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Disclosure in Public Procurement
"A Comparative Study in EU and German Law"

الإفصاح في المشتريات العامة
"دراسة مقارنة في قانون الاتحاد الأوروبي والقانون الألماني"

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مجلـة البحـوث الفقهيـة والقانونيـة
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من السادة أعضاء اللجنة العلمية الدائمة والقارئة
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الإفصاح في المشتريات العامة

"دراسة مقارنة في قانون الاتحاد الأوروبي والقانون الألماني"

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ملخص البحث:

تعالج الدراسة قواعد الإفصاح في قانون المشتريات الأوروبي لعام ٢٠١٤ وقانون المشتريات الفيدرالي الألماني لعام ٢٠١٦. حيث يكون لمتطلبات الشفافية في مجال المشتريات العامة المنصوص عليها في توجيهات الاتحاد الأوروبي مفاهيم مختلفة في الأنظمة القانونية، ولذلك يمكن أن يختلف مستوى الشفافية بشكل كبير بين الدول الأعضاء في الاتحاد الأوروبي. وفي الوقت ذاته تؤثر قواعد الشفافية على قدرة الجهات الاقتصادية الفاعلة على المشاركة في عملية الشراء، حيث أن الكشف المفرط عن المعلومات يمكن أن يشجع على التلاعب في العطاءات، وهو ما يؤدي للفساد في عقود الدولة. ولذلك، ستركز الدراسة على مدى تطبيق قواعد الاتحاد الأوروبي في النظام القانوني الالماني من خلال تحليل القوانين ذات الصلة والتطبيقات القضائية في هذا الشأن، وكذلك تحليل أحكام محكمة العدل بالاتحاد الأوروبي بشأن المشتريات والتوجيه EC/٢٤/٢٠١٤. وتبرز أهمية الدراسة في تحديد مدى تطبيق قواعد الإفصاح في المشتريات العامة للاتحاد الأوروبي في التشريع الألماني، بالإضافة إلى بحث كيفية تحقيق التوازن بين الشفافية وحرية المنافسة.

الكلمات المفتاحية: الشفافية، التلاعب في العطاءات، تكافؤ الفرص، حرية المنافسة، عقود الدولة.

Disclosure in Public Procurement
"A Comparative Study in EU and German Law"

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Abstract:

The study addresses disclosure rules in the European Procurement Act 2014 and the German Federal Procurement Act 2016. The transparency requirements in public procurement set out in the EU Directives have different understandings in legal systems, and the level of transparency can therefore vary significantly between EU countries. At the same time, transparency rules affect the ability of economic actors to participate in the procurement process, as excessive disclosure of information can encourage bid rigging, which leads to corruption in state contracts. Therefore, the study will focus on the extent of application of EU rules in the German legal system by analysing the relevant laws and judicial applications in this regard, as well as analysing the rulings of the Court of Justice of the European Union on procurement and Directive 2014/24/EC. The importance of the study is highlighted in determining the extent to which disclosure rules in European Union public procurement are applied in German legislation, in addition to examining how to achieve a balance between transparency and freedom of competition.

Keywords: Transparency, Bid Rigging, Equality Of Opportunity, Freedom Of Competition, State Contracts.

Introduction:

In the European Union (EU), the impact of transparency on competition in the public procurement sector is rarely discussed. Public procurement is when a public sector purchases goods and services to secure the best value for public funds and entails the government acquiring goods and services for state activities. Transparency is the prerequisite for ensuring that the principles of equal treatment and non-discrimination, equality of opportunity and freedom of competition are respected during the contract award procedures.[1] In addition, it ensures accountability for funds allocated to public sector activities. [2] In the bid to ensure transparency, there is a need for contracting authorities to provide

[1] The principle of transparency stipulates that the contracting authority must maintain a sufficient level of transparency before, during and after the public procurement procedure. It follows from the two previous principles. A public client should not only Respect the principle of transparency before the procedure and at the time of publication of the contract notice, but also during the procedure and even after the contract has been awarded.
Principle of equal treatment in the context of public procurement means that all potential interested parties and bidders for public contracts and concessions must be treated equally and without distinction. This principle does not mean that different situations or economic actors cannot be treated differently, but from the perspective of awarding authority all parties in the same position must be treated equally.
Effective competition means that: in the period between the contract announcement and the actual offer, many economic operators have effective and equal access to the tender documents and the tender documents enable many economic operators to submit their offers. Effective competition is the aim of public procurement because the best value for money can only be achieved if effective competition actually takes place in relation to the public contract.
See: Article 18 of Directive 2014/24/EU.

[2] **I. Georgieva**, Using Transparency against Corruption in Public Procurement' Publishing, 2017, P. 6; **A. Reinisch and S. W. Schill,** *Investment Protection Standards and the Rule of Law*, Oxford University Press, 2023, P.127.

adequate information about the procurement processes to the tenderers and other parties. Besides, the procurement documents before, during, and after the contract award decision must be accessible to the tenderers and any third party. [1]

The public procurement rules are currently embedded in EU 2014 Procurement Directives. The directives focus on harmonizing standards on contract award procedures and regulations on transparency. Several EU member states have slowly warmed up to disclosing procurement documents held by the public sector to other parties. So far, different jurisdictions have different meanings for transparency depending on its implications. [2] For instance, contracting authorities in certain member states may disclose contract details online. In contrast, some may treat this information as protected business secrets regardless of EU provisions to make them accessible by default. Given that the EU rules require a general approach to transparency, it is essential to understand these rules and how they compare to the laws in other member states.

Therefore, the purpose of this study is to meaningfully explore how the disclosure rules stipulated under the EU procurement law compare with Germany's Federal Public Procurement Act 2016. It focuses on the aspect that specific disclosure rules can contribute to bid rigging[3] due to excessive

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[1] **K.-M. Halonen**, The many faces of transparency in EU Public Procurement, SSRN *Electronic Journal* 1, 2018, <https://doi.org/10.2139/ssrn.3263269> accessed 10 July 2023.

[2] **K.-M. Halonen**, P.R. 3.

[3] Collusion in public procurement or “bid manipulation” refers to illegal agreements between economic actors with the aim of distorting competition in procurement procedures, for example by predetermining the content of

transparency, thus distorting competition in the procurement market. [1] However, it is often assumed that public procurement regulations cannot promote bid-rigging, but this assumption is pegged upon economic and legal perspectives.[2] Emerging findings reveal that the public procurement environment promotes the breeding of bid-rigging schemes. According to the Organization for Economic Cooperation and Development (OECD), public procurement rules encourage transparency and facilitate communication between rivals, thus enabling collusive agreements among bidders.[3]

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offers (particularly the price) in order to influence the outcome of offers. The action or non-tendering or the division of the market based on geographical location, the contracting authority or the subject of the procurement or the creation of rotation plans for a series of actions. The aim of all of these procedures is to enable a pre-selected bidder to secure the contract and at the same time give the impression that the process is actually a competition.

See: European Commission, Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground 2021/C 91/01 C/2021/1631.

[1] **In application of this, The Bundeskar has been inflicted on millions of euros of quarter construction enterprises Höhler GmbH & Co, based in Dortmund. KG, Möckel Bauunternehmung GmbH & Co. KG, Möllmann Straßen- und Ingenieurbau GmbH & Co. KG and Stra-La Bau GmbH for collaborating applications concerned with router traffic contracts. Gehrken Straßen- und Tiefbau GmbH & Co. KG, which is a participle in the collection, a beneficial of the immune system in the application of legislatives Registan the Clemency programme, because she was the first member of the cartel to co-operate with the Bundeskartellamt. A collection of more cents of offers in the Dortmund area concerned with traffic routes between January 1, 2012 and February 20, 2018, for an environmental volume of 18 million euros.**The Bundeskartellamt, B9-67/21, 3 April 2023.

[2] K. V. Thai, International Handbook of Public Procurement, Taylor & Francis, 2017, P. 314.

[3]**Organization for Economic Cooperation and Development** 'Competition and Procurement – OECD' <www.oecd.org, 2011.

The study will take an analytical approach by analysing secondary documentary resources, including case studies, principles of the judiciary, and legislative texts. The proposed research is highly significant as there is a need to maximize the efficiency of public expenditure on contracts to enhance budget savings during an economic crisis and to save costs, as public procurement involves a significant cost of public money. EU member countries account for approximately 14 per cent (equivalent to 2 Trillion Euros per year) of GDP.[1] The magnitude of public spending involved demands protecting the integrity of the general procurement process, which is vital to protect the market competition and maximize the benefits for society. Rigging of bids distorts market competition among bidders. It could result in low quality or high prices for procured goods or services. There are two ways' competition has desirable effects on the procurement market. First, free entry into the market and the absence of collusive practices drive prices towards marginal costs.[2] Thus, genuine market competition enables the public

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https://www.oecd.org/daf/competition/sectors/48315205.pdf.> accessed 2 September 2023.

[1] **European Commission** 'Public Procurement: Internal Market, Industry, Entrepreneurship, and SMEs'.< https://single-market-economy.ec.europa.eu/single-market/public-procurement_en#:~:text=Why%20public%20procurement%20is%20important,of%20services%2C%20works%20and%20supplies> accessed 2 September 2023.

[2] **R. D. Anderson, W. E. Kovacic, and A. C. Müller**, Ensuring integrity and competition in public procurement markets: a dual challenge for good governance, The WTO Regime on Government Procurement: Challenge and Reform, 2011, <https://content.unops.org/publications/ASR/ASR-supplement-2011_EN.pdf> accessed 8 May 2023.

procurement authorities to attain a better value for their money.[1] Furthermore, genuine competition drives development.[2] Low-priced and quality products save and free up resources for other goods, services and innovation. Therefore, the study will offer insights into which policymakers can deploy to maximize the benefits of public procurement rules to promote competition by balancing transparency.

This article is structured into two sections. The study will first set out the principles of transparency and disclosure in EU directives and German law. Section two explores the disclosure rules in public procurement under EU law and how they compare to those implemented in Germany under the German Federal Public Procurement Act of 2016 and analyses the recent EU court decisions concerning Directive 2014/24/EU of the European Parliament to reduce corruption opportunities in the procurement process. Lastly, the study will provide a conclusion and recommendations to ensure balance and competition in public procurement.[3]

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[1] **P.-A. Giosa**, Do e-auctions increase the risk of bid-rigging?, 2018, https://pure.port.ac.uk/ws/portalfiles/portal/15931910/Do_e_auctions_increase_the_risk_of_bid_rigging.pdf accessed 10 July 2023.

[2] **R. D. Anderson, W. E. Kovacic, and A. C. Müller**, Ensuring integrity and competition in public procurement markets: a dual challenge for good governance, The WTO Regime on Government Procurement: Challenge and Reform, 2011, <https://content.unops.org/publications/ASR/ASR-supplement-2011_EN.pdf> accessed 8 May 2023.

[3] The previous studies on the research topic include a group of books and articles, the most important of which are those written by Sanchez-Graells, Such as :public procurement and competition (2013); Public Procurement and the EU Competition Rules, (2015); The difficult balance between transparency and competition in public procurement, (2013). In these studies, Sanchez-Graells provides a remarkable approach to studying the relationship between public acquisition in the EU and antitrust regulations. The author is

1- The Principle of Transparency and Disclosure in EU Directives and German Law:

The section will first provide literature on transparency, including the anti-competitive practices in the public procurement process, and the legislation applicable to transparency in the EU. As well, it explores the disclosure rules in public procurement under EU law and the German Federal Public Procurement Act of 2016.

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attentive to the synergetic interlinkages through which operations to procure supplies can be strengthened to develop a more diversified and competitive market within the European Union. The introduction serves as a base for understanding procurement techniques' juridical and economic consequences.
The article “Transparency in EU Procurement” written by Sanchez-Graells, Halonen & Caranta (2019) is an example of a good representation of the theme of EU openness in the article. They want transparent policies to curb corruption and guarantee that everyone in the market gets the chance to succeed. It emerges in this context from Sóltysiński, in which he sheds light on technological tools that fulfill the principle of transparency and give a better performance.
In "Transparency as a Tool against Corruption in Public Procurement" (2017), Georgieva also explains how transparent procedures can be a shield against corrupt public procurement systems.
As for international perspectives, "International Handbook of Public Procurement" (2017), which provides an overview of diverse practices and knowledge from global experiences, inspires readers by offering a broad comparative view that enlightens understanding of public procurement practice beyond the European context.
Flynn, Buffington, and Pennington "Legal Aspects of Public Procurement" (2020) highlight the multifaceted issues in such partnerships and institutional imperatives just like the legal framework. They draw our attention to the problem of strategic procurement because there are concurrent legal, strategic, and collaboration issues in all official matters.

