for money. Bribery can affect these procedures in two ways. Either it simply disrupts the competitive process as the business is awarded to those who have made illegal payments. Or it is the price to pay for the bidders to enter into collusive practices. Indeed, corruption and collusion often go together. Bribes have to be paid for the competitors to "step back" i.e. to agree to align prices or refrain from tendering. Payments are made to the companies themselves (either in cash or in the form of other compensations such as sub-contracting arrangements) and sometimes to their executives. Payments may also be made to the purchaser entity's officers to close their eyes to these collusive practices; there are even cases where these officers play an active part in the organisation of the bid-rigging practice, and charge the corresponding "fee"[4] .

7. Generally, bid-rigging is considered by competition authorities as a hard-core infringement, for which they impose high penalties[5]. Although bid-rigging is not a specificity of the public sector in itself, it does regularly affect public procurement[6]. And although corruption is not a specificity of public procurement in itself, most of the high-profile corruption cases occur in the public sector. Competition authorities, both in their enforcement and their advocacy roles, must therefore play a key role in the fight against corruption in public procurement alongside anti-corruption and procurement agencies. As stated at a recent 2008 OECD Competition Committee Working Party meeting, BIAC supports the vigorous enforcement of antitrust laws aimed at preventing bid-rigging and punishing offenders[7].

8. Thanks largely to the actions of the OECD, the legal background is now very clear for companies. It is not so long ago that in many countries illegal commission payments were tax deductible as ordinary business expenses provided they were discretely declared as such, and export financing support or international aid to development was granted without serious scrutiny to ensure that it would only be used in corruption-free conditions. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 has now been ratified by 38 countries, and transposed into

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4 For a recent, ominous example of a hospital's purchasing official pleading guilty to bid-rigging, see the U.S. Department of Justice's press release of 12 January, 2010.

5 For instance in the European Union, the practice of bid rigging will automatically infringe Article 101(1) TFEU. It was condemned by the European Commission in 1973 in the European Sugar Cartel case ([1973] OJ L140/17); when bid rigging was discovered in the Pre-Insulated Pipe Cartel ([1999] OJ L24/1), and later in the Lifts and Escalators case (IP/07/09), the European Commission imposed record fines. In Germany, bid-rigging is a specific criminal offence.

6 "Evidence suggests that bid-rigging, at least in some countries, may be rather widespread, in particular in government procurement cases" (A. Jones and B. Sufrin, EC Competition Law, Oxford University Press, 3rd ed., 2008, p. 894). It is generally considered that the conditions for bid-rigging to occur more frequently are related to the structure of the market (small number of sellers, lack of ready substitution with other products, repetitive purchases by large buyers, etc.). See Fiona Carlin and Joost Haans, "Bid-rigging Demystified", *Practical Law Company - PLC* (November 2005).

7 BIAC contribution to the OECD Competition Committee Working Party No. 3 roundtable on Bid-Rigging and Public Procurement, June 10, 2008, DAF/COMP/WP3/WD(2008)74.

domestic law making it a criminal offence to bribe foreign officials[8]. Through its "peer review" process, the OECD exercises pressure on countries parties to the Convention so that their internal legislation and enforcement are improved with a view to a more efficient application of the treaty[9].

9. The OECD Convention has paved the way to several other international treaties or mutual commitments, worldwide or regional, achieving the same purposes[10]. It has been complemented by OECD recommendations to the member states, chiefly prohibiting any governmental permissiveness in exporting countries[11], and by agreements by other governmental bodies securing the co-operation of banks in the fight against corruption[12].

10. Avoiding criminal sanctions against themselves and their executives has therefore now become a very significant deterrent to company engagement in corrupt practices. However, it is not the only one. The cost of procedures and remedial actions can be very high, while the impact of management distraction and the harm to personnel motivation and corporate image are immeasurable. The damage resulting from an individual corruption case can also extend to the whole industry: the harm it inflicts on the reputation of the company who engages in it may spill over to those companies which refrain from illegal practices.

11. In many cases, the benefit derived from corrupt practices, even if successful and undetected, is questionable. Although corruption distorts competition, it is not even a reliable or guaranteed way to maintain or protect high prices: the pattern is often one where the company is approached by an intermediary who threatens "if you do not commit to bribe, you will not be allowed to compete", rather

8 For instance, the German Act of 10 September 1998, the Canadian Act of 10 December 1998, the Argentinean Act of 1st November 1999, the French Act of 30 June 2000, the Italian Act of 29 September 2000, or the U.S. Amendment of October 21, 1998 to the Foreign Corrupt Practices Act ("FCPA").

9 This may concern for instance the enactment of criminal liability of legal persons (companies), or the conditions of exercise of the officials' and private persons' right/duty to report offences. In the UK, after an initial review of existing legislative and common law provisions it was considered that these were sufficient to implement the Convention and a wide reform is now in preparation: the Bribery Bill under which an act of bribery for or on behalf of a British company anywhere in the world will be a strict liability offence carrying an unlimited fine with the sole defence being that the company took all reasonable measures to prevent the act of bribery taking place, e.g. through active compliance programmes.

10 To name only a few: the United Nations Convention against Corruption of 2003, which addresses corruption both in the public and the private sectors (signed by 140 countries, ratified by 94), the Inter-American Convention against Corruption of 1996, the Council of Europe's Criminal Law and Civil Conventions of 1998, the South African Development Protocol against Corruption of 2001, the African Union Convention on Preventing and Combating Bribery of 2003, the Asia-Pacific Economic Co-operation Organisation's Santiago Commitment to Fight Corruption and Ensure Transparency.

11 See in particular the OECD Recommendation on Tax Deductibility of Bribes (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#tax), OECD Guidelines for Managing Conflict of Interest in the Public Service (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#public), OECD Action Statement on Bribery and Officially Supported Export Credits (http://www.biac.org/pubs/anti-bribery _resource/section_2.htm#export), Principles for Donor Action in Anti-Corruption (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#donor), the Paris Declaration on Aid Effectiveness (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#aid), and most recently the OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International business transactions (26 November 2009).

12 See in particular the Basel Committee Guidelines on Customer Due Diligence for Banks (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#basel), and the rules and guidance issued by the Financial Action Task Force (http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#faft).

than promises "if you bribe you will win the competition". Moreover, the worst cases are not necessarily those where the highest margins are made by the suppliers - the margin just goes elsewhere.

12. As stated in the "Clean Business is Good Business" document[13], "Business organisations, and the companies they represent, have actively involved themselves in the fight against corruption. Companies are increasingly engaging in sector-specific or multi-industry initiatives, locally, regionally and/or globally, to share their experiences, learn from peers and, in partnership with other stakeholders, contribute to levelling the playing field."

13. BIAC has been at the forefront of the fight against corruption through its Task Force on Anti-Bribery and Corruption. This Task Force consists of business experts nominated by BIAC member associations. Since its inception in 1997, it supported the development of the OECD Anti-Bribery Convention and assisted in ensuring its implementation including through participation in consultations in the context of OECD country reviews. BIAC has also been engaged in alerting OECD governments to the on-going problem of bribe solicitation. More recently, the main focus has been to contribute business views to the ongoing review of OECD anti-bribery instruments and to the design of the future OECD monitoring of the implementation of its Anti-Bribery Convention.

14. Other international business organisations are also very active. For instance, the International Chamber of Commerce (ICC) has long been involved in the fight through its Commission on Anti-Corruption. In 2005, it issued a revised version of its Rules and Recommendations to Combat Extortion and Bribery, first published in 1977. The World Economic Forum Partnering against Corruption Initiative (PACI) is a platform for companies to commit themselves to develop, implement and monitor their anti-corruption programmes through peer network meetings and provision of private sector-driven support tools, based on the PACI Principles for Countering Bribery. PACI was initiated by World Economic Forum member company CEOs in Davos in 2004 and has widely expanded since.

15. Similar initiatives take place at the regional level, such as that of the Pacific Basin Economic Council (an association of senior business leaders in 20 economies grouped around the Pacific Ocean) and at the national level, where many national confederations publish and update recommendations on the prevention of corruption.

16. Companies also engage in "multi-stakeholder" initiatives such as those of Transparency International, which introduced in December 2002 its Business Principles for Countering Bribery, or the United Nations Global Compact. The latter is a voluntary initiative with a mandatory requirement for its 4,000 business participants to disclose, on an annual basis, performance changes in the issue areas. In 2004, a 10th Principle was added to the United Nations Global Compact, stating that: "Businesses should work against corruption in all its forms, including extortion and bribery". Another multi-stakeholder example, targeting a specific sector, is the Extractive Industries Transparency Initiative (EITI) initiated by the British government, and which has issued a set of principles and criteria, and sets of illustrative guidance for "resource-rich" countries and for extractive industry companies.

17. Beyond the statement of principles, practical tools (case studies, action guides, guidelines for whistleblowing, etc.) have been developed to assist companies in the fight against corruption and extortion. Such tools may originate from international governmental organisations like the OECD[14] or the World Bank[15], from national governments[16], from international business organisations like ICC[17], from national

13 See note 1 above.

14 OECD Risk Awareness Tool for Investors in Weak Governance Zones.

15 Business Fighting Corruption, The World Bank Institute's Resource Centre for Business.

trade associations[18], from NGOs, international like Transparency International[19] or domestic, or from multi-stake-holder organisations[20].

18. Special attention must be given to industry sector initiatives. Remarkable efforts have been made in certain sectors, which are particularly vulnerable to corruption and extortion. One example is the "Common Industry Standards" developed by the members of the Aerospace and Defence Industries Associations of Europe (ASD), including commitments to avoid all forms of direct and indirect corruption, and providing guidance on compliance matters. Similarly, U.S. defence industry companies have signed the "Defence Industries Initiative Principles of Business Ethics and Conduct". Another example is the "Guidelines on Reputational Due Diligence" published by the International Association of Oil and Gas Producers, a practical tool to assist companies in the evaluation of the potential risks of doing business through associates and the implementation of measures to reduce those risks.

19. Understandably, antitrust authorities may be wary of situations where competitors get together to address issues related to their behaviour on the market. However, companies dedicated to "top-class" standards of business conduct, cannot succeed (or even survive) if they are alone in their stand against corruption. The sector initiatives described above are key contributions to the levelling of the playing field, and their goals are of such importance to the development of the world's economy that they must seriously be encouraged.

20. The authorities should also be clearly supportive of compliance programmes developed by companies, which are generally multi-subject and may address both anti-corruption and antitrust issues. Indeed, both collusive and corrupt behaviour can only be successfully combated if employees, who may be tempted either by personal greed or be put under pressure to achieve performance targets to give in to extortion or engage in illegal action, are clearly made aware of the principles and values on which the company will not compromise, are provided with adequate training and be subjected to adequate internal controls. In this respect, the OECD urges its member countries to encourage internal compliance programmes in companies[21] and the relevant authorities should properly take those programmes into account in both their advocacy and their enforcement roles, especially as a potentially mitigating factor or remedy when reviewing companies' conduct.

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16 For instance, the Business Anti-Corruption Portal of the Danish International Development Agency.

17 ICC Guidelines on Whistleblowing.

18 For instance, "Avoid Corruption, a Guide for Companies" by the Confederation of Danish Industries, "Avoid Corruption in International Business (*Korruption bei Auslandsgeschaeften vermeiden*)" by ICC Austria and the Austrian Federal Economic Chamber (AWO), or "*Démarche Export – Prévenir le risque de corruption*", a practical guide aimed at SMEs by MEDEF, the Confederation of French Industries.

19 Transparency International's "Six-Step Implementation Process" (a guide for companies in the process of devising and implementing an anti-bribery programme), "Self-Evaluation Module" (to assist companies wishing to assess their anti-bribery performance) and "Global Integrity Pact" (a process that including an agreement between a public purchase and all bidders for a public contract).

20 For instance, "RESIST" is a joint project of ICC, PACI, Transparency International and the UN Global Compact to develop concise advice on how to resist different extortion scenarios.

21 OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International Business Transactions, p.5. See also the International Standard Organisation's draft "Guidance on Social Responsibility" document ISO/DIS 26000, currently circulated for comments, which spells out recommendations for compliance programmes relating to, among other issues, anti-corruption (p. 46) and fair competition (p. 48). See also the UK Bribery Bill approach, as referred to in note 9 above.

CONTRIBUTION FROM CUTS

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT[1]

-- CUTS --

1. Introduction

1. According to the Organisation for Economic Co-operation and Development (OECD), "*procurement is the process of:*

- *Identifying what is needed;*
- *Determining who is the best person or organisation to supply this need; and*
- *Ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner.*" (OECD, 2006)

2. In yet another definition by Transparency International "Procurement" refers to the acquisition of consumption or investment goods or services, from pencils, bed sheets and aspirin for hospitals, gasoline for government cars, car and truck fleets, equipment for schools and hospitals, machinery for use by government departments, other light or heavy equipment or real estate, to construction, advisory and other services from the construction of a hydroelectric power station or expressway to the hiring of consultants for engineering, financial, legal or other advisory functions.

3. Public procurement refers to the government's activity of purchasing goods and services needed to carry out its functions - ranging from construction to paper, missiles to street cleaning, information technology to secretarial services, etc. Such procurement is of huge importance to any country including India. Public procurement is a key economic activity of governments, accounting for an estimated 15% of Gross Domestic Product (GDP) worldwide on an average.[2] Public procurement impacts the economy of any country significantly by generating demand and consumption.

4. Public procurement can be used as a tool for generating social benefits - for example, by way of preferential treatment in procurement, it may be used to promote and support development of backward regions or protection of small scale industries, etc.

5. In most countries characterised by a high incidence of corruption, public procurement remains a key activity of the government suggesting some kind of possible positive association between corruption and the magnitude of public procurement, with the latter driving the former. The public procurement mechanism has been empirically found to have an impact on the integrity of vendors present in the market. An inefficient public procurement system may act as a deterrent to firms maintaining high quality and

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[1] This document was written by UDAI S. MEHTA Policy Analyst, PRADEEP S. MEHTA, Secretary General, and SIDDHARTHA MITRA Research Director, from CUTS International, India.

[2] OECD (2008), "Fighting cartels in public procurement", Policy Brief, available at http://www.oecd.org/dataoecd/45/63/41505296.pdf.

ethical standards. Firms with lesser competence would be able to survive in the market by exploiting the loopholes of the public procurement system.

6. As mentioned, the public procurement system is highly prone to corruption. But is corruption good or bad? Corruption has ancient roots and is a global phenomenon. Corruption is undesirable because it not only results in loss of public trust and faith in the government but also sub-optimal allocation of resources with negative implications for the growth and level of output. It also leads to a skewed distribution of income. As the link between individual effort and individual income is weaker in highly corrupt societies, the aggregate supply of effort is also adversely affected. This again has a negative impact on economic growth.

7. Corruption also results in lessening of innovation. Companies relying on corruption will not spend resources on innovation, and even companies that do not indulge in corruption will feel less inclined to make the necessary investments in innovation, if they are not able to gain access to markets/consumers due to corruption by their competitors. Thus, if a government allows corruption to survive and shortlists bidders not on the basis of their experience and/or ability to execute the project, but on their ability to indulge in corruption in the form of bribery or collusion, the country will soon end up risking losing new investment opportunities. Such loss will adversely affect the country's economic development and without such development poverty alleviation through trickle down or augmentation of government resources will not be possible.

8. A few economists have attempted to measure or theoretically analyse the consequences of corruption for an economy. But, on the other hand, benefits of corruption have also been identified. It is often argued that bribes work as grease in a sluggish economy to keep the wheels moving and thus improves its efficiency. As explained below, it can also pave the way for business to avoid cumbersome rules/regulations, which in most cases act as speed breakers in the path of growth:

> "*Interference with the free market usually induces inefficiencies. However, bribes sometimes can partially restore the price mechanism and improve allocative efficiency. Corruption might be viewed as people's optimal response to market distortions. In this sense, corruption has some beneficial effects to society, but the resulting solution is only second best.*"[3]

9. However, as mentioned above, there are strong arguments which point to the enormous harm caused by corruption.Many international institutions, such as the World Bank and the International Monetary Fund, have reached the same conclusion. The World Bank believes that corruption is a major factor impeding economic development. Corruption hampers economic growth, disproportionately burdens the poor and undermines the effectiveness of investment and aid.[4]

10. The rest of the paper is structured as follows. Section 2 examines the sources of corruption in public procurement and then evaluates systems of public procurement in India with emphasis on implications for the extent of corruption. This analysis is then used in Section 3 to suggest the way forward i.e. the insights from Section 2 are used to come up with recommendations for the public procurement system/processes in India.

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[3] Arrowsmith, S. and Davies, A (1998), "Public Procurement – Global Revolution", Kluwer Law International.

[4] Zhang H, "Corruption, Economic Growth and Macroeconomic Volatility", available at http://www.karmayog.org/anticorruption/anticorruption_913.htm.

2. Public Procurement: Impact of Corruption

2.1 Corruption in Public Procurement

11. Corruption has many faces in public procurement. These can range from the most common form of bribery to more sophisticated forms of political corruption or blue collar corruption. Bribes usually are smaller amounts paid to lower level officials to expedite a decision, to induce a decision which has been delayed or to avoid undue delays.

12. The most common and rampant form of corruption in public procurement is the practice of collusion or cartelisation for the purpose of bid rigging. Bidders often form a cartel, which then tries to manipulate the award decision in favour of one of their members, with or without the involvement of a corrupt official. Each of the cartel members thus gets a chance to be a successful bidder through prearranged bidding for several contracts bid for by the same set of firms. This undermines competition in the industry and its price lowering impact. Bidders can eliminate competition in public procurement in many simple ways - for example, a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer; a competitor agrees not to bid or withdraws a bid from consideration; a competitor agrees to submit bids only for certain geographic areas.

13. There are certain factors that help bidders to engage in practice of collusion, such as[5]:

- High entry barriers that make it difficult for new or smaller firms to bid for contracts;
- Opportunities for repeated interaction among market participants
- Presence of active trade associations
- A high level of market transparency that makes it easy to see what the competitors are doing (if bidders are easily identifiable)

14. Corruption in government abets such collusion as corrupt government officials turn a blind eye to practices such as bid rigging, with such behaviour being linked to a share in the gains enjoyed by colluding firms.

2.2 Public Procurement in India: Status and Challenges

15. In India, different procurement rules apply at the Central Level, in the states/territories, to the central public sector units and to public sector enterprises. At the federal level, procurement is regulated through executive directives. The General Financial Rules, issued by the Ministry of Finance, lay down rules and procedures for the procurement of goods and services. A manual on policies and procedures for purchase of goods has been published to assist the procurement entities and their officers in procurement.

16. At the Central Level, procurement is administered by the individual government agencies. Certain control and functions are carried out by central authorities such as the Comptroller and Auditor General and the Central Vigilance Commission (CVC). The Comptroller and Auditor General of India (CAG) undertakes ex-post audit of government expenditures including government and public sector procurements, essentially checking the budget for expenditures and adherence to procedures. The CAGs annual and special reports highlight unauthorised and wasteful expenditures, losses to the public exchequer

[5] http://www.oecd.org/dataoecd/36/40/42594504.pdf.

and unjustified departures from established procedures. The reports are published and are discussed in the Parliament and State legislatures.

17. However, in India there is no single authority at the Central Level which is exclusively responsible for overseeing procedures relating to the procurement process. Thus, all states and public sector units have their own procurement organisation. There is no Central Procurement Authority though Central Purchase Organisations such as the Directorate General of Supplies and Disposal (DGS&D) are active in finalising contracts with registered suppliers for goods and items under the provisions of Government Financial Rules and State Financial Rules.

18. One major problem being faced in India is the confusion created by the existence of multiple procurement guidelines and procedures issued by various agencies (centre and state level). There is neither a single comprehensive public procurement standard nor a single agency to deal with public procurement policy in India. For example, in the US the Federal Acquisition Regulation is the public procurement standard which codifies a uniform policy for acquisition of supplies and services. This office is headed by a committee consisting of the heads of the major procuring organisations. Lack of standardisation not only causes inefficiency but also creates a major hurdle in ensuring transparency and accountability in procurement and provides enough leeway for indulgence in corrupt practices.

