ALLEN & OVERY

Collusion in public procurement – A "Notice" from the Commission

On 15 March 2021, the European Commission (the **Commission**) published its long-awaited "Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground" (the Notice). The Notice is primarily aimed at (i) Member States and public authorities implementing the EU Directives on public procurement and (ii) public procurement officers applying the implemented public procurement legislation in practice. However, the long-awaited Notice is disappointing: while providing some insights into the use of certain concepts (eg standard of proof – see below), it remains unclear how useful it will be in practice, as the Commission did not seize the opportunity to provide concrete examples from various Member States and to refer to Member State guidance and/or case law (like for instance, Germany, which has built up a lot of expertise and case law). In addition, the Notice abstractly refers collusion in public procurement's and its interplay with competition law and is rather general in nature.

What is collusion?

Let's start at the beginning: what is collusion? The Notice defines *"collusion in public procurement (often also referred to as "bid-rigging")* […][as] *illegal agreements between economic operators, with the aim of distorting competition in award procedures"*. This 'definition' provides some insight, but is also very broad. To provide a better idea of what constitutes 'bid rigging', below is a short list of the most common (and blatant) forms of bid rigging in public procurement – although they are all variations of the same theme:

– **Cover bidding**: agreeing to submit an artificially high/unacceptable offer – creating the appearance of competitiveness, but actually setting the stage for the contract to be awarded to another bidder.

– **Bid suppression**: agreeing not to submit an offer or withdraw an offer.

– **Bid rotation**: agreeing to take turns in participating/winning subsequent tenders.

– **Market sharing/allocation**: agreeing not to compete with one another for certain sectors, customers, etc.

As the Notice indicates "[t]*he aim of all these practices is to enable a predetermined tenderer to secure a contract while creating the impression that the procedure is genuinely competitive.*" The examples provided above seem pretty clear cut, but, in practice, private parties are often confronted with questions and issues regarding potential bid rigging, or scenario's that risk being interpreted as bid rigging.

For example: what are the rules (i) when entering into a consortium agreement (especially after the selection phase), (ii) when using a or being a relied upon as a third party or (iii) when you are (using)' a subcontractor (see below). In addition, there often are questions concerning affiliated companies (eg entities that share a common parent company), can they participate in the same public procurement procedure, and if so, what measures should they take to ensure that there is no perception of bid rigging?

Unfortunately, the Notice does not provide much insight into these issues and only spends about one page on affiliated companies, joint bidding and subcontracting. Consequently, the Notice does not do much more than reiterate the case law of the European Court of Justice on these topics, namely, in relation to:

– **affiliated companies**: that contracting authorities "*must avoid making general presumptions that could lead to automatically rejecting such tenders. Instead,* [they] […] *should allow the operators in question to demonstrate* […] *that their tenders are truly independent and do not jeopardize transparency or distort competition in the award procedure*" – however, the guidance on how to demonstrate this does not go beyond "*proving that the respective tenders were drawn up independently, that different persons were involved in their preparation etc*". Having different persons prepare a tender seems rather self-evident and should indeed be the bare minimum, setting the bar quite low. Questions in relation to access to information, internal approval procedures, etc remain unanswered.

– **Joint bidding**: that doubts in relation to collusion may be raised "*especially if the members of the group companies that bid jointly could easily bid in their own right (or, even more, they were expected to do so)*", while at the same time recognising that "[e]*conomic operators have the right to make legitimate business choices* […] *and contracting authorities should not per se limit this right but should instead assess the risk of collusion on a case-by-case basis*".

– **Subcontracting**: that a "*contracting authority should carefully assess cases where a suggested subcontractor could easily have participated in its own right in the award procedure and performed the contract independently*".

