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Between aggressive bidding, abnormally low tenders and zero-pricing in procurement contracts

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1. Introduction

EU/EEA and Norwegian Public Procurement rules are designed to foster and open up public markets to competition.[1] In the quest for competition and efficiency in public spending, the legislator at the European and national level has introduced a *principle of competition* that binds together the activities of the economic operators (suppliers) and buyers towards maximization of value for money and the fostering of competitiveness in procurement markets.[2]

This principle of competition, and the aim to obtain 'best value for money' in public tenders, encourages efficiency in procurement procedures. On the one hand, contracting authorities are required to design competitive procedures, maximize taxpayer's money and not restrict competition. On the other hand, economic operators are pushed to submit the best possible tender concerning price and quality in order to be awarded the public contract and through this maximise allocative welfare.

This push for aggressive bidding has other consequences that go beyond aggressive and healthy price and quality competition in and for procurement markets. Tenderers seem more and more

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[1] For more literature on this, see: Munro C, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) 6 Public Procurement Law Review 352; Sánchez Graells A, Public procurement and the EU competition rules (2nd edn, Hart 2015); Kunzlik P, 'Neoliberalism and the European Union public procurement regime', Cambridge Yearbook of European Legal Studies (2013); Arrowsmith S, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' in Barnard C, Gehring M and Solanke I (eds), Cambridge Yearbook of European Legal Studies (Hart Publishing 2011-2012)
[2] See Article 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ [2014] L94/65).

focused on price and, on occasions are also tempted to submit low, at times, very low tenders which run the risk of being insufficient for the fulfilment of the contract.[3] Furthermore, aggressive bidding may also become a competition problem when such conduct is done with the aim or effect of abusive economic power to not only win the tender vis-à-vis competitors but also to force their exit of future procurement markets or prevent the entry of new undertaking as rivals.

In procurement settings, low or abnormally low tenders have been studied with a focus that is either set on state aid issues related to non-compliance with social, labour or environmental law requirements, or as a contract execution issue. In this paper, we analyze these scenarios but also in light of the competition law regulation to discuss when a low tender may be predatory and in which instances such predation is anticompetitive and prohibited by the law. Our focus would be EU/EEA law as well as drawing references to the relevant Norwegian procedures, which in this case are modelling quite closely to the supranational regulation.

2. Bids in public procurement

2.1 Contractual formation and bids' importance

Public contracts are formed through tenders in which contracting authorities define a set of conditions to be met by economic operators interested in being adjudicated the right to offer a good, or service, or a good. Procurement rules are designed to foster, as much as possible, competition for such contracts and limit the buyer's discretion when awarding public contracts. Thus, procurement rules sit between traditional administrative law designed to restrain the power of the administration in its decision-making, commercial and contractual rules that seek to distribute risks and obligations of the parties, and competition rules and internal market rationale which seek to foster economic efficiency and achievement of the best value for money.[4]

Unlike most markets, price formation in public procurement takes an indirect form. Parties are not free to negotiate directly concerning price. Instead, the suppliers submit a price to be evaluated by the contracting authority. Through this mechanism, the price and contractual formation in a purchase/sale contract take place not through a direct acceptance by the contracting party of the offer but rather indirectly and independently determined/fixed by the offer of the supplier.[5] While in principle, there is no lower limit to the bids as discussed in detail in this paper, suppliers often

[3] Ølykke GS, Abnormally low tenders: with an emphasis on public tenderers (DJØF Publ. 2010); Sanchez-Graells A, 'Rejection of abnormally low and non-compliant tenders in EU public procurement: A comparative view on selected jurisdictions' (2013) 6 European Procurement Law Series; SIGMA, Abnormally Low Tenders (Brief 35, September 2016).

[4] Norway is a particularly good example of this and in particular the accent placed on the objective of ensuring best value for money and efficient spending of resources.

[5] Miño López A, *La defensa de la competencia en la contratación del sector público* (Thomson-Reuters - Aranzadi 2019)

face a higher ceiling which is imposed in contract documentation by the contracting authorities: a reservation price or the budget for the procurement. If the offer exceeds such ceiling, contracting authorities have to reject it as non-compliant with its minimum requirements. Consequently, bidders are enticed to submit offers as low as possible to increase the chances of adjudicating a public contract, more so if considering that price or cost is always considered part of the award criteria, and sometimes it is the sole award criteria.

Additionally, the public procurement rules on award criteria condition further the price formation as well as the expectations of suppliers as well as obligations of contracting authorities to enter into a contract. Unlike private markets, contracting authorities have limited discretion to determine with whom they will enter into contracting authorities have to award contracts based on the selection,[6] and most importantly, award criteria.[7] According to the general award criteria in public procurement contracting authorities "shall base the award of public contracts on the most economically advantageous tender."[8] The most economically advatangeous tender is that which has either the lowest price/cost or the best possible combination of "the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question".[9]

Award criteria restrict the contracting authorities' freedom to determine which offer will be assigned the contract to avoid favoritism and prevent corruption. Because of this, the general rule is that the best offer in terms of price and/or quality should be the one assigned to the contract, regardless of whether it is an aggressive bid. This does not mean that contracting authorities *have* to enter into a contract with bidders that have submitted a tender regardless of the circumstances. Examples of instances in which procedures can be terminated for lack of sufficient competition for a contract exist in the case law. In *Metalmeccanica*, the ECJ confirmed that "the contracting authority is not required to award the contract to the only tenderer judged to be suitable".[10] Indeed, contracting authorities are not required to award contracts without being critical to the situation at hand, in particular if there is insufficient competition for said contract.[11] However, this does not mean that contracting authorities can freely discard tenders. Doing so would also constitute an abuse of its margin of discretion and contrary to principles of legitimate expectation enjoyed by tenderers. Thus, only on justified circumstances may contracting authorities terminate lawfully a procedure without awarding a contract, notwithstanding the possibility for the affected tender or tenderers to seek compensation for damages and even *lucrum cessans*.

