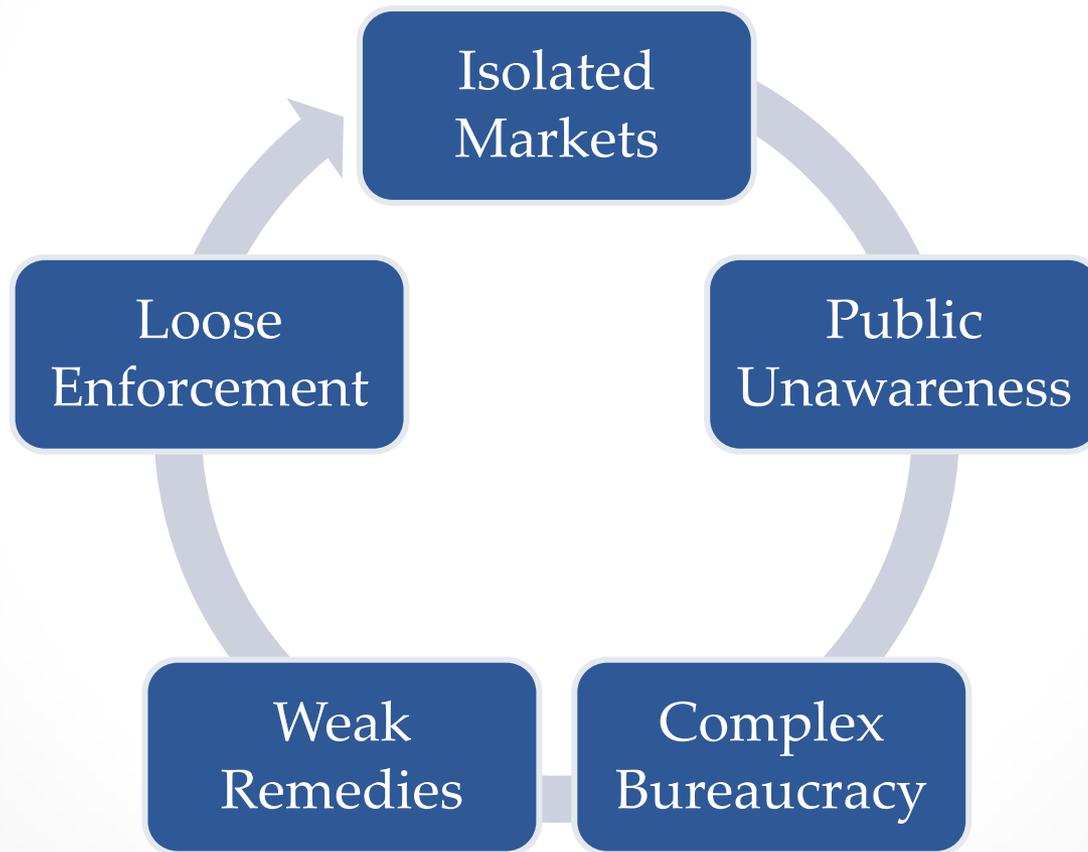


# Anti-Corruption in Public Procurement.

Possible Lessons from Europe



# Corruption/Cronyism:



There is a perceived  
problem in Argentina

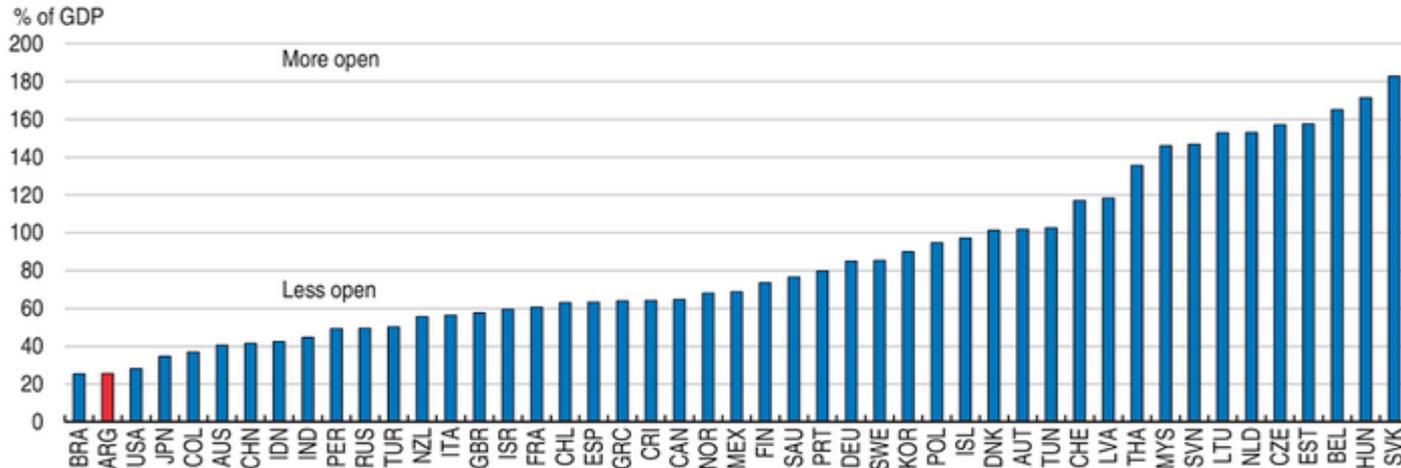
# Regulatory Barriers

- Argentina has experienced large barrier to entrepreneurship due to complex regulation.
- Complexity in legal frameworks along with corruption create unfavourable terms for investment.

## ASSESSMENT AND RECOMMENDATIONS

Figure 25. **The economy is fairly closed and barriers to trade are high**

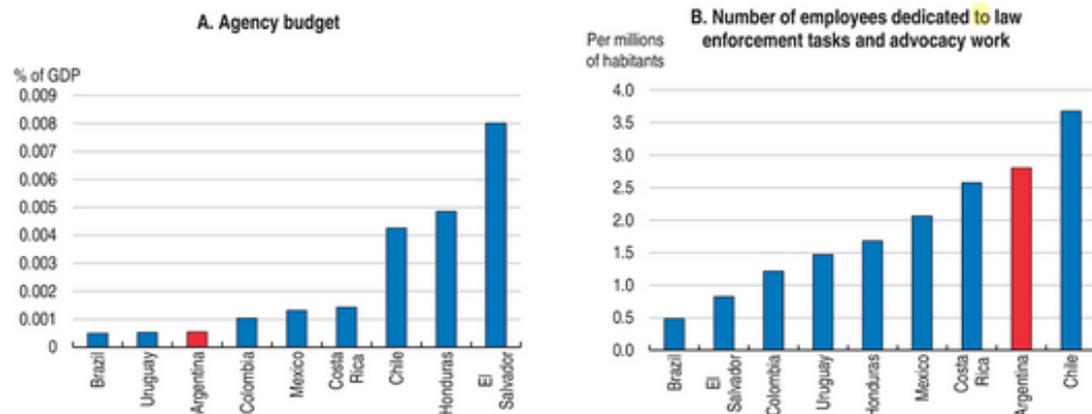
**A. Trade openness (trade in % of GDP)**  
average 2010-16



