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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM
FOR SUSTAINABLE DEVELOPMENT



**Promoting Competition and Deterring Corruption in Public
Procurement Markets: Synergies with Trade Liberalisation**

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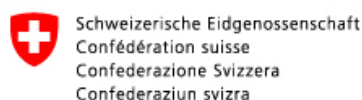
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ABSTRACT

Efficient and effective government procurement markets are critical to economic growth, development, and the welfare of citizens. Yet, two very serious challenges bear on the performance of these markets: (i) ensuring integrity in the procurement process (preventing corruption on the part of public officials); and (ii) promoting effective competition among suppliers. Typically, these challenges are viewed as separate and distinct: the former (corruption) is treated primarily as a principal-agent problem in which the official (the "agent") enriches himself/herself at the expense of the government or the public (the "principal"); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and removing barriers that impede participation in relevant markets. This think-piece demonstrates that these two problems often overlap, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion. As well, while transparency requirements are often central to efforts to eradicate corruption, such measures can, if not properly tailored, facilitate collusion and thereby undermine efforts to strengthen competition. Thus, careful coordination of measures to deter corruption and to foster competition is needed. Further, the think-piece argues that participation in the WTO Agreement on Government Procurement (GPA), or in similar regional arrangements, can play an important role both in promoting competition and in deterring corruption. The GPA enhances possibilities for healthy competition in relevant markets through participation by foreign-based or affiliated contractors. It helps to prevent corruption by requiring adherence to appropriate (tailored) transparency measures, and by exposing procurement activities to checks and balances including domestic review ("bid protest" or "remedy") systems and international scrutiny.

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LIST OF ABBREVIATIONS AND ACRONYMS

DSU	Dispute Settlement Understanding
GDP	gross domestic product
GPA	Agreement on Government Procurement
OECD	Organisation for Economic Co-operation and Development
RCC	Romanian Competition Council
TCA	Turkish Competition Authority
URL	Uniform Resource Locator
WTO	World Trade Organization

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INTRODUCTION

Efficient and effective government procurement markets are critical to economic growth, development, and the welfare of citizens. Such markets account for a very substantial portion of overall economic activity – typically, 12 percent or more of gross domestic product (GDP), on average, in both developed and developing economies (OECD 2015; see also Anderson, Pelletier, Osei-Lah, and Müller 2011). Government procurement is, furthermore, an essential input to the delivery of broader public services and functions of government that are vital for development and for the welfare of citizens, including investment in transportation, telecommunications, energy, and other public infrastructure; the provision of public services, such as the construction and maintenance of schools, hospitals, and public sanitation systems; and the efficient delivery of medicines and other aspects of health care. For all these reasons, government procurement is rightly at the centre of efforts to promote development and prosperity in the 21st century (World Bank Group 2014).

Two very serious challenges bear on the performance of public procurement markets (Anderson, Kovacic, and Müller 2011): (i) ensuring integrity in the procurement process (preventing corruption on the part of public officials) and (ii) promoting effective competition among suppliers. Typically, these challenges are viewed as separate and distinct problems: the former (corruption) is treated first and foremost as a principal-agent problem in which the official (the “agent”) enriches himself/herself at the expense of the government or the public (the “principal”); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and removing barriers that unnecessarily impede participation in relevant markets (see, for further development and clarification, Jenny 2005 and Anderson, Kovacic, and Müller 2011). The two problems, nonetheless, often overlap, 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).

Careful coordination is, in any case, needed between measures to deter corruption and those aimed at fostering competition, to ensure maximum efficacy of both. For example, while transparency requirements are often central to efforts to eradicate corruption, such measures can, if not properly tailored, facilitate collusion and thereby undermine efforts to strengthen competition (this potentially surprising result is well established e.g., in Kovacic et al 2006; Anderson and Kovacic 2009; Anderson, Kovacic, and Müller 2011; Marshall and Marx 2012; and Sanchez Graells 2015A). Consequently, a central argument of this paper will be that the problems of corruption and inter-supplier collusion should not be addressed without regard to each other and, in fact, merit a coordinated response.

Trade liberalisation can also play a very useful role in addressing corruption and collusion concerns in public procurement markets. The World Trade Organization (WTO) plurilateral Agreement on Government Procurement (GPA) is the world's primary tool for facilitating progressive market opening and limiting the scope for protectionism in the public procurement sector. As such, it plays an essential role in maintaining and enhancing possibilities for healthy competition in relevant markets, through participation by foreign-based or foreign-affiliated contractors. The GPA also ensures adherence to minimum standards of transparency in procurements covered by the Agreement and commits such countries to the implementation of measures to prevent corruption and avoid conflicts of interest in their procurement systems (see, for relevant details, Part 4 below). The impact of the GPA is reinforced by numerous regional and bilateral agreements that replicate its essential provisions and extend their application to a wider set of WTO members than the 45 countries and special customs territories that currently are directly covered by the Agreement (Anderson, Müller, and Pelletier 2015).

For the foregoing reasons, participation in the GPA or in related bilateral or regional trading arrangements can, it will be argued, complement importantly national efforts to deter both corruption and collusion. Still, GPA participation is not at all a “cure-all”: its success, too, requires and enhances the importance of both effective anti-corruption work and competition law enforcement, in addition to good procurement design and the training and professionalisation

BOX 1:

Purpose of the think-piece

This think-piece explores a range of issues at the interstices of competition policy, trade liberalisation, and anti-corruption work. The government procurement sector is used as a focal point for the analysis, reflecting the economic, social, and developmental significance of this sector and its acknowledged prominence as a locus of both corruption and competition concerns. The overall purpose of the think-piece is to highlight the synergies and complementarities to be derived from coordinated application of competition policy, trade liberalisation, and anti-corruption work in the government procurement sector and to suggest practical steps for action in this regard.

of procurement officials. Indeed, the viewpoint of this think-piece is that neither trade liberalisation nor domestic competition and anti-corruption measures are likely to achieve full success in the absence of the other; rather, the maintenance of healthy competition and, thus, the attainment of maximum value for money for citizens in public procurement markets is most likely to be assured through the coordinated application of all three tools.

