



FIGHTING BID RIGGING IN THE ENERGY SECTOR IN UKRAINE

A review of public procurement at Ukrenergo

2021



Fighting Bid Rigging in the Energy Sector in Ukraine: A Review of Public Procurement at Ukrenergo

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Foreword

Robust public procurement policies aim to achieve value for money. Governments across the OECD and beyond are determined to design public procurement procedures that promote true competition on price and quality among bidders and reduce the risk of bid rigging.

This review assesses the procurement practices of Ukrenergo, the Ukrainian energy state-owned enterprise (SOE) and national-grid operator, within the framework of the OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement. The resulting recommendations can help to improve the competition practices of Ukrenergo in particular, and the Ukrainian energy sector more generally.

The OECD has long worked with countries and their administrations to design public procurement processes that promote competition and to set up methods for detecting collusive agreements. This review was undertaken at the request of the government of Ukraine and with the support of the government of Norway.

The recommendations resulting from the review show that Ukrenergo can make significant improvements that address both the prevention and detection of bid rigging in its tenders. Additional high-level recommendations to the government of Ukraine suggest improvements to the Procurement Law.

These specific recommendations for Ukrenergo can be used by other SOEs in Ukraine to benchmark their own practices and adjust them accordingly. Bid rigging is a highly relevant phenomenon in public tenders in Ukraine, and efforts to prevent and detect it will lead to significant savings.

Acknowledgements

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Information and comments from stakeholders were also key to this project. In particular, the OECD is grateful for input from Pavlo Kukhta, then First Deputy Minister of the Ministry for Development of Economy, Trade and Agriculture (MDETA), and his team; Daria Rudiuk at the procurement department of MDETA; representatives of the Ministry of Finance; representatives of the National Anti-Corruption Bureau of Ukraine; representatives of the Norwegian Embassy in Ukraine; Konstantin Konstantinov, Chief Expert, European Integration, International Co-operation and Communications Section of the Antimonopoly Committee of Ukraine (AMCU); Dar'ya Cherednichenko, former Deputy-chair/State Commissioner of the AMCU, as well as other representatives of the AMCU; representatives of the Anti-Corruption Action Centre in Ukraine (AntAC); Tetyana Korotka, Deputy Business Ombudsman at the Business Ombudsman Council in Ukraine; Ivan Lakhtionov, Innovation Projects Programme Director at Transparency International, Ukraine; Khrystyna Zelinska, Innovation Projects Programme Manager at Transparency International, Ukraine; representatives of the International Bank for Reconstruction and Development (IBRD); representatives of the European Investment Bank (EIB); Meghan E. Iorianni, Antitrust Consultant; Olexander Martinenko, Partner at Kinstellar Ukraine; Maksym Nazarenko, Partner at Sayenko Kharenko; representatives of Sayenko Kharenko and Ilyashev & Partners. The OECD also thanks Mykhailo Semchuk, local consultant in Kyiv, and Liudmila Taranina, interpreter, for the organisation and interpretation of meetings with a number of these stakeholders.

The opinions expressed in the report do not necessarily reflect the views of the above-mentioned organisations or individuals.

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Executive Summary

This report is part of the work undertaken within the wider context of the OECD project Supporting Energy Sector Reform in Ukraine, launched in 2019 with the financial support of the government of Norway. The work is carried out within the framework of the OECD Memorandum of Understanding for Strengthening Co-operation with the Government of Ukraine, signed in 2014 to support Ukraine carry out its reform process in line with international standards. The purpose of this review is to assess the procurement practices of Ukrenergo, the Ukrainian energy state-owned enterprise and national-grid operator, within the framework of the 2012 OECD Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, in order to improve the competition practices of Ukrenergo in particular, and the Ukrainian energy sector more generally.

The OECD has longstanding experience in advising countries and procurement bodies on their procurement laws and practices. Public procurement seeks to use the competitive market process to achieve value for money and purchase with the best possible conditions to ensure that public money is used most efficiently and not wasted. Whenever suppliers in public procurement procedures collude and enter into bid-rigging agreements, they corrupt the process, damaging the public customer and subsequently, society. The OECD Recommendation and its related Guidelines on Fighting Bid Rigging in Public Procurement address this problem and show ways for public purchasers to prevent and detect illegal collusion between suppliers.

A close analysis of Ukrenergo's procurement practices demonstrates that Ukrenergo has been making great efforts to improve its procurement and has already made great strides in professionalising its procurement practices. The focus of Ukrenergo's efforts to date has been on creating a more efficient and professional procurement structure with strong safeguards against fraud and corruption, in order to tackle the legacy of systemic inefficiency, corruption and embezzlement in public spending in Ukraine.

Despite this real progress, Ukrenergo needs to improve further. Bidder conspiracies and collusion have yet to be sufficiently targeted, and Ukrenergo has only recently initiated the reporting of suspicions of illegal bid rigging to the Antimonopoly Committee of Ukraine (ACMU) for investigation and prosecution, despite bid rigging being a widely recognised problem. A close analysis of current Ukrenergo practices has generated a number of recommendations that will help Ukrenergo to improve its procurement system. These recommendations address actions to be taken to prevent bidder collusion – such as more and better market research, increased bidder numbers, better tender design, and reduced communication between bidders – and improved detection of bidder collusion and its reporting to the competent authorities. An additional section addressed to the government of Ukraine issues recommendations for changing Ukrainian procurement law, in particular a reduction in the high levels of transparency in the procurement process that can facilitate bidder collusion.

The implementation of the recommendations will improve Ukrenergo's procurement practices at all levels. The savings this generates will likely offset any additional investment in procurement. In addition, a clear signal will be sent to suppliers that Ukrenergo's tenders are based in fair competition and that the company will not tolerate illegal anti-competitive practices.

This review should be seen as a case study featuring recommendations specific to Ukrenergo, but which can be replicated more broadly across the energy sector. Other SOEs in Ukraine can benefit equally from the recommendations in this report, which they can compare with their current practices and make any necessary adjustments.

Abbreviations and acronyms

ALT	Abnormally low tenders
AMCU	Antimonopoly Committee of Ukraine
AntAC	Anti-Corruption Action Centre
B2B	Business-to-business trade
CADE	Conselho Administrativo de Defesa Econômica (Brazilian Administrative Council for Economic Defence)
CCO	Chief compliance officer
CEO	Chief executive officer
CIBD	Certificate of independent bid determination
COFECE	Comisión Federal de Competencia Económica (Mexican Competition Authority)
CoST	Construction Sector Transparency Initiative
CPV	Common procurement vocabulary
EBRD	European Bank for Reconstruction and Development
ENTSO-E	European Network of Transmission System Operators for Electricity
IBRD	International Bank for Reconstruction and Development
IFI	International financial institutions
IP	International procurement
IMSS	Instituto Mexicano del Seguro Social (Mexican Social Security Institute)
IPS	Integrated power system of Ukraine
KPI	Key performance indicator
KfW	Kreditanstalt für Wiederaufbau (German state-owned development bank)
MDETA	Ministry for Development of Economy, Trade and Agriculture of Ukraine
NABU	National Anti-Corruption Bureau of Ukraine
NACP	National Agency for Prevention of Corruption
NEURC	National Energy and Utilities Regulatory Commission
RPC	Regional procurement centres of Ukrenergo
SAPO	Specialized Anti-Corruption Prosecutor's Office
SAS	State Audit Service of Ukraine
SBU	Security Service of Ukraine
SOE	State-owned enterprises
TFEU	Treaty on the Functioning of the European Union
TI	Transparency International Ukraine
TOR	Terms of reference
TSO	Transmission system operator
UPL	Ukrainian Law on Public Procurement
USAID	United States Agency for International Development
WTO	World Trade Organization

Table of contents

Part I Introduction and background	13
1 Background: cartels and bid rigging in public procurement	15
2 Project description	18
3 Ukrenergo: company profile	19
4 The legal framework for public procurement in Ukraine	21
5 Stakeholders in public procurement in Ukraine	31
Part II Procurement at Ukrenergo	35
1 Procurement structure	37
2 Procurement stakeholders	39
3 Procurement workflow	45
4 The IFI procurement process	48
5 Monitoring and control	49
Part III Alignment of Ukrenergo's procurement regime with OECD recommendations	51
1 Bid rigging in energy-sector procurement and Ukrenergo countermeasures	53
2 The importance of information in good tender design and procedures	58
3 Maximise participation of genuinely competing bidders	67
4 Defining clear tender terms, avoiding predictability, and rewarding competition through well-designed evaluation and award criteria	80
5 Effectively reducing communication among bidders	88
6 Detecting and punishing collusive agreements	95
Part IV Recommendations for changes to Ukrainian procurement law	107
Part V Conclusions	111
Annex A. Summary of OECD recommendations for action	113
Annex B. 2012 Recommendation of the OECD Council on fighting bid rigging in public procurement	117
Annex C. Guidelines for fighting bid rigging in public procurement	121
Annex D. Certificate of Independent Bid Determination (Cofece)	133
References	139

FIGURES

Figure 1. International bid-rigging cartels as a % of all international cartels by region, 1989-2018	16
Figure 2. Percentage of bid-rigging cartel cases prosecuted by AMCU, 2017-2019	16
Figure 3. Regional transmission systems managed by Ukrenergo, 2021	19
Figure 4. Ukrenergo investment programme, 2010-2018	20
Figure 5. Number of procurement appeals, 2014-2019	30
Figure 6. Top 75% of Ukrenergo procurement purchases, 2017-2019	37
Figure 7. Differences between estimated and realised tender prices, by type of procurement, 2017-2019	38
Figure 8. Corporate structure of Ukrenergo, September 2019	39
Figure 9. Structure of Ukrenergo's Supply Chain Management Directorate, 2020	40
Figure 10. Procurement volumes and value by region, 2017-2019	41
Figure 11. Shares of procurement procedures used, 2017-2019	47
Figure 12. Appeals against Ukrenergo tender decisions, all stages, 2017-2019	50
Figure 13. Procurement appeals of Ukrenergo tender procedures, 2017-2019	50
Figure 14. Average bidder numbers by procedure, 2017-2019	69
Figure 15. Cancelled tenders, 2017 - 2019	69
Figure 16. Average fine imposed for international cartels	102
Figure 17. Possibility of imposing criminal sanctions on individuals	103

TABLES

Table 1. Expected cartel overcharges	15
Table 2. Outcomes of procurement appeals, 2018 -2019	29
Table 3. Top 3, 10 and 15 Ukrenergo suppliers by contract value, 2017-2019	38
Table 4. Procurement staffing, 2017-2019	64
Table 5. Procurement staff and value in the Directorate for Supply Chain Management, 2019	65
Table 6. Ukrenergo's sub-threshold procurement and negotiated procedures, 2017-2019	71
Table 7. Participation of foreign bidders in non-IFI tenders, 2017-2019	72
Table 8. Average bidder numbers in English-language open-bidding tenders, 2017-2019	72

Part I Introduction and background

The ultimate aim of OECD procurement reviews of public purchasers such as Ukrenergo is to secure the best value for money for the purchaser and, consequently, the public budget and the taxpayer. The basic idea is to benefit from a purchasing process that makes the best use of market competition between suppliers. The process should be designed to encourage and enable competition, to facilitate domestic and foreign bidder participation, to instil a sense of fairness and trust in suppliers, and to fit the needs and capacities of the purchaser. At the same time, any violations of competition principles by suppliers cannot be tolerated and should be detected and prosecuted.

This section provides a brief outline of the general background of procurement reviews, how they fit into the OECD's competition mandate and relate to the activity of Ukraine's competition authorities. It further introduces the OECD Energy Sector Reform Ukraine project, of which this review forms an integral part, and its beneficiary, Ukrenergo. Lastly, it provides an overview of the public procurement rules in Ukraine that govern Ukrenergo's purchasing activities, and define the limits within which Ukrenergo can adjust its procurement activities to promote competition.

1 Background: cartels and bid rigging in public procurement

This report is part of a wider effort by the OECD and its member countries to promote the fight against cartels and bid rigging, actions that have been recognised unequivocally as the most egregious violations of competition law (OECD, 2019^[1]) (OECD, 2012^[2]).¹ Fighting bid rigging can help to reduce procurement costs, open up markets, tackle corruption, and address inequality.

Cartels are agreements between independent undertakings that aim to reduce or abolish competition on price, quality, innovation or any other competition parameter. If a conspiracy affects procurement through a bidding or tendering process, this is called bid rigging. As a result of such collusive practices, customers will pay more and receive less than if there were vigorous market competition.

An extremely conservative estimate of the excess price paid by customers of a cartel is 10% above the competitive price, and studies suggest that in bid-rigging cases, the average overcharge is even higher than in non-bid-rigging cartels and can amount to approximately 20% (Smuda, 2012^[3]).

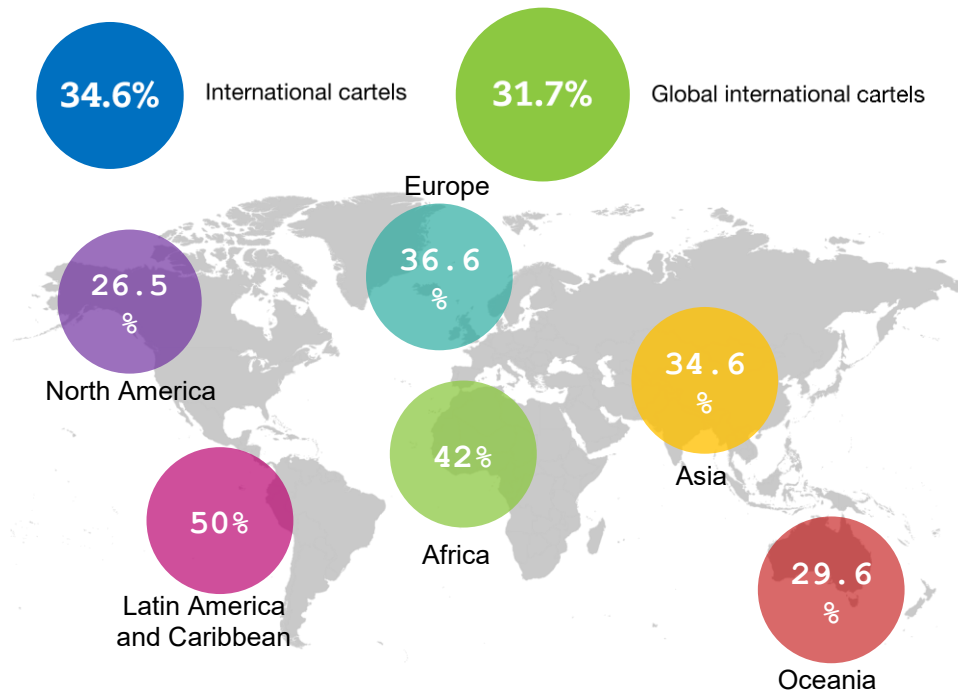
Table 1. Expected cartel overcharges

	European Union	United States	United Kingdom	Netherlands
Price effect of cartels	10-15%	10%	10-15%	10%

Source: (OECD, 2014^[4]).

Bid rigging in public procurement is pervasive. Based on enforcement statistics for international cartels, about a third of all international cartel cases are bid-rigging cases.²

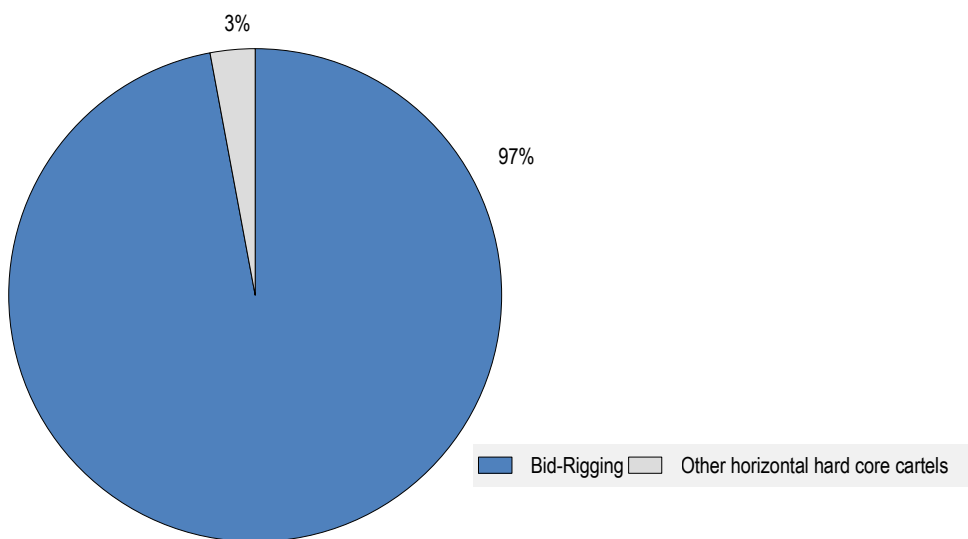
Figure 1. International bid-rigging cartels as a percentage of all international cartels by region, 1989-2018



Source: (OECD, 2020, p. 46^[5]).

In Ukraine, bid rigging is the single most prosecuted horizontal competition offence. Between 2017 and 2019, the Antimonopoly Committee of Ukraine (AMCU), the authority in charge of implementing Ukrainian competition law, prosecuted and fined almost 600 bid rigging cases and imposed total fines of more than EUR 100 million. Of all horizontal hardcore infringement cases that the AMCU decided between 2017 and 2019, 97% were bid-rigging cases.³

Figure 2. Percentage of bid-rigging cartel cases prosecuted by AMCU, 2017-2019



Source: AMCU.

Cartels and bid rigging not only increase prices of goods and services or decrease their quality, but they also tend to increase inequality, and foster or support other types of criminal or fraudulent conduct.

When procurement of goods and services is more expensive than it would be under competitive market conditions, less money from the state budget can be spent on healthcare, education or social benefits. At the same time, cartelists steal additional gains at the expense of taxpayers (OECD, 2013^[6]). This affects in particular poorer parts of the population that rely more heavily on state support and benefits, and, in the case of Ukrenergo, will pay more for electricity and for goods produced using significant amounts of electricity.

Many other offences are linked to bid rigging in public procurement, of which corruption is of particular concern (Box 1). Bid rigging is greatly facilitated when a procurement official is involved either actively as a facilitator, or passively by turning a blind eye. Additional gains from artificially inflated procurement volumes allow for bribes and kickbacks to procurement officials (Anderson, Jones and Kovacic, 2018^[7]) (OECD, 2010^[8]). A recent OECD report has identified corruption risks in procurement as one of the key challenges in the energy sector in Ukraine and for Ukrenergo (OECD, 2020^[9]).

Box 1. Car Wash bid-rigging cases

The Car Wash (*Lava Jato* in Portuguese) investigations in Brazil began in 2013, and helped uncover one of the most harmful corruption, collusion and money-laundering cases in Latin American history. The initial investigation raised flags of a possible corruption scheme involving a senior director of the state-owned oil company Petrobras, which was in part financed by rigging bids for government contracts. It revealed that politicians would appoint high-level directors at Petrobras, who in turn were accepting bribes in the form of a “commission” in exchange for awarding government contracts. These “commissions” were then later used to finance political campaigns. In addition, the construction companies involved in the corruption scheme were also allocating markets and fixing prices affecting government procurement. Since the beginning of Operation Car Wash, the Brazilian competition authority CADE has opened around 20 bid-rigging investigations. These initially targeted construction companies involved in bid rigging for Petrobras contracts in the oil and gas markets, such as the construction of power plants. This investigation unearthed further alleged bid-rigging practices in other projects, notably the construction of football stadiums (for the 2014 FIFA World Cup and the 2016 Olympic Games in Rio de Janeiro) and railways.

Source: OECD (2019), *OECD Peer Reviews of Competition Laws and Policy: Brazil*, www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf, p. 56.

For all these reasons, the OECD recommends that countries fight bid rigging vigorously and has issued guidelines to support this effort (OECD, 2012^[2]) (OECD, 2009^[10]). Significant in-country work has been carried out in OECD member and non-member countries, and with procurement bodies on how to improve legal frameworks and procurement practices in line with OECD best practices.⁴

2 Project description

The review of Ukrenergo's procurement practices continues the OECD's work against bid rigging, and aims to support the company, and other state-owned enterprises (SOEs) in Ukraine, in their effort to improve the integrity of procurement. This report is a part of the OECD project Supporting Energy Sector Reform in Ukraine, which was launched in 2019 with financial support from the government of Norway.⁵ The purpose of the project is to support the government of Ukraine in reforming the country's energy sector and in promoting energy efficiency through the provision of policy analysis, recommendations and capacity-building activities aimed at various levels of government and other stakeholders involved in the sector. The project has five separate areas of work for the following expected outcomes.

1. Review architecture and governance of the energy sector
2. Enhance government capacity to carry out SOE sectoral reform using an evidence-based approach in line with international standards
3. Improve competition practices in the energy sector
4. Improve conditions for investment in the energy sector
5. Strengthen anti-corruption measures and practices in the energy sector.⁶

This report falls into the third work stream – improving competition practices in the energy sector – and assesses the procurement practices of the Ukrainian energy SOE Ukrenergo within the framework of the OECD Recommendation on Fighting Bid Rigging in Public Procurement (Annex B). Ukrenergo is Ukraine's sole electricity-transmission system operator. Ukrenergo was selected for review as one of the largest SOEs in Ukraine⁷ and one of its largest procurers; in 2019, for example, it made more than 5 000 purchases worth over UAH 1.25 billion (Ukrainian hryvnia). As part of Ukrenergo's current process of implementing far-reaching management and governance reforms, changes to procurement practices will lead to savings and could inspire reforms in other SOEs. Ukrenergo wishes to be a flagship of quality corporate reform in the Ukrainian public sector. The OECD has long supported procurement policy reform and public-sector purchasing reforms to align them with global best practice.⁸

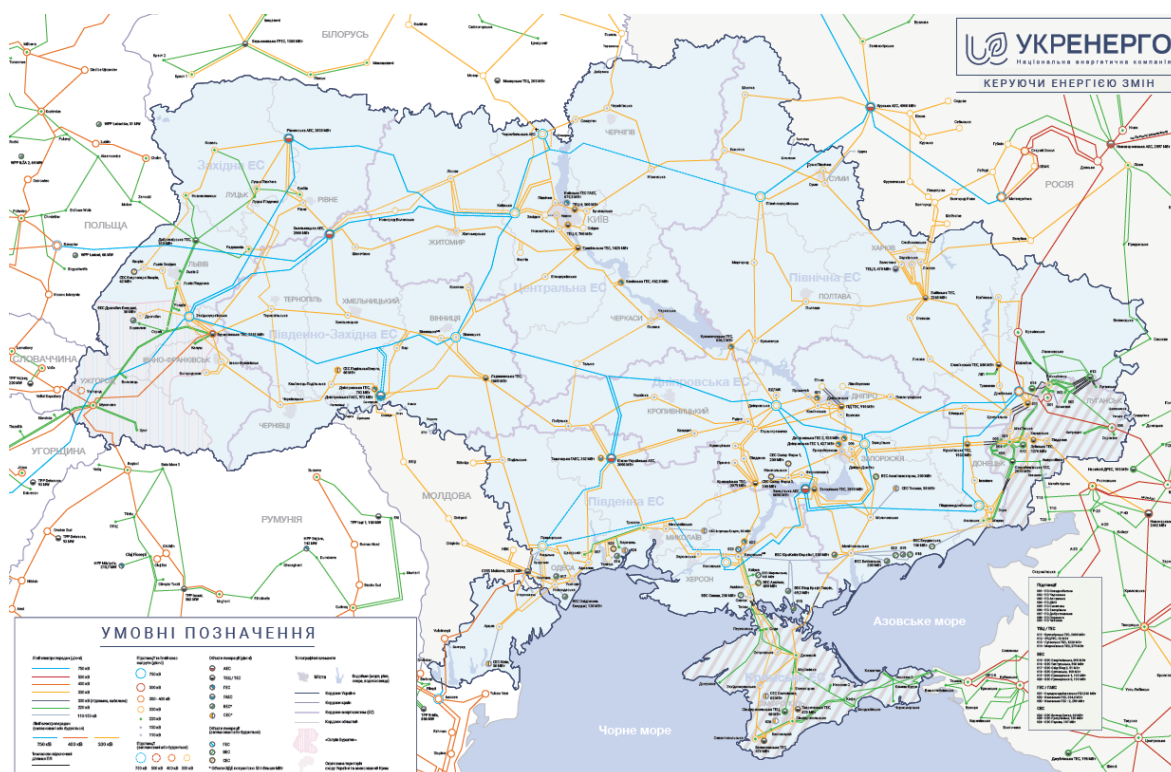
Within the same work stream, the OECD is set to deliver training materials and capacity-building workshops to Ukrenergo procurement officials on effective tender design and bid-rigging detection.

To collect data and background information for this report, the OECD team worked in close co-operation with Ukrenergo, in particular, the Directorate for Supply Chain Management, and with the full support of Ukrenergo's management and audit and compliance officers. Two requests for information were sent to the company (in December 2019 and March 2020), and a fact-finding mission visited Kyiv in early March 2020. During the fact-finding mission, multiple meetings were held with different Ukrenergo teams and officials, as well as with other key officials, including those at the Ministry for Economic Development and Trade, the Ministry of Finance, the AMCU, the National Anti-Corruption Bureau, Transparency International Ukraine, the Anti-Corruption Action Centre (AntAC), World Bank, and European Bank of Reconstruction and Development (EBRD). A draft of this report was sent to Ukrenergo, AMCU, government officials responsible for Ukrenergo and procurement policies, and procurement experts familiar with Ukrainian and European procurement law; all provided valuable comments to improve the report.

3 Ukrenergo: company profile

The Private Joint Stock National Power Company Ukrenergo (NPC Ukrenergo) is Ukraine's sole electricity-transmission system operator. It is responsible for the operational and technological management of Ukraine's integrated power system (IPS), the operation of trunk and interstate electricity grids, and the transmission of electricity along trunk electrical grids from generation centres to distribution network operators (Ukrenergo, 2019_[11]). The company services 137 substations of ultra-high voltage (220-750 kV) with a total installed capacity of more than 80 500 MVA and 21 800 kilometres of trunk and interstate transmission lines (Ukrenergo, 2019, pp. 6-7_[11]). The country is split into six regional transmission systems (Figure 3). The company also manages transmission system operations and cross-border electricity flows with neighbouring countries, including Hungary, Slovakia, Romania, Poland and Moldova (Ukrenergo, 2019, p. 16_[11]).

Figure 3. Regional transmission systems managed by Ukrenergo, 2021



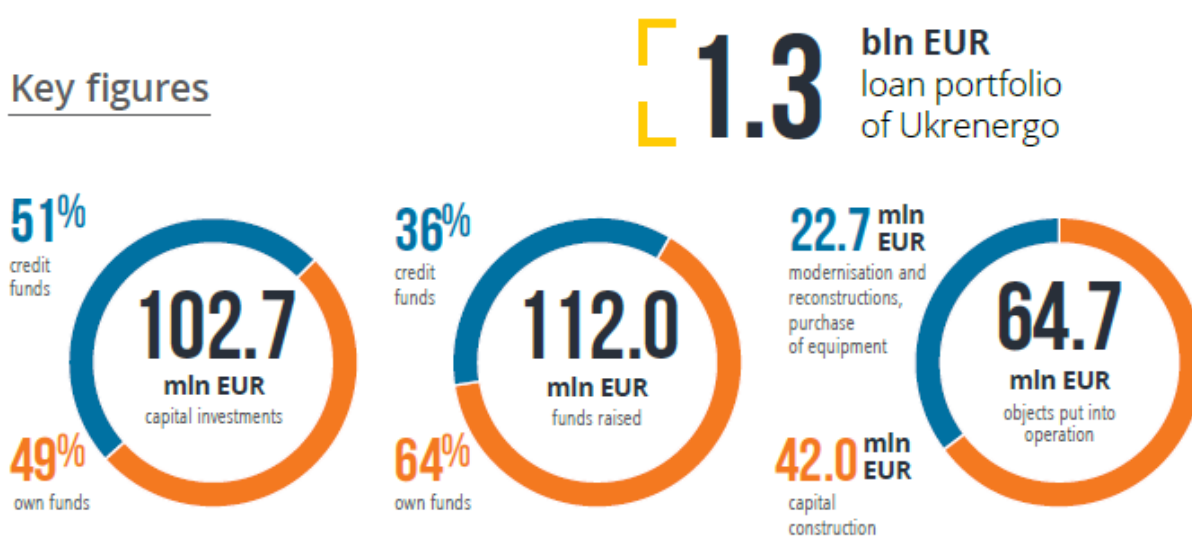
Source: Ukrenergo (5 March 2021).

Ukrenergo is one of the largest SOEs in Ukraine. In 2019, the company generated total revenue of EUR 875 million and a net profit of EUR 62 million (Ukrenergo, 2020, p. 3_[12]). In 2018, the company had approximately 8 600 employees (Ukrenergo, 2019, p. 16_[11]), and total assets valued at EUR 1.85 billion (Ukrenergo, 2020, p. 3_[12]).

In 2019, following the requirements established by Law No. 2019-VIII on the electricity market (Electricity Market Law) to establish a certified independent transmission system operator (TSO), Ukrenergo was corporatised as a fully state-owned joint-stock company in 2019. The Electricity Market Law also aimed to integrate Ukrenergo (as a certified TSO) into the European Network of Transmission System Operators for Electricity (ENTSO-E). At the time of writing, Ukrenergo is yet to be certified as a TSO,⁹ as it does not still hold ownership rights over the electricity transmission system which, according to Ukrainian law, must belong to the state. With the launch of the new wholesale electricity market in July 2019, Ukrenergo acquired new functions and obligations pursuant to the Electricity Market Law, including the organisation and functioning of two new electricity market segments – the balancing and ancillary services markets – and performing the functions of Commercial Metering Administrator and Settlements Administrator (OECD, 2020, p. 47^[9]).

Ukrenergo's functions require significant investment and with this procurement activities.

Figure 4. Ukrenergo investment programme, 2010-2018



Source: (Ukrenergo, 2019, p. 43^[11]).

Apart from running the transmission grid, Ukrenergo is investing heavily in the modernisation, refurbishment, enhanced reliability, efficiency, and technical quality required for integration into ENTSO-E. This includes the construction and reconstruction of substations, automation of substations, power equipment and transformers, and the construction of state and interstate transmission lines (Ukrenergo, 2019, pp. 46-47^[11]). Other than capital investment, Ukrenergo spending also covers basic equipment and company needs.¹⁰

4 The legal framework for public procurement in Ukraine

Ukrenergo purchases goods, works and services under two different and separate regimes.

One is used for procurement financed by loans from international financial institutions (IFI) and the other for procurement financed through Ukrenergo's budget. The 56% of procurement exercised under the IFI procurement regime (Box 2) is made using dedicated rules and under close oversight by the IFI.

This review focuses on Ukrenergo's budget-financed procurement – the remaining 44% – which is subject to Ukrainian procurement law and Ukrenergo's own institutional choices.

Box 2. IFI procurement

International financial institutions (IFI) assist developing or transitional economies by advising on and funding development projects, and assisting with their implementation. The World Bank, through the International Bank for Reconstruction and Development (IBRD), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), and Kreditanstalt für Wiederaufbau (KfW) are all financial partners of Ukrenergo and provide loans against government guarantees. Ukrenergo's credit portfolio with international financial institutions is worth over UAH 40 billion. Projects include the modernisation of substations, high-voltage line construction, smart-grid appliances, balancing-market data processing, and transmission-network modernisation.

IFI procurement is centralised and performed by Ukrenergo's International Procurement Department. It follows IFI procurement rules, including the World Bank's Procurement in Investment Project Financing Goods, Works, Non-Consulting and Consulting Services (<http://pubdocs.worldbank.org/en/178331533065871195/Procurement-Regulations.pdf>*) and Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants (<http://documents1.worldbank.org/curated/en/634571468152711050/pdf/586680BR0procu0IC0dislosed010170110.pdf>**); KfW's Guidelines for the Procurement of Consulting Services, Works, Plant, Goods and Non-Consulting Services in Financial Cooperation with Partner Countries (www.kfw-entwicklungsbank.de/PDF/Download-Center/PDF-Dokumente-Richtlinien/Vergaberichtlinien-2019-Englisch-Internet_2.pdf); the EIB's Guide to Procurement for Projects Financed by the EIB (www.eib.org/attachments/strategies/guide_to_procurement_en.pdf); and the EBRD's Procurement Policies and Rules (www.ebrd.com/work-with-us/procurement/policies-and-rules.html).

Over the past three years, IFI procurement accounted for 56% of Ukrenergo's total procurement and was worth UAH 8.7 billion.

Notes: * These rules will apply to future procurement projects. ** The rules in use for current loan agreements.

Source: Ukrenergo, <https://ua.energy/activity/cooperation-with-imf>.

Ukrenergo's procurement using its own funds is subject to the Ukrainian Law on Public Procurement (UPL), and to orders issued by the Ukrainian government and the Ministry for Development of Economy, Trade and Agriculture (MDETA). The relevant legislation is:

- Law of Ukraine of 25 December 2015 No. 922-VIII on Public Procurement, as amended by Law No. 114-IX of 19 September 2019, VVR, 2019, and Law No. 45, Article 289
- Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine of 11 June 2020 No. 1082 on the Procedure for Posting Information on Public Procurement
- Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine of 30 March 2016 No. 557 on Approval of the Model Provisions on the Tender Committee or Authorised Person(s)
- Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine of 13 April 2016 No. 680 on Approval of Tender Documents
- Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine of 15 April 2020 No. 708 on Procedure for Determining the Subject of Procurement.
- Order of the Ministry for Development of Economy, Trade and Agriculture of Ukraine of 28 September 2020 No. 1894 on the Approval of the Approximate Methodology for Determining the Cost of the Life Cycle.

As an energy operator, Ukrenergo's purchasing activities fall under the UPL provisions for utilities (Article 2-I-4) and Article 2-II-3).