19. In the absence of a Central law or State act in public procurement, each ministry department, agency, etc, follows the basic tender system with certain variations. The key stakeholders involved are always the government and the private sector but these are represented by different agencies in different cases and thus procedures and practices vary from case to case. This reduces the credibility and public confidence in the system, creates confusion and thus provides room for corruption.

20. Another problem that one faces in public procurement is the multiplicity of tender documents used by different ministries and agencies in India. According to one estimate, there are more than 150 different contract formats used by the government and its agencies. This leads to confusion in the minds of bidders and concern about the risks imposed on them. Often in a given state, for the same work (for example, construction of a bridge), the tender document differs with the agency of issue, i.e. the nature of the document issued by the Public Works Department is different from that issued by the Municipal Corporation and both documents are different from that issued by the Metropolitan Urban Development Authority or the State Road Development Corporation. The differences manifest themselves in differences in criteria such as qualification requirements, selection, payment terms, dispute settlement mechanism, etc.

21. Thus, there is an urgent need in India to put in place comprehensive public procurement law/standards with a single authority to deal with relevant issues.

22. The efforts made by the Government to ensure standardisation in other areas such as steps taken by the Committee on Infrastructure under Planning Commission of India to adopt Model Concession Agreements with respect to Public Private Partnerships[6] can be potentially replicated for standardising the whole public procurement system in India.

2.3 Public procurement at State level in India: Presence of Corruption

23. In a federal set up, states compete with each other to attract industrial investment by offering various incentives to the private sector such as electricity duty waivers, tax holidays, etc. Similar packages are also provided to protect and promote local units. One such preference given by the States is to local units during public procurement. Under this policy, price preference is given to the local units.

6 http://infrastructure.gov.in/mca.htm.

24. The aim of such policy is to protect and support small sector units, which otherwise might find it difficult to meet competition from large enterprises. Even if products of other players are better in quality or more competitive, these are not purchased because of price preference. Overall, the policy of giving preference might be desirable in the context of promoting balanced development and might keep vote banks happy but the incentives it offers for cartel formation by local units under the aegis of government protection are problematic. In such cases, the State Government invariably ends up paying a higher price for a product which might be of inferior quality (refer to Box 1).

Box 1. Barbed wire association in Rajasthan

As per an earlier Rajasthan Government policy, a certain quota of barbed-wire was to be procured from local manufacturers. This is supposed to have led to the formation of a 'cartel' under the name of Rajasthan Barbed – Wire Manufacturers Association in mid-80s. This association hiked the prices and with an implicit arrangement allocated the total requirement of barbed-wire amongst its members.

As a consequence of this arrangement, poor quality of barbed-wire was procured at high price with almost no quality checks at the Government end. Local manufacturers depended solely on Government's patronage rendering them uncompetitive. With the changed Government procurement policy, local units were closed down and the association broke up.

Source : Mehta. P (2006), "Towards a Functional Competition Policy for India", CUTS International

25. In this context, the Parliamentary Standing Committee on Railways in 2004 observed, that "the procurement of concrete sleepers has become a sensitive matter, because a lot of unscrupulous existing manufacturers have formed a 'cartel' to secure orders by unfair means or tampering with the procedure and simultaneously keeping the new competitors out of the race. The committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing unit. They also expressed their unhappiness that new entrants are not encouraged, which ultimately strengthen the cartel of old/existing manufacturers". This, in procuring 160 lakhs broad gauge sleepers, the Railways awarded contracts to existing 71 firms, and ignored 24 new firms entirely.[7]

26. Further, collusion between the contractor and/or supplier and the procurement agency to earn extra profits is a major problem. By the very nature of the arrangement, it is extremely difficult to detect and curb these though there have been instances where the agreement did not materialise and the cases were reported:

> "*Few instances could be drawn from the CAG report. One such example is the procurement of Balau sleepers from Malaysia by Indian Railways, involving a sum of INR 20 crore. The Railways went against the report of the Forest Research Institute and cleared the imports. Later, the officers who were charged with the responsibility of checking quality standards also cleared the sleepers, despite their being of sub-standard quality. Thus, few of the strategies that are followed in collusion with the suppliers are:*

- *Quantity variations or change in specification ex post to favour the contractor in case of projects;*

7 Mehta. P (2006), "Towards a Functional Competition Policy for India", CUTS International.

- *Accepting poor quality product or work;*

- *Coming up with ingenious requirements and arguments in favour of the contractor or the supplier.*"[8]

3. Way Forward

27. In recent times, public procurement has attracted attention in the policy discourse on improving governance to promote sustainable growth and improve quality of public services. However, the situation is not so grim in all Indian states. For example, in Tamil Nadu, an Act called 'The Tamil Nadu Transparency in Tenders Act 1998' came into effect in 2000. The Act mandated an open advertisement mechanism for the tender system, and publication of tender notices and tender decisions in weekly bulletins, and also introduced an appeal procedure.

28. Following the steps taken by Tamil Nadu, the state of Karnataka too enacted 'The Karnataka Transparency in Public Procurement Act 1999.' The steps taken by the two states have enhanced transparency and improved public confidence. The performances of public sector enterprises have improved a lot and large business houses have also become more efficient and transparent in their functioning. Overall, the number of public complaints has gone down.

29. Thus, other states could also follow the steps taken by Tamil Nadu and Karnataka to ensure transparency and accountability in public procurement. Given below are a few suggestions for policy makers/decision makers to fight corruption in public procurement.

3.1 Adoption of a dedicated agency for public procurement

30. The absence of a nodal agency to look after issues pertaining to public procurement policies/processes has contributed to the multiplicity of procedures, rules, practices and documents, etc. It is recommended that an agency be created at the Centre with offices in each state to exclusively deal with public procurement policies and bring about standardisation in theory and practice.

3.2 Introduce Public Procurement Law and Public Procurement Regulations[9]

31. A 'Public Procurement Law' complemented by a set of Public Procurement Regulations, to replace and consolidate the present fragmented rules, will improve transparency and ensure accountability. The law would discourage the polity and corrupt officials from adopting short cuts in the name of public interest. The law could also define the precise scope for court intervention, thereby eliminating frivolous suits which result in wastage of time.

32. A few States have taken the lead - for example, the issue of 'The Tamil Nadu Transparency in Tenders Act 1998' by Tamil Nadu followed by a similar issue by the Karnataka Government. There are also international models to draw lessons from - for example, the UNCITRAL model law published in 1980 which has served as a model for the procurement law being legislated in most East European and ex-Soviet Union countries, as well as some developing countries in Africa and Asia; and the Government Procurement Agreement of the WTO.

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8 India Infrastructure Report (2003), "Public expenditure allocation and accountability", 3iNetwork, Oxford University Press.

9 World Bank (2003), "India Country Procurement Assessment Report", Report No 27859-IN.

3.3 Adoption of E-Procurement Process

33. Procurement is generally regarded as a sensitive function of the public sector and is rarely transparent. Governments across the globe are under immense pressure to meet the expectations of citizens and ensure transparency in the process as well as enhance accountability of involved government officials. There is a growing realisation in governments that usage of information and communication technology (ICT) can remove existing hurdles and make the public procurement mechanism more efficient and transparent.

34. The history of extensive use of e-procurement in the public sector in India is short and therefore does not yield many pointers for the future. "The e-procurement project of Government of Andhra Pradesh has been implemented successfully. The implementation was instrumental in reducing cartel formations amongst contractors and suppliers since all the bidding is done online through the portal. It has actually increased the participation from the supplier community since anybody can bid for a tender remotely through the internet. The new system has considerably empowered the small and medium-sized suppliers[10]".

3.4 Role of Competition Commission of India

35. The Indian Competition Act, 2002 specifically prohibits collusive bidding. Thus, the Competition Commission of India (CCI) is mandated to play an important role in developing an efficient public procurement system in India. There is a need to buttress competition advocacy with effective enforcement through action against cases of bid rigging, collusive bidding, etc. Strict and proactive enforcement against bid rigging has promoted fair and free competition in public procurement in many countries and saved significant public resources by enhancing competition.

36. The following are certain steps that could be taken by CCI:

- Creation of awareness regarding risks of bid-rigging in procurement by way of outreach programmes;
- Education and capacity building of procurement officials in detecting and collecting evidence which could then be used against colluders in a court of law;
- Education of public procurement officials and government investigators on the cost of bid-rigging to the government and taxpayers;
- Development of a toolkit to catalogue standard indications of potentially collusive conduct which could help procurement agencies to undertake spot investigation for identifying possible collusive activities, etc.

3.5 The Right to Information Act, 2005

37. The adoption of the Right to Information Act, 2005 in India marks a watershed in attainment of transparency and accountability with its objective of creating an informed citizenry to facilitate effective democracy. Procurement procedures are covered by the Act. The active involvement of civil society organisations in social audit could lead to greater awareness and transparency in the whole process of public procurement. Information relating to the procurement process is accessible by the citizens under this Act.

[10] http://www.csi-sigegov.org/casestudies/22_implement_e_procure.pdf.

38. The Right to Information Act is one tool through which we can monitor the work of anti corruption agencies and use this information to create political pressures for change. It is only when the common man is able to use these tools and take a more proactive role in the discourse on checking corruption that pressure for reforms emerge, as it would be unrealistic to expect insiders who benefit from the system to take initiatives to improve the system and make it more transparent and corruption free. Political pressures need to be created externally and public pressure is thus essential.

CONTRIBUTION FROM MR. DAVID LEWIS

BID RIGGING AND IT'S INTERFACE WITH CORRUPTION

-- Contribution by Mr. David Lewis --

Introduction: defining the terms

1. Bid rigging is a very large subject, the more so given its close interface with corruption. So it's as well to clarify at the outset the sense in which I will use the terms 'bid rigging' (or 'collusion') and 'bid corruption' (or 'corruption').

2. When I use the term 'bid rigging' I refer to a private agreement between competitors designed to determine the outcome of a putatively atomised, individualised bidding process. The agreement may cover price, market and/or customer allocation and the identity of the winner of the bid, and frequently also the payback to the losers. This is bid rigging in its normal antitrust meaning and which most competition statutes prohibit *per se* along with other price and market allocation agreements. Notionally competing suppliers are not competing on the merits, they are not offering the lowest priced, best quality goods and services that they are capable of supplying. They are rather putting in an offer that is the product of a clandestine agreements amongst themselves, an agreement that by its very nature will include not only the agreed, supra-competitive winning price but also the identity of the winner and, naturally, of the losers.

3. I distinguish this from 'bid corruption' which is the solicitation by, or offer to, a public official of something of value in order to influence the outcome of a bid. This is characteristically the province of the criminal justice system, although it may also be subject to sanction by the procurement authorities, that is, administrative bodies, who, in many jurisdictions, are empowered to disbar a firm from public procurement tenders, may sue for damages and void agreements.[1]

4. Although it is conceivable, and it undoubtedly does occur, that bid corruption may upset the best laid plans of colluding suppliers, I will focus on bid rigging (as defined above) and will consider bid corruption when it operates in tandem with bid rigging, when they complement each other. For reasons that are elaborated below this combination of bid collusion and bid corruption is particularly toxic.

5. I will not however deal with the interface between corruption and what may be termed 'exclusion' even though the competition implications and effects of the exclusion that arise from corruption are undoubtedly severe. This is the interface explicitly captured by the World Bank's broader definition of bid rigging whereby *'government officials manipulate the bidding process to exclude other (presumably cheaper) competitors.'* The fact is that, as the World Bank definition recognises, in relation to public procurement every act of corruption in the bidding process will always embody potentially grave competition implications even if the bid is not the outcome of a collusive agreement between competitors.

[1] Note well that the World Bank, in its manual on the 'Most Common Red Flags of Fraud and Corruption in Procurement in Bank-Financed Projects', uses a much broader definition of bid rigging that explicitly takes in, is indeed principally directed at corruption. It defines bid rigging as a practice designed 'to ensure that the contract will be awarded to the bribe-paying firm (whose prices are now inflated to cover the costs of the bribe)' whereby 'government official manipulate the bidding process to exclude other (presumably cheaper) competitors.'

Firm A will pay a bribe to a state procurement official in order to secure a contract that A has chosen to contest, not on the merits, but rather by the payment of a bribe intended to persuade the buyer to reject the offering of A's rivals, no matter that their offering is superior. The upshot of 'pure' bid corruption (that is, bid corruption that involves no collusion) is that millions of consumers the world over are denied the benefits of the best quality, lowest price goods, which is precisely the objective of antitrust enforcement. However, in instances of bid corruption this has occurred because of the *corrupt* vertical relationship between a public procurement official and a producer of goods or services rather than as a result of *collusion* between horizontally related competitors.[2]

6. This Forum may want to consider whether there is, at competition law, an impeachable vertical agreement or even impeachable unilateral conduct arising from 'pure' bid corruption. As already intimated this poses the reverse of the usual vertical practice problem: consumer harm will not usually be difficult to identify and prove, but does the harm arise from an impeachable transgression of competition law? I will not deal with this issue although I will take note of exclusion where collusion and corruption interface precisely to extend an advantage to the cartel through the exclusion of a maverick or any other bidder who is not part of the cartel. Of course corruption may support a cartel in other ways as well, for example, in order to protect the cartel from detection, or to enhance the internal stability of the cartel. However when discussing the various interfaces between bid rigging and bid corruption I will occasionally draw on examples from 'pure' bid corruption cases. I will try, wherever possible, to illustrate issues in bid rigging, and, where appropriate, bid corruption by reference to actual cases.

7. But first a number of preliminary remarks. Firstly why *'collusion and corruption in public procurement'*. In particular is there a quality, a character, to collusion in public procurement that distinguishes it from any other form of collusion? Certainly the abiding character of public procurement is that it takes the form of the public issue by procurement authorities of tenders that specify the goods and services that are required by a public authority. Prospective sellers of the good or service in question then submit bids that offer to supply the specified products or services at a stated price. However, if there was to be collusion in the submission of these bids, how does this differ from any purchaser, public or private, approaching a range of widget manufacturers individually only to find that each offers, in consequence of a collusive relationship, an identical price and discount?

8. We should recognise at the outset that tenders issued by public procurement authorities cover anything from the supply of pens and pencils to government offices to the provision of a turnkey nuclear power station. That is, the variety of tenders will cover a range from the purchase of 'off the shelf' products whose specifications are easily established and described to immensely complex engineering projects or ICT products and services that require concomitantly detailed, complex and customised specifications. In the nature of things, by volume of tenders issued it will be the standardised products that dominate whether these be in the area of pharmaceutical products, building products or stationery products, although it is likely that the massive, highly specified armaments purchases or power stations or software systems loom larger when public procurement tenders are measured by value.

9. We should also recognise that, increasingly, procurement by means of tender is employed in the private sector as well. However this session of the forum is explicitly concerned with '*collusion and corruption in public procurement'*. Although, many competition statutes make specific reference to price fixing, market allocation *and* bid rigging in those sections dealing with the *per se* prohibition of particular types of horizontal agreement, suggesting that in the perception of many legislatures bid rigging represents collusion of a particular type, I know of no legislation that distinguishes the rigging of public tenders from

[2] The bid corruption literature often refers to the vertical relationship between a procurement official and a bidder, as 'collusion' between buyer and seller.

the rigging of privately issued tenders. I will however focus on public procurement tenders although occasional reference will be made to private procurement tenders.

10. So what is special about 'collusion and corruption in public procurement'?

Why bid rigging in public procurement?

11. If hard-core cartel conduct is understood to be the most egregious antitrust offence, then bid rigging in public procurement is possibly the most egregious form of hard-core cartel conduct.

12. Firstly, as already intimated, it frequently operates in tandem with corruption thus drawing public servants into what is otherwise – that is, in characteristic price fixing or market allocation cartels – purely private conduct. Society is thus hit with a double whammy of criminality or law breaking - on the part of private sector players pursuing their private interests through collusion, and then by the extension of this criminality and self-interested conduct into the ranks of those public servants entrusted precisely with protecting the interests of the public. As we know while collusion is not always a criminal offence, it is generally prohibited *per se* in competition statutes. Corruption is, on the other hand, always a criminal offence.[3] I should emphasise that this is not to suggest that all collusive conduct in relation to public procurement necessarily involves corruption. As already intimated the intervention of corruption may upset a well organised cartel and make it more susceptible to detection. However, that there is frequently a relationship between corruption and collusion in tendering is sufficient to place it in a category of anti-competitive offences that demands particularly close attention.

13. Secondly, bid rigging hits the consumer with a double whammy. He not only suffers the characteristic consequences of hard core cartel conduct – higher priced products of inferior quality - but he pays an additional price because of the reduction it involves in the value of his tax dollar. He is, in other words, hit *qua* private consumer, and *qua* tax payer. He pays top dollar for an inferior good from a public agency which has used his tax dollars to purchase the inferior or over-priced product and then sell it back to him, say in the form of supra-competitive public transport fares or water charges.

14. Thirdly, we should recognise that most collusive conduct in relation to procurement by way of public tender is, in most of its essential aspects, indistinguishable from any of the other familiar forms that collusion takes insofar as its essential mechanisms involve the fixing of a price and the allocation of a market. Because the form that the purchase takes is that of a public tender, it presupposes that the colluding firms agree which firms will participate in the tender, will bid for the contract (market allocation), and the minimum price or maximum discount (price fixing) that will be tendered by those firms who are designated as the losers of the bid, in order to ensure that the pre-determined winner, does indeed triumph. Hence, when all is said and done for the most part the rigging of a bid in response to a public tender is concerned with familiar questions of price fixing and market allocation.

[3] At least this is true of the recipient of the bribe. Regrettably it is not always true of the bribing party. Notoriously, until recently in several European countries bribes were tax deductible expenses, at least if paid to foreign government officials.

Box 1. The South African Cement Products Cartel

This is one of the most comprehensive, longest standing cartels yet uncovered in South Africa. The cartelised products included pre-cast concrete pipes, culverts and manholes with a variety of applications including road building and maintenance, the construction of storm water systems and water reticulation infrastructure and sewage systems. The vast majority of the products were procured by public tender either by the public sector itself or by firms under contract to the public sector. The cartel leaders were both South African based – Rocla a subsidiary of the giant Murray and Roberts Group and Infraset a division of the Aveng group – and are sub-Saharan Africa's leading suppliers of cement products. Rocla applied for and was granted leniency and the Commission filed charges against 10 other companies, several of whom, including Infraset, have entered into consent decrees with the Commission.

The modus operandi of this cartel, which operated for 35 years and which covered the South African, Swaziland, Botswana, Namibia, Zimbabwe, Mozambique, Zambia and Tanzanian markets was the fixing of prices and the allocation of contracts and tenders in accordance with agreed upon market shares in designated regions. The allocation occurred at monthly meetings with a cartel member known as 'the banker' responsible for allocating contracts and receiving reports from each of the members regarding tonnages sold in a designated period. Where the tonnages sold had the effect of distorting the agreed market shares, the banker would ensure that this distortion was corrected by subsequent allocations.

Thus, although the form of much of this cartel activity involved 'bid rigging' it was, for the most part, a plain vanilla price fixing and market allocation cartel that measured its success in its ability to maintain agreed market shares. However the mode of price fixing had to be geared towards competing for a bid. Accordingly, for each bid – in which the appearance of competition had to be maintained – each bidder was assigned a maximum discount off the transparent list prices, with the designated winner naturally permitted the largest discount and with the rest, the designated losers, submitting 'cover prices', prices which by virtue of the lower discount permitted by the cartel, exceeded the price quoted by the designated winner. In particular contracts, the compensation to the losers, generally in the form of a share of the contract, was also agreed.

It was a minutely detailed, comprehensively planned operation dependent upon significant flows of information. While the cartel undoubtedly wrought major damage in key markets there was no evidence of corruption revealed to the Commission, although it is important to add that corruption is not the Commission's remit and this is not what it was looking for.