[6] Articles 57 and 58 of the Directive 2014/24
[7] Article 67 of the Directive 2014/24
[8] Article 67.1 of the Directive 2014/24
[9] Article 67.2 of the Directive 2014/24
[10] C-27/98 - Fracasso and Leitschutz, para 33.
[11] C-27/98 - Fracasso and Leitschutz, paras. 23-34.

2.2 Aggressive bidding

When bidders take aggressive pricing strategies, several possibilities may qualify as a form of aggressive or very aggressive bidding. Experience and the literature identify three different groups types of 'aggressive' bidding. First, we find aggressive but above costs bidding in which suppliers are driven by competitive forces to limit their supra-competitive profits and price their goods, services or goods at the most efficient level for society. Second, following Miño López classification,[12] we encounter three different modalities of *predatory pricing*. These types of bids go beyond normal 'aggressive' bidding and involve a profit loss for the supplier. *Predatory bidding, sensu stricto,* in which a dominant supplier incurs in a short term loss when selling their products to later on recoup it once it has managed to displace other firms from the market. *Offers below cost* by non-dominant undertakings which may amount to a breach of unfair competition rules or good commercial conduct. Last, *zero-pricing offers* – which typically but not always – would imply pricing below costs and in which the offer has a value of zero or a purely symbolic or token value. Lastly, we encounter abnormally low tenders, concept typical of public procurement rules, and which do not require an offer to be below costs, it simply needs to be very different to other offers or the price range it would be expected for such goods, works or services.

2.3 Risks associated to aggressive bidding from a procurement perspective

Aggressive bidding is desirable for society. Public procurement rules are oriented in Europe not only to prevent discrimination from non-national providers but also to increase efficiency in public contracting.

However, aggressive bidding may bring about undesired consequences that are of concern for society's wellbeing from an economic perspective. European Competition policy in a broad sense, therefore, has different vehicles and tools to address undesirable aggressive behavior through different sets of regulation.

Public procurement aims at ensuring that societal's needs that are to be delivered by the State or through the state. Because of this, the focus of procurement rules whenever dealing with aggressive bidding would be to prevent public contracts being unfulfilled, or if fulfilled of over very poor value for money in terms of quality.[13] It protects the contracting authority as remarked by Indén,[14] but also the beneficiary of the services or goods provided through the procurement. The intuition

[12] Miño López A, *La defensa de la competencia en la contratación del sector público* (Thomson-Reuters - Aranzadi 2019), p. 300.
[13] SIGMA, *Abnormally Low Tenders* (Brief 35, September 2016), p. 2.
[14] Indén T, 'Article 69 - Abnormally Low Tenders' in Steinicke M and Vesterdorf PL (eds), *Brussels Commentary: EU Public Procurement Law* (C.H. Beck; Hart; Nomos 2018), p. 745.

here is logic as they might be based on technically, economically or legally unsound assumptions or practices.[15] If a provider tenders a good, service or work under conditions that are not profitable there is a risk that the contract would be: i) not fulfilled; ii) the provider might become insolvent trying to comply with it iii) subject to a request for its modification by the supplier within the limits imposed by Article 72 of the Directive 2014/24, for instance by requesting an increase in the payment received; iv) the quality of the procurement might be lower than required by the tender documentation; and v) the tenderer might not be complying with its social obligations (tax, social benefits, etc); or vi) there will be associated costs if a new tender needs to take place.[16] In a negative way, seeking rules to prevent contracting authorities to choose a tender that appears as excessively low, and which otherwise might find itself either doing because the award criteria is based on pure pricing or if not subject to claim for damages in case it opts for terminating the procedure without adjudicating the contract,[17] "are also aimed at supporting genuine competition between economic operators and reducing unfair advantages".[18]

Because of these reasons, public procurement regulations across Europe put an accent on rejecting tenders that seem unable to deliver the obligations within the contract because they appear as unrealistic.[19] If a public contract is not fulfilled, social goods that sometimes are of the utmost importance, for example specific medicines to treat cancer patients, the risk and cost associated by that lack of compliance with the contractual obligation may be too high and also politically too costly. This is particularly the case when one factors the time which it takes for a new public procurement contract to be entered into (between 4 and 6 months for an open or restricted procedure) in case it is needed to be replaced. This assessment, of whether an aggressive offer may lead to the contract obligations not being fulfilled is conducted by the contracting authority within the procurement procedure.

Competition policy, on the other hand, has a different aim when dealing with aggressive bidding. On the one hand, the design of public procurement procedures should go and in hand with a competitive outcome in the form of efficient spending of public resources.[20] This implies that suppliers and buyers must engage in as efficient as possible conduct and, therefore, aggressive bidding tactics will be pursued. Competition policy, therefore, seeks to foster competition among the suppliers (and buyers) towards the most competitive price formation possible. Yet, not all forms of aggressive bidding are necessarily either pro-competitive, and therefore under the scope of

[15] Recital 103 of the Directive 2014/24.
[16] See also another perspective rgarding the risks associated with abnormally low tenders: SIGMA, *Abnormally Low Tenders* (Brief 35, September 2016), p. 3-4; https://www.fenwickelliott.com/research-insight/annual-review/2012/eu-procurement-tenders
[17] Metalmeccanica here.
[18] SIGMA, *Abnormally Low Tenders* (Brief 35, September 2016), p. 2.
[19] Sanchez-Graells, Albert, Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions (April 11, 2013). European Procurement Law Series, Vol 6, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2248590

[20] Sánchez Graells A, *Public procurement and the EU competition rules* (2nd edn, Hart 2015).

application of competition/antitrust rules, or 'fair' under the scope of unfair competition rules. In the case of competition law, aggressive bidding strategies adopted by a dominant undertaking that incurs in a deliberate loss to foreclose (exclude) rivals and potentially affecting end consumers by, at a later stage, recouping that loss through monopoly pricing, as we discuss in further detail below.