The UPL has undergone significant changes over time, with most amendments made in 2020 (Box 3). These changes were largely due to two major events, the 2014 Association Agreement with the EU¹¹ – which foresees that Ukraine shall ensure that the existing and future legislation on public procurement will be gradually made compatible with the EU public procurement *acquis communautaire* – and Ukraine's accession to the WTO's General Procurement Agreement (GPA) in May 2016.¹²

Box 3. Main changes in Ukrainian procurement law in 2020

Changes for the procuring entity	Changes for the participant
 <p>Protection against dumping The system will automatically detect anomalously low price proposals</p>	 <p>A greater number of tenders all procurement above UAH 50,000 will be mandatory to hold in ProZorro</p>
 <p>More professional procurement by introducing "authorized procurement officials" instead of "tender committees"</p>	 <p>Option to recover the fee for disputing a tender</p>
 <p>Rejection of participants with bad track record</p>	 <p>Disputing the cancellation of the procedure and rejection of all proposals</p>
 <p>Protection against "tender trolls"</p>	 <p>Fixing errors in the documentation within 24 hours</p>
 <p>Using non-price criteria for assessment of proposals</p>	 <p>Forming associations with other participants to participate in tenders</p>
 <p>Buying quickly and sensibly by implementing electronic catalogs — online stores (Prozorro Market) for state-owned entities</p>	 <p>Personal responsibility of officials in the procuring entity for violations of the law (a fine from 2 to 10 minimum incomes pretax — UAH 34,000-170,000)</p>



Source: Transparency International Ukraine 2019; SECOND PROCUREMENT REVOLUTION: ANALYSIS OF THE DRAFT LAW; <https://ti-ukraine.org/en/news/second-procurement-revolution-analysis-of-the-draft-law>.

Procurement in entities defined as contracting authorities in Article 2 of the UPL is the responsibility of *authorised persons*.¹³ This is an official or other person employed by the purchaser who is responsible for organising and conducting procurement procedures objectively and in an impartial manner in accordance with UPL, on the basis of the purchaser's own administrative decisions or employment agreements. This person must hold a university degree, normally in economics or law. Purchasers can appoint one or more authorised persons. In cases where several authorised persons are appointed, the purchaser has to define each one's areas of responsibility clearly. In cases where the contracting authority decides to establish larger procurement teams in the form of working groups for consideration of tender proposals, such working groups are headed by an authorised person (Article 11-XII). Responsibilities of authorised persons according to Article 11-X are the:

1. annual procurement plan
2. choice of the procurement procedure
3. conducting of procurement procedures

4. provision of equal conditions for all participants, and the objective and fair selection of the winner of the procurement procedure
5. preparation, approval and storage of relevant documents on public procurement
6. publication in the electronic procurement system of all necessary information
7. performance of other actions foreseen in the UPL.

Authorised persons can be held personally liable for infringements of the procurement legislation (Article 44), and violations can be fined with amounts between 100 and 10 000 non-taxable minimum incomes, depending on the type of violation and the person responsible for the violation.¹⁴

The procurement process under Ukrainian procurement law

The pre-tender phase

The annual plan

Procurement must be carried out based on an annual plan (Article 4 of the UPL), which is published in the electronic procurement system. The plan has to contain information about the purchaser, the type and approximate start of the procurement procedure – provided the procurement falls within the value thresholds as defined in Article 4-II (Box 4) – the classification of the procurement in accordance with the Unified Procurement Dictionary, the intended lots, and the expected value of the tender. For framework agreements, the annual plan must also indicate the term of the agreement.

Box 4. Value thresholds in Ukrainian Procurement Law

	Goods and services	Works
Customers according to Article 2-I-1 to 3	≥ UAH 200 000 (EUR 6 666)	≥ UAH 1.5 million (EUR 48 940)
Customers according to Art. 2-I-4, includes Ukrenergo	≥ UAH 1 million (EUR 33 261)	≥ UAH 5 million (EUR 166 306)

For procurement below the thresholds but exceeding UAH 50 000 (EUR 1 663), the simplified-procedure rules apply.

If the expected purchase price is ≥ EUR 133 000 for goods and services and ≥ EUR 5.15 million for works, the tenders must also be published in English (Article 10-III).

To any purchases below UAH 50 000, basic procurement principles apply (Article. 5), and the electronic platform can be used.

Source: Article 3, UPL; exchange rate on 18 June 2020.

Market research

To plan and prepare specific procurements, purchasers can carry out market consultations and request information from all types of economic actors (Article 4-IV of the UPL). This can be done through the electronic procurement system or open meetings with potential suppliers, provided the consultations are in line with the requirements of fairness, openness and non-discrimination (Article 5). Market research will serve as a basis for the subsequent determination of the appropriate procurement procedure, and for setting the qualification and evaluation criteria necessary to ensure that the procurement meets the purchaser's needs.

Choosing a procurement procedure

Eight types of procurement procedures are foreseen under UPL.

1. **Open-bidding procedure** (Section 4, Articles 20-33). At least two bids must be submitted in the open-bidding procedure, which is considered the main procurement procedure under UPL. It is conducted entirely on the electronic bidding platform ProZorro: tender publication, clarifications, submitting an initial tender offer, evaluation of offers, three-stage electronic auction, publication of the notice of intent to award the contract or tender cancellation, and the publication of the report on contract implementation.
2. **Limited-participation procedure** (Section 6, Articles 36-39). The limited-participation procedure can be used if there is a need for a preliminary verification of bidders' qualifications. It takes place in two stages with at least four participants needing to submit documents in the first stage, and at least three qualified participants needed to proceed to the second stage. In the second stage, tender offers with prices are submitted, with the final price setting taking part in a three-round electronic auction.
3. **Competitive-dialogue procedure** (Section 5, Articles 34-35). A two-stage procedure, competitive dialogue can be used if a purchaser cannot determine the technical or qualitative characteristics of the required goods, works or services in advance, making it necessary to negotiate them with bidders. At least three participants meeting the determined technical and qualification criteria must remain to start negotiations. The tender is amended according to the results of the negotiations, and all participants are then invited to submit final bids in the second round, which takes place as a three-round electronic auction.
4. **Negotiated procedure** (Section 7, Article 40). A negotiated procedure may be used only in exceptional cases. These include:
 - cancellation of an open-bidding procedure twice due to an insufficient number of bidders
 - if only one supplier can meet the requirements, such as when procuring artworks, protecting intellectual property rights, or the absence of competition for technical reasons
 - emergency purchasing
 - follow-up purchases from the same supplier within three years of the initial contract and not exceeding 50% of the initial contract.
5. **Simplified procurement procedure** (Article 14) Simplified procurement applies to tenders with a value equal or above UAH 50 000 but below the otherwise specified higher thresholds (see Box 4). It is administered using an electronic auction if at least two proposals are submitted. If only one bid is submitted, ProZorro automatically proceeds to check the bid's compliance with the tender announcement's technical and qualification criteria.
6. **Sub-threshold procurement procedure** (Section 7, Article 5) Used for tenders with a value below UAH 50 000, the procedure remains subject to the basic procurement principles of the UPL (including fair competition among participants), but does not require the use of ProZorro. Even if a purchaser does not tender electronically, however, a report on the concluded procurement contract must be published on ProZorro containing information such as the supplier's identity, the subject of procurement and contract's price and terms (Article 3-III).

Procurement tenders can also be organised under a framework agreement, and can split a contract into different lots.

7. **Framework agreements** (Article 15). Framework agreements are concluded between a purchaser and several bidders. Procurement has to be carried out using the open bidding procedure and a minimum of three participants is required. The procurement procedure determines the basic conditions for the conclusion of contracts during the term of the agreement.

8. **Contracts split into lots** (Article 22-II-9). Participants are permitted to win more than one lot in the same procurement procedure.

Tender terms

Qualification criteria and technical specifications

The legal provisions on **qualification criteria** (Article 16 of the UPL) stipulate that bidders can be required to prove they have: 1) access to the necessary equipment, material and technical base and technologies; 2) employees with appropriate qualifications and knowledge and experience; 3) proven experience in delivering similar contracts; and 4) sufficient financial capacity for the goods, works or services in question.

The **technical specifications** must describe the essential characteristics of the goods, works or services to be procured, including technical, functional and quality characteristics (Article 23). They may refer to established standards or regulations, provided that equivalent solutions are permitted. References to specific brands, trademarks or technologies must not be used. In cases where no alternative and appropriate description of a purchaser's need can be found, equivalent solutions must be explicitly included.

Evaluation criteria and price

Evaluation criteria need to be laid out clearly in the tender documentation (Article 22-II-10 of the UPL), which must provide a list of relevant criteria and methods of evaluation that indicate each criterion's specific weight.

Price plays a major role in the UPL. Article 21-II-4 requires the expected value of the procurement be published with the tender documentation. The price of a submitted tender offer should not exceed the expected value (Article 26-IV). Procurements can be based on **life-cycle cost**. In this case, the tender documentation has to spell out all cost elements and constituent elements of the life cycle, and the value and weight of the life-cycle elements (Article 22-II-10).

A procurement can include other evaluation criteria in addition to price or life cycle cost to determine the **most economically advantageous tender**. Article 20-III provides examples for such additional criteria, such as payment terms, performance speed, warranty services, technology transfer and staff training, or procurement-related environmental or social criteria. The tender documentation must spell out their cost equivalent or the share the criteria will have in the overall evaluation. The weight of price or life-cycle costs must amount to at least 70% of the overall weighting criteria (Article 29 VIII). The only exception to this is the competitive-dialogue procedure, for which there are no set percentages.

Tender offers with **abnormally low prices** can be rejected by the purchaser (Article 29-XIV). An abnormally low price is any that is 40% or more below the arithmetic mean of all price offers at the auction's initial stage, and 30% or more below the second best offer at the end of the auction (Art. 1-I-3). An abnormally low price warning is generated automatically by the electronic-procurement system. A successful bidder with an abnormally low bid must justify the price within one working day of winning (Article 29-XIV); if the justification is unsatisfactory or none is provided, the contracting authority may reject the bid.

Eligibility of bidders

Bidding is open to all bidders, both Ukrainian and foreign (Article 5-II of the UPL). If the expected purchase price is higher or equal to EUR 133 000 for goods and services, and EUR 5.15 million for works, the tender announcement must also be **published in English** (Article 10-III).

Bids can be submitted jointly in **associations of bidders**, as defined in Article 1-I-37. Tender offers must disclose how participants are associated, but purchasers have no right to require a specific organisational or legal form of association (Article 26-X).

Sub- or co-contracting is also permitted. A bidder can meet the qualification criteria of a tender by showing that its sub- or co-contractors meet the tender requirements (Article 16-III). A sub- or co-contractor must be declared in a tender if it will be charged with over 20% of the value of works or services under the contract (Article 22-II-18).

Bidders can be excluded from participation in the tender procedure if they have been found guilty of criminal offences including bribery, corruption, money laundering, child labour and human trafficking, or because they have been found guilty of bid rigging, owe taxes or fees, or have family ties to other bidders or procurement officials (Article 17).

The tender procedure

In open bidding, the most-used procurement procedure, (Section IV, Articles 20-33 of the UPL), the process is the following.

1. Announcement of the tender
2. Publication of the tender documentation, technical specifications and draft contract
3. Clarification phase and changes to the tender documentation
4. Submission of tender offers
5. Automatic disclosure of tender offers – including information on price and other evaluation and qualification criteria – and generation of a list of tenderers ranked by price
6. Publication of accepted tender offers, and the date and time of the electronic auction
7. Electronic auction
8. Automatic evaluation of tender offers, and consideration of tender offers by the purchaser
9. Determination of the winner and publication of the intention to enter into a procurement contract.

Box 5. Electronic-auction process

Article 30 of the UPL describes the procedure for the electronic public procurement auction.

The auction takes place in three stages with the electronic procurement system generating a list of participants ranked according to price at each stage. The bidder with the highest price in each previous round may submit a new offer first. Participating bidders who wish to reduce their bid price must do so by at least one step from their previous price offer with the size of the minimum step being determined by the purchaser within 0.5% to 3% of the expected purchase price or in absolute values.

At each stage, all bidders have access to the auction and to information about their own bid price. They receive information about their position in the current bid-price ranking and on the number – but not the names – of active bidders.

After the third round of the auction, the final results are published, simultaneously with all bidders' names.

Source: Article 30 Ukrainian Procurement Law.

Regardless of the type of tender procedure, all tenders, tender documentation and changes to the tender must be published in one of the electronic procurement systems (Article 10). Publication deadlines vary according to the type of procurement procedure.

Box 6. ProZorro and DoZorro: Electronic procurement and monitoring

In December 2015, the government of Ukraine adopted amendments to the Law on Public Procurement to improve the transparency, efficiency and fairness of procurement systems through the use of **electronic public procurement mechanisms**. This reform had become particularly urgent given the significant losses to the state budget from corrupt public procurement practices, which were estimated at 10-15% or UAH 35 to UAH 52.5 billion of annual state expenditure; they were part of fiscal consolidation measures. The electronic procurement system put in place was **ProZorro** (<https://prozorro.gov.ua>), which has been obligatory for procurement procedures for all government authorities and SOE since its launch in 2016. Built using open-source data, ProZorro was the result of a collaboration between the government, the private sector, and civil society, with important contributions from experts at Transparency International and financial support from EBRD, USAID and other international donors. According to the Ministry for Development of Economy, Trade and Agriculture (MEDTA), the introduction of ProZorro and its open-bid, open-access system has been responsible for an estimated 7.53% savings in government procurement. Since its launch, ProZorro has received wide international recognition, and was awarded first place at both the World Procurement Awards and the Open Government Awards in 2016.

To complement this important innovation, further improve transparency, and prevent theft at all stages of public procurement, DoZorro (<https://dozorro.org>), an online platform designed to enable civil society to have some degree of control over public procurement was introduced. The DoZorro community unites 24 professional civil-society organisations across Ukraine that identify and submit complaints concerning violations in over 1 500 procurement processes every month. It offers the option to leave feedback, comments and information about state customers, supplier, public and law enforcement authorities, and about procurement procedures. The information allows prioritisation of complaints and observations, which will be further investigated and eventually passed on to the relevant authorities. Complaints launched in DoZorro can be verified using procurement documentation from ProZorro.

Sources: (OECD et al., 2020, p. 499^[13]), (Institute for Economic Research and Policy Consulting, 2018^[14]), (OECD, 2018^[15]).

Note: Civil society organisations using DoZorro are listed here: <https://dozorro.org/community/ngo>.

Procurement results are published on the electronic procurement system in a report that must specify the exact procurement, its type, evaluation criteria, number of bidders, name of the successful bidder, prices of tender proposals and the final price, dates of all relevant procurement steps, information on joint bids and sub-contractors, and grounds for tender cancellations (Article 19). This report is generated automatically by the electronic procurement system within one day of publication of the award or the cancellation of the tender.

Procurement contract

The purchaser can request a deposit not higher than 5% of the amount of the contract as a **performance bond** for the delivery of the goods, works or services by the successful supplier (Article 27). The deposit is returned after the successful completion of the contract.

Article 41 spells out the basic requirements of the purchasing contract and any possible modifications. The terms of a contract cannot be changed after its signing, except in certain circumstances, including:

1. reduction of procurement budgets or volumes
2. price increases of up to 10% that are the result of changes in input cost prices, not more than once within 90 days of the signature of the contract
3. quality improvements provided they do not lead to an increase in the contract value

4. extension of the procurement contract without changing its total value if objective circumstances cause delays (such as force majeure), and delays caused by customer financing
5. extension of the procurement contract by up to 20% of the value of the initial contract.

The successful implementation of the contract, as well as changes to the contract need to be notified in the electronic procurement system.

Procurement appeals

Article 18 determines the appeals process and the appeals body. Appeals can be made for mistakes in the tender documentation and against decisions, actions or omissions made by the purchaser, which occurred before the submission deadline of tender proposals, after the bid evaluation, and after the conclusion of the tender process. All appeals must be made through the electronic procurement system, and the law foresees tight deadlines.

The procurement appeals body is the Antimonopoly Committee of Ukraine (AMCU) (Article 1-I-17 and Article 18). Procurement appeals are reviewed by three administrative boards, with decisions taken by three AMCU state commissioners sitting on each board. Complaints against concluded procurement contracts and claims for damages must be to the appeals court, not the AMCU.

As a result of a procurement review, the AMCU can make a reasoned decision to:

1. confirm a violation of the procurement rules or to make a finding of no infringement
2. impose measures to eliminate violations, which can include full or partial cancellation of the tender award, provision of documents or explanations, elimination of discriminatory provisions, corrections to the tender documentation, or cancellation of the tender procedure.

Once the AMCU's procurement appeal decisions have become binding, they must be executed within 30 days of the decision's adoption. A failure to comply with the AMCU's decision is an administrative offence and can lead to fines between 2 and 5 000 non-taxable minimum incomes.¹⁵ During the consideration period of a procurement complaint, the procurement procedures themselves and any relevant deadlines are suspended, and the purchaser can take no action, except for eliminating any violations of the procurement rules specified in the complaint. Table 2 shows that more than 50% of all procurement appeals are fully or partly successful.

Table 2. Outcomes of procurement appeals, 2018 -2019

	2018	2019	Growth,%
Total considered Complaints on the merits	5549	8 601	55.00
Denied	1645	2927	77.93
Satisfied fully/partly	3197	4657	45.67
Terminated Consideration	707	1017	43.85
Revoked Complainant	353	486	37.68
Cancellation of Procedure	238	318	33.61
Fix violations	32	60	87.5

Source: AMCU

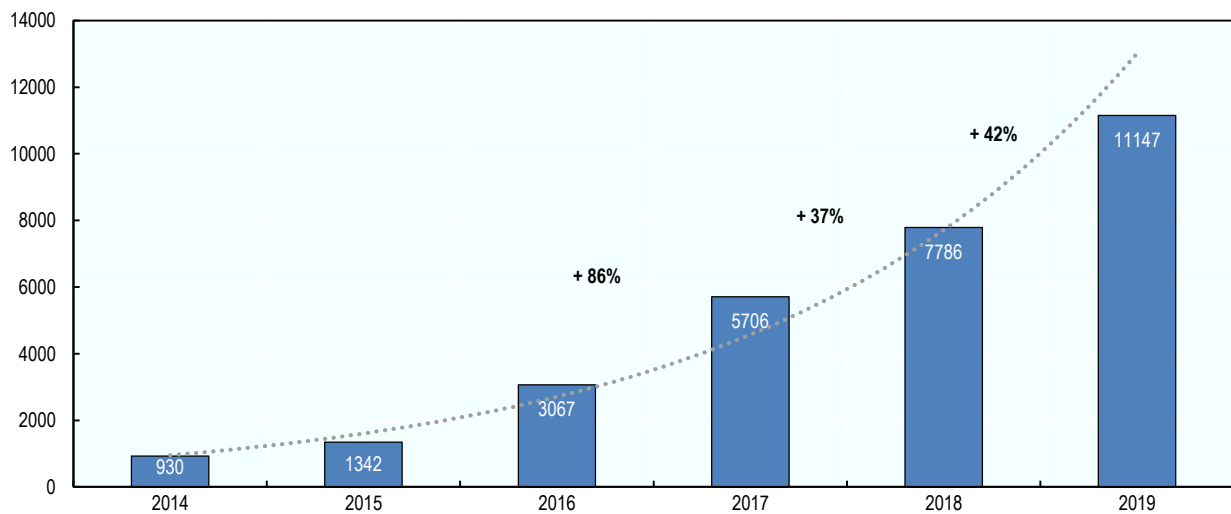
Note: Revoked complaints, cancelled procedures or eliminated violation cases are not included in total.

The most frequent violations of procurement rules take place in tenders in building and construction, fuel and energy purchasing, transport infrastructure, food, and purchases of medical equipment and pharmaceuticals. In terms of violations, the following categories of violations were most frequently found by the AMCU appeals boards: discriminatory bidder exclusion in cases where neither the excluded nor the winning bidder satisfied the qualification criteria; bidders being excluded post-auction despite pre-qualification; winners rejected for

failure to submit product samples; winners rejected for failure to supply non-mandatory documents; discriminatory qualification requirements that could be met by only one supplier; and request of bidder documents that could be accessed freely in the state register.¹⁶

Stakeholders have reported that the AMCU is working effectively as an appeals body. However, employees are overburdened with an ever increasing number of appeals, of which many are frivolous, as well as a formalistic approach to complaints, meaning that many violations are technicalities. The recent amendments to the UPL introduced a fee to lodge a complaint¹⁷ and established that a complaint cannot be withdrawn once it is registered in the electronic procurement system. It is expected that these changes will reduce the number of appeals.¹⁸

Figure 5. Number of procurement appeals, 2014-2019



Source: AMCU.

5 Stakeholders in public procurement in Ukraine

Public procurement receives much attention from government and civil-society stakeholders. The equivalent of around 13% of Ukrainian annual GDP, procurement has in the past been seen as a source of embezzlement and misappropriation, insufficiently monitored by Ukraine's State Audit Service. In 2014, the Ukrainian Ministry of Justice quoted expert estimations saying that the abuse of tender procedures had led to a decrease in GDP of 6-7% (OECD, 2016, p. 69^[16]).

In two earlier OECD reports, the utilities and energy sectors were identified as particularly vulnerable to corruption and integrity risks (OECD, 2018^[17]) (OECD, 2020^[9]). Various OECD reports have also revealed concerns about the abilities of anti-corruption authorities and AMCU to address vested interests and corruption schemes involving SOEs in Ukraine (OECD, 2020^[9]) (OECD, 2019^[18]) (OECD, 2018^[19]).

The introduction of ProZorro and the related monitoring tool DoZorro, as well as the changes to the procurement law, and the various institutions and bodies that exercise formal or informal oversight over public spending all relate directly to serious problems with public procurement and the widespread misappropriation of funds. While these are all positive steps, it is not always entirely clear how the competencies of these bodies are defined, allocated and shared.

There are various public and civil-society entities exercising oversight over public procurement in Ukraine, certain with particular relevance to Ukrenergo. Public bodies include:

1. **Verkhovna Rada Committee on Economic Development.** A parliamentary committee tasked with developing and reviewing legislation in the area of economic development and with preparing legislation for the Parliament's plenary sessions. Its competence includes public procurement and it was the main committee for the adoption of the UPL.
2. **Ministry for Development of Economy, Trade and Agriculture (MDETA).** The authorised body under Article 7-I of the UPL, it is in charge of regulating and implementing state policy in procurement. It can, for example, introduce regulations necessary to implement the UPL and analyse the functioning of the procurement system. It must present annual reports to the Verkhovna Rada, Ukraine's parliament; ensure the functioning of the electronic platform and related information resources; develop tender documentation and rules on authorised persons; develop methods for the estimation of the reserve price; and co-operate with other organisations to prevent corruption.
3. **Accounting Chamber.** This body implements state policy in state financial control at all stages of the procurement process, from the procurement procedure to conclusion of the contract and its operation (Article 7-IV of the UPL).
4. **State Audit Service of Ukraine (SAS).** A central executive authority (co-ordinated by the Ministry of Finance) carrying out independent financial control to ensure the efficient and legal use of public financial resources by public entities, including SOEs. The SAS performs public financial audits, monitors public procurements of these entities, and conducts inspections every two years (OECD, 2020, p. 76^[9]).¹⁹

5. **National Anti-Corruption Bureau of Ukraine (NABU).** A government law-enforcement body, it is specialised in investigating corruption-related offences committed by high officials of state or local governments, including those at SOEs.²⁰ NABU is highly familiar with corruption offences related to procurement and potential competition-law violations.²¹ For example, NABU is involved in an ongoing investigation of corruption allegations related to transformer procurement by Ukrenergo (OECD, 2020, pp. 79-80_[9]). NABU is overseen by the **Specialised Anti-Corruption Prosecutor's Office (SAPO)**, a department of the Prosecutor General's Office of Ukraine, which provides procedural guidance in NABU investigations, represents the public prosecution in courts, and has the right to appeal to the courts with civil, commercial, and administrative claims in the public interest.²²
6. **Antimonopoly Committee of Ukraine (AMCU).** The designated procurement appeal body, it addition also works in competition-law enforcement, including enforcement against bid rigging (see Part I, Chapter 1).

Notable civil-society organisations include:

1. **Transparency International Ukraine.** It carries out extensive monitoring of public procurement, using the DoZorro platform (Box 6) and checks for red flags using a set of indicators, referring suspicious cases to relevant state bodies. Red flags can be related owners, beneficiaries and executives; the frequency of bidders participating in different auctions, simultaneous downloads of a file by different bidders; similar mistakes in bidding documents; or staff relationships between different bidders. It referred 34 042 cases to different state control bodies for the period 2017-2019.²³
2. **Anti-Corruption Action Centre (AntAC).** An organisation uniting experts from legal, media and civic-political sectors to fight corruption, which it sees as a root cause of the key problems in state building in Ukraine. Its activity is focused on political corruption in the form of regulatory decisions taken by the officials in power;²⁴ public procurement is one of its main centres of interest. AntAC carries out systematic monitoring of public procurement and has submitted 2 669 observations since 2016 to authorities such as SAS. Approximately 30% of its observations were directed at AMCU and related to competition and procurement.²⁵
3. **Construction Sector Transparency Initiative, Ukraine (CoST).** A global initiative improving transparency and accountability in public infrastructure, CoST works with public, industry and civil-society stakeholders to increase transparency of infrastructure projects. Its aim is to reduce mismanagement, inefficiency, corruption and the risks posed to the public from poor-quality infrastructure.²⁶ Ukrenergo signed a memorandum of co-operation with CoST in 2016 (Ukrenergo, 2020_[20]).²⁷

Monitoring the e-procurement system is an important part of the activities of both public enforcement bodies and civil organisations. While the focus is strongly on corruption offences (Box 7), when it comes to procurement, bid rigging and corruption often go hand in hand. Ukrenergo's efforts to prevent and detect bid rigging (Part III, Chapter 6) could benefit from the monitoring experiences of these stakeholders.

Box 7. OECD Typology of Corruption Schemes in the Energy Sector in Ukraine

A forthcoming *OECD Typology of Corruption Schemes in the Energy Sector in Ukraine* will document cases of (alleged) corruption in the energy sector, many of which involve **corruption schemes in procurement processes**. Typical schemes have included the following characteristics.

- A system of kickbacks at which the price of goods and services is increased several times in order to pay bribes to lobbyists, politically connected individuals, relatives or those with connections to SOE officials
- Tenders and purchases of unsolicited or superfluous services and goods
- Schemes for the purchase of equipment, works or services significantly over the planned cost: suppliers offering a lower price are simply ejected from the tender on artificial, pre-set formal grounds leading to the product of the winner – usually a favoured supplier – having an inflated price
- Prior agreement on price between bidders or the participation of fictive competitors, usually represented by companies whose beneficial owners are family members or friends from the political elite or energy companies' leadership.
- Rigging the procurement process to ensure that a bidder is predetermined, with a large payment made in advance to the selected supplier; the bid winner can be a shell company that immediately transfers the funds to an offshore company or does not deliver on its contractual obligations.
- Outsourcing services previously carried out by the SOE to an external provider, which then bribes SOE officials to use the SOE's own resources (such as equipment and staff) to carry out the outsourced services.

Source: OECD/ACN (forthcoming), *Typology of Corruption Crimes in the Energy Sector in Ukraine*.

Part II Procurement at Ukrenergo

This section provides an overview of Ukrenergo's procurement activities and outlines the institutional set-up of procurement at Ukrenergo, as well as the procurement processes and workflows, and the procurement oversight functions. This will provide the background for Part III, which analyses Ukrenergo's practices in the context of the relevant OECD recommendations.

1 Procurement structure

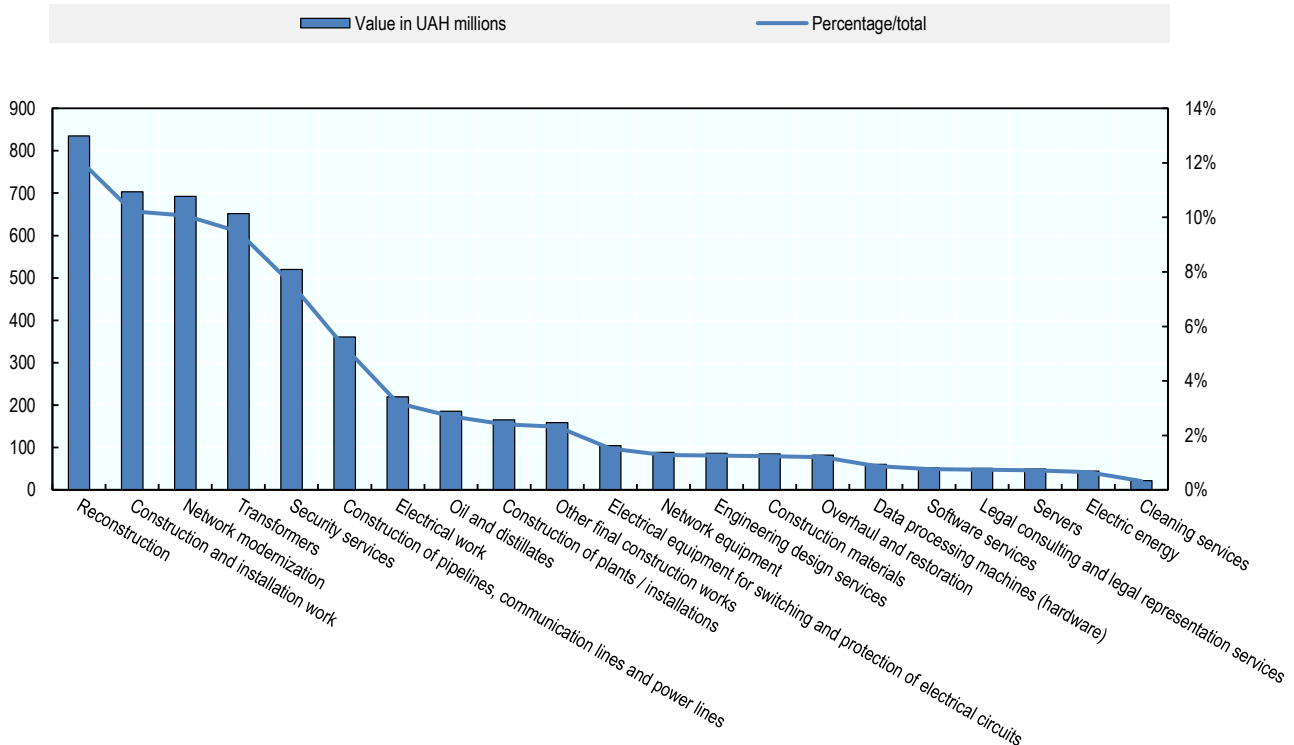
Procurement value

In the period 2017-2019, Ukrenergo's **total procurement expenses** amounted to UAH 15.58 billion, of which 44% was funded by Ukrenergo's budget-financed procurement, which is the subject of this review.²⁸

Most important purchases and suppliers

Figure 6 shows the **top 75% of goods, works and services** procured by Ukrenergo in the period 2017-2019. The majority of these purchases were characteristic of the activity of a transmission-systems operator (TSO), such as the reconstruction of substations, construction and installation work, network modernisation, transformers, construction of pipelines, and switching and network equipment. Other purchases, such as data processing, legal-consultancy services, and oil and distillates are more common types of products, less specific TSO needs.

Figure 6. Top 75% of Ukrenergo procurement purchases, 2017-2019



Note: The analysis combines works, goods and services. The high value of works procurements tends to reduce the relevance of goods and services procurement, which should be looked at separately to identify Ukrenergo's high-relevance procurements in goods and services.

Source: Ukrenergo Responses to OECD February and May 2020.

Given that Ukrenergo has procured a number of large construction and reconstruction projects, as well as investment goods, in the last years, it is unsurprising to find that there is a certain **concentration on the supplier side** in terms of their shares of the total procurement value. The top 15 suppliers account for almost 48% of Ukrenergo's total procurement volume, despite their share of the total number of contracts being negligible.

Table 3. Top 3, 10 and 15 Ukrenergo suppliers by contract value, 2017-2019

	Procurement expenditure (UAH, billion)		Number of contracts	
	Total	Share	Total	Share
Top 3 suppliers	1.43	20.7%	18	0.11%
Top 10 suppliers	2.8	40.9%	163	1.05%
Top 15 suppliers	3.3	48%	238	1.53%

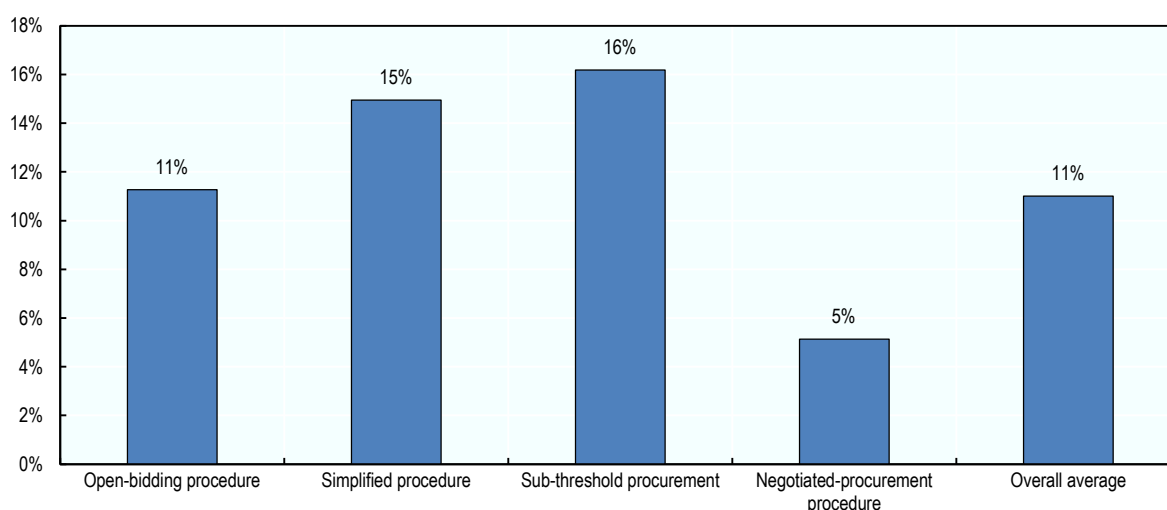
Source: Ukrenergo Responses to OECD February and May 2020.

