iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

PRELIMINARY MARKET CONSULTATIONS IN INNOVATION PROCUREMENT: A PRINCIPLED APPROACH AND INCENTIVES FOR ANTICOMPETITIVE BEHAVIOURS

Antonio MIÑO LÓPEZ[1]

INDEX

[1] Lawyer of the Xunta of Galicia. Former Head of Investigation for the Competition Authority of Galicia. Professor (by contract) of Public Law, University of Vigo.

1. FUNDAMENTALS OF PUBLIC MARKET CONSULTATIONS

1.1. An ancillary figure

A preliminary market consultation (PMC), whether understood as an institution or as a process, is bound up to the development of a future tender. In European Union Law, a threshold decides where tenders do or do not abide by the Directives on public procurement through the national laws enacted for their implementation. However, the unanimous doctrine from the European Court of Justice claims that every procedure must respect a well-known bunch of principles, which act both as inspiration and as boundaries. These principles encircle the whole fabric of public procurement. So, they must spread to other figures that – as preparatory or ancillary- play a role in the development of a tender or in the implementation of a contract. That is the only way for a procurement to follow the straight line without bringing from the past the seeds for a future nullification.

Directive 2014/24 on public procurement devotes Article 40 to PMC. It lodges a minute regulation, which barely picks the essence of the figure. Despite its paucity, the article quotes three principles that are mandatory for the contracting authorities when they come to designing and implementing any PMC: the principles of non-discrimination, transparency and competition.

The present paper holds that these principles have their own scope in PMCs. This can be different from the one they possess during the contracting procedures. The difference comes from three PMC's features: it is a pre-procedural, not-compulsory and not-decision-making stage. Such sum of attributes justifies to leave their over-the-minimum application in the hands of any specific contracting authority. With this insurmountable limit, purchasers have a free hand to make a general call for advice or restrict the query to a limited number of entities. They are entitled to summon or miss market operators, as well.

Last, they are to decide the extension for the consulted people of the duty to provide information, the level of confidentiality and the degree of transparency.

The notion of preliminary market consultations (PMC) roughly encompasses a multi-faceted query whereby a contracting authority asks for experts and market operators to offer their contribution in order to make up the object of the contract and to draw other features of the procedure.

To launch a PCM prior to engage in a tender seems a rational behaviour for any standard contracting entity. Therefore, this figure is by no means an oddity in the European states public procurement systems. It is neither a new born idea, nor an ignored technique before the EU regulated it in the latest Directives on public procurement. Obviously, contracting authorities have usually put in contact with all those who possessed the knowledge and expertise for helping them to draw a tender. In particular, for contractual activities which are new, technological or hard to define. Those contacts have taken different ways. Informality presided over most of the communications, ranging from personal or telephone chats to e-mail exchanges among the civil servants and the third parties involved in the consultations.

Pre-procedural contacts have never been restricted to any particular typology of contract. For obvious reasons, the more complex or innovative procurements demand a finer expert advice. But no classical category demands *per se* further support than the others. Contracting unit's previous knowledge and experience is the rule for the typical public contracts. This factor and the singularity of each procedure are the conditions for a PMC to be necessary, convenient or optional. Since every rule has its exception, the services contracts linked to innovative procurement - such as pre-commercial procurement and the association for innovation- deserve a particular treatment. Both types are the most obvious examples of PMC bound up to a procedure. It looks inconceivable to start an innovative tender without conducting a previous query (specially, for pre-commercial procedure).

Public procurement of innovation requires technical experts and specific markets difficult to gather *in-house* by a public buyer in many cases. Preliminary market consultations play the role of (an effective) instrument for the preparation of innovative procedures where the contracting authority lacks such experience or specific expertise in the subject matter of the contract.

Thus, PMC is an essential action for a public procurement of innovation to success given the complexity of the archetypical contracts. Some of the products may require completely innovative solutions; what triggers the articulation of a technical dialogue between public buyers and companies before the publication of the tender. In the field of high technology, buyers may (roughly) know their needs but not what is the best technical solution to apply. As a result, a discussion and a technical dialogue on the contract between them and the would-be suppliers shows as a cooperated attempt to sort out the mess. This enhanced debate enriches the first phase (definition of ideas), before the start of the contract awarding, always respecting the principle of equal treatment and without restricting competition[2].

However, to circumscribe the PMC to the pre-procedural phase of innovative procurement is a mistake often denied by real examples. Neither the Directive nor the three studied transposition laws prohibit that a public purchaser starts or resumes a consultation to the market during the tender. It is simply a tool in her hands. Notwithstanding, procedural PMCs have to develop with considerable more care for principles of transparency and competition. The reason lies in the fact that a PMC developed during a tender is part of this competitive process and must abide by its seminal rules. The tender ends with a sole winner and multiple losers. The ultimate goal of a consultation in this moment is to help the contracting authority to award the contract. So, it issubmitted to the same principles and to the same degree of rigour than the procurement.

[2] Guía de buenas prácticas para favorecer la contratación pública de innovación en Galicia (*Guide to good practices to promote public procurement of innovation in Galicia*), Xunta de Galicia, 2015.

1.2. Primary and secondary goals

The main goal for a contracting authority to start a -complex and laborious- PMC is to request information and guide about how to bring the contracting procedure to a successful conclusion[3]. Innovative procurement is driving PMC beyond their traditional framework. The reason is that this new category of public contracts raises singular issues, arisen out of 'fear to the new' and from the stress for updating the contract to the latest state-of-the-art in technology. In principle, contracting authorities turn to PMCs because of their inability to describe the contract object, to identify the best selection criteria or the ablest technical solutions. But it is not unusual that the PMC covers up the contracting body's helplessness about how to accurately define the public needs they are compelled to satisfy.

The expansive role achieves its apex where a public purchaser goes blind to a PMC, waiting for it to advise about the 'what' (necessities) and the 'how' ('procedure'). Graphically speaking, the completion of a successful consultation enlightens the contracting authority to come to all kind of conclusions. So, the lack of feasible solutions may move it to see inadvisable to launch a contracting procedure. If discussions in the PMC indicate that there are workable solutions already in the market, the contracting body may well opt for the 'traditional' procurement. Whether the necessary technology is not available in the market, but could be achieved with minimal adaptations and developments, the chosen option will be the innovation partnership. But if it is necessary to develop new technology, non-existent to this day or that provides new solutions or improvements, pre-

[3] GIMENO FELIU, JOSÉ-MARÍA, "La corrupción en la contratación pública", in CASTRO MORENO, ABRAHAM y OTERO GONZÁLEZ, PILAR (ed.) *Prevención y tratamiento punitivo de la corrupción en la contratación pública y privada*, Dykinson, page 26.

commercial procurement the choice must be. It follows that the market consultation is carried out regardless the type of procedure used in a possible adjudication[4].

Other secondary goals are present in PMCs, as well. They are natural outcomes linked to innovative procurement. Among them, the feedback among the industry and the contracting body. This interaction will improve the implementation of the contract as well as strengthen new industrial and commercial sectors. The sheer fact of being consulted in a PMC may easily stimulate experts and firms to channel financial and labour resources towards new or innovative products. Perhaps, the innovation is only useful to public entities. But there is a chance that it becomes a new line of market business for the firms. Last, PMC and innovative procurement foster technological, logistical and managerial development, which is in itself a relevant economic contribution for a society.

Linked to all the previous features, the European regulation this institution has been designed with the primary goal of preventing the infringement of non discrimination and competition when implementing any particular PMC[5].

[4] Preliminary procurement of innovation, Guidance for Public Authorities, PPI Platform Consortium, January, 2014, pages 9 and 15.

[5] VILLALBA PÉREZ, FRANCISCA. "El principio de eficiencia, motor de la reforma normativa de la contratación del sector público ", in VIEIRA DE ANDRADE, JÓSE CARLOS and TAVARES DA SILVA, SUZANA, *As reformas do sector público. Perspectiva ibérica no contexto pós-crise*, Imprenta da Universidade de Coimbra, 2017, p. 209.

