

The Case for Reforming the Rules on Contracting Authority Damages Claims for Bid Rigging in the EU

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☞ Cartels; Collusive tendering; Damages; EU law; Germany; Private enforcement; Public procurement procedures; Torts

1. Introduction

The value of goods and services procured by public authorities in 2015 was worth 127.56 billion Euros in the UK alone.¹ Major contracts are awarded through a tendering process that is meant to be competitive. Competition forces tenderers to keep their prices low, thereby saving money for the taxpayer. Anti-competitive agreements between tenderers such as bid rigging allow them to act as monopolists, artificially raising prices that are ultimately paid by consumers (in this case taxpayers) and thus placing an unnecessary burden on public finances. The ability of local authorities and government departments to bring private actions for damages for a breach of competition law allows some of this public money to be recovered and deters other tenderers from engaging in similar practices. Before the recent competition law Damages Directive 2014/104/EC² (hereinafter the “new Damages Directive”), contracting authorities were not in a particularly good position to seek damages for bid rigging.

This article critically analyses whether the new Damages Directive has made it easier for authorities to successfully recover damages for being overcharged and, if this is not the case, what recommendations can be made and what alternative compensatory remedies are potentially available. This question has largely been unexplored to date because academics have focused on the other side of the coin, namely the damages awarded by the authorities to private bidders for violating public procurement procedures and fundamental principles of equal treatment.³ It is also an issue of great importance given the value of procurement contracts across Europe⁴ and the potential cost to taxpayers resulting from bid-rigging behaviour.⁵ The significance of this issue is even more apparent if one takes into account the fact that bid

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¹ Commission, *Public Procurement Indicators 2015, DG GROW G4 - Innovative and e-Procurement*, 19 December 2016, available at: <https://ec.europa.eu/docsroom/documents/20679> [Accessed 5 September 2018].

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

³ S. Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (Winteringham: Earls Gate, 1993); S. Treumer and F. Lichère, *Enforcement of the EU Public Procurement Rules* (København, Djøf Publishing, 2011); D. Fairgrieve and F. Lichère, *Public Procurement Law: Damages as an Effective Remedy* (Oxford: Hart, 2011); H. Schebesta, *Damages in EU Public Procurement Law* (Cham: Springer International Publishing, 2016), p.21.

⁴ According to public procurement indicators, the estimated value of tenders published in Tenders Electronic Daily (“TED”) (including utilities and defence) was 450.21 billion Euros in 2015. Additionally, every year over 250,000 public authorities in the EU spend around 14 per cent of European GDP on public contracts for the purchase of services, works and suppliers. See Commission, *Public Procurement Indicators 2015, 2016*; See also Commission, *Public Procurement*, available at: https://ec.europa.eu/growth/single-market/public-procurement_en [Accessed 5 September 2018].

⁵ It is estimated that the annual direct cost to consumers and other victims of hardcore cartels in the EU, including bidding rings, ranges from approximately 13 billion Euros (on the most conservative assumptions) to over 37 billion Euros (on the least conservative). Due to bid rigging, the prices are artificially raised between 6 and 48 per cent above the competitive level, while the prices in a supply chain can be raised by more than 30 per cent without this increase being concomitant with a respective restriction of output. See Commission, Staff Working Article accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final, available at: <http://eur-lex.europa.eu/legal-content>

rigging leads to higher artificial prices than other anti-competitive activities, such as price fixing and market sharing.⁶ Bid rigging is a practice whereby firms agree to cooperate over their response to invitations to tender, while price fixing and market sharing are horizontal agreements between independent undertakings to fix prices and divide markets accordingly, in order to suppress price competition and perpetuate the isolation of geographical markets.⁷ In a time of economic crisis in which attempts are made to reduce public expenditure in any possible way, the promotion of private enforcement of EU competition law by public authorities in the EU Member States may secure budget savings.⁸

Moreover, any shortcomings in the enforcement of arts 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) not only hinder the achievement of competition goals, such as better allocation of resources, greater economic efficiency, increased innovation and lower prices, but also negatively influences the functioning of the internal market, which relies on a system of undistorted competition.⁹ In addition to these reasons, this topic is closely related to bid rigging cartel behaviour, a very deliberate breach of the law that involves overpaying taxpayers’ funds—money that could otherwise be invested in public services, for example. Bid rigging constitutes a criminal offence in Germany and other countries.¹⁰ Indicatively, in Germany the official statistics of the Federal Statistics Office report 297 convictions and 42 suspended prison sentences for bid rigging from 1998 to 2013, whilst the French Competition Authority issued more than 220 decisions for collusion cases in public procurement resulting in more than 750 different firms being fined.¹¹ In England, 109 construction firms were found to be engaged in bid rigging activities in 199 tenders from 2000 to 2006.¹² Similarly, in Sweden, some of the biggest construction companies in the country, such as NCC, Skanska and PEAB were found guilty of forming a cartel that “enriched itself at the expense of customers, taxpayers and consumers”.¹³ Bidding rings were also detected in various other markets, such as the market of installation and maintenance of elevators and escalators¹⁴ as well as the market for heating pipes.¹⁵

The likely scale of the problem that EU Member States face when it comes to bid rigging renders necessary research on the entitlement of procurement authorities to damages in case of collusive tendering. This is so because it is believed that private enforcement may be not only be a deterrent against this anti-competitive conduct but also a means of restorative justice that can restore taxpayers’ money.¹⁶ This function of damages claims for bid rigging is apparent in countries like Japan, where the deterrent effect of private enforcement is significant, as “activist plaintiffs obtain substantial recoveries on behalf of local

/EN/TXT/PDF/?uri=CELEX:52008SC0404&from=EN [Accessed 5 September 2018]; J.B. Baker, “The Case for Antitrust Enforcement” (2003) 17 *Journal of Economic Perspectives* 27, 29; Competition and Markets Authority, *Local Authorities and Competition*, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/669668/local_authorities_and_competition_final_report.pdf [Accessed 5 September 2018], p.10; I. Apostolakis, “Antitrust Liability in Cases of Indirect Contacts between Competitors: VM Remonts” (2017) 54 C.M.L.R. 609.

⁶ S. Davies and A. Majumdar, *The Development of Targets For Consumer Savings Arising from Competition Policy - Report prepared for the Office of Fair Trading (OFT)*, June 2002, [file:///C:/Users/Penelope/Downloads/The_development_of_targets_for_consumer_savings_a%20\(3\).pdf](http://file:///C:/Users/Penelope/Downloads/The_development_of_targets_for_consumer_savings_a%20(3).pdf) [INVALID URL], p.3; see also M. Maci, “Bid Rigging in the EU Public-Procurement Markets: Some History and Developments” (2011) 32 E.C.L.R. 406.

⁷ R. Whish and D. Bailey, *Competition Law*, 7th edn (Oxford: Oxford University Press, 2012), pp.524, 530–531, 536–537.

⁸ M. Botta, “Commission acting as plaintiff in cases of private enforcement of EU competition law: Otis” (2013) 50 C.M.L.R. 1115.

⁹ Commission, *Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules*, COM (2013) 404 final, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf [Accessed 5 September 2018], p.18.

¹⁰ Austria is one of these countries. See W.P.J. Wils, “Is Criminalization of EU Competition Law the Answer?” (2005) 28 *World Competition* 130.

¹¹ F. Wagner-von Papp, “Compliance and individual sanctions in the enforcement of competition law,” in J. Paha (ed.), *Competition Law Compliance Programs-An Interdisciplinary Approach* (Cham: Springer, 2016), 155; J. Moore, *Cartels Facing Competition in Public Procurement: An Empirical Analysis*, September 2012, available at: http://chaire-eppp.org/files_chaire/moore_2013_-_cartels_facing_competition.pdf [Accessed 5 September 2018].

¹² OFT, *Bid Rigging in the Construction Industry in England*, available at: http://webarchive.nationalarchives.gov.uk/20140402154534/http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/bid_rigging_construction [Accessed 5 September 2018].