1-1- The Principle of Transparency in public procurement

1-1-1- The legal framework for the principle of transparency in public procurement

Since the Treaty of Rome was signed in 1957,[1] the EU has stepped up efforts to embody transparency in public procurement procedures to reduce anti-competitive practices. Apart from introducing the principle of a 'single market' and the free movement of goods across member states, the Treaty of Rome sought to outlaw anti-competitive behaviours favouring national suppliers in the procurement process.[2]

In the public procurement sector, anti-competitive practices include corruption, fraud, coercion, or bid rigging. First, corruption occurs when a public official offers or solicits valuable things directly or indirectly to influence their actions in the selection or contract execution process. Public officials can use the powers bestowed unto them for personal gain by taking bribes in exchange for granting tenders. [3] Secondly, misrepresenting or omitting facts to influence a selection process or contract execution is considered fraud. In addition, coercive practices that can distort competition encompass harming or threatening individuals to control their actions in the procurement process or how they execute a contract. [4] Lastly, collusive practice (bid

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[1] Treaty establishing the European Economic Community, signed on 25 March 1957, and Entry into force: 1st January 1958.

[2] **I.-G. Popa,** Public Procurement Principles Generated by the Treaty of Rome, In *International conference KNOWLEDGE-BASED ORGANIZATION* 26(2), 2020, P. 218.

[3] **O. Fagbadebo and N. Dorasamy**, Public Procurement, Corruption and the Crisis of Governance in Africa, Publishing 2021, P.145.

[4] **United Nations** 'Conference of the States Parties to the United Nations Convention against Corruption' United Nations : Office on Drugs and Crime

rigging) is an anti-competitive practice that significantly impedes genuine competition in the EU. Bid rigging occurs when two or more firms conspire to establish artificial and non-competitive prices or lower the quality of goods and services, thus removing the elements of market competition. Bidders determine who wins the tender and arrange their bids to favor their designated bid winner. [1] As a result of bid rigging, the contracting authority pays more for less. Rigging bids can take four forms: *cover bidding, bid suppression, bid rotation* and *market allocation*. During a *cover bidding* scheme, bidding firms collude to submit one bid higher than their designated winner, and the proposed bid is too high to accept or contains special terms that the public purchaser will likely reject. [2] *A bid suppression* scheme that involves the bidding competitors agreeing on which one or two firms will refrain from bidding or withdraw their submitted bids so that the designated winner takes the lead also influences competition. [3] *Bid rotation* schemes entail firms involved in the conspiracy bid taking turns being the winning bidder. [4] In *market allocation* schemes, competing firms may also agree not to participate in bidding for particular procurers or geographic regions, where the

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https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html Accessed 6 September 2023.

[1] **A. Sanchez-Graells,** Public Procurement and the EU Competition Rules, Bloomsbury Publishing, 2015, P. 145.

[2] **OECD** 'Guidelines for Fighting Bid Rigging in Public Procurement – OECD' oecd.org. <https://www.oecd.org/competition/cartels/42851044.pdf.> Accessed 6 September 2023.

[3] **M. Flynn ،K. W. Buffington ،R. Pennington**, Richard Pennington, Legal Aspects of Public Procurement, Taylor & Francis, 2020, P. 7.

[4] **OECD,** Ibid 2.

public purchaser does not get value for their money because the winning bidder is protected from the entire competition's rigours.[1]

Certain factors of the public procurement process make the procurement process vulnerable to distortion through anti-competitive behaviour. First, the high number of public procurement projects in sectors historically prone to corruption creates new opportunities for corruption.[2] In addition, the contracting authorities are constrained regarding the range of permissible actions. The general procurement process is highly regulated, so the government needs more strategic options to address anti-competitive practices as a threat. For these reasons, the Rome Treaty regulates public procurement procedures by instigating that contracting authorities adopt necessary measures to avoid situations that could restrict, hinder, or distort market competition. Besides, they are expected to instil conditions that manifest real competition between economic operators so that they can participate in public procurement procedures.[3]

One of the principles outlined in the Treaty of Rome for achieving fair market competition is transparency. The transparency principle deems it necessary for information regarding the development of a particular procurement process to be clearly and precisely formulated in the documents specific to

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[1] **X. Xiansheng,** Public Procurement in Chinese Law and Practice, Springer Nature Singapore, 2023, P.8.

[2] **A.Sanchez-Graells, K.-M. Halonen, R. Caranta,** Transparency in EU Procurements, Edward Elgar Publishing, 2019, P. 53.

[3] **A.Sanchez-Graells,** Public Procurement and the EU Competition Rules, P.R., P. 192.

it.[1] According to the Criminal Justice of the European Union (CJEU), the transparency obligation intends to preclude the risk of favouritism by contracting authorities on specific tenders or tenderers.[2] Several EU member states have enshrined the transparency principle in the national constitution on the basis that citizens have a right to access documents possessed by public authorities and information on their procurement practices. According to the EU Freedom of Information Act (FOIA) regulations, increased transparency enhances the effectiveness and accountability of public administrators to the citizens in a democratic society.[3] In this regard, the transparency principle incentivizes citizens to engage in a democratic society by supporting their freedom of monitoring those in power, increasing the government's integrity while using public funds, preventing corruption, and ensuring justice and legal protection. Besides, transparency requirements promote competition by informing the economic operators of competing opportunities and instilling confidence in them that the assessment of their bids will be merit-based.[4] As a result, the economic operators' incentive to bid is enhanced.

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[1] **M. Bult-Spiering and G. Dewulf,** Strategic Issues in Public-Private Partnerships, An International Perspective, Wiley, 2015, P. 59.

[2] Case C-538/13 eVigilo v EU (2015) ECR-166, 34.

[3] Recital 2 of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[4] **R. D. Anderson, W. E. Kovacic, and A. C. Müller**, Ensuring integrity and competition in public procurement markets: a dual challenge for good governance, The WTO Regime on Government Procurement: Challenge and Reform, 2011, <https://content.unops.org/publications/ASR/ASR-supplement-2011_EN.pdf> accessed 8 May 2023.

In the EU region, competition in the public procurement market is promoted by a legal framework to ensure transparent and non-discriminatory practices in the general procurement process. The measures to promote transparency are embedded in the EU Procurement Directives 2014/23/EC, 2014/24/EC, and 2014/25/EC, enacted in April 2014. EU procurement directives provide legal solutions for the publication of notices and effective communication with economic operators. According to CJEU, adequate transparency, which is enabled through disclosure rules, is essential for verifying tenders based on the award criteria as published and which the tenderers consider when writing their tenders.[1]

1-1-2- ECJ and principle of Transparency in public procurement

The European Court of Justice (ECJ) plays a crucial role in protecting transparency in public procurements within the European Union (EU). The ECJ ensures compliance with EU law and directives related to public procurement, including the principles of transparency, equal treatment, and non-discrimination by several ways: Firstly, Interpretation of EU Directives: The ECJ interprets EU directives on public procurement to ensure that member states comply with the principles of transparency, equal treatment, and non-discrimination. It clarifies the obligations of contracting authorities and sets precedents for future cases. The court's

[1] Case C-87/94 Commission v Belgium [1996] EU: C: 1996:161; Case C-331/04, Judgment of the Court (Second Chamber) of 24 November 2005. ATI EAC Srl e Viaggi di Maio Snc, EAC Srl and Viaggi di Maio Snc v ACTV Venezia SpA, Provincia di Venezia and Comune di Venezia.

judgments help establish a consistent approach to transparency in public procurements throughout the EU.

Second, Enforcement Transparency Requirements: The ECJ ensures that the transparency requirements of public authorities are effectively enforced by member states. It reviews complaints about violations of the agency's policies and can impose sanctions or penalties on member states that do not comply with their transparent obligations. Court interventions help maintain a level playing field and prevent unfair practices in public procurement.

Third, Disclosure of Information: The ECJ has ordered the disclosure of information related to public authorities in certain cases. For example, he stated that public contracts and documents tend to be accessible to interested parties, allowing the fairness and legality of the procurement process to be assessed. These guidelines promote transparency by ensuring that information is available to all interested parties.

Finally, the Declaration of Transparency Obligations: Proceedings from ECJ judgments, which clarify and strengthen the transparency obligations of contracting authorities. It provides direction on topics such as the publication of contract notices, access to procurement documents and disclosure criteria. These explanations help the contracting authorities and the prices understand their rights and obligations regarding transparency in public procurement. Overall, the ECJ plays a vital role in protecting the transparency of public administrations within the EU. The interpretation of EU regulations, enforcement actions and regulations on the disclosure of information and transparency

obligations should help ensure that public procurement processes are fair, open and accountable.

The European Court of Justice (ECJ) has played a significant role in ensuring transparency in public administrations within the European Union. One interesting case study that the ECJ highlights the impact of transparency in public procurement is the "Telaustria et Telefonadress" case.[1] In this case, Telaustria and Telefonadress were telecommunications companies that sought access to public procurement information from Austria's Telefonbuchgesellschaft (TBG), which had a general monopoly on telephone directory services in Austria. The companies claimed that TBG's procurement process lacked transparency, preventing fair competition. The European Court of Justice ruled that TBG's activities fell within the scope of the EU procurement directives and, therefore, its procurement process must be transparent and open to competition. The court stressed the importance of transparency in ensuring equal treatment, non-discrimination, and fair competition among bidders for public procurement. This case set an important precedent in the field of public procurement, confirming the principle that transparency is an essential aspect of the procurement process. It strengthened the commitment of public authorities to provide access to procurement documents and information, allowing interested parties, such as potential bidders, to participate effectively in the procurement process. As a result of this ruling, public procurement processes across the EU have become more transparent, with increased access to information for potential bidders. This would enhance competition, efficiency and

[1] **Judgment of the Court of 7 December 2000, C-324/98.**

accountability in public spending, ultimately benefiting both public authorities and the wider public. Overall, the decision of the European Court of Justice in the "Telaustria and Telefonadress" case demonstrates its commitment to enhancing transparency in public procurement within the EU and promoting fair competition between bidders.

In addition, the European Court of Justice has issued several rulings on the subject of transparency in government procurement. These provisions help define and clarify Member States' obligations regarding transparency in public procurement. Here are some notable rulings: Case Committee v. Italy:[1] In this case, the European Court of Justice ruled that Italy had failed to fulfil its obligations under EU law regarding the transparency of public procurement procedures. Italy did not provide appropriate remedies in cases where contracting authorities violated their transparency obligations. The ruling stressed the importance of effective measures to ensure transparency in public procurement. Case Committee against Germany: [2] The European Court of Justice ruled that Portugal failed to comply with transparency requirements in public procurement. Portugal did not properly advertise contracts for road construction projects, which limits competition and violates the principles of transparency and non-discrimination. This provision reinforced the commitment of Member States to ensure transparent advertising of public contracts. SECAP v. Österreichische Post:[3] The European Court of Justice ruled that a contracting authority's decision to award a

[1] **Judgment of the Court of 30 September 2010, C-314/09.**
[2] **Judgment of the Court of 9 June 2009, C-480/06.**
[3] **Judgment of the Court of 15 May 2008, C-147/06.**

public contract without a transparent and competitive procedure can be appealed by the parties concerned. The ruling affirmed the right of stakeholders to appeal decisions violating transparency requirements, and enhanced accountability and transparency in government procurement.

Another notable ruling is the "Pressetext" case, [1] which highlighted the contracting authorities' commitment to providing comprehensive information on procurement contracts. This ruling stressed that contract notices must contain sufficient information to enable potential bidders to assess their interest in participating in the tender and submitting a bid. Furthermore, Fabricum v. Belgian State: [2] This ruling made it clear that contracting authorities must ensure that their procurement procedures are transparent from the outset, including the publication of contract notices. He stressed the importance of providing clear and accessible information to potential bidders.