ENSURING EFFICIENT AND COMPETITIVE GOVERNMENT PROCUREMENT MARKETS AS A CORE CHALLENGE FOR GLOBAL PROSPERITY AND DEVELOPMENT IN THE 21ST CENTURY

Government procurement markets are key drivers of economic growth and, therefore, of global prosperity and development in the 21st century. As already noted, government procurement represents a very significant component of global economic activity, at least 12 percent, on average, in most countries worldwide.¹ Due to its magnitude, the government procurement sector is an important market for individual businesses in both the goods and (particularly) the services sectors. Often, the government will be one of the biggest individual customers for businesses, having a significant impact on the scale of their operations. As such, the ease with which businesses can access relevant markets can reinforce or undermine their overall competitiveness. Removing obstacles and boosting the involvement of the private sector in such markets is a priority for commercial success.

Further enhancing its importance is the role of government procurement as an input to the delivery of public infrastructure (including investments in transportation, energy, and communications networks that impact directly on the export market competitiveness of users) and public services (e.g., health, education, defence, and policing) that are vital to the welfare of individual citizens. The challenge of delivering

essential medicines to citizens in poor countries is, to a large extent, a public procurement problem (see, for an analysis of the importance of sound procurement policies in the public health sector, WTO, WIPO, and WHO 2013).

The significance of these core functions of government (infrastructure investment and the delivery of essential public services) for economic growth and public welfare heightens the importance of measures to eradicate corruption and ensure healthy competition in the public procurement markets that are essential to their delivery (World Bank Group 2014). The government procurement sector is, therefore, increasingly at the centre of the global struggle against corruption and in favour of good governance. This recognises both the vulnerability of the sector to corrupt practices (given principal-agent problems and the magnitude of the expenditures involved) and the possibility that measures to ensure integrity and accountability in this sector can have positive spillovers with respect to other dimensions of government activity (e.g., by establishing a general culture of accountability and transparency and raising stakeholders' expectations). For all these reasons, government procurement has a developmental significance that transcends its magnitude as a component of economic activity (Anderson, Pelletier, Osei-Lah, and Müller 2011).

The fact that government procurement markets are often heavily regulated can add to the complexity of the issues at hand. The scale and importance of the government procurement sector are such that governments often seek to harness it in different ways, for example, through policies and regulations that reserve contracts to national suppliers or particular groups of suppliers. Most, if not all, countries employ such measures at least in limited ways, for example, on behalf of aboriginal or other minorities or disadvantaged groups. Much experience suggests, though, that such reservations are a costly way of assisting the targeted groups, relative to direct transfers or similar measures. As observed aptly by Schooner and Yukins (2009) at the outset of the world financial crisis: "Faced with limited access to the world's best (and best-priced) firms, facilities, materials, and talent, governments inevitably pay premiums for what they buy. Past studies routinely identify welfare losses in those countries with high barriers to procurement trade."

1 Government procurement undoubtedly accounts for even more than this, as a proportion of economic activity, in some (especially developing) economies. For example, it has been estimated that it may account for 30 percent or more of GDP in India, in view of the importance of government provision of essential public services (e.g., through the Indian railway system) in that economy.

CORRUPTION AND INTER-SUPPLIER COLLUSION AS IMPEDIMENTS TO THE EFFICACY OF GOVERNMENT PROCUREMENT MARKETS

Both corruption and collusion are major obstacles to achieving efficiency and optimal value for money in government procurement markets. In a broad sense, 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 (see, e.g., “How do you define corruption?” on the website of Transparency International, at http://www.transparency.org/news_room/faq/corruption_faq). In the context of public procurement markets, such abuses typically involve 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 (bribes).

In fact, procurement markets are among those most prone to corrupt practices. As pointed out compellingly by Transparency International (2014A):

Few government activities create greater temptations or offer more opportunities for corruption than public sector procurement. And with around US\$2 trillion estimated to disappear annually from procurement budgets, few examples of corruption cause greater damage to the public purse and harm public interests to such a grave extent.

As such, corruption in government 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.

Though perhaps not as widely appreciated, harm on a similar scale can also be caused by a lack of competition resulting from supplier collusion and/or structural monopolies or regulatory barriers in government procurement markets. Collusion involves a horizontal relationship between bidders in public procurement, who conspire to remove the element of competition from the process (OECD 2010). In most countries with well-developed competition laws and policies, bid rigging,

as the means of choice with regard to collusion in public procurement, is a prohibited hard-core cartel offence, often subject to criminal sanctions.

As with corruption, public procurement markets are among the most attractive targets for supplier collusion and other anti-competitive practices. This is due, in part, to the high potential cartel overcharges that can be achieved: collusion in public procurement markets has been conservatively estimated to raise prices on the order of 20 percent or more above competitive levels (Connor 2014A; Levenstein and Suslow 2006; and Froeb et al 1993). Reflecting the scale of these potential gains and other characteristics of procurement markets that are outlined below, 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, investigations and prosecutions of cartel activities in the public procurement sector continue to account for a substantial proportion of competition law enforcement activity in both the United States and Canada. Sanchez Graells (2014) observes that “bid rigging seems pervasive in the public procurement setting across the European Union, despite increased enforcement and advocacy efforts.”

The harm caused by both corruption and collusion occurs because a public contract is awarded on a basis other than fair competition and the merit of the successful supplier, such that maximum value for public money is not achieved. However, the harm does not stop there: less than optimal procurement with regard to publicly funded projects often leads to undesirable final outcomes with wide-reaching consequences on the intended beneficiaries: roads may be of poor quality, food procurement may not offer optimal nutrition, or school buildings may be deficient in terms of safety standards, among other things. Furthermore, corruption and collusion in procurement markets reduces opportunities and incentives for private sector companies to participate and compete in procurement markets. Start-ups may not be able to enter markets in which incumbents have put in place corrupt or collusive schemes, and public confidence in governments is diminished.

The following subsections delve further into the root causes and effects of each problem (corruption and collusion) separately, subsequently reflecting on the extent to which the two challenges overlap or coincide. In Part 4, attention is given to measures that may be employed to address the two problems.

CORRUPTION IN PUBLIC PROCUREMENT MARKETS: ALTERNATIVE ANALYTICAL APPROACHES AND POLICY SOLUTIONS

Traditionally, corruption has been considered first and foremost as a principal-agent problem in which the official

(the “agent”) enriches himself at the expense of the government or the public (the “principal”). As explained by Jenny (2005):²

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.

Building on this analysis, policy recommendations to fight corruption typically include the following kinds of measures (United Nations Office of Drugs and Crime 2013):

- enhancing transparency through the publication of information related to the conduct of procurement;
- reducing the discretion given to agents, e.g., through the imposition of objective and predetermined criteria for decision-making; and
- enhancing control and accountability through the creation of review systems and clearly defined and enforceable duties to pursue ethical, fair, and impartial procurement procedures in line with applicable legislation.