Performance

Based on the price estimates for each tender, the difference between the realised and the estimated price can be calculated for each tender. Figure 7 shows the average “savings” rate by type of procurement procedure over all procurement. On average, Ukrenergo realises **purchase prices 11% lower than the initial price estimate**. This may be due to vigorous competition in the tendering process, but might also reflect an overestimated initial price, an explanation supported by the highest savings rate being in sub-threshold procurement for which there is no competition in the process.

Recent publications provide at least anecdotal evidence of Ukrenergo procurement performing better than that of other Ukrainian energy SOEs, such as Ukrhydroenergo or Energoatom, which paid twice or more for similar purchased products such as transformers and cables. The comparisons also showed that Ukrenergo purchased goods such as fire extinguishers, roofing felt, Internet access and other common goods and services at prices 0.4 to 2.1 times cheaper than other energy SOEs in the period 2017-2019.²⁹

Figure 7. Differences between estimated and realised tender prices, by type of procurement, 2017-2019



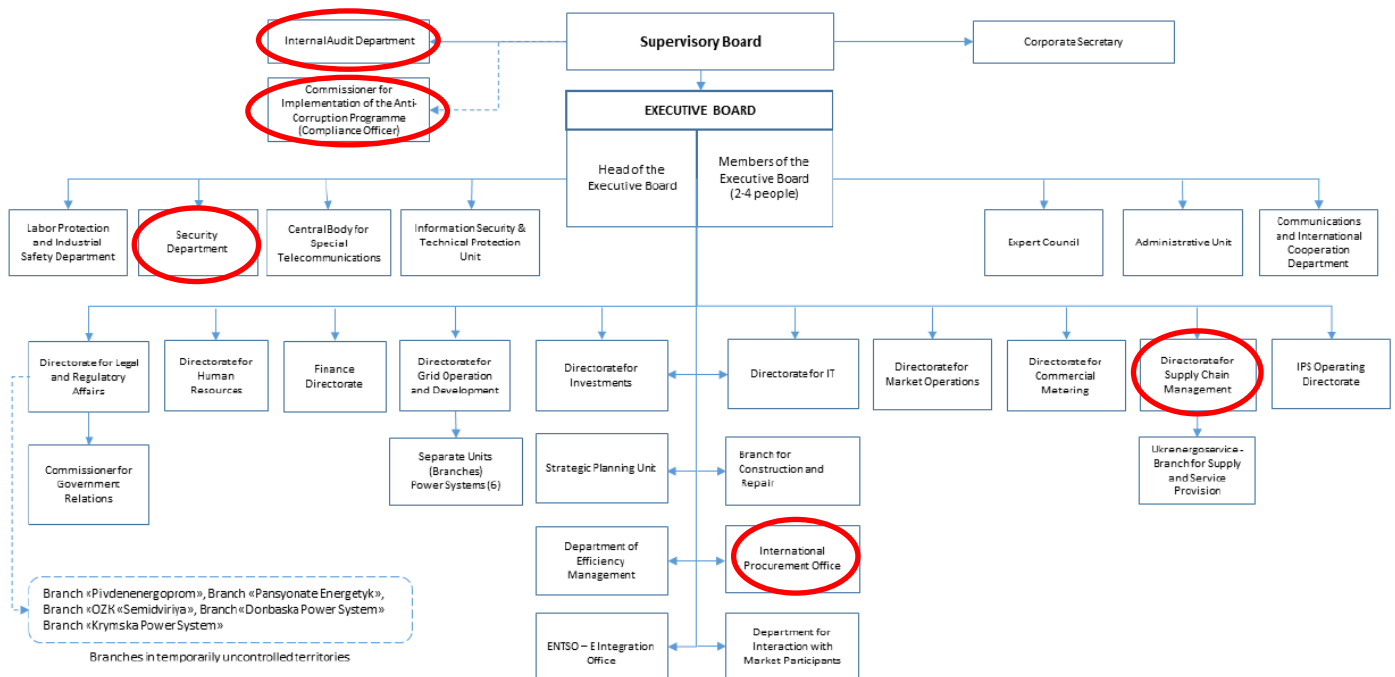
Note: Calculated as the percentage difference between estimated and realised prices.

Source: Ukrenergo Responses to OECD February and May 2020.

2 Procurement stakeholders

At Ukrenergo, the Supervisory Board and the Executive Board have general oversight functions over the company's processes, including procurement,³⁰ while departments and directorates with functions specifically in Ukrenergo procurement are: Directorate for Supply Chain Management; International Procurement Office; Internal Audit Office; Office of the Grid Compliance Officer; and the Security Department (all circled in Figure 8).

Figure 8. Corporate structure of Ukrenergo, September 2019



Note: Two of the technical sub-divisions are not in the corporate structure.

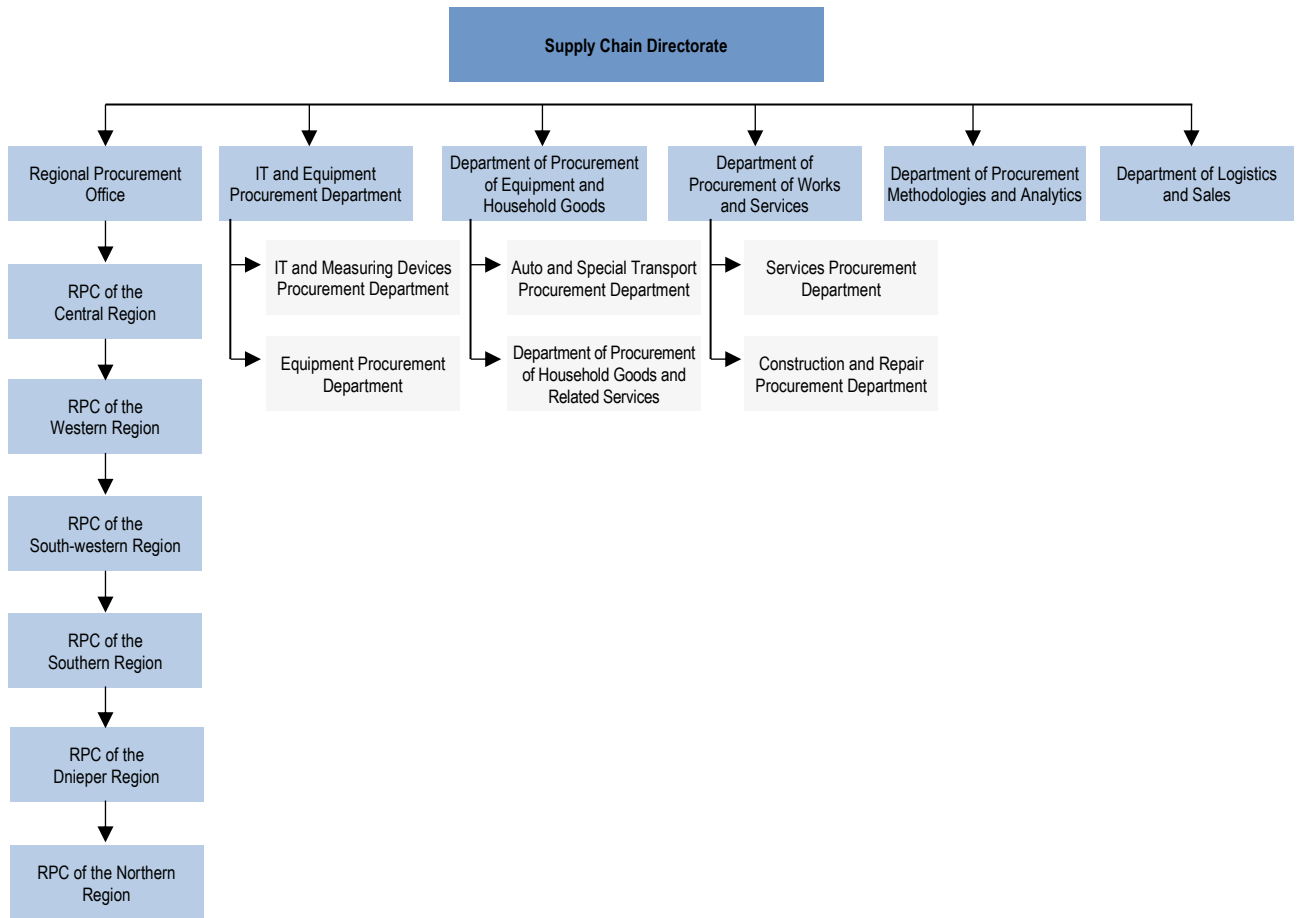
Source: (OECD, 2020, p. 49[9]).

The Directorate for Supply Chain Management

The **Directorate for Supply Chain Management** was created in 2018 to centralise procurement and consolidate powers and create transparency at all procurement stages. At the same time, a supply-chain management system was introduced, and uniform standards were established throughout the supply chain.

Reporting to a member of Ukrenergo's Executive Board, the Supply Chain Management Directorate consists of three specialised departments that centralise Ukrenergo procurement in designated product categories: Department of Procurement Methodology and Analytics, which provides planning support and monitors and controls all stages of the procurement process; the Department of Logistics and Sales; and six Regional Procurement Centres (RPCs).

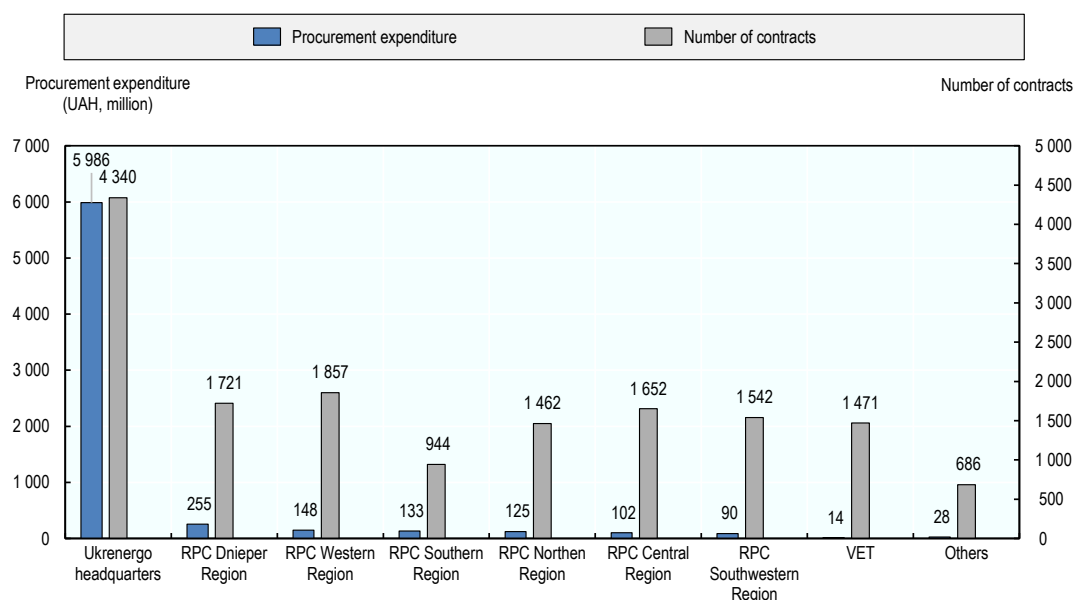
Figure 9. Structure of Ukrenergo’s Supply Chain Management Directorate, 2020



Source: Ukrenergo Responses to OECD February and May 2020.

Procurement volumes, value by region and number of contracts are shown in Figure 10.

Figure 10. Procurement volumes and value by region, 2017-2019



Note: "Other" includes units that in 2020 are no longer within the organisational structure of Ukrenergo or are carried out directly through the Ministry of Energy.

Source: Ukrenergo Responses to OECD February and May 2020.

Within the three specialised departments that centralise Ukrenergo procurement in designated product categories, six departments for specific categories of purchases were created, each managed by a **category manager** responsible for the development and implementation of purchasing strategies, demand forecasts, technical specifications, suppliers and the appraisal of business risks within the designated category. Category managers report to the heads of department, who are also **authorised persons**³¹ (as defined by Article 11-X of the UPL). In total, there are 12 appointed authorised persons, six at centralised Ukrenergo level, and six for the RPCs.

In January 2017, Ukrenergo introduced the institute of authorised persons to replace tender committees previously in place, to improve professionalisation of the process and to assign clear responsibilities for the overall tender process. Ukrenergo's operational units and cost centres – operational and management units that implement plans for maintenance, repair or enhancement of power grids, and other investment projects – have now delegated their procurement responsibilities to authorised persons who also act as category managers. According to Article 44 of the UPL, authorised persons, who can be held personally liable for infringements of the procurement legislation,³² have responsibilities that include:

1. preparation and approval of the annual procurement plan within relevant categories, according to the needs of each cost centre
2. reception of procurement requests from cost centres and preparation of procurement procedures
3. selection of appropriate procurement procedures
4. organisation of market research in relevant categories, and active searches for actual and potential suppliers to increase competition in procurements
5. organisation and co-ordination of tender-document preparation, and execution of the tender process to ensure a fair, equal and objective selection process

6. publication of all relevant procurement information in ProZorro
7. representation of Ukrenergo in all matters related to procurement, including inspection and control measures, and handling complaints and court cases
8. centralisation of procurement, consolidation of powers, and transparency at all stages of procurement.³³

Each of the six procurement departments of Ukrenergo's central administration and in the RPC has an average of six support-staff members. In total, there are 82 employees, evenly split between Kyiv and the six RPC.

International procurement

International Procurements (IP) is a Ukrenergo department tasked with procurement projects financed by IFI. With a staff of ten, it reports to the Executive Board and is completely separate from procurement departments dealing with self-funded tenders. IFI procurements are divided into three main categories: 1) consultancy services; 2) transmission networks; and 3) IT systems. Each has its own dedicated staff. A separate unit is charged with ongoing contracts.

IP staff members are in charge of the entire procurement process, including market research and price estimates. Initial costing estimates are usually prepared by independent international consulting companies involved in feasibility studies during the preparation of projects. IFIs require Ukrenergo to detail all reference prices and cost estimates for which detailed market research is carried out by consulting online and real-life sources, project consultants, and stakeholders.

Decisions for IFI procurements are taken by evaluation committees composed of seven to nine persons, usually consisting of two groups: technical experts and commercial experts. The chairperson of the evaluation committee is usually the project manager assigned to the project. He or she selects committee members from a draft list of candidates proposed by the IP, based on recommendations made by the technical, financial and legal departments that take into account staff availability and experience. The committee is then established by order of Ukrenergo's CEO.³⁴

Internal Audit Office

Ukrenergo's first head of Internal Audit was appointed by the Supervisory Board on 27 September 2019 and took office in November 2019. The Internal Audit Office that he runs is independent of the Executive Board, appointed and dismissed by the Supervisory Board, and reports to the Audit Committee of the Supervisory Board. All activities are carried out in accordance with the approved annual plan of internal audit, which is currently under development.

The office's procurement-related functions include ensuring effectiveness and efficiency, that internal controls are in place, and that procurement fits the company's strategy. It also assess key performance indicators (KPIs), and more broadly, who has control functions and how are they employed. In 2020, the Internal Audit Office hired six internal auditors; it commenced its first audits in April 2020.

Compliance Office

The Compliance Office was established in October 2018. The chief compliance officer (CCO) is a lead manager who can only be dismissed with the approval of the Supervisory Board, and reports directly to the CEO or chairman of the Executive Board. The Compliance Office operates two units: 1) anti-corruption;³⁵ and 2) compliance, which both report to the CCO. The anti-corruption unit was previously part of the security department and has a staff of six; the new compliance unit has a staff of three.

In February 2019, Ukrenergo's Supervisory Board approved the company's new compliance policy, which was then communicated to staff and published on the company's official website.³⁶ The policy identifies key roles,

principles, procedures and standards to ensure compliance with the relevant rules and regulations in the company's day-to-day operations. In relation to procurement, the CCO checks for corruption risks and red flags for bid rigging in tenders. The CCO is also responsible for contacts with other anti-corruption authorities, including NABU and NACP.

Security Department

The Security Department, supervised by the head of the Executive Board, carries out internal checks and investigations, market monitoring and price control; it is also tasked with the physical security of Ukrenergo facilities, as well as human-resources management, monitoring the execution of procurement contracts, and relations with law-enforcement agencies, such as the police, SBU and Prosecutor General's Office.

The Department of Market Research and Cost Control, which was until the end of 2020 part of the Security Department, carries out pre-tender research and produces price and value estimates for tenders and an annual plan for all purchases with a value equal or above UAH 50 000.³⁷ The Economic Security Department carries out checks on all potential bidders and their conformity following the criteria set out in Article 17 of the UPL. These checks include the ultimate ownership of bidders; convictions for corruption; and tax or bankruptcy proceedings or offences; they make use of publicly accessible state registers.³⁸ Up to 6 500 checks are run annually by the Economic Security Department's staff of three to four. Similar checks are run in parallel by the category manager at the Supply Chain Management Directorate.

The market-research unit's staff usually have experience of over three years in controlling and providing price estimates and have expertise in the procurement markets for electrical equipment required by Ukrenergo. In addition, they are skilled in analysing data; about half the team are able to work in English.

Executive Board

A collegial body that carries out Ukrenergo's operational activities, the Executive Board is accountable to the Supervisory Board and the company's annual general meeting. The chief supply-chain officer reports to a specific member of the Executive Board and is responsible for the development and implementation of the procurement strategy; management of contract work; and logistics and property sales (OECD, 2020, pp. 70-73^[9]).

Supervisory Board

The Supervisory Board is a collegial body representing the interests of the company and of the state (as the main shareholder); it is responsible for general oversight of Ukrenergo. The Supervisory Board established an Audit Committee, which was delegated a number of issues directly or indirectly linked to procurement, such as fulfilment controls; financial statements' accuracy and their timely preparation; the company's financial and business activity, and its risk management; its annual financial plan and the report on its implementation; appointment and dismissal of the head of the Internal Audit Office; the selection of an independent auditor and appraiser of Ukrenergo's property portfolio; periodic analysis and assessment of the company's internal and external audits; and the financing and refinancing of the company's foreign loans. The Board also appoints or dismisses members of the Management Board, one of whom is the chief supply-chain officer (OECD, 2020, pp. 63-68^[9]) (Ukrenergo, 2018^[21]).

Ministry of Finance

Since February 2019, following ownership unbundling and corporatisation, the Ministry of Finance has been Ukrenergo's sole shareholder and managing entity. Until then, that role had been played by the Ministry of Energy and Coal. The Ministry of Finance approves Ukrenergo's annual financial and investment plans, as well as the strategic development plans that the company's Supervisory Board reviews and co-ordinates.

Ukrenergo submits information on financial plans and statements on a quarterly basis, along with explanatory notes on performance results. At the end of the year, it produces an annual report (OECD, 2020^[9]) (Ukrenergo, 2020^[22]).³⁹ The annual financial and investment plans are the basis for Ukrenergo's procurement activities.

Ukrenergo's debt financing is obtained in its entirety from IFIs. The majority is provided as sub-loans from the state, which technically borrows the IFI funds and backs them with guarantees from the Ministry of Finance (OECD, 2020, p. 55^[9]), and requires its prior approval. Ukrenergo also borrows directly from IFIs; these loans are guaranteed by the state.⁴⁰

Ministry of Energy

The Ministry of Energy is the main central-government body charged with establishing, implementing and supervising state policy in the energy sector. Among other responsibilities, the Ministry of Energy co-ordinates Ukrenergo's investment programme, as set out in National Energy and Utilities Regulatory Commission (NEURC) Resolution No. 1972 of 30 June 2015 on the Technical Part of the Investment Programme (OECD, 2020, p. 83^[9]).

National Energy and Utilities Regulatory Commission (NEURC)

NEURC develops and approves distribution and transmission codes, the conditions for providing balancing services, certifies the transmission system operator, and sets tariffs for Ukrenergo's services. In addition, it monitors Ukrenergo's independence and ensures regulatory compliance. NEURC approves Ukrenergo's annual Ten-Year Transmission System Development Plan and Generation Adequacy Report, as well as Ukrenergo's investment plan. The investment plan's approval by NEURC and the Ministry of Energy is a prerequisite for its submission to the Ministry of Finance.

3 Procurement workflow

Ukrenergo's procurement activities are related to its mandate as the company responsible for the operational and technological control of Ukraine's integrated power system (IPS) and high-voltage electricity transmission through trunk power grids from generating plants to regional distribution companies. Ukrenergo also coordinates transmission-system operations and manages cross-border electricity flows. Procurement serves and supports the operation of the Ukrainian electricity-transmission system, its maintenance, repair and improvement.

As outlined in earlier sections, a large number of internal and external bodies are involved in the various stages of the procurement processes, which are themselves governed by a multitude of internal and external regulations, in addition to the provisions foreseen under the UPL. Many of the processes have been recently revised and adjusted. This section sets out to provide an overview of current procurement processes and the responsibilities of the actors involved, based on the information provided by Ukrenergo.

Procurement starts with outlining and planning needs for the next procurement period and drafting the annual plan, which provides the basis of pre-tender market research. The procurement is then conducted and the contract executed.

Annual procurement plan

Ukrenergo has 122 cost centres, which are operational and management units and internal buyers that implement plans for maintenance, repair or enhancement of power grids, and other investment projects. All calculate their procurement needs for inclusion in the annual procurement plan within the limits of Ukrenergo's wider investment programme and financial plan. Cost centres send their procurement needs for goods, works and services to the Supply Chain Management Directorate using the common procurement vocabulary (CPV),⁴¹ including a value estimate based upon Ukrenergo's internal price directory, a set of list prices based on previous procurement and market research.

The Supply Chain Management Directorate consolidates applications and draws up the annual procurement plan and its annexes in accordance with the UPL. Before being included in the annual plan, all items require the approval of the authorised person responsible for the respective procurement category.

After authorised-person approval, a procurement plan for the full year is generated in the electronic procurement system, which states for each item the:

1. subject of procurement with the corresponding four-digit CPV code
2. expected procurement value
3. procurement procedure
4. expected month of procurement launch.

Each expected purchase has to be noted as a separate entry in the plan, which should provide information on all planned purchases, regardless of their value.

The UPL imposes no strict deadlines for drafting and approving the annual procurement plan. According to Ukrenergo, cost centres submit proposals for inclusion in the annual plan in July and August and at the latest in November, while priority procurements for the initial months of each plan are identified in the proposals.

Once the plan is approved and signed by the authorised persons, it then must be published on the electronic procurement platform within five working days.

The annual procurement plan is not necessarily based on an approved investment programme or financial plan. A number of internal and external stakeholders are involved in the financial plan, and Ukrenergo's investment programmes require approvals by NEURC, the Ministry of Finance, and MDETA. In case of non-approval of investment projects and the related budget, procurements included in the annual plan can be cancelled, delayed, reduced in volume or terminated; this can significantly interfere with long-term investment projects. If funding is not approved, Ukrenergo must apply for new approval in following year's financial plan.

Multi-annual, long-term procurement planning is incompatible with this system of annual, multi-stakeholder approvals. Long-term investment projects will be included in the annual plan for the year when the project is scheduled to start, with any purchases in following years based on the declarations made in the annual plan of the start year.

Market research and cost estimates

Under the UPL, the purchaser must publish a price estimate for each tender. To facilitate this, market research at Ukrenergo focuses on finding adequate market information to set a realistic, competitive tender price.

Pre-tender market research is carried out by the Supply Chain Management Directorate, under the control of the Department of Market Research and Cost Control, itself a sub-division of the Security Department. Market research follows an internal business-process regulation and begins as soon as the needs for the following year, together with terms of reference and any other necessary specifications, are submitted by the cost centres. A first cost estimate based on the internal price directory is provided by cost centres for their needs. The specialised procurement departments then form an updated application and conduct market research to determine expected prices, and technical requirements and qualification requirements for bidders. When the expected procurement value equals or exceeds UAH 50 000, procurement departments must obtain approval from the Department of Market Research and Cost Control, which analyses updated procurement requests to see if cost estimates are in line with market reality. It uses information from ProZorro and about recent purchases by other large customers, studies developments in commodity markets, checks components of estimates, surveys potential suppliers and asks for indicative price quotations, considers key input-price developments, and domestic and global price trends. Information is considered relevant if it is confirmed by different sources. In the end, the market-research unit either confirms the initial price and value, and approves the purchasing request in the electronic procurement system or returns the request for revision.

The Department of Market Research and Cost Control also contacts foreign suppliers, often through visits to international industry trade shows, face-to-face meetings, and visits to foreign suppliers' production facilities. For example, in 2018, visits by representatives of the market-research unit to industry trade shows in Hannover, Germany, and Katowice, Poland, resulted in the expansion of bidder numbers for a transformer purchase in late 2019.⁴² Transformer production factories have also been visited in Poland, Azerbaijan, and Turkey, and ongoing negotiations with a Polish supplier of transmission-line equipment will likely result in the supplier opening a representative office in Ukraine.⁴³

Procurement requests cleared by the Department of Market Research and Cost Control will then go to the relevant category managers or RPCs in the Supply Chain Management Directorate. Staff there checks if the technical and qualification criteria proposed by the cost centres in the initial request contain any discriminatory requirements. For purchases of goods and services exceeding UAH 200 000 and for works exceeding UAH 1.5 million, qualification criteria will be set up in accordance with Ukrenergo's internal rules.⁴⁴

In order to determine the technical and qualification criteria for the actual tender, category managers and authorised persons research potential suppliers' promotional materials, and then contact them to confirm the intended product specifications and technical characteristics, delivery logistics and timelines, payment terms and procedures, as well as their business reputation. This process both informs the technical and qualification

criteria set out in the tender documentation and can lead to a centralisation of purchases if discounts are obtained for larger quantities or a decentralisation if regions make more efficient purchases.

If the expected value of procurement is below UAH 50 000, the category manager will base the qualification criteria on the cost centres' proposals and previous experience with similar purchases without the approval of the Market Research and Cost Control Department. Category managers and authorised persons at central and regional level search for suppliers in such procurements.

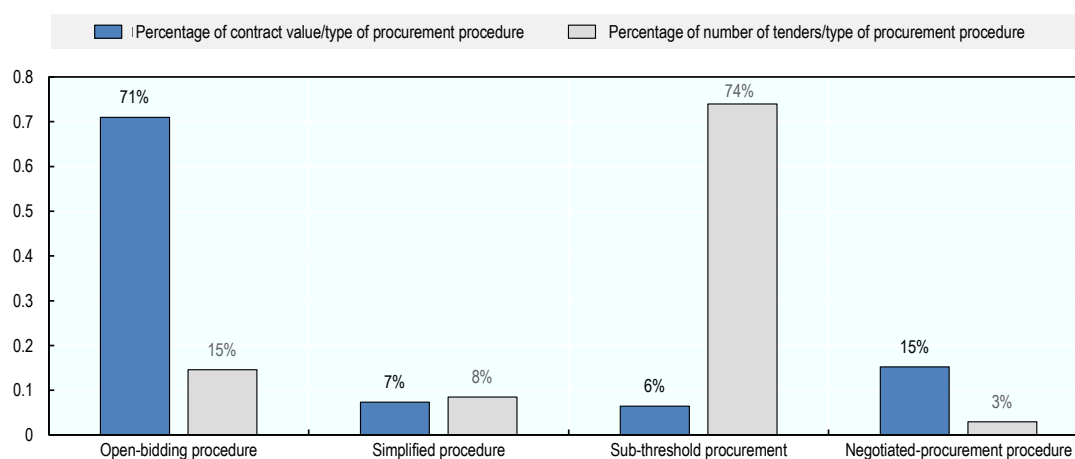
Sub-threshold procurement is governed by Ukrenergo's Business-Process Marketing Procurement, which provides a lighter procedure for the contracts not exceeding UAH 50 000 that, for instance, requires fewer internal approvals. From 2017 to 2019, Ukrenergo's sub-threshold procurement was completed without using ProZorro.

Tender procedures

Bids are received in accordance with the type of procurement chosen, and except for sub-threshold procurement, the tendering process is executed fully on ProZorro.

Until 2019, Ukrenergo had used only **four different types of procurement procedures**: open bidding; simplified procurement; sub-threshold purchases; and negotiated procedures. The competitive-dialogue procedure was not used, and the limited-participation procedure was only introduced into the UPL in 2020; there are no data for its use yet. Framework agreements and the splitting of contracts into lots were not applied between 2019 and September 2020.⁴⁵ Figure 11 shows how tender numbers and volumes are distributed over the different procedures. Almost 75% of all procurement in terms of tender numbers is carried out in sub-threshold procurement, yet these tenders represent only 6% of overall procurement value. Open-bidding procurement is almost the mirror image of this: 71% of procurement value, representing only 15% of the tender numbers.

Figure 11. Shares of procurement procedures used, 2017-2019



Source: Ukrenergo responses to OECD February and May 2020.

Contract execution

Once a bid has been accepted and cleared by all internal reviewing units, an agreement is concluded with the successful bidder, and the contract execution starts. The Supply Chain Management unit in charge of a contract will appoint one employee responsible for communicating with the supplier, as well as the monitoring the fulfilment of its contractual obligations.

4 The IFI procurement process

Ukrenergo procurements financed with loans by IFI are for the construction and reconstruction of 220-750 kV substations, and the construction of new 330-740 kV overhead transmission lines.⁴⁶ The procurement process is carried out by the International Procurement Department, in line with IFIs' specific procurement rules. Members of other units within Ukrenergo can act as members of the evaluation committees in charge of assessing the bids.

Based on the initial procurement plans prepared before entering into loan agreements, procurement conditions are updated and revised by Ukrenergo in co-operation with an IFI to define the details and steps of the specific procurements. The operational departments that will benefit from the procurement provide the initial technical descriptions, reference prices and cost estimates, as well as an implementation schedule, all of which are then analysed by the International Procurement Department. Based on the cost estimates provided by the operational departments, and initial cost estimates by international consulting companies that are involved in the preparation of IFI projects, specialists in the International Procurement Departments carry out market research and verify the information provided. Details of all reference prices, which are only internal and not published with the tender information in IFI procurement need to be given to the IFI as fully as possible. Any market research undertaken involves Internet research, support by external industry consultants and discussions with suppliers.

Calls for tenders are published on Ukrenergo's and IFI websites, and suppliers are invited to submit sealed bids. The bids are evaluated by evaluation committees and a protocol of bid evaluation with bidder names and prices is then published, together with award notices.

5 Monitoring and control

Procurement by Ukrenergo is subject to extensive controls and monitoring, both internal and external, and can be subject to appeal by tender participants.

Internal monitoring

Within Ukrenergo, different vertical lines of management are involved in procurement monitoring at different stages of the procurement process: the compliance officer and related anti-corruption unit; the Internal Audit Office, which reports to the Audit Committee and the Supervisory Board; the market-research and economic-security unit; the Finance Directorate for budget control; and the Legal Directorate of Ukrenergo.

All monitoring focuses on the integrity of processes within Ukrenergo, and with procurement and anti-corruption laws, and adherence to budgets. Except for a soon-to-be introduced obligation for the Chief Compliance Officer to screen higher-value tenders for bid-rigging red flags (see Part III, Chapter 6 “Detecting and punishing collusive agreements”), bidder collusion has so far not been expressly included in any of the monitoring obligations, compliance programme, code of ethics or other internal regulations.

External monitoring

In accordance with Article 7 of the UPL, to prevent violations of the procurement law, the Accounting Chamber of Ukraine and the State Audit Service of Ukraine (SAS) monitor procurement by public procurement bodies at all stages of procurement, from the tender process to the execution of the contract.

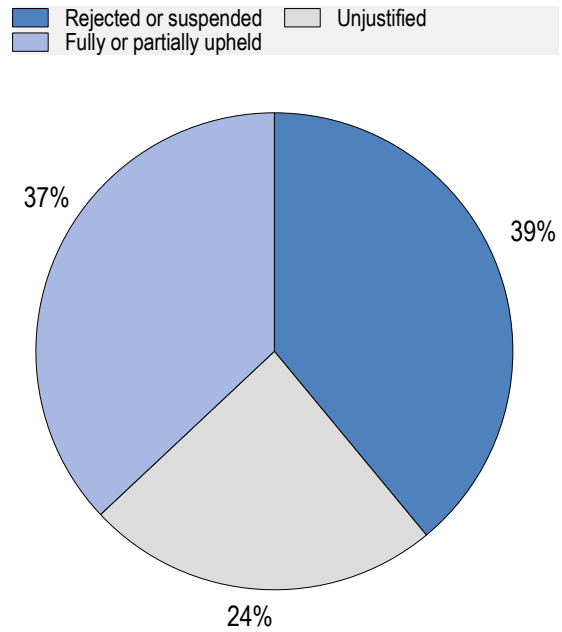
This monitoring can look at long-term behaviour or be conducted on an ad hoc basis. An ad hoc monitoring procedure (which follows Article 8 of the UPL) can be started based on information from the media, public organisations, other state bodies, either ex officio or in reaction to risk indicators automatically generated by ProZorro such as the use of negotiated procedure without sufficient grounds; open tenders without publication and e-procurement; lack of necessary signatures; violation of time limits; exclusion of all but the winning bidder from the tender; or failure to meet contractual obligations following the procurement procedure.⁴⁷ For example, in 2019, ad hoc SAS monitoring revealed that Ukrenergo had committed a violation by providing insufficient tender documentation and not complying with the annual procurement plan. The company appealed the SAS decision, and it was eventually rejected by the Kyiv District Administrative Court.

Longer-term monitoring was carried out between August 2017 to December 2018 by SAS into Ukrenergo procurement and a number of potential violations were found in terms of bidder rejection, publication of agreements and cost estimates, and insufficient descriptions of technical or qualification criteria. Ukrenergo has said that SAS has accepted most of its substantiated objections to the findings.