In "Commission v CAS Succhi di Frutta" case, [3] The European Court of Justice ruled that public authorities must provide adequate information to potential bidders about the evaluation criteria and their relative weight. This clarification ensures that bidders have a clear understanding of the factors that will be taken into account when evaluating their offers. Also in "Wall AG v La ville de Francfort" case,[4] the ruling stressed the importance of providing reasoned decisions to unsuccessful bidders. He stated that contracting authorities must provide

[1] **Judgment of the Court of 19 June 2008, C-454/06.**
[2] **Judgment of the Court of 3 March 2005, C-21/03.**
[3] **Judgment of the Court of 29 April 2004, C-496/99.**
[4] **Judgment of the Court (Grand Chamber) of 13 April 2010, C-91/08.**

sufficient information about the reasons for their decisions, allowing bidders to understand why their bids were not successful.

These provisions, together with others, have contributed to establishing a framework for transparency in government procurement within the European Union. It emphasizes the importance of providing clear and accessible information, disclosing evaluation criteria, and ensuring that reasons are provided to unsuccessful bidders to promote fairness and competition in the procurement process.

The ECJ in the ruling of "Ministero dell'Interno v Fastweb" case, [1] it declared that contracting authorities must ensure that the criteria for selecting prices are objective and non-discriminatory. He stressed the importance of transparency in the evaluation process and stressed the need to obtain clear and transparent information about potential prices. Likewise, in "Esaprojekt v Województwo Łódzkie" case. [2] This led to the outcome of the public procurement battle. The European Court of Justice stated that contracting authorities must ensure that there is no conflict of interest that could undermine the objective and fair nature of the procurement process. He stressed the importance of transparency in identifying and managing conflicts of interest. In addition to the above cases, the European Court of Justice ruled in "Finn Frogne v Rigspolitiet ved Center for Beredskabskommunikation" case,[3] the contracting authorities were unable to make substantive changes to the bids determined after the submission of bids, in order to undermine the transparent and equal treatment of prices.

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[1] **Judgment of the Court of 11 September 2014, C-19/13.**
[2] **Judgment of the Court of 4 May 2017, C-387/14.**
[3] **Judgment of the Court of 7 September 2016, C-549/14.**

These latest regulations, along with others, demonstrate the European Court of Justice's continued commitment to enhancing transparency in governance within the European Union. The court indicated in "Stefan Rudigier v Salzburger Verkehrsverbund" case,[1] that concession, as outlined in Articles 43 to 49 of the Treaty. This includes adhering to the principles of transparency and equal treatment. These rules do not exempt public authorities from their obligations under directives related to the awarding of public contracts, especially when public service contracts are involved. This recognizes that failure to comply with these rules could give an advantage to a transport service operator over its competitors.

However, as long as the service in question provides the provision, the objectives of transparency and non-discrimination are met in that provision. Directive 2014/24, similar to Directive 2004/18, means that the contracting authority must set appropriate limits to the procedures, taking into account the complexity of the contract and the time required to prepare the tender. When a public authority wants to entrust a public interest to another party, it must comply with European laws governing public contracts and concessions. This ensures that the selection process is transparent and treats all potential operators equally. In addition, public authorities must adhere to regulations relating to the award of public contracts. This regulation recognizes the importance of ensuring that no one benefits unfairly from workers' burdens and emphasizes the need for transparency and non-discrimination in light of the decision. Directive 2014/24 further clarifies that the

[1] **Judgment of the Court of 20 September 2018, C-518/17.**

contracting authority must determine the appropriate periods for the procedures depending on the complexity of the contract and the time required to prepare the tender. By following these approaches, public authorities can ensure a fair and transparent selection process when outsourcing public services to third parties.

These Directives demonstrate the ongoing efforts of the European Court of Justice (ECJ) to emphasize the importance of transparency and fairness in government procurement processes. These standards emphasize the need for contracting authorities to use open and objective procedures, provide reasons for their decisions and intervene in disputes. The Regulations explore the basic steps that contracting authorities must follow to maintain transparency and fairness throughout the procurement cycle. First, it depends on the contracting authorities to clearly define the requirements for the procurement process. By doing this, potential buyers can have a clear understanding of what to expect and unknowns can be minimized. To facilitate access to information, contracting authorities should publish detailed information about the designated agency or sites, with all relevant information such as scope of work, evaluation criteria, application deadlines, and contact information. Next, making a fair evaluation is very important. Contracting authorities must evaluate submitted offers based on objective factors such as price, quality and compliance with specified requirements. There is a need to communicate pricing guidelines prior to the evaluation process and document the entire evaluation process. Providing feedback at a low cost enhances transparency and accountability. After completion of the evaluation process, contracting authorities must immediately

inform qualified candidates and provide them with a detailed selection summary. If possible, by entering into a negotiated settlement, talks can help finalize the terms and conditions. By following these steps and adopting the principles of transparency and fairness, contracting authorities can ensure that the government procurement process is carried out fairly and efficiently. This not only enhances confidence between prices, but also supports healthy competition, resulting in a better price for public resources.

1-1-3- German courts and the principle of Transparency in public procurement

There have been several rulings from the German Federal Constitutional Court (Besverfassungsicht) that emphasize the importance of protecting transparency in various aspects of governance, including government procurement. The Federal Constitutional Court established the principle that fundamental rights act as a limitation on government action, including the duty to disclose information. The court held that transparency is essential for safeguarding the democratic process, enabling public scrutiny, and ensuring accountability. [1] In "NPD-Verbotsverfahren" case, The Federal Constitutional Court ruled that transparency is crucial for maintaining trust in the political system and preventing undue influence. The ruling emphasized that citizens have a right to access information related to political parties and their financial activities. [2] The Federal Constitutional Court also took the view that transparency through the involvement of EU institutions as well as reporting and

[1] **Judgment of 30 June 2009 - 2 BvE 2/08.**
[2] **Judgment of 17 January 2017 - 2 BvB 1/13.**

accountability obligations to national parliaments serves to guarantee democratic legitimacy and control. [1] As, Federal legislation ensures the provision of consistent and understandable information regarding market activities nationwide. Ensuring market transparency in this way is a prerequisite for consumer confidence in relevant information. [2]

While these cases may not directly focus on government procurement, they highlight the broader principles upheld by the German Federal Constitutional Court in protecting transparency as a fundamental aspect of democratic governance and citizens' rights. The court recognizes the importance of openness, public scrutiny, and accountability in all areas of government activity, including procurement processes.

The German Federal Administrative Court (Bundesverwaltungsgericht) emphasizes the importance of transparency in public procurement processes. Emphasizing the importance of transparency, the Court considered that transparency contributes to legal certainty and constitutes a protection for the rights and freedoms of individuals. [3] The court also affirmed that increased transparency is necessary to strengthen public control of the use of funds. It is necessary for the legislature to establish a balanced weighting to transparency on one hand and interference with fundamental rights on the other. [4] It can be stated that German administrative courts have established clear principles for tenders and selection procedures. The competent authorities have a certain

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[1] **Judgment of 30 July 2019 - 2 BvR 1685/14.**
[2] **The Order of the First Senate of 21 March 2018**
[3] **BVerwG, Urteil vom 22.06.2020 - 8 CN 1.19.**
[4] **BVerwG, Urteil vom 24.10.2019 - 3 C 21.17.**

degree of discretion in determining the award criteria and the selection decision itself. Judicial review therefore focuses on whether the authority has violated procedural provisions or exceeded its scope of assessment. This could be the case if incorrect facts were considered, irrelevant considerations were made, or the assessment criteria, as well as the principles of appropriateness, transparency, and non-discrimination, were not adhered to. The appellate court review mainly deals with the question of whether these limits were observed in the lower court's decision. It is important to emphasize that the selection process must be conducted in a transparent and non-discriminatory manner to ensure fair decision-making. The regulations and provisions for the selection procedure are set out in various guidelines and regulations. Overall, these principles aim to ensure equal opportunities and transparency in selection procedures and to ensure that the best offers are chosen. By adhering to these principles, companies and applicants can have confidence in the process and be assured that their applications will be evaluated fairly.[1]

The German Federal Administrative Court highlighted the importance of transparency and fairness in the approval process for the granting of permission to operate an independent scheduled transport service. The court held that the responsible authority cannot grant deviations from the requirements of the advance notice that only apply to one applicant among several who have submitted timely self-financing applications. This would undermine the transparency required by the constitution and intended by the new regulation. Ensuring equal competition

[1] **BVerwG, Urteil vom 13.12.2012 - 3 C 32.11.**

and fair market access is essential. Every applicant should be given a fair chance to be considered in accordance with the legally regulated approval requirements. The procedure should be designed in a way that allows changes to offers after the offer period has expired, but ensures the transparency for all applicants. Initiative-based improvements that deviate from the old legal situation should be excluded. Instead, an orderly approval process structured by the approval authority should be established. This ensures that additions and changes to applications after the deadline are approved in a transparent manner that is equally open to all applicants. Application competitions between company-initiated and public transport-initiated transport should be regulated according to the aim of the law. Waiving the fulfilment of the requirements of the advance notice for only one of several applicants contradicts the goal of ensuring transparency and fairness in the approval process. To sum up, the lawsuit emphasizes the need for transparency, fairness, and competition in the approval of independent scheduled equal transport services. By following these principles, the responsible authority can ensure that all applicants have an equal opportunity to participate and compete in the market. [1]

In another case related to access to documents relating to the tender and award of the Aviation Research Funding Program.[2] The Federal Administrative Court has balanced the right to obtain information and non-disclosure in order to protect competition. This case revolves around the plaintiff's request for information regarding the aviation research-funding program conducted by the

[1] **BVerwG, Urteil vom 01.06.2023 - 8 C 3.22.**
[2] **BVerwG, Urteil vom 15.12.2020 - 10 C 24.19.**

Federal Ministry of Economic Affairs and Energy. The plaintiff, an inventor, has previously submitted numerous applications and supervisory complaints in order to gain access to the relevant information. In the summer of 2014, the plaintiff applied for access to the documents related to the tendering and allocation of the aviation research-funding program. However, the Federal Ministry rejected the application, citing previous disclosures and alleged abuse of rights as well as disproportionate administrative burden. The Administrative Court dismissed the claim regarding access to specific documents for the IV-3 and IV-4 funding programs as inadmissible since this information was not available to the Ministry. With regard to the documents for the V-1 funding program, the claim was largely decided in favor of the plaintiff, with allegations of abusive application and the primacy of procurement regulations being denied. Subsequently, the defendant filed an appeal, but the Higher Administrative Court rejected the appeal. It was determined that claims for procurement-related information do not supersede the Freedom of Information Act under § 1 para. 3 IFG. The plaintiff's request for information was not deemed abusive. While the principle of good faith must be respected in the enforcement of the Freedom of Information Act, it must be clearly recognizable to an objective observer that the applicant's intention is not to gain knowledge through the disclosure of information, but rather to pursue other disapproved objectives and use the information claim as a pretext. Abusive application can only be assumed if there is a threat to state institutions.

According to established case law of the Federal Administrative Court, the Freedom of Information Act (IFG) is

displaced by norms that have an abstract-identical substantive regulatory content with § 1 Abs. 1 IFG and are intended as a conclusive regulation (§ 1 Abs. 3 IFG). The decisive factors for this are both the wording of § 1 Abs. 3 IFG and the sense and purpose of the regulation, which aims to ensure the primacy of specialized law over general access to information. It is crucial to determine whether the alternative regulation deals with access to official information in terms of its subject matter. In addition, it is decisive whether the alternative regulation not only permits such access in individual cases, but generally or typically, and whether it is addressed to those subject to the information obligation under the Freedom of Information Act. However, the alternative regulation does not have to grant the individual an individual, judicially enforceable right of access to information. Therefore, procurement regulations that relate to a completed procurement procedure do not take precedence over the Freedom of Information Act. The relevant provision, § 5 Abs. 2 Satz 2 of the Procurement Regulation (VgV) of April 12, 2016, does not regulate access to information but rather excludes it. According to this provision, expressions of interest, confirmations of interest, requests for participation, and offers, including their attachments, as well as documentation of the opening and evaluation of applications and offers, must be treated as confidential even after the completion of the procurement procedure. Therefore, § 5 Abs. 2 Satz 2 VgV does not establish a governmental obligation to provide information, but rather defines a confidentiality provision within the meaning of § 3 Nr. 4 IFG.