Notwithstanding a plethora of good efforts and recommendations of this type, efforts to eradicate or even reduce the scale of corruption in many countries have met with decidedly mixed success. Taking this as a starting point, recent research highlights alternative perspectives on the nature and origins of corruption, describing corruption principally as a collective action rather than a principle-agent problem (see, for a compelling analysis and synthesis of related work, Persson et al. 2013). Persson et al (2013) argue that an observed lack of “honest, public interest-oriented principals” willing to enforce anti-corruption measures in countries where corruption is endemic reflects the fact that actions by

individuals depend critically on shared expectations about how other individuals will act. In other words: “All the actors may well understand that they would stand to gain from erasing corruption, but because they cannot trust that most other actors will refrain from corrupt practices, they have no reason to refrain from paying or demanding bribes.”³

As a consequence of such unaddressed collective action problems, societies may face a vicious circle of corruption that nobody alone can break. For progress to occur, something more than the formal monitoring and sanctioning mechanisms described above is needed: what is required is a “revolutionary change in institutions” or a perceived “new game in town,” leading to fundamental changes in the shared expectations of citizens. As discussed below, the entry of countries into binding, legally enforceable agreements such as the GPA may be one tool for the creation of such change. Indeed, recent experience suggests that some countries with well-documented problems in this area are using the Agreement precisely for this purpose.

COLLUSION AS A PERENNIAL CHALLENGE TO GOOD PERFORMANCE IN PUBLIC PROCUREMENT MARKETS: REASONS FOR ITS PREVALENCE AND POLICY RESPONSES

While all markets are potentially susceptible to collusive practices, there is evidence that public procurement markets may be uniquely prone to such practices. The large number of cartel cases related to procurement markets that have been prosecuted in recent years shows that suppliers view public bodies as attractive targets for collusive schemes. Sanchez Graells (2014) notes that while “anecdotal evidence shows that collusion ... is pervasive in almost all economic sectors where procurement takes place, [it] maybe has a special relevance in markets where the public buyer is the main or sole buyer, such as roads and other public works, healthcare markets, education, environmental protection, or defence markets.” Relatedly, Heimler (2012) observes that despite the inherent instability of cartels with many participants, those detected in public procurement provide evidence that even bid rigging schemes with up to 100 members can operate successfully over years.

As one particularly compelling illustration of the harm caused by collusion, bid rigging in health care markets is a particular concern for many countries, given the importance that governments and non-governmental groups rightly attach to the efficient delivery of medicines and other public health objectives. Box 2 (below) presents examples of bid rigging

2 | See also, and more generally, Yukins (2010).

3 | Persson et al. (2013).

schemes concerning health care procurement markets that have been prosecuted successfully in various jurisdictions in recent years. It is worth noting, in the first example, the role that “buy local” preferences may have played in facilitating collusion. As well, the Romanian example highlights the role of exclusionary tender specifications in limiting competition and facilitating collusion. We shall return to these points, below. The examples also further underscore the general vulnerability of public tendering systems to collusive practices.

Collusive tendering schemes take a variety of common forms. All such schemes have at least one element in common, namely an agreement between some or all of the bidders that limits or eliminates competition between them and (normally) predetermines the winning bidder. Additional information on specific forms of bid rigging is summarised in Box 3 (below).

A striking feature of collusive agreements in the public procurement sector is the extent to which they also involve elements of deception aimed at masking the scheme. As observed by Heimler (2012), “the ring organizers [go to substantial lengths to] simulate an artificial environment that looks competitive.” The need for such dissimulation is evident: contrary to what happens in normal markets where customers are typically not aware of the existence of a cartel, public procurement officials may often be in a position to discover them through systematic observation, the collection of statistics and other relevant data, etc. They might, for example, easily observe a failure by well-qualified suppliers to bid, owing to a bid rotation scheme. Heimler (2012) points out that over time, “bid riggers leave a lot of evidence on the strategies pursued that a well-trained public administration official could ... identify.” As a result, while a public procurement cartel may be stable on the supply side, it is potentially vulnerable to detection on the demand side.

BOX 2:

Examples of collusion in health care procurement markets

An OECD Roundtable held in 2010 considered the following examples of collusion in health care procurement markets:

- In the South African case of *The Competition Commission vs Adcock Ingram Critical Care (AICC) and four others*, it was established that 5 pharmaceutical companies had, over a period of at least 14 years, colluded in rigging bids for the supply of intravenous solutions to public hospitals, a tender initially issued annually and later every 2 years. Prices were fixed, markets worth many hundreds of millions of [South African] rands were allocated and winners and losers were determined, as was the compensation, often in the form of a post-award subcontract, 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 it posed:

“... 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 SMEs 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.”

- A submission by Turkey to the same roundtable “reveals that in 2009 most of the bid rigging investigations carried out by the [Turkish Competition Authority] 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.”
- A submission by Romania to the same roundtable also identifies the health sector as the sector most vulnerable to bid rigging practices. Thus, in 2008, the [Romanian Competition Council] RCC imposed fines totalling approximately €22.6 million (approximately US\$ 24.3 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 three distributors. As well, the Romanian submission raises many other examples of dubious tendering and bidding practices in various markets for health products. Many of these appear to involve the use of exclusionary tender specifications as a tool to limit competition.

Source: OECD (2010) and sources quoted therein.

Why are collusive agreements in the public procurement sector often stable and capable of extracting high anti-competitive profits for the perpetrators, over an extended period? Heimler (2012) identifies several characteristics of procurement markets that facilitate such outcomes. First, procurement markets often lack the elasticity of demand that is a primary defence of consumers: once the government has determined the need for a particular purchase, the procurement officer will generally go ahead with the procurement provided enough bids are made. This, in turn means not only that cartelisation can lead to high anti-competitive profits, but also that a potential cartel member has less of an incentive to cheat on a collusive arrangement, as a reduced price will not (contrary to what would be expected in non-procurement markets) necessarily lead to bigger quantities being sold over time. The best possible outcome of defection is likely to be a single procurement contract won, whereas compliance with the collusion scheme assures longer-term enhanced profits.