¹³ Swedish Competition Authority, *Construction Companies Convicted of Operating an Asphalt Cartel*, available at: www.konkurrensverket.se/en/news/construction-companies-convicted-of-operating-a-asphalt-cartel/ [Accessed 5 September 2018].

¹⁴ *Kone AG v OBB-Infrastruktur AG* (C-557/12), EU:C:2014:1317; [2014] 5 C.M.L.R. 5.

¹⁵ *LR AF 1998 A/S (formerly Logstor Ror A/S) v Commission of the European Communities* (T-23/99) [2002] E.C.R. II-1705; 5 C.M.L.R. 10.

¹⁶ A. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Oxford: Hart Publishing 2008), p.19; A. Komninos, “The relationship between public and private enforcement: quod Dei Deo, quod Caesaris Caesaris”, in Philip Lowe and Mel Marquis (eds), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies* (Oxford: Hart Publishing, 2014), p.142.

governments and public entities frequently seek and obtain damages”.¹⁷ By contrast, in Europe damages claims for bid rigging do not yet play a crucial role in deterring anti-competitive activities,¹⁸ but this does not mean that things may not change for the better.¹⁹

In light of the attempt to improve the European private damages landscape, i.e. through the new Damages Directive, this article will firstly discuss the problems that contracting authorities usually face when seeking damages for bid rigging from colluding undertakings, such as proof of the loss suffered and its amount. Secondly, it will examine whether the new Damages Directive can overcome some or all of these issues and whether it brings any advantages over the longstanding damages claims based on tort law. As we will see after analysing the shortcomings of the new Damages Directive and the challenges arising under it relating to the incentives and practical obstacles to bringing an action, there has not been much improvement in the legal reparation of contracting authorities as private litigants since its enactment. For this reason, this article asks whether any recommendations can be made to address this problem and whether there can be any alternative to compensatory remedies for contracting authorities.

This article is structured as follows. Section 2 explains the reasons why contracting authorities are reluctant to pursue an action against businesses engaged in bid-rigging practices in public procurement. These reasons are specific to bid rigging and they differ from the general obstacles to effective compensation identified in the current “Green and White Articles” (see below) providing for damages actions for breach of the EU antitrust rules. The new Damages Directive is briefly outlined to better understand the obstacles faced by contracting authorities in seeking effective compensation. Section 3 examines the question of whether the ability to make claims for damages in case of bid rigging under the new Damages Directive is worthwhile and practicable, taking into account the fact that this ability already existed in most EU Member States under the national tort laws. This will be done by outlining and analysing the challenges that arise under the new Directive regarding private enforcement by procurement entities. In section 4, recommendations are made in order to deal with some of the hurdles that contracting authorities face when seeking damages for bid rigging, since the new Damages Directive failed to address them properly. In section 5, there is a discussion of whether a remedy which is not based on tortious liability but on contractual principles could also help contracting authorities to overcome the challenges under the new Damages Directive regarding their right to claim damages for bid rigging. The cause of action at issue is based on the experience gained in Germany and the UK. The last section draws together the main conclusions.

2. Why Contracting Authorities Do Not Sue Cartels for Damages

Before analysing the reasons why actions by public authorities to recover damages for bid rigging are infrequent in the EU, it is necessary to briefly present the legislative background of the new Damages Directive and refer to the main issues that were identified by the Green and White Article on damages actions for breach of the EU antitrust rules as obstacles to private enforcement.

On 19 December 2005, the Commission adopted the Green Article which identified the main obstacles to effective compensation.²⁰ The response to this public consultation was wide and involved several institutional stakeholders.²¹ As a result, a Report and a Resolution were adopted by the European Parliament in 2007, which invited the Commission to proceed to a White Article that would make detailed proposals

¹⁷ S. Vande Walle, “Private Enforcement of Antitrust Law in Japan: An Empirical Analysis” (2011) 8 Comp. L. Rev. 8.

¹⁸ Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013); OECD Secretariat, *Relationship Between Public and Private Antitrust Enforcement*, June 2015, available at: [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2015\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&docLanguage=En) [Accessed 5 September 2018]; B.J. Rodger, “Competition Law Litigation in the UK Courts: A Study of All Cases 2005-2008- Part I” (2009)2 G.C.L.R. 95, 104.

¹⁹ M.P. Schinkel, “Effective Cartel Enforcement in Europe” (2007) 30 *World Competition: Law and Economics Review* 556–557.

²⁰ Commission, Green Article - Damages Actions for Breach of the EC antitrust rules, COM (2005)672 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN> [Accessed 5 September 2018]. The Green Article was prepared by a 2004 study on the conditions under which private parties can bring actions for antitrust damages.

²¹ Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), p.6.

to facilitate actions for damages.²² On 2 April 2008, the White Article²³ was published including suggestions for specific measures that would ensure the effective exercise of the right to compensation for antitrust harm.²⁴ The White Article was accompanied by an Impact Assessment. In these documents, the major difficulties that victims of competition law infringements usually experience when asking for compensation were identified. Some of them were:

“The difficult access to the evidence that is necessary for proving a case, lack of clear rules on the passing-on defence (i.e. a defence against a direct purchaser’s damages claim, relying on evidence showing that the overcharge resulting from a cartel was passed on-fully or partially- by the direct purchaser to its own customers further down the distribution chain), the calculation of damages and the rules concerning the costs of a damages action”.²⁵

The Directive sought to overcome these issues by introducing a number of key provisions. For instance, regarding access to evidence, it contemplated that courts should ensure enhanced but proportionate access to evidence held by plaintiffs, defendants and third parties, including antitrust agencies, subject to two important limitations.²⁶ The first one concerns the prohibition of disclosure of corporate statements submitted to the Commission under the EU’s amnesty regime (i.e. its leniency programme) and the second concerns the ban on the disclosure of settlement submissions under the EU’s settlement procedure.²⁷ Regarding the passing-on defence,²⁸ the new Damages Directive made the defence available in response to claims by either direct²⁹ or indirect³⁰ purchaser claims.³¹ In case of direct purchaser claims, the burden of proof is on the defendant who must prove that every overcharge was passed on by the plaintiffs to their own customers.³² The new Damages Directive also created a rebuttable presumption as to the existence of harm resulting from a cartel but it did not introduce any presumption as to any particular overcharge percentage.³³ Furthermore, it provided for joint and several liability of defendants in cartel cases, except where the infringer is a successful immunity recipient and a small or medium-sized enterprise (“SME”).³⁴

After briefly highlighting the measures introduced by the new Damages Directive with the aim of increasing civil antitrust claims, we turn now to the reasons why the level of private enforcement among contracting authorities is low in relation to bid rigging. Firstly, the entitlement of contracting authorities to damages under competition law can generate costs in terms of resources involved in litigation and time, which will ultimately be borne by the public budget to the detriment of taxpayers. This is particularly true in EU Member States where there are many and small procurement agencies (“high fragmentation of

²² Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), p.6.

²³ Commission, White Article on Damages Actions for Breach of the EC antitrust rules, COM(2008)165 final, http://ec.europa.eu/competition/antitrust/actionsdamages/impact_assessment_en.pdf [Accessed 5 September 2018].

²⁴ Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), p.6.

²⁵ Commission, Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules (2013), p.15; Commission, White Article on Damages Actions for Breach of the EC antitrust rules (2008), para.2; Schinkel, “Effective Cartel Enforcement in Europe” (2007) 30 *World Competition: Law and Economics Review* 557–558.

²⁶ Directive 2014/104, art.6; M. Sansom, A. Morfey and P. Teague, “Recent Developments in Private *Antitrust* Damages Litigation in Europe” (2015) 29 *Antitrust* 33, 36–37.

²⁷ Commission, White Article on Damages Actions for Breach of the EC antitrust rules (2008), para.6; Sansom, Morfey and Teague, “Recent Developments in Private *Antitrust* Damages Litigation in Europe” (2015) 29 *Antitrust* 37.

²⁸ I.e. a defence against a claim for damages for which the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.

²⁹ Direct purchaser means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law: Directive 2014/104, art.2(23).