Tender appeals

Ukrenergo tenders can be appealed to the AMCU with authorised persons representing Ukrenergo in the appeals procedures. Compared to the total number of tenders run above threshold by Ukrenergo, the number of appeals is extremely low. In the period 2017 to 2019, of the 4 024 above-threshold tenders run by Ukrenergo, only 134 cases were appealed with the AMCU or only 1.2% of all tenders.⁴⁸ Of these appeals, 37% were fully or partially successful for reasons such as unjustified refusals or acceptances of bidders, and unsound decisions on winning bids.⁴⁹

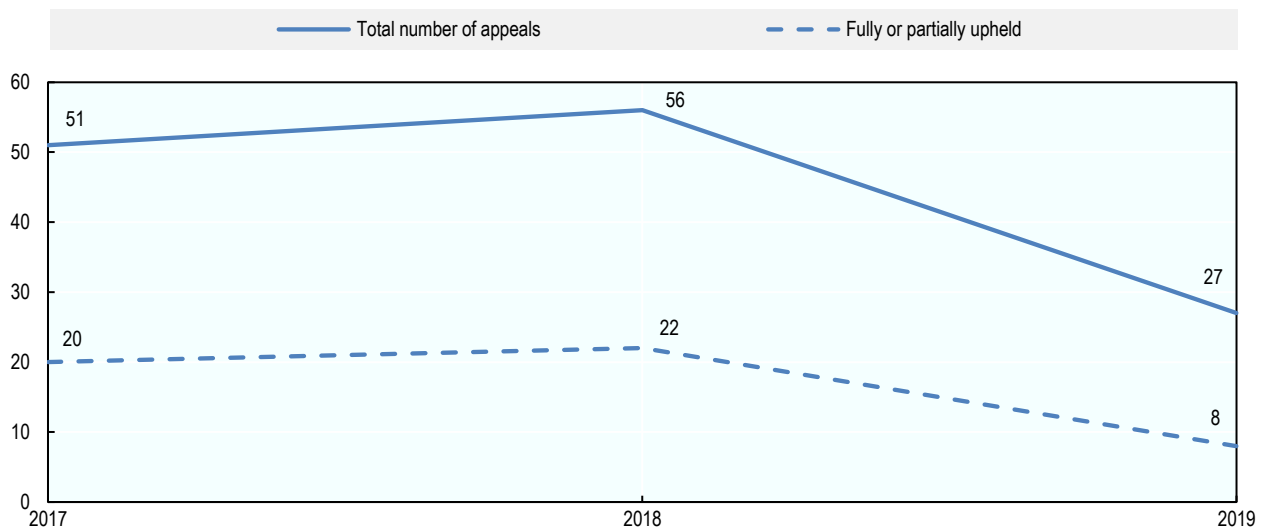
Figure 12. Appeals against Ukrenergo tender decisions, all stages, 2017-2019



Source: AMCU Responses to OECD, December 2019 - March 2020.

The number of successful appeals remained stable in 2017 and 2018, but dropped sharply in 2019, without a corresponding drop in the number of tenders (Figure 13). Given that many stakeholders have stressed that procurement appeals have become increasingly popular – also demonstrated by the increase in overall numbers (Figure 5), the results appear to indicate that procurement rules were being increasingly well implemented by Ukrenergo.

Figure 13. Procurement appeals of Ukrenergo tender procedures, 2017-2019



Source: AMCU Responses to OECD, December 2019 - March 2020.

Part III Alignment of Ukrenergo's procurement regime with OECD recommendations

Ukrenergo has already undergone significant organisational and structural changes to be better equipped to manage Ukraine's electricity-transmission system, and for its integration into the larger European energy transmission system, ENTSO-E. This ethos of innovation and adoption of best practices extends to Ukrenergo's procurement, which is vital to its mission of ensuring the operation of a competitive electricity market and to becoming an ENTSO-E member (Ukrenergo, 2019^[11]).

This has seen important steps already taken to improve and professionalise procurement. Ukrenergo was one of the first SOEs to fully procure through ProZorro; introduce the concept of an authorised person responsible for procurement; create a dedicated Supply Chain Directorate with specialised procurement category managers; and create support functions of an internal audit and a chief compliance officer. In September 2020, Ukrenergo was certified according to the CIPS Global Standard for Procurement and Supply.⁵⁰

In general, there is no one-size-fits-all strategy or solution to reduce the risk of collusion in tenders. Ukrenergo, like any public institution, must find solutions best adapted to its own situation and needs. Nevertheless, the OECD Recommendation on Fighting Bid Rigging in Public Procurement can provide a benchmark for public purchasers that can be tailored to each institution and to relevant national legal contexts.

Part III of this report begins by outlining the specific context of procurement in energy markets and the real risks of being exposed to supplier collusion. It then sets out a number of recommendations developed by the OECD Secretariat that are designed to foster competition in Ukrenergo's procurement processes, and help prevent and detect bid-rigging conspiracies.

To tackle collusive practices successfully, the recommendations included in this report should be understood and implemented flexibly. When measures are successful, bidders who have colluded in the past (or intend to do so in the future) can be expected to react and seek new and possibly more subtle ways to collude. Changes in procurement law may also necessitate changes in policy. Ukrenergo should remain constantly vigilant and prepared to assess, revise and adapt these recommendations to reflect the changing reality of its procurement environment.

1 Bid rigging in energy-sector procurement and Ukrenergo countermeasures

Bid rigging is a real risk in TSO procurement

Ukrenergo's procurement activities are clearly concentrated on construction and reconstruction works, and related repair and engineering services (see Figure 6). Purchased works and goods include power lines, substations and transformers.⁵¹ While Ukrenergo also buys more "ordinary" consumption goods and services of the type required by a large company, much of the demand is specific to building and running an electricity-transformation system. The demand met in IFI financed projects is entirely on such specific items.

Certain works require prospective providers to have specific experience and specialisation to enable them to work on high-voltage power-grid infrastructure. This often results in low numbers of competitors, which is known to be a factor in facilitating the formation of cartels and ensuring their stability. Other factors that help collusion are little or no market entry, a predictable flow of demand, repeated purchase orders, stable technological conditions, and few or no substitutes for the procurement items (Box 8).

Box 8. Industry, product and service characteristics conducive to collusion

Small number of companies. Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.

Little or no market entry. When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants; this protective barrier helps to support bid-rigging efforts.

Market conditions. Significant changes in demand or supply conditions tend to destabilise ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion, yet during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.

Industry associations. Industry associations can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted for illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid-rigging agreement.

Repetitive bidding. Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the

members of the cartel can punish any cheating member by targeting its originally allocated bids. Regular and recurring contracts for goods or services may require special tools and increased vigilance to discourage collusive tendering.

Identical or simple products or services. When the products or services that individuals or companies sell are identical or highly similar, it is easier for firms to reach an agreement on a common price structure.

Few if any substitutes. When there are few, if any, good products or services that can be substituted for the product or service being purchased, individuals or firms wishing to rig bids are more secure. Knowing that the purchaser has few, if any, good alternatives, they can be more confident that their efforts to raise prices are more likely to be successful.

Little or no technological change. Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

While not all characteristics need to be present on a market at the same time to increase the risk for supplier collusion, the presence of a few should already lead to higher vigilance by procurement officials.

Source: (OECD, 2009, pp. 2-3₍₁₀₎).

Even in projects where Ukrenergo manages to generate higher bidder participation, as is the case for large-scale IFI procurements for which the average is six to eight bidders (excluding specific transformer equipment and specific IT technology, where it drops to two to three), international experience has shown that there is no guarantee against cartelisation.

Box 9. Examples for major energy-sector bid-rigging cases

European Commission: high-voltage power-cable cartel

In 2014, the European Commission imposed fines of EUR 301 million on 11 producers of underground and submarine high-voltage power cables. A majority of the industry's largest global players at the time were involved, including six European, three Japanese and two Korean producers. From 1999, for almost ten years, the companies engaged in market and customer sharing on a global scale. This involved agreements between European and Asian producers to stay out of each other's home markets, and to divide the rest of the world between them by geographic region or customer. Japanese or Korean firms would refuse to bid for European tenders and vice versa, and all would exchange information on price offers to ensure that the designated winner would bid with the lowest price, and other competitors would refrain from bidding or make offers they knew would not be attractive to the customer.

European Commission: Gas-insulated switchgear cartel

In 2007, ABB, Alstom, Areva, Fuji Electric, Hitachi Japan AE Power Systems, Mitsubishi Electric Corporation, Schneider, Siemens, Toshiba and VA Tech were fined over EUR 750 million for rigging bids in procurement contracts, fixing prices, market sharing and allocating projects between themselves between 1988 and 2004. Based on two written agreements, the Japanese companies would not sell

European markets and European companies would not sell in Japan, while European companies were also allocating the tenders between themselves.

European Commission: Power transformer market-sharing cartel

In 2009, ABB, AREVA T&D, ALSTOM, Fuji Electric, Hitachi, Siemens and Toshiba were fined a total of EUR 67.6 million for a so-called “gentlemen’s agreement” to share the European and Japanese markets for power transformers between 1999 and 2003 and to protect each other’s home markets.

Sources: European Commission press release, 2 April 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_358; European Commission press release, 24 January 2007, https://ec.europa.eu/commission/presscorner/detail/en/IP_07_80; European Commission press release, 7 October 2009, https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1432.

More examples show that bid rigging in electricity-sector procurement is also found within domestic markets (see Box 10).

Box 10. National bid-rigging cases

In 2010, the **Israel Competition Agency** began investigations into a bid-rigging scheme in 18 tenders issued by the Israel Electric Company and two municipalities for **pruning trees** underneath power lines. More than 40 bidders were found to have rigged bids for 18 contracts in 2009 and 2010, with an aggregate value of more than USD 10 million. Of the 20 contractors that did not plead guilty under plea agreements, 17 were given prison sentences of between 4 and 11 months in 2019. The agreement between the main competitors had focused on keeping the status-quo allocation of contracts and providing each with a steady client base.

In 2017, the **Romanian Competition Council** imposed a fine of almost EUR 16 million on several suppliers of **electricity meters** and ancillary measuring equipment. The competitors rigged bids in tenders of Romanian energy distribution companies by agreeing on cover bids, refraining from bidding, allocating tenders, and sub-contracting.

Sources: OECD (2020), “Criminalisation of cartels and bid rigging conspiracies – Note by Israel”, [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2020\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)7/en/pdf); OECD (2018), “Criminalisation of cartels and bid rigging conspiracies – Note by Israel”, [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2018\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)5/en/pdf); OECD (2018), “Annual Report on Competition Policy Developments in Israel”, [https://one.oecd.org/document/DAF/COMP/AR\(2018\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)9/en/pdf); Romanian Competition Council, Decision No.77/2017; Concurrences (2020), “Energy and Anticompetitive Practices: An Overview of EU and National Case Law”, www.concurrences.com/en/bulletin/special-issues/energy-anticompetitive-practices/energy-and-anticompetitive-practices-an-overview-of-eu-and-national-case-law-92518-en.

Lack of a systematic approach to bidder collusion by Ukrenerg

Procurement within Ukrenerg is subject to internal and external monitoring and controls. Yet for reasons perhaps best explained as the public procurement in Ukraine’s legacy as a source of corruption and embezzlement of public funds,⁵² all controls and monitoring focus almost exclusively on preventing corruption and fraudulent practices by creating maximum transparency and limiting the discretion of procurement officials. Ukrenerg lacks a systematic approach to bidder collusion.

The relatively new Internal Audit and Compliance offices have yet to address the issue, but they have plans to do so. Ukrenerg’s draft compliance guidelines have short sections on procurement and antitrust actions, which contain general references to promoting fair competition in procurement.⁵³ Similarly, the code of ethics only states that, in general, procurement should, among other things, be based on the principle of fair

competition between participants.⁵⁴ According to information provided by Ukrenergo, a new draft of the Compliance Office's "Guidelines on Third Parties' Due Diligence" sets up a number of red flags for bid rigging, which need to be checked for all tenders exceeding UAH 20 million; these include matching words and phrases, suspicious timings of submissions and matching typos.⁵⁵ The guidelines entered into force in June 2020. There do not seem to be other detailed instructions or policies targeting bid rigging specifically, however.

The answers provided by Ukrenergo in the written responses, as well as in meetings, reveal that it has no systematic approach to fighting bid rigging, despite Ukrenergo staff and third-party stakeholders widely acknowledging it as a clear problem in Ukrainian procurement markets. However, the first three cases showing suspicious signs for bid rigging were forwarded to the AMCU at the end of 2020 by the CCO.

The information gathered suggests that bidder collusion and bid rigging until very recently was only addressed in two ways by Ukrenergo.

1. Bidders' identities and their mutual connections are investigated
2. Reference prices are set at a level that supposedly does not allow for supplier pricing above competitive market conditions, even in the case of supplier collusion.

Checks of bidder identities and connections do not address an actual collusion problem, however. Generally, under competition law, **only exchanges of sensitive business information and co-ordination of competitive conduct between independent companies are prohibited** by anti-cartel provisions (Box 30). Accordingly, this type of behaviour is targeted by the OECD Recommendation, and all following analysis and recommendations are aimed at addressing this type of illegal co-ordination by independent competitors. Controlling for related persons is not an action relevant to the prevention and detection of bid rigging.⁵⁶

For the second alleged safeguard, competitive tendering is not the same as setting reference prices at a competitive level. The whole concept of public tendering is that the procurement process is supposed to generate the competitive price, creating competition between suppliers, their products and potential innovative solutions. Buyers believing they know the competitive outcome and who consider this a solution to possible collusion problems turn the process on its head and do nothing to solve the problem of collusive tendering. The following practical considerations exemplify why it is not a good solution for tackling supplier collusion.

1. If the reference price is generated based on historic procurement prices, there is no guarantee that collusion was absent from those previous tender results.
2. Reference prices generated by asking existing and known suppliers do not take into account new or potential (and yet unknown) competitors, which might bid with lower prices but will not if they see the reference price as a signal to enter with higher bids.
3. Publication of the reference price, which is a requirement under the UPL, serves as point of reference for all potential tenderers, even without collusion, and so reduces competitive pressure in the tendering process.
4. Different, innovative solutions that may satisfy the procurement demand may be overlooked and discouraged when market research focuses on existing suppliers and past tenders.
5. Suppliers can game the system and collude when the procurement body's market research requests quotation prices; this behaviour has been found in Mexican procurement cases (Box 11).

Box 11. Collusion on market research in Mexico

An investigation by COFECE, the Mexican competition authority, found that between 2009 and 2013 five suppliers of latex probes and condoms had rigged bids in procurement organised by public-health providers.

Before rigging the bids, suppliers had colluded on the prices they would quote to public-health providers during pre-tendering market research. This served to increase the maximum price caps foreseen in the Mexican procurement system.

Five companies and seven individual received fines of over MXN 112 million. The damages incurred by the public health care providers through the collusion amounted to an estimated amount MXN 177 million.

A similar finding was made in the market for media-monitoring services, where between 2012 and 2016 collusion took place during the tender and the market-analysis stage, when price quotes were submitted. This resulted in fines of MXN 7.25 million for damages to purchasers estimated at MXN 3.14 million.

Sources: COFECE (2018), "COFECE sanctions condom and latex catheter suppliers for bid rigging in public procurement in the health sector", www.cofece.mx/wp-content/uploads/2018/03/COFECE-016-2018-English-1.pdf; COFECE (2018), "COFECE fines companies and individuals for collusion in public procurement in the market for media monitoring services", www.cofece.mx/wp-content/uploads/2018/02/COFECE-05-2018-COFECE.pdf.

2 The importance of information in good tender design and procedures

The most decisive stages of procurement take place before the tender process begins when needs are formulated and translated into actual procurement requests. This is the stage at which intelligent market research and information gathering can aid in the design of tenders that minimise the risks of bid rigging.

A well informed tender process serves multiple purposes.

1. Purchases will meet the actual needs of internal clients and not their wants
2. Bidder participation is maximised and innovation incentivised.
3. Tender terms and the tender's organisation and running are clear and non-discriminatory and instil trust in bidders.
4. Post-tender negotiations and changes are avoided.
5. Tenders can be aggregated, split or distributed over time in ways that prevent bid rigging.
6. Any procurement will achieve best value for money.

Box 12. OECD Checklist to design tender methods to reduce bid rigging: tender process information

Be informed before designing the tender process

Collecting information on the range of products and services available in the market that would suit the purchaser's requirements, as well as information on their potential suppliers, is the best way for procurement officials to design the procurement process to achieve greatest value for money. In-house expertise should be developed as early as possible.

- Be aware of the characteristics of the market in which the purchase will take place and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which the purchase will take place has characteristics that make collusion more likely.
- Collect information on potential suppliers, their products, prices and costs; if possible, compare prices offered in B2B procurement.
- Collect information about recent price changes and prices in neighbouring geographical areas and for possible alternative products.
- Collect information about past tenders for the same or similar products.
- Co-ordinate with other public-sector procurers and clients who have recently purchased similar products or services to improve understanding of the market and its participants.
- Any external consultants used to help estimate prices or costs must sign confidentiality agreements.

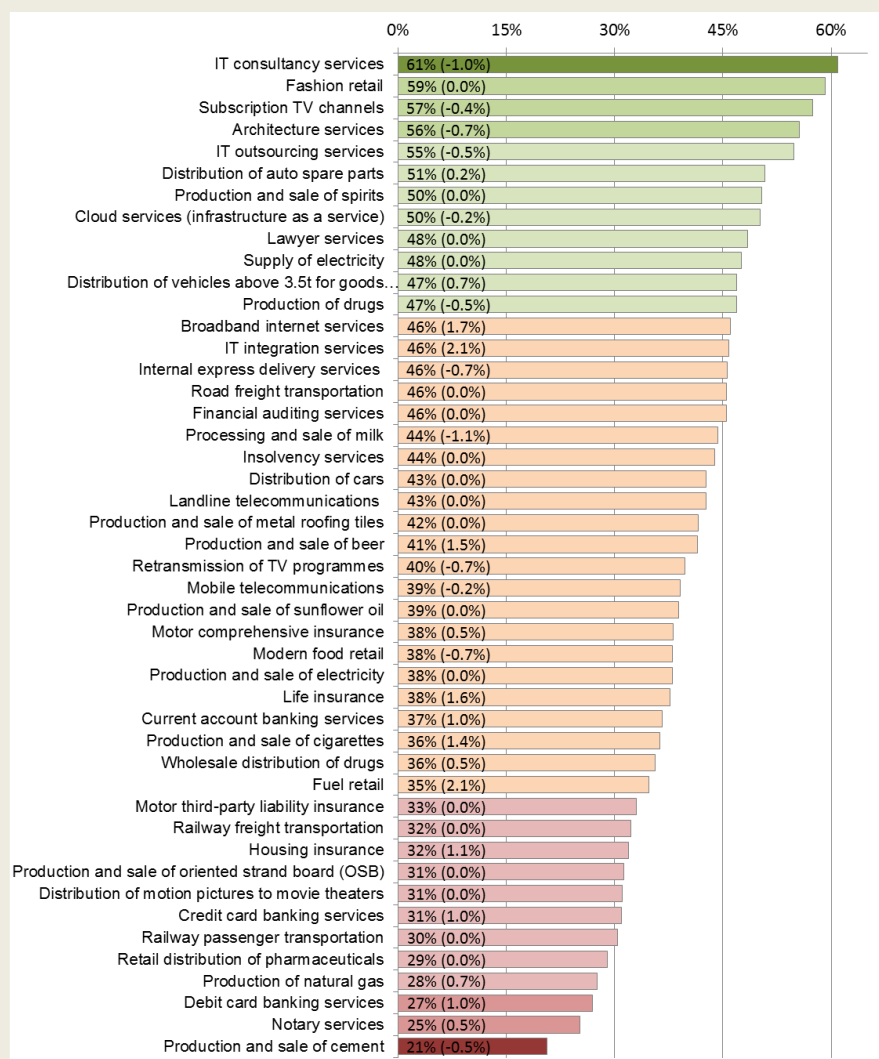
Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

Identifying high-risk and high-priority procurements and focusing and improving market studies

In order to design an efficient procurement strategy, procurement staff must assess the degree of competition in procurement markets; this helps to design appropriate tender processes and identify markets that show high risks of bidder collusion (see Part III, Sections 3 and 4). Such assessments can also include providers in local or foreign jurisdictions blacklisted for violation of competition laws, specifically, collusive acts.

Market research with these characteristics can then lead to a list of markets – and possibly a ranking – specific to Ukrenergo procurement of the risk level of bidder collusion. Competition agencies use similar methodologies to identify markets and industries that might warrant closer monitoring and investigation, based on relevant criteria and often, publicly available information (Box 13).

Box 13. Competition agency approaches to identifying markets with collusion risks



The Romanian Competition Council's Aggregate Index of Competitive Pressure (AICP) is a methodology to identify the intensity of competition in industries in Romania using 20 primary indicators: barriers to entry; number of competitors; concentration; innovation; market transparency; price elasticity of demand; product homogeneity; existence and impact of business associations; market-share symmetry; structural links; cost symmetries; intensity of marketing and communication; "maverick" competitors; market growth rate; fluctuations of aggregate demand; buyer power; stability of market shares; multi-market contacts; profitability; and general price level. These are grouped into four categories of relevance and weighted to produce a composite index number: the lowest ranked are those with the lowest competitive pressure, which therefore require surveillance.

The Netherlands Competition Authority has developed a similar screening tool to identify markets and industries with a higher propensity for anti-competitive conduct, based on nine indicators: number of firms; market concentration; level of imports; number of firms that have entered and exited an industry; survival rate; active trade associations; number of innovations; and a rough price-development index within an industry.

Sources: (Paun, Prisecaru and Alexa, 2017^[23]) and (Petit and de Waal, 2017^[24]).

Ukrenergo could **systematise its market research** so as to create a repository of procurement markets and ranked according to expected competition risks. This would prioritise market research and information-gathering resources by focusing less on low-risk markets and more in high risk markets; it could also inform ex post screening efforts, as well as compliance related oversight (see Part III, Section 6).

Ukrenergo should therefore identify and standardise a common set of indicators and possibly assign them weights to **create an aggregate indicator**. Such a list should be set up over time, starting with known high-risk, high-volume and high-priority procurement areas, which can be easily identified based on aggregate procurement and supplier statistics, such as those in Figure 6 and Table 3. This information can and should be revised on a regular basis, focusing on priority markets and updated whenever a new procurement is started. Such information would also help new staff to gain an informed view of specific market conditions and circumstances in their procurement area.

In-depth research can be carried out once priority and high-risk markets have been identified. Sources of information for in-depth market studies can be **internal and external**, and Ukrenergo already makes good use of both. Historical information, such as that included in price-directory lists⁵⁷ created by the market research and value control division of Ukrenergo, are a good starting point for the collection of information on previous Ukrenergo tenders, while the ProZorro database provides an overview of past prices and contract terms. This information should be enriched with actual experience from tenders, including information on how specific contractors performed, if they met the tender requirements in a timely way, if the quality of the products or staff qualifications met expectations, and if cost limits were met or exceeded.

This information then requires updating with other sources of market intelligence, as prior contracts may have resulted from non-competitive procedures or been affected by collusive agreements, or market conditions may simply have evolved, reducing historical data's usefulness in market analysis by not reflecting genuine market conditions. Internet research, information by industry associations, industry databases, and contacts with potential suppliers to receive quotes are also useful.

When conducting more and better targeted, systematic market research, activities will benefit from a **clear list of principles** (Box 14).

Box 14. Principles for market research in procurement procedures

- **Trustworthy information.** Information must come from official sources and be readily available, or be the result of a trusted investigation by a unit.
- **Confidentiality.** Information regarding market studies must not be revealed to suppliers at any time
- **Transparency.** Market studies require frequent interactions between both parties; to ensure transparency, all meetings should be documented.
- **Preparedness.** Market studies need to anticipate which products or markets will be relevant to future procurement so that they can be properly crafted and ready for use when required.
- **Differentiation.** Not all market studies require the same in-depth analyses, so procurement officials must be prepared to decide on the extent of analysis required, depending on the structure of the market and the characteristics of goods or services.

Source: (OECD, 2015, pp. 136-137^[25]).

The UPL allows for **market consultations** that are in line with the requirements of fairness, openness and non-discrimination. Depending on the type and complexity of procurement, early engagement with all potential suppliers can be sought. Using the ProZorro platform can facilitate this dialogue. While open meetings with potential suppliers are also allowed under UPL, the OECD does not recommend them as they can facilitate supplier collusion (see Part III, Section 5).

A standardised questionnaire template and careful minute taking of such electronic or in-person consultations will help to ensure equal treatment, as well as easy access for Ukrenergo to information in future procurements. Box 15 illustrates sample questions for bilateral discussions with potential suppliers. Communication with suppliers should generate feedback about procurement projects' time scales, feasibility and affordability. Consultations are particularly useful if they also generate information on future trends, developments and innovations.

Box 15. Questions to open a dialogue with potential suppliers

1. Are you interested in this opportunity?
2. If not, why not?
3. Is the business model realistic?
4. Are the business aims realistic? Is the business attractive?
5. What do you see as the risks?
6. Can you give an early indication of cost? What are the major cost drivers and how can these be minimised?
7. Can you give an indication of likely timescales?
8. Are there other, better approaches?
9. What added value, in terms of sustainability, could the potential supplier provide related to the subject matter of the contract?
10. How can potential suppliers provide added value on sustainability and other issues over and above the regulations' requirements?
11. Can you share examples of good or bad practice in terms of how others have tried to secure these products or services?
12. What can be done to ensure clarity and improve the tendering process for potential suppliers?

Sources: (OECD, 2019, p. 34^[26]); Scottish Government (2021), "Procurement Journey: Route 3 (Supply Market Analysis)", www.procurementjourney.scot/node/88.

To ensure that market consultations include new and innovative solutions and suppliers that have not previously taken part in Ukrenergo or Ukrainian procurements, an analysis of procurement results and conditions of other public or private purchasers should be made. Such information is more widely available for a company's consumption goods than for Ukrenergo's specialised and at times unique demand as a TSO. A first step to resolve this problem could be to analyse procurement conditions achieved by other national TSO for comparable purchases. Due to the transparency requirements in public procurement, information on the winning bids is widely available. For EU TSO, for example, this type of information can be found in the Tenders Electronic Daily (TED) database.⁵⁸ Moreover, **closer co-operation and exchanges with other national TSO** could help Ukrenergo analyse its own procurement experiences and strategies, and identify alternatives to current practices and supply chains.

External consultants can be another source of market information and provide assistance when more complicated, high-value or high-priority procurements are planned. Ukrenergo's IFI procurement provides good examples of such involvement and has generated favourable results. When required, consultants' procedures and practices used in IFI procurement could inform Ukrenergo's procurement. Industry consultants must be free of any conflicts of interest and supplier affiliations and, as a minimum requirement, need to meet strict confidentiality obligations. Experts' proximity to an industry may also entail a risk that they might favour certain suppliers or use their position to orchestrate a collusion scheme between suppliers (see Part III, Section 5).⁵⁹

All information gathered through internal and external market research needs to be filed systematically, and in a way that it can be accessed by procurement item, procurement markets, and suppliers. The market-analysis template included in the OECD Procurement Toolbox (Box 16) is a useful tool to aid in documenting and filing pre-tender information collected by procurement officials, and record sources used.

Box 16. OECD template for market-study reports

Box: Generic template for a market study report

Overview

When was market study conducted?

Were files from previous similar tenders accessed?

Yes, please outline tender number.....

No, please outline reasons.....

Was information collected using

Desk-based research

Solicitation from private market participants

If desk-based research was conducted, what sources were accessed?

If there was a direct solicitation from private market participants, how were these identified? How many were contacted? How many responded?

If external consultant(s) were used to estimate prices or costs, did they sign a confidentiality agreement?
.....

Survey results

Market analysis (number of suppliers):

Supplier analysis (capability):

Supplier analysis (price):

Aside from value-for-money, were any particular criteria given as part of the market study?

Environmental

Social

Innovation

Other

Source: OECD (2009), "Public Procurement Toolbox: Template for market study report",
www.oecd.org/governance/procurement/toolbox/search/template-market-study-report.pdf.

Information gathering and market research should be understood as a continuous process that does not end with a successful tender and a concluded contract. In high-risk and priority markets, an analysis of a tender should be undertaken immediately after its conclusion; it should critically review whether the procurement's intended goals were achieved *prima facie* in terms of, for example, the number of qualified competitors and new bidders, and achieved price, quality or innovation. If the goals were met, the methods used in the procurement should be promoted for other tenders. If they were not reached, a critical analysis should consider improvements for future tenders. Additional information should also be fed into the system throughout the lifetime of the contract, relating to real-life performance and meeting of Ukrenergo needs.

Specialise and centralise market-research functions and improve co-ordination between procurement actors

Any systematic approach to identifying competition risks would benefit from **staff being specialised and centralised** in one unit. In addition, all procurement efforts would benefit at their various stages, particularly during tender preparation. Currently, with market research and preparatory work being undertaken at different functional and regional levels of Ukrenergo, it remains unclear how professional, co-ordinated and systematic its approaches are, and if staff in different units are sufficiently qualified and incentivised for their assigned tasks. If they are not, market research and tender planning risk becoming a box-ticking exercise.

The procurement workflow shows that market information is generated at various levels of Ukrenergo in the pre-tender stages. It involves cost centres, which provide data on previous contracts; the Supply Chain Management Directorate, which carries out pre-tender market research; and the Department of Market Research and Cost Control, which controls price estimates. The different stages of this workflow could overlap creating competing responsibilities or at least the perception that another unit will check information, which may reduce incentives to carry out assigned tasks with the utmost diligence.

An uneven distribution of staff between the different procurement actors and within the Directorate for Supply Chain Management also raises questions about the effectiveness of work-process organisation.

Table 4 shows the total number of staff that work on procurements in Ukrenergo, including staff in IFI procurement, and staff in the Department of Market Research and Cost Control.

Table 4. Procurement staffing, 2017-2019

Department	Total staff	Departed staff	Hired staff
Directorate for Supply Chain Management	82	17	24
IFI Procurement	7	1	5
Market Research	13	3	3
Total	102	21	32

Source: Ukrenergo Responses to OECD February and May 2020.

Staff numbers in the Department of Market Research and Cost Control are too low for its volume of work. With a total staff of just 13, it carries out market research and control of cost estimates for more than 5 000 tenders annually, and cannot dedicate time to the majority of procurement requests. The greater part of specialised procurement staff are in the Supply Chain Management Directorate, organised according to product areas and regions; they could be tasked exclusively with the entire market research and cost-control function. Centralising this work, together with making staff more specialised in specific areas, would allow for more and better-designed and targeted market-research activities.⁶⁰

A departmental reorganisation accompanied by process improvements could also address the large imbalance between the responsibilities of employees in the Supply Chain Management Directorate in Ukrenergo headquarters and those in Regional Procurement Centres (see Table 5). Headquarters staff are responsible

for procurement values that are on average more than seven times higher than in those produced in regional offices, albeit for a significantly lower number of tenders, but their staff number is the same as for the remaining 13% or procurement value carried out by regional procurement. According to Ukrrenerg, the high number of low-value procurements at regional level results from RPCs' inefficient planning of annual needs. This leads to needs regularly being produced outside of the annual procurement-planning process and so the Supply Chain Management Directorate being prevented from aggregating and consolidating and including them in the Annual Plan. Aside from real emergency procurement, such as for urgent repair or emergency recovery work, regional needs should be planned and communicated in the timeliest fashion to allow for more effective and centralised procurement. **Structural reorganisation could free up more staff for intensified, focused and systematic market research and tender preparation.**

Table 5. Procurement staff and value in the Directorate for Supply Chain Management, 2019

Unit	Number of contracts	Number of staff	Procurement value	Procurement value per employee
Ukrenerg headquarters	4 340	40	5 985 535	149 638
Regional offices	10 649	42	865 356	20 604

Source: Ukrrenerg Responses to OECD February and May 2020.

This could be achieved, for example, if procurement specialists in the Supply Chain Management Directorate would **work more closely with cost centres** – central and regional internal clients – in defining needs. While the ultimate users of procurement goods, works and services are essential to understanding needs, their current role goes beyond their capacity and training. While not being sufficiently trained to identify procurement alternatives, innovative solutions and new suppliers, including suppliers from abroad, they are expected to formulate terms of reference and technical specifications when defining their own needs and drafting procurement requests. Their lack of procurement know-how creates an increased risk of their favouring existing solutions, products and suppliers.

Close co-operation with internal clients in defining purchase requirements will ensure that the required knowledge of the needs is available to the procurement specialists, and will enhance their product know-how. Given the extremely technical nature of sections of Ukrrenerg procurement, it might be helpful to create a **list of approved technical staff** from different Ukrrenerg cost centres available for consultation and assistance by procurement departments, especially in the pre-tender phase. Consultation and assistance should focus on the definition of tender requirements to avoid unclear or biased specifications, especially in the case of high-risk purchases. Such designated technical staff could also receive basic training in procurement to facilitate a common understanding between them and procurement specialists.

In summary, procurement function specialisation and good market research will help to inform the entire tender process and make it more effective and efficient. The depth of research required for particular tenders will be informed by the priority list that should take into account markets with a collusion risk.

Recommendations for action – organisation and implementation of pre-tender information gathering and market research

1. **Do not rely on a seemingly competitive reference price** to solve all issues related to bid rigging, and **improve understanding of procurement at all levels** and the risks and costs associated with bid rigging.
2. Create a **database for procurement items and related market research**, including information on the **likelihood of collusion** and other anti-competitive practices. Procurement markets could be ranked by **risk indicators**, which could combine collusion, financial and other risks. The database needs to be updated on a continuous basis.

3. Ensure that responsibility for **market research is clearly assigned to one level of Ukrenergo procurement**, preferably the Directorate for Supply Chain Management and the specialised category managers. Avoid ambiguities in market-research competences and **ensure close co-ordination with technical experts at end-user level**.
4. **Reconsider staff and purchasing distribution between the different regional procurement centres** to account better for high-priority and high-risk purchases, and to allow for more in-depth market studies when necessary.
5. **Differentiate the depth of market research** and market studies according to priorities derived from collusion and risk indicators.
6. Always **use multiple sources to verify market intelligence**, in particular, by not relying exclusively on historic data and information from existing suppliers. Include contract execution information such as contract delivery, modifications, performance evaluation, extensions and price renegotiations.
7. Where possible, **share market intelligence with other public procurement bodies** to increase overall knowledge about market conditions and to enrich Ukrenergo's own findings.
8. **Benchmark TSO-specific purchases against procurements undertaken by other TSO**, and co-operate with them to learn about their procurement practices and strategies.
9. **Carry out ex post analysis** of high-risk and strategic tenders to inform future tender planning.