Another very significant factor that can facilitate collusion in the public procurement sector is the extent to which possibilities for competition and the number and characteristics of potential competitors may be directly limited by governmental (state) measures. Such measures can include: (i) "buy national" measures that exclude foreign-based or affiliated suppliers in many circumstances; (ii) more general restrictions on market participation, such as burdensome licensing requirements; and (iii) the use by procuring agencies of proprietary or other standards that unnecessarily exclude alternative suppliers (Anderson and

Kovacic 2009; Anderson, Kovacic and Müller 2011). Such measures are an important example of state measures and practices that directly limit competition and (potentially) facilitate private anti-competitive conduct (i.e., collusion). Often, it can be difficult to address such measures effectively through competition law enforcement per se, notwithstanding that both competition law and competition advocacy have important roles to play (see, for the definitive treatment of this and related issues, Fox and Healey 2014). As will be elaborated below, these concerns (especially the first and third ones) are addressed explicitly by the GPA – a clear manifestation of the Agreement's role as an important complement to competition law enforcement and competition advocacy.

In addition, as already pointed out, the ease of detection of "cheaters" on a collusive scheme can be facilitated by transparency measures that are often associated with public contracting, thereby alleviating one of the main challenges faced by cartel participants in ensuring the stability of their agreements. Indeed, the disclosure of winning and losing bid characteristics, including prices and non-price elements together with the identity of the bidders, which is often mandated by public procurement regimes, can be a powerful tool for facilitating cartel formation (Kovacic et al 2006; Marshall and Marx 2012; see also Kovacic 2012).

The foregoing does not, in our view, overcome the positive case for at least minimum transparency measures in public procurement, which are essential for public accountability and the prevention of potentially even greater abuses (e.g.,

BOX 3:

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 are either 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 from the successful low bidder in exchange for their cooperation. 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 subcontracting 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 (undated; see also Anderson and Kovacic (2009).

the awarding of contracts to family members or political cronies, or outright stealing of appropriated funds by responsible officials). Concerns about facilitating collusion also should not obscure the fact that many transparency measures will, in fact, be pro-competitive. For example, the systematic advertising of procurement opportunities is essential to draw capable suppliers into the market. Information about how to qualify as a supplier, where to submit bids, etc. facilitates participation and, thereby, enhances competition.⁴

Concerns about transparency measures that facilitate collusion do, however, underscore the need for appropriate tailoring of such measures. More generally, they highlight the risks that are present in public procurement markets and the importance of competition law enforcement and other collusion prevention measures in this sector.

Leniency programmes, which are a core tool for the investigation and prosecution of cartels in many markets, may be less effective in the context of public procurement markets than they are generally. This is because two key reasons for participation in a leniency programme, namely the discovery of cartel participation during merger control and related due diligence and the expected break-up of cartels due to instability, are arguably of less relevance in procurement markets (Heimler 2012).

Finally, while the fact that cartels in procurement markets are potentially vulnerable to detection is a principal justification for training programmes aimed at familiarising procurement officials with "suspicious signs" that potentially indicate bid rigging (see discussion in Part 4, below), this possibility, too, is subject to an important potential limitation: in many cases, procurement officers themselves may have limited incentives to identify cartels:

The public official [typically] is not evaluated on how many cartels he discovers but on his ability to set up and to run bidding processes and how quickly the goods and services he purchases are actually delivered. Suspicion that there is a cartel delays the whole process of purchasing. Furthermore, the money that is being saved because of the dismantling of a cartel usually does not remain in the administration that actually discovered or helped discover the cartel, but is redistributed to the general administration's budget (Heimler 2012).

To be clear: the foregoing absolutely does not mean that efforts to detect and deter cartels in public procurement are not worth pursuing (vigorously). Arguably, the specific problem identified by Heimler (2012) concerning the incentives of procurement officials might be addressed through the provision of special incentives (financial awards or bounties) for procurement officers that successfully detect collusive arrangements. In any case, the scale of welfare losses resulting from collusion in the public procurement sector is such that its prevention must be a core concern for competition agencies and policy advocates. The point

is the intrinsic difficulty of standard detection/deterrence methodologies and the need for creative measures to strengthen competition/deter collusive arrangements. This, again, points to the potential contribution of complementary tools, such as trade liberalisation, that can enhance both the number and diversity of potential competitors in relevant markets, thereby also making collusive schemes more difficult to implement.

THE EXTENT TO WHICH CORRUPTION AND COLLUSION MAY OVERLAP IN PRACTICE

While corruption and collusion problems have often been analysed in isolation from each other (and institutions and constituencies dedicated to the eradication of each problem have typically grown up separately), casual observation suggests that, in many cases, they overlap. An important recent example concerns the massive corruption and collusion scandal that has come to light recently in the Quebec (Canada) construction industry, which has allegedly involved both widespread illicit payments and other favours to public officials involved in the contracting process and pervasive rigging of bids for public contracts (Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction [the "Charbonneau Commission"] 2015; see also Connor 2014B and Box 4, below). Other possible examples include the ongoing "Petrobras" scandal in Brazil, which is alleged to have involved both corruption and cartel-like practices (New York Times 2015) and corruption and collusion in the South African construction industry (Mail and Guardian 2013).

A salient point concerning the Quebec scandal that has been overlooked in some analyses is that, for most of the period of alleged illegal practices, Quebec government procurements were excluded from Canada's market access commitments under the GPA (see, for background, Collins 2011). This, undoubtedly, facilitated both collusion and corruption, in that it unnecessarily limited the pool of potential competitors and shielded the relevant markets from external scrutiny (Box 4). To its credit, Canada has subsequently extended its GPA coverage commitments to subject Quebec and other provincial government procurements to international competition — a development that will surely make both collusion and corruption more difficult in the future.

Analytical considerations also point to the confluence of corruption and collusion concerns in many cases. Both corruption and collusion show elements of principal-agent and/or collective action problems. In the case of corruption, the procurement officer benefits directly from socially harmful practices; in the case of collusion, he may

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These are the core types of transparency required, e.g., by the GPA.

be better off continuing with the procurement process, thus ignoring the welfare-reducing behaviour of suppliers. Perhaps unsurprisingly, therefore, procurement processes often are designed in a way that does not, in practice, prevent or even facilitate collusion and corruption.

As Jenny (2005) points out, perversely, the complementarity of corruption and collusion may be particularly high in democratic countries and in countries that have a strictly enforced public procurement code.