³⁰ Indirect purchaser means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom: Directive 2014/104, art.2(24).

³¹ Directive 2014/104, art.13; Sansom, Morfey and Teague, “Recent Developments in Private *Antitrust* Damages Litigation in Europe” (2015) 29 *Antitrust* 37.

³² Directive 2014/104, art.13.

³³ Directive 2014/104, art.17; Sansom, Morfey and Teague, “Recent Developments in Private *Antitrust* Damages Litigation in Europe” (2015) 29 *Antitrust* 37.

³⁴ Directive 2014/104, art.11.

public sector”), that lack or do not allocate efficiently enforcement resources. The “loser pays” cost rule that governs the national tort systems in Europe makes a claim for damages very expensive and risky for contracting authorities that manage and use the taxpayers’ money, i.e. the State budget.

Whereas private actors usually have a strong motivation and industry-specific knowledge to monitor and detect anti-competitive behaviour,³⁵ public officers may have difficulty in identifying and comprehending the length and nature of deviations from the initial quantity ordered and contracted by the State. This is so because bid rigging is tricky to detect, whilst the public procurement community is not always equipped with tools to prevent, detect and deter bid rigging, as successfully happens in the UK for instance, where the Competition Market Authority (“CMA”) has developed tools and advice to help purchasers within the public sector identify suspicious behaviour by suppliers when bidding for contracts.³⁶ Public officers are also under constant pressure to ensure maximum value for taxpayers’ money, whilst having to take numerous considerations—legal, environmental and social—into account. This means that sometimes they may pay little attention to whether bidding rings exist or not, without constantly monitoring bidding activities and without performing analyses on bid data in order to collect historical information on bidding behaviour. This makes sense if it is also considered that the performance of public officers is generally not assessed on the basis of the number of bidding rings discovered but on how they set up and ran the bidding processes successfully to meet public needs without delay.³⁷ In addition to the above, when it comes to bid rigging, there are many EU Member States, such as Austria, Belgium, Germany, Hungary and Romania which, as a matter of policy, promote more individual sanctions, like criminal penalties³⁸ as opposed to sanctions operating at the corporate level, like civil damages claims. Another reason could be that only a few cases have recently been brought by public contracting authorities in the courts of Member States for damages resulting from bid rigging, giving a false impression that bid rigging is less of a problem in the EU.³⁹ According to a 2007 study, the antitrust infringement that is most frequently challenged through private litigation in the EU is vertical restraints,⁴⁰ and only 12 cases out of 96 involved hardcore cartels, including bid rigging schemes.⁴¹ Nevertheless, in Netherlands after the revelation of bidding rings in the construction sector, the government reached a global settlement with the construction industry, recovering 70 million Euros in damages for bid rigging.⁴²

One of the few cases brought for damages resulting from bid rigging in the EU is *European Commission v Otis NV*, which preceded the new Damages Directive.⁴³ In this case, the EU represented by the Commission, asked for damages for the higher price it allegedly paid for the maintenance of elevators in European institution buildings in Belgium and Luxembourg, as a result of the anti-competitive practices established in the decision of 21 February 2007. According to the Commission’s decision in 2007, the

³⁵ R. Preston McAfee, H.M. Mialon and S.H. Mialon, “Private v. Public Antitrust Enforcement: A Strategic Analysis” (2008) 92 *Journal of Public Economics* 1866–1867; Department for Business Innovation & Skills, *Private Actions in Competition Law: A Consultation on Options for Reform - Government Response*, January 2013, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf [Accessed 5 September 2018], pp.8, 11; A. Renda, J. Peysner, A.J. Riley and B.J. Rodger, *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios - Final Report*, 2007, p.18.

³⁶ The CMA Screening for Cartels tool is freely available for procurement professionals to download and use. It is a software that uses algorithms to spot unusual bidder behaviour and pricing patterns which may indicate that bid rigging has taken place. For further information, see: www.gov.uk/government/news/cma-launches-digital-tool-to-fight-bid-rigging [Accessed 5 September 2018].

³⁷ Alberto Heimler, “Cartels in Public Procurement” (2012) 8(4) *Journal of Competition Law & Economics* 861.

³⁸ Wagner-von Papp, “Compliance and Individual Sanctions in the Enforcement of Competition Law” (2016).

³⁹ S. Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Antwerp: Maklu Publishers, 2013), p.227.

⁴⁰ Vertical restraints are agreements or concerted practices between two or more undertakings operating at a different level of the production or distribution chain, that may affect trade between Member States and that prevent, restrict or distort competition. For further information, please see Guidelines on Vertical Restraints [2010] OJ C130/1.

⁴¹ Renda, Peysner, Riley and Rodger, *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios - Final Report* (2007), p.40.

⁴² S. Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, (Antwerp: Maklu Publishers 2013), p.232.

⁴³ *European Commission v Otis NV* (C-199/11), EU:C:2012:684; 4 [2013] C.M.L.R. 4.

elevator manufacturers were found guilty of infringement of art.101 TFEU from 1996 to 2004, as they were involved in market sharing and bid rigging with regard to the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. Shortly thereafter, the Commission fined the relevant elevator manufacturers 992 million Euros.

Despite this decision, the Court dismissed the Commission's claim for damages in respect of the harm caused by the elevators and escalators cartels. Since the new Directive was not applicable when the action for damages was lodged and so the rebuttable presumption under art.17(2) did not yet apply, it was held that the Commission did not submit direct evidence or oral evidence of witnesses that could determine or estimate the damages caused by the cartel arrangements.⁴⁴ In other words, before the enactment of the new Damages Directive, it could not be assumed that practices such as bid rigging automatically led to higher prices.

As already highlighted above, the introduction of the new Damages Directive has arguably not improved the position. The fact that cartels are presumed to cause harm does not mean that the (exact amount of the) cartel overcharge is automatically proved nor the loss suffered by the claimant. The financial harm still needs to be specified and quantified and currently the burden of proof is on the claimant. This is an additional reason why contracting authorities are not particularly well-placed to pursue an action for damages against cartels.

3. Evaluation of the New Directive's Effectiveness in Fostering Actions for Damages

As indicated, there were a number of reasons why the level of private enforcement for bid rigging has been historically low. With the aim of improving the position of government procurement authorities as private litigants in competition cases, para.(3) in the Preamble of the new Damages Directive was introduced. According to the Preamble, in addition to consumers and undertakings, public authorities (and so procurement entities) can also claim compensation before national courts for the harm caused to them by an infringement of arts 101 and 102 TFEU. This right already existed in most EU Member States and so the new Damages Directive expressly confirms that arts 101 and 102 TFEU create obligations and rights for contracting authorities that national courts must enforce. Competition damages for bid rigging in public procurement will enable contracting authorities to get compensated for losses unjustly suffered. Under the legal regime of the new Damages Directive, a pivotal question arises as to whether the new Damages Directive is effective for the legal reparation of contracting authorities as private litigants, and whether this will bring any advantages over the longstanding damages claims based on tort law. In order to answer this question, there is need to take into account the shortcomings and challenges arising under the Directive.

First, the new Damages Directive does not provide for specific aspects of antitrust litigation, such as legal costs and cost shifting (loser pays), which are determinant factors of whether the harmed contracting authorities will commence a legal action or not,⁴⁵ as procurement entities manage and spend public money and so it is the citizens that will eventually bear any financial loss and litigation cost by contributing to the state budget as taxpayers.⁴⁶ For contracting authorities in their capacity as claimants, the size and predictability of litigation costs can determine whether they will access justice or not because if the costs are too high, there may be no benefit for them to pursue a legal action.⁴⁷ In almost all countries, cost

⁴⁴ J. Ramos and D. Muhume, "The Brussels Court judgement in Commission v Elevators manufacturers, or the story of how the Commission lost an action for damages based on its own infringement decision" (2015) 36 E.C.L.R. 386.