3 Maximise participation of genuinely competing bidders

A higher number of bidders will usually increase competition in tender procedures (Box 17). Competition generated between bidders will not only bring down prices, but can also lead to higher quality and more innovation. Higher bidder numbers and tenders that attract new bidders will decrease the risk of collusive practices in tenders, as anti-competitive collusion is harder to initiate and sustain than it is with a small number of familiar competitors.

Box 17. Correlation between the number of bidders and prices in the construction sector in Romania

The OECD's competition assessment review of the procurement rules applicable to the construction sector in Romania identified provisions that were possibly limiting the number of participants in public tenders. The OECD performed a quantitative analysis and concluded that a higher number of offers (or more offers accepted by the public authority) led to a larger discount of the award price compared to the estimated price. Also, a larger contract value and more days for preparing bids correlated with a higher number of submitted offers.

By extrapolating the results of the analysis to all construction procedures in 2014, and accepting a number of factors, the OECD estimated that stimulating, on average, one additional acceptable bid in construction procurement procedures could amount to approximately EUR 418 million in total savings, while two additional offers could yield approximately EUR 871 million in savings.

Sources: (OECD, 2019, p. 40^[26]); (OECD, 2016^[27]).

Part two of the OECD Checklist to design tender methods to reduce bid rigging (OECD, 2009^[10]) lists a number of principles that can help increase bidder participation (Box 18), and Ukrainian procurement law incorporates certain, including required e-tendering; bid securities no higher than 5%; no formal restrictions to participation of foreign bidders; standardised procurement documents and procedures; and allowing for lots in tender procedures.

Box 18. OECD Checklist to design tender methods to reduce bid rigging: bidder numbers

Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

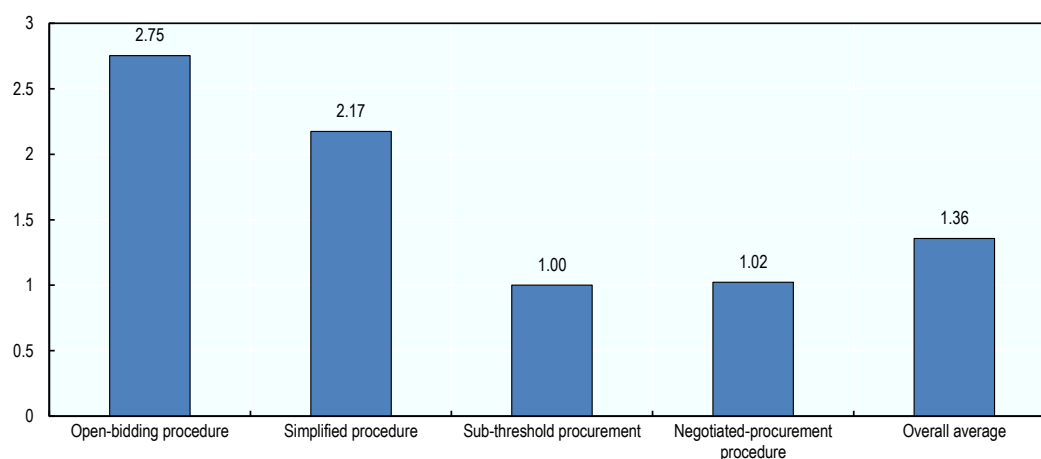
1. **Avoid unnecessary restrictions** that may reduce the number of qualified bidders. Set minimum requirements proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition or nature of firms that may submit a bid.
2. **Avoid requiring large monetary guarantees from bidders** as a condition for bidding as this may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
3. **Reduce constraints on foreign participation** in procurement whenever possible.
4. To the greatest extent possible, **qualify bidders during the procurement process** in order to avoid collusive practices among a pre-qualified group and to increase uncertainty among firms as to the number and identity of bidders. Avoid a long period of time between qualification and award, as this may facilitate collusion.
5. **Reduce bid preparation costs** by:
 - streamlining tendering procedures across time and products; for example, use the same application forms and asking for the same type of information
 - packaging tenders – different procurement projects – to spread the fixed costs of bid preparation
 - keeping official lists of approved contractors or certification by official certification bodies
 - allowing adequate time for firms to prepare and submit a bid; for example, consider publishing details of pipeline projects well in advance through trade and professional journals, websites or magazines
 - using an electronic bidding system, if available.
6. Whenever possible, **allow bids on certain lots or objects within the contract**, or on combinations, rather than only bids on the whole contract. For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small- and medium-sized enterprises.
7. **Do not disqualify bidders from future competitions** or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
8. **Be flexible about the number of firms required to bid**. For example, if the bid initially requires five bidders, but only three are received, consider if it is possible to obtain a competitive outcome from the three, rather than insisting on a retendering exercise, particularly as that would make it clear that competition is scarce.

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

Low bidder numbers and high rate of tender cancellation

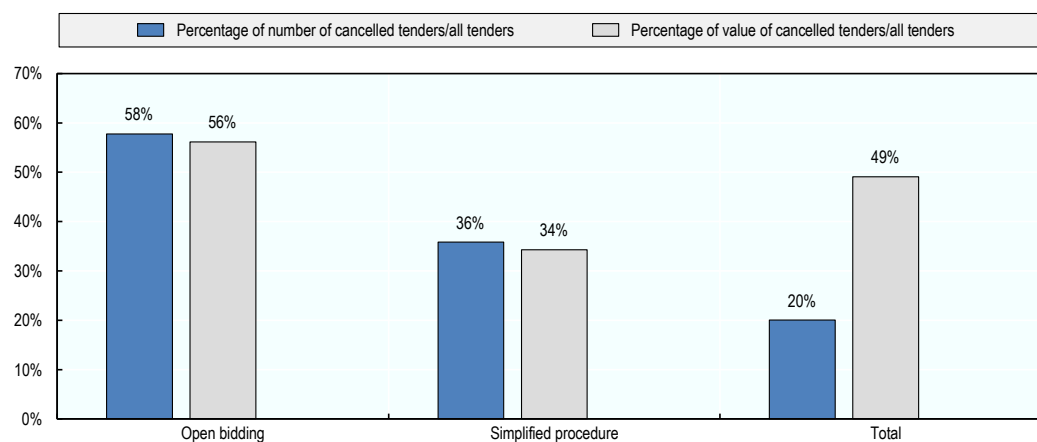
The average number of bidders is an indicator for the level and intensity of competition in procurement. Figure 14 shows the average number by type of procurement procedure at Ukrenergo in the period 2017-2019. By definition, an actual bidding process only takes place in open bidding, for which average bidder numbers were 2.75, and when there are at least two bidders in the simplified procedure (2.17). When taking into consideration that to a large extent negotiated procedures result from open-bidding tenders that were cancelled twice and so move to negotiated procedure, the average bidder number would further decrease for all biddings in which a competitive procedure was initially foreseen. Negotiated procurement in these cases results simply from the absence of the minimum number of bidders in open bidding and is not necessitated by unique requirements or tender constellations. Almost 60% of all open-bidding procedures are cancelled (Figure 15). In the period 2017-2019, no significant trend for increases or decreases in bidder numbers was seen and annual averages were close to the three-year average.

Figure 14. Average bidder numbers by procedure, 2017-2019



Note: Figures were calculated by dividing the number of bidders in successful tenders by the number of tenders, based upon the assumption that the total number of tenders and their value equivalent given by Ukrenergo only included those tenders successfully held and which ended with a contract award.
Source: Ukrenergo Responses to OECD February and May 2020.

Figure 15. Cancelled tenders, 2017 - 2019



Note: Tenders are cancelled in open bidding if there are fewer than two participants or if the procurement is no longer needed. In simplified procedures, the tender is cancelled if the procurement is no longer needed, or the winning bidder does not meet the qualification requirements. Insufficient bidder numbers are most often due to bidder disqualification due to technical mistakes in submitted bids.
Source: Ukrenergo Responses to OECD February and May 2020.

Ukrenergo is aware of low bidder numbers and is making significant efforts to attract more. Among the initiatives discussed during the fact-finding mission and in response to OECD questionnaires were:

1. the introduction of category management and centralisation of pre-tender communications with (potential) tender participants
2. opening a partnership dialogue with market players, in particular in the narrow and TSO-specific markets for works
3. increasing market research and creating a database of suppliers
4. wider free publication of information on planned tenders in the annual plan, targeted mailing lists for procurement plans, technical specifications and invitations to tender in different markets
5. organising seminars and presentations for potential bidders on bid preparation and potential problematic issues in procurement processes.

Further improvements could also be made to increase and incentivise the participation of more domestic bidders, small- and medium-sized bidders, and foreign bidders. Tender design could be reviewed to make full use of the instruments provided by the UPL, such as aggregating tenders, splitting tenders into lots, and framework agreements. When doing so, close attention needs to be paid to the collusion risks of specific tender designs, joint bidding and sub-contracting. Valuable insights can be gained from Ukrenergo's IFI procurement activities.

Market research and supplier outreach

Ukrenergo recognises that an increase in bidder participation requires thorough market research and constant efforts to learn about markets, technical solutions and actual and potential suppliers. All remedies and techniques for improving the market-research process, communication with bidders, and the prioritisation of market studies noted in Part III, Chapter 2) are also valid in attempts to increase bidder numbers.

Box 19. Tender preparation conducive to increasing bidder numbers

The insulation for electricity-meter installation products – which is a low-voltage conductor connector – is a highly technical product. In the Netherlands, the three suppliers selling the connector had a limited market consisting of the country's seven grid operators. After health and safety regulations demanded a different type of insulation for the connector, one of the three suppliers offered to develop it and then sell the new product to the grid operators in guaranteed numbers. This proposal would have resulted in that supplier owning all the new product's intellectual property rights and a monopoly position in a market in which competition was already limited. In 2013, energy-grid operator Enexis headed up a design contest to encourage co-development of the connector in competition. Seven companies responded to the contest. The grid operators evaluated the products, and Enexis awarded the co-development to one supplier. However, through co-development the intellectual property rights rest partly with Enexis and can be used for future procurement and to develop and promote additional competitors. This way, dependency on a single supplier was avoided and other suppliers can enter the market. Enexis avoided a vendor lock in.

Source: <https://ted.europa.eu/udl?uri=TED:NOTICE:205820-2015:TEXT:EN:HTML> (accessed 8 February 2021).

As part of its efforts to intensify market research, Ukrenergo has set up an internal **database of potential suppliers** in its various procurement markets, containing information on suppliers that showed an interest or participated in previous tenders; suppliers found through tender research of other public purchasers; and news of industry associations, trade fairs, or through direct contacts. These suppliers are contacted actively by

Ukrenergo, in addition to the mandatory and openly accessible publication of the tender on the e-procurement platform. Each receives the annual plan relating to the product categories it supplies, technical specifications for specific tenders, and messages with specific tender announcements. No potential supplier should be deterred from participating in a tender because it has not been directly contacted by Ukrenergo. This can be best ensured by transparency about communications, and by making it known that all interested suppliers will be added to Ukrenergo's internal database and so receive the information.

Use of open-bidding procedure and other types of competitive procurement and avoiding direct awards

Ukrenergo procures a high percentage of its needs through sub-threshold purchases and negotiated procedures that do not require a minimum number of bidders (Table 6).

Table 6. Ukrenergo's sub-threshold procurement and negotiated procedures, 2017-2019

Procedure	2017 - 2019	
	Percentage of tender numbers	Percentage of value
Sub-threshold	74	6
Negotiated	3	15
Total	77	21

Note: Percentages are calculated by dividing total procurement values by number of tenders.

Source: Ukrenergo Responses to OECD February and May 2020.

A large part of **negotiated procedure purchases** result from repeatedly cancelled open-bidding procedures that did not attract the minimum number of bidders. The kind of products or services affected – including cables, transformers, tyres, security services, computer equipment and cleaning products – makes it unclear why only one company bid each time. The resulting predictable move from competitive to negotiated procedure, as foreseen under the UPL, could provide bidders an incentive to engage in bid suppression and bid rotation as a simple way to share the market and eliminate competition.

The large number of **sub-threshold procurements**, which represent around 75% of Ukrenergo tenders, and 6% of overall procurement value could also raise concerns, since this type of procurement does not have to follow the UPL's strict rules. Also, the number of sub-threshold purchases that are administered by Ukrenergo procurement staff is extremely high and could be deflecting their attention from higher-value purchases, which would benefit from greater attention to generate more competition.

For both types of procurement, Ukrenergo could consider the possibility of employing **more tender aggregation** (whether regionally or by related or complementary product groups); the **use of framework contracts**; or, in case of more complex projects and products, **limited-participation procedures**.

1. **Tender aggregation** could make tenders more economically attractive, and would also justify better pre-tender market research and preparation, to generate more initial bidders.
2. **Framework contracts** are permissible under the UPL, but have yet to be used by Ukrenergo. Recurrent purchases of standard products could be covered by a higher purchasing volume and a longer duration (up to four years), which would provide predictability and security of supply, while lowering administration costs associated with recurrent, small-scale tenders.
3. For more complex products and projects, Ukrenergo could consider making use of **limited-participation procedures**, which would guarantee a minimum number of bidders before the tendering stage, while taking into account product and market specificities. Pre-qualifying bidders could, however, increase the risk that bidders communicate during the subsequent tendering

procedure. This risk needs to be balanced against the cost of negotiating with a single bidder, which is the current alternative.

Participation of foreign bidders

Ukrainian public procurement is open to all foreign bidders, with no formal restrictions on their participation in place. Certain stakeholders have mentioned, however, that obstacles for foreign bidders are found outside procurement law; for example, in the country's burdensome business licensing procedures, obtaining visas or merely opening local-currency bank accounts. It was also mentioned that Ukrainian SOEs suffer from a reputation for corruption, which deters foreign bidders.

The total number of foreign bidders to participate in Ukrenergo's tendering process is extremely low. In 2017 and 2019 for example, only one foreign bidder was involved in non-IFI Ukrenergo tenders.

Table 7. Participation of foreign bidders in non-IFI tenders, 2017-2019

Year	Number of foreign bidders	Percentage of tender value	Percentage of tender volume
2017	1	40	0.5
2018	8	36	0.9
2019	1	37	0.7

Source: Ukrenergo Responses to OECD February and May 2020.

Participation rates are different for procurements run under IFI rules with foreign bidders making up 86% in 2017, 90% in 2018, and 89% in 2019. One straightforward explanation for this higher participation rate is the higher value of IFI tenders; others include the thorough preparation of tenders, often with the use of external consultants; advertisement of tenders on IFI websites; full availability of tender documentation and process in English; reliability of funding and payment; close monitoring for irregularities by IFI; and the availability of lots. Some of these reasons are useful to consider in efforts to attract foreign bidders to tenders funded out of Ukrenergo's own budget.

Attracting more bidders – both domestic and foreign – would intensify competition. Bringing new and foreign bidders to the market serves to break up established bidder relationships and cartels. In a relatively small, domestic market, competitors tend to know and meet each other frequently when competing for the same customers. New competitors with no prior association with incumbents can stir up markets and generate competition.

Table 8. Average bidder numbers in English-language open-bidding tenders, 2017-2019⁶¹

	2017	2018	2019	Overall average
Average bidder numbers	3.69	3.12	3.11	3.31

Note: If the expected purchase price is \geq EUR 133 000 for goods and services and \geq EU 5.15 million for works, the tenders must be published in English additionally (Article 10-III of the UPL).

Source: Ukrenergo Responses to OECD February and May 2020.

Many of the measures most likely to attract new bidders – **more and improved market research, active outreach to potential suppliers, and tender aggregation** – apply to both domestic and foreign bidders. Ukrenergo numbers confirm that higher-value tenders, which are legally obliged to publish minimum information in English, attract over three bidders on average, compared to less than three for the overall tender average (Figure 14 and Table 8). To attract more foreign bidders a number of additional measures could be used in smaller tenders, including:

1. use of **consultants and knowledge obtained by IFI procurement staff** during larger and more complex tenders
2. **consolidation of the databases** containing information on Ukrenergo's budget-funded and IFI procurement to inform both types of tenders
3. for tenders that need to be published in **English**, publication of more than simply the minimum amount of required information (currently, customer name, contact and procurement-item information, and financial-guarantee information); any additional information available in Ukrainian should also be published in English, including contract execution
4. **advertising** tenders outside the e-procurement system to make them accessible to foreign bidders.

More general measures discussed in this report, such as an active and visible fight against bid rigging and corruption in Ukrenergo procurement, as well as budgetary and investment independence, would all help to improve Ukrenergo's reputation within and outside Ukraine as an independent and reliable business partner, and so also help to attract foreign suppliers.

Tailoring demand to attract new and more suppliers

The **aggregation of contracts** and the use of **framework contracts** could make certain tenders more attractive to a larger number of bidders. Depending on market specificities, and the structure of suppliers, more bids could also be generated by **splitting larger contracts into lots**.

By doing this, smaller suppliers that could not bid for a large tender are encouraged to participate, increasing the overall number of bidders, with the concomitant positive effects on the intensity of competition and potential to break up existing cartels and stir up settled markets. The UPL allows tenders to be split into lots and one bidder to win multiple or all lots. European Union rules require contracting bodies to justify when they do *not* split a contract into lots (Box 20).

Box 20. Lots under the European Union Directive on Procurement

The European Union Directive on Public Procurement (2014/24/EU) encourages public procurement authorities to divide contracts into smaller or more specialised lots to allow smaller firms to bid. Such division can be done on a quantitative basis by adapting the size of the individual contracts to the capacity of small- and medium-sized enterprises (SMEs) or on a qualitative basis, adapting the requirements of individual contracts to different trades or SME specialities. A contracting authority must justify its decision *not* to split a contract into lots if it is possible.

The directive also addresses overly demanding requirements for economic and financial capacity, which frequently rule SMEs out of bidding. Contracting authorities should not be allowed to set a minimum-turnover requirement disproportionate to the size of the contract for potential suppliers; it should not exceed twice the estimated contract value.

Source: European Commission (2014), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, L 94/65, (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L0024-20200101>).

Ukrenergo has not used this possibility since 2017 due to previous experience of procurement appeals for individual lots blocking the whole procurement. This has changed with recent amendments of the UPL, and appeals relating to individual lots will no longer affect the other parts of the procurement. Given that the actual appeal numbers did not support concerns about excessive appeals even before the law was changed as few Ukrenergo tenders are appealed (see Part II, Chapter 5: Tender appeals), the policy of not using lots should

now be reconsidered. Ukrenergo's own experience in IFI tenders proves that splitting contracts into lots can improve competition and reduce prices significantly, and the company had equally positive experiences outside IFI procurement in 2017 and 2018.⁶² As Ukrenergo has noted about IFI procurement:

One of the indirect incentives for encouraging high competition is to divide the large scope into smaller lots. The lots are set considering the research in the respective specific markets of the works, goods and services to be procured. Thus, the commercial (financial soundness) and technical requirements under separate lots are more attractive to potential bidders. (Ukrenergo, 2020)^[22]

Box 21. Use of lots in Ukrenergo IFI procurement

Monitoring and control systems for the smart grid

In 2018, two technological solutions were required to implement a monitoring and control system for the smart grid, an electricity network that uses digital and other advanced technologies to monitor and manage electricity transport from generation sources. Market research showed that only three big suppliers would be able to supply *both*.

The contract was then split into two parts, each of which required only one technology, increasing participation to nine bidders in the two tenders, as well as products better tailored to requirements, and prices around 50% lower than the initial estimate.

Modernisation of six substations

The tender for the works, issued in 2019, was divided into three lots, with two substations in each. One included two substations for which specific gas-insulated switchgear technology was required; the other two were conventional substation modernisations and were divided based on the estimated size of contracts and the substations' geographical location. Lot 1 attracted 10 bidders; lot 2, 10 bidders; and lot 3, 9 bidders. The total final price for all three lots was 11% below the initial estimate.

Reconstruction of substations package

After the initial bid opening for a tender of two lots for the reconstruction of three substations each in 2018, price estimates were exceeded by 67% for one and 81% for the other. Initial estimates had been obtained based upon expert calculations and the results of previous tenders, but closer analysis indicated a lack of competition for the installation and building works, which would mainly be delivered by local specialists co-operating with international bidders. The tender was cancelled, but later retendered as three lots rather than two after Ukrenergo had actively looked for new suppliers. The outcome of this tender resulted in final prices that were below even the cost estimate, and significantly lower than in the initial bidding procedure.

Source: Ukrenergo Responses to OECD February, May and December 2020.

When splitting contracts into lots, some principles should be observed to avoid facilitating market allocation between bidders. Box 22 below sets out the OECD's guidance on when to split contracts into lots and how to do so without having an adverse effect on competition.

Box 22. OECD Checklist for protecting competition when splitting contracts into lots

When to split contracts into lots

A decision on splitting contracts into lots may be taken when a contracting authority is concerned that large, bundled contracts may reduce competition because:

1. efficient SME or specialist firms are unable to provide the full bundle of goods or services that the procurer is purchasing
2. public purchases account for all or most of the market for a certain good or service, and awarding the contract to a single firm may increase the market power of the chosen supplier and reduce bidder numbers in future tenders.

Before splitting a tender into lots to address either or both of these concerns, procurers should conduct market research to understand whether, given the type of product or service being procured, tendering smaller lots actually is the best solution.

If 1): are there no alternative methods to encourage participation by smaller specialist firms? For example, could simplifying the bidding procedure help them bid for the contract? Might they be able to form a joint bidding consortium?

For 2): would losing bidders exit the market and therefore not participate in future procurements, or would they and others re-bid the next time a contract is tendered? Similarly for future procurements, would the strength of rival bids be limited by their lack of experience or would they be able to strengthen their bids and demonstrate their experience by hiring staff from the incumbent contractor?

How to split a contract into lots without reducing competition

At the **pre-tendering stage**, the contracting authority should:

1. Provide all potential bidders with clear tender documentation including all available and relevant information about the product or service to be procured in order to minimise any advantage to the incumbent supplier; this should be done electronically and free of charge.
2. Consider dividing a contract into lots when it is understood that small or specialist firms will not otherwise participate in the bidding. For example, an additional lot should not be carved out if that lot is expected to have fewer competitors than there would be for the bundle of lots.
3. Allow package bidding when a bidder can make bids for different combinations of lots in order to obtain any cost synergies available from providing a larger bundle of goods or services. Obtaining these synergies may, for example, encourage non-local bidders to bid for packages of different lots even if they are unwilling to bid for individual lots.
4. Use award limits rather than participation limits to prevent all lots being awarded to a single firm, but only if the benefits will clearly outweigh the reduced competition for the contract.
5. Providing it does not create inefficiency, consider making the number of lots fewer than the number of expected bidders. This can make it more difficult for colluding bidders to agree a division of lots and so improve achieved value.
6. Providing it does not create inefficiency, consider making the lots different in size from bidders' market share. This can make it more difficult for colluding bidders to agree a division of lots and so improve value achieved.
7. Providing it does not create inefficiency, consider making the division into lots unpredictable in repeated procurements; for example, by changing the size or composition of the lots. This can reduce the risk of lot division facilitating collusion.

At the **tendering stage**, the contracting authority should:

1. Refer to the competition authority any suspicious actions taken by incumbents to obstruct rivals' abilities to put together an attractive bid; the competition authority can determine whether this constitutes anti-competitive exclusionary conduct.
2. Refer any suspicious actions taken by bidders to rig the bidding to the competition authority.
3. Be aware that joint bidding may be anti-competitive in cases where bidders are capable of submitting separate bids.

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

Prevent anti-competitive collaboration between competitors

Special attention should be paid to suppliers who **submit joint bids or who sub-contract bids**. Joint bidding – when two independent bidders join forces to submit a bid – and sub-contracting – when a bidder uses another company to carry out part of the contract – are both permissible under Ukrainian procurement law. The identities of all bidders must be disclosed in the tender procedure, and sub-contractors need to be declared if they will execute more than 20% of the contract value. Ukrenergo has no statistics about the frequency of sub-contracting in its tenders.

Joint bidding

Joint bids can have both pro- and anticompetitive effects. For example, they can be used for market-sharing cartels among competitors (Box 23). However, when joint bids are between small- and medium-sized companies, which individually have insufficient capacity for a large tender, it will enable them to participate, and this increases participation and competition. Other pro-competitive results can result from an efficient combination of different or complementary technologies or economies of scale, which can lead to cost reductions (OECD, 2019^[26]).

Box 23. Anti-competitive joint bidding in Lithuania and Norway

Illegal joint bids in the Lithuanian construction industry

In 2017, the Competition Council of Lithuania found that joint bids submitted by two Lithuanian construction firms were actually an illegal cartel. Between 2013 and 2015, they had submitted joint bids in 24 public procurements for the renovation and modernisation of schools and kindergartens in Vilnius, but the Competition Council found that both companies could have participated in the procurements separately. However, instead of competing, they presented joint bids, and so restricted competition. In particular, the two companies agreed on how work and revenues would be shared between them when they would win contracts. The fines imposed on the two firms were EUR 3.7 million and EUR 8.5 million.

Bid-rigging case in Norway

In 2017, the Norwegian Competition Authority imposed fines exceeding EUR 1.6 million on six electricity companies for participating in an illegal bid-rigging scheme. One company had initiated and organised the co-operation between the five competing companies for a 2014 tender for the maintenance and repair of electrical installations in school buildings in Oslo. The five companies agreed on identical prices and submitted joint bids for a framework agreement, and were open about their co-operation. This raised the suspicions of the contracting entity, which went to the Norwegian Competition Authority; it investigated and found that the individual companies could have submitted independent

bids. As part of this assessment, the authority compared the number of employees needed to execute the contract and the number of each business's actual employees and planned recruitment and the possibility of hiring extra manpower. It concluded that the businesses either already had the necessary capacity to submit a credible independent bid or needed only minor adjustments to be in a position to do so. The decision was upheld by the Norwegian Competition Authority Complaints Board.

Sources: Press release Lithuanian Competition Council (21 December 2017), "Competition Council: Joint Bidding of Two Construction Firms Restricted Competition", <https://kt.gov.lt/en/news/competition-council-joint-bidding-of-two-construction-firms-restricted-competition> (30 July 2020); Norwegian Competition Authority (4 September 2018), "Favourable ruling in El Proffen case", <https://konkurransetilsynet.no/favourable-ruling-in-el-proffen-case/?lang=en>.

Determining when a joint bid has pro- or anti-competitive effects can be difficult. Different competition authorities have developed guidelines about when joint tendering is in line with or violates competition law; for example, the Danish Competition and Consumer Authority's guidelines (Box 24), first published in July 2018 and updated in 2020.

Box 24. Suggested criteria to distinguish between pro- and anti-competitive joint bids

Pro-competitive	Anti-competitive
Suppliers are active in different (product) markets	Each firm has the economic, financial and technical capabilities to fulfil the contract on its own
Co-operators provide a single integrated service that none could supply independently	Joint bidders are the strongest competitors in the relevant market
Two or more providers active in different geographical areas submit a single bid for the whole of the contract area, producing efficiencies	A joint bid does not produce any efficiencies
Two or more providers combine their capacity to fulfil a contract that is too large for either individually	A consortium allows its members to exchange sensitive information that might harm competition in future tenders

Source: (Danish Competition and Consumer Authority, 2020^[28]).

Whenever joint bids are submitted, Ukrenergo should carefully check if the partners in the joint bid could submit individual bids without foregoing economies of scale or other efficiencies. Good preliminary market research will facilitate this assessment. Competing firms should be asked to provide reasons for any joint bid upon delivery of an offer. When the suspicion arises that a joint bid could be anti-competitive, the AMCU should be informed (Box 24).

Sub-contracting

Sub-contracting can raise similar competition concerns to joint bidding, but it can equally have pro-competitive effects. Companies that can perform a contract individually should bid against each other, not tender jointly or as contractor and sub-contractor; however, when one bidder is unable to submit an offer without sub-contracting a portion of the work to another undertaking – because it lacks the necessary know-how, certifications or specialisation, for example – sub-contracting can be beneficial, as it will increase the total number of bidders. Similarly to joint bids, it is important to ensure that a sub-contracted undertaking could not perform the work as an independent bidder.

The OECD recommends that procurement agencies should require bidders to disclose their intention to subcontract when submitting their bids, along with the identity of any subcontractors, and the reasons why subcontracting is necessary for the correct fulfilment of the contract (OECD, 2019, p. 47^[26]).

Good pre-tender market research will again be useful to establish whether sub-contracting generates efficiencies or undesirable anti-competitive effects.

Improving Ukrenergo's reputation as a reliable business partner

Between 2017 and 2019, almost **2 200 tenders were cancelled** by Ukrenergo (Figure 15), which has affected an even higher number of bidders. If Ukrenergo wishes to attract more bidders to its tenders, then it **must reduce the number of cancellations**, which are mostly due to insufficient bidder numbers in open-bidding procedures and disqualification of bidders not in compliance with technical and qualification criteria. Apart from the obvious waste of internal resources, **every cancelled tender also squanders bidders' time and effort**. The preparation of tender documentation and proposals and tender participation is costly. When a bidder repeatedly experiences tender cancellations, it will no longer be interested in supplying the customer.

The same issue arises when tenders are cancelled because they lack budgetary approval. Ukrenergo's budget to finance procurement has to go through a **lengthy approval process of the investment plan and the related budget**, with a number of different players involved, such as NEURC, MDETA, the Ministry of Energy and the Ministry of Finance. In case of a lack of approvals for investment projects and their related budget, **procurements included in the annual plan can be cancelled, delayed, reduced in volume or terminated**. While Ukrenergo is free to plan and announce purchases based on the actual needs, it is forced to cancel initiated procurement processes if no budget has been approved in time for the tender. For this reason, a warning is included in the tender documentation that tender volumes may be decreased or Ukrenergo can unilaterally terminate tenders.

These lengthy approval processes, some of which may take up to three years, have in the past led to **postponement and backlogs of investment operations**. As noted in a recent OECD report, *State-Owned Enterprise Reform in the Electricity Sector in Ukraine*: "More generally, the heavy reporting and approval process for Ukrenergo's key strategic document negatively affects the company's performance by hampering its ability to effectively plan and implement its investment projects" (OECD, 2020, p. 86^[9]).

The annual investment plan for 2020 was only approved by the Ministry of Finance in May 2020 and the financial plan in July 2020, after Ukrenergo contested the lack of approval and brought the case to court in January 2020.

Ukrenergo should become an attractive and trusted business partner for suppliers. For this reason, responsibilities for the approval of key documents such as the company's strategy, financial plan, business plan, and investment plan should be shifted to Ukrenergo's Supervisory Board, as previously recommended by the OECD (OECD, 2020^[9]).

Recommendations for action – increase bidder numbers and competition

Ukrenergo's tender processes can be improved, in particular through 1) the use of appropriate bidding procedures and contract types; 2) more participation of foreign competitors; 3) aggregation and disaggregation of tenders; and 4) greater attention to joint bids and sub-contracting that could reduce competition in tenders. The OECD has nine specific recommendations.

1. Ensure that **supplier databases** are open and non-discriminatory, and that unlisted suppliers are not disadvantaged in the tendering process or do not feel deterred from bidding if they have not been contacted directly by Ukrenergo. Ensure that interested suppliers are included in the database.
2. **Decrease the share of sub-threshold procurements and negotiated-procedure procurements** and conduct them under the open-bidding procedure.

3. Consider **aggregating purchases** or introducing **framework agreements** to increase tender volumes and make them more attractive to a larger number of bidders. Consider using **limited-participation procedures** for more complex tenders to ensure that they are aligned to the market offer and open and attractive to the largest possible number of bidders.
4. **Learn from IFI procurement** and its market research and procedural knowledge to inform Ukrenergo's procurement. **Consolidate** the supplier **databases** for both types of procurement.
5. Publish more than the minimum required amount of tender documentation **in English**, and **advertise** important tenders **outside Ukraine**.
6. When only few bidders can afford to supply large volume or high-value contracts, consider **splitting the resulting tenders into smaller lots** to attract more competitors.
7. Pay **close attention to joint bids and sub-contracting** in Ukrenergo tenders and ensure that bidders that could submit individual bids do not submit joint bids or enter into sub-contracting agreements. **Inform the AMCU** when a suspicion of anti-competitive joint bidding or sub-contracting arises.
8. **Make every effort to reduce the number of cancelled tenders** to avoid frustrating and deterring competent bidders and to hinder bid-suppression schemes.

The final recommendation is directed at the Ukrainian state as the owner and shareholder of Ukrenergo:

9. To become a trusted and reliable purchaser, attractive to a maximum number of bidders, the OECD reiterates the recent recommendation to: **“Strengthen the capacities of the ownership entity responsible for Ukrenergo”** (OECD, 2020, pp. 95-96^[9]). For **greater efficiency** and in line with OECD SOE guidelines, it would be advisable to **shift responsibilities for the approval of key documents**, such as the company's strategy, financial plan, business plan, and investment plan to the **Supervisory Board**.

4 Defining clear tender terms, avoiding predictability, and rewarding competition through well-designed evaluation and award criteria

While tender terms should be clear and designed to maximise the number and type of bidders, to frustrate attempts to enter into market sharing agreements, they should not be easy to anticipate for bidders. Part 3 of the OECD Checklist (OECD, 2009^[10]) provides a number of helpful suggestions (Box 25).

Box 25. OECD Checklist to design tender methods to reduce bid rigging: defining requirements

Defining requirements clearly and avoiding predictability

Drafting specifications and terms of reference (TOR) is a stage of the public procurement cycle vulnerable to bias, fraud and corruption. They should be designed to avoid bias and be clear and comprehensive, but not discriminatory. They should, as a general rule, focus on performance namely on what is to be achieved rather than how it is to be done – to encourage innovative solutions and achieving value for money. How tender requirements are written affects the number and type of suppliers that may be attracted to a tender and so affects the success of the selection process. The clearer the requirements, the easier they are for potential suppliers to understand, increasing bidder confidence when preparing and submitting bids. Clarity should not be confused with predictability, however. Predictable procurement schedules and repeated procurement quantities can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase bidders' incentives to compete. The OECD Checklist has recommendations for the process.