# Encouraging NCA action

- OECD Notes: low budget in Argentina for competition law.
- Through new legislation, NCAs are being restructured and given more enforcement powers, expanding their leniency programmes and also providing the legal basis for a competition court.

Figure 1.12. **The competition authority has a low budget**



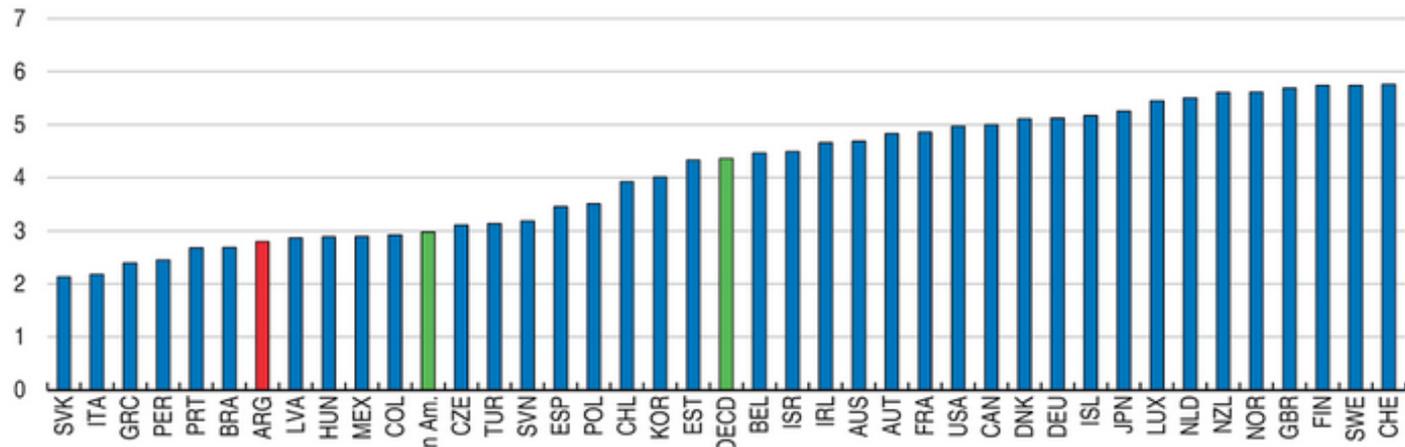
Note: Data are for 2012. Chile includes the sum of the Tribunal de Defensa de la Libre Competencia and Fiscalía Nacional Económica. Budget data for Brazil is provided in Brazil Real and converted to USD using 2012 average exchange rate.  
Source: Centro Regional de Competencia para América Latina and World Bank, World Development Indicators.