One might argue that EU competition rules or its antitrust equivalents that forbid predatory bidding are even more justified in public procurement contracts, or at least with respect to some of them, because public procurement might be, in fact, the sole market at hand in a specific case. This would be the case in the instance of defense procurement, in which the state has a legal monopsony, or in the case of healthcare appliances in countries like Norway in which the state represents more than 90% of the market. Therefore, for suppliers in sectors in which the buyer is predominantly the state, being awarded the public contract in its entirety[21] might signify a de-facto monopoly in the provision of the good, even if the way in which that monopoly was granted was through competition. Because of this, anticompetitive foreclosure might have even stronger effects in these type of markets. Also, in mixed markets, the effect of being awarded a procurement contract through an aggressive and predatory bidding is likely to have an spillover effect over the private markets as it has happened, for example, in pharmaceutical markets in France.[22]

A non-dominant economic operator that conducts predatory aggressive bidding would not be under the scope of application of EU competition law. However, it might be subject to stricter national competition laws,[23] for example if in breach of relative dominant positions as they exist in Germany or Austria, or rules of economic dependence. These provisions deal with some degree of economic inefficiency, as those dealing with abuse of dominant firms that resort to

In the case of unfair competition law or rules that deal with sales at a loss, the justification relies more on grounds based with more ethical concepts such as the idea of fairness or even protection of a small player against a larger one, which may not necessarily align with a narrow view of welfare economics and maximization of economic efficiency.

[21] An alternative to avoid these type of winner takes all situations would the division of the public contract into lots, a rather commonly used strategy and which has been strengthened by Article 46 of the Directive 2014/24. For some reflections concerning this strategy and

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[23] For a discussion regarding the scope of application of national competition law to agreements as well as abuse of dominant position see, inter alia, Gjendemsjø R and Herrera Anchustegui I, 'The Scope for National Regulation of Unfair Trading Practices' in Giertsen J and others (eds), Festskrift til 50-årsjubileet for jurist-utdanningen ved Universitetet i Bergen (Fagbokforlaget 2019);

3. What constitutes an abnormally low tender in public procurement?

3.1 Towards a definition

As discussed before, aggressive bidding may imply that certain suppliers, in their aim of being awarded a public contract, may submit tenders that appear 'too good to be true'. This could be because they, compared to either the budget of the contracting authority, other offers or simply experience and knowledge from the market. Typically, but not necessarily exclusively, this would be directly associated with the offer having a price or cost that is too low. For these type of offers, public procurement rules, based on the EU Directives, have come with a figure of an "abnormally low tender".[24] Neither current EU/EEA public procurement Directive 2014/24 nor its predecessor Directive 2004/18 define the term. However, from the provision, case law and translation it flows that an abnormally low tender would be one that appears to be with a very low value/price with respect of the procurement object and which, because of such characteristic, it is likely to indicate that the tender is likely to not be fulfilled or of insufficient quality. Due to this, the contracting authority would be required to assess the reasons why such tender is of such low value, and only if the explanations supplied is not satisfactory or the tenderer has not complied with applicable obligations in the fields of environmental, social and labour law, it may reject the tender as non-compliant.

Despite the lack of a union concept, the public procurement directives have in the past and continue now to include a rather detailed treatment of the figure and showing also an evolution. The rule contained in the Directive 2004/18 established that "[i]f, for a given contract, tenders *appear to be abnormally low in relation to the goods, works or services*, the contracting authority shall, before it *may reject those tenders*, request in writing details of the constituent elements of the tender which it considers relevant."[25] Not very different is the definition given by the current Directive 2014/24 which stresses that "[c]ontracting authorities shall *require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low* in relation to the works, supplies or services".[26] However, on a closer look the current rule seems to have a stricter or narrower focus in which it moves away from a more general conception of what can be an

[24] Article 69 of Directive 2014/24.
[25] Article 55.1 of Directive 2004/18.
[26] Article 69.1 of Directive 2014/24

abnormally low tender,[27] towards an approach that is centred on price, costs or profitability,[28] which would be a relation between costs and income.

3.2 Identification of abnormally low tenders

Contracting authorities are required to assess the offer and only based on this analysis they may reject the tender as non-compliant. This assessment is not done in the abstract but instead it should be "defined by reference to the contract to be awarded and to the work involved".[29] The rule, therefore, is the opposite.[30] In principle any tender, even if low, should be accepted following a direct application of the award criteria, and the contracting authority "may *only* reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed".[31]

Article 69.2 of the Directive gives guidance to contracting authorities as to which elements the consideration should be paid. With slight variations in its wording, the non-exhaustive list[32] follows the wording of its predecessor in the Directive 2004/18. Accordingly, contracting authorities may request explanations concerning several aspects. The contracting authority may request information to other entities located even in a different Member State concerning the different aspects that is to evaluate, such as for example, laws, regulations, universally applicable collective agreements or national technical standards.[33]

First, those related to value of the procurement in an explicit manner; this includes the manufacturing of the good or provision of the services or construction of the goods, technical solutions or competitive advantages of the supplier, as well as originality of the work (with regard to origin and novelty).[34] It is important to note here that the Directive does not expressly include strategic reasons to justify that a tender is low, such as for example using a very low price to gain entrance into a new market or to secure a public contract and, therefore, gain the reputation that

[27] See the opinion of Sánchez Graells when interpreting the provision in the Directive 2004/18 as implying that in cases of abnormally low tenders "contracting authorities are entitled to reject tenders that appear to be abnormally low in relation to any of the relevant parameters and award criteria (ie not only price, at least where the award criterion is that of the most economically advantageous offer", in Sanchez-Graells, Albert, Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions (April 11, 2013). European Procurement Law Series, Vol 6, Forthcoming, p. 2.