1-2- EU Directives on Public Procurement

The EU public procurement was governed by the Directive 2004/18/EC, which stayed in force until 18 April 2016.[1] The Commission identified policy gaps in public works management and replaced the rules with an updated Directive 2014/24/EU version. The new Directive outlines new rules for the open market in public procurement and fair management in the supervision and awarding of public works. The new Directive opened channels for transparency and information sharing. Public works would now be publicly scrutinized, and awarding criteria and contact notices would be shared in the EU's open-source database. With the availability of open-source data on public procurement contracts, small and medium enterprises are granted the chance to compete equally for public contracts. However, the availability of contract information has opened a loophole for manipulating public contracts.

The Directive 2014/24/EU has made it mandatory for all contracting authorities to utilize electronic communication and data sharing. Much of the information about the tenderers is openly shared within the public domain. That has been a vast resource for economic cartels who rely on the available data to formulate bid-rigging schemes.[2] As the Directive 2014/24/EU stipulated, public tenders are awarded based on price versus quality considerations. The party with the best

[1] DIRECTIVE 2004/18/EC of the EUROPEAN PARLIAMENT and of the COUNCIL of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts.

[2] **P.-A. Giosa**, P.R. 6.

price while maintaining the quality and efficiency in delivering public services wins the tender contract.[1] Under such circumstances, bidders in a public tender may collude to suppress the competition among them and agree to share the collusive gains after the inflation of a tender contract. That is what Chantale describes as bid rigging.[2] It is one of the ways the EU has faced a challenge in effectively managing public procurement.

The Directive 2014/24/EU on public procurement dictates the general and specific requirements for contracting authorities when handling contracts related to works, goods and services. Overall, the Directive dictates that national leaders must observe equality and non-discrimination for all the applicants of public tenders.[3] That creates a chance for equal success for all the business and public tenderers within the EU market. The tender contract is awarded to the most appropriate party with the best price-quality ratio. The criteria involve cost, operational quality, social and environmental sensitivity, and delivery effectiveness. Within this Directive, there are three major provisions. First, it abolishes the distinction between Part A and Part B services that distinguish them based on their ability to promote cross-border trade.

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[1] **C. Ratcliff, M. Wosyka, B. Martinello, and D. Franco,** Public Procurement Contracts: Fact Sheets on the European Union European Parliament, (2023) Www.europarl.europa.eu.<https://www.europarl.europa.eu/factsheets/en/sheet/34/public-procurement-contracts#:~:text=The%20reform%20of%20public%20procurement>accessed 9 September 2023.

[2] **C. LaCasse,** Bid rigging and the threat of government prosecution, The RAND Journal of Economics, 1995, P. 398.

[3] Procurement Directive 2014/24/EU of 26 February 2014 [2014] 0J L 94/65.

Secondly, all services are regulated by the procurement rules unless they are classified as 'light regime', which applies to specific social, health and cultural services. Lastly, Directive provides rules stipulating the conditions under which contracting authorities are not obligated to apply procurement procedures, specifically during public-private partnerships. [1]

Besides, Directive 2014/25/EU stipulates the specific requirements through which tenders within the entities operating in the water, energy, transport, and postal services sectors can work within the sphere of public procurement. [2] Concerning environmental sustainability in public procurement, the contracting authorities must confirm that ecological management measures are followed in the performance of a public contract. The tenderers are expected to produce Ecolabel certificates demonstrating that they can observe optimum environmental sustainability in practice.[3] To maintain confidentiality throughout the procurement process, the contracting authorities instruct the tenderers on the requirements for the protection of the procurement information of a confidential nature. Lastly, Directive 2014/23/EU dictates the following conditions for public

[1] **P. Telles and L. Butler,** Public procurement award procedures in Directive 2014/24/EU, (2014) Novelties in the 2014 Directive on Public Procurement 1; European Commission 'New Rules on Public Contracts and Concessions'(2014) < http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en> Accessed 16 September 2023.

[2] Procurement Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC Text with EEA Relevance [2014] OJ L 94/243.

[3] **B. Neamtu, and D. C. Dragos**, Sustainable Public Procurement, 10 (2) European Procurement & Public Private Partnership Law Review 2015, P. 92.

concessions. [1] The first provision within this Directive is to define concessions into categories and stipulate the rules applicable to each. Secondly, it lays out concessions that should be published in the EU's Official journal if they attain the EUR 5 million threshold. Lastly, the Directive provides the conditions when contracting authorities are not obligated to follow contracting procedures, specifically when the member state has defined its procedures.

There exist specific objectives that are integral to EU procurement directives. For instance, the directives aim at creating a culture of integrity and fair play.[2] In the awarding of public tenders within the EU, there are many channels for conducting unethical public practices. The cases are rampant when there is a lack of transparency in public information. That leaves minimal chances for the members of the public and relevant legislative bodies to identify unethical play in the awarding of public tenders. Thus, it is the role of EU directives to minimize the chances of public officials, fulfilling their rational interests through the discriminative awards of public tenders. The free and open sharing of public procurement information makes it easy to curtail the unethical practices of unscrupulous tender cartels within the EU public procurement sector. [3]

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[1] **C. Bovis,** Research Handbook on EU Public Procurement Law, Edward Elgar Publishing, Incorporatedm 2016, P. 29.

[2] **Organization for Economic Cooperation and Development,** '*OECD principles for integrity in public procurement'* (OECD Publishing 2009).9< https://cor.europa.eu/en/engage/studies/Documents/Public-Procurement.pdf> accessed 5 September 2023.

[3] **C. Bovis,** P.R., P. 457.

Furthermore, the procurement directives address societal challenges.[1] Through public procurement, the EU targets to affect the EU society positively. One of the areas where it seeks to impact positively is the eco-control. In alignment with the need for social, economic, and environmental sustainability, the public procurement rules focus on supporting the procurers invested in eco-innovation. Through that, more focus is directed to projects pegged towards social and environmental sustainability. For instance, to foster environmental sustainability within the EU housing sector, tender awarding may be channelled to companies that deal with eco-friendly materials.[2] Empowering sustainable industries goes a long way in attaining a sustainability impact within the EU socio-economy. Additionally, EU directives imposed more flexibility on contracts providing social services like health and education. That is to attract more parties and make it easy for deserving parties to win the tender and contribute to overall societal development.[3]

Another objective is to modernize public services and slash administrative burdens in the procurement sector. Several policy administration mechanisms have been established to realize effective public procurement within EU. Much of the challenges have been factored in by strict administrative practices and tendering, making it hard for effective public procurement within

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[1] **V. Alessandro, M. Alessandrini,** Paul Negrila, and Pietro Celotti, 'Public Procurement - European Committee of the regions, (2019) 5 <https://cor.europa.eu/en/engage/studies/Documents/Public-Procurement.pdf> accessed 5 September 2023.

[2] **R. Caranta and W. Janssen,** Mandatory Sustainability Requirements in EU Public Procurement Law, Bloomsbury Publishing, 2023, P. 113.

[3] **A. Sanchez-Graells,** Smart Public Procurement and Labour Standards, Bloomsbury Publishing, 2018, P. 133.

the EU region. To curb that, the EU policy reforms are geared towards slashing the administrative burdens involved in public services. A critical area that has been heavily reformed has been the use of innovative technologies. The EU has heavily encouraged innovation partnerships that have ensured that public services are current. The update has opened new channels for potential bidders to easily win government tenders without going through many administrative barriers.

Besides, they aim to facilitate small- to medium-sized enterprises (SMEs) to participate in public procurement to achieve common societal goals.[1] For instance, they encourage contracts to be awarded not solely dependent on the price but also tenders that create social advantages, such as creating employment opportunities for most people. Secondly, they encourage contracting authorities to make tenders accessible to SMEs and start-ups by limiting the turnover that participates in tender procedures. [2] Directive 2014/24/EU gives guidelines on how the procurement process can address the needs of SMEs. Another

[1] **The World Bank Group,** 'Promotion of Smes/Local Content in Public Procurement Laws and Regulation'(2020)Public-Private-Partnership Legal Resource Center< https://ppp.worldbank.org/public-private-partnership/promotion-smes-local-content-public-procurement-laws-and-regulation#:~:text=European%20Union,-Reference%3A%20Directive%202014&text=The%20directive%20provides%20guidance%20on,contracts%20into%20multiple%20smaller%20contracts > accessed 5 September 2023.

[2] **European Commission** 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency' (2015). <https://ec.europa.eu/docsroom/documents/16412/attachments/1/translations/en/renditions/native#:~:text=contracting%20authorities%20will%20be%20encouraged,tenders%20more%20accessible%20to%20SMEs.&text=the%20turnover%20required%20to%20participate,and%20start%2Dups%20to%20participate > accessed 5 September 2023.

strategy for ensuring that SMEs participate in the procurement process is subdividing large contracts into smaller lots that can be assigned to them effectively.[1] Lastly, the requirement to use e-procurement enables SMEs to exploit the benefits of a digital market, such as efficiency. By addressing the needs of SMEs, the directives have facilitated a means for attaining societal goals through procurement.

1-3- German Federal Public Procurement Act 2016

The EU member countries must integrate the three directives into their national laws by 18 April 2016. Thus, the reforms provided the basis for forming the German Federal Public Procurement Act 2016. Germany has the largest economy in Europe, with a Gross Domestic Product (GDP) of approximately 3,869,900 million Euros. [2] As a result, it boasts of having one of the largest public procurement markets—the country's expenditure on public procurement accounts for 15% of its GDP.[3] Public procurement has a diverse impact in shaping the livelihood of its citizens and strengthening the economy in Germany. To fully attain that, German public procurement is controlled and regulated

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[1] **OECD** '*OECD Public Governance Reviews SMEs in Public Procurement Practices and Strategies for Shared Benefits'* (OECD Publishing 2018). <https://www.oecd-ilibrary.org/sites/9789264307476-4-en/index.html?itemId=/content/component/9789264307476-4-en > accessed 5 September 2023.

[2] **Statista Research Department** 'GDP of European Countries 2022' Statista (20 June, 2023) <https://www.statista.com/statistics/685925/gdp-of-european-countries/#:~:text=Germany's%20economy%20has%20consistently%20had,of%20West%20and%20East%20Germany > accessed 5 September 2023.

[3] **OECD** 'Public Procurement in Germany – OECD' oecd.org. <https://www.oecd.org/gov/public-procurement/country-projects/public-procurement-germany/> accessed 5 September 2023.

by the overall public policies stipulated within the EU public procurement laws. That ensures consistency in trade and social market coordination with other market actors operating within the EU. On 18 April 2016, the directives 2014/23/EU, 2014/24/EU, and 2014/25/EU were implemented in Part IV of the German Federal Public Procurement Act 2016 against Restraints of Competition and Ordinance on the Award of Public Contracts (Procurement Ordinance (Vergabeverordnung – VgV) to reconcile with the regulatory framework of EU member countries. However, the reforms went beyond the requirements stipulated by EU directives as policymakers interpreted them as an opportunity for several other aspects of the procurement system at the national level. This aspect is evidenced by the requirements for procurements with a value below the threshold set by EU.[1]

The German Federal Public Procurement Act 2016 is pegged on fulfilling the following objectives: Firstly, the legislation's primary goal is to positively impact the economy and well-being of the people. The German government spends more than 35% on public procurement.[2] This percentage implies that the government heavily relies on the sector to strengthen its economic sector and other aspects of society, such as environmental sustainability and social welfare. Another objective of the German Federal Public Procurement Act 2016 is to streamline the legal

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[1] **BMWi** 'Referentenentwurf Verordnung zur Modernisierung des Vergaberechts' (2015) < http://www.forum-vergabe.de/fileadmin/user_upload/Rechtsvorschriften/Referentenentwurf_Verordnungen_11.11.2015/Referentenentwurf_Verordnungen_gesamt_11.11.2015.pdf> accessed 5 September 2023.