⁴⁵ M. De Sousa e Alvim, "The new Directive on antitrust damages - a giant step forward?" (2015) 36 ECLR, p.247; S. Peyer, "Compensation and the Damages Directive" (2016) 12 E.C.J. 87-112; S. Peyer, "The Antitrust Damages Directive – Much Ado About Nothing?", in Cisotta and Marquis (eds), *Litigation and Arbitration in EU Competition Law* (Cheltenham: Edward Elgar, 2015).

⁴⁶ M. Maci, "Private Enforcement in Bid Rigging Cases in the European Union" (2012) 8 (1) E.C.J. 216.

⁴⁷ C. Hodges, S. Vogenauer and M. Tulibacka, "The Oxford Study on Costs and Funding of Civil Litigation - Introduction", in Hodges, Vogenauer and Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Bloomsbury Publishing 2010), p.4.

shifting (loser pays) is the general rule, apart from Lithuania and the USA, where each party undertakes its own costs.⁴⁸ By not following the example of Lithuania and the USA, the new Damages Directive has lost the chance to overcome the funding barriers that claimants usually face when it comes to bring damages for anti-competitive practices, depending in this way on the discretionary power of each court to award or not reasonable costs instead of full legal costs. It was suggested that such important elements of the private enforcement of competition law were left out of the Directive's scope on purpose; otherwise the new Damages Directive would not be accepted. The loser pays rule is too engrained in European legal tradition.⁴⁹

Secondly, the new Damages Directive has not dealt with the key procedural hurdles that a contracting authority may face when bringing a damages claim for bid rigging, such as the evidence of a causal link and the quantification of the financial harm suffered by contracting authorities as a result of overcharged products or services in the context of the public procurement procedure. The Directive has been "reticent to engage in an extensive harmonization of the causation requirement", by insisting on reliance on the various tort law systems of EU Member States, under the framework of the principles of equivalence and effectiveness.⁵⁰ The CJEU has also not clarified the issue.⁵¹ Though the new Damages Directive proceeded to include a number of provisions that make the evidence of a causal link much easier, practically speaking, these steps are not adequate to boost the number of damage actions initiated by public contracting authorities. Despite the explicit rule of joint and several liability in art.11, nothing is really gained by this rule. When it comes to bid rigging, it is much harder in terms of evidence to establish which undertakings were participants in the bidding ring and which undertakings were outsiders. This is so because there is not any typical illegal behaviour that would enable a simple establishment of who is in the bidding ring and who is not, as may happen in normal cartels, where one of the ways to determine cartel membership is to look at the level of output that a firm produces before and after the alleged cartel formation. Moreover, the lack of familiarity of procurement officers with bidding patterns related to bid rigging makes it even harder for them to assess whether or not a specific tender presents a bid pattern that raises concerns and constitutes prima facie evidence of bid rigging that needs formal antitrust investigation.⁵² So, the extra difficulty of identifying the members of the bidding ring as well as the fact that procurement agencies lack skills and experience necessary to identify prima facie evidence of bid rigging and to apply the economic theories of collusion means that inevitably the private enforcement will be little in the domain of public procurement. Yet, some jurisdictions have gotten off to a good start by enabling their national competition authorities to control the competitiveness of public procurement and initiate a bid rigging case on their own initiative every time they suspect infringement of competition law in the course of a public tender.⁵³

The same applies to the reversal of the burden of proof on the infringer/defendant, in case it invokes as a defence against a claim for damages the fact that the injured party/claimant has already reduced its actual loss by passing it on, entirely or partly, to its own purchasers.⁵⁴ It is not usual at all in the context of public procurement to see public authorities selling on the goods that they procure and do so for a profit. Again, it is neither common nor usual at all to see indirect purchasers in the context of public procurement,

⁴⁸ C. Hodges, S. Vogenauer and M. Tulibacka, "The Oxford Study on Costs and Funding of Civil Litigation - National approaches to costs and funding of civil litigation", in C. Hodges, S. Vogenauer and M. Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Oxford: Hart Publishing, 2010), p.17.

⁴⁹ Editorial Comments, "One bird in the hand ... The Directive on Damages Actions for Breach of the Competition Rules" (2014) 51 C.M.L.R. 1342.
⁵⁰ I. Lianos, "Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe" (2015) 1 *Yearbook of European Law* 50.

⁵¹ F.G. Wilman, "The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies It Provides For" (2016) 53 C.M.L.R. 902.

⁵² International Competition Network, *Anti-Cartel Enforcement Manual- Chapter on Relationships between Competition Agencies and Public Procurement Bodies*, April 2015, available at: <http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf> [Accessed 5 September 2018].

⁵³ International Competition Network, *Anti-Cartel Enforcement Manual- Chapter on Relationships between Competition Agencies and Public Procurement Bodies* (2015).

⁵⁴ Directive 2014/104, Recital 39.

namely natural or legal persons who acquired from a government department or local authority products or services that were the object of bid rigging or derived therefrom. Thus, the presumption of causality for the benefit of indirect purchasers because they “did not themselves make any purchase from the infringer (i.e. bid riggers in our case) to prove the scope of that harm”⁵⁵ does not have practical relevance in case of contracting authorities suing cartels for damages in the context of the public procurement process. At this point, it would be worth mentioning that the passing-on defence is not accepted in the USA in line with the *Illinois Brick* case.⁵⁶ However, there are some exceptions to the exclusion of indirect purchaser claims provided for in US Federal law and cost-plus pricing⁵⁷ is one of them.⁵⁸

Even the causal presumption for cartels that the new Damages Directive expressly sets in order to “remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, as well as to ensure the effectiveness of claims for damages”,⁵⁹ is not enough for contracting authorities to be incentivised to sue bid riggers for damages. To be more specific, according to art.17 of the new Damages Directive, it shall be presumed that cartel infringements cause harm and the infringer shall have the right to rebut that presumption. Yet, the existence of an infringement decision does not prove itself the level of harm incurred by the overcharge.⁶⁰ Contracting authorities must still predict the real prices of the supplies or services had bid riggers not raised them artificially, by estimating what the winning bids would have been but for the collusive agreement (the counterfactual).⁶¹ This is something particularly demanding and costly, especially in view of the “blanket ban” imposed on the disclosure of files and documents submitted by the firm that first blew the whistle on the bid-rigging conspiracy⁶² as well as the difficulty of procurement officers in identifying and comprehending the length and nature of deviations from the initial quantity ordered and contracted by the State for the reasons discussed in section 2. The demonstration and calculation of the cartel overcharge by contracting authorities becomes even more difficult in cases in which there is need to take into account environmental, social and innovative aspects when assessing a tender on the basis of the best price-quality ratio. By procuring in a more quality oriented way, contracting authorities are called to determine each time the overcharge not only on the basis of price and life-cycle costs but also quality, environmental considerations, social aspects or innovation of what is procured.

Of course the new Damages Directive contemplates that when it is practically impossible or excessively difficult for a claimant precisely to quantify the harm suffered on the basis of the evidence available, the national courts shall be empowered to estimate the amount of harm.⁶³ However, the calculation of damages is one of the most complex issues in private competition law claims. In addition, the damage estimation exercise may be rather challenging for contracting authorities for another reason. Bid riggers take great care not to get detected and so direct proof of the amount of the overcharge is not usually available in the context of public procurement.⁶⁴ This is compounded by the fact that the application of the leniency

⁵⁵ Directive 2014/104, Recital 36 and art.14(2).

⁵⁶ *Illinois Brick Co v Illinois*, 431 US 720 (1977).

⁵⁷ Cost plus contracts do not specify a price, like in case of a fixed price contract, where the seller receives a lump sum payment irrespective of the costs actually incurred, but they reimburse the contract or for costs. This reduces the adversarial relationship that may arise between the seller and the buyer if the completion of the contract entails additional work above the originally described, and for this reason cost plus contracts are generally preferred in the construction industry. For further information, please see Patrick Bajari and Steven Tadelis, *Procurement Contracts: Fixed Price vs. Cost Plus*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=156470 [Accessed 5 September 2018].

