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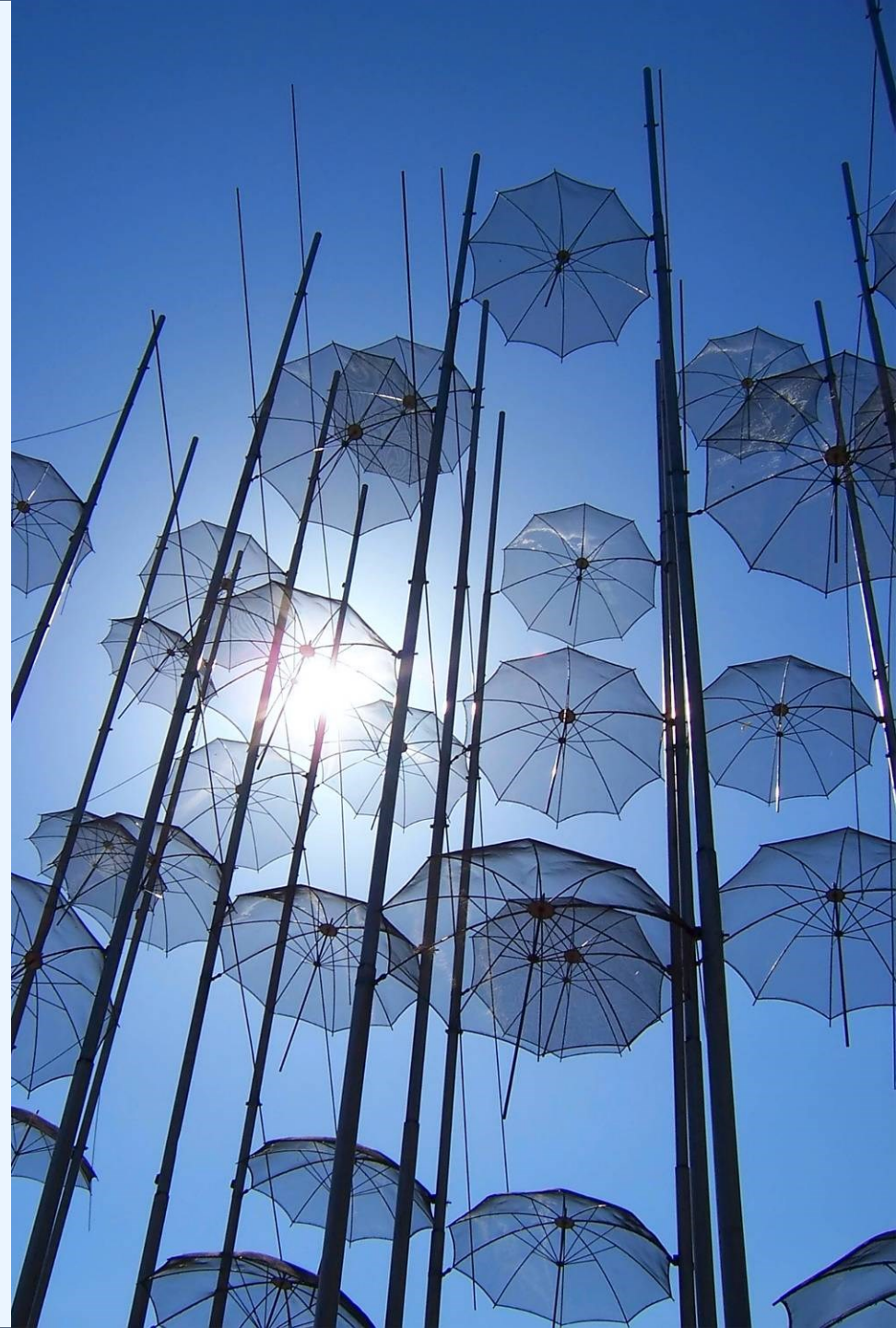
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# Public Procurement & Competition Policy

*Public-Private antitrust enforcement: differences, incentives and policy considerations*

**Avv. Gian Luca Zampa**  
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**Public procurement & competition policy**  
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## *Today's agenda*

- A) The importance of public Procurement: selected numbers & figures**
- B) Technical differences, incentives & constraints**
- C) EU Damage directive implementation: a real change?**
- D) Learning from other experiences**
- E) Policy considerations**



## **A) The importance of public procurement: selected numbers & figures**

# ***The objective importance of public procurement***

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- Strategic role of public procurement within EU policies for economic development in the European 2020 Agenda
- According to EU Commissions' estimates, public procurement value in the 2012-2015 amounts to 1924.1 bln/year (considering total general government expenditures on works, goods, and services and excluding utilities).
- Italy is on 4<sup>th</sup> place, with average 170.7 bln/year (2012-2015), behind Germany (434,5), France (316,6), UK (309,5).
- Public expense for public procurement in the EU is around 13.8% of GDP, in Italy around 11% GDP.

***...despite its importance no debate (academic or otherwise) on public-private enforcement of antitrust laws!***

# ***Public procurement & competition enforcement***

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- ***Public procurement and bid-rigging***

- Tenders for the procurement of goods and services
- Public concession tenders (i.e. transportation, gas distribution etc.)