[28] See suggesting that even with the new wording the assessment will be based on general conditions, including the contract's profitability, Indén T, 'Article 69 - Abnormally Low Tenders' in Steinicke M and Vesterdorf PL (eds), *Brussels Commentary: EU Public Procurement Law* (C.H. Beck; Hart; Nomos 2018), p. 745.

[29] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-285/99 and C-286/99 Lombardini SpA - Impresa Generale di Costruzioni, para. 32.

[30] See discussing this as a form of protecting the economic operator that submits a tender: C-103/88 - Fratelli Costanzo v Comune di Milano, para. 20;

[31] Article 69.3 of the Directive 2014/24

[32] Joined Cases C-285/99 and C-286/99 Impresa Lombardini SpA - Impresa Generale di Costruzioni, para. 83.

[33] Article 69.5 of Directive 2014.

[34] Article 69.2(a), (b) and (c) of Directive 2014/24.

might be associated with it as a provider of the public. Second, particularities regarding either they payment or lack thereof of social contributions by the economic operator or regarding the obligations that sub-contractors must comply with.[35] These could be, for example, that the supplier or its sub-contractor does not comply with its tax or social security obligations with respect of its employees. A third group would be due to the fact that the economic operator has benefitted from State aid – and therefore a subsidy to its costs and operations.[36] Interestingly, the Directive also stresses than if an economic operator has received State aid, and therefore has lower costs, "the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, (…) that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU."[37] If the tender is rejected, then the Commission must be notified. Thus, being recipient of State aid is sufficient for it to be rejected without the contracting authority having to prove that the tender is unrealistic with respect to the goods, services or works to be provided, but such aid must be incompatible with the market,[38] which is a task that most contracting authorities will find very difficult to determine. However, if the State aid is compatible with the internal market, then such ground cannot be used to consider the tender as non-compliant.

3.3 Consequences of being found abnormally low

Once the assessment has been conducted the contracting authority has three options according to the Directive 2014/24 in Article 69.3. The main rule is that it would only reject the tender after assessing that there is no satisfactory explanation for the low level of price or costs proposed. Alternatively, the tender *shall* be rejected if the reason for it being abnormally law is due to the tenderer not complying with its social contribution obligations as required by Article 18.2 of the Directive 2014/24. In this case there is no economic valuation in the assessment; if the tenderer has not complied with its obligations with regard to the fields of environ-mental, social and labour law, then the rejection happens automatically. Lastly, if the explanations submitted by the tenderer are sufficient to provide a justification for the low or aggressive tender, then it shall be deemed as compliant and be evaluated along with the rest of the offers.

The Directive does not include any particular rules or indications regarding low tenders that may be predatory or that may imply a sale at a loss. Neither does it include a provision similar to the one related to the identification of illegal state aid and subsequent reporting to the corresponding authority. Beyond stressing again the somewhat inadequate tools and/or obligations that, at least in the EU regulation, contracting authorities have regarding potential breaches of competition

[35] Article 69.2(d) and (e) of Directive 2014/24.
[36] Article 69.2(f) of Directive 2014/24.
[37] Article 69.4 of Directive 2014/24.
[38] Indén T, 'Article 69 - Abnormally Low Tenders' in Steinicke M and Vesterdorf PL (eds), *Brussels Commentary: EU Public Procurement Law* (C.H. Beck; Hart; Nomos 2018), p. 751.

law, the lack of such a rule also indicates the goals or objectives pursued by public procurement, as we discussed briefly in Section 2.

Therefore, a tender below that is not abnormally low in light of the assessment pursuant to Article 69 because it is sufficiently justified would be accepted as compliant and evaluated along with the rest of the tenders. This could potentially apply to predatory tenders, tenders involving sales at a loss as well as tenders with zero pricing. If such aggressive tender is not declared as non-compliant and could eventually be awarded the public contract, the question, therefore, would be if it could still be in breach of public procurement other rules such as antitrust or unfair competition laws.

4. Zero price or below cost tendering in public procurement

4.1 Introduction

If a tender is not abnormally low due to some justification, such as a business strategy to enter a new market or gain experience as a provider to the public sector, for example, doubts surge concerning whether a tender that is priced as zero – potentially being a 'gift' to the public buyer – or below costs could be accepted under public procurement rules. Zero price contracts in at least private markets, and also in some public markets, are not necessarily a rarity and with some part of the literature going as far as to claim that they "have exploded in quantity and variety".[39] Also, corporate strategies to sell at a loss are neither uncommon in jurisdictions in which such practices are not forbidden. Undertakings may have legitimate reasons to sell below costs or even to offer 'token' or symbolic prices. For example, to gain access to a market or receive a "seal of approval" by being the provider to the State.

Public contracts, an EU legal concept applying equally to all EU and EEA Member States regardless of the national definition of a contract or agreement,[40] are defined by the Directive 2014/24 as "contracts for *pecuniary interest* concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services".[41] And as stressed by the ECJ, "only a contract concluded for pecuniary interest may constitute a public contract".[42]

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[39] Newman, J.M., 2015. Antitrust in zero-price markets: Foundations. *University of Pennsylvania Law Review*, pp.149-206, p. 149.
See also dealing with zero price markets: Newman, J.M., 2016. Antitrust in zero-price markets: applications. *Wash. UL Rev.*, *94*, 49; Shampanier, K., Mazar, N. and Ariely, D., 2007. Zero as a special price: The true value of free products. *Marketing science*, *26*(6), pp.742-757;

[40] Steinicke M, 'Article 2 - Definitions' in Steinicke M and Vesterdorf PL (eds), Brussels Commentary: EU Public Procurement Law (C.H. Beck; Hart; Nomos 2018), p. 159.

[41] Article 2(4) of the Directive 2014/24.

[42] C-451/08 - Helmut Müller, para 47.