⁵⁸ *In re ATM Fee Antitrust Litigation*, 686 F.3d 741 (9th Cir. 2012); Commission, *Study on the Passing-On of Overcharges - Final Report 2016*, available at: <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf> [Accessed 5 September 2018], pp.18–20; Herbert Hovenkamp, “The Indirect-Purchaser Rule and Cost-Plus Sales” (1990) 103(7) *Harvard Law Review* 1717–1731.

⁵⁹ Directive 2014/104, Recital 42 and art.17(2).

⁶⁰ A. Stephan, “The EU Damages Directive”, in D. Geradin, A. Stephan and C. Argenton (eds), *EU Cartel Law and Economics* (Oxford: Oxford University Press, 2018) forthcoming.

⁶¹ J.H. Howard and D. Kaserman, “Proof of Damages in Construction Industry Bid-Rigging Cases” (1989) 34 *Antitrust Bulletin* 363–364; S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (London, Sweet & Maxwell, 2010), Ch.17.

⁶² Directive 2014/104, art.6(6); J. Kwan-Terry, “The Damages Directive: end of England’s eminence?” (2015) 36 *E.C.L.R.* 459.

⁶³ Directive 2014/104, art.17(1).

⁶⁴ Howard and Kaserman, “Proof of Damages in Construction Industry Bid-Rigging Cases” (1989) 34 *Antitrust Bulletin* 363–364; Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2010), pp.363–364.

programme for the detection of bid rigging in public procurement is not widespread, in contrast to normal cartels where leniency applicants are the most frequent source of information.⁶⁵ As a consequence, the difficulty, time and administrative cost of collecting intelligence and evidence of cartel infringements still remains in public procurement, whilst the leniency programme could have been a significant help for public officers.

The first reason for this is the great stability of cartels in public procurement markets. It is a disincentive for colluding firms to report the existence of a bidding ring when it does not seem to break up immediately.⁶⁶ The second reason relates to the fact that many cartels are usually reported in the context of a merger between two firms, as soon as the acquiring firm discovers the anti-competitive conduct of the acquired firm. In case of public procurement, the size of bid rigging companies is usually small and so a merger between them does not fall under the turnover threshold to trigger a merger notification under the EU law.⁶⁷ Moreover, the reputational damage that can be politically adverse in the next procurement process is another disincentive for firms involved in a bidding ring, when it comes to apply for leniency.⁶⁸ The ineffectiveness of leniency policies when it comes to bid rigging has also been empirically proved by an experimental study that took place in a repeated procurement auction game.⁶⁹ But even if direct proof of the overcharge amount is available, it will probably be an “understated measure of damage”.⁷⁰

Further, there may be difficulty in deciding which contracts to include in the sample under investigation in order to classify them as rigged or unrigged.⁷¹ As already explained above, when it comes to bid rigging, there is not a typical illegal behaviour that gives an indication of which undertakings were participants in the bidding ring and which undertakings were outsiders, thus enabling contracting authorities to collect evidence and make the relevant classifications. This is particularly true in the case of industries where there has been evidence of “endemic” bid rigging in respect of thousands of tenders, such as the construction sector in England and Scotland, in which, according to one study, 112 companies were found to be engaged in bid rigging.⁷² If this problem is not properly addressed, the statistical analysis of damages may be “seriously biased downward”, by indicating lower damages than were actually suffered by the victims.⁷³

An additional problem may be the identification of an adequate control group so that comparator-based methods may be used in order to estimate over time on the same market the price difference between the real value of the products or services and the artificially raised price at which they were purchased by the contracting authorities.⁷⁴ This means that a reliable statistical evaluation presupposes a sufficient number of unrigged observations in order to compare the price in the infringement scenario with a non-infringement scenario.⁷⁵ However, it may be rather difficult to collect data on public contracts awarded before the formation of a bidding ring and after its detection, either because of the time that has passed or because

⁶⁵ Heimler, “Cartels in Public Procurement” (2012) 8(4) *Journal of Competition Law & Economics* 857. See also Wils, “The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years” (2016) 39(3) *World Competition* 327–388.

⁶⁶ Heimler, “Cartels in Public Procurement” (2012) 8(4) *Journal of Competition Law & Economics* 859.

⁶⁷ Heimler, “Cartels in Public Procurement” (2012) 8(4) *Journal of Competition Law & Economics* 859.

⁶⁸ Heimler, “Cartels in Public Procurement” (2012) 8(4) *Journal of Competition Law & Economics* 10–12; ICN, *Anti-Cartel Enforcement Manual: Relationships between Competition Agencies and Public Procurement Bodies*, April 2015, available at: www.internationalcompetitionnetwork.org/uploads/library/doc1036.pdf [Accessed 5 September 2018].

⁶⁹ Y. Hamaguchi and T. Kawagoe, *An Experimental Study of Procurement Auctions with Leniency Program*, CPRC Discussion Article Series CPDP-24-E, January 2007, available at: https://www.researchgate.net/publication/237664384_An_Experimental_Study_of_Procurement_Auctions_with_Leniency_Programs [Accessed 5 September 2018]; C. Marvão and G. Spagnolo, “What do we know about the effectiveness of leniency policies? A survey of the empirical and experimental evidence”, in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age - Leniency Religion* (Oxford: Hart Publishing, 2015), pp.77–78.

⁷⁰ Howard and Kaserman, Proof of Damages in Construction Industry Bid-Rigging Cases (1989) 34 *Antitrust Bulletin* 363–364; Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2010), pp.363–364.

⁷¹ Howard and Kaserman, “Proof of Damages in Construction Industry Bid-Rigging Cases” (1989) 34 *Antitrust Bulletin* 365.

⁷² M. Tourmier and J. Pheasant, “The UK Construction Industry Under the Spotlight Again” (2008) 29 *E.C.L.R.* 557–559.

⁷³ Howard and Kaserman, “Proof of Damages in Construction Industry Bid-Rigging Cases” (1989) 34 *Antitrust Bulletin* 365.

⁷⁴ Howard and Kaserman, “Proof of Damages in Construction Industry Bid-Rigging Cases” (1989) 34 *Antitrust Bulletin* 365–366.

⁷⁵ Commission, Practical Guide Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD (2013) 205, available at: www.ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf [Accessed 5 September 2018], pp.15–19.

the damages action was brought so promptly that not many public contracts could be concluded in the aftermath.⁷⁶ Particularly in the domain of public procurement, where the fragmentation of the public sector is extremely high, there is an enormous volume of data which is fragmented in computerised systems from different contracting authorities. As a result, the collection of data on public contracts awarded before the formation and after the detection of a bidding ring becomes even more difficult. What is more, as already mentioned in the previous paragraph, in industries where bid rigging turns out to be “endemic”, it is rather hard to ensure a sufficient number of unrigged observations.

In addition to the above weaknesses and challenges that the new Directive presents, there is empirical research suggesting that there would be no point in promoting private enforcement actions involving bidding rings. This is so because of the limited role that private antitrust litigation plays in most European jurisdictions regarding the deterrence of anti-competitive violations and the compensation of consumers and undertakings suffering from those violations.⁷⁷ Additionally, settlements are prevalent in EU Member States. According to the Organisation for Economic Co-Operation and Development (“OECD”) only a few victims of antitrust infringement have been indemnified, as from 2006 to 2012 “less than 25 per cent of the European Commission’s infringement decisions were followed by damages actions”.⁷⁸ The European Commission clearly stated in para.52 of its Impact Assessment Report on damages actions for breach of the EU antitrust rules that:

“Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only seven Member States. In the 20 other Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision”.⁷⁹

Though it is not clear whether the above statistics include public bodies that sue for bid rigging, it is likely that the same applies because settlements are also favoured in the domain of public procurement. Public authorities are usually in a strong position to encourage bidders to settle claims for damages instead of going to court, as the undertakings know well that they will have to bid for future public contracts from the former. At the same time, contracting authorities take great care not to spoil cooperative relationships with future partners and so they may be content with partial instead of full compensation, since a settlement would be better for them than nothing. The overall prevalence of settlement activity in public procurement can also be supported by the new Damages Directive, which contemplates in Recital (48) that: “infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration, mediation or conciliation”. Thus, “an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement”.⁸⁰ Moreover, compensation paid as a result of consensual settlement

⁷⁶ Howard and Kaserman, Proof of Damages in Construction Industry Bid-Rigging Cases (1989) 34 *Antitrust Bulletin* 365-366.