In democratic countries, the political consequences of overt favouritism can be dire and corrupt elected officials are usually careful to hide their misbehaviour so as not to offer weapons that their political opponents could easily use against them. Furthermore, in countries that have public procurement codes designed to ensure that officials do not misuse public funds to which they have access, a controlling body is usually in charge of verifying the appropriateness of the procedures followed during the tender processes. In both instances, therefore corruption must remain hidden from view. One of the ways used by corrupt procurement officials to achieve this result is to ask the corrupting firm to ensure (through bid rigging) that its bid will be the lowest bid, thus making

the detection of the corruption more complex by the political opponents or the public procurement code enforcers.

Conversely, the fact that procurement officers often have the basic information that would allow them to detect bid rigging schemes means that the reverse scenario may also happen: existing collusion may lead to bribes being paid to procurement and other officers charged with verifying the procurement process to avoid being charged with fines etc. under competition laws.

This means that inherently, and from the outset, measures to fight corruption may lead to collusion and vice versa if both problems are not tackled together and measures are not found to address them jointly. Furthermore, to address collective action problems that exacerbate suboptimal outcomes for the public as ultimate principal, in both cases (corruption and collusion) clear signals need to be given to society that a reform of institutions and their agent's behaviour will lead to changed outcomes to radically modify incentive structures. Optimal and effective solutions to both challenges will take into account both the principal-agent and the collective action problems, where they are present.

BOX 4:

Alleged corruption and supplier collusion in the Quebec (Canada) construction industry

- A 4-year, 1,741-page official report issued by the "Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction" of Quebec [the "Charbonneau Commission"] in November 2015 found corruption and inter-supplier collusion in Quebec's construction industry to be "far more widespread than originally believed."
- Separately, the Competition Bureau of Canada has observed that collusive behaviour in the construction industry in the Province of Quebec has been particularly prevalent. Of the 654 immunity and leniency applications received by the Bureau across all industries between 1996 and 2014, 123 related solely to alleged offences in the Quebec construction industry. Preferred methods of collusion observed by the Bureau include bid rotation, cover bidding, and the provision of side payments to "losing" competitors.
- The Chairperson of the Quebec Commission highlighted a perceived link between inter-supplier collusion and political party financing and the granting of subsidies and public contracts, calling the practice deep rooted and systemic (the link was disputed by a second commissioner).
- For most of the period of alleged illegal practices, Quebec government procurements were excluded from Canada's market access commitments under the GPA — a factor that arguably facilitated the apparent illegality by eliminating a source of potential competition (foreign suppliers) and minimising external scrutiny of the relevant markets and practices.
- Recently, Canada has extended its GPA market opening commitments to cover Quebec and other provincial government procurements — a development that will surely strengthen competition and make corruption more difficult.

Sources: Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction [the "Charbonneau Commission"] (2015); and Canada, Competition Bureau (2015).

OPTIMIZING REMEDIES FOR THE TWO CHALLENGES: THE RESPECTIVE ROLES OF TRANSPARENCY MEASURES, COMPETITION LAW AND POLICY, AND INTERNATIONAL TRADE LIBERALISATION

This subsection of the think-piece explores the respective roles of three main policy tools through which societies can grapple with corruption and collusion problems: well-designed transparency and other anti-corruption measures; competition law enforcement and competition advocacy; and international trade liberalisation. In our view, without doubt, each of these tools is important in its own right. Moreover, the need for each individual tool is well understood by the institutions and policy constituencies responsible for its application. What is, we suspect, less generally understood are the complementarities and other interactions that arise between the three tools. We seek to clarify these below.

THE FUNDAMENTAL NECESSITY OF CORE TRANSPARENCY MEASURES FOR PUBLIC ACCOUNTABILITY AND THE PREVENTION OF CORRUPTION

Transparency is, appropriately, a central element of most responses to corruption problems. It is the means of choice to combat corruption if looked at from the perspective of principal-agent problems that occur in the procurement process (see, generally, Yukins 2010). The hypothesis here is that transparency enables the principal, i.e., the taxpayer/civil society to monitor procurement processes and outcomes, and, if combined with appropriate enforcement measures, overcome problems created by a diverging interest of the agent. Consistent with this perspective, Kameswari (2006)

posits that “the most powerful tool [to combat corruption] is public exposure.” Similarly, the OECD’s 2004 Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement identified the lack of transparency and accountability in public procurement as one of the major threats to the integrity of the procurement process (Burton 2005). OECD (2007), United Nations Office on Drugs and Crime (2013), and Transparency International (2014A) provide detailed related recommendations.

In many respects, moreover, transparency can be expected to have positive effects from a competition as well as a corruption-prevention standpoint. As already noted, transparency with regard to applicable laws and regulations facilitates participation by new suppliers. Furthermore, competitive bidding processes can only occur if potential suppliers are informed of relevant opportunities, including, at least in general terms, the need to be met and information on how to participate in the procurement process. Transparency with respect to these matters is fundamentally pro-competitive in that it facilitates participation in procurement markets, including by suppliers from “outside the club.”

However, increasingly, some challenges in the design of appropriate levels of transparency at the different stages of the procurement process have been recognised in both the procurement and competition communities. The OECD (2007) points out that:

Governments need to find an adequate balance between the objectives of ensuring transparency, providing equal opportunities for bidders, and other concerns, in particular efficiency. The drive for transparency must therefore be tempered by making transparent what sufficiently enables corruption control.

Indeed, as discussed above, certain kinds of transparency measures can clearly facilitate collusion and, consequently, are problematic from a competition policy point of view (Marshall and Marx 2012; Sanchez Graells 2015A). While, for example, there may be no way around the need for publication of award criteria and technical specifications in public procurement if responsive tenders are to be solicited, their usefulness as tools for facilitating inter-supplier agreement needs to be recognised. Similarly, the publication of procurement outcomes, while enabling monitoring by the public as the “principal,” can also serve cartel participants in policing anti-competitive agreements and thereby enhancing cartel stability. Sanchez Graells (2015B) discusses specific possible concerns regarding transparency measures that may be associated with centralised procurement registers.

A further complication is that optimal transparency levels may differ from country to country. “Solutions” that are potentially workable in some contexts may be highly problematic in others. For example, in jurisdictions where outright corruption problems are believed to be minimal, some lessening of transparency measures might be considered, for the sake of preventing collusion. On the other hand, in economies where

corruption is rampant, any lessening of transparency measures may be a recipe for disaster. This explains why the very high priority that is given to transparency in public procurement processes in some countries in Eastern Europe may, in fact, be appropriate notwithstanding possible collusion facilitation concerns, at least as an interim measure. In any case, as explained below, both competition law enforcement and competition advocacy are clearly part of the solution.