Does a tender with the value of zero complies with such general and broad concept of pecuniary interest? Is it a 'gift', or a zero pricing tender may still have pecuniary interest for the economic operator in the form of an expectation or different type of consideration that will be received from the contracting authority? Authors such as Steinicke also stress this complex point when remarking that "[a] contract will not be for pecuniary interest if a contract authority receives goods or services as a gift, without an obligation to provide reciprocal consideration. On the other hand, if the gift is a financial subsidy which the authority can use to make a purchase, the authority's purchase will be covered by the procurement directives."[43] Dismissing 'gifts' takes a narrow approach to the concept of pecuniary interest, while subjecting them to a form of consideration can be expanded. For example, would it be a consideration for the economic operator to be recognized as a provider of public goods, services or works? Or the consideration could be simply entering the market and the experience gained in the tender procedure and possibility to be awarded future contracts by this or a different contracting authority, partly due to the knowledge gained as well as reputation? Put it differently, does the remuneration needs to be in the form of monetary compensation or can this be broader than this?

4.2 Pecuniary interest

Pecuniary interest is the key in assessing whether a zero-price contract would be acceptable under EU/EEA public procurement rules. As the concept of public contracts, the pecuniary nature of a such a contract is also an independent EU/EEA concept.[44] The case law has recently interpreted the term "pecuniary interest" in public procurement matters in several instances.[45] Key concepts are the need for reciprocity between the parties, the likelihood of that reciprocity taking place as well as whether it should either imply a profit for the economic operator or at least the coverage of some cost benchmark.

Several options appear from the interpretation of the pecuniary interest. A narrow interpretation that understands pecuniary interest of a contract as requiring a monetary compensation for the contract capable to cover all costs. Under such interpretation aggressive bidding, of any kind, below costs could mean that even if a tender is not abnormally low, the tender acceptance would not lead to the formation of a public contract. A more flexible interpretation would imply that there is

[43] Steinicke M, 'Article 2 - Definitions' in Steinicke M and Vesterdorf PL (eds), Brussels Commentary: EU Public Procurement Law (C.H. Beck; Hart; Nomos 2018), p. 162.
[44] Steinicke M, 'Article 2 - Definitions' in Steinicke M and Vesterdorf PL (eds), *Brussels Commentary: EU Public Procurement Law* (C.H. Beck; Hart; Nomos 2018), p. 159-160.
[45] *Consiglio Nazionale* order, paragraph 38; judgment in *Remondis*, paragraph 43; judgment of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843), paragraph 31. In her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:303), point 32, Advocate General Trstenjak stated that 'the view can be taken that only a broad understanding of the notion of "pecuniary interest" is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition', and made specific reference to other forms of remuneration such as swaps or the waiver of reciprocal claims existing between the contracting parties.

sufficient degree of pecuniary interest if there is some partial remuneration to cover some level of cost. A last option would be to take a broad interpretation of pecuniary interest and understand it as some form of remuneration which may be monetary towards the covering of some of the associated costs of the contract or of a different nature that may grant the undertaking with some actual or potential advantage. The last two interpretations would allow under most circumstances below cost tenders and perhaps also zero price tenders, while the first and narrower interpretation would consider that neither below cost tenders nor zero price tenders (unless the cost benchmark for the good, service or product is zero) satisfy the requirement of a 'public contract' and, therefore, would not be susceptible to be accepted as a valid offer as there would be no procurement.

4.2.1 Reciprocity, profitability and cost covering

The European case law has stressed the need for an element of reciprocity as a defining character for the pecuniary nature of a contract to exist. The Judgments and opinions on this matter indicate the need for a mutual reciprocation for a contract to be of pecuniary interest. The cases, however, as less clear when they discuss the type of reciprocation expected by the economic operator and whether there must be a full, partial or even cost recovery at all for the contract to be considered as a public contract.

Seminal for the understanding of pecuniary nature based on the idea of reciprocity is the classic definition of the term by the ECJ in *Helmut Müller GmbH*. In this case dealing with the sale of land by a public body, the Court clearly stated that the "*pecuniary nature* of the contract *means* that the contracting authority which has concluded a public works contract *receives a service pursuant to that contract in return for consideration*. That service consists in the realisation of works from which the contracting authority intends to benefit".[46] The Court kept discussing the nature of the service the contracting authority receives, stressing that it must be of an economic nature understood in a broad manner, but it did not elaborate any further regarding the type of consideration to be received by the tenderer, not requiring for this to be of any specific nature either.[47] Also in this line and building upon *Helmut Müller GmbH*, the Advocate General Wathelet stressed that a public contract, in this case a concession, becomes so if it is concluded for pecuniary interest. In his opinion it was stressed that the "pecuniary nature of the concession contract means that the contracting authority which has concluded a public contract receives a service pursuant to that contract in return for consideration paid by it to the contractor".[48]

More recently, the ECJ has confirmed this mutual exchanged based on the provision of a benefit as a characteristic defining pecuniary interest. In *IBA Molecular Italy* the case law continued in the

[46] C-451/08 - Helmut Müller, para. 48 (emphasis added). See also in this sense, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 77, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45.
[47] C-451/08 - Helmut Müller, paras. 48-54
[48] Opinion of Advocate General Wathelet in Commission v Netherlands, para. 106.

previous like placing the accent of pecuniary interest on the exchange of services or obligations between the parties as it is the nature of a bilateral obligation (and more precisely a synallagmatic perfectum contract in civil law systems or bilateral contracts in common law systems). In this case, the ECJ stressed that such a character clearly designates the situation "a contract by which each of the parties undertakes *to provide a service in exchange for another*".[49]

The pecuniary interest is not only an exchange of obligations between the parties, as clarified by the case law, in addition, the contracting authority obtains an economic benefit and it compensates the economic provider in a way or another. Dealing with this latter, the ECJ clarified further in Auroux and Others that "[t]he pecuniary interest in a contract refers to *the consideration paid to the contractor* on account of the execution of works intended for the contracting authority",[50] and which could be, as in this case, the transfer of a sum of money from the contracting authority as well as obtain an additional income from third parties. The Court did not required for the payment of a sum of money to be the sole consideration nor it demanded a specific level of payment with regard to the goods, services or works provided.