⁷⁷ According to the Ashurst study that took place in 2014, almost 104 damages actions were identified for the whole of the EU. Another report which was prepared for the European Commission found only 96 antitrust damages actions between May 2004 and the third quarter of 2007. From these antitrust actions, 61 concerned horizontal agreements, concerted practices or naked cartels (12 on hardcore cartels or concerted practices, 1 on horizontal agreements); and 22 cases involved abuses of dominance. The aforementioned damages actions were observed only in 10 of the 27 Member States. Moreover, research from the Office of Fair Trading (“OFT”) in the UK surveyed 202 companies about their views on private actions under competition law. Although 45 of them thought that their company had been harmed by a breach of competition law by someone else, only five companies finally decided to bring an action because the expected costs would outweigh the benefits. See D. Waelbroeck, D. Slater and G. Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report*, 31 August 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf [Accessed 5 September 2018]; Renda, Peysner, Riley and Rodger, *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios - Final Report* (2007); Department for Business, Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform*, April 2012, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf [Accessed 5 September 2018].

⁷⁸ OECD Secretariat, *Relationship Between Public and Private Antitrust Enforcement* (2015), p.5.

⁷⁹ Commission, *Impact Assessment Report - Damages Actions for Breach of the EU Antitrust Rules* (2013).

⁸⁰ Directive 2014/104, Recital 51.

and prior to the imposition of a fine, may be a mitigating factor taken into account by the relevant competition authority.⁸¹

It must be acknowledged that the new Damages Directive did not have as one of its express objectives the improvement of contracting authorities' ability to bring damages actions in the context of public procurement. However, in view of the above discussion and analysis, it could be said that, whilst public procurement authorities can bring damages actions, the new Damages Directive does not provide a framework for encouraging contracting authorities to use private enforcement and for this reason its practical relevance in the area of public procurement seems limited.

Hence, it seems that the new Damages Directive does not provide any advantages over claims according to long-standing national tort laws and the general competition law when it comes to public authorities in public procurement. This conclusion is also supported by several recent empirical surveys which affirm that it would not be appropriate to promote damages claims for bid rigging, in view of their limited role in deterring antitrust violations in most European jurisdictions and the prevalence of settlement activity.

4. Recommendations

In the absence of provisions under the new Directive that may have some practical relevance for the contracting authorities in the area of public procurement, it is time to make some recommendations that would make it easier for public authorities to seek damages for bid rigging. The first recommendation regards the high litigation costs that public authorities usually face when claiming damages for bid rigging. A possible suggestion to deal with this issue is to form a "Competition Damages Litigation Fund", i.e. a supply of money collected from contracting authorities, with the aim to use it for covering the competition damages litigation costs. A Competition Damages Litigation Fund would permit the collection and saving of money for this specific reason, every time the national courts of a particular EU Member State award damages to the relevant contracting authorities for the anti-competitive activities of economic operators in the context of public procurement. Though it could be counter-argued that it is sufficient for every contracting authority to collect its own damages awarded by the national courts, without having to establish a separate Competition Damages Litigation Fund, a single account for competition damages litigation is an essential tool for consolidating and managing procurement entities' cash resources. In EU Member States with a highly fragmented public sector the establishment of a Competition Damages Litigation Fund would enable aggregate and efficient control and monitoring of the damages awarded to various contracting authorities, while it would prevent idle balances maintained in several bank accounts. At the same time, it would facilitate reconciliation between banking and accounting data and it would prove that as a matter of fact damages claims for bid rigging in public procurement is a priority in the public agenda.

The management of this fund could be left to the Auditor General of every EU Member State, who will be in charge of calculating and paying the arising litigation costs as well as of informing regularly the contracting authorities about the balance of the account. Something similar already happens in the UK, where the Accountant General of the Senior Courts is responsible for the control of the money paid into courts.⁸² Additionally, in the UK there is a Court Funds Office which provides banking and investment services by accounting for any money being paid into and out of court and by looking after any investments made with that money.⁸³ Similarly, when the residual funds of the Competition Damages Litigation Fund are beyond a specific and predetermined amount of money at the end of each year, the Auditor General of every EU Member State may distribute them pro rata to the involved contracting authorities in order

⁸¹ Directive 2014/104, art. 18(3).

⁸² The National Archives, *Court of Chancery: Office of the Accountant General, Supreme Court Pay Office: Indexes to Accounts*, available at: <http://discovery.nationalarchives.gov.uk/details/r/C18421> [Accessed 5 September 2018]; UK Government, *Pay Money into the Court Funds Office*, available at: www.gov.uk/pay-court-funds-office [Accessed 5 September 2018].

⁸³ UK Government, *Pay Money into the Court Funds Office*.

to apply them for their indirect benefit, such as purchase of new furniture for their premises, organisation and conduct of a new procurement process etc. The fact that part of this money may remain in the administration will also be an extra incentive for public officers to become more interested in discovering bidding rings and in claiming damages for bid rigging. Another recommendation could also be to restrict the compensation of the defendant's fees to the statutory attorney fees in order to prevent situations of abuse on behalf of the defendant. Germany is an illustrative example of this, despite the "loser pays" rule that applies there.⁸⁴

Regarding the concern of contracting authorities that the initiation of litigation against colluding economic operators may spoil their cooperative relationship, the author would suggest the assignment of their claims to a third party that would also have an interest in bringing an action. It has been suggested that special courts/institutions, like audit agencies, procurement oversight agencies, like the National Anti-Corruption Authority of Italy, as well as private agents, like law firms and taxpayer associations could be identified as having a proper incentive to sue as a third party.⁸⁵ This is something that already takes place in Germany, where claimants can assign their claim to third party funders or special purpose vehicles (SPVs).⁸⁶ In the above list of third parties with a proper incentive to sue, the competitors of the bid riggers that were not selected for the award of the public contract due to the manipulation of the bidding process could also be included.

As far as the contracting authorities' difficulty in specifying and quantifying the financial harm is concerned, the introduction of statutory or pre-established damages might be a good solution to the problem. Specifically, it is suggested that contracting authorities before the final judgment should have the option to ask for the recovery of statutory/pre-established damages instead of actual damages, namely a lump sum calculated by the national courts on the basis of pre-determined factors. These factors could mutually be agreed by the litigants before the initiation of the legal proceedings and they could indicatively be the tenders submitted by "maverick bidders", i.e. firms that have demonstrated aggressivity in the past, an aggressive reserve price or at least the cost of the entire procurement process, "from the identification of procurement opportunities, through the preparation of relevant documentation (an invitation to tender/offer) and the conduct of the whole procurement procedure, to provision for possible complaints and litigation".⁸⁷ Such an evidence-facilitating device already applies in the domain of intellectual property, where judicial authorities are enabled "in appropriate cases" to set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.⁸⁸ Similarly, statutory damages can be found in copyright cases after the enactment of the Digital Theft Deterrence and Copyright Damages Act of 1999 and the Digital Millennium Copyright Act of 1998.⁸⁹

⁸⁴ A. Bach and C. Wolf, *Germany: Private Antitrust Litigation*, 2016, available at: www.globalcompetitionreview.com/chapter/1067842/germany-private-antitrust-litigation [Accessed 5 September 2018].

⁸⁵ G. Spagnolo, *Public Procurement, Bid Rigging and (the Lack of) Actions for Damages*, Lear Conference on Public Procurement and Competition Policy, Rome, 3–5 July 2017, available at: www.learconference.com/wp-content/uploads/2017/07/SPAGNOLO_Damages_Lear_2017.pdf [Accessed 5 September 2018].

⁸⁶ Bach and Wolf, *Germany: Private Antitrust Litigation* (2016).