1.3. Regulations

1.3.1. Precedents

The figure of "preliminary market consultations" is neither a novelty in EU public procurement nor in national legislations. Although the regulation of PMCs has been considered one of the main innovations of *Directive 2014/23 of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC*, regarding the preparation of public contracts, it must be acknowledged that there was some history behind.

The most accurate precedent of PMC is the 'technical dialogue', recognized in Community law by recital 8 of *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, supply and service contracts*. That recital provided that "*Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition.*".

Even before the translation to a EU Directive, the technical dialogue had been recommended by the European Commission. In its Communication of 27 November 1996 the Commission revealed that a technical dialogue between contracting authorities and private companies is advisable, given the complexity of most projects, some of which may require entirely novel solutions (point 5.23). The Communication of 11 March 1998 emphasized that technical dialogue is a procedure whereby a contracting authority initiates technical discussions with potential suppliers at the stage of the definition of requirements but before the start of the procurement procedure. Technical dialogue must always respect equal treatment and cannot restrict competition (point 10 of the Communication).

Although these regulatory precedents existed in the European context and legislators were able to establish the basic conditions for the efficient use of "technical

dialogues", the application of this instrument by EU Member States was scarce. As far as Spain is concerned it was not introduced by any law.

1.3.1. Directive 2014/24/ce and three transposition laws

As said above, Article 40 of Directive 2014/24 sets out a minimum regulation of PMC. So, it states that:

> *Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.*
>
> *For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.*

Article 40 stresses several several features of public market consultations. On the first hand, it seems to circumscribe PMC to the preparatory phase and, as such, it can only be managed before launching the procedure. However, the article does not prohibit that a contracting authority goes on a query during the development of the tender. In that case, the consultation is not 'preliminary' but built-in the procedure. As such, the public procurement principles are full-operating.

On the second hand, Article 40 does not impose the duty to make a PMC before starting any tender. In other words, the Directive considers that it is an optional tool. All the decisions- design, start and management- are left at the discretion of the contracting unit .

Third, PMC plays a twofold function, preparatory of the procedure and informative to possible bidders. Concerning the public purchaser, the preliminary query is intended at providing workable information on multiple topics of the procurement. It has to decide the width of the PMC. Depending on its previous knowledge and the singularity of the contract, the experts, independent authorities and market operators should be allowed to

say a word over topics such as the necessity of the procurement, the most appropriate procedure and the selection criteria. Taking part in a PMC is presumably of the utmost importance for the third category of advisors. Market operators in a PMC are possible bidders in the subsequent tender. Their two-staged participation can be an issue for the correct implementation of non-discrimination and competition principles in the procurement. Article 41 of Directive 2014/24 deals with the twofold nature of the competing firms in the PMC and in the ulterior tender.

On the fourth hand, the relationship of advisors mentioned in Article 40 - independent authorities, experts and market operators- is exemplary . Therefore, it does not shut down the gate for other types of entities to participate in the query.

Last, the sketched treatment of this figure by the Directive leaves the field open for the national transposition laws to decide on their definition, extension and boundaries. Apart from the general role of PMCs, respect for competition, non-discrimination and transparency principles is the only limit an internal law is forbidden to overstep, as the stretched Spanish Draft shows.

One of the three categories of advisors quoted in Article 40 are the economic operators present in the market of the public procurement at stake. They may easily present a bid to the tender. The importance of a PMC for the subsequent tender may work as a catalyser for the participants to agree or coordinate their responses to the query. They would take on this behaviour with the view of rigging the tender. But the contrary situation is also possible. Those ablest consulted operators will influence the contracting authority during the preparation of the tender. This will likely make their way easier to compete for the contract.

National transposition laws have adopted this feature, but they have also added other elements.

In Spain, The Draft of the Public Contracting Law (DPCL) devotes Article 115 to preliminary market consultations. The precept, which seeks to transpose Article 40 of the Directive, was coherently included in the section devoted to "*the preparation of public*

administration contracts". It states that contracting authorities may carry out market research and consult the economic operators active therein in order to properly prepare the invitation to tender and to inform the concerned economic operators of their plans and the requirements they have to meet to submit a bid. Contracting authorities may rely on the advice of third parties, who may be experts or independent authorities, professional associations, sectoral representatives or even, exceptionally, economic operators active in the market. These actions will be given, as far as possible, on the Internet, so that all potential stakeholders can access and be able to make contributions[6].

The advice may be used by the contracting authority to plan the tender procedure and also during the tender procedure, provided that this does not have the effect of distorting competition or violating the principles of non-discrimination and transparency. Consultations cannot result in a contractual object so specific and delimited that only one of the consulted meets the technical characteristics. The results of the studies and consultations should, where appropriate, be concretized in the introduction of generic characteristics, general requirements or abstract formulas that ensure a better satisfaction of public interests, without in any case, the consultations carried out may have advantages over the award of the contract for the companies participating in the contracts.

Where the contracting authority has carried out the consultations referred to in this Article, the actions taken shall be recorded in a report. The report will quote the studies carried out and their authors, the entities consulted, the questions that have been asked and the answers to them. This report will be part of the recruitment file. In no case during the consultation process, the public purchaser may disclose to the participants the solutions proposed by the other participants, the former is the only one that knows them in its

[6] For a thorough studio of PCM in the impending Spanish Law on Public Contracts, see VALCÁRCEL FERNÁNDEZ, PATRICIA, "Las consultas preliminares del mercado como mecanismo para favorecer las "compras públicas inteligentes", forthcoming.

entirety, and it will weigh them and use them, where appropriate, when preparing the bidding process correctly.

In the United Kingdom, the Public Contracts Regulation 2015 devotes Article 40 to this figure. It copies Article 40 of Directive 2014, and adds nothing. Last, in France, Article 4 of Decree No 2016-360 of 25 March 2016 on public procurement does not add anything remarkable to Article 40 of Directive. In fact, it estates that: "*In order to prepare for the award of a public contract, the buyer may consult or carry out market studies, solicit opinions or inform economic operators of his project and requirements.*
The results of these studies and preliminary exchanges may be used by the buyer, provided that they do not distort competition and do not lead to a violation of the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures".

1.3.3. Why a full regulation is not the best option

The acknowledged importance of PCM for the design and success of innovative procurement procedures does not justify submitting it to statutory rules from the EU Commission or national authorities. On the contrary, a rigid code would entail the failure of this tool. (First), developing a market consultation is not compulsory but a faculty for contracting authorities. Therefore, (second) each PCM should be tailored on the view of the case.

The above reasons do not mean that PCM must be inordinate and 'anarchic'. On the contrary, no contracting body should set out managing a market consultation without a sound and well-established 'table of contents'. Two sets of rules are suitable as a basis for consultations: 'soft law' from public authorities and self-regulation from the concerned contracting authority.

First, EU and national authorities are entitled to provide recommendations to those contracting entities which engage in innovative procurement. Soft law on PCM would take the form of guidelines and offer two types of contents: a code of good practices and a list of malpractices. The effectiveness depends to a large extent on the authorities' ability to lay out a workable and versatile scheme based on successful cases of innovative procurement. Two other factors are essential for the guidelines to be useful: dissemination (webpages, etc) and quick adaptation to changes in innovative procurement.

Second, any contracting authority may (and must) set a compound of requirements to rule on PCMs. This 'hard law' obliges all those who are to be consulted. Mainly, it should rein in the operators interested in taking part in innovative procurement. Since they are actual rivals in the market and would-be bidders in future tenders, the rules have to ensure that their advice is autonomous and will not coalesce into future collusive bids.