Neither profitability is a requirement for a public contract to have a pecuniary interest. That an entity conducts is business with the general aim for profit is a circumstance to take into account when defining who is a contracting authority but not whether a contract has to be profitable to be a public contract. In a well-known case concerning the definition of a contracting authority, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa), the ECJ clarified that public procurement applies also to entities that may offer goods, services or works even if they are not profit making bodies and may be awarded public contracts.[51] Thus, absence of profitability does not render a contract void of pecuniary interest or makes it gratuitous.[52]

Connected to profitability the case law has developed further the concept of pecuniary interest and the retribution granted to the economic operator discussing if a reimbursement of the expenses/costs is sufficient or even if a partial one would be so.

A broad interpretation of this pecuniary character also finds based on the Advocate General Trstenjak in *Azienda Sanitaria Locale di Lecce* discusses the relationship between the pecuniary character of a contract, a reciprocity between the parties and a remuneration in favor of the economic operator.[53] The Advocate General clearly stresses that the "notion of 'pecuniary interest' requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means, (…) reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of

[49] C-606/17 - IBA Molecular Italy Srl, para. 28
[50] Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45.
[51] Case C-305/08 – *CoNISMa* [2009].
[52] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce, para. 32.
[53] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce.

a tendering procedure to apply".[54] The concept of reciprocity is not only important but rather broad and connected with a form of remuneration. For the Advocate General, the notion of pecuniary interest has to be broad enough to cover "any kind of remuneration which has monetary value",[55] and that:

> *"the absence of profit alone does not render the contractual agreement gratuitous. It continues to be a contract for valuable consideration from an economic point of view, especially since the recipient is in any case given a non-cash benefit, and could thus, in principle, come within the scope of Directive 2004/18. Notwithstanding the above, the view can be taken that only a broad understanding of the notion of 'pecuniary interest' is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition. Only in this way is it possible to guarantee the effectiveness of the procurement directives and to prevent the circumvention of procurement law by agreeing other forms of remuneration which are not readily recognisable as profit-making, for example through swaps or the waiver of reciprocal claims existing between the contracting parties."*[56]

The Advocate General concludes, detaching from the obligation of all tenders to cover generate profits, when stating that (linking pecuniary interests with the freedom to provide services in Article 56 TFEU) "a broad understanding of the notion 'pecuniary interest' would seem logical. In accordance with that broad interpretation, the service provider *may not be absolutely required to be profit-making*. Rather, it *should also be sufficient*, for the pecuniary interest requirement to be satisfied, if the *service provider merely receives cost-covering remuneration in the form of reimbursement of costs*. The notion of pecuniary interest is thus also intended to cover simple reimbursement."[57]

This cost-covering remuneration characteristic or its absence was somewhat reiterated by the ECJ but in perhaps even broader terms when it stressed that "as stated by the Advocate General in paragraphs 32 and 34 of her Opinion, and as is clear from the usual and ordinary meaning of the phrase 'pecuniary interest', *a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure* incurred to provide the agreed service"

Again, in Piepenbrock Dienstleistungen GmbH & Co. KG, with reference to Azienda Sanitaria Locale di Lecce, the ECJ discussed the topic of cost recovery in an indirect manner as part of the concept of 'pecuniary' interest when it concluded that "a contract must be considered as being 'for

[54] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce, para. 30.
[55] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce, para. 32.
[56] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce, para. 32.
[57] Opinion of Advocate General Trstenjak in Case C-159/11, Azienda Sanitaria Locale di Lecce, para.33.

pecuniary interest' (…) even if the remuneration provided for remains limited to reimbursement of the expenditure incurred to provide the agreed service."[58]

More recently in *IBA Molecular Italy* the Court seems to have departed from this full cost-coverage and seems to accept as compliant with the requirement of pecuniary interest when "a contract providing for the exchange of services is covered by the concept of public contract, *even if the remuneration provided for is limited to the partial reimbursement of costs* incurred in order to supply the services agreed".[59]

More recently in *Informatikgesellschaft für Software-Entwicklung (ISE) mbH*, a pending case, Advocate General Campos Sánchez-Bordona elaborated on the concept of pecuniary interest involving a case in which a software transfer contract for managing fire department activities was transferred from a contracting authority to another *free of charge.*[60] The question put forth for a preliminary ruling was whether such a free transfer constituted as a public contract or a mere collaboration contract between to public entities, prompted by "the (apparent) lack of pecuniary interest in the transfer".[61] Discussing whether the transfer could have some pecuniary interest, Advocate General Campos Sánchez-Bordona stressed that the free provision of the software was fundamental to the set up of a cooperation scheme, which could lead to subsequent development of software with a an economic value which is potentially very high.[62] Even if there was no obligation to develop software, the contractual conditions were interpreted as implying that parties had a legitimate expectation that software will be developed and

> "[t]here is therefore a reasonable expectation that Stadt Köln will contribute developments and modular extensions of the software. This serves as consideration for the provision of the software by Land Berlin.
>
> In short, from the point of view of Stadt Köln, the consideration which makes it possible to speak of pecuniary interest in its relationship with Land Berlin *is its participation in a cooperation scheme suitable for generating benefits* for the latter in the form of adaptations of the software (Article 1 of the cooperation agreement) and additional specialised modules (Article 5 of that agreement)."[63]

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[58] C-386/11, Piepenbrock Dienstleistungen GmbH & Co. KG, para. 31.
[59] C-606/17 - IBA Molecular Italy Srl, para. 29. See also: *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 29, and of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraph 31.
[60] Opinion of Advocate General Campos Sánchez-Bordona in Case C-796/18, Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln, para. 16.
[61] Opinion of Advocate General Campos Sánchez-Bordona in Case C-796/18, Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln, para. 40.
[62] Opinion of Advocate General Campos Sánchez-Bordona in Case C-796/18, Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln.
[63] Opinion of Advocate General Campos Sánchez-Bordona in Case C-796/18, Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln, para. 40 (emphasis added).