# Strengthening Governmental institutions

- Argentina ranks amongst the last ten of 140 countries in favouritism of government officials, ethics and corruption.
- Recent measures such as the Anti-Corruption Agency have been commended steps towards the right direction.

Figure 28. **Argentina ranks low on the rule of law and corruption perceptions**

A. Efficiency of legal framework in settling disputes, 2016-17  
1-7 (best)



These are familiar problems.  
They were relevant to several  
EU Countries.  
They are not insoluble!

# Europe's been there before!

- During the 1980s the European market was segregated and enforcement of competition law was weak.
- In ***Samenwerkende Prijsregelende Organisaties (SPO)***, which translates to Association of Co-operating Organisations for Pricings, 28 regional constructions associations adopted rules regulating and co-ordinating prices, but also imposing penalties to its members for breaching their obligations under those rules. The cartel impeded healthy competition and foreign companies entering the market. **(NETHERLANDS)**
- In ***Pre-Insulated Pipe*** the Commission found a series of agreements and concerted practices involving manufacturers of pre-insulated pipes used for district heating with the effects of: dividing up markets on the basis of quotas, forcing other producers out of the sector, price fixing, and manipulating tendering procedures. The Commission imposed fines totalling nearly EUR 92m. **(FINLAND)**

# Europe is not perfect either

- Screw ups are inevitable. Learn from them and do not be embarrassed.
- Europe is still learning:

On 28 August 2014, the Bundeskartellamt (BKartA) imposed fines totalling € 17 400 000 on five providers of specialist underground mining services on account of price fixing and bid rigging. Six companies not only divided specific lots among themselves, but also coordinated the price levels of their bids (and cover quotas).

On October 2012, the Romanian Competition Authority (RCC) found that four undertakings had taken part in bid rigging in the framework of two public procurement procedures organised by a Romanian authority. Between 2009-2011 contracts were allocated for the construction, repair and maintenance of natural gas pipelines. Based on its findings, the RCC sanctioned the undertakings concerned with fines totalling € 5 600 000.

# Edinburgh Tram

- Even good faith arrangements could turn out to be problematic.
- Authorities have to remember: good regimes do not abolish bad practices, but facilitate good ones.

In 2003 the City of Edinburgh sought to build a tram line stretching 14km across the city. The project was allocated to a German firm, Bilfinger Berger, in good faith with no signs of collusion. Nevertheless, completion of the project was delayed by five years; and while the initial budget was GBP 375 million, by 2014 it had exceeded GBP 776 million.

The problem was not one of bad faith or impropriety. The reports from Audit Scotland stated that it was the contractor being “ill -prepared for the task”, a failure to get a common understanding between the parties about the infrastructure contract; and too many changes in senior personell.

What would happen in Argentina if a journalist wrote a story about bid-rigging?

# Some Suggestions



# Recruit Public Sympathy

- National Authorities should raise awareness and rally public sentiment against cartels.
- Bid-rigging often involves excessive charging of public authorities. Therefore the bidders are usually targeting public funds, procured by taxes.

# The *Elevator and Escalator* case

The European Commission (Case COMP/E-1/38.823-PO) imposed fines of over EUR 990 million, on lift and escalator companies involved in bid rigging cartels through fixing prices, allocating project to one another, while dividing several national markets amongst themselves, among themselves from 1995 to 2004.

Subsequently the Commission sued the parties in a private capacity for €6 million in damages from all defendants. In a preliminary ruling the ECJ confirmed that the Commission could initiate damages proceedings against undertakings which it had itself investigated and fined. However, the Brussels Commercial Court dismissed the claim for damages, suggesting that the Commission had not provided sufficient evidence that it had actually sustained any damage.