The boundary between bid rigging and legitimate cooperation (eg through consortia, third party reliance, etc) is narrow and may lead to uncertainties for private parties, as private parties (rightfully) wish to steer clear of any insinuation or perception that they might be involved in any type of bid rigging practice. As it is often assumed that where there is smoke, there is fire, and trust and reputations take years to build, seconds to break, and forever to fix – some private parties believe it best to avoid this type of risk altogether and therefore do not participate in the public procurement procedure. Especially in light of the vague wording on an exclusion for collusion in the directive, as a tenderer may be excluded if the contracting authority has "sufficiently plausible indications" of collusion (see below for further detail). Unfortunately, the guidance in the Notice merely scratches the surface, eg in the paragraph regarding affiliated companies there is no reference to the doctrine of the single economic entity.

Grounds for exclusion?

In addition to reputational damage, sufficiently plausible indications of 'bid rigging' may lead to exclusion from participation in a public procurement procedure. Article 57, paragraph 4, (d) of the Directive of 26 February 2014 on Public Procurement (the **Public Procurement Directive**) states that:

"*Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:* […]

where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition"

The exclusion ground for 'distorting competition' (ie collusion or 'bid rigging') is a so-called 'discretionary ground for exclusion'. Meaning that, unless implemented as a mandatory basis for exclusion by a Member State in its implementing legislation, contracting authorities have a wide margin of discretion in deciding whether or not they will exclude a tenderer if it "*has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition*".

In addition, the Commission proposes a broad interpretation of the wording in article 57, paragraph 4, (d), more specifically in relation to what is to be understood as "agreements". The Commissions states that this should not only be considered as 'agreements', "*but also concerted practices in public procurement aimed at distorting competition may trigger the application of this exclusion ground*". We note that the implementing legislation in Germany and Belgium, for example, indeed allow for a more extensive interpretation.

The Notice touches upon the interplay between 'collusion' as a ground for exclusion and 'grave professional misconduct' as a ground for exclusion. Both grounds for

exclusion are discretionary, however, as the Notice points out, they both appear to have different standards of proof. 'Collusion' requires "*sufficiently plausible indications*", while 'grave professional misconduct' requires more stringent proof, as the contracting authority must "*demonstrate by appropriate means that the economic operator is guilty*".

However, the Notice provides only limited insights into the interplay with self-cleaning measures and leniency, and provides no guidance in relation to confidentiality that is inherent in most leniency procedures. In principle, an economic operator that is cooperating with a competition authority in the framework of a leniency procedure will be bound by strict confidentiality requirements, meaning that it cannot be transparent in its European single procurement document (**ESPD**) – as it may indicate that it has taken self-cleaning measures (ie tick the relevant box on the ESPD), but, pending the leniency procedure, it will be unable to transparently communicate to the contracting authorities what those self-cleaning measures are. In Germany, a German-wide register run by the German FCO has recently launched. Its purpose is to register all infringements that may trigger an exclusion ground for bidders. The FCO must make a centralised decision on whether or not the self-cleaning measures are sufficient, and the FCO will then publish guidelines in relation to self-cleaning measures.

Moreover, the Notice does not provide any guidance on the relationship between the grounds for exclusion for "s*erious misrepresentation in supplying information for the verification of the absence of grounds for exclusion" and for "negligently provid*[ing] *misleading information that may have a material influence on decisions concerning exclusion, selection or award*". As it is not a great stretch of the imagination for a contracting authority to consider that by not being forthcoming on the (potential) application of collusion as a ground for exclusion in its ESPD (even if under a confidentiality requirement), that the tenderer could be caught by either of these two grounds for exclusion. As the Notice takes a rather broad approach, we cannot help but conclude that the Commission has missed the opportunity to address some of the real issues that parties are faced with in practice.

Our views

As the Notice was announced many years ago, many were eagerly awaited its publication and were anticipating further clarifications on the interplay between competition law and public procurement law and some of the other exclusion grounds in the Public Procurement Directive.

Unfortunately, a lot of answers remain unanswered, and the actual practical guidance provided in the Notice is rather limited. However, the publication has started a debate, so hopefully these discussion will lead to further insights and, hopefully, more specific guidance in the future.