THE ESSENTIAL CONTRIBUTIONS OF COMPETITION LAW ENFORCEMENT AND COMPETITION ADVOCACY

The competition law community, consisting of competition law enforcement authorities and related institutions/experts, has an essential role to play in ensuring well-functioning procurement markets. Both competition law enforcement and the “advocacy” functions of competition authorities are essential to this mission.

The need for effective legal prohibitions of collusive tendering, normally in a national competition or antitrust law, is a basic prerequisite to fight bid rigging and related practices. Often, bid rigging in public procurement processes is prohibited through general antitrust provisions against cartels or conspiracies in restraint of trade; however, it can also be the subject of legal provisions that focus specifically on collusion in public procurement markets. In any case, the effective prohibition of “naked” or “hard-core” cartels arguably is fast becoming an internationally accepted norm (First 2001).⁵ In some jurisdictions, bid rigging can also trigger penalties under statutes aimed at the prevention of fraud – effectively recognising collusion as a species of corruption.

In many jurisdictions, competition agencies also 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. Such work is, in our view, of critical importance, coequal in many circumstances with the competition law enforcement function.

Three main areas can be identified for competition advocacy activities aimed at promoting competition in public procurement markets (see also Anderson, Kovacic and Müller 2011):

- 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 policies, practices and regulations that may (intentionally or inadvertently) suppress competition, for example technical specifications that are framed in ways that unnecessarily exclude potential

competitors. “Buy local” in public procurement legislation measures may also merit attention; and

- third, broader efforts to modify or reduce sectoral and/or cross-sectoral policies that are not specifically concerned with procurement but that affect the scope for competition in public procurement markets, for example unnecessary or unduly onerous licensing requirements.

Such considerations also underline elements of the 2012 OECD Recommendation on Fighting Bid Rigging in Public Procurement, which integrates competition law enforcement and broader policy considerations (see Box 5).

A specific tool for the prevention of collusion now in use in many jurisdictions is the mandatory submission by prospective suppliers of “certificates of independent bid preparation.” Such certificates attest that bids/proposals have been prepared independently and not in coordination or consultation with competitors, consistent with relevant laws. To be sure, such certificates are not an infallible tool: suppliers who are willing to collude may also be willing to make false statements. They, nonetheless, raise the stakes by exposing suppliers to additional penalties if/when they do collude and generally raise awareness of relevant prohibitions.

Another important recommendation is for increased, direct cooperation and contacts between competition authorities and procuring entities. By directly involving the competition authorities in the design and monitoring of the procurement process, from a principal-agent point of view, an independent third party, namely the competition authority, is added to the game. Furthermore, from a collective action point of view, competition agencies often have a good reputation as independent enforcement agencies with considerable authority to impose sanctions. They also have the expertise to analyse and monitor markets from a competition standpoint: while procurement bodies often have the necessary information, they may have neither the capacity nor the incentive to undertake this kind of work.

As noted above, policymakers may also wish to consider incentivising procurement officials to watch for signs that may signal collusion (see Box 6) and to cooperate with competition authorities in appropriate cases. Careful market research may also help to limit the scope for collusion, in that procurement authorities will have a better sense of the real competitive possibilities in the market. The latter reinforces the general importance of a professionalised procurement service aware of the possibility of collusive practices in addition to effective competition law enforcement systems.

5 | The deterrence of hard-core 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 at: www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

Overall, such efforts may have the potential to change shared expectations of cartel participants and the general public regarding the tolerance of collusion in the system. At the same time, the enhanced level of scrutiny exercised by competition authorities may also increase the risk of detection of corruption and therefore act as a deterrent to some extent. A question that remains is whether, and in what ways, trade liberalisation can further reinforce and complement the essential contributions of both: (i) transparency and other anti-corruption measures; and (ii) competition law enforcement and competition advocacy, in deterring corruption and maximising possibilities for healthy competition in the public procurement sector. This is the focus of the next subsection of the think-piece.

THE CONTRIBUTION OF TRADE LIBERALISATION TO STRENGTHENING COMPETITION AND DETERRING CORRUPTION

As already foreshadowed in preceding sections of this paper, a third policy tool that can contribute powerfully to both the fight against corruption and the strengthening of competition

in government procurement markets is trade liberalisation. The liberalisation of trade in relation to government procurement markets can in principle be undertaken unilaterally but in practice is much more likely to occur through participation in the WTO's GPA or in bilateral agreements embodying similar rules and commitments. A principal benefit of such participation is the enhanced competition in the home market that external liberalisation generates. External liberalisation also creates the possibility of specialisation and exchange based on the principles of comparative advantage. Often, it provides access to technology that is not available in the home market (the market in which goods and services are being procured).

The foregoing benefits are well established in relevant literature (e.g., Anderson and Kovacic 2009; Schooner and Yukins 2009; Sanchez Graells 2015A) if not universally "taken to heart" by governments. As discussed in this section, trade liberalisation, especially when undertaken via a tool such as the GPA, may also aid in the struggle to overcome principal-agent and collective action problems that impede the efficient performance of government procurement markets.

The pro-competitive impact of the trade liberalisation in government procurement markets does not arise from explicit

BOX 5:

OECD Recommendation on Fighting Bid Rigging in Public Procurement

On 17 July 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement that calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of bid rigging in public tenders.

The Recommendation is a step forward in the fight against collusion in public procurement that the OECD has been leading for a long time, especially through the issuance of the 2009 Guidelines for Fighting Bid Rigging in Public Procurement and the work related to its dissemination worldwide.

In the document, the OECD Competition Committee recommends that members:

- i. assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and reduce the risk of bid rigging while ensuring overall value for money;
- ii. ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour, and unusual bidding patterns that may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies;
- iii. encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part;
- iv. develop tools to assess, measure, and monitor the impact on competition of public procurement laws and regulations.

Sources: OECD (2012).

rules to combat bid rigging. Rather, it operates through different channels:

- First, the Agreement 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 "covered" in this way then becomes subject to rules requiring non-discriminatory treatment ("national treatment") of other GPA parties' goods, services, and suppliers. Suppliers from other GPA parties cannot be arbitrarily excluded. This makes collusion more difficult by increasing both the number and the diversity of potential competitors for individual procurements and thereby addressing key underlying conditions that are known to facilitate collusion (see, for the classic and still pertinent analysis, Stigler 1964; see also Shapiro 2007);
- Second, the GPA's transparency provisions ensure that the information necessary to participate in particular procurements and to prepare responsive tenders is not shared only with "the usual suspects" (a procuring entity's preferred suppliers). This helps to broaden the set of potential suppliers;
- Third, the Agreement promotes "open" approaches to procurement design and discourages or makes more difficult practices such as the "wiring" of technical specifications to favour particular brands or suppliers. For example, it articulates a clear preference for technical specifications that are framed in terms of performance and functional requirements, rather than design or descriptive characteristics. Procuring entities (government departments and agencies) are specifically prohibited from prescribing technical specifications

BOX 6:

Signs that may signal the existence of collusion — updated!