[2] **OECD** 'Public Procurement in Germany – OECD' oecd.org. <https://www.oecd.org/gov/public-procurement/country-projects/public-procurement-germany/> accessed 5 September 2023.

layout. Germany is part of the European Union. Therefore, there is a need for the government to simplify its public procurement to align with EU public procurement rules. Besides, the legislation ensures a strong coordination of the local procurement practices and the practices observed by other economies within the EU. Thirdly, the legislation facilitates the consolidation of public procurement services. Addressing the people's unique social and economic needs goes a long way in strengthening the German public procurement sector. Therefore, the government has embarked on bundled procurement to fully cater to the unique needs of the micro-sectors within its economy.[1] That ensures that there is ease of accessibility of all the public procurement services. Furthermore, dividing the tenders into segmented portions makes it easy for small and medium enterprises to participate in national procurement. Another objective of the legislation is to achieve strategic procurement.[2] Germany's public procurement has embarked on strategic tender awarding to ensure that the country's economy is well covered. That ensures that all the market actors operating in different spheres of the economy and society are equally empowered to foster balanced growth. Lastly, the public procurement rules aim at strengthening the public service. [3]Germany recognizes public procurement's role in

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[1] **M. Ines,** Digital transformation of the German state, KOPS Universität Konstanz, 2021, P. 331.

[2] **OECD** 'The use of strategic procurement in Germany', in *Public Procurement in Germany: Strategic Dimensions for Well-being and Growth* (OECD Publishing 2019) 42. <https://doi.org/10.1787/280042ae-en > accessed 5 September 2023.

[3] **OECD** '*OECD Public Governance Reviews Public Procurement in Germany Strategic Dimensions for Well-being and Growth'* (OECD Publishing 2019).< https://doi.org/10.1787/1db30826-en>

creating economic activities for its local citizens. Therefore, the government utilizes its public procurement sector to foster general service delivery to its people. In the issuance of public tenders, much consideration is made to ensure that the winning parties have the best interests of the members of the public in the implementation of the public tender.

2- Comparison of Disclosure Rules in EU Public Procurement and German Law:

While Germany is expected to transpose the EU procurement directives into its national laws, the disclosure rules harmonize the publication of award notices, electronic availability of contract documents, and notices of award decisions to the candidates and tenderers, publicly made and accessible procurement information enables economic operators to assess the possibility of infringement in the contract award criteria and the legality of non-competitive procedures in the awarding of a contract. [1]

2-1- Contract Award Notice

According to Articles 32, 50 and 70 of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU, respectively, a contracting authority should send a concession award notice containing the results of the award procedure to the Publications Office of the European Union within 48 days after giving the award. The concession award notice should include the name and address of the contracting authority, concession description and date of the award decision, number and nature of received tenders, details of the successful tenderer, the value of the awarded concession, and the methods used to calculate the values. [2] The

[1] **A. Sołtysińska,** E-procurement and the principle of transparency in public procurement in the European Union, E-Administracja: Skuteczna, Odpowiedzialna i Otwarta Administracja Publiczna w Unii Europejskiej, 2021. 147. <https://doi.org/10.12797/9788381386739.08>

[2] Procurement Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] 0J L 94/65, Procurement Directive 2014/23/EU of the

publication of the contract award notice guarantees transparency to the economic operators and third parties, given that sensitive details of the procurement procedure are revealed.

Identically, the contracting authority is expected to announce a contract award notice in Germany. This requirement is enshrined in § 39 of the Ordinance on the Award of Public Contracts, which stipulates that a public contracting entity, as per guidelines in Annex III of the EU Implementing Regulation 2015/1986. According to § 39, a contracting entity shall, within 30 days after awarding a contract, send a contract award notice or a concluding framework agreement with the procurement process results to the Publications Office of the European Union.[1] The only difference between the disclosure rules in EU and Germany is that in the latter, a contract award notice is transmitted within 30 days, whereas in the EU, the transmission has to be within 48 days. The content of the award notice is similar to the EU requirements as it consists of the number of tenders received, including details of whether they are from SMEs, EU member states or non-EU member states.[2] Over and above that, information on the estimated value of the contract, the award criteria, such as the highest and the lowest offers, and whether the

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European Parliament and of the Council of 26 February 2014 [2014] 0J L 94/2, and Procurement Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC Text with EEA Relevance [2014] OJ L 94/243.

[1] Ordinance on the Award of Public Contracts (Procurement Ordinance (Vergabeverordnung – VgV)) of 12 April 2016 [2016] /624.

[2] Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (Text with EEA relevance) [2015] OJL 296/1.

award was given to a group of economic operators, is provided to the Publications Office of the European Union. Just like in the EU disclosure rules for contract award notice, these provisional requirements are in the pursuit of transparency in the procurement procedures as they are accessible to the public once published.

ECJ in the case of (Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice),[1] ensuring transparency and equal treatment of economic operators in framework agreements necessitates clear communication of the maximum quantity and value to be covered. This enables tenderers to accurately assess their capabilities and avoids situations where the contracting authority exceeds the predefined limits, holding the successful tenderer accountable for non-compliance.

The importance of Transparency and Equal Treatment in Framework Agreements When it comes to the conclusion of a framework agreement, it is crucial to uphold the fundamental principles of EU law, namely equal treatment and transparency. These principles ensure that all parties involved are treated fairly and have access to necessary information. Equal treatment and non-discrimination principles, along with the principle of transparency, require that all conditions and rules of the award procedure be clearly and precisely stated in contract notice or tender specifications. This ensures that all potential tenderers can understand the requirements and interpret them in the same way. It also enables the contracting authority to assess whether the submitted tenders meet the criteria. further emphasizes the importance of these principles. The judgment highlights that the

[1] Judgment of 19 December 2018, C-216/17.

conditions of the award procedure must be unambiguous, so that informed tenderers can comprehend their significance. Additionally, the principle of transparency could be compromised if the duration of the framework agreement extends beyond what is justified. Directive 2014/24 allows framework agreements to be concluded for up to four years, or longer in exceptional cases. However, this prolonged duration may hinder transparency in the long term.

Furthermore, it is crucial to accurately define the maximum estimated value or quantity covered by the framework agreement. A broad interpretation of this obligation could undermine the rule that contracts based on a framework agreement should not entail substantial modifications. It could also lead to improper use or restrictions on competition. In conclusion, adhering to the principles of equal treatment and transparency is essential in framework agreements. Clear and precise communication of requirements, along with a reasonable duration and accurate definition of quantities, ensures fairness and promotes healthy competition among tenderers.

ECJ Decision Highlights Importance of Transparency and Equal Treatment in Framework Agreements. In a recent case (Simonsen Weel v Region Nordjylland og Region Syddanmark),[1] the European Court of Justice (ECJ) made an important ruling regarding modifications to framework agreements. According to the ECJ, non-substantial modifications are allowed under certain conditions. It is worth noting that these modifications must be agreed upon by all parties involved, including the successful

[1] Judgment of the Court of 17 June 2021, C-23/20.

tenderer. Furthermore, the ECJ clarified that the indication of the maximum quantity or value of supplies covered by a framework agreement can be included either in the contract notice or in tender specifications. This is particularly important because framework agreements require contracting authorities to provide unrestricted and free access to procurement documents via electronic means. This ensures the transparency and equal treatment for all potential tenderers. It is essential to comply with the principles of transparency and equal treatment as stated in Article 18(1) of Directive 2014/24. By meeting the aforementioned conditions, these principles can be upheld. However, it is important to note that these principles would not be met if economic operators were required to express interest to the contracting authority before accessing tender specifications. Access to these specifications should be open and available without any preconditions. According to Article 49 of Directive 2014/24, as well as points 7, 8, and 10(a) of Part C of Annex V to the directive, in conjunction with Article 33 and the principles of equal treatment and transparency laid down in Article 18(1), the contract notice should clearly indicate both the estimated quantity/value and the maximum quantity/value covered by the framework agreement. Once the maximum limit is reached, the framework agreement will no longer have any effect. This decision by the ECJ reinforces the importance of transparency and equal treatment in the context of framework agreements. It provides clarity on the conditions for modifications and the inclusion of necessary information in contract notices. Upholding these principles ensures a fair and competitive procurement process for all parties involved.

The Berlin Higher Administrative Court held that,[1] an administrative practice according to which a grant is rejected due to procurement violations is not an error of discretion if the violations are likely to effect the economic efficiency and economy of the use of the grant; Concrete proof of this is not required. The announcement should, among other things, provide evidence required for assessing the suitability of the bidder. The bidder should be able to clearly and unequivocally see from the announcement whether he is eligible to submit an offer; He must be able to determine from the announcement whether and how he can provide the required evidence. That was not guaranteed in this case. In the announcement, the plaintiff did not specify any evidence that the bidders were required to provide. In principle, it is possible for a contracting authority to specify the proof of suitability required there even after the award notice has been published. However, the information in the announcement must be so substantial that it gives the bidder an idea of what specific evidence the awarding authority requires. A later increase in the requirements for the proof of suitability to be sent is not permitted. The regulation serves to protect competition and is intended to prevent competing companies from making price agreements. Accordingly, the obligation of secrecy is mandatory and must be observed at all stages of the procedure; It also applies to the implementation of on-site visits and cannot be restricted with the consent of the applicants.

[1] Judgment of the Court of 27.02.2013, OVG 6 B 34.12.

2-2- Contract Award Decision

Another profound similarity in the public procurement disclosure rules in the EU and Germany is the disclosure of the award decision. In EU, this requirement is enshrined under Articles 40(1), [1] 55(1), [2] and 75 of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU respectively. According to the Directives, the contracting authority should inform each unsuccessful candidate and tenderer of the contract award decision within 15 days after making a request. In the notice to the candidates, they shall be told why their application to participate in the procurement process was rejected. Conversely, the contracting authority should inform the unsuccessful tenderers why their request for participation in the procurement was dismissed. First, the notice should include the functional requirements their supplies or services did not meet and the provisional advantages of the successful bidder. It should be justifiable that the unsuccessful tenderer needs proof that their services or goods do not meet the technical specifications referred to in the functional requirements of the tender or the technical reference system established by the European standardization body. Secondly, the notice should include the name of the successful tenderer or parties involved in the framework agreement and their relative advantage over other tenderers based on the features of their services and goods. Lastly, the contracting authority should dispatch the progress of the negotiations and its

[1] Procurement Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 [2014] 0J L 94/2.

[2] Procurement Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] 0J L 94/65,

dialogues with other tenderers. From the perspective of a tenderer, the justification to know the award decision is necessary. Failure to be informed of the reasons for rejection in the procurement process or poor evaluation scores could result in complaints, consequently prolonging the contract award process.[1] In addition to the justification for the award procedure, the contracting authority should provide details such as the value issued by the successful tenderer, the number of tenders submitted by economic operators, and the price values for the highest and lowest bids considered during the contract award decision.[2] What's more, the contracting authorities must notify when the contract will conclude as outlined under Directive 2014/24/EU. The information should be issued within 15 days after the unsuccessful candidate and tenderer have made a request.

In the same way, according to § 134 (1) of Part IV of the Act against Restraints on Competition (GWB) 2016, the contracting authority will inform the unsuccessful tenderers and candidates of the contract award decision. However, unlike in the EU, Germany has no limit on when this notice should be dispatched, although it should be as soon as possible after the decision has been made.[3] Firstly, the contract award notice should include the reasons for dismissal and the name of the successful tenderer or parties involved in the framework agreement. In the same way, this information should be accompanied by details of when the contract will be concluded. The earliest date an agreement may terminate is 15 days after the notification has been

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[1] **Kirsi-Maria Halonen**, P.R. 9.
[2] Procurement Directive 2014/24/EU of 26 February 2014 [2014] 0J L 94/65.
[3] Act against Restraints on Competition (GWB) 2016, § 134 (1).

sent by text to the unsuccessful tenderers and within ten days if the transmission method is electronic.[1]

There are various noticeable differences in the disclosure of contract award decisions in the EU and Germany. Firstly, according to EU requirements, the award decision is disclosed to the unsuccessful tenderers and candidates upon request; in Germany, the disclosure by the contracting authority is mandatory, as the economic operators do not have to make any request. Secondly, while EU rules stipulate that the contracting authority disclose to the unsuccessful tenderers and candidates reasons for dismissing or rejecting, including the relative advantage of the successful parties, these details are withheld in the German procurement sector. Another noticeable difference is that the German rules do not require the disclosure of the negotiations' progress and dialogues between the contracting authority and the tenderers, unlike EU disclosure rules.