- Define requirements as clearly as possible in the tender offer with specifications independently checked for clarity before publication. Do not produce requirements that might allow suppliers to challenge key terms after the tender is awarded.
- Use precise performance specifications and state actual requirements, rather than a simple product description.
- Avoid going to tender before a contract is completely specified, as a comprehensive and exact definition of a need is the key to good procurement. In rare circumstances where early publication is unavoidable, require bidders to quote per unit, a rate that can then be applied once quantities are known.

- Define specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in procurement requirements: consider aggregating or disaggregating tenders so as to vary their size and timing.
- Work with other public sector procurers to run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

The selection of appropriate bidders and bids and the criteria for the award should emphasise qualitative criteria that stimulate the intensity and effectiveness of competition in the tender process. Credible bidders of all sizes should be encouraged to submit bids, including small and medium enterprises (Box 26).

Box 26. OECD Checklist to design tender methods to reduce bid rigging: evaluation criteria

Carefully choose criteria for evaluating and awarding the tender

Selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on which qualitative selection and awarding criteria to use is important not only for the project being designed, but also for maintaining a pool of potential credible bidders, including SMEs, with a continuing interest in future projects.

1. When designing a tender offer, consider the impact any choice of criteria might have on future competition.
2. Whenever evaluating bidders on criteria other than price – such as product quality or post-sale services – describe and weight such criteria adequately in advance to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, while promoting competitive pricing. The extent to which weighting criteria are disclosed in advance of the tender closing can impact upon the ability of bidders to co-ordinate bids.
3. Avoid any kind of preferential treatment for a certain class or type of suppliers.
4. Do not favour incumbent suppliers.¹ Incumbents' advantages may be counteracted by tools that ensure as much anonymity as possible throughout the procurement process.
5. Do not over-emphasise the importance of past-performance records and whenever possible, consider other relevant experience.
6. Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
7. Enquire with bidders if prices or bids do not make sense, but never discuss these issues with bidders collectively.
8. Whenever possible under the legal requirements governing award notices, keep the terms and conditions of each firm's bid confidential. Educate those involved in the contract process – such as those in contract preparation or making estimates – about strict confidentiality.
9. Reserve the right not to award the contract if the bidding outcome is suspected to be uncompetitive.

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

¹ The incumbent is the company currently supplying the goods and services to the public administration and whose contract is coming to an end.

Any investment Ukrenergo makes in improving and professionalising its pre-tender market research will ensure clearer tender specifications, terms of reference, and evaluation and award criteria that will attract the highest possible number of bidders with innovative, high quality solutions.

Ukrenergo is already moving in the right direction with its specialisation and professionalisation of the procurement organisation. More could be done to **improve the knowledge base at cost centres**, as they are start and end points of the procurement cycle. **Life-cycle costing** should be applied to open tenders to create more innovative, sustainable procurement solutions and to attract bidders that excel in quality rather than price. Tender design should always be aware of the possibility of bidder collusion and should try to render market sharing as difficult as possible by planning and structuring tenders in such a way that a “fair” sharing of the market becomes harder for conspiring firms. Abnormally low tenders should be considered carefully and not be dismissed too hastily.

Clear and open tender terms

The procurement process at Ukrenergo begins with technical experts at cost centres formulating their needs. As the ultimate users or beneficiaries of procurements and not procurement experts, they tend to formulate requests based on their own future and present needs, often previously used goods or services, and also based on suppliers and products with whom they have already worked. For these reasons, it is important to **review procurement requests critically** as they may well be product or supplier specific and lack openness for alternative solutions.

In close communication with the cost centres and their technical experts, procurement staff should attempt to **question specific demands** to discover which requirements are necessary, and where there is flexibility with technical and qualification requirements.

The less product-specific and targeted tender terms are, the more competing bidders can be attracted. Terms should be clear, **focus on performance and allow for substitute products** to attract new potential suppliers. Such newcomers, with no relationship to incumbent suppliers, can break up collusive market structures that feature little or no competitive dynamic, and so initiate increased competition.

The 2020 UPL will facilitate performance-based purchasing with innovations including **life-cycle cost** and an award criterion of the **most economically advantageous tender**, which can be incorporated up to a maximum of 30% in the overall evaluation, next to price.

Currently, Ukrenergo does not use such criteria, for fear of being exposed to procurement appeals. It has stated that the previous version of the UPL lacked a clear definition of the “complex or specialised nature” of a product that was required to justify the use of criteria other than price. Following AMCU practice in its procurement-appeal reviews, reasons for the use of qualitative criteria must be well documented and include the need to prove a technical design not already available in a market.⁶³ The 2020 version of the law no longer prescribes this “complex or specialised nature” of procured goods; instead, as confirmed in MDETA Order No. 1894 of 28 September 2020, the law now contains a list of products for which the life-cycle cost criterion may be used.⁶⁴

Introducing the use of criteria other than price and seeing them through the appeals process may take time and effort from procuring authorities, yet it is likely to pay off by incentivising high-quality or innovative suppliers that would not participate in tenders based on the lowest price and minimum technical specifications. Indeed, when their products are uncompetitive in this context, they would not even submit a bid and Ukrenergo would forego a chance to purchase products that could produce lifetime savings or bring other benefits. Alternatively, giving quality a higher weight can **reward innovation and help cost-cutting measures**, while **promoting competitive pricing**, and **increased participation** in future tenders.

Improving performance-based specifications and award criteria would be helped by **providing minimum training to technical specialists** at the cost centres to enable them to understand procurement and

competition requirements. At the same time, **procurement specialists should have or should improve their technical understanding**, a process that has started with the creation of category managers in Ukrenergo procurement. Both measures will help to improve communication between cost centres and procurement specialists.

When drawing up technical specifications, in addition to working closely with in-house experts, Ukrenergo should consider using **industry experts and consultants** to advise on specification and performance criteria in appropriate tenders. The practice in IFI procurement shows that the outside knowledge can improve tender design by bringing expertise and information from other tenders or jurisdictions. It should be ensured that outside consultants have no conflict of interest and no close present, past or future affiliations with any of the active suppliers (see Part II, Chapter 5).

In the pre-tender stage, consultations about technical specifications and tender terms with existing suppliers should be used with caution. If undertaken, several competitors should provide input, so as not to run the risk of specifications being drawn up too narrowly. Contacting several suppliers also runs the risk of their colluding on tender specifications to exclude innovative or substitute suppliers (Box 11).

Limit predictability and tailor tenders to inhibit market sharing

Repeat tenders that feature equal and steady amounts of goods or services facilitate suppliers wishing to form a cartel. Procurement should be designed or altered to disturb such market-allocation schemes. Once a supplier can no longer expect to receive its cartel share, it will be more inclined to make a competitive offer.

In IFI procurement, Ukrenergo divides large contracts into lots, which is a good practice. Still, there is room for improvement, as a quote from Ukrenergo demonstrates (Ukrenergo, 2020_[22]):⁶⁵

*Large contracts are usually divided into smaller lots. The criteria for such division are as follows: **approximately equal size of contracts, geographical location** of the substations and transmission lines, **voltage class** of the substations and transmission lines to be constructed/rehabilitated and equipment to be supplied, some specific technical solutions and technical requirements are to be applied. (emphases added)*

Predictably dividing tenders into equal lots, lots that always cover the same geographical location or feature a particular technical criterion can actually lead to a market-sharing scheme. When designing lots, the **number of lots** should always be fewer than the anticipated number of bidders, so any (potential) bidder cartel is unable to ensure an even distribution of lots (and so compensation) between its members. When fewer lots than bidders are issued, bidders have more of an incentive to submit competitive bids. Equal lot **sizes** and lots that cover specific **geographical locations** should also be avoided.

When conspirators in a collusive bidding scheme do not face the risk of losing a tender because there is always a sufficient and predictable number of lots, there is little incentive to leave a cartel. Aggregating some tenders or locations, and, in the case of repeated purchases, **changing the lots as well as the timings of the tenders** can help to alter this. It should not be possible for bidders to safely anticipate the next round and composition of tenders.

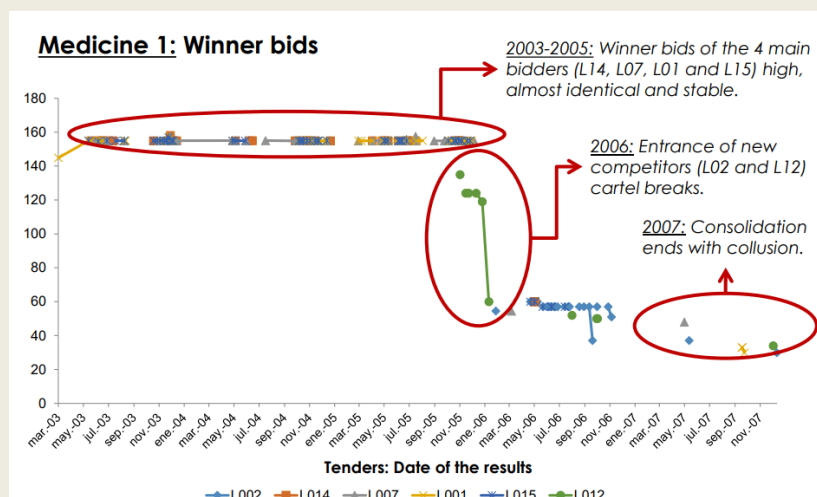
Another strategy to increase risks for cartel participants, which can also help to attract more bidders and increase competition, is the **aggregation or consolidation** of tenders into one large economically attractive tender can. Consolidation may attract new or foreign entrants (see Part III, Chapter 3), while larger, “all or nothing” tenders can help to break up existing collusive schemes (Box 27). The incentive of winning or losing the entire contract makes bid-rigging schemes less stable. Such a tender strategy would need to be accompanied by a strict policy on joint tendering and sub-contracting to avoid a contract award being later shared out to losing cartel members. This policy is not in contradiction to the recommendation to split contracts into lots. Which strategy to use depends on the product characteristics and the specific situation on the market. The procurer needs to make an informed choice about appropriate tender strategies, which will lead to more competition, and they can be very different.

Potential market effects must be taken into account when consolidating tenders. While making a tender “all or nothing” provides incentives to compete, it can also force suppliers out of a market if a procurer has a high share of total demand on the market or has specific needs that can only be met by a few companies, as is the case for part of Ukrenergo’s procurement. In such cases, consolidation of tenders would decrease the available base of suppliers and reduce competition in future tenders. This does **not mean supporting inefficient suppliers need to be kept alive** or preserving market structures at all costs; sometimes, markets with lower numbers of competitors show a higher intensity of competition.

Box 27. Mexico: reducing risk through changes in tender design

Between 2006 and 2008, Mexican health care provider IMSS, modified its procurement policies to reduce the risk of collusion in its public tenders. Procurement was consolidated and tenders were less frequent, which attracted new competitors for various medicines, creating high savings between 2007 and 2011.

The Mexican competition authority COFECE also did a systematic investigation of IMSS’s most important procurement markets and found indications of bid rigging in the majority, including the procurement of insulin and intravenous fluids.



In this example, after consolidation and changes in tender frequency, new competitors entered the market and prices, which for years had been extremely stable, decreased by more than 50% in response to the new procurement strategy and the breakup of the cartel. The cartel members were fined USD 11.5 million, while the total estimated harm amounted to USD 48 million.

Note: Amounts in USD at 2010 exchange rate.

Source: COFECE (March 2017), “Bid Rigging – Procurement Peril”, www.cofece.mx/wp-content/uploads/2017/11/17-02-13-bid-rigging-procurement-peril-malasia.pdf (accessed 4 August 2020).

In the end, deciding between splitting and consolidating tenders to increase and intensify competition and avoid predictability is a careful balancing exercise. The balancing needs to account for possible efficiencies, the intensity of competition, and sustainability of competition through the various options. Good market research will facilitate the decision.⁶⁶

Abnormally low tenders

When awarding tenders, very low tender offers should not be dismissed too easily as this could discourage in particular new entrants. The 2020 Ukrainian procurement law foresees that tender offers with **abnormally low prices** can be rejected by the purchaser (Art. 29 XIV). An abnormally low price is any price that is 40% or more below the arithmetic mean of all price offers at the initial stage of the auction, and/or 30% or more below the second best offer at the end of the auction (Art. 1 I 3). An indication of an abnormally low price is generated automatically by the electronic procurement system. A winning bidder can justify such a price within one working day (Art. 29 XIV).

Contracting authorities in many OECD countries consider that abnormally low prices are risky because a winning, low-price bidder often requests a higher-priced contract after the award. Another risk of abnormally low tenders is that the winning bidder simply stops work as the price being paid does not cover its costs, leading to budget overruns and long delays in completing a project (OECD, 2015^[29]) (OECD, 2019, p. 60^[26]).

An **abnormally low tender price may be genuine**, however, and can result from a **new entrant having a more advantageous cost structure** than its rivals or being more **efficient** due to the use of **new technologies, or economies of scale or scope**. It can also be explained by a new entrant taking an **aggressive entry strategy** that invests to establish itself on the market and needs to ensure a minimum presence. The **restoration of competitive conditions** in a market (for example, the termination of a cartel following a competition authority investigation) could also explain significantly lower tender prices compared to previous tenders. Ukrenergo should therefore **consider the tender terms and the market reality carefully** when deciding whether a price offered is too low, and listen closely to the justifications brought forward by the bidder. In addition, when abnormally low tender prices are a serious concern, a number of measures can be taken to **mitigate such risks** (Box 28).

Box 28. OECD Checklist for protecting competition when managing the risks of very low tenders

To address the risks of abnormally low tenders without acting to reduce competition at the pre-tendering stage, the procurer should:

1. Provide all potential bidders with clear tender documentation, including all the relevant information available on the product or service being procured, in order to help bidders make the most realistic cost estimates possible.
2. Ensure that the time allotted for suppliers to respond is proportionate to the size and complexity of the procurement. This is particularly important in technically complex projects for which it may take time to develop more accurate cost estimates.
3. Use assessment criteria that focus not only on price, but also factors such as quality, deliverability, value or others important to the procurer that bidders might reduce in order to offer a very low price.
4. Require the winning bidder to take pre-emptive steps to internalise the risk if its costs are higher than expected. For example, by taking out professional liability or project insurance, or providing a performance bond that pays out to the procurer in the event that the contractor cannot deliver the project on the originally agreed terms.
5. Set out in detail in the tender documentation that renegotiation will only be considered when the information originally provided by the procurer proves to be inaccurate (incorrect or incomplete), or when clearly specified conditions are satisfied (for example, an increase in the price of specific inputs that could not have been predicted by the bidder). Furthermore, applicable procurement law may set out conditions that must be fulfilled for renegotiation to be permitted.

6. Include sanctions in the contract for any bidder that pulls out or fails to deliver the terms of its contract, unless the information originally provided by the procurer proves to be incorrect or incomplete. These sanctions could include financial penalties, temporary debarment of firms or individuals, or legal claims for damages by the contracting authority against the contractor. In the large majority of cases, sanctions are a sufficient deterrent, suppliers deliver at the conditions at which the tender was decided, and no extra action is necessary. Any sanctions would need to be consistent with applicable procurement law.
7. Set out in the tender documentation that if a procurer suspects a firm has strategically bid below its average variable cost, it will refer the case to the competition authority, which may decide to assess whether the action is problematic under the relevant standards.
8. In high-value projects, consider creating whistle-blower rewards for reporting evidence that a firm has bid at a price it intends to renegotiate at a later date, especially if accompanied by evidence of corrupt agreements with procurement officials.

At the tendering stage, to address the risks of abnormally low tenders while not reducing the value that the procurement might achieve, the procurer should:

1. Assess all bids against its evaluation criteria, which might include the quality or deliverability of the bid, and not automatically exclude a bid on the basis of its low price. Doing so would, for example, risk excluding new entrants making loss-leading bids to obtain a foothold in a market.
2. Check the cost assumptions of the winning bid to make sure it is deliverable, whether it is an abnormally low bid or not. Any checks carried out need to be proportionate to the procurement in question to avoid creating unnecessary costs and delays in the bidding process.

Source: OECD (2009), "Public Procurement Toolbox: Checklist for protecting competition when managing the risks of very low tenders", www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-managing-risks-very-low-tenders.pdf.

Recommendations for action – be clear and open but avoid predictability and reward quality

1. **Use market research** to provide clear tender terms and technical specifications.
2. **Critically review procurement requests** from cost centres and ensure that they do not favour existing solutions and incumbents; allow for **performance-based specifications, innovation and substitutes** and keep tender requirements as open as possible.
3. Encourage and enable **close co-operation between procurement specialists, technical specialists** and end users to find procurement solutions that satisfy needs, while allowing for new and innovative solutions.
4. Provide minimum training for technical experts on procurement, and ensure that procurement specialists acquire basic technical understanding to facilitate communication.
5. Switch from purely price-based award criteria to **life-cycle cost** and **most economically advantageous tender award criteria** to allow competition on a wider variety of qualitative criteria.
6. When splitting tenders into lots, ensure that the number of lots is fewer than the expected number of suppliers, and that lots are not designed according to clear and predictably foreseeable criteria such as geography or certain technical parameters.
7. Consider **consolidation and aggregation of tenders** to increase the economic risks for colluding suppliers, while keeping in mind that the supplier base should not be unduly reduced by such measures.
8. Consider abnormally low tenders carefully, and pay due attention to the reasons and justifications for any low price, such as more efficient production, economies of scale or scope, an aggressive but

credible entry strategy, or the return to competitive market conditions after a period of collusion. Use risk-mitigation strategies to minimise any economic risks from low tenders.

9. For complex, high-value purchases consider using **industry experts and consultants** to inform the market research and to help design tender terms and procedures. At the same time ensure that they do not facilitate communication between potential suppliers.

5 Effectively reducing communication among bidders

Collusion is greatly facilitated when bidders have access to information that helps them verify the implementation of an agreement and the ability to communicate with each other. To agree and monitor, some kind of communication between the colluding bidders will be essential. Tender procedures that allow meetings between bidders, provide them opportunities to communicate, and spread information between them will facilitate bidder collusion and should be avoided.

Box 29. OECD Checklist to design tender methods to reduce bid rigging: reducing communication

Designing the tender process to reduce communication among bidders

When designing a tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process depends upon the bidding model adopted and how the tender is designed and carried out. Transparency is indispensable for a sound procurement procedure that helps in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information to potential bidders that goes beyond legal requirements. There is no single rule about the design of an auction or procurement tender. Each needs to be designed to fit the situation. The following factors should be taken into account.

1. Invite interested suppliers to discuss with the procuring agency about the technical and administrative specifications of the procurement opportunity, but avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
2. Limit as much as possible communications between bidders during the tender process. Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
3. Carefully consider the information disclosed to bidders at the time of the public bid opening.
4. When publishing the results of a tender, carefully consider the information published and avoid disclosing competitively sensitive information as this can facilitate the formation of future bid-rigging schemes.
5. Where there are concerns about collusion due to market or product characteristics, if possible, use a first-price sealed-bid auction rather than a reverse auction.
6. Consider if procurement methods other than single-stage tenders based primarily on price might yield a more efficient outcome. Other types of procurement may include negotiated tenders and framework agreements.

7. Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is competitive. Do not publish the reserve price, but keep it confidential or deposit it with another public authority.
8. Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use consultants' expertise to clearly describe criteria and specifications, and conduct the procurement process in-house.
9. Whenever possible, request that bids be filed anonymously, such as using identifying bidders with numbers or symbols, and allow bids to be submitted by telephone or mail.
10. Do not disclose or unnecessarily limit the number of bidders in the bidding process.
11. Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a certificate of independent bid determination (CIBD).
12. Require bidders to disclose upfront if they intend to use subcontractors, as this can be used to split profits among bid riggers.
13. Joint bids can be a way to split profits among bid riggers, so be particularly vigilant about joint bids by firms that have been convicted or fined by competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
14. Include in the tender a warning about national sanctions for bid rigging, such as temporary suspensions from participating in public tenders, extra penalties for conspirators that signed a CIBD, damages paid to the procuring agency, and any punishment under competition law.
15. Indicate to bidders that any claims of increased input costs that cause budget overruns will be thoroughly investigated.
16. If external consultants are used during the procurement process, ensure that they are properly trained, sign confidentiality agreements, and are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

Ukrenergo is required by law to publish tender information and disclose results, maximum reference prices and tender methods. In all other cases, however, it should minimise opportunities for bidders to communicate. Wherever possible, **avoid transparency and disclosure beyond the legal minimum** about bids and bidders, and future procurement plans.

The following sections will focus on Ukrenergo practices in facilitating bidder communication, and how they could be improved. It is extremely important that procurement bodies understand the sensitivity of the exchange of information between bidders from a competition-law perspective. Under European competition law, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits collusive practices between competitors, and actions such as bid rigging are always considered serious violations.⁶⁷ Even seemingly lesser competitor contacts such as direct or indirect information exchanges between competitors that do not reach the stage of a mutual agreement have been found illegal due to their harm to competition (Box 30). For this reason, procurement bodies must avoid disclosing too much tender-related information and limit competitor contacts.

Box 30. Illegal information exchange between competitors under European Union law

European competition law sets strict limits to information exchanges between competitors.

As long ago as 1972, the European Court of Justice noted that: “Each economic operator must determine independently the policy which he intends to adopt on the common market”.¹ In 1975, it ruled that any direct or indirect contact between competitors that seeks to influence the conduct on the market of an actual or potential competitor or to let a competitor know about one’s own strategies is prohibited.²

This strict approach and the type of information exchange that can be problematic is illustrated in two cases.

T-Mobile Netherlands v Nederlandse Mededingingsautoriteit

A single meeting between five mobile phone operators at which they exchanged information on their future pricing policies was ruled to be “concerted action”. In its 2009 ruling, the European Court of Justice wrote that: “the possibility cannot be ruled out that a meeting on a single occasion between competitors, ... may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical co-operation between them for competition and the risks that that entails.”³

Fresh Del Monte Produce, Inc. v European Commission

Every Wednesday, three banana importers would exchange information about market conditions, expected shipments, weather conditions in farming regions, and intended quotation prices (“bilateral pre-pricing communications”). While the employees engaged in these conversations did not have ultimate authority to set those prices, the European Court of Justice found that, “as they made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, the pre-pricing communications had the object of creating conditions of competition that do not correspond to the normal conditions on the market and therefore gave rise to a concerted practice having as its object the restriction of competition”.⁴

While not all information exchange between competitors is anti-competitive (OECD, 2010^[30]), information usually seen critical concerns recent and future prices, customers, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes. Highly individualised data, recent data and confidential information also tend to be problematic.⁵ As seen in the Del Monte case, in specific circumstances, even exchange of information about weather conditions can raise competition concerns.

¹ Paragraph 64, Case 48/69, *Imperial Chemical Industries v Commission of the European Communities*, ECLI:EU:C:1972:70, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61969CJ0048>.

² Paragraphs 173-174, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, “*Suiker Unie*” *US and others v Commission of the European Communities*, ECLI:EU:C:1975:174, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0040>.

³ Paragraph 59, Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62008CJ0008>.

⁴ Paragraph 134, *Fresh Del Monte Produce, Inc. v European Commission*, Case C-286/13 P, Judgment 19.03.15, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1712523>.

⁵ See paragraphs 86-94, European Commission (2011), *Communication from the Commission – EU Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29>.

Prevent direct contacts between competing bidders

Ukrenergo organises seminars and presentations on the preparation of bids and on problems often encountered in the tendering process for prospective bidders. While a useful practice to increase the number of bidders in tenders, Ukrenergo should in general arrange meetings that go beyond a specific tender or demand and **avoid bringing together (potential) competitors**. Such meetings can facilitate bidder contacts.

The competition **risk is raised even higher** when in-person meetings with groups of bidders are arranged about **a specific procurement**. In this case, direct competitors can attend the same meeting and discuss the same tender-related questions. They would learn about each other's interest in tender participation, the identity of competitors, and from their questions and contributions to the discussion also infer commercial strategies, technical solutions or innovative competitor approaches. This is all information that should be unavailable to competing bidders in a tender process, as well as to potential competitors in the pre-tender phase.

This problem becomes particularly acute when **site visits** seem to be necessary, such as for works procurement. Ukrenergo has provided examples from IFI procurement for which a group of interested suppliers was taken on a series of site visits over several days. For certain projects, a site visit may be unavoidable to familiarise potential bidders with the specific circumstances of the designated project locations, but **joint visits and business trips with competitors can be conducive to competitor communication** going beyond what would be permissible as information exchange under competition law; for more detail, see (OECD, 2010^[30]) and Box 30. One of the red flags for bidder collusion (Part III, Section 6) are meetings of suppliers in more private settings, which are greatly facilitated through collective multi-day business trips. Concerns about efficiency and equal treatment are often used to justify such joint events, but need to be balanced against collusion concerns.

Alternatives to joint supplier meetings and joint site visits include **online events** with anonymised attendants, a clearly structured agenda, and a moderated discussion with clear rules. This avoids physical meetings of competitors, and the event could be recorded. **Video visits of sites**, including drone views, could also be an alternative to a physical on-site meetings. While this may increase preparation costs, it would save travel costs and ensure that the same information is provided to all interested bidders without disclosing their identities. This is a worthwhile investment in terms of bid-rigging prevention.

Clear rules must be established for all types of events at which competitors are invited to meet pre-tender and **safeguards** should be put in place.

1. Suppliers should be informed about their obligations under competition law regarding information that must not be exchanged with competitors, and certify that they have read and understood the instructions, and will abstain from sharing information in any form. This should be done in addition to having bidders sign a **certificate of independent bid determination** (Box 31).
2. Detailed **meeting notes** should include all project-related communication, questions and answers, as well as signed lists of participants.
3. Staff at the **compliance and anti-corruption unit should be present** for the full duration of such meetings, to supervise or advise when necessary.

Box 31. Certificate of independent bid determination

A certificate of independent bid determination (CIBD) is recommended by the OECD Guidelines to promote competition in public procurement (OECD, 2009^[2]). A CIBD is a statement by a bidder that its submitted bid is genuine, non-collusive and made with the intention of accepting the contract, if awarded. It makes firms aware of the unlawful nature of collusive agreements; demonstrates that the contracting authority is aware of, and alert to, bid rigging; and shows the contracting authority's zero tolerance for bid-rigging practices. Moreover, it makes the legal representatives of firms more directly accountable for any unlawful behaviour. As such, it can be an important deterrent to bid rigging.

Ukrainian procurement law does not require bidders to submit a CIBD if they wish to participate in a tender. Nevertheless, Ukrenergo should be free to add this to its tender documents.

Annex D provides an example of a CIBD, written by the Mexican competition authority COFECE.

Avoid dissemination of information between bidders by procurement officials or consultants

In a number of jurisdictions, procurement officials and consultants have been found to play an active role in supporting information exchanges and bid-rigging conspiracies in public procurement.

Box 32 illustrates instances of this kind of **cartel facilitation by procurement officials**. The competition laws of various countries and the European Union consider such involvement as officials actively participating in a cartel, in line with facilitator case law, and punish the procurement body and the colluding bidders. Since Ukrainian competition law is closely aligned to European law for cartels, this would certainly be considered by the AMCU in appropriate cases.

Box 32. Cartel facilitation by procurement agencies

Riga bus-service case¹

In 2019, the Latvian Competition Council found that between 2012 and 2014, six suppliers of cleaning chemicals for public-transport vehicles in Riga had rigged bids in tenders run by Riga City Council's transport company, Rīgas Satiksme, worth more than EUR 800 000. The Competition Council found that Rīgas Satiksme had not just known about the collusion, but actually initiated it and co-ordinated how each supplier would participate, the documentation to be submitted, and which bidder would win the contract.

Belgian traction substations case²

In 2017, ABB, AEG, Siemens, Schneider and Sécheron were found guilty by the **Belgian Competition Authority** for rigging bids in tenders run by Belgian railway-infrastructure manager Infrabel between 2010 and 2016 for different types of transformers. Infrabel employees facilitated the functioning of the cartel by providing sensitive information to the market, which enabled the competitors to agree on designated winners and bid prices.

Practice in Japan³

Japan has a longstanding practice of fining procurement officials for their involvement in bid-rigging conspiracies. When the Japanese Fair Trade Commission finds that officials are involved in a bid-

rigging conspiracy, for example, by proactively organising collusion or leaking confidential information on tenders to participating bidders, it asks the heads of procurement agencies to implement improvement measures; this can lead to disciplinary actions and damage compensation claims against officials involved. This has been implemented in 13 cases since 2002. In addition, any acts by officials that harm bidding fairness in public procurement are subject to criminal sanctions; there are approximately 10 such criminal cases each year.

¹ *Global Competition Review* (24 April 2020), “Latvian court upholds €2.4 million bid-rigging fine”, www.globalcompetitionreview.com/article/1226096/latvian-court-upholds-eur24-million-bid-rigging-fine.

² Belgian Competition Authority (3 May 2017), “Press Release No. 7”, www.belgiancompetition.be/sites/default/files/content/download/files/20170503_press_release_7_bca_0.pdf.

³ OECD (2019), “Hub-and-spoke arrangements – Note by Japan”, DAF/COMP/WD(2019)83, [https://one.oecd.org/document/DAF/COMP/WD\(2019\)83/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)83/en/pdf).

While it can be extremely beneficial to make use of **consultants’** expert knowledge for tender preparation and market research, a **cautious approach** is advised. They are often experts because they have some **ongoing or previous affiliation with the industry**, where they were employed by one or more of the suppliers, have worked in an industry association, or consulted the industry. Industry consultants will usually have a network of industry contacts and possibly economic links to one or more competitors. An industry consultant could easily use contacts or be used by the suppliers on the market to **co-ordinate bids** or to **orchestrate a collusive bidding scheme**. This would be considered **cartel facilitation**, and both facilitator and conspiring suppliers can be held liable for violation of competition law the cartel provisions (Box 33).

Box 33. Industry consultancy as cartel organiser

In the case and subsequent appeals of *AC-Treuhand v Commission of the European Communities* (2008-2014), consultancy firm AC-Treuhand was found guilty of facilitating cartels of producers of organic peroxides and heat stabilisers.¹ AC-Treuhand offered a range of services to national and international associations and interest groups, and “played an essential and similar role ... by organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers concerned data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.”²

The conspiring competitors and AC-Treuhand were found guilty of cartel behaviour and fined by the European Commission.³ On appeal, the last instance court, the European Court of Justice, upheld the Commission’s decision and explained that it was necessary for the full effectiveness of the implementation of Article 101 of TFEU to include the cartel facilitator, as, “it would not be possible to put a stop to the active contribution of an undertaking to a restriction of competition simply because that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about.”⁴

¹ Case T-99/04 *AC-Treuhand v Commission of the European Communities*, ECLI:EU:T:2008:256 (8 July 2008), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004TJ0099> and *Appeal brought by AC-Treuhand in the case of AC-Treuhand v European Commission*, C-194/14 P (22 October 2015),

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=170304&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=395660>.

² Paragraph 9, *Appeal brought by AC-Treuhand*, C-194/14 P.

³ *European Commission Decision 2005/349/EC of 10 December 2003*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005D0349&qid=1614420605433>.

⁴ Paragraph 36, *Appeal brought by AC-Treuhand*, C-194/14 P.

External consultants should be recruited competitively and required to sign **confidentiality agreements** and to report any **conflicts of interest**.

Recommendations for action – reduce bidder meetings and be careful when contracting industry consultants

1. **Avoid organising in-person tender or general information meetings** that allow competitors to meet.
2. **Avoid joint site visits** whenever possible.
3. Make use of **alternatives to in-person meetings** with suppliers, such as virtual seminars, and investigate alternative information material.
4. Ensure that **appropriate safeguards** are in place for when in-person meetings with several suppliers are unavoidable; these might include mandatory signature of a CIBD, detailed meeting notes, and the presence of anti-corruption and compliance staff.
5. Be aware that the Ukrainian procurement system's **notable transparency** can **facilitate** the formation and functioning of **collusive practices** among bidders. Do not be more transparent about competitors, bids, technical and qualitative characteristics or other competitively relevant information than necessary. **Educate procurement staff to avoid any unnecessary disclosure** of sensitive information.
6. Be **cautious when contracting industry consultants** and ensure they are independent and free of any conflicts of interest. Ensure they sign strict confidentiality agreements.

6 Detecting and punishing collusive agreements

Collusion of bidders in public procurement procedures is a common phenomenon in all jurisdictions and in Ukraine, one of AMCU's enforcement priorities. Nevertheless, Ukrenergo has only recently started to report suspicions and incidents of bidder collusion to AMCU. Currently, efforts to prevent bidder collusion are limited to more and improved market research that aims to increase bidder numbers, and establishing reference prices that should ensure a quasi-competitive outcome in every tender process.

To implement recommended practices to prevent bid rigging and increase competition, Ukrenergo staff at every stage of procurement must be helped to develop an understanding of the risks, mechanisms and signs of bidder collusion, and of the required actions to take. Suppliers can be also targeted so they are informed about competition-related requirements in tenders, and the risks they run by entering into collusive agreements. Ukrenergo's management needs to introduce reporting mechanisms and incentives to ensure that due weight is given to the topic.

Box 34. OECD Checklist to design tender methods to reduce bid rigging: raising staff awareness

Raise staff awareness about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data.

- Implement a regular training programme on bid rigging and cartel detection for staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders, such as products purchased, participants' bids, and winners.
- Periodically review tender histories for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.

- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform staff of the national leniency policy,¹ if applicable, and review the policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with the national leniency policy.
- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to competition authorities in addition to the procurement agency's Internal Audit Office and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish co-operative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

Source: OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm.

¹ Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to co-operate with the competition authority's investigation.

The following sections address the detection of collusive agreements and ways to raise staff and bidder awareness of the risks and mechanisms of collusion in tender procedures. Finally, the punishment of collusive agreements and ways for Ukrenergo to obtain compensation for harm incurred through bidder collusion are outlined.

Detection of collusive agreements

Within Ukrenergo, the responsibility for detecting bid-rigging schemes lies with the Security Department and the Office of the Compliance Officer. In the past, **checking was mostly limited to bidder relationships and corruption concerns**, or past bid rigging in a public tender as grounds for exclusion. Since October 2020, **Ukrenergo has been submitting reasoned suspicions of bidder collusion to the AMCU** for further investigation, with submissions based upon sound analysis of red flags in tender documents and bidder behaviour. In the past, the AMCU fined two bidders in a Ukrenergo tender for bid rigging in one case (Box 35).

