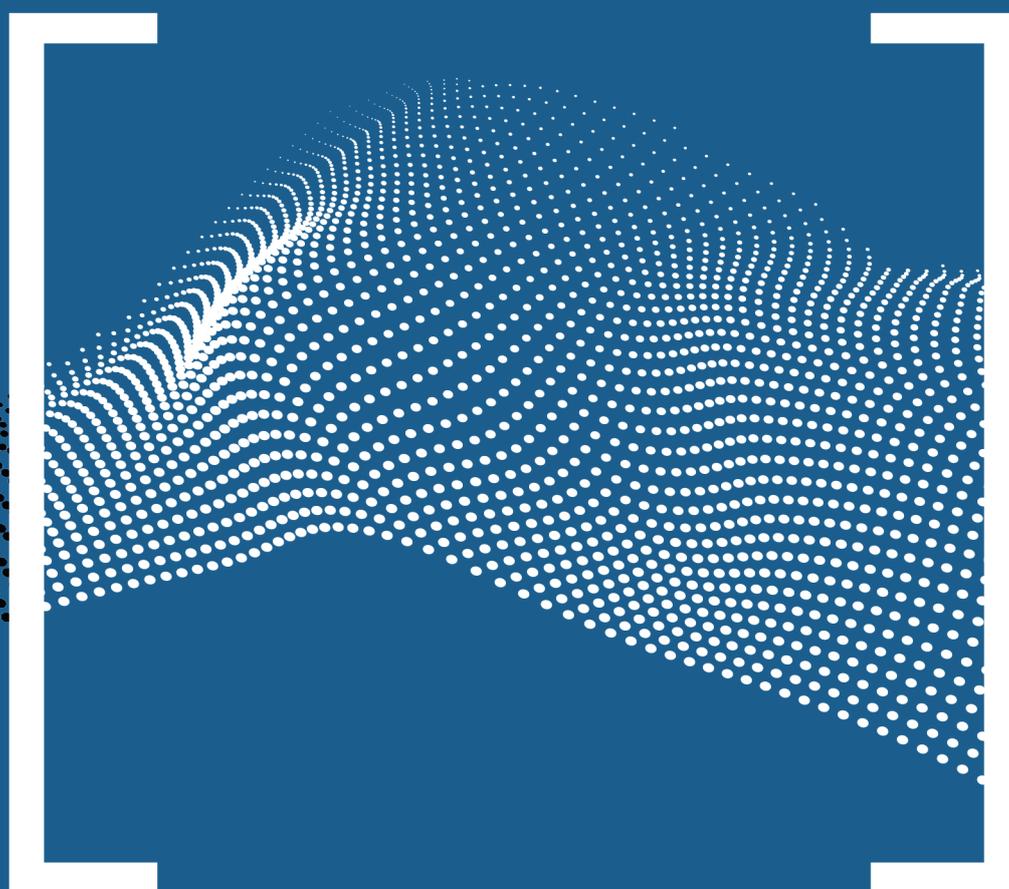


COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Focus on Bid Rigging in Public Procurement



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
Newsletter no. 17, July 2021



Inside a competition authority: **BOSNIA AND HERZEGOVINA**

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Foreword

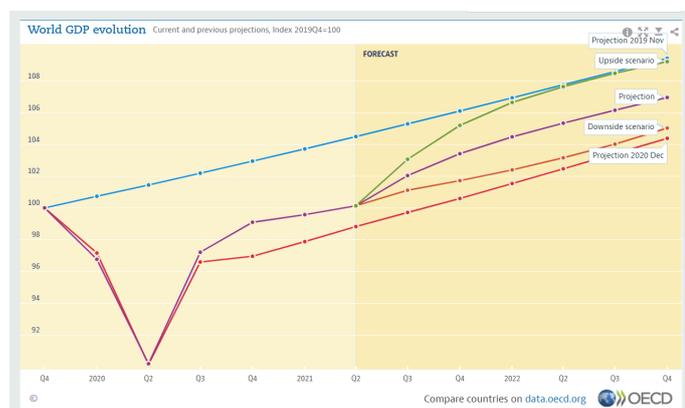
The economic Phoenix



In his Histories, written in the fifth century BC, Herodotus talks about the legend of the Phoenix – the fabled bird that burns up and rises from its ashes. Over the centuries, this myth has spread across several cultures, as a symbol of renaissance and hope.