2-3- Rules for Non-disclosure Information

Under both EU and German procurement rules, there are exemptions for which the contracting authority should not disclose certain contract award decisions. Under Art. 40(2) of Directive 2014/23/EU, Art.50 (3) of Directive 2014/24/EU, and Art.75 (3) of Directive 2014/25/EU, the contracting is not under the obligation to inform the tenderers if the disclosure of certain information interferes with law enforcement, is against the interest of the general public, harms legitimate commercial interest or is likely to distort market competition. The information shared

[1] Act against Restraints on Competition (GWB) 2016, § 134 (1).

ranges from technical market knowledge, trade secrets, and personal details describing the tenders. Any references to nomenclatures engaged in the public procurement shall be made using Common Procurement Vocabulary (CPV), which is stipulated within Regulation (EC) No 2195/2002[1]. Exposure of confidential data to a competing party may compromise the firm's position within the market. Therefore, it is the responsibility of the contracting authorities to ensure that the trade and personal information stay guarded within the market. This EU requirement conforms to what the CJEU demonstrated in the disclosure reforms in the case of Antea Polska, where all the procurement information sent to the tenderers was published in total, except for trade secrets.[2] The court reiterated that the disclosure rule is broad and needs to be applied under a case-to-case analysis of crucial information. Hence, there was a need to create a precise balance between public procurement transparency and the cushioning of personal data with commercial value to a party competing in a tender process.

Similarly, the rules for non-disclosure in the notice for contract award decision under the EU directives are identical to the regulations conveyed in the Act against Restraints on Competition 2016. In Germany, the contracting authority is

[1] Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (Text with EEA Relevance)

[2] **A. Sanchez-Graells,** New CJEU Case Law against Excessive Disclosure: Quid de Open Data? (C-54/21, and Joined C-37/20 and C-601/20)' (2022)< https://www.howtocrackanut.com/blog/2022/11/22/cjeu-case-law-against-excessive-disclosure-quid-de-open-data#:~:text=In%20Antea%20Polska%2C%20the%20CJEU > accessed 7 September 2023.

restrained from informing the unsuccessful tenderers and candidates of the award decision if the disclosure impedes law enforcement, is against the public interest or has the potential to distort fair market competition.[1] However, the German rules have additional rules outside the EU regulations on what the contracting authorities should avoid disclosing. For instance, if the negotiation procedures for procurement are urgent, then the procurement authorities will not be obligated to inform the tendering parties.[2] As well, the procurement authorities should refrain from disclosing information on contract awards if it involves the Defense or security sector. Public contracts relating to Defense or security, as outlined under §104, include services such as equipment, works, or services for military purposes.[3]

A significant aspect of the interplay between competition and public procurement that has drawn much attention from the study is the role of procurement rules in promoting transparency and the effect on competition for public contracts.[4] Based on the comparison findings, it is evident that transparency is viewed from a competitive perspective in Germany. The government is more focused on secrecy and protection of information than transparency. A significant reason for this is that excessive transparency can foster collusion and distort market competition. Germany's rules are contrary to the transparency approaches adopted by the EU, which are considered excessive. The extreme

[1] Act against Restraints on Competition (GWB) 2016, § 134 (3).
[2] Act against Restraints on Competition (GWB) 2016, § 134 (3).
[3] Act against Restraints on Competition (GWB) 2016, § 104.
[4] For more details, see **J. Smith's,** Competition and transparency: What works for public procurement reform, Public Contract Law Journal, 2008, P. 86 et s.

transparency under the EU procurement rules will likely facilitate bid-rigging activities. This finding aligns with the Organization for Economic Cooperation and Development (OECD)'s claim that public procurement rules encourage transparency and facilitate communication between rivals, thus enabling collusive agreements among bidders.[1] Similarly, some jurists believe that the few procurement restrictions in the EU market have a broad scope of generating competition distortion.[2] The transparency rules encourage collusive arrangements among bidders even though they do not intend to lessen competition.[3] Hence, the reason for Germany's less adherence to the transparency rules imposed under the EU 2014 Directives. The rights of information and compulsory disclosure by procurement authorities to tenderers and bidders in the region require strengthening to ensure the effectiveness of the EU procurement rules. Based on this revelation, the following section will analyse EU court decisions where the judges were oblivious to the impact of excessive transparency on bid rigging.

The CJEU intervened to offer an interpretation of the type and amount of information that should be shared with unsuccessful parties in a bidding competition. Evropaiki

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[1] **Organization for Economic Cooperation and Development** 'Competition and Procurement – OECD' <www.oecd.org, 2011. https://www.oecd.org/daf/competition/sectors/48315205.pdf.> accessed 2 September 2023.

[2] **A.Sanchez-Graells,** Public procurement and competition: some challenges arising from recent developments in EU public procurement law, Research Handbook on European Public Procurement, Forthcoming, 2013, P. 40.

[3] **OECD** 'Recommendation of the Council on Fighting Bid Rigging in Public Procurement' OECD Legal Instruments (2012). <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0396> accessed 2 September 2023.

Dynamiki had sued the European Commission, citing unsatisfactory feedback from the Commission on the criteria utilized in awarding the tender.[1] The complainant stated that the Commission had not provided sufficient reasons for awarding the tender to another bidder. The CJEU ruled that the Commission is not legally obligated to brief an unsuccessful bidder on the detailed evaluation report and the systematic criteria to decide to award the public tender. The court's ruling also highlights that the Commission cannot reveal a detailed comparative analysis of the successful tender.

From the case, it is evident that there is a clear policy gap that creates a balance between the need to safeguard the confidential data involved in tender awarding and opening an open and transparent ground for competition. With the Commission withholding essential information regarding the awarding of a public bid, it poses the question of the legitimacy of the awarding of public tenders. With corruption and bid-rigging being a high probability in public procurement, it only leaves the unsuccessful bidders with unanswered questions about how the tender's criteria were attained. Also, with the non-disclosure of tender awarding criteria, there are high chances of unscrupulous business entities colluding in bid-rigging schemes.[2] In addition,

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[1] **A. Sanchez-Graells,** Risk of Anti-Competitive Collusion after Excessive Level of Transparency in Public Procurement Debriefing?, European Law Blog, 2012, < https://europeanlawblog.eu/2012/10/08/risk-of-anti-competitive-collusion-after-too-excessive-level-of-transparency-in-public-procurement-debriefing-c-62911-p-evropaiki-dynamiki-v-commission/> accessed 12 September 2023.

[2] **A.Sanchez-Graells,** The difficult balance between transparency and competition in public procurement: Some recent trends in the case law of the

forge false tender qualification attributes. With the tender awarding and bidder evaluation data being publicly scrutinized, many public resources could be wasted by thoroughly vetted successful bidders. Therefore, the ruling of the CJEU in support of the Commission's move to withhold bidding information from unsuccessful bidders can be viewed as a factor contributing to bid-rigging schemes within EU public procurement. Many policy reforms need to be done to ensure adequate information regarding the criteria of bid awarding. However, there needs to be a balance between the need to attain transparency in public procurement and the goal to protect the personal and confidential data shared by the tenderers.

Anti-competitive behaviour through bid rigging has a detrimental impact on the public sector. Firstly, failure to attain the best value for public money adversely affects the range and depth of services and infrastructure the State government can provide. Consequently, the public's confidence in the government and a competitive market diminishes. As a result of the loss of sound public governance, a state’s investments are inhibited, and economic development needs to be improved. In general, deficiencies in public procurement adversely influence the broader economy.

In a similar ruling, there have been significant challenges with identifying and resolving challenges related to bid-rigging within EU public procurement. A recent ruling by the Court of Justice of European Union (CJEU) on a bid-rigging case highlights the legal challenges that EU faces in fighting the bid-

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European Courts and a look at the new Directives, University of Leicester School of Law Research Paper 13, 2013.

rigging cartels. The Finnish Competition and Consumer Authority (FCCA) had requested the court to fine Eltel Group Ltd and Eltel Networks for having engaged in a bid-rigging scheme with Empower Ltd on the design and construction of electric transmission lines in Finland.[1] The tender was submitted on 4 June 2007 and signed into approval on 19 June the same year. In its investigation, the FCCA identified that one of Eltel's competitors, Empower, had conspired to fix the prices and profit margins of the high-voltage transmission lines tender. The income that was to be generated from the tender would be shared among the parties involved in the bid-rigging scheme. Through that, millions of Finish taxpayer's money were lost to unscrupulous public tenderers. The government ended up paying more than the actual value of the tender project. That highlights a significant challenge: many economies within EU need to become vigilant to cushion themselves against the bid-rigging cartels. With the lack of a proper market supervisory body backed with appropriate legal policies, millions of public resources will be lost to the pockets of unfaithful bid-rigging cartels. Therefore, EU Commission should identify the gaps in its legislation that may help promote the space for bid-rigging in the region's public procurement to thrive. Legal policy reforms must be adopted to increase the integrity and fairness in the awarding and execution of public procurement projects. After identifying the existence of the bid-rigging scheme,

[1] **K. Coates, J. Ysewyn**, The CJEU Provides Guidance on the End Date in Case of a Bid-Rigging Cartel, Covington Competition, 2021, <https://www.covcompetition.com/2021/01/the-cjeu-provides-guidance-on-the-end-date-in-case-of-a-bid-rigging-cartel/#:~:text=In%20its%20preliminary%20ruling%20of> accessed 5 July 2023.

the Finish Competition and Consumer Authority sued the winner of the tender, Eltel, proposing to the Finish Market Court to fine the party a total of EUR 35 million. The case posed a major legal dilemma for the country's Supreme Court, compelling it to seek legal advice from the Court of Justice of European Union.

In its 2021 ruling, the CJEU ruled in favour of Eltel. The ruling argued that a big-rigging infringement ceases on the date when the essential characteristics of the contract, majorly the pricing, come to an end. The decree grants the parties engaged in the bid-rigging case immunity from the fining since the contract days had ended. From grounds of EU law, the CJEU could not hold Eltel accountable on legal grounds to settle the proposed fines by the FCCA. The ruling offered a significant reference case for solving similar bid-rigging issues within EU.

The CJEU ruling identified a significant legal gap that makes it difficult for EU Public Procurement Commission to effectively identify and deal with issues related to bid-rigging. Any party responsible for the vice needs to be held accountable and necessary measures taken even with the maturity of the contract dates. Basing the validity of a claim on the contract span encourages many cartels to engage in the bid-rigging scheme with the hope of getting away with the malpractice after the end of the contract. Despite the CJEU stating that the bid-rigging cases be determined through a case-to-case analysis, the ruling on the Finish bid-rigging cases sets a primary legal line through which many similar cases are to be determined. There is a need for the CJEU to come up with better legislation that ensures that all the legal loopholes, mainly concerning extensive rigging, are well sealed. With a solid and definitive law against bid-rigging, there

will always be enough legal grounds to curb the procurement cartels from conspiring to engage in bid-rigging activities. EU contracting authorities can always rely on the defined laws to protect the public resources of EU citizens in procurement. That is the surest way to safeguard the security of public resources within EU public procurement. That also would strengthen EU's vision of a fair and equitable public procurement.

2-4- E-procurement

Electronic public procurement is integral in EU public procurement procedure. According to articles 34, 53 and 73 of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU, respectively, all contracting authorities must communicate all concession documents to economic operators electronically. The term used to describe activities of contracting authorities and economic operators by electronic means in all phases of a procurement procedure is e-procurement. During the pre-awarding phase, the contracting authority must publish all the tender notices, including calls and specifications, in electronic format on its website and European Union Official Journal. Additionally, during the post-awarding phase, the contracting authority will evaluate, award, send invoices and make payments for the ordered goods or services using electronic methods. According to recitals 52 and 63 of Directives 2014/24 and 2014/25, respectively, electronic communication should be the standard means of publishing contracts since it promotes efficiency and transparency of procurement processes in every member state.[1] However, there are exceptional cases where the contracting authorities should

[1] Procurement Directive 2014/25/EU of 26 February 2014 [2014] 0J L 94/243.

refrain from using electronic information exchange. According to Art.34 (2) of Directive 2014/23/EU, this rule is exceptional if it is duly justified that the information is sensitive and would require a very high security level, thus necessitating transmission over other mediums.[1] On this basis, a contracting entity can use other secure communication means, such as fax and postal services, which are dedicated to delivering the necessary level of protection.