Box 35. Bid-rigging detection in a Ukrenergo tender

In 2014, Ukrenergo carried out a tender for motor-vehicle parts and accessories. One of the two participating firms had the most economically advantageous offer, and it was awarded a contract worth UAH 389 634.

The Investigative Department of the Main Directorate of the National Police in the Kharkiv Region had a control mandate over compliance with requirements of the public procurement legislation and found signs of competition-law violations when investigating the tender, in particular, bids handed in simultaneously or within a short time interval. It referred the case to AMCU's Kharkiv Regional Territorial Office.

AMCU analysis of the bidders' pricing behaviour showed that prices for both bids differed only by 2.2%, and indicated that both firms had made a prior agreement on bid pricing. In addition, it was found that the market price level was dramatically lower (up to 744%) than the prices offered in the tender.

On this basis, AMCU concluded that the bidders had violated Ukrainian competition law by co-ordinating their tender bids. In May 2017, AMCU imposed fines of UAH 68 000 on each of the firms.

Source: Ukrenergo Responses to OECD February and May 2020.

A first step to improving the situation is Ukrenergo's "Compliance Office Guidelines On Third Parties' Due Diligence", which indicate a number of red flags for bid rigging, such as similar words and phrases in documents, similar submission timing or matching typos, which are mandatorily checked by the Compliance Officer in all tenders exceeding UAH 20 million. Bid-rigging detection must not stop with the Compliance Officer, however; every person involved in the procurement must pay close attention.

It can be expected that if Ukrenergo **actively intensifies its efforts across the entire company to detect bidder collusion** in ongoing or past tenders, many cases of suspicious signs for bidder collusion would be found. The *OECD Guidelines for Fighting Bid Rigging in Public Procurement* provide numerous indicators for collusive bidder behaviour, grouped into the following categories (OECD, 2009, pp. 12-15^[10]).

1. Warning signs and patterns when businesses are submitting bids
2. Warning signs in all submitted documents
3. Warning signs and patterns related to pricing
4. Suspicious bidder statements
5. Suspicious bidder behaviour.

The AMCU relies on the OECD Guidelines and Checklist to help and direct public procurement officials.

Ukrenergo could learn and benefit from the activities that Ukrainian civil society organisations, such as **Transparency International** and the **Anti-Corruption Action Centre** (Part I, Chapter 5), which carry out regular monitoring of public procurement for signs of anti-competitive conduct, fraud and corruption.

Box 36. Tender monitoring by civil society organisations in Ukraine

Transparency International Ukraine uses the DoZorro platform to monitor public procurement and in the last three years has referred 34 042 cases to different state control bodies for further investigation. Of these, 1 950 were sent to the AMCU because of suspicions of bidder collusion. Among the screening criteria used by Transparency International Ukraine are bidder relationships, frequency of bidders meeting in tenders, simultaneous downloads of files, use of the same computers, or similar mistakes in tender proposals.

The **Anti-Corruption Action Centre (AntAC)** similarly investigates public procurements for suspicious signs, among them competition violations. AntAC looks at a variety of signs, including metadata from files and owner relationships; it has submitted 2 669 observations in the past five years, of which approximately 30% were referred to AMCU.

Sources: OECD meetings and correspondence with Transparency International Ukraine and AntAC, March 2020.

While procurement officials should always keep these indicators in mind when carrying out procurements, **detection efforts should not be limited to ongoing tenders**, but also to reviewing **past tenders** across public bidders and regions. They should use the OECD indicators and check for developments of prices and bidder participation over time, as well as regional and customer-related patterns.

It is useful to **carefully store** data from past tenders electronically and make them accessible internally and to competition authorities. The ProZorro database includes data for Ukrenergo and all other public procurement bodies and, according to the UPL, data must be kept for at least 10 years, and include all documents received from contracting bodies, bidders, and the appeals body for each tender process. In addition, Ukrenergo's procurement departments are responsible for collecting, storing and analysing procurement data, and a system is currently being implemented that will allow for standardised collection, storage and analysis of all data, including procurement data. Ukrenergo should **ensure that the data are organised so they can be made**

searchable with the use of adequate software, which can help uncover the existence of various collusion indicators.

Systematic analysis of past bidding data can use various methodologies, and competition authorities have invested significantly in **cartel-screening tools** to enable them to detect cartels and bidder collusion, many of which rely on their countries' electronic procurement systems (Box 37).

Box 37. Cartel screening: a proactive cartel-detection tool

Competition authorities make increasing use of cartel-screening tools to detect illegal cartels and to avoid being dependent on whistleblower tools or leniency applications. The growing availability of data and computing power provides efficient ways of detecting signs or suspicious behaviour typically associated with collusion. Economic theory and data analysis from discovered cartels have provided numerous indicators to the existence of a cartel. Search and analysis algorithms can be run on the data set and flag suspicious tenders and bids. It is important to note that positive results from screening will hardly ever suffice to prove a cartel. Further investigative steps to uncover direct evidence will usually be required.

Following are examples of different cartel-screening methods used by competition authorities.

Cérebro (“Brain”) project, Brazil

Brazil's Administrative Council for Economic Defence, CADE, has developed a screening project called Cérebro or brain, which integrates large public procurement databases and applies data-mining tools and economic filters to identify and measure the probability of cartels occurring in public bids. The objective is both to identify evidence of cartels in public bids, such as suspicious, implausible facts or behavioural patterns, and provide relevant information for case investigations. By identifying suspicious firm behaviour, CADE has developed mathematical models and statistical tests used as part of “reverse-engineered” investigative process. A number of bid-rigging investigations have been started following information provided by Cérebro.

Bid-Rigging Indicator Analysis System (BRIAS), Korea

In 2006, the Korean Fair Trade Commission (KFTC) developed the Bid-Rigging Indicator Analysis System (BRIAS) to help in its investigations. An automatic quantitative analysis IT system, BRIAS analyses large amounts of online public procurement data and applies a formula that quantifies the likelihood of bid rigging in a tender.

A total of 16 Korean public procurement agencies are participating in BRIAS, including central administrative agencies and state-owned companies. Between 2015 and 2019, BRIAS flagged more than 5 600 cases for further analysis, following which KFTC initiated 783 investigations.

Source: (OECD, 2020^[31]) and the OECD's 2018 “Workshop on cartel screening in the digital era”, www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm.

Ukrainian procurement entities are in a favourable position when it comes to screening for bidder collusion. ProZorro offers rich opportunities for screening, from the most basic to the more sophisticated. It also offers opportunities to access procurement and bidding data that go beyond UkrenergO tenders, which facilitates comparisons across purchasers, regions and time (Box 38).

Box 38. Screening for bidder collusion using ProZorro

Screening for bidder collusion in Ukrenergo tenders can be performed based upon ProZorro data, complemented by an internal database at stock-keeping unit (SKU) level. These two core data sets can be enriched with external information from the different registries of companies and public AMCU cases data and reports, which can provide information on previous competition or procurement-law infringements in relevant procurement markets.

Contracting authorities can use ProZorro data – both machine-readable central ProZorro data and information manually extracted from the documents – to analyse: 1) competition in markets; 2) bidding patterns of suppliers and bidder patterns in tenders, including at auction stage; 3) prices and cost structures; and 4) tender proposal documents and files.

ProZorro data allow structural and behavioural indicators to be monitored; additional SKU-level data on suppliers, market characteristics and prices is required to achieve a greater level of accuracy and precision to inform collusion suspicions.

The different types of data analysis used to detect and prevent collusion include:

Price- and quantity screens. Price variations or stability; correlation with input prices; price differences across competitors and across regions; and changes in market shares in time are important behavioural indicators that can indicate collusive behaviour.

Pairs screens. Based on information about (repeated) participation of bidders and suppliers in the same tenders, a contracting authority can infer information about bidder strategies and collusion risks.

Auction-behaviour screens. Auction behaviour can reveal bidders that are not aiming to win tenders, and pairs of bidders whose bids show signs of correlation. Such screens can help to differentiate between genuine competitors and those pretending to be.

Sample analysis for xxx services (CPV xxx), 2018¹

Of the 56 companies that participated in Ukrenergo tenders for these services in 2018, 29 won at least once. In general, the market for xxx services is extremely competitive with over 3 000 companies bidding for such contracts on ProZorro, and individual market shares often no higher than 2%. Yet in the Ukrenergo tenders, just 4 bidders won 19% of all tenders, amounting to 76% of total Ukrenergo procurement expenditure for these services. Such a finding would warrant further investigation to understand the reasons for such a bidder concentration.

Further analysis showed that 15 pairs of bidders competed at least twice in Ukrenergo tenders, and 4 pairs competed 4 times. The same bidders meeting frequently in different tenders can indicate a collusive strategy. An in-depth analysis of the overall bidding behaviour of bidders in a specific pair showed that one won a tender only rarely. When that bidder's behaviour was tracked in other tenders, however, it was seen that it bid at more reasonable prices. This raises the suspicion that when competing in Ukrenergo tenders with its "pair", the bidder was submitting offers with no intention of winning. Since it had a proven ability to make more competitive bids, this can raise a suspicion of collusion.

¹ Product and market information anonymised.

Such detailed data analysis can be resource consuming. Ukrenergo should develop a **policy of systematic screening of historical procurement data** for certain strategic procurement objects and sectors. A screening exercise is also advisable when **changes in procurement policy** lead to more competition in tenders. As shown in Box 27, this can lead to drastic changes in observed pricing patterns, which might indicate

irregularities before the change was made. Regular **lesser-priority purchases could be screened on a rotating basis**, but with a lower frequency. For ongoing procurement, **staff should be trained systematically** to notice any suspicious signs and to react accordingly.

Uncovering suspicious signs will usually not suffice to prove actual bidder collusion, but that is not expected of any procurement or other Ukrenergo official. Once a suspicion arises, Ukrenergo internal guidelines foresee that information is sent to the Security Department and to the Office of the Compliance Officer, both charged with deciding on further action and **transferring the information to the AMCU**. Bidders suspected of bid rigging should under no circumstances be approached and informed by a procurement official about any suspicions.

In addition to these proactive detection tools, Ukrenergo should provide **easy and accessible communication channels** so that suppliers and actual and potential bidders can **report their concerns** about specific tenders or the general competitive situation of markets. Ukrenergo has already made great progress, but must ensure that bidders know of and trust its **reporting opportunities**.

In 2019, Ukrenergo introduced a **whistleblowing hotline**, which is managed by an external, independent provider. It can be accessed by telephone, e-mail, and a dedicated website (<https://energy.ethicontrol.com/web/en>), and reports on any types of suspicions can be submitted. Calls are free of charge, and the website allows for the submission of anonymous complaints and two-way communication, including submitting video and audio files. All submissions are transmitted to the Chief Compliance Officer and his deputy; the Internal Auditor and Head of the Audit Committee have full access to the complaints. As of March 2021, no bid rigging had been reported through the hotline. Nevertheless, access to the hotline needs to remain simple.

Ukrenergo should also consider providing **confidential internal reporting mechanisms** for employees who suspect internal and external procurement-related wrongdoing outside normal reporting structures. This would incentivise employees who may themselves be involved and need advice on how to rectify their behaviour. Ukrenergo officials did mention an existing “**trust line**”, but did not provide any examples of reporting on bidder collusion through this channel. If necessary, the OECD has a wide range of resources about setting up and running such whistleblowing systems, as well as about whistleblower protection.⁶⁸

Raise awareness of Ukrenergo staff to the risks and mechanisms of procurement collusion

According to information provided to the OECD, within Ukrenergo, the Economic Security Department and the Office of the Compliance Officer are responsible for preventing collusion in Ukrenergo tenders. When suspicions do arise, procurement staff are instructed to inform both units. This first took place in late 2020.

Ukrenergo’s Code of Ethics, approved by the board in April 2020, states that employees must immediately report any violation; it also contains a section on procurement, with general references to competition in the process. Its recent introduction means that it is too early to reach any conclusions about its effectiveness.

Training for procurement staff

The reporting of suspicions by Ukrenergo staff could be greatly improved through improved staff training. Employees have not received training that focused on the signs for collusion in tenders and on the prevention of bid rigging in tenders. Procurement officials’ awareness of the costs and risks of collusion is crucial to tackling bid rigging, and **Ukrenergo should regularly train its staff in cartel and bid-rigging detection and prevention with AMCU assistance**. This should include clear **information about reporting mechanisms and action to take** when collusion is suspected. Ukrenergo could appoint procurement and compliance officials to conduct or support employee training. The companion volume to this report, *Training to Fight Bid Rigging in Public Procurement at Ukrenergo*, provides helpful guidance.

It is important that such **competition-focused training is regular**, and that **all procurement officials and other staff involved in procurement** – for example, technical experts in cost centres – also receive **training dedicated to their specific needs and functions**. While a general understanding of the basic problems and methods for detection and prevention of bid rigging should be created for all staff, **differentiated trainings** that focus for example on market research, bidder contacts, collusion indicators or screening should be provided on needs basis. All training should be **repeated and refreshed regularly**, and new staff should always receive the necessary training after joining Ukrenergo.

Key performance indicators

Incentives to concentrate on collusion in procurement and to invest time in its prevention and detection would be greatly increased if the subject were a part of **procurement staff's key performance indicators (KPI)**. Information provided by Ukrenergo indicates that only heads of departments responsible for procurement have procurement-related KPIs, such as timely preparation of the annual plan, percentage of on-time purchases, number of bidders in a tender, number of contracts made and approved, and timely contract execution. For example, a relevant KPI for staff active in market research is the price decrease achieved at auction compared to the published price estimate. In IFI procurement, KPI are timely submission of tender drafts to the IFI, no bidder complaints to the IFI, tender fulfilment, and the signature of contracts. Currently, there appears to be only one indicator included in the KPI which refers to competition, the number of participants in a tender. Ukrenergo should refine the KPI and **add more competition-related indicators**, expanding **KPI and performance goals across all employees active in procurement**, differentiated by function and seniority level.

Examples of KPI that incentivise prevention and detection of collusion in Ukrenergo tenders include:

- Ratio of qualified bidders (qualified bids received/total number of bids received)
- Number of new bidders participating in a given number of tenders in a particular area or time period
- Number of foreign bidders participating in a given number of tenders in a particular area or time period
- Percentage of re-tenders required due to insufficient bidder numbers
- Percentage of negotiated procedures due to insufficient bidder numbers
- Number of clarification requests received in a tender
- Number or percentage of use of criteria, such as lifetime cost or qualitative criteria
- Number of implemented changes compared to previous tenders, such as division into lots or consolidation of tenders or framework agreements, in each case with an explanation of benefits
- Successful participation in training related to prevention and detection of competition-law violations in tenders
- Number of internally reported reasonable suspicions related to competition violations
- Number of reasonable suspicions related to competition violations reported to the AMCU
- Number of compensation claims for damages incurred through collusive tendering.

Ukrenergo is encouraged to actively seek KPI that would incentivise its procurement staff at all levels to take an active interest in preventing and detecting collusive practices in Ukrenergo tenders.

Each **successful discovery of bidder collusion** in Ukrenergo tenders should be **communicated to all procurement staff**, and a **database of such cases** should be created to provide guidance and serve as a basis for future training. This could also serve as **knowledge resource to identify common forms of collusion** to which procurement is particularly at risk, and how those risks are or were mitigated.

Raise awareness of suppliers to the risks of procurement collusion

Suppliers must be informed about the illegal nature of bid rigging, its legal and financial consequences, and its negative impact upon business reputation and future business opportunities. Many larger companies have compliance programmes in place, which are a useful tool to increase awareness on which actions may be illegal in a bidding process. Still, around the world, as noted in a 2019 OECD report, *Fighting Bid Rigging in the Procurement of Public Works in Argentina*, both the private and the public sector remain unfamiliar with competition law and the difference between corruption and collusion (OECD, 2019^[26]). Adding good competition practices to compliance programmes would be a good measure, even if this remains beyond Ukrenergo's remit.

Ukrenergo can **improve the understanding of competition risks** among its suppliers by **providing more relevant information on such risks**, including in its **tender documentation**, requiring the **signing of documents such as a CIBD** (Box 31 and Annex D), and ensuring that **all appropriate sanctions are applied**.

Currently, Ukrenergo tender documents only include an anti-corruption clause, but no specific clauses on anti-competitive behaviour and its consequences on tenders. A **competition-related clause** could be added, but it may be more effective to require bidders to **sign a separate CIBD** to inform them clearly about the types of behaviour constitute a competition-law violation and their possible consequences.

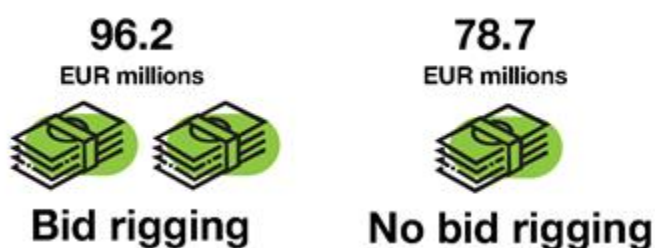
Ukrenergo should add information on competition-law requirements to **all general procurement-related trainings or information events** provided to suppliers.

Punishment of collusive agreements in tender procedures and actions for damages

Public enforcement

Detection, investigation and prosecution of **bid-rigging cartels is a priority policy objective** for the OECD, as well as an **enforcement priority** for competition authorities in both OECD and non-OECD countries (OECD, 2020, p. 29^[5]). Competition agencies dedicate significant resources to the fight against bid rigging in public tenders, with the toughest sanctions are applied in them due to the immense societal harm they can cause (Part I, Chapter 1). This is reflected in the higher fines imposed in bid-rigging cases on average (Figure 16), as well as their treatment as a criminal offence in a large and growing number of countries (Figure 17).

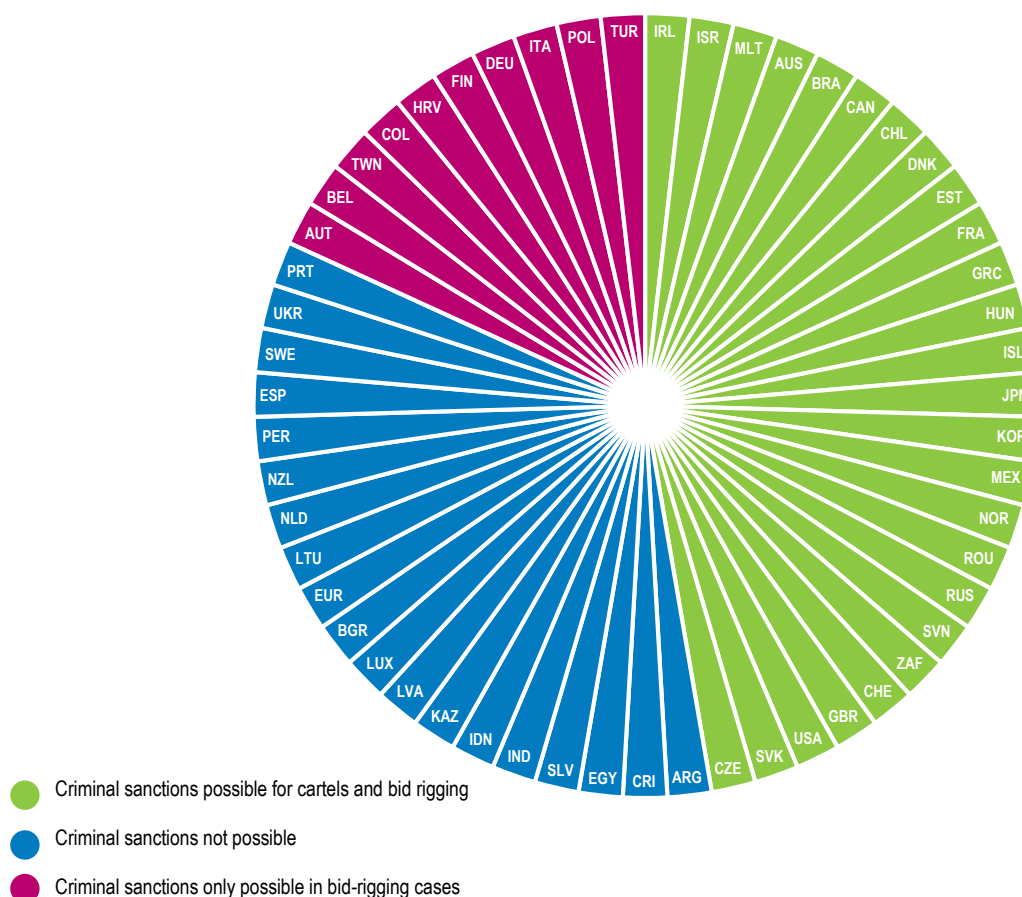
Figure 16. Average fine imposed for international cartels



Source: OECD ICStats Database; (OECD, 2020, p. 68^[5]).

Around two thirds of jurisdictions included in the OECD International Cartels database⁶⁹ treat bid rigging as a criminal offence. Persons held responsible for bid rigging increasingly face custodial sentences.

Figure 17. Possibility of imposing criminal sanctions on individuals



Source: OECD ICStats Database; (OECD, 2020, p. 18_[5]).

A competition-law violation such as bid rigging in a public tender can only be investigated and prosecuted by responsible authorities, not by the procurement body. For this reason, **Ukrenergo and its staff must be made aware of and familiar with the AMCU's mandate**, while **all actions relating to the detection of bid rigging must come with clear instructions** on action in case of a suspicion and how to preserve eventual evidence. This will **support and facilitate**, rather than interfering with, **public enforcement action**.

Cartels and bid rigging in public tenders are prohibited under Article 50 of Law of Ukraine on the Protection of Economic Competition. The maximum fine for a cartel is UAH 68 000 when prosecuted by a regional office, and 10% of the company's turnover in the Ukrainian market affected by the violation when prosecuted by AMCU's central office. The highest bid-rigging penalty imposed was a fine of UAH 870 million on companies involved in bid rigging of a defence contract in 2019.⁷⁰

The **AMCU prioritises bid-rigging cases in its enforcement activity**, uncovering such cases through systematic investigations of procurement databases and tip-offs received from organisations such as TI or AntAC. It also co-operates with the State Bureau of Investigation, Security Service of Ukraine, Prosecutor General's Office, National Police, and the National Anticorruption Bureau. Alternative detection tools, such as the existing leniency programme or the whistleblower hotline, have yet to generate any cases.

Box 39. AMCU: Ukrenergo tenders prioritised in 2020

In its priorities plan, AMCU announced that in 2020 it would prioritise screening of procurement data for violations in Ukrenergo tenders. It is a common AMCU policy strategy to focus on specific industries or public buyers when conducting its screening for competition-law violations.

By January 2021, AMCU had conducted a sample analysis of Ukrenergo procurement procedures to identify signs of bid-rigging.

Source: AMCU (2019), "Priorities of the Antimonopoly Committee of Ukraine 2020", <https://amcu.gov.ua/storage/app/uploads/public/5e1/8ad/3b9/5e18ad3b95eef510197431.pdf> (accessed 6 January 2021).

Ukrenergo must actively co-operate with AMCU to provide information about possible bid-rigging schemes. In addition to a fine, **convicted bidders are barred from participating in public tenders for three years**, in line with Article 17 of the UPL. The more cases that are detected and fined, the more impact it will have on the business community, **detering future bid-rigging behaviour**.

The fact that Ukrenergo has never reported an incident to AMCU until very recently shows that there is **significant room for improvement in the relationship** and in internal procedures. Recent reports made by Ukrenergo prove that suspicious cases exist. Ukrenergo pointed out to the OECD that AMCU can take years to reach a decision on a case and globally, the average duration of a cartel investigation is 2.8 years (OECD, 2020, p. 34^[5]). Despite investigations often taking time, it is important that they are carried out diligently and to a high legal standard. Cartel cases are often appealed in court, and only a thorough investigation and a legally thorough and sound case can ensure that penalties will be upheld. The time lags are no reason not to report concerns.

Ukrenergo should establish a working relationship and seek active contact with AMCU's competition-law enforcement branch. This can include agreeing on clearly identified contact points; defining communication streams; clarifying information relevant to AMCU; agreeing on regular meetings; and AMCU participation in Ukrenergo procurement staff training.

Private enforcement

Another reason to provide active support to AMCU is the **possibility of Ukrenergo claiming bid-rigging damages**. Based on a binding AMCU decision, Ukrenergo can **sue convicted companies for twice the amount of overcharges** it paid in the tender (Antimonopoly Committee of Ukraine, 2020^[32]). Overcharges – how much the price paid by the tenderer exceeded the competitive price – can be significant (Box 40).

As an SOE whose budget is based on tariffs paid by Ukrainian consumers and funded by Ukrainian taxpayers, Ukrenergo **should endeavour to seek compensation for any damage incurred**.

Box 40. Damages actions against TSO suppliers

In 2007, ABB, Alstom, Areva, Fuji Electric, Hitachi Japan AE Power Systems, Mitsubishi Electric Corporation, Schneider, Siemens, Toshiba and VA Tech were fined a total of EUR 750 million for rigging bids in procurement contracts, fixing prices, market sharing and project allocation for **gas insulated switchgear** between them between 1988 and 2004 (see Box 10). In 2014, the UK's National Grid Electricity Transmission (NGET) settled its damages claims with ABB, Alstom, Siemens and Areva for losses it incurred through 16 years of rigged gas-insulated switchgear contracts. NGET's initial claim amounted to GBP 400 million, including interest payments; the final sum was reached in an out-of-court settlement and was not made public.

In 2014, the European Commission has fined 11 producers of underground and submarine **high voltage power cables** with fines totalling EUR 301 million. For almost ten years, the companies engaged in market and customer sharing on a global scale (see Box 10). Currently a number of damages claims by utilities and grid operators are pending in courts. The state-owned utility companies of Bahrain, Saudi Arabia, Kuwait and Oman have lodged claims in Dutch courts for damages against power-cable producers in contracts worth USD 500 million, and the UK's National Grid Electricity Transmission has filed a claim with the UK courts for damages in 127 projects.

EC Press release 24 January 2007, https://ec.europa.eu/commission/presscorner/detail/en/IP_07_80; Oxera presentation, ACE conference 2014, https://www.competitioneconomics.org/dyn/files/basic_items/551-file/GIS%20damages%20James%20Kavanagh%20ACE%202014.pdf; EC Press release 2 April 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_358; mLex market insight, <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/gulf-utility-providers-file-damages-suits-against-prysmian-others-over-power-cable-cartel>; PaRR report 12 March 2020, and UK Competition Appeal Tribunal <https://www.catribunal.org.uk/cases/13405720-t-national-grid-electricity-transmission-plc>.

The OECD Recommendation concerning Effective Action against Hard Core Cartels recognises the important interplay of public and private enforcement and asks adherents to: “Provide a mechanism that gives anyone who has suffered harm caused by a hard core cartel the right to obtain redress or claim compensation for that harm from the persons or entities that caused it” (OECD, 2019^[1]). **Taken together, public and private enforcement can effectively increase deterrence and reduce harmful collusion**, in particular in public tenders (see also (OECD, 2018^[33]) (OECD, 2015^[34]). Ukrenergo should take advantage of its legal right to compensation to recoup its losses resulting bid-rigging activity. Ukrenergo and other public procurement groups actively and regularly seeking damages from colluding parties would **deter companies from engaging in bid rigging** in public tenders. Moreover, it would send a clear message that public procurement groups were fighting back in the battle against bid rigging.

This underlines the urgency of supporting law-enforcement agencies – and in particular, AMCU – in their work against bid rigging. Private-damage claims need a sound basis to succeed in court, which in general can only be provided by a competition authority's binding infringement decision.

Recommendations for action – improve detection efforts, training and support of public enforcement

1. Ukrenergo must **intensify its efforts actively to detect bidder collusion** in its tenders. Data from ongoing and past tenders must be reviewed for suspicious signs, and a **systematic analysis of priority procurements** should be undertaken. ProZorro offers good options for data screening, and Ukrenergo's **internal database should be set up to facilitate screening for collusion indicators. Suspicions must be transmitted to AMCU.**
2. Ukrenergo should critically assess the reporting channels it offers to suppliers and staff and ensure they are widely known, and accessible and trustworthy.
3. Staff training is required to improve the reporting of suspicions. Ukrenergo should give staff regular training in cartel and bid-rigging detection and prevention with the assistance of competition authorities or external legal consultants, including clear information about reporting mechanisms and action to take when collusion is suspected. Training should, to varying degrees and intensity, include all staff at all stages of the procurement process. Specific training modules should be set up for specialised staff.
4. Ukrenergo should refine its KPI, add more competition-related KPI, and should spread the KPI and performance goals across all employees active in procurement. Procurement staff at all levels needs to be incentivised to take an active interest in the prevention and detection of collusive practices in Ukrenergo tenders.
5. **Suppliers should be informed** on a regular basis about the economic and reputational risks related to entering into collusive agreements in Ukrenergo tenders. **Supplier training and tender documentation** should include competition-related information. **Bidders should be required to sign a CIBD** as part of tender documentation.
6. **Co-operate actively with AMCU** and other law-enforcement agencies that investigate and prosecute public tender collusion to help enforce the law and deter future bid rigging. Ukrenergo must **give clear instructions to its staff about the actions to be taken when bid rigging is suspected** and should **establish communication channels and closer co-operation with AMCU.**
7. Ukrenergo should **proactively seek opportunities to obtain compensation for damages** whenever it has suffered collusive conduct that has been investigated and successfully prosecuted by AMCU. To this end, **support of AMCU investigations is vital.**

Part IV

Recommendations for changes to Ukrainian procurement law

Throughout this report, it has been noted that legal restrictions prevent Ukrenergo from more effectively preventing bidder collusion or increasing the number of bidders in its tenders. Ukrainian procurement law focuses on a high degree of transparency throughout the procurement process and dictates a focus on price when awarding tenders. The reasons are straightforward: transparency and simple, one-dimensional award criteria limit the discretion of procurement officials, allow for easy monitoring of their actions and increase accountability, which decreases the risks of corruption that procurement in Ukraine has suffered and continues to suffer. At the same time, however, these very criteria can favour collusion in public tenders with all its economic and social harm, including increased corruption. Due attention should be paid to both collusion and corruption concerns when designing procurement laws. To do this would require changes to the current legal framework, which does not yet include competition considerations.

The following recommendations are addressed to the government of Ukraine.

Transparency requirements

Ukrainian procurement law currently provides high transparency to bidders.

1. The annual procurement plan requires a procurement body publish detailed information about its planned procurements for the year, including their start dates, intended lots and the expected value.
2. Each tender announces a reference price, which serves as the maximum price above which the procurement body will not award a tender.
3. The auction process provides a bidder with detailed information about offers submitted by other competitors, albeit anonymously, as well as its own position in the bid ranking.
4. Tender results are published within a day of the award decision and include the name of the winning bidder and the price of the winning bid, as well as the number of bidders in the procedure and their price offers.

While full transparency before the publication of the terms of reference for the tender provides increased opportunities for participation, and should therefore be promoted, increased transparency in procurement and easy access of bidders to sensitive or competitor-related information in tenders can facilitate bidder collusion, as this report has pointed out. Information that allows for the identification of competitors and their offers can help in the establishment of cartels and cartel members monitoring compliance to the agreed terms. Detailed information on planned procurements – including size of tenders and lots, location of tender execution, timing and reference prices – provides a high degree of predictability and can facilitate market allocation between colluding suppliers.

Detailed information about the number of competing bidders and their auction offers allows bidders to more easily assess if a bid-rigging scheme is working, and the competitiveness of the process. This facilitates monitoring of cartels and decreases competitive pressure on bidders even without the presence of collusion.

The immediate publication of a winning bid and bidder provide any cartel with relevant monitoring information and allow members to adjust their strategies or to engage in retaliation measures against deviating bidders.

Published reference prices inform bidders about a procurement body's willingness to pay and make price fixing easier. Even without explicit collusion, such reference prices can serve as a focal point for all competitors.

The OECD has four recommendations.

1. **Reduce the level of detail in information made public in the annual plan.** Published information could be limited to overall planned purchasing volumes and to aggregated lists of intended purchases. Aggregation could be done on a product-based or regional level. The intended start dates of the tenders should not be disclosed. Internally, procurement bodies should still draft

a detailed and differentiated procurement plan, which would be accessible to procurement control bodies.

2. **Maximum reference prices should not be published.** These prices do have value for the purposes of internal planning and performance measurement, but their publication is likely to decrease competition in tenders.
3. **Reduce information available to bidders during an auction.** A bidder can perform successfully in an auction without having information on anything but the lowest price after each round.
4. **Delay the publication of tender results and reduce the amount of information made public.** Tender results should be made public with a delay of some weeks or months. Detailed information about the number and prices of competing bids should not be published. If necessary, the lowest and the highest bid price could be indicated.

Price-based awards

Currently, price is the determining award criterion with a minimum weight of 70%, with other, quality-based criteria, making up the other 30%. This does not allow bids of superior quality to beat low-price bids. As a result, competition is to a large extent based upon price, which facilitates collusive schemes. If greater product differentiation were possible, more competitors might submit bids and co-ordination between them would be less likely as products would be less homogeneous.

The OECD has one recommendation.

1. **Give non-price criteria greater weight** in award criteria. Once established, criteria and their respective weights need to be clearly defined at the beginning of the process and it should not be possible to change them during the tender.

Mandatory bidder exclusion

Bidders found guilty of collusion and other offences must be excluded from bidding in public tenders for three years and the procurement body has no discretion in imposing the penalty. Such mandatory bidder exclusion or debarment is an effective measure in increasing deterrence and making bid rigging and other offences less likely. However, when a supplier is excluded from a market with low number of participants, this may lead to a significant decrease or even complete loss of competition in public tenders for the period of exclusion.

In such cases, allowing excluded bidders to participate might be advisable. Procurement bodies could decide to lift the ban in close co-ordination with AMCU, whose approval could be a mandatory precondition. Such approval could, for example, be based on credible steps taken by the debarred undertaking to compensate for any harm caused and to improve compliance with competition law to prevent future bid rigging.⁷¹

The OECD has one recommendation.

1. **Allow authorities greater discretion to readmit bidders excluded from bidding.** Any readmission could require AMCU approval to ensure that a neutral and competent authority oversees the process.