1.4. Constituent parts

1.4.1. PMC as a process

Even though it is not the core of this study, it is advisable to sketch several elements of the PMC taken as a process. In that concept, a regular PMC follows the next three steps[7]:

1. Decide the scope of consultation (*Decide what information needs to be gathered and shared and which market players to target:* 1) Initial research and needs assessment should identify area(s) of focus and specific user needs, as well as the potential innovations which might meet them . 2) Further information may be needed to develop a

[7] Guidance for public authorities on Public Procurement of Innovation, Procurement of Innovation Platform (www.innovation-procurement.org.), p. 19.

specification and choose an appropriate procurement procedure. 3) Analyse the market to determine which tiers to target (e.g. manufacturers, service providers, subcontractors, systems integrators, researchers and third sector etc.)

2. Choose format and plan (*Choose the best format for the consultation and prepare the resources and people involved*): 1) Determine how best to engage the suppliers / stakeholders identified. 2)Consider using a questionnaire or survey, written submissions, face-to-face, phone or web-based meetings, open days and supplier demonstrations. 3) Be clear on the timelines and resources needed to make it work. 4)Prepare documents to be circulated as part of the consultation, e.g. a *"prospectus"*

3. Consult and capture information *Conduct the consultation, keeping good records and ensuring equal treatment***)**: 1) Publish a *Prior Information Notice* (PIN), publicise the consultation on relevant industry or other websites, and notify suppliers directly wherever possible. 2) Keep records of all contact and be prepared to follow up with respondents. 3) Prepare a summary of the findings and implications for procurement. Be sensitive towards the confidentiality of any information provided by respondents.

Before launching a procurement process, consider what measures must be taken to avoid any distortion of competition arising from the undertakings who have been involved in preliminary market consultation. For example, the same information should be shared with other operators and adequate time allowed for preparation of tenders. Exclusion of those involved in the consultation can only be done if there is no other means to ensure equal treatment, and the operators involved must be given a chance to disprove this.

1.4.2. Formats

Consultations may comprise a plurality of manifestations and the interlocutors have a very varied nature. Moreover, the different manifestations can be used cumulatively or alternatively. Thus, they may consist of: 'Meet-the-Market event' (MTM), market

surveys, industrial fairs (it does not require any kind of organizational effort on the part of the purchasing entity), open days, publication of annual public procurement plans in official or/and commercial journals and on Internet (this option is very attractive because it does not involve a great organizational effort or an added cost); the provision of information directly through governmental websites (Public Procurement Platforms, or even if information becomes fragmented and makes transparency difficult, the contracting authority's Profile), webinars, electronic platforms, etc.

A PMC can also be carried out through a variety of methods, such as commissioning analyses or reports on the experiences of other countries, developing documents, consulting experts and scientists, or promoting discussion of public bodies with potential contractors. In addition to the consultations with potential participants, public purchasers can prepare tenders through consultations aimed at research staff, scientists, professional associations, specialized public authorities, centers of knowledge. In general, queries should spread to any person and institution that enable the contracting authorities to gain a better knowledge of the market where the contract is to be developed, provided that such actions do not distort competition and do not give rise to violations of the principles of non-discrimination and transparency.

1.4.3. Advisors

The approach to this topic in Article 40 of Directive 2014/24 and in the three national implementations seen above can be summarized in two assertions: the specific mention of three categories of subjects and the list is not *numerus clausus*.

The articles at stake refer to three types of interlocutors: experts, independent authorities and market participants. As regards as the experts, their independence vis-á-vis the economic operators competing in the market appears as an insurmountable precondition. Only those persons who do not belong or are not related to the would-be bidders in the future tender should be entitled to sign their contribution as "experts". The ones linked to the latter will take part in the query as staff or representatives of the market

participants. They can be consulted as well; but the query is subjected to all the obvious connotations of the third category.

The word "independent authorities" names all public institutions able to give support to the innovative contracting bodies. Article 40 does require they to be independent. It is unnecessary. By definition, laws ensure the independence of every public institution. Among them, the most evident ones are other innovative contracting entities that had successfully dealt with (similar) innovative procedures. But any other type of authority is admissible; for instance, regulatory agencies, scientific institutions, and even Ministries.

"Market participants" are the last quoted as advisors. The concept admits several meanings, depending on how the word 'market' be understood. If referred to any economic activity, then any firm can be consulted. The latter does not seem to be the meaning wanted by the Directive. It is more appropriate to narrow the concept in favour of firms competing in a market linked to the subsequent innovative tender. Preferably, the same one. However, this restricted option assumes that the public purchaser has a good knowledge of this market. The real situation may easily be the opposite. For instance, in the purest pre-commercial procedures, it knows the useless current means, its lacks and necessities. Perhaps it has even a pretty good idea on how to meet them. But it does ignore the technological, managerial or industrial ways for this idea to become real. In these cases, contracting authorities will take on a loose market definition. Therefore, they will probably make an overstretching call for advice.

The market operators participating in a PMC cannot be forbidden to submit their bids to the future tender. To avoid possible conflicts of interests or the infringement of the competition and non-discrimination principles, Article 41 of Directive set two rules. First, the contracting authority cannot prohibit them from bidding in the tender on the sole basis of their role in the PMC. They must be given the chance to show that their previous advice does not put them unfairly on better conditions that the other bidders. Second, if the opposite is demonstrated, the public purchaser has to expel him of the tender. Article 41 will be studied below.

Art 115 of the Spanish DPCL imposes two additional boundaries to market participants. The first one is that the operators required to give advice must be "active" in the market. That precision is reasonable since only those firms currently present in the concerned market would be capable of providing workable suggestion. Moreover, it does not prevent the authority from appealing to former market operators. They could be included in the group of experts.

The second restriction is more important. Article 115 states that market operators can be called on 'exceptional cases'. They appear to be designed as a subsidiary solution where previous consultations to experts and institutions failed. It seems to mean that, only when consultations to the independent figures have been carried out and they delivered no workable solution, the contracting body can call up actual market operators. The Spanish legislator probably set that rule as a stronghold against competition infringements during a PMC. However, it looks like a huge mistake, contrary to reason and to fact. In practice, innovative authorities appeal to market participants in PMCs as the only way to ensure the participation of workable bids in the subsequent tenders.

As said above, Article 40 of the Directive quotes an exemplary relationship of advisors (independent authorities, experts and market operators). Therefore, it does not shut the gate for other types of persons or entities to participate in the query. For example, other contracting bodies, operators that already quitted the market at stake or trade in different markets.

2. PRINCIPLES OF PUBLIC PROCUREMENT INVOLVED IN PCM: NON-DISCRIMINATION, TRANSPARENCY AND COMPETITION

1.1. Principle of non-discrimination

For the *Guidance*, the application of this principle is directly linked to the principle of competition. The new Directive states that a preliminary market consultation can be carried out provided that it does not distort any later competition. By applying the same interpretation criteria that are pervasive for the procedural phase (the tender), that statement can be understood as imposing on the contracting authority the duty of requesting the participation in the PMC to as many experts, independent authorities and operators as possible. With this meaning, the Treaty principles of transparency and non-discrimination apply to preliminary market consultations; bring with them the principle of publicity and all three reach the high standard universally accepted for public procurement[8].

Principles of equal treatment and transparency are really two facets of the principle of non-discrimination. Equal treatment requires that comparable situations are not treated differently and that different situations are not treated similarly unless such a difference or similarity in treatment can be justified objectively[9]. A contracting authority must act fairly in the course of the public procurement; all competitors must have an equal opportunity to compete for the contract. The principle of transparency requires a transparent

[8] For a thorough study on this principle's role in public procurement and its links with the other principles, see NIELSEN, RUTH, *Discrimination and equality in public procurement*, http://arbetsratt.juridicum.su.se/filer/pdf/klaw46/discrimination.procurement.pdf.