Similarly, the electronic availability of contract details in German is identical to EU rules. According to the Act against Restraints on Competition (GWB) § 97(5), it is stipulated that all public procurement practices should be communicated electronically. The sending, reception, and storage of data involved in a procurement exercise should use electronic means per the ordinances stipulated under § 113. According to §113, the information to be disclosed includes the rules for entering into the procurement process, the estimated value of the contract or order, tender requirements, notice, the award of subcontracts, and public contracts.

However, the German rules on transmitting contract award notices differ from EU rules on certain aspects. In Germany, the unsuccessful candidates and tenderers are notified of the contract award decision in the form of a written text to act as evidence and for documentation. This requirement contrasts with EU rules, which stipulate that the notice be transmitted electronically. Another notable difference in Germany's rules is that the contract award notice is communicated to unsuccessful tenderers whose contract values are below and above EU threshold of 5,186,000

[1] Procurement Directive 2014/23/EU.

Euros for public work contracts. This requirement is against EU rules whereby the procurement rules stipulated in the directives only apply to contracts with values above the threshold of 5,186 000 Euros. The contracting authority must indicate on the tender invitation notice that the concession documents will be transmitted via other means. Regarding these findings, it is clear that EU has stricter rules on electronic data transmission than Germany, as the latter allows written text to some extent and to all tenderers and candidates below and above EU threshold value for which the Directives target.

In EU, the Commission has enforced two initiatives to digitalize procurement. For instance, e European Commission implemented Directives 2014/24 and 2014/25, which envisage the mandatory transmission of procurement notices and availability of documents through electronic form. Under the two Directives, the main characteristic of the e-procurement system is that all information required for the e-auctioning in all procurement phases should be communicated to the tenderers to enable them to identify a relative position compared to their competitors. The information regards the price details or values the bidders offer and the number of bidders participating in the procurement process. However, the identities of other bidders are not disclosed. Another element of e-procurement is that the contracting authorities close the system at the assigned date and time and when the specified auction phases have been completed. [1] Due to the transparent nature involved, e-procurement platforms are

1 P.-A. Giosa, P.R. 5-7; S. Khorana, K. Ferguson-Boucher, and W. A. Kerr, Governance Issues in the EU's e-Procurement Framework, 53(2) Journal of Common Market Studies, 2015, P. 294 et s.

perceived to enhance the likelihood of economic operators' participation in procurement procedures within EU internal market.

In EU, technologies such as cloud and mobile computing are being deployed to tender for public works, identify potential suppliers, interact with suppliers, purchase goods and services, and transfer payments.[1] The growing support for e-procurement is embedded in the rationale that it will generate competition and, consequently, lead to the efficient functioning of a single market.[2] Another justification is that digital procurement offers a range of benefits. These benefits include significant savings for all parties to promote fiscal consolidation, simplified and shortened processes, and new business opportunities by improving access to enterprises, including small and medium-sized enterprises, to public procurement markets. In addition, the Commission envisages that e-procurement will enhance the efficiency of the procurement process by increasing competition in the marketplace, harmonizing performance, cost-effectiveness and accessibility, and increasing transparency.[3] The goal is to reduce fraud and corruption to save taxpayers money.

Other initiatives to support e-procurement include the Electronic Procurement System for Public Administrations (e-Prior), the Internal Market Information (IMI) system, European Single Procurement Document (ESPD), and E-Certis. Firstly, an e-Prior is an e-procurement system that promotes the exchange of

[1] **H. Min and W.P. Galle,** E-purchasing: profiles of adopters and nonadopters, *32*(3) Industrial Marketing Management, 2023, P. 227-233.
[2] European Commission (2010c) Green Paper on Expanding the Use of e-Procurement in the EU (Brussels: European Commission).1-22.
[3] European Commission (2012a) 'A strategy for e-procurement.' COM (2012) 1.

documents between public administrators and economic operators within Europe. Its functionalities include e-invoicing, e-ordering, e-submission of tenders, e-cataloging, and payment modules. [1] The system has been used to develop Tenders Electronic Daily (TED), an electronic platform for publishing tenders. The new rules on e-procurement require that tender opportunities be posted on TED. Secondly, procurement documents must be accessible electronically, and the link must be included in the TED notice. Thirdly, economic operators are mandated to submit tenders electronically, and all contracting authorities must submit the invoices electronically.

Furthermore, the IMI system enables procurement authorities in a particular EU member country to verify data and documents delivered by economic operators in another country.[2] Thus, a public entity can assess whether a particular firm involved in the tendering meets the given technical specifications, has a past conviction for fraud, and whether the provided documents, certifications, and information in the self-declaration form are genuine. Besides, the IMI system enables procurement authorities in different EU countries to exchange information, send notifications and requests to several recipients, or store data that is accessible to its users or stakeholders.

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[1] **O. Adrian**, E-Prior: Electronic Procurement System for Public Administrations' Joinup, (2017) <https://joinup.ec.europa.eu/collection/open-source-observatory-osor/document/e-prior-electronic-procurement-system-public-administrations> accessed 2 April 2023.

[2] European Commission 'Public Procurement in IMI' (2015) The EU Single Market - European Commission <https://ec.europa.eu/internal_market/imi-net/news/2015/04/index_en.htm> accessed 8 September 2023.

Another initiative is European Single Procurement Document (ESPD) and E-Certis. The ESPD is a self-declaration form submitted by economic operators as proof of fulfilling the exclusion and selection criteria during the procurement process. The criteria may comprise the presence of overdue tax payments or criminal records. In this way, it acts as a passport for economic operators to bid for tenders anywhere within the EU. According to EU directives, an ESPD should be submitted electronically by the winning bidder. An E-Certis is a web-based service that assists tenderers in obtaining certifications to prove their eligibility in the procurement process. [1] Hence, ESPD and e-Curtis play a significant role in the transition to e-procurement by reducing administrative burden and easing access to tendering opportunities across EU member states.

The timetable for implementing the legislative framework for transitioning into e-procurement in EU was as follows. First, all tender opportunities and documentation were to be availed from 2016. In addition, the contracting authorities were to implement complete electronic communication means by April 2017. Lastly, all contracting authorities and procurement procedures were scheduled for electronic submission by October 2018.

One such case concerns e-procurement. The European Commission believes that one strategy to safeguard the principles of transparency and open competition is through e-procurement.

[1] European Commission. "European Single Procurement Document and eCertis." Internal Market, Industry, Entrepreneurship and SMEs. Accessed 7 September 2023. https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/european-single-procurement-document-and-ecertis_en.

E-procurement uses web-based software to facilitate competition between potential suppliers, online and in real-time. The competition is based on price, quality, or level of service. Besides, e-procurement takes two forms: reverse and forward procurement. During the latter, the contracting authorities award the tender to the bidder with the highest price, whereas for reward procurement, the lowest price wins the contract. In that way, the public procurement process has evolved from being conventional to incorporating information and communication technologies. The European Commission highly recognizes the importance of e-procurement in alignment with the World Trade Organization (WTO) government procurement agreement (GPA) enforced in 2012. According to GPA 2012, the importance of electronic procurement means is encouraged since the use reduces the periods for tendering.[1] Likewise, the Digital Agenda for Europe and the e-Government Action Plan 2011-2015[2], highlights the importance of connecting electronic procurement capacities across EU market.[3]

On 28 September 2017, the General Court (Seventh Chamber) drew a striking ruling concerning a case between *Aanbestedingskalender BV and Others v European Commission*

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[1] World Trade Organization 'Government Procurement.' WTO <https://www.wto.org/english/tratop_e/dtt_e/dtt-goproc_e.htm> Accessed 8 September 2023.

[2] European Commission 'The European eGovernment Action Plan 2011-2015' eur-lex.europa.eu (2010) 11 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0743:FIN:EN:PDF > Accessed 8 September 2023.

[3] European Commission 'A Digital Agenda for Europe' eur-lex. europa.eu (2010) 15< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0245R%2801%29&from=EN> Accessed 8 September 2023.

'The TenderNed Case.' [1] According to the TenderNed case background, the decision by the Dutch government to intervene in the market through the provision of an electronic procurement platform was perceived as controversial. On 6th 2012, the complainants (Stichting Crow, Negometrix, CTM Solution, and Stillpoint Applications) appealed a previous judgment made on 18 December 2014 by the General Court of European Union (EU: T:2017:675), which had rejected their request to annul the platform's funding by the Netherland's authorities.[2] They claimed that the aid by the State government was illegal as it infringed Article 107 (1) of TFEU, whereby the services offered by the platform were considered non-economic and of general interest. TenderNed is run by PIANOo, a Netherlands Ministry of Economic Affairs, Agriculture, and Innovation sub-department. It offers a wide range of accessible functions to the contracting authorities, including a module to publish public procurement notices and an exchange of information between procurement authorities and economic operators. However, the General Court dismissed their plea based on establishing that the financing of TenderNed did not amount to State aid. It concluded that the TenderNed activities, which involved collecting and publishing data, were non-economic and were a means of compliance with statutory obligations provided by the EU procurement directives. The ruling by the General Court of European Union reflects its

[1] Case T-138/15 *Aanbestedingskalender BV and Others v European Commission*, judgment of the General Court of 28 September 2017, EU: T: 2017:675. 8.

[2] Case T-138/15 *Aanbestedingskalender BV and Others v European Commission*, judgment of the General Court of 28 September 2017, EU: T: 2017:675.

ignorance of the adverse effects excessive transparency through e-procurement platforms can have on procurement procedures.

Access to E-procurement transaction data increases compliance with public procurement policies by generating audit trails and allowing public scrutiny of decisions and procurement actions. Thus, enhanced data availability and integrity under transparency and accountability activities deliver better procurement outcomes, such as lower prices and better quality, to stimulate greater competition across EU market. In addition, it contributes to addressing two main challenges that affect the European economy. Firstly, there is a need to maximize the efficiency of public expenditure within the existing fiscal constraints. Besides, there is a need to identify new sources of economic growth. E-procurement enables transparency and access to procurement opportunities, thus stimulating cross-border competition. [1]

Although e-procurement has the potential to increase transparency in the procurement process, its use raises particular competitive concerns due to excessive disclosure of sensitive information. Firstly, disclosing certain information facilitates collusive schemes even though the tenderers are anonymous. [2] Specifically, the mandatory disclosure of information such as price and other related details enables bidders to observe the prices at which their competitors quit and, thus, submit valid offers for every round of the e-bidding process. Therefore, the

[1] **T.K. Mackey and R. E. Cuomo,** An interdisciplinary review of digital technologies to facilitate anti-corruption, transparency, and accountability in medicines procurement, 13(1) Global Health Action, 2020, P. 169.
[2] **P.-A. Giosa**, P.R. 6.

bidding rig team members can assess members who have deviated from the promises in the collusive agreement. The bid rigging team thus punishes the deviating bidders in the subsequent auctions. In that way, the bid-rigging team will have succeeded in suppressing competition among members, as they know who deviates from the agreement. The information disclosure makes it possible to detect deviation from a collusive agreement; hence, bid rigging is stabilized.

Secondly, the multiple rounds of e-auctions enhance the susceptibility to bid rigging. This argument is based on the economic theory of auction, which posits that collusion will likely thrive when auctions are repeated at regular intervals and when the same group of bidders meets regularly. [1] The frequent interaction creates an opportunity for the members of the deceitful team to observe the formation of prices and, consequently, follow those who deviate from the collusive agreement. The presence of fewer bidders facilitates this quick identification of deviators. [2] Besides, since the time intervals between rounds of an e-auction with several games are limited, the enforcement of bid rigging is strengthened as a deviating member is threatened by a prompt retaliation during the next phase of the e-auction.[3] However, if the firms competed less frequently, the likelihood of sustaining collusion is low, as deviations can only be punished in the future.

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[1] **R. C. Marshall and L. M. Marx,** *The economics of collusion: Cartels and bidding rings*, MIT Press, 2014, P. 206.

[2] **O. Soudry,** Promoting economy: Electronic reverse auctions under the EC directives on public procurement, 4(1) Journal of Public Procurement 2004, P. 340.

[3] **G.L. Albano, G. Spagnolo, and M. Zanza**, Preventing collusion in procurement: A primer' *Handbook of Procurement*, Cambridge University Press, 2006, P. 347.