15. However, notwithstanding the essentially familiar aspects of most instances of bid rigging, the sheer scale of public sector procurement and the overwhelmingly prevalent use of public tenders as the form of procurement alone makes it worthy of particular attention. Indeed, it is, usually mandatory for the public sector to procure by way of public tender in respect of any purchase above specified thresholds. It is also a requirement of large lending agencies that provide project financing such as the World Bank, funding which is generally made through a government agency. And of course procurement by the public sector represents a very high proportion of GDP, estimated to be as high as 15% in OECD countries and certainly higher in many developing countries.

16. Public procurement is thus particularly vulnerable to corruption, collusion, fraud of various types and embezzlement because of the large amounts of money characteristically involved and the difficulties of supervising a large number and wide range of projects. As already noted, increasingly there are large public tenders put out by private procurers of goods and services. However, and this generalisation naturally does not hold good in all instances, the in-house skills and expertise involved in the evaluation and adjudication of a complex tender are probably more readily available in the private sector than in the public sector procurement office, if for no reason other than that the latter has to spread its monitoring and other resources over a greater number and variety of projects or has to rely on the services of outside consultants – that is to say the information asymmetries between the buyers and sellers in a public sector procurement tender are bound to be greater than in a private sector procurement tender and the detection

capabilities concomitantly smaller and more thinly stretched.[4] And, while public sector procurement contracts are generally shrouded in more elaborate arrangements to protect against corruption and collusion, regrettably the profit maximising incentives in private procurement are probably greater than the incentives to efficiently utilise tax payer funds. Indeed it is largely because of the absence of a direct incentive to spend tax dollars as efficiently as private dollars that bidding is so ubiquitously employed in public procurement and is subject to such elaborate administrative rules.

17. Bid rigging is of course particularly damaging when a country is engaged in exceptionally large infrastructural spend programmes, whether for a particular event – for example, the hosting of the FIFA World Cup – or where a government is, again as in **South Africa**, employing infrastructural spending as the major component of an economic stimulus package and as a necessary foundation for long term growth. The South African Competition Commission has explicitly identified bid rigging in construction and construction-related sectors as a strategic focus of its enforcement activities precisely in order to align itself with government's infrastructure build programme. The data pertaining to the leniency applications received by the South African Competition Commission is detailed in its submission to this forum. Suffice to say that the vast majority emanate from the construction sector and many admit to collusion in the preparation and submission of bids in response to public procurement tenders.

18. The submission of the **United States** outlines an initiative of the Antitrust Division aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009.

19. Fourthly, and following from this, there is a particularly offensive aspect to the wilful perversion of a mode of procurement that is ubiquitously employed in the public sector precisely in order to secure competition and public accountability. The practices of bid rigging and bid corruption do not 'merely' ensure the provision of inferior goods at supra-competitive prices, it seriously undermines a key component of sound, accountable public governance.

20. Moreover, the impact of public procurement bid rigging on poor consumers is disproportionately great. In fact while in an effectively operating progressive tax system the rigging of public procurement tenders may hit the rich *qua* tax payer proportionally more than it hits the poor *qua* tax payer, *qua* consumer it is inevitably the *poorest* consumers who pay the highest price for bid rigging. It is those who use *public* education facilities, *public* hospitals, *public* transport, *public* housing that pay directly for the increment in price or the lowering of quality that is the consequence of rigging a public sector procurement tender.

[4] The bid corruption literature deals extensively with the problem of corruption in the procuring of consultants acting as advisers on public sector procurement, particularly when this gives them a key role in preparing the tender and in evaluating the responses.

Box 2. Bid rigging in Health Care markets – South Africa, Turkey and Romania

In the **South African** case of *The Competition Commission vs Adcock Ingram Critical Care (AICC) and four others* , it was established that five pharmaceutical companies had, over a period of at least fourteen years, colluded in rigging bids for the supply of intravenous solutions to the public hospitals, a tender initially issued annually and later every two years. Prices were fixed, markets worth many hundreds of millions of rands were allocated and winners and losers were determined, as was the compensation, often in the form of a post-award sub-contract, for the losers. In a statement submitted to the hearing at which the Tribunal approved the consent decree, a representative of the national Department of Health succinctly summed up the character of bid rigging and the nature of the problems that it posed:

> *The Department of Health purchases large volume parenterals and administration sets through the public tender system in order to secure affordable prices, which ultimately benefit the many people who use the public health system, and as has been stated, the majority of whom are poor. The advantages for the suppliers are a guaranteed market, economies of scale and a binding contract....*
>
> *We are committed to giving preference to local manufacturers to promote job creation, poverty eradication and skills development. However, it is difficult to pursue these objectives of promoting local manufacture when such manufacturers act in such a manner. We find it very disturbing that SMMEs that get preferential points in the tender system to enable them to gain market share, resort to this kind of behaviour...*
>
> *These findings beg the question of whether this is the only case of collusion in the industry and there is a high possibility that this is not the only case of collusion in the industry. The challenge that we face is how does one prevent such collusive practices in the future? Tender systems, by their very nature, are at risk of collusion, especially in the pharmaceutical sector where there are usually only a handful of competitors that are known to one another.*

Note that **Turkey's submission** to this roundtable reveals that in 2009 most of the bid rigging investigations carried out by the TCA were in the health sector, including medicines, laboratory supplies and medical equipment. This appears to have included the prosecution of several cases of collusive boycotts of tenders issued by procurement authorities in the health sector. As with the South African public health official cited here, the Turkish submission ascribes the frequency of bid rigging in health markets to the oligopolistic structure of the suppliers' markets. In 237 out of 310 tenders issued in Turkey for laboratory equipment fewer than 3 suppliers responded to the tenders.

Romania's submission also identifies the health sector as the sector most vulnerable to bid-rigging practices. Thus, in 2008, the RCC imposed fines totalling approximately Euro 22.6 million on four pharmaceutical companies for sharing the publicly funded section of the insulin market in the context of a national tender organised in 2003 by the Ministry of Health. The collusive practice in this case aimed at sharing the diabetes product portfolio of a drug manufacturer between 3 distributors.

In another important case, 3 distributors who rigged a bid in response to a national tender issued by the Ministry of Health for the supply of dialysis products and equipment were fined Euro1,5 million.

The **Romanian submission** raises many other examples of dubious tendering and bidding practices in various markets for health products. Many of these appear to relate to the preparation of exclusionary tender specifications.

21. Fifthly, given the scale and concentrated nature of public procurement by way of tender, it is potentially easier for the competition authorities to enlist the purchasers as allies in identifying and apprehending collusive conduct than is the case in markets characterised by more fragmented, atomised purchasers. For example, it is striking that while the South African health department's procurement authorities in the South African *Adcock Ingram* matter (see the box above) were aware of the practice of post-award sub-contracting to the losers, this never seemed to have aroused their suspicions although the practice is a textbook red light signalling collusive conduct. However, the good news of course is that the prospect of teaching and enabling a procurement committee to recognise cartel conduct is significantly greater than the prospect of achieving the same level of awareness amongst thousands of individual consumers. I will return to this issue below.

22. Moreover, when purchasing is concentrated in the form of a small number of large bids it is significantly easier to measure the actual extent of consumer harm and seek recompense than in the case of thousands of atomised consumers. In *Adcock Ingram* evidence unearthed by the Commission documents quite precisely the increment in price achieved by the bid rigging cartel in each successive tender. The estimates – partly demonstrated by what occurred when, in one tender, one of the cartel members reneged on the agreement necessitating the last minute submission of a new price by other members – vary from increments over a notional competitive price ranging from 10% to 33%, increases compounded by each successive rigged bid. Turkey's submission cites its Ministry of Construction who is quoted in an OECD study: *"[u]ntil the enactment of the new Public Procurement Law in 2003, Turkey has suffered exceptionally high construction costs by international comparison. For instance, the cost of construction for 1 km of highway was US$ 10 million in Turkey, compared to international reference price of a US$ 4 million* "

23. One final point here: while, as illustrated by the *Rocla* case (see box), the fact that public procurement takes place by way of public tender does not distinguish its essential mechanisms from the price fixing and market allocation that is at the heart of most hard-core cartel conduct, cartelisation of the bidding process in true bidding markets – for example, the tendering for the building of a massive power station, a one-off project which cannot be bought off the shelf using transparent price lists and in which the winner may take all – may become immensely complex precisely because of the scale of the contract and the fact that it is unlikely to be repeated in the foreseeable future means that it may lead to massive 'disturbance' in the market. That is, these contracts have the capacity to disturb precisely what bid rigging, or any other form of cartel, is aimed at preserving: the stability of market shares. These are the circumstances in which the principal contractor may be required to organise a complex array of consortia and sub-contracts, precisely to ensure that a carefully organised cartel, or even series of cartels, is not disturbed by a contract of the sort described that may be characterised as part of the unusual genus of bidding market.

Bid Rigging and Bid Corruption

24. However, let's return to the interface between bid rigging and corruption. As already noted, a corrupted tendering process does not presuppose that there has also been collusive co-operation between the bidders. Quite the contrary, it will, more often than not, reflect an exclusive relationship between the corrupted officials and a single seller who has secured a place at the head of the queue through an act of corruption – drawing on family connections, or powerful political connections, or simply the payment of a bribe. In this instance, the bid is corrupted but not collusive. However, even in a non-collusive, but corrupted, bid the co-operation of the losers may well be necessary lest the corrupted pre-arranged outcome is upset by disgruntled and uniquely well-informed losers thus necessitating a degree of agreement between the private bidders. Once this happens, once other potential bidders are drawn into the corrupt conspiracy between a procurement official and a potential supplier, it would appear that – although this warrants further discussion – the loser who accepts a kickback for accepting the outcome has both abetted corruption and entered into a collusive arrangement.

25. By the same token, collusive bid rigging does not necessarily involve corruption, that is to say, it does not necessarily pre-suppose that the colluding bidders are in a corrupt relationship with the public officials responsible for the preparation and/or adjudication of the bid. Indeed, as already intimated, it is not difficult to imagine how the intervention of a corrupt official may disturb a well organised cartel such as the cement products cartel outlined above.

26. However, it's reasonable to hypothesise that bid rigging and bid corruption will frequently work in tandem. Certainly there are powerful incentives to bolster bid rigging with bid corruption. Corrupt procurement officials may be of service to a bid rigging cartel in numerous ways. They may provide

advance notice of a bid and consult the cartel organiser in the preparation of the tender specifications. This is a particularly valuable function insofar as it can be used to secure conditions favourable to cartel formation by excluding, through purposefully designed tender specifications, mavericks or non-cartel members from eligibility for the bid. In general, given that those who are managing the bid have a large measure of discretion in deciding which bidders have qualified, corrupted public officials may exercise this discretion to disqualify non-members of the cartel from the bidding process on spurious grounds. This act of corruption reduces the number of bidders and the obstacles to cartel formation and the prospect of detection. **Pakistan** cites the considerable discretion given to procurement authorities in determining the responsiveness of the bid – that is, the bids compliance with the baseline conditions for validating the bid – as a major source of both corruption and bid rigging. **El Salvador** reports that its competition authority examines public procurement from two perspectives, namely, in order to detect evidence of bid rigging and to determine whether the terms of the bid designed by a public contractor reduce or limit competition in the bid procedure.

Box 3. Fuel procurement in Zambia and tractor procurement in Pakistan

A recent fuel tender in **Zambia**, although apparently in favour of a single preferred buyer rather than a cartel, is an instructive example of the pertinence of influence at the bid preparation stage. Here, in a two year contract to procure crude oil worth some US$1,4bn – a very significant act of public procurement anywhere and more so in an economy of Zambia's size – it is alleged that senior government officials directed the Zambian Public Procurement Authority to design tender specifications to accommodate a pre-selected bidder. The media, quoting an unidentified source, charges that the changes that were made to the original tender document required that '(1) bidders must own or charter in excess of 30 oil tankers at any given time; (2) the bidders must own or operate a refinery capacity in excess of 1 million barrels per day; (3) bidders must produce crude oil in excess of 1 million barrels per day and (4) bidders must trade in excess of 2 million of (sic) crude oil per month'. And then, in what appears to be ultimate act of exclusion, lest all others fail, the bidding was to close on the 18th December 2009 and the first delivery of crude oil was scheduled for a fortnight later, on the 1st January 2010! After the Zambian Competition Commission referred the matter to the Anti-corruption Commission, the tender was withdrawn and redesigned.

The Competition Commission of **Pakistan** effectively utilised its advocacy function in improving procurement practices in a Tractors Subsidy Scheme (2008-09) launched by the Government of Punjab. The CCP received complaints from a number of manufacturers and importers of tractors who claimed that only two local tractor manufacturers had been invited by the Agriculture Department of the Government of Punjab to supply tractors under the Scheme. The CCP took cognisance of this apparent exclusion of all other manufacturers, dealers/importers of tractors and informed the concerned authorities of the provincial Government that this action ran afoul of competition principles. The situation was rectified and the provincial Government started negotiations with rest of the manufacturers and importers of the tractors for the supply of tractors under the Scheme.

27. Another large **South African** bid rigging cartel – in this instance a purchasing cartel - appears to have benefitted from the assistance of, as the cartel leader put it in an email exchange with other members of the cartel, 'our boys' in the procurement authority of a large state owned enterprise. Here, it appears that the assistance took the form of advance information about sales of the product in question and inside information on the pricing expectations and strategies of the sellers.

28. Recently, much media attention has been given to a large tender put out by a large South African publicly owned utility, where a contract is alleged to have been awarded on the basis of a closed tender, that is a tender for which selected firms are invited to bid, rather than an open tender as apparently required by the pertinent tender rules. A senior executive is alleged to have authorised the use of a closed tender system without possessing the requisite authority to override the standard operating procedures applied to

tenders of this scale.[5] Note that the allegation here is not one of collusion – although that may yet surface. Rather it is that the purchaser assisted a particular bidder by utilising a tendering procedure that excluded potential competitors.

What is to be done about bid rigging and bid corruption?

29. We have seen the anxiety expressed by the South African health department official in relation to the rigging of pharmaceutical bids. It is not misplaced. Bid rigging in public service tenders, and particularly in civil engineering and construction, appears to be such a widespread and deeply entrenched practice that one is entitled to despair at it ever being eliminated or significantly reduced.

30. However, the costs are so great that it justifies moving bid rigging and bid corruption to the top of the agenda for both competition enforcement authorities as well as for the authorities charged with policing corruption. The World Bank estimates that public procurement bid rigging inflates price by 20-40 per cent. Some evidence of the cost of bid rigging has been gleaned from the submissions to this roundtable and are reported above. Suffice to say that all estimates of the premium charged as a result of bid rigging in public procurement significantly exceed the rule of thumb estimate of a 10% premium which is widely accepted as the premium resulting from 'ordinary' price collusion. Indeed it is not surprising that price inflation in rigged bids would be higher than in other collusive activity because the winning firm has not only to ensure the monopoly rent that is the point of the collusion in the first place, but it must ensure a premium sufficient to enable the losers to be paid off and, in many instances, to enable the bribed public officials to receive their agreed pay back.

31. It is equally clear that bid corruption is commonplace. Moreover it appears that some of the most effective strategies available to defeat corruption are used in the formation and maintenance of cartels. Maximum transparency is generally considered to be a powerful antidote to corruption but it equally provides an important source of the information necessary to form cartels and to detect cheating. I recall responding to a bid put out by USAID for a research contract in which a specific opportunity was given to each of the qualifying bidders to pose questions to USAID aimed at clarifying aspects of the bid. The questions had to be posted on a website to which all the other bidders had access, as were the answers. The objective was clear: it was to ensure that no bidder was able to engage in *ex parte* communication with the purchaser of the service that may have enabled the passing of selective information and provided even the appearance of possible corruption.[6] However, the opportunities that this creates for collusion are manifest and this practice, alongside joint site visits and the like, is not uncommon particularly in the context of large and complex engineering or ICT tenders where bidders understandably are often obliged to pose clarificatory questions and request additional information before submitting a bid. It is striking how many of the competition authorities who have made submissions to this forum advocate transparency as a mechanism to limit bid corruption without apparently appreciating the support that it may give to bid collusion.

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5 It appears from **Turkey's** submission that there the Public Procurement Act specifies that open tenders are the default form in which public tenders must be issued. Other forms of tendering can only be practiced when specified special conditions for their use are present. In **Singapore o**pen tendering is also the default option. Selective tenders limit suppliers who satisfy the conditions for participation on grounds such as financial solvency, experience and capability but limited tendering may only be used in exceptional circumstances.

6 I may give USAID more credit than it deserves. The purpose may simply have been convenience – to pre-empt having to answer the same question several times over – but I don't believe this to be the case. I understood the requirement to be aimed at promoting transparency.

32. The anti-corruption community is, as is to be expected, unanimously committed to transparency as the key weapon in the fight against corruption, including in corrupt procurement practices. However, although the quantity and character of information that anti-corruption watchdogs demand be made transparently available may cause concern to the anti-collusion watchdogs, there is no doubt that certain of the data gathered may greatly assist in the detection of collusion. For example, in the area of procurement of anti-retroviral drugs used to combat HIV/AIDS, researchers from Boston University working with the UK's DFID have developed a 'high price outlier analysis' where the 'high price outliers' are precisely likely to indicate collusion rather than corruption. Interestingly while the researchers concede that these outliers may be the consequence of 'managerial difficulties' rather than corruption, they do not seem to have contemplated the possibility of horizontal collusion.[7]

33. By the same token measures to counter bid rigging may facilitate and incentivise bid corruption. For example, a regular pattern of tendering public service contracts, as opposed to less frequent, large contracts, may facilitate collusion because it brings suppliers into more regular contact with each and it more easily enables the sharing out of contracts between the members of the cartel thus promoting the stability of the cartel. Moreover, a large contract, as opposed to a number of smaller contracts, is also more likely to attract bidders from outside of the geographical area, including international bidders.[8] The antitrust authority may thus urge less frequent, larger tenders upon the public procurement office in order to avoid a pattern of bidding that facilitates collusion.[9] However, large contracts may incentivise the paying of bribes, lower the cost of bribing (because there is only one set of procurement officials to bribe instead of several) and reduce the possibility of detection because fewer people will have knowledge of the payment of the bribe than would be the case where multiple bids had to be corrupted.

So what is to be done?

34. Close co-operation between the competition authorities and those responsible for policing corruption is essential. While it is obviously not known with any precision what proportion of collusive bids also involve corruption, the incentives for these practices to operate together are sufficiently strong to justify the competition authorities and the anti-corruption authorities to proceed on this basis. However, gauging the response of several sub-Saharan African countries to public procurement bid rigging, while it is clear that there is a ready inference drawn that a rigged bid has enjoyed inside support, that it operates in tandem with corruption, it appears common practice for many competition authorities who are alerted to bid rigging elect to simply hand over the cases to the public procurement or anti-corruption officials. One senior African competition official explained that the latter – the anti-corruption officials – enjoyed greater investigatory powers and resources than the competition authorities and are empowered to impose

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7 See Brenda Waning and Taryn Vian - *Transparency and accountability in an electronic era: the case of pharmaceutical procurements* published on the website of U4 Anti-Corruption Resource Centre (www.U4.no) The U4 website is a gold mine of information in the area of corruption. It is however striking how little the site mentions collusion. When it does mention 'collusion' it usually refers to the vertical relationship between a procurement official and a bidder.

8 This paper does not deal with the interface between international trade and public procurement. This is dealt with in detail in an excellent paper by Rob Anderson of the WTO and Bill Kovacic of the US FTC which has been made available to participants in this forum. (see Robert D. Anderson and William E. Kovacic *Competition Policy and International Trade Liberalisation: essential complements to ensure good performance in public procurement markets* Public Procurement Law Review (2009).

9 The submission from the **United States** notes: *'Antitrust agency officials provide advice about techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract.'*

significantly greater sanctions. It is also likely that the anti-corruption culture is stronger than the pro-competition culture and so public appetite and support for the investigation of corruption is greater than in the case of competition violations. Moreover, the estimates of the sheer scale of corruption in public procurement are so vast that this factor alone may explain a focus on bid corruption over bid rigging. The submission by **Pakistan** cites an estimate by Transparency International that puts kickbacks in public procurement contracts at about 25% of the procurement or project budget. The World Bank is reported to have estimated the cost of corruption in public procurement alone at 15% of Pakistan's development budget for 2007/8.[10]

35. The evidence and the incentives tell us that corruption may be sufficiently useful to a bid rigging cartel that, as a matter of course, the competition authorities should always invite the anti-corruption officials to investigate possible corruption in a bid rigging cartel. By the same token, the anti-corruption officials should invite the competition authorities to explore a possible collusion angle in any case of bid corruption.