# Celebrate Success

- The Commission should publicise its achievements. Effective enforcement should be celebrated and infringers should be exposed.



# Fines and Penalties

- Changing behaviour is more important than penalties. High penalties are less important than effective penalties.
- Choose your targets well.
- Consider whether corporate fines are the best way. Other avenues for deterrence could be:
  1. Administrative fines on individuals;
  2. Potential disqualification;
  3. Reporting of the employee's history in the annual company report.

# Criminal Sanctions

- Criminal sanctions could be another major deterrence factor for bid-rigging cartels, however the EU has not enacted the legal framework to facilitate such penalties.
- Due to the severity of punishment it would be up to individual States to enact legislation permitting criminal prosecution. This would require public and cultural approval.
- In the US, criminal sanctions have proven to be a major deterrence factor. During 2016 there were only two fully US companies that had anti-cartel actions taken against them by the US Department of Justice. This could be due to criminal sanction imposed on 29 people per year, leading to up two years imprisonment.

# Economic Aspects

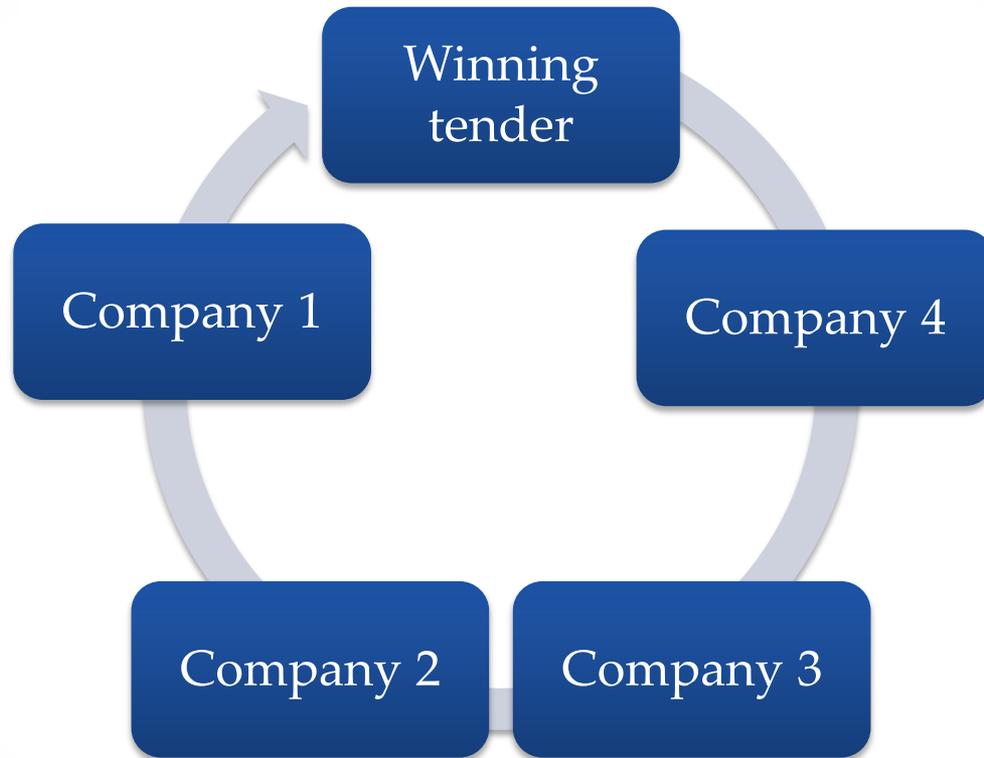
# European experience of bid-rigging.