Part V Conclusions

Ukrenergo is making a credible effort to professionalise its procurement practices, with admirable commitment being shown by management and staff. Many changes are planned and being implemented, such as internal reorganisations and the implementation of an amended legal framework, and will have effects in the future.

Difficulties that need to be overcome result in a large part from the company's difficult heritage: SOEs were long considered difficult and unattractive customers; corruption was (and remains) a major problem in Ukrainian public procurement; and the state's governance of Ukrenergo and its investment decisions are burdensome and lead to hold-ups and inefficiencies.

Overcoming such inherited burdens and instilling trust in suppliers will require a constant and credible effort by Ukrenergo.

Efforts so far have focused on building a more effective and compliant purchasing organisation, and installing multi-level controls that ensure internal processes are robust, and this should be continued. Ukrenergo seems to have the necessary capacity to take a more comprehensive and professional approach towards a problem that targets the essence of competitive public procurement, namely, anti-competitive supplier collusion or bid rigging. It is essential that public purchasers show publicly their intolerance of such practices, which render null all their efforts to purchase competitively. Doing so will also help address bid rigging's twin – corruption.

Ukrenergo will need to make significant improvements to its prevention and detection efforts that target illegal supplier collusion. The majority of the recommended practices to prevent supplier collusion lead to general improvements in planning and purchasing processes. Better detection sends a clear signal to markets that such practices will not be tolerated and will support Ukrainian law-enforcement agencies, in particular AMCU, in their efforts to prosecute and sanction behaviour widely recognised as being among the most harmful to market-based economies.

Implementing the recommendations will yield results in a number of ways: Ukrenergo's procurement system will improve; competition in the tenders will increase; legal compliance will be promoted and lead to savings that will offset any additional implementation costs. Ukrainian citizens will reap the benefits from a more efficient and competitive procurement through a better, more reliable and up-to-date electricity transmission system. Ukrenergo can also serve as a role model for other Ukrainian SOEs.

The OECD has two high-level recommendations that will be the basis on which all other recommendations should be built.

1. Ukrenergo needs to ensure that its tender designs encourage competition and discourage collusion.
2. Ukrenergo must increase its vigilance and make a greater effort to detect and report suspicions of bid rigging in its tenders.

Additional improvements to generate more competition in tenders in Ukraine in general will require changes in the UPL. Such changes should decrease market transparency to bidders; allow for more competition on quality; and provide a certain discretion on bidder exclusion.

Annex A. Summary of OECD recommendations for action

Summary of OECD recommendations for action to Ukrenergo

1. Organisation and implementation of pre-tender information gathering and market research

1. **Do not rely on a seemingly competitive reference price** to solve all issues related to bid rigging, and **improve understanding of procurement at all levels** and the risks and costs associated with bid rigging.
2. Create a **database for procurement items and related market research**, including information on the **likelihood of collusion** and other anti-competitive practices. Procurement markets could be ranked by **risk indicators**, which could combine collusion, financial and other risks. The database needs to be updated on a continuous basis.
3. Ensure that responsibility for **market research is clearly assigned to one level of Ukrenergo procurement**, preferably the Directorate for Supply Chain Management and the specialised category managers. Avoid ambiguities in market-research competences and **ensure close co-ordination with technical experts at end-user level**.
4. **Reconsider staff and purchasing distribution between the different regional procurement centres** to account better for high-priority and high-risk purchases, and to allow for more in-depth market studies when necessary.
5. **Differentiate the depth of market research** and market studies according to priorities derived from collusion and risk indicators.
6. Always **use multiple sources to verify market intelligence**, in particular, by not relying exclusively on historic data and information from existing suppliers. Include contract execution information such as contract delivery, modifications, performance evaluation, extensions and price renegotiations.
7. Where possible, **share market intelligence with other public procurement bodies** to increase overall knowledge about market conditions and to enrich Ukrenergo's own findings.
8. **Benchmark TSO-specific purchases against procurements undertaken by other TSO**, and co-operate with them to learn about their procurement practices and strategies.
9. **Carry out ex post analysis** of high-risk and strategic tenders to inform future tender planning.

2. Increase bidder numbers and competition

1. Ensure that **supplier databases** are open and non-discriminatory, and that unlisted suppliers are not disadvantaged in the tendering process or do not feel deterred from bidding if they have not been contacted directly by Ukrenergo. Ensure that interested suppliers are included in the database.
2. **Decrease the share of sub-threshold procurements and negotiated-procedure procurements** and conduct them under the open-bidding procedure.

3. Consider **aggregating purchases** or introducing **framework agreements** to increase tender volumes and make them more attractive to a larger number of bidders. Consider using **limited-participation procedures** for more complex tenders to ensure that they are aligned to the market offer and open and attractive to the largest possible number of bidders.
4. **Learn from IFI procurement** and its market research and procedural knowledge to inform Ukrenergo's procurement. **Consolidate** the supplier **databases** for both types of procurement.
5. Publish more than the minimum required amount of tender documentation **in English**, and **advertise** important tenders **outside Ukraine**.
6. When only few bidders can afford to supply large volume or high-value contracts, consider **splitting the resulting tenders into smaller lots** to attract more competitors.
7. Pay **close attention to joint bids and sub-contracting** in Ukrenergo tenders and ensure that bidders that could submit individual bids do not submit joint bids or enter into sub-contracting agreements. **Inform the AMCU** when a suspicion of anti-competitive joint bidding or sub-contracting arises.
8. **Make every effort to reduce the number of cancelled tenders** to avoid frustrating and deterring competent bidders and to hinder bid-suppression schemes.

3. Be clear and open, while avoiding predictability and reward quality

1. **Use market research** to provide clear tender terms and technical specifications.
2. **Critically review procurement requests** from cost centres and ensure that they do not favour existing solutions and incumbents; allow for **performance-based specifications, innovation and substitutes** and keep tender requirements as open as possible.
3. Encourage and enable **close co-operation between procurement specialists, technical specialists** and end users to find procurement solutions that satisfy needs, while allowing for new and innovative solutions.
4. Provide minimum training for technical experts on procurement, and ensure that procurement specialists acquire basic technical understanding to facilitate communication.
5. Switch from purely price-based award criteria to **life-cycle cost** and **most economically advantageous tender award criteria** to allow competition on a wider variety of qualitative criteria.
6. When splitting tenders into lots, ensure that the number of lots is fewer than the expected number of suppliers, and that lots are not designed according to clear and predictably foreseeable criteria such as geography or certain technical parameters.
7. Consider **consolidation and aggregation of tenders** to increase the economic risks for colluding suppliers, while keeping in mind that the supplier base should not be unduly reduced by such measures.
8. Consider abnormally low tenders carefully, and pay due attention to the reasons and justifications for any low price, such as more efficient production, economies of scale or scope, an aggressive but credible entry strategy, or the return to competitive market conditions after a period of collusion. Use risk-mitigation strategies to minimise any economic risks from low tenders.
9. For complex, high-value purchases consider using **industry experts and consultants** to inform the market research and to help design tender terms and procedures. At the same time ensure that they do not facilitate communication between potential suppliers.

4. Reduce bidder meetings and be careful when contracting industry consultants

1. **Avoid organising in-person tender or general information meetings** that allow competitors to meet.
2. **Avoid joint site visits** whenever possible.

3. Make use of **alternatives to in-person meetings** with suppliers, such as virtual seminars, and investigate alternative information material.
4. Ensure that **appropriate safeguards** are in place for when in-person meetings with several suppliers are unavoidable; these might include mandatory signature of a CIBD, detailed meeting notes, and the presence of anti-corruption and compliance staff.
5. Be aware that the Ukrainian procurement system's **notable transparency** can **facilitate** the formation and functioning of **collusive practices** among bidders. Do not be more transparent about competitors, bids, technical and qualitative characteristics or other competitively relevant information than necessary. **Educate procurement staff to avoid any unnecessary disclosure** of sensitive information.
6. Be **cautious when contracting industry consultants** and ensure they are independent and free of any conflicts of interest. Ensure they sign strict confidentiality agreements.

5. Improve detection efforts, training and support of public enforcement

1. Ukrenergo must **intensify its efforts actively to detect bidder collusion** in its tenders. Data from ongoing and past tenders must be reviewed for suspicious signs, and a **systematic analysis of priority procurements** should be undertaken. ProZorro offers good options for data screening, and Ukrenergo's **internal database should be set up to facilitate screening for collusion indicators. Suspicions must be transmitted to AMCU.**
2. Ukrenergo should critically assess the reporting channels it offers to suppliers and staff and ensure they are widely known, and accessible and trustworthy.
3. Staff training is required to improve the reporting of suspicions. Ukrenergo should give staff regular training in cartel and bid-rigging detection and prevention with the assistance of competition authorities or external legal consultants, including clear information about reporting mechanisms and action to take when collusion is suspected. Training should, to varying degrees and intensity, include all staff at all stages of the procurement process. Specific training modules should be set up for specialised staff.
4. Ukrenergo should refine its KPI, add more competition-related KPI, and should spread the KPI and performance goals across all employees active in procurement. Procurement staff at all levels needs to be incentivised to take an active interest in the prevention and detection of collusive practices in Ukrenergo tenders.
5. **Suppliers should be informed** on a regular basis about the economic and reputational risks related to entering into collusive agreements in Ukrenergo tenders. **Supplier training and tender documentation** should include competition-related information. **Bidders should be required to sign a CIBD** as part of tender documentation.
6. **Co-operate actively with AMCU** and other law-enforcement agencies that investigate and prosecute public tender collusion to help enforce the law and deter future bid rigging. Ukrenergo must **give clear instructions to its staff about the actions to be taken when bid rigging is suspected** and should **establish communication channels and closer co-operation with AMCU.**
7. Ukrenergo should **proactively seek opportunities to obtain compensation for damages** whenever it has suffered collusive conduct that has been investigated and successfully prosecuted by AMCU. To this end, **support of AMCU investigations is vital.**

Summary of OECD recommendations for action to the Government of Ukraine

1. To become a trusted and reliable purchaser, attractive to a maximum number of bidders, the OECD reiterates the recent recommendation to: **“Strengthen the capacities of the ownership entity responsible for Ukrenergo”** (OECD, 2020, pp. 95-96^[9]). For **greater efficiency** and in line with OECD SOE guidelines, it would be advisable to **shift responsibilities for the approval of key documents**, such as the company’s strategy, financial plan, business plan, and investment plan to the **Supervisory Board**.
2. **Reduce the level of detail in information made public in the annual plan.** Published information could be limited to overall planned purchasing volumes and to aggregated lists of intended purchases. Aggregation could be done on a product-based or regional level. The intended start dates of the tenders should not be disclosed. Internally, procurement bodies should still draft a detailed and differentiated procurement plan, which would be accessible to procurement control bodies.
3. **Maximum reference prices should not be published.** These prices do have value for the purposes of internal planning and performance measurement, but their publication is likely to decrease competition in tenders.
4. **Reduce information available to bidders during an auction.** A bidder can perform successfully in an auction without having information on anything but the lowest price after each round.
5. **Delay the publication of tender results and reduce the amount of information made public.** Tender results should be made public with a delay of some weeks or months. Detailed information about the number and prices of competing bids should not be published. If necessary, the lowest and the highest bid price could be indicated.
6. **Give non-price criteria greater weight** in award criteria. Once established, criteria and their respective weights need to be clearly defined at the beginning of the process and it should not be possible to change them during the tender.
7. **Allow authorities greater discretion to readmit bidders excluded from bidding.** Any readmission could require AMCU approval to ensure that a neutral and competent authority oversees the process.

Annex B. 2012 Recommendation of the OECD Council on fighting bid rigging in public procurement

The full text of the Recommendation is available on the OECD database of legal instruments where additional information and any future update can be found: <http://acts.oecd.org/Default.aspx>

As approved by Council on 17 July 2012
C(2012)115 – C(2012)115/CORR1 – C/M(2012)9

The Council,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels, which invites, “Member countries [to] ensure that their competition laws effectively halt and deter hard core cartels”, which include “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices [or] make rigged bids (collusive tenders)” [C(98)35/FINAL];

Having regard to the Recommendation of the Council on Enhancing Integrity in Public Procurement, which lists collusion among the “integrity violations” in the field of public procurement and recognises that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayers’ money [C(2008)105];

Having regard in particular to Principle 1 (Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers) and Principle 7 (Provide specific mechanisms to monitor public procurement, as well as to detect misconduct and apply sanctions accordingly) of the Council Recommendation on Enhancing Integrity in Public Procurement;

Having regard to the Third Report on the Implementation of the Council Recommendation concerning Effective Action Against Hard Core Cartels, which lists the fight against anticompetitive behaviour in auctions and in procurement among the enforcement priorities that Members should pursue in their fight against hard-core cartels [C(2005)159];

Recognising that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

Recognising that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, “value for money” to the benefit of end consumers, users of public services and taxpayers;

Recognising that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers;

Recognising that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition;

Recognising that rules that unduly restrict competition often can be revised in a way that promotes market competition while still achieving public policy objectives; and

Recognising the efforts to disseminate the Guidelines on Fighting Bid Rigging in Public Procurement adopted by the Competition Committee in 2009 [DAF/COMP(2009)1/FINAL];

Noting that a number of OECD Members have developed tools to detect and limit bid rigging in public procurement tenders;

On the proposal of the Competition Committee:

- I. **RECOMMENDS that Members assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging, while ensuring overall value for money.**

To this effect, officials responsible for public procurement at all levels of government should:

1. Understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser, and the potential suppliers of these products and/or services.
2. Promote competition by maximising participation of potential bidders by:
 - i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition;
 - ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products;
 - iii) allowing firms from other countries or from other regions within the country in question to participate, where appropriate; and
 - iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract.
3. Design the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies.
4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a continuing interest in bidding on future projects. Qualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders.
5. Strengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive, and to store information about public procurement opportunities in order to allow appropriate analysis of bidding behaviour and of bid data.
6. Require all bidders to sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.

7. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, suspension from participating in public tenders for a certain period of time, sanctions for signing an untruthful Certificate of Independent Bid Determination, and liability for damages to the procuring agency. Sanctions should ensure sufficient deterrence, taking into account the country's leniency policy, if applicable.
- II. **RECOMMENDS that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.**

In particular, Members should encourage competition authorities to:

1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;
2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and
3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Members should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials.

- III. **RECOMMENDS that Members encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part.**
- IV. **RECOMMENDS that Members develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.**
- V. **INVITES Members to disseminate this Recommendation widely within their governments and agencies.**
- VI. **INVITES non-Members to adhere to this Recommendation and to implement it.**
- VII. **INSTRUCTS the Competition Committee to:**
 - i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;
 - ii) promote this Recommendation with other relevant committees and bodies of the OECD; and
 - iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

Annex C. Guidelines for fighting bid rigging in public procurement

1. Introduction

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organisations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement¹. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD Member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting “cover” (higher) bids².

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For

¹ In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures*, 2007.

² In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for subcontracting works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- **Cover bidding.** Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.
- **Bid suppression.** Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.
- **Bid rotation.** In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.
- **Market allocation.** Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. Industry, product and service characteristics that help support collusion

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- **Small number of companies.** Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- **Little or no entry.** When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.
- **Market conditions.** Significant changes in demand or supply conditions tend to destabilise ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.

- Industry associations. Industry associations³ can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- Repetitive bidding. Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.
- Identical or simple products or services. When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- Few if any substitutes. When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- Little or no technological change. Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

A. Checklist for Designing the Procurement Process to Reduce Risks of Bid Rigging

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best “value for money”. Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more likely⁴.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B⁵ procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.

³ Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

⁴ See “Industry, product and service characteristics that help support collusion” above.

⁵ Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

- Co-ordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.
- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
 - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).⁶
 - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
 - By keeping official lists of approved contractors or certification by official certification bodies.
 - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
 - By using an electronic bidding system, if available.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.⁷ For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain

⁶ Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

⁷ Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the 'splitting contracts' technique could provide an opportunity to conspirators to better allocate contracts.

a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.
- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.
- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process.⁸ Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in

⁸ For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.

- Carefully consider what information is disclosed to bidders at the time of the public bid opening.
- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.
- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders⁹ and framework agreements.¹⁰
- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.
- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination¹¹.
- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.

⁹ In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

¹⁰ In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

¹¹ A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.¹²
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.
- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to co-ordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents.¹³ Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.
- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted

¹² Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

¹³ The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.¹⁴
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.
- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform yourself about your country's leniency policy,¹⁵ if applicable, and review your policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.
- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish co-operative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.)

B. Checklist for Detecting Bid Rigging in Public Procurement

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

¹⁴ See "Industry, product and service characteristics that help support collusion" above.

¹⁵ Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to co-operate with the competition authority's investigation.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Subcontracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be coordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice

in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
 - Suppliers' prices were the same for a long period of time,
 - Suppliers' prices were previously different from one another,
 - Suppliers increased price and it is not justified by increased costs, or
 - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or co-ordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at "industry suggested prices", "standard market prices" or "industry price schedules".
- Statements indicating that certain firms do not sell in a particular area or to particular customers.
- Statements indicating that an area or customer "belongs to" another supplier.
- Statements indicating advance non-public knowledge of competitors' pricing or bid details or foreknowledge of a firm's success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complimentary, token, symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.
- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialise together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.

After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

Annex D. Annex D. Certificate of Independent Bid Determination (Cofece)

_____ [Name of agent or common representative], representing
 _____ [Name of person or entity] (hereinafter and interchangeably, the “Offerer” or “Bidder”), submitted the attached bid or proposal (hereinafter “Offer”): [The power to represent must also include signing this statement on behalf of all who are represented]:

To _____

[Name and Password for the process involved]

Convened by: _____

[Name of Convenor] (hereinafter, the “Convening Authority”)

I come to present for myself and on behalf of the Offerer, the following statement of integrity (hereinafter the “Declaration of Integrity”):

I have read and I understand the contents of this Certificate;

I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;

I understand that if the Declaration of Integrity is not true I am personally engaged and engage my client in wrongful civil, criminal and administrative responsibilities, and in particular, the penalties incurred for those who falsely declare to an authority other than the judicial authority in terms of Article 247, Section I of the Federal Criminal Code. The foregoing is without prejudice to the penalties in terms of the laws applicable to this procedure;

I know the Federal Economic Competition Act, in particular the provisions of Articles 53 and 127 sections I, IV, IX, X, and XI, and Article 254 bis of the Federal Penal Code;

Each person whose signature appears on the accompanying bid has been authorised by the Bidder to define the terms and conditions of the Offer and to sign on their behalf;

For the purposes of this Declaration of Integrity and the accompanying bid, I understand that the word “competitor” shall include any individual or organisation, other than the Bidder, whether or not affiliated with the Bidder who:

- a) has submitted or could submit a bid in response to this call for tender;
- b) could potentially submit a bid in response to this call for tender;

The Bidder discloses that (check one of the following, as applicable):

- a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
- b) the Bidder has entered into consultations, communication, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors

and the nature of, and reasons for, such consultations, communications, agreements of arrangements; [The information is especially relevant when the offer joint proposals or schemes involving subcontracting. In this case, you must include the terms and conditions involving the people involved];

In particular, without limiting the generality of paragraphs (7)(a) o (7)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

- a) prices;
- b) methods, factors or formulas used to calculate prices;
- c) the intention or decision to submit, or not to submit, a bid; or
- d) the submission of a bid that does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (7)(b) above;

In addition, there has been no consultation, communication, agreement or arrangement whit any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorised by the Convening Authority or as specifically disclosed pursuant to paragraph, (7)(b) above;

The terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, with the object or effect of handling, fixing, or setting prices; manipulating, establishing or arranging methods, factors or formulas used to determine prices; affecting or inducing the intention or decision to submit or not Offer; or submitting a bid which does not meet the specifications of this process.

Moreover, the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, with the object or effect handling, fixing, or arranging the quality, quantity, specifications or details of shipping of the products or services referenced in this process or as set out in paragraph (7)(b) above.

I also show that by myself or through another person, I will refrain from adopting behaviours that the public servants of the Convening Authority, induce or alter the evaluations of proposals, the result of the procedure or other aspects that give more advantageous conditions to other participants.

(Printed Name and Signature of Authorised Agent of Bidder)

(Date)

Endnotes

¹ See also, Annex B

² Cartel agreements are considered to be international when at least two of the companies taking part in the infringement are headquartered in different jurisdictions, regardless of the geographic coverage of the cartel activities (OECD, 2020, p. 32^[5]).

³ Data provided by AMCU, 24 April 2020.

⁴ For a comprehensive overview of bid-rigging work undertaken by the OECD, see www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm.

⁵ For further information on Supporting Energy Sector Reform in Ukraine, see www.oecd.org/eurasia/competitiveness-programme/eastern-partners/supporting-energy-sector-reform-ukraine.htm.

⁶ For further information, see (OECD, 2019^[18]), (OECD, 2020^[53]), (OECD, 2020^[9]), and www.oecd.org/corruption/acn/ukraine-oecd-anti-corruption-project.htm.

⁷ Other large SOEs in Ukraine's energy sector include Naftogaz, the national oil and gas company involved in extraction, transport and refining, and its subsidiaries; Energoatom, which operates nuclear power plants; and Ukrhydroenergo, which operates hydropower plants.

⁸ For more information, see the OECD website on public procurement, (www.oecd.org/gov/public-procurement); the OECD and EU's SIGMA initiative (www.sigmaweb.org); and the OECD's bid rigging in public procurement website (www.oecd.org/daf/competition/fightingbidrigginginpublicprocurement.htm).

⁹ On 19 February 2021, the Ukrainian Parliament approved a first reading of a law for certification.

¹⁰ See Ukrenergo (29 January 2020), "In 2019, Ukrenergo has saved 15% in the process of procurement", <https://ua.energy/media-2/news/in-2019-ukrenergo-has-saved-15-in-the-process-of-procurement> (accessed 15 July 2020).

¹¹ Article 153, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 21 March 2014, https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf.

¹² Agreement on Government Procurement (GPA), www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. The agreement's text establishes rules requiring that open, fair and transparent conditions of competition in government procurement. The fundamental aim of the GPA is to open signatories' government procurement markets to others.

¹³ Prior to the entry into force of the revised UPL on 19 April 2020, the contracting authority was also able to appoint one or several tender committees for the organisation and conduct of procurement. This responsibility is now held by the authorised persons under the revised UPL, but during the transition period that runs until 1 January 2022, the contracting authority can still opt to establish a tender committee for the organisation and conduct of procurement (Section X-IV, UPL).

¹⁴ Article 164 of the Ukrainian Code on Administrative Offences. In December 2020, one non-taxable minimum income for the purpose of calculating this fine was UAH 17 (Section XX, subsection V of the Tax Code of Ukraine).

¹⁵ Article 164 of the Code of Ukraine on Administrative Offences.

¹⁶ Ibid.

¹⁷ The requirement to pay a fee to lodge a procurement complaint is a widespread practice in the EU (European Commission, 2015^[54]).

¹⁸ A detailed review of the AMCU's activities as a procurement review body was recently published by Transparency International Ukraine (Transparency International Ukraine et al., 2020^[50]).

¹⁹ <http://www.dkrs.gov.ua/kru/en/publish/article/131910>; last accessed 30 June 2020.

²⁰ See <https://nabu.gov.ua/en/faq>; last accessed 30 June 2020

²¹ Meeting with NABU representatives, March 2020.

²² See <https://map.antac.org.ua/agencies/sapo/>; last accessed 30 June 2020.

²³ Transparency International Ukraine, meeting and e-mail communication, March 2020.

²⁴ See <https://antac.org.ua/#targets>; last accessed 30 June 2020.

²⁵ AntAC, meeting and e-mail communication, March 2020.

²⁶ See <http://infrastructuretransparency.org/about-us/>; last accessed 1 July 2020.

²⁷ See <https://ua.energy/activity/cost-initiative/>; last accessed 2 July 2020.

²⁸ The remaining 56% was IFI procurement; see Part I, Chapter 4.

²⁹ See for example, <https://ukranews.com/en/news/722728-ukrenergo-procurements-in-2018-2019-were-twice-cheaper-than-the-same-procurements-made-by> and <https://expro.com.ua/en/articles/ukrenergo-case-successful-corporate-experience-vs-political-accusations> (accessed 5 October 2020).

³⁰ For more specific and detailed information on Ukrenergo's governance structure and corporate structure, including recent changes, please see (OECD, 2020, pp. 48-49^[9]).

³¹ The activities of authorised persons are regulated by Ukrenergo's internal order of 21 December 2016 No. 420 on Approval of the Regulations on the Authorised Person(s) of NPC Ukrenergo, and in accordance with UPL.

³² The activities of authorised persons are further governed by a set of Ukrenergo-internal rules: Order of 21 December 2016 No. 420 on Approval of the Regulations on the Authorised Person(s) of NPC Ukrenergo; Order of 17 September 2019 No. 84 on Appointment of Authorised Persons of NPC Ukrenergo; and the following internal Ukrenergo business processes applicable to procurement not relating to IFI procurement: Procurement Planning; Organisation of Public Procurement; Organisation of Sub-Threshold Procurement; Supporting the Implementation of Public Procurement Contracts; and the Technical Policy; Compliance Policy; Security Policy; and the Anti-Corruption Programme of Ukrenergo. See (Ukrenergo, 2020^[22]).

³³ See (Ukrenergo, 2020^[22]).

³⁴ Ukrenergo Responses to OECD February and May 2020.

³⁵ For details of Ukrenergo's anti-corruption policy, see <https://ua.energy/wp-content/uploads/2020/06/ANTYKORUPTSIJNA-PROGRAMA-2020-1.pdf> (accessed 6 July 2020).

³⁶ See https://ua.energy/wp-content/uploads/2019/02/UE_KPMG_Compliance_Policy_UKR.pdf.

³⁷ Since 2021, the market research department reports directly to the head of the Executive board.

³⁸ These include: <http://corrupt.informjust.ua/>; <https://kap.minjust.gov.ua/login/index/>; <https://usr.minjust.gov.ua/ua/freesearch>; and <http://sfs.gov.ua/businesspartner> (accessed on 8 July 2020).

³⁹ Ukrenergo Responses to OECD February and May 2020.

⁴⁰ Two examples of this process: on 24 May 2018, Ukraine and the EIB signed an agreement for the rehabilitation of Ukrenergo's substations for which the state guaranteed the EUR 136 million EIB loan to Ukrenergo; on 30 July 2019, Ukraine and the EBRD signed an agreement for a EUR 146 million loan to finance Ukrenergo's procurement of up to 26 new transformers and the automation and upgrade of 12 high-voltage substations for the country's transmission network, for which the state provided a guarantee .

⁴¹ The EU classification of public procurement subjects/items is called the Common Procurement Vocabulary (CPV).

⁴² See <https://prozorro.gov.ua/tender/UA-2019-12-18-000496-c> (accessed 8 July 2020).

⁴³ Ukrenergo Responses to OECD February and May 2020.

⁴⁴ See "List of criteria for determining the qualification and other requirements of Ukrenergo to suppliers and contractors".

⁴⁵ For further explanation, see Part III, Chapter 3, "Tailoring demand to attract new and more suppliers".

⁴⁶ For details of IFI-financed procurements, see "International Procurements", <https://ua.energy/for-partners/international-procurements> (accessed 8 July 2020).

⁴⁷ Ministry of Finance of Ukraine Order No. 647 of October 28, 2020 on the Methodology for Determining Automatic Risk Indicators, <https://zakon.rada.gov.ua/laws/show/z1284-20#n4> (accessed 5 March 2021).

⁴⁸ Ukrenergo Responses to OECD February and May 2020.

⁴⁹ AMCU Responses to OECD, December 2019 - March 2020.

⁵⁰ Run by the UK-based Chartered Institute of Procurement and Supply, the CIPS Global Standard for Procurement and Supply is a "comprehensive competency framework" and benchmarking tool. The Primary Award certification obtained by Ukrenergo confirms that Ukrenergo's key procurement processes comply with global standards, national legislation, and a code of ethics specifically developed by CIPS with the European Bank for Reconstruction and Development (EBRD). See <https://ua.energy/general-news/ukrenergo-s-procurement-is-the-first-in-ukraine-to-be-certified-according-to-the-cips-global-standard> (accessed on 8 October 2020).

⁵¹ See <https://ua.energy/media-2/news/in-2019-ukrenergo-has-saved-15-in-the-process-of-procurement> (accessed 20 July 2020).

⁵² See for example, (OECD, 2016, p. 69_[16]) and (EBRD, 2017_[41]).

⁵³ See Ukrenergo compliance policy, https://ua.energy/wp-content/uploads/2019/02/UE_KPMG_Compliance_Policy_UKR.pdf.

⁵⁴ See Ukrenergo Code of Ethics, <https://ua.energy/media-2/news/ukrenergo-approved-the-corporate-ethics-code/>; p 24-25.

⁵⁵ Ukrenergo Responses to OECD February and May 2020.

⁵⁶ Such conduct may still be in violation of procurement rules, which are different from competition rules. Article 17 of the UPL foresees as grounds for exclusion persons related to other tender participants submitting tender bids. In other procurement legislation, such as in the European Union, bidders may be obligated to disclose their connections or prohibited from parallel bidding in the same tender under national procurement or individual tender rules, even though such practices do not generally break competition law. See for example, Judgments by the European Court of Justice, *Lloyd's of London v Agenzia Regionale per la Protezione dell'Ambiente della Calabria* (2018), C-144/17, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0144> and "*Šiaulių regiono atliekų tvarkymo centras and 'Ecoservice projektai' UAB*" (2018), C-531/16, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0531>.

⁵⁷ Price directories are lists of items with technical parameters that match CPV codes. They are regularly controlled and updated with current pricing information, and accessible on Ukrenergo's intranet.

⁵⁸ See <https://ted.europa.eu/TED/browse/browseByMap.do> (accessed 24 July 2020), also tender examples relevant to Ukrenergo: Netherlands-Arnhem: Instrument transformer; Germany-Bayreuth: Instrument transformer; Netherlands-Arnhem: Repair and maintenance services of transformers; and Netherlands-Arnhem: Parts of electricity distribution or control apparatus.

⁵⁹ In the 2016 Latvian “VM Remonts” case, for example, the Latvian Competition Council found collusion after an independent consultant prepared tenders by three competitors; see European Court of Justice, Judgment of 21 July 2016, *SIA “VM Remonts” (formerly SIA “DIV un KO”) and Others v Konkurences padome*, Case C-542/14, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0542>.

⁶⁰ A concentration and market-specific specialisation of staff may raise corruption concerns, but this could be alleviated through: 1) better staff training and remuneration; 2) closer monitoring of high-risk markets through the internal compliance function; and 3) regular staff rotation between industries.

⁶¹ Ukrenergo Responses to OECD February and May 2020.

⁶² For example, in 2018: Tender 31170000-8 – Voltage transformers, https://prozorro.gov.ua/tender/UA-2018-05-05-000476-c?lot_id=35ca16b6d3f944c7828258c38fe563e5#lots; Tender 34350000-5 – Tires for heavy vehicles, https://prozorro.gov.ua/tender/UA-2018-11-23-001221-b?lot_id=2957c0e95fc04d30837dbfdeaa2f2c41#lots; Tender 66510000-8 – Employee accident insurance, https://prozorro.gov.ua/tender/UA-2018-05-24-000688-c?lot_id=2b74435f33cf4c38a025359d7ca6ff85#lots; and in 2017: Tender 44210000-5 – Intermediate metal supports for substations, https://prozorro.gov.ua/tender/UA-2017-07-28-001007-b?lot_id=accf944817114164bf4de829400d59f3#lots.

⁶³ Ukrenergo Responses to OECD February and May 2020.

⁶⁴ The products listed in the 2020 UPL are: 1) office equipment and accessories; 2) medical equipment and medical devices; 3) television and audiovisual equipment; 4) computer equipment and accessories; 5) electronic equipment; 6) heavy motor vehicles; 7) school furniture; 8) furniture, structures and their parts; 9) finished textile products; 10) mechanical spare parts other than engines and engine parts. To calculate the value of a product life cycle, a customer can use the following cost categories: 1) purchase price; 2) use and maintenance costs; 3) disposal costs; and 4) environmental-protection costs.

⁶⁵ Ukrenergo Responses to OECD February and May 2020.

⁶⁶ More information and criteria for assessing the splitting or consolidation of tenders into lots is available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2\(2017\)1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2017)1&docLanguage=En) (Albano, 2017^[46]).

⁶⁷ Article 101, *Treaty on the Functioning of the European Union*, Official Journal C 326, 26.10.2012, https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj.

⁶⁸ See for example, www.oecd.org/corruption-integrity/reports/committing-to-effective-whistleblower-protection-9789264252639-en.html.

⁶⁹ OECD International Cartels Database, https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC.

⁷⁰ AMCU Decision No. 200-r of 4 April 2019, <https://amcu.gov.ua/npas/rishennya-200-r-vid-04042019>.

⁷¹ For example, such a provision is included in the German competition and procurement law, Act Against Restraints of Competition; Article 125 foresees mandatory or facultative ban from participation in procurement procedures can be lifted when sufficient self-cleaning measures have been taken. See www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.htm#p1314.

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FIGHTING BID RIGGING IN THE ENERGY SECTOR IN UKRAINE: A REVIEW OF PUBLIC PROCUREMENT AT UKRENERGO

As part of the project on “Supporting the Energy Sector Reform in Ukraine”, the OECD is supporting the Government of Ukraine in enhancing competition in the energy sector. In this context, the OECD assessed the procurement practices of the Ukrainian state-owned energy company Ukrenergo against the Recommendation on Fighting Bid Rigging in Public Procurement.

This report provides a review of the procurement practices of Ukrenergo within the context of the applicable Ukrainian procurement law. It provides a series of recommendations to Ukrenergo on how to improve its tender design to prevent bidder collusion and increase competition, and on how to better detect bidder collusion and report to the competition authority. The report can serve as a benchmark for procurement of other Ukrainian SOEs.

The report was prepared based on desk research, information collected through questionnaires, face-to-face consultations in Kyiv and inputs provided by Government representatives and procurement stakeholders in Ukraine. The report has been prepared by the OECD Competition Division as part of the project Supporting Energy Sector Reform in Ukraine. The project is implemented in the context of the OECD-Ukraine Memorandum of Understanding, and is made possible thanks to the financial support of the Government of Norway.

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