We all hope that the world economy will rise again like the Phoenix, after the recession caused by the Covid-19 pandemic. Eastern Europe and Central Asia have not escaped the global economic downturn. According to OECD estimates, in 2020 the sanitary crisis inverted the upward trend of the previous years and hit Eastern Europe particularly hard (where the EU average decline of 5% was exceeded).¹

Fostering a quick and vigorous recovery is the key challenge for public institutions in the years to come. Public investments and spending will need to be combined with a set of coordinated measures, including those in support of investments and trade, employment, access to finance, as well as against the digital divide and corruption.



Source: OECD Economic Outlook, May 2021

Competition policy will have to be in the forefront of this struggle. Competition is the fuel that powers the economic system by creating the right incentives to invest, innovate and thrive. It also promotes competitive neutrality by preventing discriminatory terms between State Owned Enterprises and private companies or between domestic and foreign firms (see our July 2020 edition).

This edition of our review is dedicated to another area that promises to be crucial for competition enforcement and

advocacy in the next few years: the fight against big rigging in public procurement.

We can expect that public procurement, which accounts for 12% of gross domestic product and almost 30% of total government expenditures in OECD Members², will further increase as a reaction to the current crisis. It is paramount that public tenders are conducted successfully, with a view to selecting the best companies and saving public resources.

Many competition authorities have identified the fight against bid rigging as a priority for their efforts. By detecting and punishing bid rigging – which is a cartel, i.e. a serious antitrust infringement – they also deter other businesses from future wrongdoing.

The following articles highlight a broad range of inspiring initiatives that have been adopted by competition authorities in Eastern Europe and Central Asia, as well as by other advanced competition authorities in different continents.

A common theme seems to be the fruitful cooperation with public procurement bodies. Firstly, competition authorities can use their advocacy tools to help procurement bodies improve tender design and thus prevent cartels. Secondly, procurement officials can share their expertise and procurement data, thus enhancing infringement detection by competition authorities and contributing to more informed antitrust decisions.

Furthermore, our journey of exploration across competition authorities of Eastern Europe and Central Asia continues. This time we will discover the activity of the Competition Council of Bosnia and Herzegovina and will learn about its achievements and challenges from President Stjepo Pranjić.

The topic of the next issue of the review will be **market studies**, which represent a powerful tool for competition advocacy and enforcement. In particular, they allow competition authorities to gain an in-depth understanding of key sectors, especially when they are affected by quick changes in the business model. We would like to learn more about how antitrust authorities select, analyse and assess competition issues in specific sectors, and eventually use the findings of their studies. The deadline for your contributions is **15 October 2021**.

¹ OECD calculation based on the IMF database for the EU average. Source: IMF World Economic Outlook, April 2021.

² OECD (2019), Government at a Glance 2019, OECD Publishing, <https://doi.org/10.1787/8ccf5c38-en>.



Programme 2021

The Programme of the OECD-GVH Regional Centre for Competition for 2021 has been designed in a manner that enables it to be flexibly adapted depending on the developments of the Covid-19 pandemic, particularly in the first semester of 2021. As long as circumstances permit, we will organise in-person seminars, which represent the most complete and satisfactory format for training and networking purposes. However, should the Covid-19 outbreak still impose travel restrictions, in-person seminars will be replaced by virtual seminars.

In line with last year’s programme, traditional seminars on competition law (Section A of the Programme) are complemented by other initiatives aimed at developing the potential of the Regional Centre (Section B). The Heads of the Beneficiary Agencies will discuss and further explore these innovative activities at the 15th Anniversary Celebration of the OECD-GVH RCC “Reviewing the past to design the future”, scheduled for November 2021.