[9] See, e.g., Case C-13/63, Italy v Commission, [1963] ECR 165 at paragraph III, (4)(a); Case C-306/93, SMW Winzersekt v Land Rheinland-Pfalz, [1994] ECR I-5555 at paragraph 30

decision-making process in order to show that the purchaser is following the principle of equal treatment. Although the contracting authority remains free to define the subject of the contract in any way that meets the public's needs, including through technical specifications and award criteria promoting horizontal policies, it must do so in a way to ensure transparency in awarding the contract.

On a European Union basis, the principle of non-discrimination prohibits all unreasonable difference based on nationality, irrespective the type or level of the contract. No contracting entity may, for example, give preference to a local company simply because it is located in the municipality[10]. Similarly, the principle of equal treatment requires that all suppliers be treated equally. All suppliers involved in a procurement procedure must, for example, be given the same information at the same time.

Regarding PMCs, Article 40 of Directive, taken literally, means that an innovative contracting authority will fulfil the principle of non-discrimination during the PMC provided that it imposes on the consulted firms no unfair difference based on their nationality. Moreover, the public purchaser has to hand out all the information needed to submit a successful tender between the participants. Then, it is supposed that the principle is satisfied where all the participants in this phase belong to the same EU member state. Since Article 40 seems not to impose on contracting authorities the obligation to make '*EU wide*' invitations, no discrimination will exist whether no foreigner operator is admitted to the PMC, provided that the same-nation candidates are treated on equal terms. That circumstance would explain why the principle of publicity is not quoted in Article 40.

[10] The ECJ is crystal-clear about the universal effectiveness of the non discrimination principle in plenty of the judgements. For example, *Teleaustria-Telefonadress* (7 December 2000, C-324/98) when states that "*In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular*."

The findings put forth in the previous paragraphs look as straight and indisputable as a rule of three. However, this formal and nation-wide interpretation of the non-discrimination principle is fallacious. Not only does it reduce the scope of collaborating firms and is contradictory with the sheer essence of innovative procurement (new ideas or technologies demand the best contributions). What is more significant, it would appear that the own Directive would exempt from a whole category of contracts the seminal principle of publicity, which ensures the materialization of the internal market on public procurement.

A rational and imperative rule on this significant topic is hard to find due to the lack of an objective threshold. Two ways appear as rules of thumb. The first one is to use the same threshold that Article 4 of Directive 2014/24 sets out so as to decide which procurements the Directive is applied to. The alternative solution is to figure out that every preliminary market consultation has to be published in the Official Journal of the European Union.

The first option seems to be more accurate for PMCs preparatory of innovation partnerships, since this one is a type of procurement regulated in the Directive. Regarding pre-commercial procurement, the quantitative threshold is by no means workable, as long as as the procedural documents decide it. But the nature of PCP makes the second option more suitable. After all, in a sheer PCP a great deal of elements is ignored by the contracting authority. The definition of the idea, the solution, the prototype and the costs of the project call for every feasible contribution. Since most of these cases are related to top-of-the-league technological sectors, it is inconceivable that the contracting authorities engaged in PCP decide to restrict international participation in PMCs. Since PCP is not regulated at an EU level, Commission's soft law and contracting authorities' own rules have the upper hand to choose a solution.

Both rules of thumb admit a significant number of exceptions where the principles at stake only work in abstract. The contracting body has always in its hands the power to make a universal call for advice, by publishing a notice in an official journal. But the concurrence of factors ("barriers") reduces the number of participant in the PMC. An

exemplificative relation distinguishes among legal barriers, business barriers and geographical barriers.

The archetypical legal barrier for a general entry in the PMC is the ownership of IP rights. Where only one firm owns a patented product or technology lacking any alternative and, so, it is necessary for the innovative contract to be implemented, all the operators but the patent's holder have no role in the PMC. Of course, the innovative contract may have among its goals to find a substitute for the patented product. This is generally a difficult and long lasting task. In many sectors, the presence of standard essential patents will make that goal a never ending labyrinth. And even if it is found, the patent incumbent will possibly tackle a patent war.

Business barriers relate to the corporate purpose, capacities, experience and other features which make the difference between capable or non-capable firms for the contract. The more innovative the procurement the less companies qualifies for implementing it. Principles of non-discrimination, transparency and publicity are not infringed when the Contracting authorities restrict the calls and exclude those firms alien to the contract and incapable to deliver sensible recommendations. Last, geographic or territorial barriers may dissuade certain operators whose business is mostly focused far from the contracting authority's jurisdiction.

As said above, the presence of one or more of these barriers does not ban the contracting authority to look for the widest participation in the PMC (there is no barrier on the offer side since contracting authorities enjoy unilateral power over official journals). However, they reduce the number of *de facto* participants in the PMC, and also the probable number of feasible solutions and, at the end, the effectiveness of the contract.

Anyway, the principle of non-discrimination demands that where the contracting authority sets requirements as pre-conditions to participate in a PMCs, all the firms that fulfil them must be admitted in. Those requirements must be suitable, proportionate and accept equivalent solutions to achieve the result the innovation procurement pursues.

Principle of suitability is not met where the participant does not ensure that the public purchaser will enjoy the pacific use of the product or service of the contract.

2.2. Principle of transparency

The principle of transparency derives directly from the freedoms of establishment and the provision of services (Articles 49 and 56 TFEU) and from the principles of equal treatment and non-discrimination between tenderers[11]. They all impose an obligation of transparency on the contracting body, which must guarantee - for the benefit of all potential tenderers- an adequate publicity to open up to competition the award of services and to monitor the impartiality of award procedures.

This principle is absolutely indisputable in European public procurement due to its role in the fight against corruption[12]. A transparent procedure leaves little room for discretion to the contracting body, thus reducing the incentives to bribe its members or to incur corruption[13]. Their manifestations in the contracting procedure are multiple, but they can be summarized in a single maxim: the right of the interested parties (mainly, the

[11] On the basis and contents of transparency in public procurement, see BOVIS, CHRISTOPHER, *EU Public Procurement Law*, 2nd ed. Edgar Elgar, 2012, page 220 and on.

[12] OSEI-AFOAKWA, KOFI, "How Relevant is the Principle of Transparency in Public Procurement? (March 31, 2014). *Developing Country Studies (IISTE)*, Vol. 4, No. 6. Available at SSRN: https://ssrn.com/abstract=2420311, BÉRTOK, JÁNOS, "The Role of Transparency in preventing Corruption in Public Procurement: Issues for Consideration", in *Fighting Corruption and Promoting Integrity in Public Procurement*, Chapter 9, OECD Publishing, Paris, 2005.

[13] TREPTE, PETER, "Transparency and Accountability as Tools for promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations", OECD, Paris 2005,

bidders) to obtain certain, relevant, complete and updated information about the different phases and elements of the procedure through a plurality of means (official bulletins, contractor profiles, contracting platforms)[14].

However, the excess of transparency will allow each tenderer to monitor the behaviour of its competitors. In cases of collusion, this would discourage alleged cartel owners from bidding against the agreement for fear of retaliation. If excessive opacity favours corruption, excessive transparency paves the way for collusion. Where contracting procedures are repeated and foreseeable, as well as for homogenous and standardized products, an intelligent use of legal advertising will make it unnecessary to resort to a stable collusive structure. Sometimes it will be enough to revitalize the cartel when the call is published or the invitations to participate in the next tender are notified[15].

Even if there is no competition problem, absolute transparency procedure after procedure makes possible tacit collusion between tenderers. Protecting confidentiality for competitive reasons acquires greater relevance in the new contractual modalities based on the generation of ideas and technologies; In particular, pre-commercial procurement.

[14] ARROWSMITH, SUE (ed. & author), EU Public Procurement Law: an Introduction, pp. 80 and 131. https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf.

[15] SÁNCHEZ GRAELLS, "GC gets it totally wrong and pushes once more for excessive price transparency in public procurement (T-667/11)", *How to crack a nut*, 29 January 2015, http://www.howtocrackanut.com/blog/2015/01/gc-gets-it-totally-wrong-and-pushes.html, "The difficult balance between transparency and competition in publicprocurement: Some recent trends in the case law of the European Courts and a look at the new Directives", *University of Leicester School of Law Research Paper* No. 13-11.