- ***Italian experience***

- Bid-rigging in public procurement as criminal offense – long history of cases (corruption & collusion)
- Bid-rigging as a competition law infringement – High priority on IAA's agenda
  - The IAA initiated 15 proceedings for bid-rigging in public tenders in the last 3 years
  - 2014 Memorandum of understanding between AGCM and Public Contract Supervisory Agency (ANAC), i
  - 2013 AGCM's Vademecum on bid-rigging (expressly making reference to antitrust damages actions by procurement agency)
- OCSE 's Guidelines for the fight against bid-rigging in public tenders  
<http://www.oecd.org/daf/competition/cartelsandanti-competitiveagreements/44162111.pdf>.

***... expectation of a significant number of damage actions...?***



## **B) Technical differences, incentives & constraints**

# *Technical differences*

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- ***Standing***

- Direct public purchasers (i.e. hospital) and indirect procurement agencies (i.e. CONSIP)
- Excluded competitors in case of boycotts
- No role for consumers except possibly in tenders for public concession

- ***Quantifying damages***

- More information on price increase/cost estimations on the value of public contracts owned by the procurement agency
- Which counterfactual? Given size and features of tenders, potential problem in verifying “outside” contracts unaffected by bid-rigging scheme

- ***Passing on defence?***

- Absence of indirect purchaser in tenders for procurement of goods and services
- Public body typically end-user of the tendered goods/services
- Some scope for consumers’ actions in relation to parts of public concession tenders (i.e. bid-rigging affecting transportation/gas distribution tariffs)

***...do these differences really...make the difference?***

# *Incentives/constraints for public bodies to initiate civil litigation versus suppliers*

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## *Incentives*

vs

## *Constraints*

- more information owned by the awarding agency as to quantify the overcharge
- absence/limited scope for passing-on defence
- passive behaviour could damage the State – individual accountability of public officials
- legal costs/expenses ultimately borne by the State

- victims of the overcharge – procurement agency v. ultimate purchasing public body?
- role and incentives of procurement agencies (consortia v. ultimate purchaser)
- relationships with usual suppliers
- possible standing barriers?
- individual accountability as possible constraints in settlements?





## **C) Damage directive implementation: is this a real change?**

# ***Main changes introduced by the damage directive - highlights***

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- binding nature of final (and not further appealable) decisions of the Italian Antitrust Authority *vis-à-vis* national judges, with regard to the existence of the infringement and the identification of the undertaking(s) liable therefor;
- presumption of the existence of damages, in case of any infringement which constitutes a cartel (including bid-ridding)
- possibility to ask to the Italian Antitrust Authority for assistance in quantifying damages
- attribution of specific powers to judges to order the disclosure of documents (including those contained within the case file of the proceedings by the Antitrust Authority), in favor of both the claimants and the plaintiffs also in order to identify the existence of the possible passing-on defense;
- explicit recognition of passing on defence

## ***... but has the damage directive introduced a real change?***

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- before, not explicit presumption but a cartels were already considered likely to have caused a damage
- technical expert (CTU) mechanism already provided significant assistance in quantifying damages
- the final decision of Italian Antitrust Authority was already considered as “*privileged evidence*” of the existence of the infringement and the identification of the undertaking(s) liable therefor;
- EU Commission’s decision already binding by virtue of Reg. n° 1/2003;
- case law already interpreted the powers conferred by civil procedural rules to national judges somewhat extensively as to allow the claimant(s) to overcome information asymmetries (see Cass 11564/2015);
- national judges already considered the potential existence of passing on (since Court of Cagliari 23 January 1999, *Unimare c. Geasar* ... to Court of Milan 26 June 2016 n.7970, *Swiss International Air Lines v. SEA*)

***....and so? What needs to happen?***



## **D) Learning from other experiences**

## ***Civil damages under environmental law - similarities***

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- Underlying public interest (environment vs. competition)
- Tort actions (2043 cc) – require to demonstrate infringement, loss and casualty link
- Standing: State (*iure proprio* and/or representing citizens) + local administrations/associations (for additional suffered damages) vs. each damaged subject (including public)
- Complex damages quantification criteria
- Possible accountability for damage to State's revenue in case damages action has not been brought

## *Civil damages under environmental law - differences*

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- Antitrust private enforcement is not widespread yet in Italy while environmental damages claims have been regulated for years (Legislative decree 152/2006)
- Cultural differences – damages for environmental damage is more obvious
- Trade-off between damages recovery and risk of antagonizing suppliers/repetitive players
- Binding nature of prior finding by an administrative agency (IAA/EU Commission)
- Possible difficulties in settlement procedures



## **E) Some policy considerations**

## *Food for thought...*

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- need for an *ad hoc* provision in analogy with other areas of law which already have specific provisions (ex. environmental damage) to resolve procedural issues?
- need for an enforcement mechanisms uncoupling the potential conflicting roles – bringing damage actions versus maintaining good relationship with suppliers?
- need to regulate scope of accountability for loss in revenues for public officials not having brought an antitrust damages action?
- special provisions as to facilitate settlements – how to assess the fairness of the settlement?
- cultural spread and role of advocacy of the national competition authorities and the procurement agencies



# Thank you

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