The Advocate General's Opinion requires some form of consideration granted to the party that gives a good, service or work for free. Such consideration should materialize or be highly likely to take pace, even if it has not been made conditional for the agreement to take place. If there is no reciprocal consideration, there will be no pecuniary interest. However, the consideration does not have to be a condition for the contract if it is highly likely that it will take place. In such a way, there must be a rather firm

Narrower seems to be definition of pecuniary interest set forth by the Consiglio di Stato in the national proceedings of this IBA Molecular Italy preliminary ruling. The Italian State Council is the legal-administrative consultative body and ensures the legality of public administration, and with jurisdiction to decide public procurement matters.[64]

5. Can or should competition law deal with predatory bidding?

5.1 Introduction

In this section we discuss if and to what extent competition law may be applied on abnormally low tenderers that may a negative effect on competition. This section will discuss article 101 and 102 TFEU, but the discussion is relevant for national competition law as well, since many jurisdictions include national provisions equivalent to Article 101 and 102 TFEU. Article 101 and 102 have traditionally not been applied on abnormally low tenders, and outside of the predatory bidding cases may at first sight not appear relevant in these scenarios. Our goal in this section is to investigate the possibilities that may be in applying these provisions on cases of abnormally low tenders, outside of the traditional predatory bidding scenarios, which to our knowledge has not been addressed in detail in the existing literature.

Before we discuss if abnormally bids may amount to a violation of competition law, we will address the concept of undertaking in EU competition law, which is decisive for to what extent Articles 101 and 102 TFEU are applicable to conduct in tender procedures. Then, we will present a short discussion of predation in tender procedures as a possible violation of the prohibition of abuse of a dominant position in Article 102 TFEU, and finally we will discuss if Article 101 may be applied on agreements between the contracting authority and the bidder how submits an abnormally low bid.

[64] Article 100 of the Italian Constitution, available in English at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

5.2 Concept of undertaking in EU competition law

Both Article 101 TFEU and article 102 TFEU are only applicable to conduct performed by undertakings.[65] An undertaking has been defined as "every entity engaged in an economic activity regardless of legal status of the entity and the way which it is financed."[66] Economic activity has been described by the EU courts as "offering goods or services on a given market".[67] Even though this statement only refers to the selling side of a transaction, economic activity also encompasses the buyer side of a transaction. But not all buying or procurement activities are considered as economic activity, and hence not all entities performing buying activities are considered to be undertakings. The most important limitation on when buying is considered as economic activity, especially in relation to public procurement, is the Fenin-doctrine. According the ECJ's judgment in *Fenin*, a purchasing activity cannot be dissociated from the subsequent use of the goods and that the "nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity".[68] This ruling excludes many public bodies' procurements from the scope of both article 101 and 102, since a public buyer often don't use the purchased good or service in an economic activity.

The reason why the Fenin-doctrine excludes buying from public buyers from the concept of an undertaking, and hence also from the application of competition law, is that a public buyer often use the purchased good or service as en input in an activity which is not considered economic activity. Even though public bodies, subject to public procurement rules, also may provide services considered to be an economic activity, the majority of the activities performed by public bodies are not considered economic activity. First, exercising public authority is not considered as an economic activity.[69] Second, many of the services provided by public bodies are not offered on a market, but are public services offered outside of markets, such as e.g. hospital treatment, social security services etc. Consequently, public purchasers buying through tender procedures are often excluded from the application of Article 102, even if they sometimes could be considered to be in a dominant position, and furthermore the agreements entered into between the public buyer and the undertaking being awarded the contract would fall outside the scope of article 101, since that provision is only applicable to agreements between undertakings.

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[65] One exeption from this, is that article 101 TFEU may be applied to a decision by an association of undertakings, without the association itself qualifying as an undertaking. See Case C-309/99, *Wouters*, ECLI:EU:C:2002:98, para 112. See also *Odudu*, "Economic Activity as a Limit to Community Law" in *Outer Limits of European Union Law* (Oxford) 2009, p. 242.

[66] See e.g. case C-41/90, Höfner and Elser v. Macrotron, para 21.

[67] See e.g. case C-180/98, Pavlov, para 75.

[68] Case C-205/03, *Fenin*, para 26.

[69] See Case C-309/99, Wouters, para 57. -

The rest of this section, apart from the part on predatory bidding, is only relevant where the public buyer procuring through a tender procedure will use the acquired good or service in an economic activity.

5.3 Predation

Predation in tender procedures may consist of either predatory pricing from the seller or predatory buying from the buyer. Predation performed by a seller or buyer in a dominant position may be considered as an abuse of a dominant position under article 102 TFEU. It is important to be aware that for predation to constitute a violation of article 102 TFEU, the undertaking must be in a dominant position. Undertakings that don't have a dominant position on the relevant market, are not subject to article 102 TFEU. Consequently article 102 TFEU is only applicable in cases where either the bidder is a dominant seller or producer on the relevant market, or the public buyer has a dominant position as a buyer on the relevant market. In some markets public bodies may be dominant, but most of these markets are markets where the public buyer will use the purchased good or service in a public service or when exercising public authority, and hence not be considered as an undertaking. If a public buyer is buying input for a service it will offer on a downstream market, the public body will often face other competitors on the downstream market, and hence not enjoy a dominant position as a buyer of the particular good or service. Because of this we will not address predatory buying in this paper. Furthermore, predatory buying is also covered in the existing literature.[70]

Submitting abnormally low bids in a public procurement procedure, may be considered as an abuse of a dominant position. A precondition for abnormally low bids being a violation of article 102 TFEU, is that the bidder has a dominant position. If an abnormally low tender is submitted by a new entrant or an undertaking with minor market share, as an attempt to achieve a footing on the market or to increase its market shares, it cannot be considered as a abuse of a dominant position.