The principle of transparency does necessarily possess in PMC all the strength that it has in regular public procurement. Even though PMC has been regulated by Directive 2014/24PMC, it is a pre-procedural phase. This entails that the innovative contracting authority has the upper hand to increase or reduce the scope of the principle. Such level of definition grants the purchaser a considerable power of definition over the boundaries of the confidentiality principle. That is, over the extension of the disclosure-data obligation imposed on it and on the bidders.

As a preliminary conclusion, transparency and confidentiality do not work in the same way in a PMC as in a tender. Variations respond to differences of nature and on the kind of relationships established within each phase. During a PMC, there exists only a relationship between each consulted operator and the innovative contracting authority. It is a mutual collaborative link, since both give feedback to one another for the subsequent tender. On the contrary, there is no link among the consulted operators.

During a contracting procedure two types of relationships exist. The first one links the contracting body with each bidder. It is a procedural and hierarchical direct connexion, since the latter participates in a tender decided by the former and is bound up to her decision. The second link connects the bidders. It is an indirect relationship based on competition and mutual exclusion. They do not share anything, because the selection of one means the exclusion of the others. Transparency, transmission of information and limited confidentiality play a role during the tender. They tend to ensure that the procedure is presided over by legal certainty, non-discrimination, protection of fair competition and lack of conflicts of interest. All in all, their implementation allows the contracting authority to guarantee that the selected bidder is the one who deserves the contract and that the other bidders can check it by revising the documents.

Since in PMC there is neither competition nor any link among the operators (and would-be bidders) nor will any of them be selected and the rest excluded, those ones are not entitled to demand information disclosure in the terms of the Directive. The contracting body can decide act in that way, but can also restrict the access to information with the goal of protecting the collaboration with one operator.

2.3. Principle of competition

This is the moment to get back to one of the most important features of PMC: its non-competitive nature. In this phase, the firms are not rivals among each other. They do not fight to death to convince the public purchaser on the quality of their recommendations. In fact, they have no particular relationship among them. Each one has an individual link with the contracting authority. This one channels up all the singular proposals to blend them in its own formula.

Despite competition among firms is postponed to the tender, the participants may fall in anticompetitive behaviours during the PMC. Collusion or abuse of dominant position will exist since the very moment of their birth during the PMC and will deserve a sanction in this moment if the practices are considered restrictions by object. Their effects cannot take place ever or will delay until the awarding of the contract. But the effects do not count to decide on the existence of the infraction; only on the amount of the fine.

Preliminary market consultation gives the operators the chance to compete or to cartelise. Several elements may decide them in one or the other way. Some will depend on the PMC design; the others on the firms' behaviour. There is a precondition for collusion to success in this phase: that the ring possesses more and better information than the contracting authority over relevant elements of the tender or the procurement. When the asymmetry of information exists and is relevant, the cartel can proceed.

2.3.1. Information asymmetries

All in all, PMCs main potentiality is to balance the different degree of information in hands of the innovative public purchaser and the consulted entities (experts, operators in the market, other contracting authorities) for the sake of the first one.

Such differences are the essence of PMC, which becomes useless whether the contracting authority has already picked up enough data to start the innovative tender. These differences are also an essential factor to account for how dependent the purchaser is

on the data provided by the advisors and how defenceless could it feel in case that they take on a coordinated strategic behaviour and engage in any kind of collusion[16]. A first conclusion is that every PMC process have to set clear-cut rules to impede or thwart that the operators participating in the query agree or coordinate their positions in the PMC with a view to rig the tender. A good start could be to replace the 'meet-to-the-market' sessions by other formulas that hinder communication among firms.

On another level, since not all the participants possess the same level of information and knowledge of a market, no contracting authority should be obliged to stretch the call for advice more than reasonable. Most of times, a general publicity of a future PMC is desirable and convenient for the success of the query. However, no allegation of discrimination is to be admitted where the contracting body have reasons to restrict the number or features of the consulted entities. Hence, the authority can choose between two degrees of dissemination: 1) 'carpet bombing', (general publicity of the PMC: official journals, consultation days, open-door meetings); 2) or 'selected bombing' (by calling a limited number of specialists through e.g., singular mailing or face-to-face meetings).

2.3.2. Incentives for competing in PMC

Last years, public opinions in many countries have been puzzled by the multiplication of collusion cases in public procurement. The spree owes more to a renewed action of some Competition authorities than to a sudden 'collusive fever' affecting bidders. Actually, traditional public contracting is a mature sector in terms of Antitrust law. Public

[16] See NEUPANE, ARJUN *et al*, "Anticorruption Capabilities of Public e-Procurement Technologies : Principal-Agent Theory", en *Public affairs and Administration : Concepts, Methodologies, Tools and Applications, Information Resources Management Association, USA,* IGI Global, 2015, page 2120 and on.

works, supply, services and concessions have always been infested with anticompetitive agreements.

In this point, such as in so many others, innovative procurement differs from the above mentioned figures. The sheer nature of the innovative contracts and the position of the parties in the tender should foster rivalry and discourage cartelisation. However, the same features could give rise to more successive, long-lasting and dangerous collusive schemes.

FEATURES FOSTERING COMPETITION IN INNOVATIVE PROCUREMENT	
Contracting authority	Monopsony
	Unilateral design of the whole process (preliminary market consultation, pre-commercial phases, tender…)

Bidders	Rivals in private markets
	Subjected to the tender rules
	Winner-take-all awarding system
	Exclusive/advantageous use of the new solutions in private markets

On the one hand, innovative procurement implies either the search for a non-existent technology (pre-commercial), for a new good or service or for a variation of an actual one (innovation partnership). The innovative contracting authority wishes a new product because the existent one does not meet his requirements. That is, the new and the existent products are not substitutes. Therefore, they do not belong to the same market. Which means that the innovative purchaser enjoys the monopsony over the new (product & geographic) markets. Theoretically, monopsonistic power strengthens and (tends to) immunize its holder against the bidders' aggressive and anti-competitive behaviours.

On the other hand, innovative procurement disposes of several tools to lure bidders into a competitive battle for the contract and to counter their temptation to engage in collusive agreements (which means to rig the tender and decide the winner of the contract). Three may be quoted: the submission to self-drawn procedural rules; the *winner-take-all* outcome; the advantageous position in private markets.

Public procurement rules have been set out by EU and national laws. Both codes entrust the contracting authorities with the power/obligation to unilaterally draw the rules for any singular tender. Competition for the market is at the core of this system. One of its goals is to ensure a competitive process where the contract must be awarded to the operator which offers the best bid. These features are common to every type of contracts. What singularizes innovative procurement, particularly pre-commercial procurement, is the wide degree of freedom the contracting authorities enjoys to design the rules. To the point that pre-commercial procurement is atypical; that is, it lacks specific regulation in a law. Therefore, a contracting authority may be particularly stringent on the requirements to impede bid rigging from infecting a procedure. For example, by banning or restricting joint bids, or strictly enforcing the exclusion grounds set in Article 57 of the Directive.

The *winner-take-all* doctrine is a basic property of public procurement. It means that the contractor rapes all the fruits of the contract, since his rivals either were excluded or ranked below in the contest (winner-take-all the contract). Innovative procurement adds a new factor. Since the innovative contract amounts to the market, the contractor acquires not only the monopsony on the contract but monopsonizes the market, as well (*winner-take-all the market*). That situation will last until the market enriched with other substitutable products or services.

Last, the fact of winning an innovative public contract is likely to generate important positive side effects for the other's contractor business. Pre-commercial procurement offers the purest example, for both parties share in the output. Innovation partnership favours the awardee in many ways; such as to take advantage of the know-how needed to implement the contract or to develop a new business line.