36. In **South Africa** the Competition Commission and the Special Investigating Unit (SIU), an independent branch of the criminal justice system responsible for policing corruption, agree that the most effective instrument for reducing bid rigging and bid corruption is robust enforcement. This has certainly reaped a rich harvest for the Commission. The data on leniency applications is cited in the Commission's submissions as is the extent of bid rigging involved in these applications, notably, although by no means exclusively, in the construction and related sectors. The flood of leniency applications is doubtlessly a product of the Commission's strong enforcement record as well as the imminent criminalisation of collusion, including bid rigging.

37. The SIU has also engaged in some very high profile investigations, most notably alleged bid corruption in the awarding of multi-billion rand tenders by the Department of Correctional Services. It is exploring the introduction of a plea bargaining arrangement along the lines of the Competition Commission's lenience programme.

38. In addition the South African Competition Commission has, in close co-operation with the National Treasury, engaged in an extensive programme aimed at assisting the various national, provincial and para-statal procurement authorities in identifying collusion. The contents of the programme are similar to those conducted by many other authorities. Hence the South African Commission's presentation to the procurement officials identifies the various forms that bid rigging traditionally takes. These include complementary bidding or cover bidding, bid suppression where bidders either withdraw a submitted bid or fail to bid at all, bid rotation whereby the bidders take turns in winning a series of tenders, sub-contracting or other forms of compensation to losing bidders or joint venture bidding. It has also identified a number of red lights that may indicate collusion in the bidding process. These include the same winning bidder for particular work, or where the same suppliers bid but take turns in winning, or bids received at the same time with similar prices and cost calculation. Other red lights include the failure on the part of an obviously qualified firm to bid on a lucrative contract, a sudden drop in the bid price upon the entry of a new or infrequent bidder, sub-contracting to a loser and suspiciously high bids without logical underlying cost differences. Bid rigging is also indicated by such prosaic features as common handwriting or fonts or common spelling errors. Sequential numbers on banking securities will indicate that a single person has gone to arrange the securities for a group of bidders.

[10] An impressionistic reading of the submissions to this forum would indicate that while anti-corruption and/or procurement authorities frequently have jurisdiction over collusive bid rigging, competition authorities never have jurisdiction over bid corruption, despite the anti-competitive implications of the latter. Nor is this surprising. It almost certainly results from the highly specialised nature of competition jurisdiction and the absence of criminal sanction in many national competition statutes.

Box 4. A costly typographical error

The United States submission reports a case where a combination of a simple typographical error and alert procurement officials led to a successful bid-rigging prosecution: *'Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: "Please give us a call us if you have any question." The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations.'*

39. The South African Competition Commission's programme also suggests mechanisms for mitigating bid rigging. These include taking particular care in the design of the procurement process, while avoiding imposing a requirement to bid, nevertheless seeking an explanation for a failure to bid, and maintaining extensive and detailed records that will enable the detection of suspicious bidding patterns. The Commission has also proposed to the National Treasury that the submission of certificates of independent bids be made mandatory.

40. The Commission has also produced a booklet drawing heavily on the OECD Guidelines for Fighting Bid Rigging that is aimed at assisting procurement officials in the identification and mitigation of bid rigging. Most of the submissions report the publication of manuals that are prepared by the national competition authority aimed at assisting public procurement officials to detect bid rigging followed up by training courses to this end.[11]

Box 5. US bid rigging training and outreach programmes

The US submission outlines the DOJ's extremely comprehensive training and outreach programmes to combat bid rigging. It reports considerable success in combating bid rigging which it attributes, in significant part, to the impact of its training and outreach programmes. It suggests that a comprehensive training programme should:

- Explain the legal standard for a violation
- Explain how antitrust investigations are conducted
- Discuss penalties for bid-rigging and other antitrust violations
- Discuss indicators of bid-rigging
- Encourage procurement officials to report anything suspicious
- Give examples of matters in which procurement officials have played a key role in the detection of bid-rigging
- Discuss other crimes that may be prosecuted, including a variety of corrupt and fraudulent practices

41. Date collection and collation is a critical factor in combating bid rigging and bid corruption. We have noted the firm commitment of the anti-corruption community to transparency and the potential dangers that this portends for cartel formation. However, it is clear that transparency is so potentially effective in countering corruption that it will overcome any objection to the effect that it may support bid collusion. But effective information and data will also support efforts at countering bid collusion. I have

[11] See, inter alia, submission by **El Salvador.** The submission by **Brazil** reports a particularly energetic advocacy and education campaign around bid rigging.

already made mention of the 'price outlier' analysis used in combating corruption in the procurement of ARVs. It appears that the best path for competition enforcers is to engage with the anti-corruption community in identifying data that will be useful to fighting both corruption and collusion, and, concomitantly, identify those that, that if made publicly available, may abet collusion.

42. The submission from **Singapore** recognises that the additional transparency promoted by its e-procurement web portal may facilitate collusion. However it argues that:

> *..these risks are alleviated to a certain extent by the structure of the tender system itself. GeBIZ as a web portal allows for the maximisation of potential participation of competing bidders worldwide; it encourages both local and foreign participation in procurement, reduces the costs of bidding and put in place participation requirements that do not unreasonably limit competition and thereby reduces the possibility of collusion. Further, the government allows smaller firms to form a consortium and tender for bigger projects to allow more firms, including small and medium enterprises to participate in such tenders. Transparency on prices also allows benchmarking across firms and therefore facilitates competitive bidding. Moreover, the easy availability and access to information via an electronic forum by which tender and award information is provided allows for ease of monitoring and policing by the authorities. Competitors can request for information on tender selection to review evaluation results and competition authorities can detect bid rigging activities via analysis of bid history patterns and other bid data.*

Box 6. Data Gathering:
Korea's Bid Rigging Indicator Analysis System (BRIAS), Brazil's Public Spending Observatory (OPD) and South Africa's Special Investigating Unit

Korea utilises data gathering and coordination in a systematic effort to detect bid rigging. Its Bid Rigging Indicator Analysis System analyses bid-rigging indicators based on data concerning bids placed by public institutions. With the data delivered online from the public institutions, the analysis system calculates the probability of bid rigging by giving weightings to various indicators like bid-winning probability, the number of bidders, bid prices, competition methods, the number of unsuccessful bids and hikes in reserve prices, transition into private contracts, etc.

Since October 1997, the KFTC has undertaken manual analyses of bidding documents obtained from some public agencies, and then in September 2006 it set up the analysis system for bid-rigging monitoring. At first, it was applied to information provided by Public Procurement Service, but the Commission has gradually expanded the application of the system until in 2008 it was mandatory for all public bodies engaged in procurement to provide information for the BRIAS. From January 2009, the KFTC has secured the legal powers ground in the MRFTA for mandating all the public bodies to provide it with bid-related information for analysis by BRIAS.

The analysis system helps the KFTC better uncover bid rigging conspiracy by enabling it to monitor tenders of the public sector chronologically and conduct on-site investigation into those with significant indication of bid rigging. It also prevents national budget waste caused by bid rigging and helps establish a fair competitive order. Furthermore, the system makes companies voluntarily stay away from bid rigging by sending a signal that the KFTC is keeping an eye on every bid for public work.

In **Brazil**, the Office of the Comptroller-General (CGU), the federal agency responsible to the President for all matters related to the defence of public assets and transparency in administration, has established the Public Spending Observatory (OPD). The OPD is a permanent intelligence unit combining the practical knowledge and experience of auditors with advanced IT tools that enable the auditors to speedily process enormous volumes of data from hitherto disparate sources. This IT based consolidation and collation transforms the utility of previously disaggregated data in the identification, prosecution and prevention of corruption, fraud and collusion in public procurement. Hence the tax administration system provides information about the corporate structure of bidding companies and its partners, while family relationships are revealed by the social security service data bases and multiple data bases register addresses.

Box 6. (Cont.)

Crossing these data, the OPD identifies 'trails' and patterns that require further investigation. For example, the participation of companies with common shareholders in the same procurement procedures, different bidders with the same address, family bonds and past and present employer-employee relationship between partners and directors of the bidder companies. Internal analysis of the procurement databases may also indicate suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme. Those "trails" are automatically followed on a daily basis, resulting in "red" or "orange" warnings to the administrative or criminal authorities or even to the federal agency responsible for the problematic procurement process. Once a suspicious patter is detected, it is loaded in an OLAP (Online Analytical Processing) tool which results in reports and management review panels. The main objective is to analyse the distribution of bidding processes of a product or service by geographic area, government agency, amount of resources involved, per year during a certain period of time.

South Africa's Special Investigating Unit has also embarked on the difficult but potentially fruitful task of enabling various pertinent data bases to speak to each other. For example, data from procurement agencies may reveal patterns that indicate bid corruption which, if aligned with the data base maintained by the companies registration office may reveal the existence of shell companies or a pattern of inter-locking directorships between the bidding companies. If aligned with the data banks of the Department of Home Affairs, familial relationships between procurement officials and the directors of bidding companies may be revealed

43. Without exception, the submissions to this roundtable recognise the necessity for intra-governmental co-operation. A central part of the South African government's response to the ramifications of the global economic crisis is the establishment of a high level task team to 'effect savings'. The task team comprises the Ministers of Finance and Public Service and Administration and the Minister in the Presidency responsible for Performance Monitoring and Evaluation. '*Combating wastage, leakage and corruption in government, specifically in the procurement system*' is explicitly identified as a key aspect of government's efforts to effect savings, although collusion in the tendering process is not mentioned, despite anti-competitive procurement practices – such as preferences accorded certain state owned entities – being explicitly viewed as significant factors raising the costs of procurement. In order to tackle fraud and corruption a task team reporting to the Minister of Finance comprising the National Treasury, the Revenue Services, the Financial Intelligence Centre, the Special Investigative Unit and the Auditor General has been established with a range of enhanced enforcement sanctions and investigative resources under close consideration. As of the time of writing the Competition Commission is not represented on that committee although given the close relationship between collusion and corruption it is a clear candidate for membership.

44. The Special Investigative Unit and the Competition Commission are both committed to engaging with each other. As noted earlier while it is possible that the most commonly utilised mechanisms to counter bid rigging and bid corruption may sometimes work against each other, the obvious cure of this is close liaison between the agencies responsible for policing and prosecuting these closely related phenomena.

Conclusion

45. While bid rigging frequently utilises precisely the same mechanisms as 'ordinary' price fixing and market allocation cartels, there are good reasons for competition authorities to maintain a particular focus on cartelisation in the area of public procurement. In particular it is the ubiquitous, if not always necessary, relationship with corruption that warrants particularly close attention.

46. The relationship between corruption and collusion in public procurement immediately suggests the benefits of close co-operation between the agencies responsible for the prosecution of each offence.

This has been advocated – and is often practiced – by many of the participants in this forum. In addition training procurement officials to recognise rigged bids is widely supported as is the more difficult task of ensuring that various data bases 'speak' to each other, the better to act as warnings of bid rigging and bid corruption. A particularly valuable product of co-operation may be the exchange of data and the design of data collection systems that do not, in the name of transparency, promote collusion.

47. It is imperative that the competition authorities and those directly responsible for fighting corruption remain cognisant of the tremendous cost that these offences impose on society and it is equally imperative that this be communicated to the public. The costs are not 'merely' micro costs imposed on selected consumers or tax payers. They are generally imposed upon the poorest consumers of the most basic products and they embody potentially powerful macro-implications.

48. The Economist (9th January 2010) recently noted:

> *As leader of Italy's socialists from 1976 to 1993, Craxi was among the orchestrators of a system in which the main parties, and their officials, fed off bribes from companies bidding for public contracts. The cost of those kickbacks was routinely added to the price of the work, so this system contributed to the huge public debt under which Italians and their governments now labour (my emphasis).*

49. Of course, the good news in that otherwise grim story of corruption and, no doubt, collusion in public procurement is that Italy also possessed magistrates sufficiently courageous and incorruptible to indict a Prime Minister. Enforcing probity and adherence to the law in public procurement will inevitably bring the enforcement authorities up against powerful individuals and interests. When that time comes it's as well that the general public be closely informed of its deep interest in robust enforcement of pro-competition and anti-corruption rules in the area of public procurement.

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Ensuring integrity and competition in public procurement markets: a dual challenge for good governance

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I. Introduction

Ensuring the effective functioning of public procurement markets necessitates addressing two distinct but inter-related challenges: (i) ensuring *integrity* in the procurement process (i.e., preventing corruption on the part of public officials); and (ii) promoting effective *competition* among suppliers, including by preventing *collusion* among potential bidders. These two challenges sometimes merge, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion (e.g. the universe of potential bidders or the bids themselves). However, analytically, preventing corruption on the part of public officials and promoting effective competition between potential suppliers are separable challenges: the former (corruption) is first and foremost a principal-agent problem in which the official (i.e. the "agent") enriches himself at the expense of the government or the public (i.e. the "principal"); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and removing barriers that unnecessarily impede healthy competition.[1]

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[1] See, for useful clarification, Frédéric Jenny, "Competition and Anti-Corruption Considerations in Public Procurement," in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), chapter 3, pp. 29-35 (distinguishing between corruption involving public officials and collusion between potential suppliers, and noting factors contributing to each problem). Related perspectives are provided in Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, Mass.: MIT Press, 1993); in W.B. Bumett and W.E. Kovacic, "Reform of United States Weapons Acquisition Policy:

The issue of ensuring integrity in public procurement processes has rightly received a good deal of attention at the international level in recent years. It is addressed by various international instruments, including: (i) the UN Convention Against Bribery and Corruption; (ii) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and (iii) the OECD Revised Recommendation on Combating Bribery in International Business Transactions. The prevention of corruption has also been an important focus for non-governmental organizations (NGOs), which have made important contributions in this field.[2] Given this intensive international focus, it is, perhaps, not surprising that the revised text of the WTO Agreement on Government Procurement (GPA)[3] that was provisionally adopted by the Parties to the Agreement in December 2006 contains a new substantive provision that requires procurements to be conducted in a manner that avoids conflicts of interest and prevents corrupt practices, in addition to related references in the preamble to the Agreement.[4] This provision breaks new ground and signals the increasing importance of the Agreement as an international instrument of market governance.

For the most part, the promotion of competition in public procurement markets has not received similar high-level attention as an aspect of international governance.[5] This is despite the fact that competition is a core objective of national procurement systems which is essential to good performance.[6] Certainly, the promotion of efficient conditions for international competition, consistent with the principles of comparative advantage, is central to the purposes of the GPA.[7] As will be discussed in this chapter, the realization of this

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Competition, Teaming Agreements, and Dual-Sourcing," *Yale Journal on Regulation* 6 (1989), pp. 249-317; and in William E. Kovacic, "Commitment in regulation: Defense contracting and extensions to price caps," *Journal of Regulatory Economics*, vol. 3, no. 3, September 1991, pp. 219-240.

[2] See, e.g. the activities of Transparency International, profiled at http://www.transparency.org/.

[3] See GPA/W/297 (available at http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc) and, for commentary, Anderson and Arrowsmith, *this volume*, chapter __.

[4] See Part II, below.

[5] To be sure, there are important exceptions – notably the work of the OECD Competition Committee, the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the Consumer Unity and Trust Society (CUTS).

[6] Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," *Public Procurement Law Review*, vol. 11, p. 103; see also Steven L. Schooner, Daniel I. Gordon, and Jessica L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (Working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234).

[7] As stated by Judge Diane Wood, a former US Deputy Assistant Attorney General for Antitrust: "While the focus [of the Agreement on Government Procurement] might appear to be on securing access to the government's business for foreign companies, the effect just as surely will be to secure the benefits of competition for the procuring government itself." Diane P. Wood, "The WTO Agreement on Government Procurement: An Antitrust Perspective," in Bernard M. Hoekman and Petros C. Mavroidis, eds., *Law and*

objective necessitates the effective enforcement of national competition law provisions relating to collusive tendering and competition advocacy efforts by relevant agencies in addition to international liberalization via an instrument such as the GPA; none of these measures is likely to achieve its full objectives in the absence of the other.

In general, measures aimed at preventing corruption in public procurement processes, particularly through enhanced transparency, are also consistent with the promotion of competition. Transparency measures promote competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits – thereby enhancing their ability and incentive to bid on specific procurements.[8] Transparency measures, nonetheless, may not be consistent with the promotion of competition in all respects. In particular, experience in the application of competition law in public procurement markets highlights circumstances in which transparency-enhancing measures (e.g., the public opening of tenders) can facilitate collusion among suppliers.[9] This highlights a need for balancing (mutual accommodation) of competition and anti-corruption concerns. With such balancing, measures aimed at preventing corruption and promoting competition are likely to be strongly mutually reinforcing.

This chapter develops the foregoing lines of argument. The remainder of the chapter is organized as follows. Part II focuses on the challenge of ensuring integrity in public procurement processes, and the measures that can be employed to address the challenge. This includes a discussion of the new provision of the revised GPA text focusing on the "conduct of procurement". Part III reviews basic economic-theoretical considerations and evidence concerning the importance of competition in procurement markets, and the circumstances in which it is likely to thrive. Part IV discusses the principal means through which competition in public procurement markets is promoted. In addition to the possibility of international liberalization via the GPA or a similar instrument (itself a powerful tool for strengthening competition), the role of competition policy in this area is examined.[10] This

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Policy in Public Purchasing: the WTO Agreement on Government Procurement (Ann Arbor: University of Michigan Press, 1997), chapter 14. See, for related discussion, Part III(A), below.

[8] Sue Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, Studies in Transnational Economic Law, vol. 16, 2003), pp. 169-171.

[9] See discussion in Part IV, below, and references cited therein.

[10] The term “competition policy" is sometimes equated with the enforcement of laws that prohibit various forms of anti-competitive business practices (competition or antitrust law). Properly understood,

encompasses: (i) the application of antitrust rules to prevent collusive tendering; (ii) the role of such policy in addressing regulatory and other barriers to competition, through "competition advocacy" activities; and (iii) the application of other aspects of competition law including the treatment of mergers and joint ventures. Competition policy, it is argued, is an essential complement to international liberalization via mechanisms such as the GPA.[11] This part of the chapter, specifically the sub-section on competition advocacy, also reflects on the issue of transparency measures that may facilitate collusion, and suggests some appropriate limits on such measures in this regard. Part V provides concluding remarks.

II. Corruption in public procurement markets: what is the problem (analytically) and how is it addressed?

Corruption in public administration may be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them through statutory or other means.[12] In the context of public procurement markets, such abuses refer to conduct such as the awarding of contracts, the placing of suppliers on relevant lists or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (i.e. bribes). Corruption has rightly been condemned as a barrier to development and a scourge on the welfare of citizens in developing and developed countries alike.[13] This builds on the findings of economists such as Robert Wade that have long identified corrupt procurement practices as a barrier to efficient and sustainable

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however, competition policy encompasses a larger set of policy instruments by which a country can promote business rivalry as a means of improving economic performance. These include, very much, advocacy activities through which competition agencies and other bodies sharing similar interests encourage the adoption of pro-competitive and market-strengthening reforms (see, for related discussion, William E. Kovacic, "The Future of U.S. Competition Policy," theantitrustsource, September 2004, pp. 1-3; William E. Kovacic, "The modern evolution of U.S. competition policy enforcement norms," *Antitrust Law Journal*, 71(2): 377–478; and Robert D. Anderson and Frédéric Jenny, "Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy," in Erlinda Medalla, ed., *Competition Policy in East Asia* (Routledge/Curzon, 2005)). In implementing competition policy at the national level, there is considerable room to account for specific national circumstances and changing capabilities through the initial definition of responsibilities and creation of policymaking instruments, the sequencing of activities, and the adjustment of powers over time. See William E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," 77 *Chicago-Kent Law Review* 265 (2001).