The conditions for establishing that abnormally low bids submitted by a dominant undertaking amounting to an abuse under article 102 TFEU, are well established through the case law. If the price offered is below the undertakings average variable costs (AVC) it amounts to an abuse.[71] Furthermore, it follows from the case law that there is no requirement to demonstrate that the

[70] Herrera Anchustegui I, Buyer Power in EU Competition Law (Institut de Droit de la Concurrence - Concurrences 2017); Herrera Anchustegui I, 'Buyer Power Exploitation: Unfair Purchasing Practices' in Cachafeiro F, García Pérez R and López Suárez MA (eds), Derecho de la Competencia y Gran Distribución Comercial (Thomson-Reuters Aranzadi 2016); Kirkwood JB, 'Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?' (2004-2005) 72 Antitrust Law Journal 625; Alexandersson G and Hultén S, 'Predatory bidding in competitive tenders: A Swedish case study' (2006) 22 European Journal of Law and Economics 73; Lopatka JE, 'Predatory Buying' in Blair RD and Sokol DD (eds), The Oxford Handbook of International Antitrust Economics, vol 2 (Oxford University Press 2015); Blair RD and Lopatka JE, 'Predatory Buying and the Antitrust Laws' (2008) 2 Utah Law Review 415

[71] Case C-62/86, AKZO, para 71.

undertaking will be able to recoup its losses for a predatory pricing to be considered as an abuse.[72] If prices are above the bidders AVC but below its average total costs the pricing may amount to an abuse of a dominant position. In such a case there is an additional condition that the undertaking has a plan to eliminate competitors from the market.[73]

The prohibition of abuse of a dominant position may on this basis be applied to sanction abnormally low tenders, but only when the bidder enjoys a dominant position on the market. Abnormally low bids by new entrants or undertakings not enjoying a dominant position does do not constitute a violation of article 102 TFEU.

5.4 Article 101 TFEU and abnormally low tenders

Often neither the bidder nor the buyer will have a dominant position on the market. Since article 102 is not applicable in those cases, it is interesting to investigate if Article 101 may prohibit abnormally low tenders. If an agreement violated article 101, it follows from the second paragraph of the provision that the agreement will be void. One question that arises in this context is if an agreement can be considered void due to article 101 (2), if the procurement is performed in adherence with the relevant public procurement rules, such as Directive 2014/24. Before we discuss this question, we will first discuss if an agreement entered into by the contracting authority and the undertaking submitting an abnormally low bid may be in violation of Article 101 TFEU.

Article 101 TFEU prohibits – among other forms of co-operation and collusion – agreements which have as their object or effect to restrict competition. The prohibition is applicable on both horizontal and vertical agreements, and is hence applicable to an agreement between a seller and a buyer which is a vertical agreement. A precondition for article 101 to be applicable is that both parties to the agreement are undertakings, which as mentioned above is often not the case in a public procurement procedure. The application of Article 101 is restricted in the same manner as article 102 in this sense.

As mentioned above agreements are prohibited by article 101 TFEU if it has as its object or effect to restrict competition. The object alternative is in our opinion not an option for agreements entered into based on an abnormally low bid. For an agreement to be considered to have as its object to restrict competition the agreement must “reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects”.[74] An agreement between a single buyer and a single supplier does not in itself reveal such a degree of harm. Additionally, it follows from the judgment in *Budapest Bank,* that in order to classify an agreement as an object restriction

[72] Case C-62/86, AKZO, para 71; Case C-202/07 P France Télécom v Commission, para 110.
[73] Case C-62/86, AKZO, para 72.
[74] See among others Case C-67/13, Cartes Bancaires, paras 49 and 53 and case C-228/18, Budapest Bank, paras 33 and 51.

"there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition".[75] According to General Advocates Wahl and Bobek in their opinions in *cartes bancaires* and *Budapest bank* this experience may be either previous case law or established economic theory. To our knowledge no such experience exists showing that agreements based on abnormally low bids in general reveal a sufficient degree of harm to competition, that it is not necessary to investigate the effects.

On the other hand such an agreement may have as its effect to restrict competition. An effects analysis will have to be conducted on a case by case basis. One such possible effect may be foreclosure of other competitors, and then mainly for future procurement procedures. We will not enter into a full description of such analyses here, but will point out that relevant factors in such an analysis will be how large part of the market that is covered by the tender procedure, how long the contract is and whether the good or service sold is also sold in non-bidding markets.

One additional point to be made is that if one undertaking submits several abnormally low tenders in several tender procedures, article 101 allows for assessing the cumulative effect of these agreements.[76] In one specific agreement contributes to such a cumulative effect, that agreement will be void according to article 101 (2).

The last question is if the void effect pursuant to article 101 (2) will have effect on an agreement which is in accordance with the public procurement rules. One may argue that article 101 (2) should be interpreted to harmonize with the more specific rules on public procurement in this case. As we mentioned above, an abnormally low tender do not as such provide the contracting authority with a duty to or competence to reject the tender. The contracting authority may then end up in a situation where it has to either violate the public procurement rules or article 101 TFEU. On the other hand, it may appear more suitable to interpret the rule son procurement in line with the treaty provisions, meaning the such an agreement would be void. If so the consequence has to be that an abnormally low bid also is an exclusion ground according to article 57 of Directive 2014/24.

[75] Case C-228/18, Budapest Bank, para 76.
[76] Case C-234/89, *Delimitis,* paras 14 and 15.