These three collusion-deterrent factors have their own place during the innovative procurement procedure. But they should play a key role in the PMC, too. The PMC preparatory documents must state that the whole process has been designed with a view to preventing cartelization, fostering future candidates to fight for the contract and pointing out that the public contract may be profitable for the other contractor's business.

2.3.3. Incentives for colluding in PMC

Notwithstanding, the sheer features of innovative procedures can encourage some firms to make up a cartel with the purpose of improving their chances to win the contract. Some elements favour cartelisation, such as the vagueness of the procedures and the object of the contracts. In particular, the development of a PCM can help operators to decide whether to engage in collusive practices. On this point, the collusive firms' anti-competitive behaviours and the types of collusion do not substantially differ from the ones in other categories of public contracts.

INCENTIVES AND OBSTACLES TO COLLUDE IN PMC	
INCENTIVES	**OBSTACLES**
Restricted call for advice.	General call for advice.
Limited invitation to participate in the queries.	Maximum dissemination of actions on the web
Selection of the advisors in a tiny geographic scope.	Selection of advisor in a wide geographic scope

Bilateral or multilateral physical meetings with all potential operators.	Separate meetings or interviews with potential operators. Public consultation process similar to that of normative projects.
Consultation to organizations and business associations.	Avoiding or lessening the consultation to organizations and business associations
INCENTIVES	**OBSTACLES**
Small number of advisors shows an oligopolistic market	Large number of operators/advisors.
A sole operator/advisor monopolised the market	Large number of operators/advisors
One prevalent operator/advisor leads a certain number of satellite-competitors bound up to follow his opinions.	Independent operators

Important presence of groups of firms among the consulted	Independent operators
Operators/advisors share the market or engage in tacit collusion	Independent operators

Roughly, two main reasons account for that some consulted operators may be tempted to cartelise at such early stage and rig the following innovative tender. First, the setting out of collusion-fostering selection criteria on the part of the contracting authority; second, the anticompetitive practices of the operators/advisors.

Risk for competition from the PCM design

In case that the PCM requirements set out by a public purchaser are too narrow, only a reduced number of firms will attend it, what would probably favour (some of) them to agree or coordinate their answers. This side effect would arise as well from an open but restricted call for advice as from a singled-out invitation to a limited number of operators. The collusive outcome is likely to worsen when all the consultants trade in the same geographic market and the contracting authority impedes or dissuades outsiders to take part.

The width of the admittance to meetings works in a counter-intuitive way. The many firms joined in the same meeting as advisors the more dangerous for competition. Bilateral gatherings are strongly recommended. They ensure the secret of proposals to certain extent. On the contrary, multilateral physical meetings allow the participants to know about all the others' positions, reckon the chances of success and assess the

convenience of bidding on a competitive basis or join to other firms in a cartel for the future tender. In short, general gatherings serve as substitutes of information exchange.

Last, the inclusion of business associations among the consulted is also able to channel up cartelisation. Their tasks include making an easier contact and reconciling the interest of their members, which will likely make up a significant number of the consulted operators in a lot of cases. Industrial fairs are a second source of risk. A great number of them are managed – directly or indirectly- by operators and associations. An easy way to win over the contracting authority is to forge a fair or similar meeting where the public purchaser is 'encircled' by the cartel.

Risk for competition from the consulted firms

The above factors require the active engagement of the consulted firms to engender a danger for competition. However, the firms may produce the same result by taking advantage of market flaws. Two sets of market defects must be described here. First, the oligopolistic or monopolistic market structure may easily end in [tacit or open] collusion or in [collective or individual] abuse of dominant position. Second, the lack of autonomy of the consulted firms qualifies as the first point to collusion.

The first movement of the contracting authority to ensure a fair PMC and a future competitive tender is to know about the operators. To be more precise, the authority should get information about possible links among several of the participants. Independent operators are supposed to compete by the same market until the best of them expels of dwarfs the others. It is difficult to say the same regarding firms that belong to the same group.

In case those links exist, the purchaser has free hands to dispose the information from non-independent operators at will. This attitude does not infringe the principles of non-discrimination, competition and transparency. Two reasons support this finding. First, as stated above, the PMC is a pre-procedural phase, whereby the participants in a PMC neither compete nor are obliged to interact at all. Second, the contracting authority must be free to reject or take advantage of the information in the best way for the tender success.

Since no rigged tender is fruitful, the suspicion that the information has been fixed may well drive it to set it apart. This attitude does not infringe the above mentioned principles, since the firm(s) whose contributions have been unattended are not forbidden to participate in the tender on equal terms with the others.

2.3.4. Incentives for an autonomous competition in PMC

During the planning and implementation of a PMC, the contracting authority may lessen the chances of collusion by enlarging the number of consulted firms and by widening their geographic scope. Those selected act within PMC as independently as they must do in the future tender. Therefore, general meetings as well as the participation of business associations have to be avoided or reduced as much as possible.

When the public purchaser foresees that the risk of collusion arises either out of market flaws or the firms' behaviour, the first responses have to foster the participation of a large number of independent operators.

2.3.5. Position of the Spanish Competition Authority

In the Report on the Draft of Public Sector Contracts Law, the National Commission of Markets and Competition (CNMC, in Spanish) made an insightful study on the PMC concerns for competition[17]. As was written above, the Draft regulates in its art. 115 the possibility of conducting market research and consulting with economic operators in order to prepare the tender correctly and to inform operators about their plans and the requirements they will require to attend the procedure.

[17] IPN/CNMC/010/15, October, 16th, 2015.

The CNMC claims that the positive aspects of a better knowledge of the market derived from the queries to operators do not hide the problems from the perspective of competition. They may lead to a considerable risk of being caught by the contracting authority and may lead to an infringement of the principles of equal access to tenders, non-discrimination and non-distortion of competition.

The CNMC recommended that a number of corrective measures be introduced: 1) bilateral or multilateral physical meetings with all potential operators should be avoided given the risk of colluding between them; 2) no query with specific operators. They should be limited them only to independent experts or authorities; 3) queries with professional organizations and business associations should be avoided; 4) the introduction of a public consultation process in which these preliminary consultations are carried out, similar to that in normative projects; and 4) maximum dissemination of actions on the web so that all potential stakeholders have access and possibility of making contributions.

3. PRIOR INVOLVEMENT OF TENDERERS IN A PMC

3.1. Fabricom and article 41 of directive 2014/24

Article 41 of Directive 2014/24 deals with the issue put by a "*candidate or tenderer or an undertaking related to a candidate or tenderer (that) has advised the contracting authority, whether in the context of Article 40 or not, or has otherwise been involved in the preparation of the procurement procedure (...).* The ulterior participation of that firm in the tender for which preparation it had been working is a challenge for the principles of non-discrimination and competition actual effectiveness.

Article 41 is the normative development of a clear-cut doctrine enacted by the Court of Justice in *Fabricom*[18]. The case judged a Belgian normative that stated that any person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services was not allowed to participate in or to submit a tender for a public contract for those works, supplies or services where that person was not permitted to prove that, in the circumstances of the case, the experience which he had acquired was not capable of distorting competition[19].

The defendant (Belgian State) stated that all tenderers must have equality of opportunity when formulating their tenders. On the contrary, a person who had participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. Furthermore, that person may be in a situation which may give rise to a conflict of interests in the sense that, he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation would be capable of distorting competition between tenderers.

The judgement claimed that a rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paragraphs 29 and 30 of the judgment do not arise. Such a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers. Indeed, the application of that rule may have the consequence that persons who have carried out certain preparatory works are precluded

[18] Judgment of the Court (Second Chamber) of 3 March 2005, *Fabricom S.A. v Belgian State*, Cases C-21/03 and C-34/03 Fabricom.