[11] See also Robert D. Anderson and William E. Kovacic, "Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets," *Public Procurement Law Review*, 2009, issue 2, pp. 67-101. By "essential complements", we mean that neither external liberalization nor the promotion of competition through national competition policies is likely to achieve its full objectives in the absence of the other instrument.

[12] See, e.g. "How do you define corruption?" on the website of Transparency International, at http://www.transparency.org/news_room/faq/corruption_faq .

development.[14] Such practices can also be viewed as an example of the more generic phenomenon of "rent-seeking" – i.e. the dissipation of a society's resources through activities that enrich individual market participants at the expense of others, without contributing to the welfare of society as a whole – a phenomenon which is viewed by some economists as being central to the problem of under-development.[15]

The economist and jurist Frédéric Jenny offers the following analysis of the "principal-agent" problem that is central to the practice of public procurement, and which can lend itself to corrupt practices:

> "Whereas the awarding of the ... contract [is] supposed to be done in such a way as to maximise public welfare, the complexity of transactions makes it impossible for the end-users to award contracts directly and they have to go through an agent over whom they have limited control because of informational asymmetries. For example, [in] public procurement markets, the body in charge of establishing the contract specifications, selecting the bidders and choosing the winning bid is frequently composed of appointed or elected procurement officers who act as intermediaries between the beneficiaries and the potential providers. ... The difficulty stakeholders have in exercising some control over the design and awarding of public procurement contracts, and thus the possibility for corruption, will be greater in cases where the service or the product which is the object of the contract is complex and/or has been designed to meet the specific needs of the demander. [Accordingly,] there is a possibility for procurement officers or the members of the procurement commission to behave strategically, that is to design the contract, to select the bidders and award the contract in such a way that the winning bidder will not necessarily be the one who maximises the social benefits but the bidder who will maximise their own welfare (by offering the largest bribe) without this strategic behaviour being easily detected."[16]

As noted in the Introduction to this paper, the revised text of the Agreement on Government Procurement on which provisional agreement was reached by the GPA Parties in December 2006 incorporates a new substantive provision regarding the "Conduct of procurement". That provision (Article V:4(c)) reads, in relevant parts, as follows:

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[13] See. e.g., B.C. Harms, "Holding Public Officials Accountable in the International Realm," *Cornell International Law Journal*, vol. 33, 2000, at p. 159.

[14] See, e.g. Robert Wade, "The system of administrative and political corruption: Canal irrigation in South India," *Journal of Development Studies*, Volume 18, Issue 3, April 1982, pages 287 – 328, and more generally, Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 2003).

[15] See, for the classic treatment, Anne O. Krueger, "The political economy of the rent-seeking society," *American Economic Review*, 1974, 64(3): 291–303. The continuing significance of this phenomenon for developinng countries is discussed in Chiedu Osakwe, "Poverty reduction and development: the interaction of trade, macroeconomic and regulatory policies", Tenth Joseph Mubiru Memorial Lecture, organised by the Bank of Uganda, 14 December 2001.

[16] Jenny, above note 1, at p. 31.

"Conduct of Procurement

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

...

(b) avoids conflicts of interest; and

(c) prevents corrupt practices."

Insight into the intended purpose of this provision is provided by related language in the preamble to the revised text, which recognizes the shared purpose of the Agreement with other international instruments and initiatives in deterring corrupt practices. For example, a new recital to the preamble recognizes "that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources [and] the performance of the Parties' economies" in addition to the functioning of the multilateral trading system.[17] A further new recital recognizes "the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption".[18]

This provision represents a significant innovation in WTO law, in that, until now, WTO Agreements have generally not referred explicitly to corruption issues. Like all provisions of the Agreement, the provision on conduct of procurement is potentially subject to enforcement proceedings under the WTO Dispute Settlement Understanding. This provision, accordingly, establishes a new enforceable legal obligation on the part of GPA Parties to conduct their procurements in a manner that avoids conflicts of interest and corrupt practices – a significant extension of the WTO's role in regard to governance. On the other hand, as Arrowsmith points out, the general transparency provisions of the Agreement already play an essential role in the promotion of fair practices and the prevention of corruption;[19] in this sense, the issue is not new. In addition to the general procedural provisions of the GPA dealing, for example, with publication of procurement opportunities, advance specification of selection and award criteria, etc., the Agreement's provisions

[17] See the provisionally agreed revised GPA, above note 3, Preamble, third recital.
[18] See the provisionally agreed revised GPA, above note 3, Preamble, sixth recital.
[19] Arrowsmith, above note 8, p. 455 and, more generally, chapter 7, pp. 167-179.

relating to the establishment of domestic review or "bid challenge" procedures are an important bulwark against corruption. These provisions require each GPA Party to establish or maintain such procedures and to observe related procedural guarantees, notably that supplier challenges be reviewed in a timely, effective, transparent and non-discriminative manner.[20] These provisions recognize that, properly designed and administered, such procedures provide a fast, low-cost forum for bringing to light allegations of improper practices that affect individual suppliers and go a long way to establish a culture of "competition on the merits".[21]

Recent work by other international organizations – particularly the OECD – provides additional insights that are relevant to implementation of the prohibition in Article V:4(c), and reinforces the importance of general transparency provisions in this regard. Recently, the OECD has promulgated a set of "Principles for Integrity in Public Procurement" building on other relevant international provisions and experience with regard to the promotion of best practices in this area.[22] These principles are concerned with the entire public procurement cycle and include elements of transparency, good management, prevention of misconduct, as well as accountability and control (see Box 1). A related set of recommendations provides guidance on the implementation of the principles, e.g. through a related checklist and procedure for risk-mapping.[23]

Box 1. The OECD Principles for Enhancing Integrity in Public Procurement

The OECD has identified ten principles in order to provide policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organizational structures of member countries. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control.

A. Transparency

1. Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers

2. Member countries should maximize transparency in competitive tendering and take

[20] See Article XVII of the provisionally agreed revised GPA and Article XX of the GPA 1994.
[21] See, for essential qualification and commmentary, chapters 19-21 of this volume.
[22] See also OECD, Integrity in Public Procurement: Good Practice from A to Z (Paris: OECD, 2007).
[23] Also available in "OECD Principles for Integrity in Public Procurement," (2009), available online at: http://www.oecd.org/document/25/0,3343,en_2649_34135_42768665_1_1_1_1,00.html.

precautionary measures to enhance integrity, in particular for exceptions to competitive tendering

B. Good management

3. Member countries should ensure that public funds are used in public procurement according to the purposes intended

4. Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity

C. Prevention of misconduct, compliance and monitoring

5. Member countries should put mechanisms in place to prevent risks to integrity in public procurement

6. Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management

7. Member countries should provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly

D. Accountability and control

8. Member countries should establish a clear chain of responsibility together with effective control mechanisms

9. Member countries should handle complaints from potential suppliers in a fair and timely manner

10. Member countries should empower civil society organizations, media and the wider public to scrutinize public procurement

Source: "OECD Principles for Integrity in Public Procurement," (2009), available online at: http://www.oecd.org/document/25/0,3343,en_2649_34135_42768665_1_1_1_1,00.html

Clearly, the OECD Principles set out in Box 1 embody an important degree of commonality with the GPA. The promotion of transparency is a core objective and principle of the Agreement (as it is of other WTO Agreements, as well), embodied in both specific provisions on transparency of procurement information in the existing and revised texts and in the general procedural provisions of the Agreement in addition to relevant aspects of the preamble.[24] Furthermore, consistent with OECD Principle 2, the GPA provides for fully competitive and transparent, open tendering as a "default" tendering procedure, restricts the use of limited tendering and provides for special transparency measures in cases of selective tendering.[25] The above-emphasized provisions regarding supplier challenges and separate

[24] See GPA, preamble, third recital and Article XVII as well as the provisionally agreed revised GPA, above note 3, Preamble, sixth recital and Article XVI.

[25] See, e.g. Articles VII:4-8 and XIII of the provisionally agreed revised GPA, above note 3.

provisions of the Agreement dealing with exclusion of suppliers on the basis of misconduct and similar grounds[26] represent key means of giving effect to Principle 7 and – at least to some extent – also Principles 5 and 9. Similar observations can be made in regard to the commonality of the OECD principles and the UNCITRAL Model Law on Procurement of Goods, Construction and Services,[27] with the qualification that the UNCITRAL Law is a voluntary instrument providing a menu of options for national governments rather than an international treaty.

This part of the chapter has examined the basis of international concerns regarding the promotion of integrity (i.e. the prevention of corruption) in public procurement markets and institutions, in addition to the ways in which these concerns are addressed in the existing and revised GPA texts and other related international instruments and activities. The next two sections delve into an important parallel concern: the promotion and maintenance of competition. The argument is made that these two concerns – the prevention of corruption and the promotion of competition - should, in broad terms, be viewed as allied rather than in tension with each other. Nonetheless, giving due weight to the promotion of competition may require some modest refinements in the application of anti-corruption and transparency measures.

III. Competition in public procurement markets: why and how much does it matter, what can undermine it?

The idea that competition tends in most circumstances to generate lower prices and/or higher quality for a given price is one of the more basic propositions in industrial organization, the branch of economics that deals with industrial structure and performance. It is nonetheless worth briefly reviewing the basis for this proposition. Although scholars continue to debate the finer points, economic literature identifies at least four main channels through which competition can have these desirable effects. First, with free entry and an absence of collusion, prices will be driven to marginal costs. Second, costs themselves will be minimized, as firms compete for survival. Third, competition serves as an important

[26] See revised GPA text, above note 3, Article VIII:3.

[27] 1994 - UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html.

driver of innovation.[28] Fourth, competition enables the participating firms to learn from one another and thereby to continuously improve their products in addition to their marketing, production and managerial techniques.[29]

Apart from the guidance that emerges from the above-mentioned literature on competition and industrial organization generally, the benefits of competition have been explored in economic literature that deals specifically with bidding processes and procurement. This literature establishes a direct relationship between the extent of competition in procurement markets and the costs to governments of the goods and services that are procured.[30] The importance of competition for cost-effective public procurement is corroborated by the considerable efforts that firms typically devote, in business-to-business commercial transactions, to ensure that their procurement departments make effective use of competition to reduce the cost and increase the quality of inputs.[31]

Case histories and examples that illustrate the gains from the promotion of competition in government procurement regimes are fewer and less well documented than would be ideal.[32] Nonetheless, such examples as are available suggest that the gains can be substantial. A number of such examples, taken from an OECD survey, are collected in Box 2. The examples referred to therein indicate that savings to public treasuries of between 17 and 43 % have been achieved in some developing countries through the implementation of more transparent and competitive government procurement regimes. In a

Box 2. Examples of cost-savings in developing countries based on the implementation of more transparent and competitive procurement systems

A 2003 OECD study of the benefits of transparent and competitive procurement processes refers to the following examples of benefits achieved:

[28] See US, Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, October 2003; US, Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, April 2007; and Robert D. Anderson and Nancy T. Gallini, *Competition Policy and Intellectual Property Rights in the Knowledge-based Economy*, Calgary: University of Calgary Press for the Industry Canada Research Series, 1998.

[29] Useful elaboration of all four channels referred to above is provided in Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (Addison-Wesley, 2004).

[30] See, generally, Paul Milgrom, "Auctions and Bidding: A Primer," *Journal of Economic Perspectives*, vol. 3(3), 1989, pp. 3-22 and Paul D. Klemperer, (ed.) (2000) *The Economic Theory of Auctions*, Edward Elgar, Cheltenham, UK. See also R.I. Carr, "Impact of the Number of Bidders on Competition," *Journal of Construction Engineering and Management*, Vol. 109, no. 1, pp. 61-73, March 1983.

[31] See, e.g., David N. Burt and Richard L. Pinkerton, *A Purchasing Manager's Guide to Strategic, Proactive Procurement* (AMACOM, 2006).

[32] Simon J. Evenett and Bernard Hoekman, *International Co-operation and the Reform of Public Procurement Polices* (mimeo, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821424, 2004).

- In **Bangladesh**, a substantial reduction in electricity prices due to the introduction of transparent and competitive procurement procedures.
- A saving of 47 percent in the procurement of certain military goods in **Columbia** through the improvement of transparency and procurement procedures.
- A 43 percent saving in the cost of purchasing medicines in **Guatemala**, due to the introduction of more transparent and competitive procurement procedures and the elimination of any tender specifications that favour a particular tender.
- A substantial reduction in the budget for expenditures on pharmaceuticals in **Nicaragua**, due to the establishment of a transparent procurement agency accompanied by the effective implementation of an essential drug list.
- In **Pakistan**, a saving of more than Rs 187 million (US $3.1m) for the Karachi Water and Sewerage Board through the introduction of an open and transparent bidding process.

Source: OECD, *Transparency in Government Procurement: The Benefits of Efficient Governance* (TD/TC/WP/(2002)31/Rev2/14 April 2003).

broadly similar vein, an independent external study for the European Commission found that increased competition and transparency resulting from implementation of the Public Procurement Directives of the European Communities in the period between 1993 and 2002 generated cost savings of between a little less than €5 billion and almost €25 billion.[33]

A further important corroborating source of information regarding the benefits of competition which is sometimes overlooked is provided by evidence of *higher* costs to public treasuries that arise when competition is suppressed, for example through collusive tendering. Such evidence is examined in Part IV(B), below. For the present, it may be noted that collusion in public procurement markets has been conservatively estimated to raise prices on the order of 20 % or more above competitive levels.[34] The benefit of introducing competition where it has not previously existed may be expected to be of a comparable magnitude.

The foregoing does not take into account explicitly the additional benefits that can accrue to countries by opening their procurement markets to *foreign* as compared to domestic competitors, for example via accession to the GPA. International liberalization – whether with respect to markets for public procurement or other economic sectors – is often conceived principally as a tool through which countries gain access to foreign markets for their national suppliers.[35] In fact, however, much of the benefit (arguably, the main benefit) of

[33] Europe Economics, Evaluation of Public Procurement Directives, Markt/2004/10/D, September 2006, available at http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf.

[34] See Luke M. Froeb, Robert A. Koyak and Gregory J. Werden, "What is the effect of bid rigging on prices?" *Economics Letters*, vol. 42(4), 1993, pages 419-423. Somewhat higher estimates of average cartel overcharges are reported in Margaret C. Levenstein and Valerie Y. Suslow, "What determines cartel success?" *Journal of Economic Literature*, Vol. XLIV, March 2006, pp. 43–95.

[35] This is the all-too-familiar "mercantilist" paradigm for international trade relations.

international liberalization actually accrues to the countries undergoing liberalization. A principal aspect of this benefit is the enhanced competition in the home market that external liberalization generates. External liberalization also creates the possibility of specialization and exchange based on the principles of comparative advantage. This is no less true for the international liberalization of procurement markets than it is for other markets.[36] International liberalization of procurement markets can also provide access to technology that is not available in the home market (i.e. the market in which goods and services are being procured).[37] Clearly, this point may be of particular significance for developing, transition and smaller economies.

Economic analysis also provides insights into the circumstances in which competition is particularly susceptible to being suppressed through collusive practices. A classic contribution by Stigler identified three challenges that must be faced for successful collusion to take place: first, the cartel members must agree on the terms of their co-operation (in a bid rigging context, this would encompass matters such as which firm will win, how the others will be compensated, etc.); second, deviations from the agreement (e.g. by firms that promise to bid high and then bid lower in an attempt to win the contract anyway) must be detected); and (iii) defectors must be punished, e.g. through expulsion from future cooperative arrangements.[38] A related challenge involves excluding or bringing into the cartel new entrants that are attracted by the possibility of *supra*-competitive profits.[39] Stigler also posited an inverse relationship between the number of competitors in a market and the possibilities for collusion, on the basis that more competitors make it more difficult to reach an agreement. This proposition has been elaborated on and challenged in subsequent game-theoretic literature, including the literature on "super-games".[40] While this literature identifies a range of possibilities and outcomes on the basis of various assumptions regarding the behaviour of market participants, the basic idea that more potential sellers make collusion more difficult continues to command broad support. This reflects the simple fact that the greater the number of sellers, the more difficult it is for them to get together and agree on

[36] Arrowsmith, *Government Procurement in the WTO* , above note 8.
[37] Schooner, above note 6.
[38] George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy*, 1964, vol. 72, no. 1, pp. 44-61.
[39] William E. Kovacic, Robert C. Marshalll, Leslie M. Marx and Matthew E. Raiff, "Bidding rings and the design of anti-collusive measures for auctions and procurements," in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo, *Handbook of Procurement* (Cambridge: Cambridge University Press, 2006), chapter 15.
[40] See Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1988).

prices, bids, customers and/or territories and (perhaps even more so) to enforce the relevant agreements.

In addition to situations involving a small number of potential sellers, experience points to the following additional circumstances as potentially facilitating collusion:[41]

- The probability of collusion increases where restrictive specifications are used for the product being procured.
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. By contrast, it is harder to reach an agreement where other forms of competition, such as with respect to design, features, quality, or service, are important.
- The likelihood of collusion can be enhanced by repeat purchases, since the vendors may become familiar with other bidders and recurring contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.[42]
- Collusion is facilitated if bidders have opportunities to meet together in advance of the submission of bids, for last-minute consultations.

As will be elaborated in Part IV below, collusion can also be facilitated by aspects of the procurement process itself. Domestic content requirements or bans on foreign bidders directly limit the set of potential suppliers and thereby diminish the capacity of entry to upset cartel coordination.[43] The unsealing of bids in public for all bidders to observe can enable cartel members to determine whether co-conspirators fulfilled promises either not to bid or to

[41] These points have been adapted principally from US, Department of Justice, above note 63; similar material is available on the websites of several other national competition enforcement authorities.

[42] US Department of Justice, above note 63. Readers familiar with the writings of Adam Smith, *The Wealth of Nations*, 1776, will recall his dictum that "People of the same trade seldom meet together, even for merriment or diversion, but the evening ends in a conspiracy against the public, or in some contrivance to raise prices".

[43] Malcolm B. Coate, "Techniques for Protecting Against Collusion in Sealed Bid Markets," 30 *Antitrust Bulletin*, 1985, 897, 899-90.

submit artificially high "cover bids".[44] This concern provides the rationale for limiting the availability of certain kinds of information in the market, despite general transparency considerations which might otherwise favour releasing it. The use of electronic procurement tools and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. Advocacy efforts to address these concerns can, therefore, be an important additional element of a successful overall strategy to promote competition and deter collusion in procurement markets.

In reflecting on the above considerations regarding the role of competition in public procurement processes, it is important to acknowledge that the promotion of competition is by no means the only value at play in effective procurement systems. The importance of integrity in such systems has already been discussed. Other values, for example accountability, flexibility and administrative simplicity, are also important. Moreover, there may also be trade-offs involved between competition and these other values.[45] To cite an example that can sometimes be abused, procurements in response to national emergencies may, arguably, justify the suspension of normal competitive procedures.[46] Arrangements such as "framework agreements" can also involve a trade-off between competition and transactional efficiency.[47] The next part of this chapter elaborates on the roles of both international liberalization and national competition (antitrust) policies in promoting competition in such markets.

IV. The roles of international liberalization and national competition laws and policies in ensuring competition in public procurement markets

This part of the chapter examines key tools through which competition can be promoted in national procurement markets. To begin with, and as has already been mentioned, the GPA itself is an important tool for promoting competition. The ways in which it does this are summarized in sub-section A, below. A key premise of this chapter is, however, that while international liberalization – whether via the GPA, a bilateral agreement or unilaterally, is an important tool for enhancing competition in procurement markets, it is

[44] Kovacic et al, above note 39.
[45] Schooner, above note 6.
[46] But cf. the analysis in Schwartz, *this volume*.
[47] See discussion, below.

not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. This role encompasses, at a minimum, the following elements: (i) the adoption and enforcement of effective rules to prevent *collusive tendering*; (ii) *"competition advocacy" activities* that promote the use of sound public contracting procedures and the progressive elimination of regulatory and other barriers to competition; and (iii) *other aspects of the enforcement of competition rules* including the treatment of mergers and joint ventures. These elements are discussed in the remaining sub-sections of this part of the chapter.