# Cover Bidding



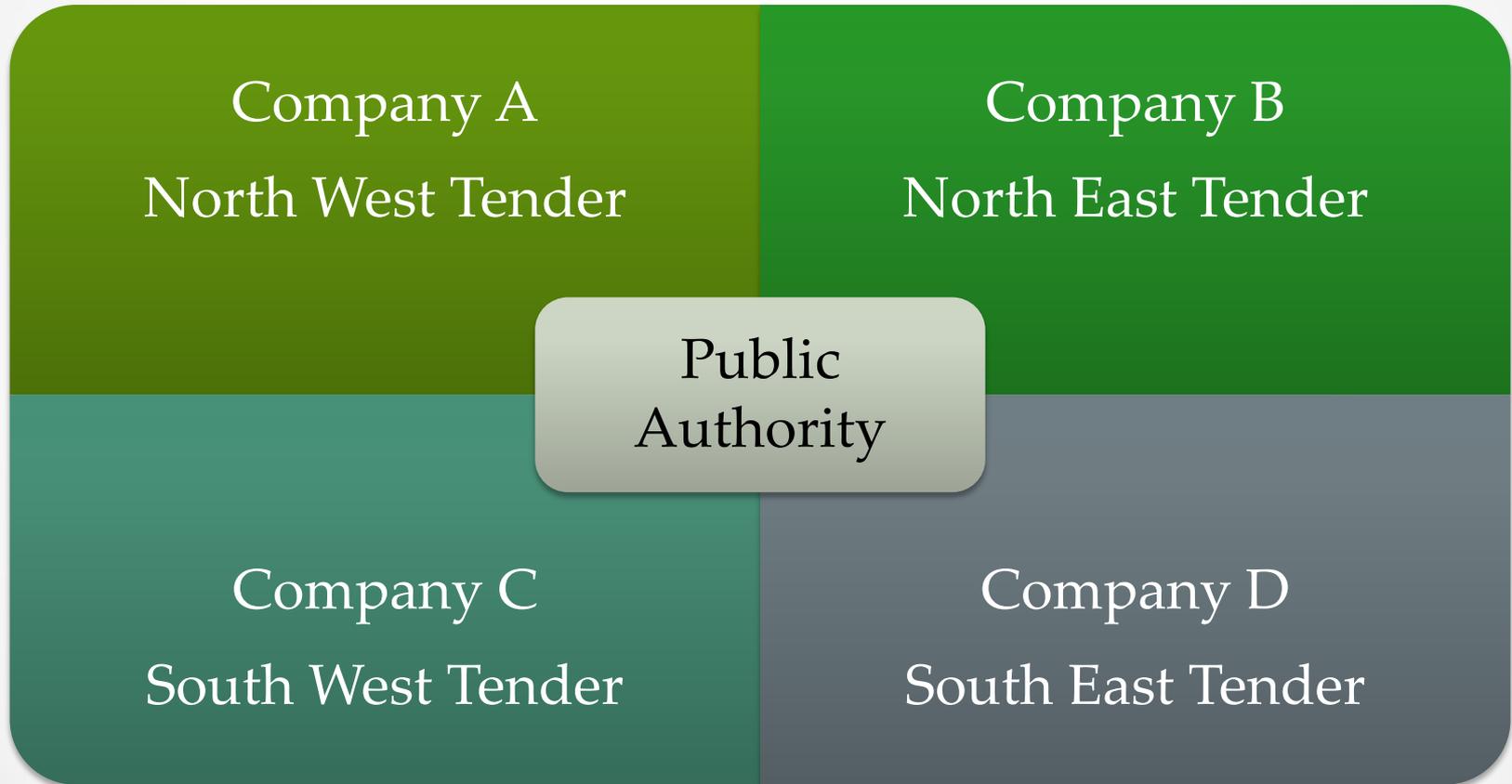
- 1) A competitor agrees to submit a bid that is higher than the bid of the designated winner;
- 2) A competitor submits a bid that is known to be too high to be accepted;
- 3) A competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser.