[19] DE KONINCK, CONSTANT & FLAMEY, PETER (ed.), *European Public Procurement law, Part II Remedies*, Kluwer Law International, page 301 and 0n.

from the award procedure even though their participation in the procedure entails no risk whatsoever for competition between tenderers[20].

> "*Article 3(2) thereof, Directive 93/36 and, more particularly, Article 5(7) thereof, Directive 93/37 and, more particularly, Article 6(6) thereof, and also Directive 93/38 and, more particularly, Article 4(2) thereof, preclude a rule(...) whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition*".

3.2. Direct and indirect participation in a previous PMC

Proprio modo, the scheme set out by the Directive rules only where an economic operator intervenes in the preparatory phase and afterwards takes part in the subsequent tender. This general statement demands a further explanation, related both the kind of participant and the type of participation.

First at all, Article 41 sets a wide circle of operators bound to the special rule of compatibility. It mentions the "*candidate or tenderer or an undertaking related to a candidate or tenderer*". Therefore, not only are the bidders at risk of been excluded, but also the firms linked with them that contributed to develop the preparatory phase, working for the contracting authority as managers, consultants and advisors. The Article is not precise about the nature of the bonds between the tenderer and the related undertaking. This inconclusiveness should be understood as encompassing both corporative and business

[20] The ECJ builds these findings on this particular cause of exclusion on the basis of the principle of equal treatment, ARROWSMITH, SUE, "EC Regime on Public Procurement", in THAI V. KHI (ed.) *International Handbook on Public Procurement*,

relationships. The intensity of the link is open to interpretation, as well. The chaining is indisputable in case that the third undertaking and the tenderer belong to the same corporate group; even more where the latter is or acts as group head. In case that firm and bidder have just a business relationship, the closeness sketched by Article 41 should be assessed on a case-by-case basis.

3.3. Scope and limits of the exclusion

The ECJ doctrine set two rules. First, the person or firm concerned is given a sort of right of defence, to show that her participation does not affects competition during the procurement. Second, exclusion is a measure of last resort, only implementable when the other reasons fail.

3.3.1. Accommodation and investigation

Since the Directive (a) allowed the advisors to bid and (b) placed the exclusion as the ultimate solution, it had to sketch (1rd) how to guarantee the effectiveness of non discrimination and competition principles within the tender (accommodation) and (2th) how to know about the (un)lawfulness of the bidder's behaviour back during the pre-procedural phase (investigation). Both weights have been loaded on the back of contracting entities. The first and foremost consequence of such *onus* means that any exclusion lacking both previous steps is illegal and may bring about the nullity of the procedure.

First, in order to 'accommodate' the bid at stake in a non-discriminatory and pro-competitive tender, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Article 41 leaves in its hands selecting the solutions. But it imposes two, which must be set out in national laws and implemented in all cases. Literally, such measures shall include (1) communication to the other candidates and tenderers of the relevant information exchanged

in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure (2) and the setting of adequate time limits for the receipt of tenders. Since principle of competition is directly concerned, the above communication must be well grounded and describe the reasons for the admission decision. Therefore, tender documents should give the other tenderers the chance to reply the communication, to state their opposition to the admission or to provide reasons for the advisor to be expelled.

Second, where the information gathered drives the authority to put into question the participation of one advisor in the tender on the basis of non discrimination and competition principles, it shall lead an investigation (since automatic exclusion is forbidden).

3.3.2. Right of defence and right to appeal

Article 41 focuses on the the advisor-bidder rights: prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition[21]. Arguments from other bidders must be asked for and assessed. Even data garnered from entities outside the tender should be requested or admitted. The sheer fact of putting the aim towards the advisor-bidder does not breach principle of non discrimination, as *Fabricom* expressly put[22].

[21] The difference among formal and material investigation criteria and the preference for the second ones is analysed by SÁNCHEZ GRAELLS, ALBERT, *Prior involvement of candidates or tenderers under Reg. 41 Public Contracts Regulations 2015*, http://www.howtocrackanut.com/blog/2015/04/prior-involvement-of-candidates-or.html.

[22] *Fabricom*, 28 and 31.

In applying the first rationale, Article 41 of Directive requires the contracting authority to act *ex officio* to check the behaviour of the candidate. The contracting body is to request information from all the participants. The bidder at stake is the main interested in claiming his lawful behaviour during the PMC phase. The right of defence calls for his active implication. Prior to any exclusion, he shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

The other bidders have a legitimate say on the matter, as well. The reason is that one of them may have incurred in a conflict of interest, different from the one laid down in Article 24 of Directive. And this one is likely to become the awardee. So, the contracting authority is bound to communicate to the other candidates or tenderers the relevant information exchanged (in the context of or) resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

The capability of the last measure to ensure transparency and, above all, to heal the appearance of confusion between the intervention in the PMC and in the tender has been overestimated. It is right that the knowledge of the formal documents may give a hint about the degree of a bidder's influence in the PMC and on his participation in the wording of the procedural documents. But these data are not enough to rule out a breach in the principles of equal treatment and competition. The influence of the bidder at stake goes far away the mere draft of those documents. It also encompasses his relationships with officials, experts and other staff; gathering of information about the contracting authority's 'philosophy' when assessing the quality of the bids. Summarizing, the knowledge of the documents showing the participation in the PMC is just a linear way to make an assessment. It does not allow the viewers to hustle the meanders.

The third interested party in the investigation is the same contracting authority's, whose concern does not go behind the bidders'. The situation that gave place to the investigation may easily come from misbehaviours on the part of some officials, such as conflicts of interests or corruption. Inquiries can also shed light on other illegal behaviours

of the bidders, such as unlawful concerts, collusion in multiple forms and even the infringement of other laws, admitted or tolerated by the public procurement official. All these situations are easier in innovative procurement than in the most classic contracts. In many cases, contracting authorities will be at the expense of the consultants during the PMC. They will (help to) draw the entirety or a substantial part of the procurement. A future bidder can easily 'hide' some clues helpful in the future tender. The contracting authority is not limited by the requests of the participants. On the contrary, he is entitled to decide and implement his own measures, since Article 41 clearly require contracting authorities to take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

The measures taken shall be documented in the individual report required by Article 84.1.e) of Directive 2014/24 ("*conflicts of interests detected and subsequent measures taken*").

3.4. Exclusion

3.4.1. Nature

Only when both actions had been applied unsuccessfully and there are no other means to ensure his compliance with the principle of equal treatment the candidate or tenderer concerned shall be thrown out of the procedure. The sack of the bidder looks like an abnormal type of exclusion ground. On the first hand, it supposes the expulsion of one participant during the procedure, on the basis of his own irregular behaviour. But, on the second hand, Article 57 of Directive 2014/24 sets a *numerus clausus* relationship of exclusion grounds, among which the above mentioned did not find its place. Moreover, Article 41, unlike Article 57, limits its future sanctions to the sacking of the same tender, but it does not include the prohibition for the bidder to participate in future tenders.

3.4.2. Grounds

Breach of principles

Article 41 builds the argument for the exclusion on the principle of non-discrimination and competition. Actually, the second one encompasses both. The participation in a tender of a firm that previously took part in a PMC will infringe the second principle in case that - by virtue of her behaviour during the preliminary market consultation- is "*capable of distorting competition*". That expression must be understood as tantamount to thwarting competition in the market as well as competition for the market. That is, the participant will be excluded where his former intervention in the PMC privileges him in the tender regarding the other bidders (for instance, through a biased design of the procedure); and also where it had colluded in the PMC phase to rig the tender. In both cases, the goal is the same: to unlawfully win the contract.

Behaviours capable to distort the competition (for the market) principle range from provision of fake data to deception in the setting of the principal features of the tender (price, duration, object of the contract, etc). All actions were implemented by a former advisor and current bidder during the PMC phase and are ready to work within the awarding process. These actions are means to rig or manipulate the tender. Their primary goal is to attain that the contract be awarded to him or to another bidder.