A. INTERNATIONAL LIBERALIZATION AS A TOOL FOR STRENGTHENING COMPETITION

Participation in the Agreement on Government Procurement promotes competition in at least four distinct ways.[48] First, it provides a vehicle for the progressive opening of Parties' markets to international competition through market access or "coverage" commitments that are negotiated and incorporated in the schedules contained in Appendix I of the Agreement. Procurement which is "covered" in this way then becomes subject to rules requiring non-discriminatory treatment ("national treatment") of other GPA Parties' goods, services and suppliers. Second, as already noted, the various provisions of the Agreement relating to the provision of information to potential suppliers, contract awards, qualification of suppliers and other elements of the procurement process provide a framework that is intended to ensure transparent and non-discriminatory conditions of competition between suppliers, including both domestic and foreign suppliers.[49] Such measures promote competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits – thereby enhancing their ability and incentive to bid on specific procurements.

Third, as noted in the discussion on integrity in public procurement in Part II, the Agreement on Government Procurement requires that all GPA Parties put in place national bid challenge systems ("domestic review procedures") through which suppliers can challenge questionable contract awards or other decisions by national procurement authorities. Minimum standards and procedures to ensure the independence and impartiality of the bodies

[48] To some extent, these benefits may also be achieved through participation in bilateral or regional arrangements relating to government procurement policy. See Anderson, Müller, Osei-Lah, Pardo De Leon and Pelletier, *this volume*, chapter __.

[49] Possible tradeoffs between competition and transparency are discussed below.

responsible for such systems are also set out in the Agreement. When fairly administered, such systems enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism. In this way, they can contribute to a culture of competition on the merits in public procurement markets.[50] Fourth, the GPA provides recourse to the WTO Dispute Settlement Understanding (DSU) in circumstances where Parties believe that international competition has been suppressed through measures taken by other Parties in breach of their GPA commitments. Applicability of the DSU is a standard feature of WTO Agreements. In the area of public procurement, recourse to the DSU has been vastly less extensive than individual bid challenges before national authorities. Such applicability nonetheless represents an essential complement to individual bid challenges as a mechanism for considering systemic matters that may not be adequately addressed in individual bid challenges.[51] A further specific contribution of foreign competition in public procurement markets, whether via the GPA or otherwise, can be to reduce the feasibility of collusion.[52]

B. PREVENTING COLLUSION AMONG SUPPLIERS[53]

Although the opening of national procurement markets either through unilateral action or via negotiations under the WTO Agreement on Government Procurement or other international instruments makes substantially increased competition in procurement markets possible, it does not guarantee this result. Rather, collusive agreements ("cartels" or "bid-rigging") between potential suppliers directly undercut this possibility. For this reason, competition or antitrust rules relating to these practices are an essential counterpart to a liberalized government procurement regime. The WTO Agreement on Government Procurement recognizes the role of such measures, without going as far as requiring Parties to adopt them.[54]

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[50] See, for related discussion, Christopher R. Yukins and Steven L. Schooner, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market," *Georgetown Journal of International Law*, Vol. 38, No. 529, Spring 2007.

[51] For a review of key international disputes under both the current Agreement on Government procurement and its predecessor, the Tokyo Round Code on Government Procurement, see Mitsuo Matsushita, "Major WTO Dispute Cases Concerning Government Procurement," 1 *Asian Journal of WTO and International Health Law and Policy* 299 (2006).

[52] See Part IV(B)(5), below.

[53] See, for complementary discussions and additional information on policy developments in OECD member countries, OECD, *Public Procurement* (Policy Roundtable, 2007); OECD, *Competition in Bidding Markets* (Policy Roundtable, 2006) and OECD, *Competition Policy and Procurement Markets* (Policy Roundtable, 1998).

[54] In particular, Article XV of the Agreement provides for the use of limited tendering procedures in circumstances where the tenders submitted in an open or selective tendering process have been collusive.

(1) Universality of the challenge of deterring collusive practices

Box 3 (next page) presents examples of bid rigging schemes that have been successfully prosecuted in recent years in various jurisdictions including developed, developing and transition economies. Several of the examples (those from China, Indonesia, Peru and Chinese Taipei) are taken from inputs prepared by those countries for the 2001 OECD Global Forum on Competition. These cases demonstrate the universality of the challenge of deterring collusive practices – i.e. such practices are in no way limited either to developed or to developing countries.[55] The cases also illustrate a number of common characteristics of bid rigging schemes. For example, in several of the cases collusion seems to have been facilitated by restrictive regulations and/or practices of the procuring entities. The role of common orthographic errors in the tendering documents of "competing" bidders as a "suspicious sign" – illustrated in the case from Peru – is well known to developed country competition officials.[56]

The cases in Box 3 also illustrate that the mere opening of bidding processes to foreign-based suppliers may not generate effective competition, if effective rules are not in place to deter collusion. The fourth case noted in the table - a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt – is interesting in that it shows the ability of collusion in tendering processes to impact directly on international assistance efforts. Of course, these are but a few examples of the much larger numbers of bid rigging schemes that have been successfully prosecuted by relevant authorities.

[55] The foregoing is not at all to suggest that the maintenance of competition in developing countries does not involve special issues and challenges. Factors differentiating the role of competition policy in developing as compared to developed countries may include any or all of the following: (a) higher 'natural' entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; (c) a greater proportion of local (non-tradable) markets; and (d) over-stretched/inadequately developed law enforcement and judicial systems. William E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," above note 10, and Anderson and Jenny, above note 10. The point is simply that the problems faced by developing and transition economies in maintaining competition are not wholly dissimilar to those of developed countries and, therefore, that there is much to be gained for both sides in sharing experiences.

[56] See related discussion, below.

Box 3: Examples of international and domestic collusive tendering schemes that have been prosecuted in various jurisdictions

a) International removal and relocation services in Belgium

In 2008, the European Commission imposed fines totalling € 32,755,500 on various large firms providing international removal and relocation services in Belgium for fixing prices, sharing the market and bid rigging, in violation of the EC Treaty's ban on cartels (Article 81). The cartel operated for almost nineteen years. Cartel members fixed prices, presented bogus quotes to clients and compensated each other for lost bids.

Source: "Antitrust: Commission fines providers of international removal services in Belgium over €32.7 million for complex cartel" (EC Commission, Press Release, IP/08/415, 11 March 2008).

b) The International Marine Hose Case

Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys. According to court papers and other documents, firms based in the United Kingdom (U.K.), France, Italy, and Japan conspired to fix prices and rig for hundreds of millions of dollars worth of marine hose and related products which was sold to other firms in addition to government agencies. The conspirators met in locations such as Key Largo, Fla., Bangkok, and London. The investigation of this case involved coordinated enforcement efforts by the US Department of Justice, the EC Commission and the UK Office of Fair Trading.

Source: US Department of Justice, "Eight executives arrested on charges of conspiring to rig bids, fix prices, and allocate markets for sales of marine hose," Press Release, May 2, 2007 and "Three United Kingdom Nationals Charges With Participating in Worldwide Bid-Rigging Conspiracy in the Marine Hose Industry," US Department of Justice, Press Release, December 3, 2007.

c) Prosecution of bid rigging in school construction in China

Ten construction companies were prosecuted for bid rigging on contract for the construction of a school building. The ten companies including No.2 Construction Company agreed that No.2 Construction Company would get the contract in exchange for payments to the other companies. They also assigned one of the companies to calculate the bidding prices of all candidates. No.2 Construction Company won the bid at a higher price than before. The administration for industry and commerce issued a decision, declaring that the bid was invalid and the illegal gains were confiscated.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

d) Bid rigging on USAID contracts in Egypt

Philipp Holzmann AG, a Frankfurt, Germany construction firm, pleaded guilty and was sentenced to pay a $30-million fine for its participation in a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt.

Source: U.S. Department of Justice, "German Company Pleads Guilty To Rigging Bids on USAID Construction Contracts in Egypt," (Press Release, 18 August 2000).

e) The rigging of bids for the supply of pipe and pipe-processing services in Indonesia

Three pipe processors were found to have exchanged their prices with each other at a meeting in a hotel the evening before the bids were opened. Material evidence was contained in statements of a complainant, as well as in the testimony of witnesses from the respondents. As this was the first case ever brought by the Commission, no fines or other sanctions were imposed. Instead, the Commission ordered that the contract between Caltex and the apparent lowest bidder be dissolved and that entire tender process be redone.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

f) Rigging bids for the supply of construction services in Peru

Three companies were convicted of participating in bid rigging on a contract for the construction of a secondary electricity net in Puerto Maldonado City. The claim was based on evidence from the documents presented by the three bidders. The documents contained the same redaction and the same format; they also presented the same orthographic errors, the same time of construction and almost the same price bid. Following appropriate investigation, the Free Competition Commission ordered the three companies to cease the practice and imposed fines of amount of nearly EUR 1,800 on each of the respondents.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

g) The rigging of bids for the procurement of truck-mounted mobile cranes by the Taiwan Power Company in Chinese Taipei

Six companies were prosecuted for having knowingly, and through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening. These acts violated Article 14 of the Fair Trade Law, which prohibits concerted acts. The Commission ordered them to cease the concerted practices. The case also included another violation of the Law committed by Taiwan Power Company that improperly restricted the criteria to bid on its contract. The company was ordered to cease its actions.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

Bid-rigging in public procurement markets accounts for a striking percentage of prosecutions by competition authorities in jurisdictions where such authorities are well-established. For example, from 1972 through 1992, the U.S. Department of Justice (DOJ) obtained 1159 criminal indictments for Sherman Act violations. Some 625 of these indictments, nearly 54%, attacked collusion against public procurement bodies.[57] The frequency of such cases suggests that suppliers view public bodies as attractive targets for collusive schemes.

[57] These data were collected from the Commerce Clearing House Trade Regulation Reporter for the years in question.

A further point worth emphasizing is that a large proportion of cartel agreements that have been uncovered by the competition authorities of major developed jurisdictions in the past decade (including both collusive tendering for government contracts and price-fixing arrangements not involving government procurement processes) have been international in scope.[58] Such arrangements directly undercut the gains from trade liberalization in addition to impacting directly on the welfare of citizens.[59] They manifest a clear need for international co-operation in the enforcement of competition laws. They are also of interest in that they demonstrate that, contrary to the assumptions of some trade policy practitioners, external market opening alone cannot always ensure vigorous competition in the absence of effective competition laws.[60]

(2) Varieties of collusive tendering

Collusive tendering schemes take a variety of common forms. Probably the most common is "bid rotation", by which suppliers organize their bids to determine which firm will win a contract.[61] The "losers" agree to refrain from bidding or to inflate their bids in the expectation that they will win when their turn comes up. Other common forms of bid rigging include "complementary bidding", in which some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer, and "bid suppression", in which one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted. The low bidder often secures support for the plan by giving its co-conspirators side payments or subcontracts.[62] All such schemes have at least one element in common, namely an agreement

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[58] See Levenstein and Suslow, above note 34; Julian Clarke and Simon J. Evenett, "A multilateral framework for competition policy?," in State Secretariat of Economic Affairs and Simon Evenett, *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond* (Bern: State Secretariat for Economic Affairs); and Simon J. Evenett, Margaret Levenstein and Valerie Suslow, 'International cartel enforcement: lessons from the 1990s', *The World Economy*, vol. 24, iss. 9, 2001, pp. 1221-45.

[59] Anderson and Jenny, above note 10.

[60] Cf. Alan Winters, 'Doha and world poverty targets," World Bank, mimeo, 2002 and Richard Blackhurst, 'Trade Policy is Competition Policy', in *Competition and Economic Development*, OECD: 1991.

[61] Representative illustrations include United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988); United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir. 1987); United States v. A-A-A Electrical Co., 788 F.2d 242 (4th Cir. 1986); United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982).

[62] *See* United States v. All Star Indus., 962 F.2d 465 (5th Cir. 1992). The use of side payments to facilitate bid rotation conspiracies is common where contractors face each other regularly, such as bidding for highway paving contracts. *See, e.g.*, United States v. A-A-A Electrical Co., 788 F.2d 242 (4th Cir. 1986); United States v. Inryco, Inc., 642 F.2d 290, 292 (9th Cir. 1981); *David Thompson*, 621 F.2d at 1149-50; *Azzarelli Construction*, 612 F.2d at 297.

between some or all of the bidders that limits or eliminates competition between them and (normally) predetermines the winning bidder.[63] Additional information on specific forms of bid rigging is summarized in Box 4.

Box 4: Basic Types of Collusive Tendering

Bid Suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding: Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to create a (false) appearance of genuine competitive bidding.

Bid Rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.

Subcontracting as a compensating mechanism: Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder agrees to withdraw its bid in favour of the next lowest bidder in exchange for a subcontract that divides the illegally-obtained higher price between them. Note, however, that sub-contracting is not necessarily anti-competitive if it is not done in furtherance of efforts to limit competition in the award of the main contract.

Source: Adapted from U.S., Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For" (available on the internet at http://www.usdoj.gov/atr/public/guidelines/211578.htm).

(3) Estimates of the price impact of collusion in public procurement processes

Collusion adds directly to the price paid by procuring entities for goods and services procured. An obvious question of interest is the extent of the premium that is paid. One of the more sophisticated estimates was done by Froeb et al using data from an investigation of the rigging of bids for the supply of frozen seafood to the US Department of Defense. They found, with a high degree of statistical confidence, that the rigging of bids had raised the

[63] See, for a useful overview, U.S., Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For," (available on the internet at http://www.usdoj.gov/atr/public/guidelines/211578.htm).

price paid by the Department by 23.1 % (this was the smallest point estimate).[64] This is broadly in line with more recent estimates of the costs of cartelization in international markets.[65] In their analysis of the price impact of international cartels, Levenstein and Suslow report a median cartel overcharge for all types of cartels of 25%; and one of 32% for international cartels (the overcharge is calculated by comparing cartel prices to a competitive benchmark).[66] Clearly, the costs of cartelization (and, therefore, the potential benefits of anti-cartel enforcement) are substantial.[67]

(4) The deterrence of collusive tendering through competition law enforcement

A pre-requisite for the deterrence of collusive tendering is an effective legal prohibition of such conduct, normally in a national competition or antitrust law.[68] (Reference is made here to "deterring" rather than "preventing" collusion since it is probably impossible to eliminate such conduct altogether.) Often, bid rigging in public procurement processes is prohibited through general antitrust provisions against cartels or conspiracies in restraint of trade;[69] however, it can also be the subject of legal provisions that focus specifically on collusion in public procurement markets.[70] In some jurisdictions, bid rigging can also trigger penalties under statutes aimed at the prevention of fraud. To be effective, legal prohibitions against collusive tendering should be backed up by an effective enforcement regime and by appropriate sanctions (penalties) including heavy fines and, in the view of many experts, prison sentences.[71] In transition economies, such a prohibition serves an important purpose by making clear that the government will not tolerate private efforts to recreate collective

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[64] Froeb, Koyak and Werden, above note 34.

[65] See, e.g., John M. Connor, "Price-Fixing Overcharges: Legal and Economic Evidence", SSRN Working Paper, 2005, Available at: http://ssrn.com/abstract=787924.

[66] Levenstein and Suslow, above note 34.

[67] Clarke and Evenett have shown, the resource saving that can be generated by only a marginal reduction in bid rigging on government contracts (e.g., on the order of 1%) is greater than the average annual operating budget of the competition agency in most countries, often by a factor of several times over. Clarke and Evenett, above note 58, p. 127.

[68] More than one hundred countries now have such laws.

[69] This is the case, for example, in the United States and the European Community.

[70] This is the case, for example in Canada, where bid rigging can, depending on the circumstances, be dealt with under either a specific provision of the *Competition Act* which addresses bid rigging as such or under the more general provision on conspiracies in restraint of trade.

[71] See OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programme*, OECD, 2002; see also Richard Whish, "Control of Cartels and Other Anti-competitive Agreements," in Vinod Dhall, *Competition Law Today: Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), chapter 1.

planning techniques that the country has abandoned. There are indications that the effective prohibition of "naked" or "hardcore" cartels is becoming an internationally accepted norm.[72]

Enactment of an appropriate competition law provision prohibiting bid rigging and other collusive arrangements is only the beginning. Recent efforts to deter such arrangements through effective enforcement of relevant statutory provisions have taken two main forms. First, sanctions for culpable parties have been substantially increased.[73] Convictions in bid rigging cases can now result in significant penalties. In the US, for corporate defendants, the Sherman Act now sets a maximum fine of $100 million. Corporate violators also may be fined up to the greater of twice the firm's gross pecuniary gain from the violation or twice the gross pecuniary loss by victims.[74] Individuals may be fined up to $1,000,000, twice the pecuniary loss by victims, or twice the defendant's gross pecuniary gain from the violation, whichever is greatest.[75] Individuals also may be sentenced to as many as ten years in prison. If it brings a civil suit to enforce the Sherman Act, the DOJ may seek an injunction or may obtain treble damages for injury the federal government has suffered as a purchaser. Under the Civil False Claims Act,[76] the Department may seek treble damages in cases of collusive bidding and, even when no actual damages can be proven, may obtain civil penalties of up to $10,000 for each separate voucher or invoice submitted under a government contract tainted by collusion. State governments injured in their capacity as purchasers also have standing to seek treble damages. In broad terms, the trend to impose heavy penalties on defendants in cases of bid rigging and collusive tendering has been progressively replicated in other jurisdictions such as the European Communities and Canada.

Antitrust violations involving bid-rigging can also result in a contractor's suspension or debarment. In the US, Federal Acquisition Regulation (FAR) 9.407-2(a)(2) permits the

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[72] Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 *Antitrust Law Journal* 711 (2001) (prosecution of vitamins cartel suggests broader international acceptance of anti-cartel norm). The deterrence of hardcore cartels was also a major focus of work in the WTO Working Group on the Interaction between Trade and Competition Policy when that body was active. See *Report (2002) of the WTO Working Group on the Interaction between Trade and Competition Policy to the General Council* (WT/WGTCP/6), paragraphs 47-64, available on the internet at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

[73] The expansion of antitrust sanctions for cartel behavior is traced in Stephen Calkins, "Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties," 60 *Law & Contemporary Problems* 127 (1997); Wouter P.J. Wils, "Is Criminalization of EU Competition Law the Answer?" 28 *World Competition: Law and Economics Review* (2005).

[74] 18 U.S.C. § 3623 (1994).

[75] *Id.* at § 3623.

[76] 31 U.S.C. §§ 3729-31 (1994).

purchasing agency to suspend contractors suspected of a violation of "Federal or State antitrust statutes relating to the submission of offers" and states that an indictment for antitrust violations "constitutes adequate evidence for suspension."[77] The entry of a criminal conviction or civil judgment for violating federal or state antitrust statutes relating to the submission of offers creates grounds for debarment.[78]

A second important tool for the deterrence of bid rigging has been to provide inducements for cartel participants to inform government competition agencies of wrongdoing through so-called leniency programs. In broad terms, such programs encourage cartel members to come forward, confess to their activities and assist the competent authorities in investigating and prosecuting their fellow cartel members. In exchange, they receive amnesty for their own behavior. Normally, only one company (the "first in") can qualify for leniency.

Leniency programs for co-operation in anti-cartel enforcement cases were introduced in the US in the 1980s and progressively strengthened through the 1990s.[79] Following the lead of the United States, the European Commission adopted such a programme in 1996.[80] The Commission's initial Leniency Notice, which was not as successful as expected, was replaced by a new one in 2002.[81] The main change was that, once a firm was admitted to the programme, immunity became automatic. Subsequently, the European Commission and all EC Member States adopted a model leniency programme developed within the European Competition Network (a network linking all competition authorities in the Community).[82] As

[77] 48 C.F.R. § 9.407-2(a)(2).

[78] 48 C.F.R. § 9.406-2(a)(2).