# Bid Rotation



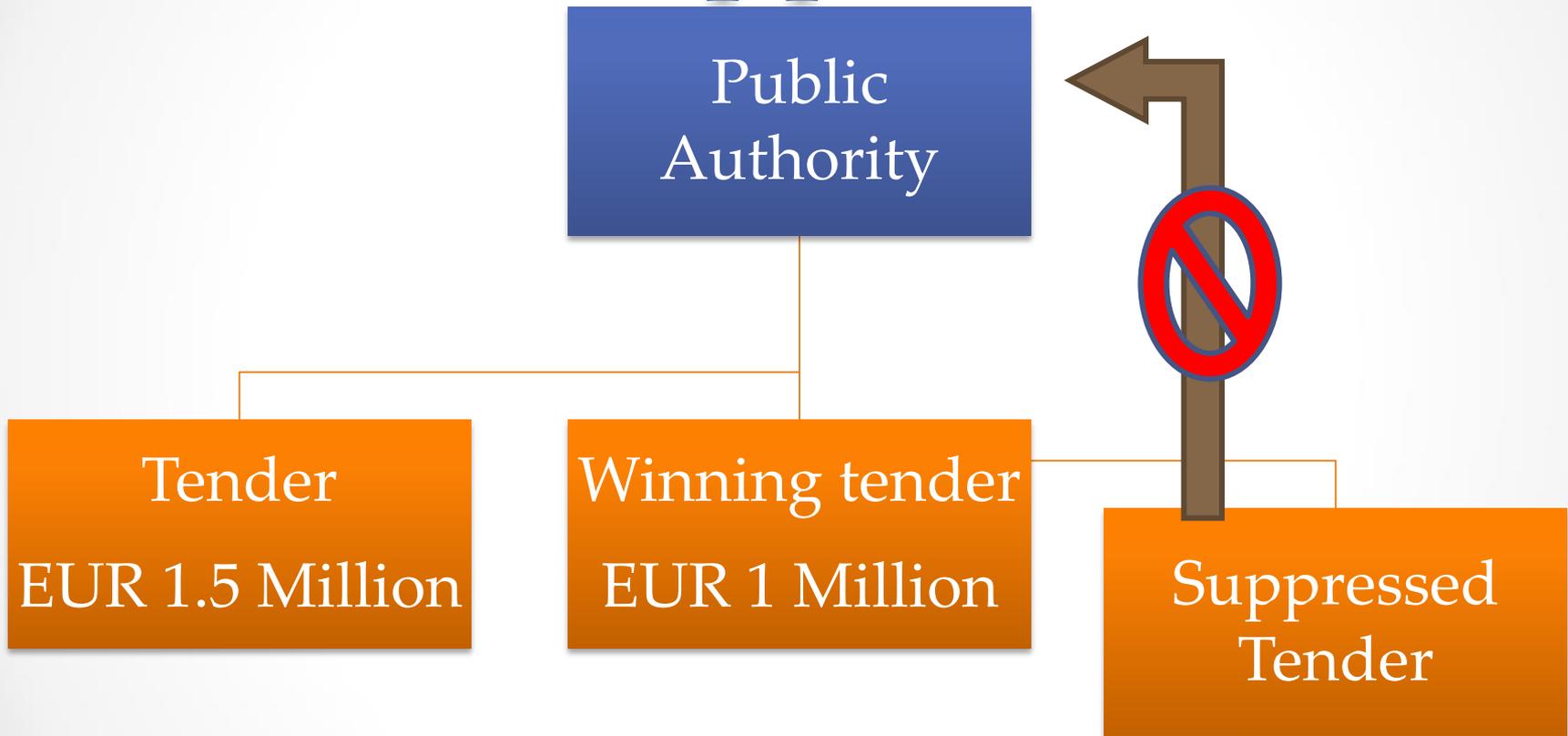
In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning bidder. Conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

# Market Allocation



Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas.

# 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.

# Promote Accessible Markets

- **In 1985 only 2%** of public tenders were awarded to foreign companies. (Martin, Hartley, and Cox, Public Procurement Directives in the European Union).
- **Today** indirect cross-border procurement are much higher, at **22.6%** of the number of awards and 20.0% of the value of awards. (European Commission, Measurement of impact of cross-border penetration in public procurement).
- **Too much bureaucracy** becomes a burden for entrepreneurship. Utilise technology to create stream-line procedures to facilitate bidder participation.
  - In Europe Article 59 of Directive 2014/24, introduces the European Single Procurement Document, allowing bidders to participate without providing all the relevant documentation required. Only the winning bidder will ultimately be required to present the documents.
  - Moreover, E-Certis will provide an updated list of documents required by the tendering authority.

# Encourage SME Participation

- Allowing smaller participants to bid enhances competitive pressure.
- In Europe the new procurement Directive encourages more SMEs to participate in cross-border procurements by:
  - restricting the turnover requirement to a maximum of twice the contract value size. Therefore, since the threshold for entering the tendering process in terms of company revenue is lower, smaller companies can compete with major market players.
  - permitting the authority to subdivide a contract into smaller parts. This may impede bid-riggers to allocate different aspects of the contract to their fellow conspirators, but will allow smaller companies to participate in the bidding of smaller contracts.

# Would new procurement criteria help the Edinburgh tram?

- Award selection needs to be based on a more holistic basis. In Europe the new procurement Directive encourages public authorities to consider:

Quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions.

Organisation, qualification and experience of staff assigned to performing the contract where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

After-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

# Conclusions

- Change will come gradually by recognising weaknesses;
- Recruit public sympathy and support.
- Choose your target well;
- Establish realistic penalty regime;
- Welcome foreign bidders.
- Encourage small new entrants.