A. Seminars on competition law

Virtual Seminar – Tackling bid rigging in public procurement

2-4 March

Bid rigging involves groups of firms conspiring to raise prices or lower the quality of the goods or services offered in public tenders. OECD countries spend approximately 12% of their GDP in public procurement. This percentage can be higher in developing countries. Competition authorities may play a key role in preventing and tackling this anti-competitive practice, which costs governments and taxpayers billions of dollars every year. Expert competition officials illustrated enforcement and advocacy actions conducted in their jurisdictions, also in light of the OECD Guidelines for Fighting Bid Rigging in Public Procurement.

Virtual Seminar – Market studies: a key driver for competition advocacy and enforcement

18-19 May

Market studies assess whether competition in a market is working efficiently and identify measures to address any issues that are identified. These measures can include recommendations such as proposals for regulatory reform to remove competition restrictions. Market studies also provide comprehensive knowledge of the market in question, which can be valuable to better detect antitrust infringements and take more informed decisions. However, they are complex initiatives, which require a good plan and prolonged engagement. Competition experts from several jurisdictions shared their experience on market studies and drew on some good practices, also in light of the OECD Market Studies Guide for Competition Authorities.

Virtual Seminar – The assessment of abusive conduct by dominant players

21-22 September

Cases of abuse of dominance are becoming increasingly complex for competition authorities. Building on the best international practices, this seminar will go through the steps that lead to a careful and informed assessment, starting from market definition and the identification of market power. The discussion will then focus on the methods and tools that competition authorities may deploy to evaluate the effects of the conduct on competition and on consumers, in order to distinguish unlawful practices from legitimate competitive initiatives.

A. Seminars on competition law

GVH Staff Training

October
Budapest
(2 days, tbc)

Day 1 – Competition and consumer protection enforcement in the digital era: adjustment or reform?
The seminar will focus on a number of issues and developments that can be traced back to digitalisation: the role of data, additional criteria for assessing vertical restraints, the relationship between consumers and online platforms, and enforcement cooperation in global cases. As usual, particular attention will be devoted to the evolution of the EU case law.

Day 2 – Breakout sessions

In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.

15th Anniversary Celebration of the OECD-GVH RCC – Reviewing the past to design the future

10 November (tbc)
Budapest

In a globalised world, high expertise and international cooperation have become indispensable for competition authorities. Building on the successful experience of the Centre over the last 15 years and the international initiatives in these areas, the event will explore the ways in which the RCC's role as a catalyst for capacity building and enhanced regional cooperation can be further enhanced.

November
Russia (3 days, tbc)

RCC-FAS Seminar in Russia

Introductory Seminar for Young Staff – Competition law principles and procedures

6-9 December
Budapest

The aim of this seminar is to provide young authority staff with an opportunity to deepen their knowledge of key notions and procedures in competition law enforcement. Experienced practitioners from OECD countries will share their knowledge and engage in lively exchanges with the participants on cartels, mergers and abuse of dominance. We will discuss basic legal and economic theories as well as the relevant case law. Participants will also have a chance to face and discuss procedural issues through practical exercises.

B. Additional initiatives

Training course on competition principles: first set of videos

Launch of the first video (Antitrust Commitments), English version: February 2021