[79] On the development and operation of modern leniency programs, see Joe Chen & Joseph E. Harrington, Jr, "The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path," in *Political Economy of Antitrust* (Vivek Ghosal & Johan Sennek eds.); Julian M. Joshua, "Leniency in U.S. and EU Cartel Cases," Antitrust, vol. 14, no. 3, at 19 (Summer 2000) (comparing U.S. and EU leniency programs); Donald C. Klawiter, "Corporate Leniency in the Age of International Cartels: The American Experience," *Antitrust*, vol. 14, no. 3, at 13 (Summer 2000) (describing development of U.S. leniency policy); and Massimo Motta & Michele Polo, "Leniency Programs and Cartel Prosecution," 21 *International Journal of Industrial Organization* 347 (2003). Regarding leniency programs in the European Community, see Robert D. Anderson and Alberto Heimler, " What has Competition Done for Europe? An Inter-Disciplinary Answer, " *Aussenwirtschaft*, 62. Jahrgang (2007), Heft IV, pp. 419-454.

[80] Commission Notice on the non-imposition or reduction of fines in cartel cases, *Official Journal C 207*, 18 July 1996 pp. 4 – 6.

[81] Commission notice on immunity from fines and reduction of fines in cartel cases, *Official Journal C 45*, 19 February 2002, pp. 3-5.

[82] Internet: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.

a result, the Commission programme was again amended in 2006, mainly to clarify the type and quality of information to be provided by leniency applicants.[83]

US enforcement authorities stress the following three characteristics as being critical to the success of leniency programs. First, there must be severe sanctions in place for firms and individuals that do not obtain amnesty. Without this, the incentive to cooperate will not be present. Second, there must be a genuine fear of detection, based on a credible possibility that illegal behaviour will be detected, prosecuted and sanctioned. Third, there must be predictability and transparency to the amnesty program such that potential applicants a high degree of assurance that, if they take the risk of coming forward, they will get the reward.[84]

In addition to the foregoing measures (effective sanctions and leniency programmes to induce cooperation), enforcement agencies also stress the importance of procurement personnel being alert to various "suspicious signs" that may signal the presence of collusion. A number of these are set out in Box 5. To be sure, the involvement of competition agencies (or, where appropriate, police or other investigatory authorities) is generally necessary to the investigation and prosecution of bid rigging. However, it is the procurement officials who are most likely to be in a position to observe behaviour that may indicate the presence of collusion. Consequently, training programs to enhance procurement officials' "collusion-awareness" are an important adjunct to the enforcement of competition law by the responsible authorities.

[83] Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8 December 2006, pp. 17-22.

[84] Thomas O. Barnett, "Criminal Enforcement of Antitrust Laws: The U.S. Model" (Remarks before the Presented at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy New York, New York, September 14, 2006).

Box 5. Suspicious signs: behaviour that may signal the presence of collusive tendering

a) Potentially suspicious bid patterns

- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or internal agency cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder routinely subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

b) Suspicious Statements and Behaviour

- Bid proposals or forms submitted by different vendors contain common features or irregularities (e.g. identical calculations, spelling errors, handwriting or typeface that suggest they may have been prepared jointly).
- A company requests a bid package for itself and a competitor or submits both its own and another company's bids.
- A company submits a bid when it is incapable of successfully performing the contract (this may be a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining who else is bidding.
- A bidder or salesperson makes: (a) any reference to industry-wide or association price schedules; (b) statements indicating advance knowledge of competitors' pricing; (c) statements to the effect that a particular contract or project "belongs" to a certain vendor; or (d) statements indicating that a particular bid was only submitted as a "courtesy," "complementary," "token," or "cover" bid.

NB: It should be emphasized that the foregoing are merely signs that may trigger suspicions; they are not, by themselves, proof of collusion.

Source: Adapted from U.S. Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For" (available on the internet at http://www.usdoj.gov/atr/public/guidelines/211578.htm).

The deterrence of bid rigging can also be facilitated by legal requirements to inform the enforcement authorities of apparent violations. In the US, federal procurement statutes

and regulations require executive agencies to notify the Department of Justice (DOJ) about bids or proposals that indicate antitrust violations.[85] Another potentially very useful practice – perhaps particularly so in developing jurisdictions where there may be limited awareness of the requirements of competition law within the business community – is to require contractors to certify that they have set their prices independently. In the US, this is done through the requirement for a "Certificate of Independent Price Determination".[86] Where appropriate, basic information on relevant competition law provisions can be provided with tender documentation. Another basic tool for guarding against the possibility of collusion involves the preparation of an internal estimate of the competitive-market cost of significant projects, as a benchmark to evaluate the possibility of collusive overcharges. It must be acknowledged, however, that such estimates are only useful to the extent that they accurately reflect actual market conditions. Finally, it should be noted that the detection of bid rigging can also be facilitated by econometric tools that can assist in the identification of suspicious bidding patterns.[87]

Competition law enforcement relating to collusive tendering does not take place in a vacuum. As already noted, other laws and policies – including, very much, those pertaining to tendering processes – can either facilitate or help to prevent collusion. Domestic content requirements directly limit the set of potential suppliers and thereby diminish the capacity of entry to upset cartel coordination. The unsealing of bids in public for all bidders to observe can enable cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high "cover bids". The use of electronic procurement tools and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. Advocacy efforts to address these concerns are, therefore, an important adjunct to law enforcement in this area. Such efforts are the focus of the next sub-section of this chapter.

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[85] The statutory requirement appears in 10 U.S.C. § 2305(b)(9) (1994) and 41 U.S.C. § 253b(i) (1994). Section 3.303(a) of the Federal Acquisition Regulations directs agencies to notify the Attorney General of evidence of collusive bidding. 48 C.F.R. § 3.303(a). FAR 3.301(b) requires agency personnel to refer instances of identical bids in advertised bidding to the Attorney General and to supply evidence of suspected antitrust violations to the agency office responsible for debarring and suspending contractors. 48 C.F.R. § 3.301(b).

[86] *See* FAR 3.103-1, 48 C.F.R. § 3.103-1 (solicitations for firm-fixed-price contracts must include Certificate of Independent Price Determination, by which supplier declares that it set its prices "independently").

[87] See, e.g. Robert H. Porter & J. Douglas Zona, Detection of Bid Rigging in Procurement Auctions, 101 Journal of Political Economy 518 (1993); Robert H. Porter & J. Douglas Zona, Ohio School Milk Markets: An Analysis of Bidding (NBER Working Paper No. 6037: May 1997).

C. COMPETITION ADVOCACY AND EDUCATION: FOSTERING SUPPORT FOR PRO-COMPETITIVE PROCUREMENT REGIMES AND ADDRESSING REGULATORY BARRIERS/OTHER GOVERNMENT MEASURES THAT IMPEDE COMPETITION

Competition agencies – and other public interest-oriented institutions such as research institutes and policy think-tanks - can play an important role in regard to the reform of government measures affecting competition. This is recognised in many jurisdictions, where competition agencies engage in "advocacy" activities (e.g., research, analysis, submissions to parliamentary bodies, etc.) aimed at influencing the evolution of government policies and raising awareness of restraints on competition. There is, in fact, a growing recognition that such work is of critical importance, co-equal in many circumstances with the competition law enforcement function.[88]

Three main areas can be identified for competition advocacy activities aimed at promoting competition in public procurement markets: *first*, general public education efforts aimed at building support for the institutions of a healthy market economy, including sound public contracting rules and procedures; *second*, efforts aimed at modifying or eliminating specific aspects of procurement policy and regulations that may (intentionally or inadvertently) suppress competition; and *third*, broader efforts to modify or reduce sectoral and/or cross-sectoral policies that are not specifically concerned with procurement but which affect the scope for competition in public procurement markets. These might include licensing or other restrictions on entry or participation in markets and cross-sectoral or "framework" laws and policies that unnecessarily make it more difficult for firms to compete.[89] Each of these categories merits elaboration.

(1) General public education efforts aimed at building support for the institutions of a healthy market economy, including transparent and competitive contracting procedures

[88] The importance of competition advocacy activities as a complement to competition law enforcement is emphasized in the competition-related work of the OECD and the WTO. See also Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," above note 10 and Anderson and Jenny, above note 10.

[89] This is not at all to suggest that regulation does not have a legitimate role to play as an element of governance; on the contrary, it is well established that regulation of one kind or another can serve an important role in remedying market failures whether due to the existence of externalities, asymmetries of information or "natural monopolies". The challenge for competition agencies and other "competition advocates" is to identify situations where regulation has been imposed in the absence of a valid market failure rationale, or the degree or nature of regulation is counter-productive.

An important aspect of competition advocacy concerns basic public education regarding the institutions of a healthy market economy. To have positive long-lived effects, procurement and other economic policy and legislative reforms ultimately must command public support. In this regard, competition advocates can be a catalyst for debate about the appropriate role of government intervention in the economy and the correct choice of strategies for conducting procurements. Performing the education function before constituencies outside the government can help to build a political constituency for market-oriented policies.

In the current economic environment, an important dimension of such advocacy may be to ensure that public infrastructure spending programmes follow proper contracting procedures and thereby maximize long-run value to citizens. The economic downturn of 2008-09 has triggered increased emphasis on public infrastructure spending as an element of economic stimulus packages, not only in the United States but around the globe. Yet the public benefits to be created through infrastructure spending – which presumably will last well beyond the current recession – depend very importantly on adherence to procurement procedures that ensure vigorous competition in markets and accountability for the use of public funds. Indeed, a time of greater-than-usual public procurement/infrastructure investment would seem to be a critical time for ensuring that proper procedures are followed to ensure competitive and transparent contracting.[90] Competition advocates and procurement authorities have a common interest in fostering a consensus to this effect.

Competition advocacy in transition and developing economies raises special issues. While such economies often have the most pressing needs for upgrading of national transportation and other infrastructure, they may also suffer from a legacy of corruption and clientism in state procurement policies that undercuts efforts at modernization and renewal.[91] A common path of reform efforts in such economies is to engage the elites - public sector and private sector professionals who often have gained formal training in Western universities or held positions that provide extensive contact with Western market institutions. While

[90] See Steven L. Schooner and Christopher R. Yukins, "Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism," George Washington University Law School Legal Studies Research Paper No. 460, 2009. Robert D. Anderson, "Remarks to the 2010 West Government Contracts Law in Review Conference," 5 January 2010 and "Public works: filling the hole," *The Economist*, December 13, 2008, p. 16.

[91] See, generally, Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, above note 14.

understandable, this approach has its limitations. Extending participation in and support for the reform process beyond the elites, to the larger body of citizens who live in extreme poverty or are politically disaffected, requires conscious efforts to increase public awareness of the rationales for reform and the encouragement of public participation in the design and implementation of specific measures.

As already noted, a particularly important audience for consciousness-raising concerning the importance and maintenance of competition concerns contracting personnel – i.e. staff members of purring entities – who should be well-informed regarding the risks of collusion, the harm that it causes and the means of preventing it.[92] The prevention of collusion in the procurement process also requires effective co-operation between procurement and competition agencies. For these purposes, competition agency staff can be invited to participate in training seminars for procurement officials that include modules on the detection and prevention of bid rigging, or can otherwise work with procurement officials to help ensure a high level of awareness.[93]

(2) Advocacy efforts focused on procurement policies and regulations that can limit competition

Public procurement policies can limit competition and even assist firms in behaving anti-competitively in at least two ways. A first way is to restrict entry into procurement markets, particularly by imposing domestic or local content rules that exclude potential bidders. A majority of countries have policies that favour their domestic suppliers in regard to at least some aspects of their public procurement. A second area of possible concern involves procedures that aim to increase the integrity of the procurement system but may also

[92] OECD, *Third Report on the Implementation of the 1998 Recommendation*, at 21 (finding that "in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among companies participating in bidding procedures and of the imiportant role they can play in preventing and detecting cartels.").

[93] Training seminars and workshops on government procurement which are presented by the WTO Secretariat for relevant officials pursuant to the Secretariat's annual technical assistance plan also typically include a module on the detection and prevention of collusive tendering, on the basis that this is important to ensure that the goals of procurement liberalization are not undercut by such activities. See, for related details, the discussion at http://www.wto.org/english/tratop_e/gproc_e/gptech_coop_e.htm .

have the unintended effects of limiting entry and facilitating supplier coordination.[94] For example, expansive civil and criminal strictures against fraud in public procurement markets that create asymmetries between public and private contracting can discourage firms from serving public purchasers.[95]

A further important example concerns the process for opening bids in sealed bid procurements. Typically, bids are unsealed in public and displayed for all bidders to observe.[96] While widely seen as being important as an anti-corruption measure, this process can also facilitate collusion by enabling cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high "cover bids" (recall the discussion in Part IV:B, above). A possible reform, in this regard, could be to permit the private inspection of bids by a guardian inside the purchasing agency, such as an inspector general. Such a measure could impede efforts by cartel members to detect cheating without undermining the integrity of the award process.[97]

The foregoing also raises possible issues in regard to the above-discussed OECD principles and recommendations for the promotion of integrity in public procurement. While, as we have emphasized, in general transparency (OECD principle 1) enhances competition and provides a level playing field for competing suppliers, too liberal dissemination of information may also result in enhanced opportunities for collusion among suppliers. For example, information on procurement planning (addressed in OECD principle 3) may be used by suppliers e.g. to prepare bid rotation schemes and similar forms of anti-competitive practices. Therefore, a balance will have to be sought between transparency standards that are necessary to discourage corruption and the requirements of competition.

Developments in procurement methodologies, including the increasing use of electronic procurement tools, reverse auctions and framework contracts, while offering

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[94] See, generally, OECD, *Competition Policy and Procurement Markets* (Paris: DAFFE/CLP/(99)3FINAL, 1999).

[95] William E. Kovacic, "The Civil False Claims Act as a Deterrent to Participation in Public Procurement Markets,"6 *Supreme Court Economic Law Review*, 1998, 201.

[96] John Cibinic Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 522-25 (3d ed. 1998).

[97] As stated by Kovacic et al, "If an auctioneer with first-price sealed bidding reveals the amounts of the bids of all the bidders, then the problem that a bidding ring faces in policing the bids of its members is made much easier. In general, the less information provided on auction outcomes, the more difficult it is for a bidding ring to operate. Unfortunately, in many settings it will be impossible to hide the identity of the winner, but

significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. For example, electronic procurement tools (e.g. electronic reverse auctions) are capable of being used to facilitate collusion if potentially competing firms gain access to each other's bids. One key here is to ensure a high degree of confidentiality of individual bids prior to the contract award.

Similarly, the use of "framework agreements" or "frameworks" (sometimes also known as two-stage contracting) as a public contracting tool, while capable of generating important transactional efficiencies, can also pose significant challenges with respect to the maintenance of competition, accountability and non-discriminatory procurement processes. While the usage of the term "frameworks" can vary across jurisdictions, a broad definition would include the following elements:

> "(a) The solicitation of tenders or offers against set terms and conditions;
>
> (b) The submission of tenders indicating the terms (e.g. price) on which different suppliers are willing to supply;
>
> (c) Chosen supplier(s) and the procuring entity entering into a "framework agreement" on the basis of the tenders; and
>
> (d) Subsequent placing of periodic orders (to conclude procurement contracts) with the supplier(s) under the terms of the "framework agreement", as particular requirements arise." [98]

Such contracts account for a large and increasing proportion of overall procurement activity in major jurisdictions.[99]

Ongoing work on the issue of framework agreements in the context of the revision of the UNCITRAL Model Law on Procurement encompasses important concerns regarding their implications for the maintenance of competition and transparency, in addition to recognition

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certainly the full range of bids with first-price sealed bidding need not be revealed." Kovacic et al, above note 39.

[98] See Sue Arrowsmith and Caroline Nicholas, "Regulating framework agreements under the UNCITRAL Model Law on procurement," in S.Arrowsmith (ed.), *Procurement Regulation for the 21st Century: Reform of the UNCITRAL Model Law on Public Procurement*, forthcoming, West; 2009, chapter 2. The US concept of "Indefinite Delivery/Indefinite Quantity" or "ID/IQ" contracts is a type of framework agreement. See, for useful background, Daniel I. Gordon and Jonathan L. Kang, "Task-Order Contracting in the U.S. Federal System: The Current System and Its Historical Context," mimeo, May 2007.

[99] According to Yukins and Schooner, as much as 40 % of the approximately $400 billion US federal procurement market is administered through such inter-agency framework agreements. Yukins and Schooner, above note 50.

of the efficiency benefits that they can bring. Summarizing the thrust of this work, Arrowsmith and Nicholas observe as follows:

> "... it is also recognized that without precise and adequate controls the operation of frameworks can inflict undue damage on the twin principles of competition and transparency that underlie the Model Law. It has therefore been sought to devise a careful system for operating frameworks that preserves these twin principles throughout. Of particular note is the fact that the UNCITRAL system will provide for a clearly defined transparent and competitive procedure for placing orders under a framework agreement – a process that has not always been clearly regulated and adequately controlled in national procurement systems and which seems to present particular dangers. This will be allied to measures that require procuring entities to provide information on awards they have made and that apply the supplier complaints system to orders under a framework. In this way, states that implement the Model Law are encouraged to reap the benefits of framework agreements whilst reducing the risks that frameworks may present for transparent and competitive procurement."[100]

An important question for competition advocates and trade liberalization bodies is whether further work on these issues is needed in the framework either of national competition policies or of trade instruments.

(3) Efforts to address regulatory and other obstacles to competition that are not specifically linked to the procurement process, but which nonetheless impact on competition in public procurement markets

Regulatory obstacles to competition that are not specifically linked to the procurement process, but which can nonetheless impact on competition in public procurement markets are of two main kinds: (i) industry-specific measures; and (ii) cross-sectoral or "framework" laws and policies. With regard to the former, such measures include a wide range of licensing and other requirements that impede entry to markets, for example by imposing excessive financial solvency requirements. The anti-competitive effects that such requirements can entail have long been recognized. Experience in both developed and developing countries shows that, in many cases, rather than having regulation imposed on them for the public benefit, incumbent firms have sought regulation for their own benefit, for the purpose of limiting entry into the industry and helping them to enjoy higher prices for

[100] Arrowsmith and Nicholas, above note 98. See also Caroline Nicholas, "Framework Agreements and the UNCITRAL Model Law on Procurement," *Public Procurement Law Review*, 2008, Number 5, pp. NA20-30.

their products.[101] Recognition of the significance of such conduct as a barrier to economic development dates back at least to Krueger's classic analysis,[102] and is affirmed in recent analyses by the World Bank and other development-related agencies.

The impact of regulatory obstacles to competition has also received attention in the context of international trading arrangements. For example, in the 1998 Report of the WTO Working Group on the Interaction between Trade and Competition Policy the following views were expressed regarding the significance of such obstacles:

> "The following examples of regulatory situations having adverse effects on competition ... were advanced: outmoded or unnecessary regulations; a failure by countries to recognize each others' technical standards; state zoning laws or sanitary and phytosanitary requirements that limited entry unnecessarily or served as disguised tools for excluding competing suppliers; legal systems that facilitated strategic use of the courts by firms to harass competitors; and discriminatory R&D funding practices. It was suggested that the regulations that needed to be reviewed could be classified as follows: regulation that openly discriminated in favour of domestic suppliers; regulations that were non-discriminatory on the surface but subtly discriminatory in their substantive requirements; regulations that simply were no longer needed; and poorly designed regulations that were desirable in principle but unnecessarily intrusive."[103]

Any or all of the above-noted regulatory measures can be an appropriate focus for competition advocacy activities.

D. OTHER ASPECTS OF COMPETITION LAW BEARING ON PUBLIC PROCUREMENT MARKETS

Competition in public procurement markets is also affected by other aspects of competition law and policy. A first important example relates to the treatment of *mergers and joint ventures*. In the absence of effective legal provisions to prohibit anti-competitive mergers, competing firms can directly circumvent competition by merging their operations. This is a clear alternative to the use of bid rigging or similar agreements. In the event that firms desire to maintain distinct identities, joint ventures can be formed for the purpose of bidding on specific procurements. The effective regulation of anti-competitive mergers and joint ventures is a challenging problem, in that by no means all such arrangements are anti-

[101] The classic diagnoses of this problem are provided in George J. Stigler, 'The theory of economic regulation', *Bell Journal of Economics and Management Science* 2(1): Spring 1971, 3–21; and William A. Jordan, "Producer protection, prior market structure and the effects of government regulation," *Journal of Law and Economics* XV(1): April 1972, 151–76.