⁸⁷ For further information about how to analyse costs of the procurement process, see PwC, London Economics and Ecorys, *Public Procurement in Europe - Cost and Effectiveness- A Study on Procurement Regulation prepared for the European Commission*, March 2011, available at: <https://ukmin.lrv.lt/uploads/ukmin/documents/files/Studija%20d%C4%97l%20kainos%20ir%20efektyvumo%20vie%C5%A1uosiuose%20pirkimuose.pdf> [Accessed 5 September 2018].

⁸⁸ Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195, art. 13(1).

⁸⁹ I. Lianos, *Observations of Ioannis Lianos, Faculty of Laws, UCL, Quantification of Damages Workshop*, Brussels, January 26, 2010, available at: www.ec.europa.eu/competition/antitrust/actionsdamages/lianos.pdf [Accessed 5 September 2018]; Alliance against Intellectual Property Theft, *Response to the Law of Damages Consultation*, July 2007.

5. Alternative Compensatory Remedy

As we have seen so far based on the analysis above, the new Directive has not managed to solve a number of problems. In the previous section, we made some recommendations that would possibly deal with some of these issues, primarily the costs and secondarily the quantification of the antitrust harm. However, some issues still remain unresolved. For this reason, in the further alternative it would be worth exploring whether a remedy which is not based on tortious liability but on contractual principles could help contracting authorities to receive compensation and overcome the problems of proof and evidence discussed so far, such as the evidence of a causal link and the quantification of antitrust harm. In this section, it is recommended that a compensatory remedy alternative to standard tort law litigation should be adopted, based on the experience gained in Germany and the UK.

Liquidated damages clauses

The contracting parties are able to agree upon “liquidated damages” or “lump sum damage” provisions, meaning “an amount of compensation payable in the event of breach of the contract, or one of its terms”.⁹⁰ Liquidated damages clauses in public contracts are particularly attractive because as soon as one breach occurs (in our own case we are particularly interested in any infringement of competition law in the context of public procurement), the claimant, i.e. public bodies, are free from the expense and burden of proving their loss and enforce their claims.⁹¹

Germany is an illustrative example of an EU Member State where liquidated damages are quite widespread in standard purchasing terms and conditions and their use is becoming even greater, by stipulating that in case of a (proven) cartel infringement by the seller, the latter will have to pay a lump sum damage to the purchaser.⁹² There are several court judgments in Germany that have ruled on the validity of liquidated damages clauses.⁹³ All of them awarded the claimed damages to public bodies, such as municipalities and public transport companies, and they accepted that the liquidated damages clause is legal and enforceable. In particular, it was held that:

“The amount of the lump sum damage of 15 per cent is not beyond the amount which can usually be expected in case of a damage caused by a cartel. Therefore the buyer can rely on its purchasing terms to claim such a damage amount in the first place while the seller then has to prove that there was actually a lower damage”.⁹⁴

Despite the attractiveness of liquidated damages clauses, they are still not standard in public contracts. There are various reasons for this. First and foremost, there is not a consistent application of the concept in civil and common law countries. As secondary obligations come into play only when the contract is breached, liquidated damages can easily be challenged in common law jurisdictions like the UK. They are primarily caught by the “penalty doctrine”, according to which liquidated damages clauses are deemed

⁹⁰ N. Andrews, *Contract Law* (Cambridge: Cambridge University Press, 2011), p.599.

⁹¹ Martin Gramsch and Simmons & Simmons elexica, *Liquidated Damages in General Purchasing Terms*, 2017, available at: www.elexica.com/en/legal-topics/antitrust-and-merger-control/190617-liquidated-damages-general-purchasing-terms [Accessed 5 September 2018].

⁹² Getting the Deal Through, *Germany, An Interview with Thorsten Mäger and Alf-Henrik Bischeke*, available at: www.gettingthedealthrough.com/intelligence/24/article/3228/cartels-germany [Accessed 5 September 2018].

⁹³ See, for instance, the judgment of the regional court of Hannover (*LG Hannover, Urteil vom 18.12.2017 – 18 O 8/17, Lkw-Kartell Göttingen*), which confirmed the liability in principle of truck manufacturer MAN towards the city of Göttingen for truck purchases made during the operation of the truck cartel, available at: www.ashurst.com/en/news-and-insights/legal-updates/first-german-trucks-judgement-confirms-manufacturer-liability-in-principle/ [Accessed 5 September 2018]; see also the judgment of the Thuringian higher regional court in Jena on 22 February 2017, which upheld an earlier judgment of the regional court of Erfurt of 3 July 2015, according to which a public transport company was in principle entitled to damages. See also the judgment of the higher regional court of Karlsruhe (*Higher Regional Court of Karlsruhe, 31 July 2013, 6 U 51/12 Kart*) as well as the judgment of the local court of Mannheim (*Landgericht [Regional Court] Mannheim 4 May 2012, 7 O 436/11 Kart*), available at: www.vbb.com/media/Insights_Newsletters/CNL_06_17.pdf and www.elexica.com/en/legal-topics/antitrust-and-merger-control/190617-liquidated-damages-general-purchasing-terms [Accessed 5 September 2018].

⁹⁴ Gramsch and Simmons & Simmons elexica, *Liquidated Damages in General Purchasing Terms* (2017).

to be unenforceable penalties if (a) they are extravagant or unconscionable comparing with the likely damage caused by the breach, (b) they purport to deter a breach of contract and (c) they are not a genuine pre-estimate of loss.⁹⁵ The common law on penalty clauses was established a little over 100 years ago. In 2015, the UK Supreme Court indicated some progress in this area of law by considering again the law of penalties and the validity of penalty clauses. The chance for this reconsideration was given on the occasion of the conjoined appeals in *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis*.⁹⁶ It clarified that a clause is not disproportionate to the innocent party's legitimate interests, despite its penal nature when it intends to deter a breach of contract and though it may not be representative of the actual loss that the innocent party sustained, as long as the clause has been the object of negotiations between contracting parties of comparable bargaining power and it has been scrutinised by their legal advisers.⁹⁷ On the other hand, in civil law countries, penalty clauses are allowed, as long as the penalty amount is not manifestly excessive.⁹⁸ In these countries, traditionally there used to be no distinction between liquidated damages and penalty clauses, but following the precedent of the German Civil Code, there is a distinction between them and they also provide for mitigation of penalty clauses if they are "disproportionate or excessively high/manifestly excessive".⁹⁹

To make things worse, the lack of uniform application of liquidated damages clauses can be found even in the context of a single EU Member State and jurisdiction. In Germany, for instance, there are several uncertainties regarding liquidated damages clauses. There is still no consensus regarding the validity of contractual clauses providing for a lump sum as compensation in case of competition law infringements. In its judgment on 13 April 2016, the regional court of Potsdam¹⁰⁰ held that purchasing terms contemplating a lump sum amount of damages amounting to 15 per cent of the contract value in all cases, regardless of the specific type and intensity of the competition law infringement that took place, are too wide in scope and so they fail to fulfill the standard of damages expected under normal circumstances.¹⁰¹ This judgment was further appealed to the Federal Supreme Court but the appeal was withdrawn, leaving many questions unanswered.¹⁰²

Another reason why liquidated damages clauses are not standard in a public contract is that they limit the damages to which the claimant is entitled and that the contract enforcement rate is generally low. Contract law matters a lot less than expected, as non-contractual enforcement mechanisms such as reputation and loss of future revenue can play a really important role for contracting parties.¹⁰³ This can be explained by the fact that contracting parties generally avoid courts in order to enforce contractual obligations, for fear that they will pay a lot of money for legal fees, while in the end the case may not be resolved in their

⁹⁵ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (1915) A.C. 70, 86–88.

⁹⁶ [2015] UKSC 67.

⁹⁷ F. Elliott, *The Brand New Law on Liquidated Damages*, November 2015, available at: www.fenwickelliott.com/research-insight/newsletters/insight/53 [Accessed 5 September 2018].