Long experience in developed and developing countries alike has given rise to a standard set of "suspicious signs" — recognised by competition agencies around the world — that can indicate the presence of bid rigging or collusion:

- 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 submits 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 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.

Apart from the above, procurement officials have often been advised to watch for bid proposals or forms submitted by different vendors containing common features or irregularities (e.g., identical calculations, spelling errors, or handwriting or typeface that suggest they may have been prepared jointly). As pointed out to one of us (Anderson) by a Russian government official at a seminar on the WTO Agreement on Government Procurement in Moscow, this advice should now be updated to cover e.g., the electronic submission of bids or proposals from a common web address or Uniform Resource Locator (URL).

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 at www.usdoj.gov/atr/public/guidelines/211578.htm). Similar lists can now be found on the websites of the competition authorities of Canada, the European Union, and other jurisdictions. NB: *the indicia set out above are merely signs that may trigger suspicions; they are not, by themselves, proof of illegal activity.*

that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as "or equivalent" in the tender documentation. The Agreement makes clear, as well, that GPA parties' procuring entities may not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement;

- Fourth, the GPA requires that all parties to the Agreement put in place national bid protest or remedy 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 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 – thereby encouraging participation from a broader range of potential suppliers; and
- Fifth, 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 frequent than individual bid challenges before national authorities. Such applicability, nonetheless, represents an essential complement to ensure that participating governments honour their commitments and do not arbitrarily exclude potential competitors from the other GPA parties.

In all the above respects, participation in the GPA or similar regional accords is powerfully complementary to competition law enforcement in the deterrence and prevention of collusion (Anderson and Kovacic 2009; Anderson, Kovacic and Müller 2011).

General evidence of the utility of market opening measures in strengthening competition and enhancing value for money is provided in an Organisation for Economic Co-operation and Development (OECD) analysis (OECD 2003) prepared to support the WTO's early multilateral work on transparency in government procurement (see Box 7, below). The examples cited make clear that some developing countries have realised significant savings to their public treasuries through the implementation of more open and transparent government procurement regimes.

Turning to corruption issues, participation in the GPA can change perspectives and fundamentally shift the dynamics of procurement systems in several respects:

BOX 7:

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:

- In Bangladesh, a substantial reduction in electricity prices, owing 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, owing 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, owing 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 3.1 million) for the Karachi Water and Sewerage Board through the introduction of an open and transparent bidding process.

Source: OECD (2003).

- First, as noted, by requiring all participating countries to establish independent “domestic review systems” (complaint review mechanisms to which both foreign and domestic suppliers may apply for correction of procedural errors), the GPA puts in place a powerful mechanism for ensuring compliance with applicable rules and “shaking up” established ways of doing business. The effect of this institutional change is reinforced by the fact that foreign suppliers coming from other GPA parties are likely to have stronger incentives and fewer inhibitions than domestic players to report collusion and/or corruption, as they are less subject to ongoing scrutiny and social or other pressures;
- Second, the GPA establishes additional external oversight by making national procurement systems subject to scrutiny in the WTO Committee on Government Procurement and through the WTO’s binding dispute settlement system. This additional scrutiny is undertaken in an institutionalised fashion by GPA parties and the WTO’s dispute settlement function at the international level, thus helping to break vicious cycles; and
- Third, GPA participation signals to both domestic suppliers and the outside world that an acceding country is intent on conforming to international best practices as embodied in the GPA — potentially challenging entrenched expectations in relevant societies with regard to collusion and corruption.

Beyond the foregoing, the revised GPA incorporates a new substantive provision regarding the “conduct of procurement.” That provision (Article V:4) reads, in relevant parts, as follows:

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 Agreement that recognises its shared purpose with other international instruments and initiatives in deterring corrupt practices. For example, a new recital to the preamble recognises “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. A further new recital recognises “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.”

While it is self-evident that the inclusion of this language in the revised GPA will not, by itself, ensure full integrity in all subscribing procurement systems, the language is another important lever that can help to promote compliance and galvanise related institutional efforts, thereby helping countries to grapple with both principal-agent and collective action problems related to corruption and collusion. In effect, the language in Article V:4(b) and (c) creates a new treaty-based obligation for GPA Parties to conduct their procurements in ways that avoid conflicts of interest and corrupt practices. This, it is suggested, can be an important “hook” for efforts to eradicate corruption on the part of both governmental and non-governmental authorities.

Indications are that, in some cases, countries are now seeking to join the GPA, at least in part, precisely for reasons of improving governance and strengthening competition in their own procurement markets. In a major development for the Agreement, on 11 November 2015, Ukraine formally concluded negotiations with the GPA’s existing parties to enable it to join the GPA over the course of the next six months. Statements made by the responsible senior official, Ukraine’s Deputy Minister of the Economy and Trade, cite Ukraine’s desire for strengthened competition and an explicit, legally binding commitment to good governance in its public procurement markets as key underlying motivations (see Box 8). Similar motivations have been cited with respect to the recent accessions to the Agreement by Armenia and Moldova.

As a further indication of the GPA’s usefulness as a tool for the promotion of good governance, GPA parties do relatively well in terms of international and comparative corruption rankings. Box 9 sets out the ranking of GPA parties in Transparency International’s most recent Corruption Perception Index (Transparency International 2014B).

The following observations are pertinent regarding the ranks and scores shown in Box 9. First, all the 41 GPA parties that were included in the survey are ranked in the upper two-thirds of the universe of countries surveyed. Moreover, 36 of those 41 parties are in the top half of the universe of countries. With respect to the scores awarded, 36 of the 41 parties were scored above the global average of 43 points. The implication is that, while GPA parties are not immune to corruption problems, on average, they clearly are less subject to such problems than non-parties.

To be sure, the foregoing by itself does not establish that GPA accession leads directly to improvements in integrity. The causation could run in the other direction: WTO members with more open and hence more corruption-free procurement systems may be more likely to join the GPA. Either way, it is encouraging to see that participation in the Agreement is generally associated with relatively low levels of corruption and higher levels of observed integrity.