[102] Krueger, above note 15.

[103] WTO, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/2), p. 36.

competitive. Rather, a majority are likely to be either pro-competitive (i.e. likely to strengthen rivalry through cost savings and synergies) or at least neutral in their effects.[104] Effective tools must be developed to distinguish those arrangements that are likely to harm competition from the others.

Antitrust rules dealing with *single-firm monopolization and/or abuse of dominant position* can also play a role in regard to public procurement markets.[105] One area in which such rules may come into play relates to privatization. Economic law reform programs commonly involve the privatization of state-owned assets through various forms of auctioning mechanisms. Such programs often raise significant competition policy issues. Without adequate attention to competition concerns, the strategy and methods chosen to alienate assets may simply transform state-owned monopolies into durable privately held monopolies.[106]

Competition policy oversight in the post-privatization period can help the public reap the benefits of placing such assets into the private sector. For example, where the government dissolves a monolithic public enterprise into a number of privately-owned successor firms, the successors may seek to use mergers, holding companies, or other institutional arrangements to re-establish the monopoly structure of the public ownership era. Some forms of consolidation or cooperation will increase efficiency by enabling the participants, for example, to realize scale economies or link complementary assets. Competition policy oversight of outright consolidations or cooperation by contract can help ensure that such measures are not mere efforts to create a private variant of the predecessor public monopoly.

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[104] In countries with mature competition regimes, typically only a small percentage (1% or less) of mergers are deemed anti-competitive. See Robert D. Anderson and S. Dev Khosla, *Competition Policy As a Dimension of Economic Policy: A Comparative Perspective* (Industry Canada Occasional Paper, 1995).

[105] See, for a recent review of relevant US rules and enforcement approaches, U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008); see also William E. Kovacic, "Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act" (available on the internet at http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf). Related perspectives are provided in William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Behavior: The Chicago/Harvard Double Helix," 2007 Columbia Business Law Review, pp. 1-82 and in William E. Kovacic, "Designing Antitrust Remedies for Dominant Firm Misconduct", *Connecticut Law Review*, vol. 31, 1999, pp. 1285-1319. The evolution of corresponding approaches in the European Community is discussed in Anderson and Heimler, above note 79; and in Robert D. Anderson and Alberto Heimler, "Abuse of Dominant Position: Enforcement Issues and Approaches for Developing Countries," in Dhall, ed., above note 71, chapter 2, pp. 59-92.

[106] J.J. Laffont, *Regulation and Development* (Cambridge University Press, 2005).

V. Concluding remarks

Ensuring good governance in relation to public procurement systems (and thereby maximizing value for money for taxpayers) requires the addressing of two distinct but inter-related challenges: (i) ensuring integrity on the part of public officials administering the procurement processes; and (ii) promoting *competition* and preventing *collusion* among alternative suppliers. Both corruption and collusion undermine the intended benefits of procurement reforms and international liberalization via the WTO Agreement on Government Procurement. Although they may sometimes occur together, they are also analytically distinct problems that each merit attention in their own right.

Corruption in public procurement systems has rightly been condemned as a barrier to development and a scourge on the welfare of citizens in developing and developed countries alike. Such practices - which can also be viewed as an example of the more generic phenomenon of "rent-seeking" – are intrinsically related to the "principal-agent" problem that characterizes much public procurement. The problem of corruption and the harm that it causes have been given explicit recognition in the 1996 revised text of the GPA, a new development in WTO law that reflects increasing awareness of governance issues as an aspect of development. In addition to the general procedural provisions of the GPA dealing, for example, with publication of procurement opportunities, advance specification of selection and award criteria, etc., the Agreement's provisions relating to the establishment of domestic review or "bid challenge" procedures are an important bulwark against corrupt practices.

With respect to the challenge of promoting competition in public procurement markets, this is key benefit of the international liberalization via the WTO Agreement on Government Procurement. This chapter has argued, nonetheless, that international liberalization is not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. As has been discussed, this role encompasses: (i) the adoption and enforcement of effective rules to prevent bid rigging (collusive tendering); (ii) promoting the progressive elimination of regulatory and other barriers to competition, chiefly through "competition advocacy" activities; and (iii) other aspects of competition law enforcement including the treatment of

mergers and joint ventures. Specific challenges for competition authorities in the area of public procurement include: (a) promoting awareness among procurement officials of "suspicious signs" of collusion between suppliers; and (b) fostering institutional links between procurement and competition agencies.

In addressing these issues, this chapter has taken as a point of departure that measures aimed at increasing transparency and, thereby, preventing corruption in public procurement processes are consistent with the promotion of competition. Such measures expand the possibilities for competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits. Nonetheless, as has also been noted, experience in the application of competition law in public procurement markets highlights circumstances in which transparency-enhancing measures can facilitate collusion among suppliers. This highlights a need for balancing (mutual accommodation) of competition and anti-corruption concerns in well-designed procurement systems. We believe that, with such balancing, measures aimed at preventing corruption and promoting competition are likely to be strongly mutually reinforcing.

PRESENTATION BY MS. SUE ARROWSMITH

The role of transparency in addressing corruption and the need for further research

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What is transparency?

- A *tool* for achieving objectives in public procurement e.g.
  - Preventing corruption
  - Achieving value for money
  - Ensuring accountability
  - Ensuring equal treatment

What is transparency?

- Four dimensions
  - Publicity for contract opportunities
  - Publicity for the rules of each procedure
    - E.g. for selection and award criteria
  - Limits on discretion
    - E.g. disclosure of criteria and weightings etc
  - Verification and enforcement

Limits on transparency

- Impossible to eliminate discretion
- Need to focus also on the contract execution (post-award) phase

Costs of transparency

1. Can *prevent* best value for money – is "second best" approach to achieving best value for money
   - *"As a strategy of organizational design, rules have a cautious character. When we design organizations based on rules, we guard against disaster, but at the cost of stifling excellence……Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement"*

   (S. Kelman, Procurement and Public Management (1990), p.28)

   - Is one reason why not found to same degree in private sector (although not only one)

Costs of transparency

2. Formal tendering can make collusion easier

3. Process costs for procuring entities and tenderers

   UK: costs 10-15% higher than private sector tendering procedures

Costs of transparency

4. Emphasis on transparency is distracting for regulators *and* purchasers?

Passive waste versus active waste: more than 80% is passive

- O.Bandiera, A.Prat and T.Valletti, "Active and Passive Waste in Government Spending: Evidence from a Policy Experiment," (2009) 99 *American Economic Review* 99(4) 1278-1308 http://www.cepr.org/pubs/dps/DP6799.asp

Conclusion

- Empirical research needed on the benefits and costs of *specific transparency rules*
- More focus on other aspects of public procurement policy?

PRESENTATION DE M. ABDESSELAM ABOUDRAR

ICPC
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Instance Centrale de Prévention de la Corruption

Royaume du Maroc
Le Premier Ministre

Forum Mondial sur la Concurrence

18 - 19 février 2010 - OCDE, Paris

Session 3 : Collusion et Corruption dans les Marchés Publics

Abdesselam Aboudrar

Président
Instance Centrale de Prévention de la Corruption,
Maroc

Vendredi 19 février 2010

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L'importance des marchés publics au Maroc

- ✓ Les marchés publics sont une composante essentielle de l'économie marocaine:
- ✓ La masse globale des commandes de l'Etat atteint plus de 120 Md de Dh (> 10,7 Md Euros), soit plus de 15% du PIB;
- ✓ Importance stratégique de ces dépenses pour le développement du pays : Grand nombre de projets d'infrastructure et de développement dans lesquels les marchés publics jouent un rôle déterminant, en terme de répartition rationnelle et efficiente de la dépense publique.

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Les risques de corruption et de collusion dans les marchés publics au Maroc

✓ **Montants importants en jeu + diversité des intervenants + multiplicité des règles et leur complexité…**

➔ Les marchés publics = Un domaine exposé au **risque de corruption et de collusion**

Certains types d'irrégularités dans les marchés publics :

- ✓ La corruption ;
- ✓ Le manque d'accès à l'information concernant les appels d'offres ;
- ✓ Le non respect des obligations de publicité ;
- ✓ Le clientélisme et le favoritisme dans le choix des adjudicataires ;
- ✓ La faiblesse du contrôle en matière d'attribution et d'exécution des marchés ;
- ✓ La fraude, les malversations et autres sortes de pratiques illicites.

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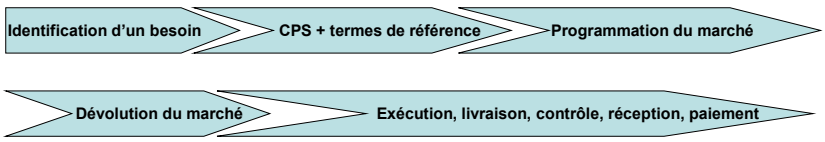
Les risques dans les différentes étapes des marchés Publics au Maroc



1- Naissance d'un marché par l'identification d'un besoin dont la satisfaction est rendue possible par la Loi des Finances, par une décision administrative, municipale, communale, territoriale, ou de la direction d'un établissement public…

⚠ Le besoin peut être :
- ✓ Fallacieux et infondé;
- ✓ Programmé à des fins de clientélisme;
- ✓ Satisfaisant un intérêt particulier….

2- Besoin exprimé à travers **un Cahier des Prescriptions Spéciales, des Termes de Références…..**

⚠ Ces spécifications peuvent être orientées ou manipulées : **risque de collusion ou d'ententes**….

Les risques dans les différentes étapes des marchés Publics au Maroc

3- Programmation du marché pour être lancé et dévolu à une date ou période donnée, après avoir passé toutes les phases de visa et d'approbation…

⚠ La programmation peut obéir au souci d'échapper au contrôle…

4- Dévolution du marché à travers des procédures réglementaires et administratives, précisées par la Réglementation des Marchés Publics, par des Règlements des Achats et par des Règlements de Consultation définissant les critères de choix et de jugement des offres…

⚠ Les principes de transparence, d'équité, de libre concurrence et d'efficacité peuvent être ignorés, manipulés ou transgressés : **Risque de corruption et de collusion**.

5- Exécution, livraison, contrôle, réception et paiement du marché selon des règles et des dispositions définies par des Cahiers des Charges Générales, Communes, ou Spéciales, par le Contrat….

⚠ Ces règles et dispositions peuvent être, également, ignorées, manipulées ou transgressées.

➔ Cette phase est souvent compliquée par l'intervention d'autres acteurs: Administrations ou collectivités locales, représentants locaux et centraux des maîtres d'ouvrage, architectes et bureaux d'études techniques…, services de la TGR et du CED...

Les principales conséquences de la corruption dans les marchés publics au Maroc

- ✓ Le gaspillage des fonds publics dû à leur allocation irrationnelle et inefficiente ;
- ✓ La réalisation de produits ou de travaux de qualité inférieure, ce qui peut causer de graves accidents, parfois mortels ;
- ✓ Le gaspillage des ressources dû au renouvellement des commandes ou au dédoublement des travaux lorsque ces derniers sont mal exécutés ;
- ✓ Le retardement, voire l'annulation, de plusieurs grands projets d'infrastructure et de développement ;
- ✓ Le découragements d'investisseurs étrangers et locaux ;
- ✓ Le manque de confiance des entreprises Marocaines en les établissements publics ;
- ✓ …

➔ **Conséquences graves avec un impact sur le développement économique et social du pays…**

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Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

1- Réforme des marchés publics

Importante réforme des marchés publics portant principalement sur l'amélioration de la gestion et sur la promotion de l'intégrité et de la transparence tout en luttant de façon active contre les pratiques de fraude et de corruption.

Les Principaux axes d'innovations de ce projet de réforme sont :

- ✓ La consécration de l'unicité de la réglementation en matière de marchés publics;
- ✓ La simplification et la clarification des procédures ;
- ✓ Le renforcement du recours à la concurrence et de l'égalité de traitement des concurrents ;
- ✓ La consolidation du dispositif de transparence et de la moralisation de la gestion de la commande publique ;
- ✓ La modernisation de la gestion de la commande publique ;
- ✓ L'amélioration des garanties des concurrents et des mécanismes de réclamation.

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Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

2- Promotion de la transparence dans les marchés publics

La volonté de transparence s'exprime notamment à travers :

- ➔ Les exigences de modernité, de bonne gouvernance et d'ouverture économique qui encouragent à se doter d'une réglementation des marchés qui tient compte de l'objectif de consolidation de la transparence et des intérêts de l'Administration et du secteur privé dans le cadre d'un partenariat équilibré, en vue d'assurer des prestations de meilleure qualité et à moindre coût ;
- ➔ La conception du nouveau décret en adéquation avec la nouvelle approche de la gestion des finances publiques basée sur la responsabilisation accrue des ordonnateurs, la recherche de la performance, ainsi que sur la contractualisation des rapports entre les administrations centrales et leurs services déconcentrés ;
- ➔ La détermination des pouvoirs publics d'inscrire, de manière irréversible, la passation des marchés de l'Etat dans une logique de respect des principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats, de transparence et de simplification des procédures.

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Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

3- Intervention d'une multitude d'acteurs publics et privés et séparation des tâches :

- ✓ Les services ordonnateurs sont chargés de la préparation des besoins, de la passation des marchés de leur suivi, de leur réception et de leur liquidation ;
- ✓ Les services de contrôle chargés de s'assurer de la régularité budgétaire et des procédures (respect des règles de transparence et de concurrence) ;
- ✓ Les services du comptable payeur chargés du règlement des dépenses correspondantes et de la libération des créances de l'entité publique ;
- ✓ Les opérateurs privés assurent la fourniture des prestations et la réalisation des travaux de l'administration dans un cadre contractuel organisé;
- ✓ La Commission des Marchés : Émet des avis sur les projets de textes législatifs ou réglementaires et sur les problèmes de toute nature relatifs aux marchés publics + Propose des dispositions pour compléter la législation et perfectionner les services de marchés et lancer des études pour améliorer les conditions de placement des commandes et des marchés de l'État.
- ✓ Le Conseil de la Concurrence;
- ✓ L'Instance Centrale de Prévention de la Corruption.

➔ **Problèmes de coordination et efficacité du contrôle?**

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Instance Centrale de Prévention de la Corruption

Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc : D'autres mesures

4- Promotion de la bonne concurrence dans les marchés publics

5- Garantie des droits des entreprises

6- Recherche de la performance dans la gestion des marchés publics

7- Moralisation de la gestion des commandes publiques

8- Prise en compte des engagements internationaux pris par le Maroc

9- Renforcement des capacités de gestion

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Merci de votre attention

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PRESENTATION BY MR. BENNY PASARIBU

Corruption and Competition

"Collusion and Corruption in Public Procurement"

presented by Dr. Benny Pasaribu

Indonesian Competition Authority (KPPU RI)
Commissioner

for the Global Forum on Competition,
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Recent Development of Indonesian Economy

- Indonesian economy has been growing above 7% per year during the period of 1970 until mid of 1990s. However, since the Asian crisis in 1997-1998, followed by reformation era, Indonesian economy sharply declined and then grew in slower path. Fortunately, since 2006 the economy grew faster and achieved more than 6 % per annum. Last year Indonesian economy was able to grow above 4% despite the impact of global crisis.
- Reform Era started in 1998, symbolized by the resigning of President Soeharto, several new laws were enacted, such as the corruption eradication law and competition law, as well as the establishment of corruption court, anti-corruption agency (KPK), and the competition agency (KPPU).

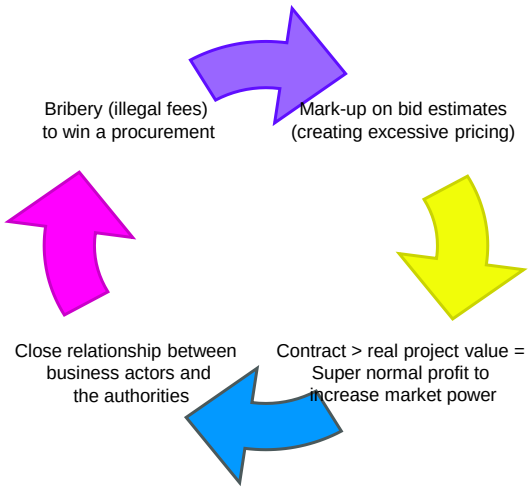
Recent Development of Indonesian Economy

- Last month, ASEAN-China FTA just started. Indonesia has to make a great deal of improvement in policy/regulatory reforms towards higher productivity, efficiency, good governance and law enforcement.
- However, from various survey agencies, Indonesia is still considered among the top rank of for corruption (Transparency International,etc.).

Corruption Grows faster in Less Competitive Areas

- Aside from other forms of anticompetitive practices, Government procurement may be one of the most collusive area that brings about bid rigging activities that lead to corruption.
- Anticompetitive practices leads to accumulation of supernormal profits by which the amount of cash money is surmount available to be given to related authorities, when it is necessary, that can be considered as kick back, bribery, or other names.
- Needs more in depth studies on the correlations between competition and corruption across sectors.

Corruption in procurement process



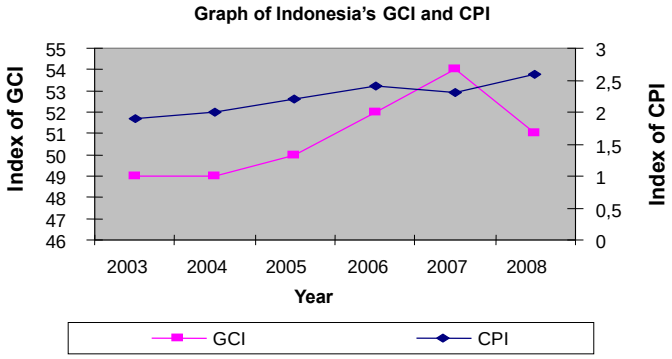
- The main characteristic of a government with high corruption level is strong relationship between those in power and business actors, which may create opportunity by business actors to freely exploit consumers by an excessive pricing in order to gain supernormal profits.
- The supernormal profit accumulated by business actors may be set aside some quite big funds that make it possible for corruption practices, in order to maintain status quo or even business expansion and hence supernormal profits.

Comparison of Corruption and Competitiveness Indices in 2009

States	Corruption		Competitiveness	
	Index	Rank out of 180 states	Index	Rank out of 134states
Singapore	9.2	3	5.53	5
Malaysia	4.5	56	5.04	21
Thailand	3.4	84	4.60	34
Brunei	5.5	39	4.54	39
Indonesia	**2.8**	**111**	**4.25**	**55**
Vietnam	2.7	120	4.10	70
Philippines	2.4	139	4.09	71

Source: processed from various sources

Corruption perception data (CPI) and competitiveness data (GCI) 2003-2008



Source: processed from various sources

KPPU and the collusion in public procurement

- KPPU has received 730 complaints in 2009 that consist of 201 reports and 529 written information. The 84% or 169 out of 201 reports is on the violation of Article 22 (bid rigging). Experiences shows cartel/collusion is maintained by guarantee a sub-contract or cooperation with bid committee in adjusting requirements for their favor.

- KPPU has made various efforts to prevent collusion in public procurement:
  1. Publish guideline on the prevention of bid-rigging;
  2. Cooperation with the Indonesian Corruption Eradication Commission;
  3. Recommend administrative actions against the officers concerned to those with higher position in their organization;
  4. Advocacy through dissemination program; and
  5. Currently putting another effort into the punishment of administrative sanctions to tender committees or principals.

- Cooperation among state agencies is a must including with:
  1. KPK (Corruption Eradication Commission)
  2. National Police
  3. Attorney General Office
  4. BPK (State Auditor)
  5. LKPP (Government Procurement Authority)

Cooperation with the Corruption Eradication Commission (KPK)

- Cooperation between the Corruption Eradication Commission (KPK) and the KPPU was agreed on February 6th 2006.
- The scope of cooperation were involving access on data, information, and coordination related to respective case findings. If there is indication of corruption in any cases handled by KPPU, then KPPU could apprehend the corruption aspect to the KPK, while KPPU continues to focus on collusion aspect and vice versa.
- Includes joint socialization of the law to stakeholders.