⁹⁸ S. Hoeve-Ouchan and G. de Rosa, *Liquidated Damages and Penalty Clauses: A Common Law and Civil Law Perspective*, July 2013, available at: www.internationallawoffice.com/Newsletters/Company-Commercial/Singapore/VoskampLawyers/Liquidated-damages-and-penalty-clauses-a-common-law-and-civil-law-perspective# [Accessed 5 September 2018]; J.F. McKenna and Reed Smith LLP, *Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison - The Critical Path*, available at: www.reedsmith.com/en/perspectives/2008/05/the-critical-path [Accessed 5 September 2018].

⁹⁹ The terminology used in order to describe when penalty clauses can be mitigated is different from civil code to civil code. Hoeve-Ouchan and de Rosa, *Liquidated Damages and Penalty Clauses: A Common Law and Civil Law Perspective* (2013); J.F. McKenna and Reed Smith LLP, *Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison - The Critical Path*, 2008.

¹⁰⁰ LG Potsdam, 1304.2016, Az. 2 O 23/15.

¹⁰¹ Global Legal Insights, *Germany, Cartels 2017*, available at: www.globallegalinsights.com/practice-areas/cartels/global-legal-insights---cartels-5th-ed./germany [Accessed 5 September 2018]; P. Meyer and M. Gramsch, "The Regional Court of Potsdam finds a clause in the procurement terms of a German municipality requiring liquidated damages of 15 per cent to be paid if the supplier participates in anti-competitive behaviour to be unlawful (Suppliers of fire engines)" *e-Competitions Bulletin*, Art. No. 77233 (November 2014).

¹⁰² Meyer and Gramsch, "The Regional Court of Potsdam finds a clause in the procurement terms of a German municipality requiring liquidated damages of 15 per cent to be paid if the supplier participates in anti-competitive behaviour to be unlawful (Suppliers of fire engines)" (2014), p.2.

¹⁰³ S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55–67.

favour, “despite the significant attention paid to drafting, amending and consulting formal contracts”.¹⁰⁴ Under these circumstances, “litigation is almost always an empty threat”.¹⁰⁵

In addition to the above, as regards public contracts in particular, corruption of the civil servants who are in charge of the contract as well as the negative effects of litigation on the continuation of the buyer-supplier relationship may prevent the effective enforcement of contractual remedies, such as liquidated damages clauses, in the domain of public procurement.¹⁰⁶ As HM Treasury characteristically mentioned in one of its reports about private finance initiatives (“PFIs”)¹⁰⁷ “there exists anecdotal evidence that the public sector can sometimes be reluctant to levy deductions for fear of spoiling the relationship with the private sector”.¹⁰⁸ In Italy, according to third party inspections commissioned by the Italian Public Procurement Agency (Consip), “in the period 2005-2008 on a total of 4095 inspections a total of 1455 contractual infringements by the contractor were ascertained, but contractual remedies/penalties were only exercised in 64 of those cases, i.e. against about 4.42 per cent of the infringements”.¹⁰⁹

In view of the above, liquidated damages clauses could be a good alternative remedy that would help contracting authorities to receive compensation and overcome the problems of proof and evidence that they currently face under the new Damages Directive, as long as there is a uniform approach regarding the extent of their validity. Otherwise there is always the risk that liquidated damage clauses remain unapplied and may be rejected by the court.

6. Conclusions

Competitive tender processes in public procurement contribute to greater economic efficiency and particularly to lower prices for the award of public contracts, saving money for the taxpayer. However, bid rigging, an anti-competitive activity that is widespread in public procurement markets, may artificially raise the prices of goods or services procured, placing an unnecessary burden on public finances as well as on taxpayers that ultimately pay for them. For this reason, the possibility for deceived contracting authorities to seek damages for the rigged goods or services for which they have overpaid is of great significance, especially in a time of economic crisis in which attempts are made to reduce public expenditure and secure budget savings.

Before the new Damages Directive, the major problems that victims of competition law infringements usually experienced when asking for compensation were the difficulty of access to the evidence that was necessary for proving a case, the lack of clear rules on the passing-on defence, the calculation of damages and the rules concerning the costs of a damages action. The Directive sought to overcome these issues by introducing a number of key provisions. This article investigated whether these key provisions adopted by the new Damages Directive were able to overcome the hurdles that contracting authorities usually face when seeking damages for bid rigging. The article has demonstrated a number of respects in which the new Damages Directive has failed to put contracting authorities in a particularly good position to recover damages for bid rigging. Though the new Damages Directive has several strong points, such as the harmonisation of evidential presumptions and procedural requirements, the explicit rule of joint and several liability in the case of multiple tortfeasors as well as a series of provisions that

¹⁰⁴ G. Hadfield and I. Bozovic, “Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation” (2016) 5 *Wisconsin Law Review* 996, 999.

¹⁰⁵ Hadfield and Bozovic, “Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation” (2016) 5 *Wisconsin Law Review* 1000.

¹⁰⁶ G. Spagnolo, Reputation, Competition and Entry in Procurement (2012) 30(3) *International Journal of Industrial Organization* 291–296, at 292.

¹⁰⁷ PFI projects are arrangements where the government department responsible for the delivery of a public service entrusts the delivery to the private sector under a contract. See more in P. Braun, *The Practical Impact of E.U. Public Procurement Law on PFI Procurement Practice in the United Kingdom*, available at: www.nottingham.ac.uk/pprg/documentsarchive/phdtheses/phd_peter_braun_.pdf [Accessed 5 September 2018].

¹⁰⁸ HM Treasury “*PFI: Strengthening Long-Term Partnerships*”, March 2006, para.4.63.

¹⁰⁹ E. Iossa and G. Spagnolo, *Contracts as Threats: On a Rationale for Rewarding A while Hoping for B* (2011), CEPR Discussion Articles No. 8195, fn.1.

facilitate the evidence of causal link, practically speaking, these steps are not adequate to boost the number of damage actions initiated by public contracting authorities. This may be done only if attempts are made to deal with the main reasons why contracting authorities are discouraged from lodging actions for damages against bid riggers.

After identifying the challenges that arise for public authorities in bringing damages claims for bid rigging under the new Damages Directive, some recommendations were made to address the problem of high litigation costs, the concern that the initiation of litigation may spoil the buyer-supplier relationship and the difficulty in specifying and quantifying the antitrust harm suffered by contracting authorities. This article has argued that a “Competition Damages Litigation Fund” is needed, which would enable the collection and saving of money with the aim that the deceived contracting authorities may seek damages for the rigged goods or services overpaid. The restriction on compensation of the defendant’s fees to the statutory attorney fees was an extra proposal for curtailing litigation costs. The assignment of public authorities’ damages claims to a third party that would also have an interest to sue was another suggestion in order to overcome the fear of bad cooperative relationships with suppliers in future. Finally, the article argued that the introduction of statutory or pre-established damages, meaning a lump sum calculated on the basis of pre-determined factors, is a good option for contracting authorities to overcome the difficulty in specifying and quantifying the financial harm.

In the further alternative, the article investigated whether an alternative remedy to classic tort law litigation could enable contracting authorities to get compensated more easily in respect of proof and evidence. The article distinguished liquidated damages clauses as a good alternative based on contractual principles because public bodies are free from the expense and burden of proving their loss and enforcing their claims. Nonetheless, until there is a uniform approach regarding their validity, there is always the risk of remaining unapplied and being rejected by the court.

In view of the above analysis, the development of damages claims brought by public authorities should be seen as an adjunct to the current state of antitrust enforcement in the EU for the reasons explained in the introduction of the article. Even if the European legislator put its best foot forward and tried to deal with several procedural problems in private enforcement, it has been reluctant to carry it through. The new Damages Directive does not seem to be effective enough for the legal reparation of contracting authorities as private litigants. Before its enactment, procurement entities were still able to get compensation by means of private actions under the relevant national tort laws, even in the shadow of the obstacles identified above. As a result, private enforcement in the domain of public procurement currently operates in the slow lane and the author believes that until the Commission reviews the new Damages Directive, submits its report and suggests more amendments that would further encourage public authorities to sue bidding rings for damages, settlements should probably be preferred in the domain of public procurement. The solutions given in the section on recommendations, as well as the alternative compensatory remedy suggested in the article, could be a good starting point for the future changes that need to be made.