Launch of the first video (Antitrust Commitments), Russian version: March 2021

Launch of the second video (Competitive Neutrality), English version: April 2021

Launch of the second video (Competitive Neutrality), Russian version: May 2021

Launch of the third video (Bid Rigging), English version: July 2021

Launch of the third video (Bid Rigging), Russian version: July 2021

Launch of the fourth video, English version: September 2021

Launch of the fourth video, Russian version: October 2021

Launch of the fifth video, English version: December 2021

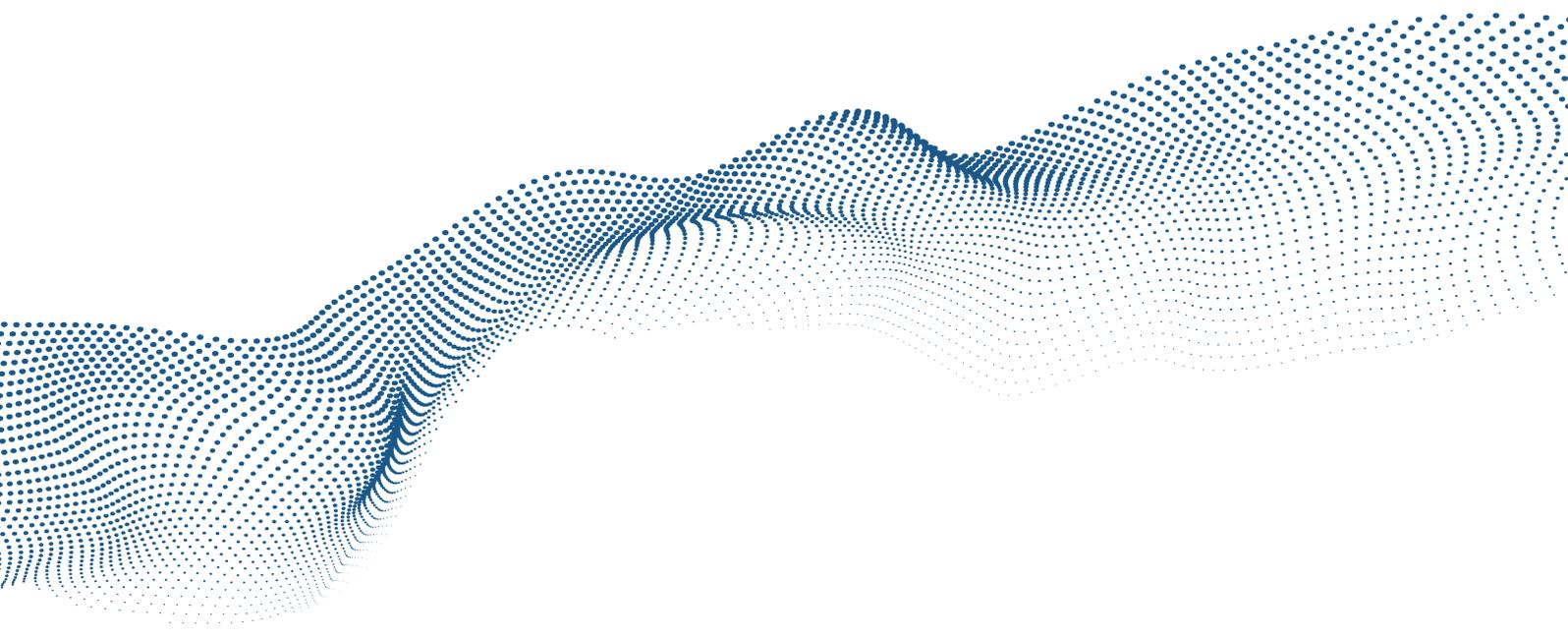
Launch of the fifth video, Russian version: December 2021