Anticompetitive behaviours

The participation of an economic operator in the preliminary phase of a contracting procedure can be used as a vehicle for a bidder to breach Competition law (Articles 101 or 102 TFEU) during the tender. Several anticompetitive practices stand out during the phase of preliminary consultations:

- Designing the tender in such a way that only the rogue (consultant) or some of his buddies will meet the requirements to be awarded the future contract.
- Advising the contracting authority either to achieve the above goal or the exclusion of a rival bidder.

- Contributing to boycott a tender (by the means of proposing the setting-out of requisites that are irrational or make impossible for other economic operators to bid).

It should be noted that these behaviours (and others alike) would break antitrust law irrespective their degree of compliance with Article 41 of Directive 2014/24/CE. Thus, a competition authority is entitled to judge them where finding out evidences of Articles 101 or 102 infringement. A decision imposing penalties on the basis of anticompetitive behaviours will run alone, regardless the contracting authority had reckoned that the conducts at stake are consistent with Article 41 requirements, then developed the tender and endorsed its outcome.

However, since the principle of competition is one and the same for the two authorities, feedback should be the rule, not the exception. Collaboration is not mutual but just one-way.The contracting body must warn the competition authority where it suspects that a possible breach of Article 41 may infringe Competition law, as well.

In August, 2016, the Competition Authority of Hungary (GVH) imposed fines on five suppliers of medical suture products for rigging their bids regarding the tenders issued by four hospitals[23]. Collusion among the suppliers was not restricted to concertation on specific tenderers. Their behaviour concealed a tacit agreement whereby the incumbent suppliers influenced hospitals to 'over´specify' their needs for the impending tenders. The anticompetitive agreement was implemented within the preparation of tenders. Each supplier (also a would-be bidder) contributed to the definition of the technical specifications and advised the hospitals to set product specifications requirements which were unimportant for the intended use but could identify the product of a given supplier. "Over-specified product requirements were seldom attacked either formally or informally,

[23] GVH, *Braun Medical, Chimax, Johnson&Johnson, Staplecare, SurgiCare, Variomedic*, Vj-79/2013, 4 August 2016.

ensuring that a kind of pre-set tender result would prevail. Maverick competitors taking active steps against such tender announcements were allegedly reprimanded or were sanctioned with refusal to deal by hospitals[24].

3.4.3. Procedural highlights

A decisive feature for the accurate application of Article 41 lies in the standard of unlawfulness. That means the level of influence that the sheer fact of participating in the preparatory phase would have to enhance the chances for a firm to win the contract in breach of principles of equal treatment and competition. Although it is in the end a case-by-case question, several clues can be provided to help contracting authorities to decide.

The first is the hard core restrictive admission option. The special incompatibility provided for in Article 41 would apply if there is *the slightest indication* that participation may lead to restrictions on attendance or involve privileged treatment and, in the end, violate the principles applicable to public procurement. In other words, compatibility would only be admitted in case that it could be completely ruled out that the participation would restrict competition in the tender or to place the company in a position of competitive advantage over the other tendering companies[25].

This position formally shelters competition and vetoes any chance of taking advantage of the previous intervention in the preparatory phase. Therefore, it appears to foster participation and ensure the rights of the other bidders. However, a mechanic

[24] ZOLTAN MAROSI, BALÁZS CSÉPAI, "The Hungarian Competition Authority fines five suppliers of medical suture products for bid rigging and exempts one of them under the leniency provisions (*Braun Medical, Chimax, Johnson&Johnson, Staplecare, SurgiCare, Variomedic*)" e-Competitions, Nº 82634, January 2017

[25] Decision 395/2015, Tribunal Administrativo de Recursos Contractuales de la Junta de Andalucía, , Sevilla, 20 de noviembre de 2015.

application of that position might infringe Article 41 prohibition of automatic ban to the participant at stake.

A second option is for the contracting authority to make a decision dependent on the evidences put forth by the bidders when revising the documents of the former's prior participation. In that case, the contracting authority restraints itself and does no research on its own. The statement of compatibility will depend of the contributions of the participants. This result makes the position insufficient. Article 41 calls for contracting authorities to engage in all the actions useful to investigate the compatibility. They are not sheer recipients of information. They are entitled and obliged to act.

Therefore, the most accurate way to implement Article 41 is to join a treble investigation plus a case-by-case perspective. First, the contracting authority must take all the measures to ease the 'beleaguered participant', the other bidders and the authority itself to investigate. Second, on the basis of the evidences, the contracting body decides the case.

Whether the automatic exclusion of the participant in a PMC is unfair and counterproductive (it will deter firms to take part in that phase), the solution given away by Article 41 Directive 2014/24 shows a decisive flaw: it relies on the contracting authority to decide on the firm's independence. Although it seems the obvious way – the independence is disputed within a tender, so the purchaser, which is the judge of the tender, is the competent to sort out the problem-, the solution forgets that a standard contracting authority may well lack the means, the time and the will to deep in the question. Moreover, a careful reading of Article 41 shows a rebuttable presumption of lawfulness. The bidder at stake has to bring in the evidences supporting her innocence. The contracting authority must assess them and can evaluate other materials that come to it.

So, it is dubious that many authorities start up proper investigations. The likeliest is that they fulfil the right to be heard and except in cases of evident violations of competition during the PMC, the purchaser takes the allegations of the firm and the limited evidences at its disposal, and decides that 'the show must go on'…, with the suspected firm on board.

4. CONCLUSIONS

Assessing the potencial importance of PMC for innovative procurement requires to apply a minimal insight. Since the innovative contracting authority has to figure out almost everything about the future contract, it looks essential to gather ideas from experts, experiences from specialised organisations and solutions by private market operators. Hence, PMC is not only a good idea, it seems necessary for ensuring a successeful tender. However, the preliminary market consultations pattern, such as has been drawn by Directive 2014/24 is not problem-free. Three issues are analysed in this study: (1) too much confidence in the principles quoted in Article 40; (2) risks of collusion [corruption and conflicts of interests] among the participants within the consultation procedure; (3) huge difficulties for asserting the competition principle in the tender following a PMC.

Regarding the first point, the Spanish, British and French laws show that national rules have not worried very much to develop the Directive. Such paucity stresses the role of principles of non discrimination, transparency and competition. It is crystal-clear that these principles inspire the whole fabric of EU public procurement and that their influence must leak to all preparatory phases. The issue is to set the boundaries of their effectiveness in PMC. As explained in detail above, they should not be used here with the same degree of stringence that is normal within tenders. The reason is that preliminary market consultation is pre-procedural, not-compulsory and not-decisive for chosing the awardee.

These three essential features favour that collusion may prey in PMC easier than in the core of public procurement. Dangers comes from the private operators willing to give advice, since they are hypothetical future bidders. Chances of collusion depend on the participants behaviour as much as on the consultation format. Put simply, the making of the PMC is up to contracting authorities, who must be very careful to impide coalitions among the participants. To do so, they should avoid those formulas entailing group rallies (“meet-to-meet”) and choose one-to-one meetings. It is foreseeable that most authorities, focused on administrative and organizational concerns, neglect the definition of consultations that

meet the minimal pro-competitive standards. In those cases, tenders can easily be born rigged or biased.

To prevent tenders from being manipulated and also to meet the prohibition of authomatic exclusion, the Directive laid down a two-pronged mechanism for qualifiying the accurability of the former advisor and current bidder. The contracting authority must first gather information and convey it to the co-bidders. Second, it will carry out a contradictory procedure to expel him as ultimate remedy. On paper, this solution looks respectful and effective. As a matter of fact, the functioning of the whole scheme sketched by Article 41 depends on the willingness and capacities of each authority. That the risk of collusion is a hypothetical and expendable side effect for most of them must be taken por granted. Such vacuum should be filled (1st) with rules or soft law that ensured a minimum consistence and legal certainty and (2nd) with the support of sectoral organisations, such as the competition authorities.