Conclusion:

Transparency in procurement procedures is crucial for promoting competitiveness and preventing corruption. This study demonstrates that EU 2014 directive for public procurement and the German Federal Public Procurement Act 2016 are geared towards promoting competition through the principle of transparency. In both EU and Germany, transparency in procurement is achieved through electronic data transmission, publication of contract notices, and disclosure of award decisions to the candidates and unsuccessful tenderers. However, the study concludes that disclosure rules for procurement information under EU directives are more extreme than in Germany. The mandatory e-procurement requirements for the revelation of information, such as the dialogues between contracting authorities and all tenderers to track the negotiation progress, promote bid-rigging. It enables competitors to monitor other tenderers for adherence or deviations from the collusive agreements. Tenderers that deviate from the collusion cartels are punished; hence, they can better coordinate future tenders. In another argument, the regulatory requirements that stipulate the procurement process increase the predictability of the process, thus creating more opportunities for collusion. Hence, the lack of flexibility deters the purchaser in the public sector from responding strategically to potential bidders who seek to increase profits. The susceptibility of procurement

procedures to achieve anti-competitive practices can be mitigated by amending the existing framework for achieving transparency.

Public Procurement is one of the critical elements in the economic and administrative framework in the EU and Germany; that is, the EU and its member states value public procurement as a means to attain an efficient and effective distribution of public resources. This key area, the acquisitions of goods and services by public authorities contributing significantly to the EU's GDP, has brought compliance mechanisms that assure fairness and competition[1]. The EU and the German approaches in public procurement connect, with the public procurement binding legal framework carefully developed in theory to balance competition and transparency, which are critical to the integrity of public expenses and the health of markets. This equilibrium is brought about by various legal instruments in place both at the EU directives and in the German legislation to promote a market where people are free to participate, as there is fairness and competition.

Firstly, procuring authorities should limit the amount of information disclosed to other bidders. The procurement process must keep information concerning other tenderers' bidding history private and their dialogues with contracting authorities. With

[1] Marta Andhov, Andrea Biondi and Luca Rubini, 'Regulating for a Sustainable and Resilient Single Market: Challenges and Reforms in the Areas of State Aid, Competition, and Public Procurement Law' [2023] SSRN Electronic Journal.

limited information, the probability of observing deviations from the bid-rigging agreement by firms is reduced. For e-auction services, the prices at which competing firms quit an auction and the number of offers submitted during each round should not be disclosed. Bidders should only know whether their bid is leading and information on the price of the leading bid. This information would enable them to gauge the price they should have submitted during the next auction. [1] Besides limiting access to price information, the procurement authority could consider delaying publishing certain information to deter collusion.[2] Since access to information concerning deviating bidders is delayed, and the e-auction has already closed, the punishment to the defector of the collusive agreement is also from collusive agreement becomes impossible. Implementing these measures will enable EU market to attain transparency while protecting the procurement competition.

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[1] **G.L. Albano, and C. Nicholas**, *The law and economics of framework agreements*, Cambridge University Press, 2016, P.197.

[2] **G.L. Albano, G. Spagnolo, and M. Zanza**, P.R. 347; **R. D. Anderson, W. E. Kovacic, and A. C. Müller**, P.R.; OECD '*OECD Public Governance Reviews Public Procurement in Germany Strategic Dimensions for Well-being and Growth'* (OECD Publishing 2019).< https://doi.org/10.1787/1db30826-en>

[2] **N. Vollmer,** Article 34 EU General Data Protection Regulation (EU-GDPR), (2023) <https://www.privacy-regulation.eu/en/article-34-communication-of-a-personal-data-breach-to-the-data-subject-GDPR.htm#:~:text=%22Communication%20of%20a%20personal%20data%20breach%20to%20the%20data%20subject%22&text=1 >accessed 12 September 2023.

Secondly, the risk of collusion can be limited by reducing entry barriers to enable more bidders' participation. A higher number of entries results in a more effective competition whereby bidders that are more credible respond to the invitation to the bidding process. Therefore, the tender process design should maximize competing bidders' participation. This incentive can be achieved by subsidizing the costs of participating in the bidding process and establishing requirements that allow firms from other countries to participate. The bidding cost can be reduced by centralizing information on bidding opportunities in the future. Furthermore, procurement officials should incentivize smaller firms to participate in the procurement process even if they cannot bid for the entire contract.

Thirdly, the EU Regulations 2014/24/EU and 2014/25/EU are the primary legal norms requiring contract notice publication. Due to this criterion, all prospective bidders are informed sufficiently in advance of procurement processes, leading to more players in the market. Transparency of this mechanism guarantees that everyone - be it the price setters or takers- has equitable access to the information, and this is a fundamental principle for eliminating impartiality and free competition. Secondly, defining threshold values for procurement contracts limits the range of contracts to which EU-wide competition rules apply[1]. Therefore,

[1] **Ch. Bovis,** The Nature and Character of the Public Markets and Their Effects on Public Procurement in the European Union, Studia Iuridica Lublinensia, 31, 2022, P. 9.

contracts that exceed these limits must comply with the strict transparency and competition regulations specified in directives, which aim primarily at the open and fair competition of the larger contracts. This mechanism thus divides the market into different sectors and applies stricter policies to agreements of high value to ensure the principles of fair competition and transparency.

Fourthly, the Act Against Restraints of Competition (GWB) in Germany is the national legislation based on the EU directives and ensures the fulfillment of conditions for competitive bidding. The GWB, in particular, seeks to avoid anti-competitive agreements and practices in bidding procedures, which consequently provides German public procurement with the compliance model of the EU competition and transparency standard[1].

Fifthly, the Procurement Ordinance (Vergabeverordnung, VgV) in Germany describes the procedural aspects of procurement in detail, including the requirements for the publication of offers or the course of a procurement. This legal mechanism means that companies bidding can all have a fair chance and will follow a process which is then step by step. Finally, the Digital Procurement Platform initiative of the EU and the Digital Procurement Platforms of Germany emphasize that technological and legal mechanisms imply more transparency and

[1] **E. Bueren and J. Crowder,** Sustainability and Competition Law in Germany, LIDC contributions on antitrust law, intellectual property and unfair competion (Print)m 2024, P.83.

fair competition[1]. These platforms ease the procurement process, thereby making it more accessible to SMEs, most of whom previously lacked the technical know-how and expertise to participate in such processes, and this has ensured that the procurement process is conducted openly and transparently.

These powerful mechanisms provide a solid structure to balance transparency and competition in public procurement contracts. The EU and Germany are recognized for having cases where the procurement process is mandated, the publication of notices, setting threshold values, enforcing anti-competitive practice laws, detailed procedural requirements, and deployment of digital platforms to make the process that favors fairness and competition.

In the end, a general overview can be given of the situation in Egypt and how to benefit from the results of the paper in the Egyptian legal system. Public contracts in Egypt are governed by Law No. 182 of 2018 on contracts entered into by public authorities. The law aims to balance the interests of all parties to these contracts, promote transparency, achieve economic efficiency and uphold equal opportunity and fair competition. Regulation of contracts through electronic procurement through the internet is part of the law to align with modern needs and to

[1] **P. Alexiadis and A. de Streel,** Designing an EU Intervention Standard for Digital Platforms' (*papers.ssrn.com*26 February 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544694> accessed 1 April 2024.

transparency The law established an electronic portal for public contracts, publishing both contracts and tenders including the publication of contractual arrangements, procedures and objectives The law Enforces the principles of compliance with standards of transparency, competitive freedom, supporting investment, ensuring balanced environmental development and restraint of monopolistic practices, balancing the interests of all parties, ensuring greater governance in contract arrangements, and controlling public spending.

This paper can describe the framework for benefiting from this comparative experience being analysed from an Egyptian perspective through the tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, which has assisted in fighting this misconduct. Initially, market analysis becomes crucial for procurement officers because it allows them to differentiate the structural markets and historical bidding data that may have already been a warning of collusion between the suppliers. Through this initiative, early identification of the issues is promoted, and preventive measures are established to halt the progress of collusion.

Second, attention is paid to preparing tender documents to deter the bidders from colluding with each other. Bids must be distinct and based on individual judgment to pursue collusive practices. Strategic typical solutions such as bid rotation and more standard can block serious completion. Transparency is underlined

as one of the most essential tools that operate through the procurement process. EU Notice aims to guarantee that the entire procurement chain is publicly accessible, and so reducing the extent of relators' darkness, which can be used for any possible collusion, makes the process more transparent.

Fourth, the Notice focuses on training for procurement officers and their counterparts. Educating stakeholders increases awareness of the signs of collusion and the beneficial effect competition has on the market. Such market conditions will lead to the prevention of conspiracy, as actual competitors can spot and avoid anti-competitive behaviour. In conclusion, using digital tools and e-procurement platforms is also one of the essential tools for the fight against collusion. They constitute platforms that can automatically detect collusive behaviour through advanced data analytics, which may occur through repetitive bidding. The digital tools will make the monitoring process more organized; hence, the effort to detect collusion will be more efficient and effective. There has been proof of how much these strategies matter in real life. For example, the employment of e-procurement platforms increased the detection rate of suspicious activities, a tangible result of digital surveillance in bidding war prevention. The EU's overall approach, including market analysis, tender design, transparency rules, training, and digitization, constitutes a holistic model for preventing, detecting, and combating collusion,

ensuring the safety of the competitive process and public funds utilization.

Promoting transparency and competition within public procurement is a universal problem presupposed by various legal tools applied in different jurisdictions. These mechanisms signify the acceptance of a universal standard that emphasizes transparency and fairness in the tender process by some degree of adaptation to the various legislative and socio-economic environments. Private sector regulators act as critical players here. For example, Canada and Australia have established supervision agencies that work by following the procedures that have been established and protect the values of fairness and competitiveness. This body not only oversees procurement activities but also serves as a platform for addressing grievances and, therefore, plays a very central role in contributing to the integrity of the procurement process.

Platforms for e-procurement adopted by South Korea and Estonia illustrate an innovative technology to improve procurement transparency and efficiency. These digital solutions play an essential role throughout the procurement period, from tender drawing to contract management, which increases the simplicity of processes, thus lowering the susceptibility to corrupt practices [1] . Another regularly employed way of promoting

[1] **J. Madzimure, Ch. Mafini and M. Dhurup,** E-Procurement, Supplier Integration and Supply Chain Performance in Small and Medium Enterprises in South Africa, South African Journal of Business Management, 51, 2020.

openness of procurements is legislative mandates for the disclosure of procurement information. In the United Kingdom, Public Contracts Regulations 2015 normally impose that the award notice and all documents related to the procurement must be publicly accessible at the tender stage[1]. Applying this guiding principle grants fair chances to everybody interested, leading to a healthy competitive bidding scenario.

Although these efforts have been made, the jurisdictions might encounter other threats, e.g., over-regulation, where the bidders will be forced to pull out of the tenders if the disclosure requirements are too stringent. Besides, the global digital disparity questions the equality of digital procurement systems adoption since there is a technological ability gap in other regions. Therefore, to overcome this limitation, a balanced approach should be designed following the central tenet of facilitating a healthy and competitive procurement market. Solutions involve adapting legal frameworks to social requirements, creating average technological environments where e-procurement processes could be implemented, and developing international cooperation to share experiences. By implementing the solutions, the global community can deal with the complexity of public

[1] **P. Henty and R. Ashmore,** Disclosure Rules within Public Procurement Procedures and during Contract Period in the United Kingdom, (*www.elgaronline.com*28 June 2019) 296 <https://www.elgaronline.com/edcollchap/edcoll/9781788975667/9781788975667.00020.xml> accessed 1 April 2024.

procurement by keeping transparency and competition on the right path for the electorate and society.

This paper has highlighted the complex legal frameworks and strategic tools critical to improving competitiveness, beginning with transparency and mitigating collusion within public procurement systems in the European Union, Germany, and the World. The study unveils the irreplaceable need for comprehensive legal provisions, advanced e-procurement technology, and strict regulation to establish a fair procurement landscape. The realization of such mechanisms as collective effectiveness in preventing procurement corruption while seeing value for public resources is done through reflection. Future research should target the dynamic environment of digital procurement tools and the level of their global availability with future and more complex legal strategies for companies' collusive behaviour elimination, and ultimately, the goal of continuous transparency and competitive, fair play in public procurement stays.

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