CONCLUDING REMARKS

This think-piece has explored a range of issues at the interstices of competition policy, trade liberalisation, and anti-corruption work. The government procurement sector has been the focal point for the analysis, reflecting both the overarching economic, social, and developmental significance of this sector and its acknowledged prominence as a locus of corruption and competition concerns. As we have discussed, two very serious challenges bear on the efficacy and performance of public procurement markets: (i) ensuring integrity in the procurement process (preventing corruption on the part of public officials); and (ii) promoting effective competition among suppliers. These problems often are analysed in isolation from each other, and institutions and constituencies dedicated to the eradication of each problem have typically grown up separately. The two problems, nonetheless, often overlap, for example, where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion (the universe of potential bidders or the bids themselves).

Careful coordination is, in any case, needed between measures to deter corruption and those aimed at fostering competition, to ensure maximum efficacy of both. For example, while transparency requirements are often central to efforts to eradicate corruption, such measures can, if not properly tailored, facilitate collusion and thereby undermine efforts to strengthen competition. Consequently, a central argument of this paper has been that the problems of corruption and supplier collusion merit a coordinated response.

This think-piece has also made the case that trade liberalisation can play a significant role in helping to address corruption and competition concerns in public procurement markets. The GPA is the world's primary tool for facilitating progressive market opening and limiting the scope for protectionism in the public procurement sector. As such, participation in the Agreement enhances possibilities for healthy competition in relevant markets, through participation by foreign-based or affiliated contractors. The GPA also ensures adherence to minimum standards of transparency that apply to all participating countries' procurements covered by the Agreement and commits such countries to the implementation of measures to prevent corruption and avoid conflicts of interest in their procurement systems. As the recent and highly topical example of Ukraine shows, increasingly, countries are seeking to join the GPA for these reasons in addition to more traditional "mercantilist" objectives.

Still, GPA participation is not a "cure-all": if at all, it enhances the importance of both effective anti-corruption work and competition law enforcement, in addition to good procurement design and the training and professionalization of procurement officials. Overall, the viewpoint of this think-piece is that neither trade liberalisation nor domestic competition and anti-corruption measures are likely to achieve full success in the absence of the other; rather, the maintenance of healthy competition and integrity and, thus, the attainment of maximum value for money for citizens in public procurement markets, is most likely to be assured through the coordinated application of all three tools. Without doubt, the complementary roles of trade liberalisation and competition policy in public procurement markets are an important further illustration of the synergies to be realised from coordinated application of these instruments.

BOX 8:

Ukraine's accession to the GPA

- On 11 November 2015, the WTO's Committee on Government Procurement agreed to invite Ukraine to join the GPA on the basis of terms that had been negotiated between Ukraine and the Agreement's existing parties. Ukraine will formally accede to the GPA 30 days after it has deposited its instrument of accession with the WTO.
- As a result of Ukraine's accession, Ukraine's suppliers will have the right to bid on GPA-covered contracts for goods, services, and public works in the European Union, the United States, and other WTO members that are bound by the Agreement. Conversely, suppliers from those WTO members (45 in all) will have legal rights to bid on contracts in Ukraine, thereby enhancing competition in Ukraine's own procurement markets.
- Maxim Nefyodov, Ukraine's Deputy Minister of the Economy and Trade, told the Committee that participation in the GPA would strengthen competition and good governance in the area of public procurement, assist in its fight against corruption, and increase the transparency of government procurement practices.

Source: "Ukraine to join WTO's Government Procurement Agreement", WTO Press Release, 11 November 2015, available at https://www.wto.org/english/news_e/news15_e/gpro_11nov15_e.htm.

BOX 9:

GPA parties as ranked in Transparency International's Corruption Perception Index⁶

Out of the 175 countries evaluated in the Index, GPA parties have the following ranks and scores:

Parties	Date of entry into force/accesion		Rank (out of 175)	Score (Global average score of 43)
	GPA 1994	Revised GPA		
Armenia	15 Sep 2011	5 June 2015	94	37
Canada	1 Jan 1996	6 Apr 2014	10	81
European Union with regard to its 28 member states:	1 Jan 1996	6 Apr 2014		
Austria,	1 Jan 1996		23	72
Belgium,	1 Jan 1996		15	67
Denmark,	1 Jan 1996		1	92
Finland,	1 Jan 1996		3	89
France,	1 Jan 1996		26	69
Germany,	1 Jan 1996		12	79
Greece,	1 Jan 1996		69	43
Ireland,	1 Jan 1996		17	74
Italy,	1 Jan 1996		69	43
Luxemburg,	1 Jan 1996		9	82
the Netherlands,	1 Jan 1996		8	83
Portugal,	1 Jan 1996		31	63
Spain,	1 Jan 1996		37	60
Sweden	1 Jan 1996		4	87
the United Kingdom	1 Jan 1996		14	78
Cyprus	1 Jan 1996		31	63
Czech Republic,	1 May 2004		53	51
Estonia	1 May 2004		26	69
Hungary,	1 May 2004		47	54
Latvia,	1 May 2004		43	55
Lithuania,	1 May 2004		39	58
Malta,	1 May 2004		43	55
Poland,	1 May 2004		35	61
Slovak Republic,	1 May 2004		54	50
Slovenia,	1 May 2004		39	58
Bulgaria,	1 Jan 2007		69	43
Romania,	1 Jan 2007		69	43
Croatia,	1 Jul 2013		61	48
Hong Kong, China	19 Jun 1997	6 Apr 2014	17	74
Iceland	28 Apr 2001	6 Apr 2014	12	79
Israel	1 Jan 1996	6 Apr 2014	37	60
Japan	1 Jan 1996	16 Apr 2014	15	76
Korea, Republic of	1 Jan 1997	Pending	43	55
Liechtenstein	18 Sep 1997	6 Apr 2014	-	-
Montenegro	15 July 2015	15 July 2015	76	42
Netherlands with respect to Aruba	25 Oct 1996	4 July 2014	-	-
Norway	1 Jan 1996	6 Apr 2014	5	86
Singapore	20 Oct 1997	6 Apr 2014	7	84
Switzerland	1 Jan 1996	Pending	5	86
Chinese Taipei	15 Jul 2009	6 Apr 2014	35	61
United States	1 Jan 1996	6 Apr 2014	17	74

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