Questionnaire for Heads of Agencies

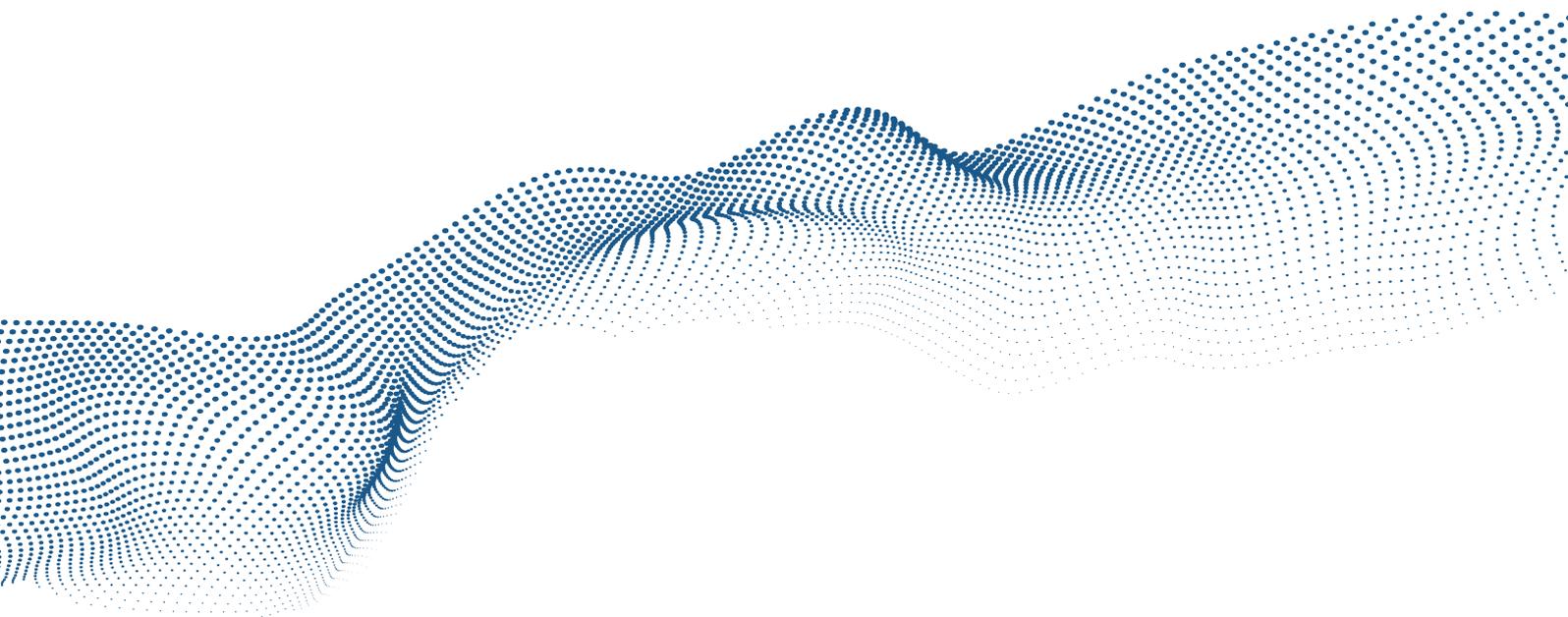
In preparation for the celebration of the 15th Anniversary, the RCC will circulate a questionnaire aimed at collecting the views and comments of the Heads of Agencies on a number of future opportunities for the Centre, e.g. regarding policy discussion, internal dissemination within the agencies, enforcement cooperation and synergies with other RCCs. The replies will be elaborated into a working document to be discussed at the Anniversary.

15th Anniversary Publication: Special supplement of the RCC Newsletter on regional and international cooperation

Renato Ferrandi,
Senior Competition Expert,
Renato.FERRANDI@oecd.org



Fighting Bid Rigging in Public Procurement



The fight against bid rigging: a goal for competition authorities in Eastern Europe and Central Asia



Despina Pachnou,
Competition Expert, OECD



Renato Ferrandi,
Senior Competition Expert, OECD

1. What is bid rigging and why it is important to combat it

1.1. Bid rigging is a competition law infringement

Bid rigging is an illegal agreement through which companies that should be genuinely competing in a public procurement process collude to fix their bids, in order to raise prices and/or lower the quality of the goods or services that they offer. Bid rigging is a hard-core cartel conduct, prohibited under competition laws. The terms collusion, cartel and bid rigging are often used alternatively.

Bid rigging occurs between bidders or potential bidders, and does not require the involvement of a procurement official. If a public procurement official is involved, bid rigging may be accompanied by other illegal and punishable conducts, like corruption, fraud and mismanagement.

1.2. Bid rigging is costly

Public procurement is a core government spending activity, with direct impact on the quality of public services offered to citizens in sectors such as healthcare, education and infrastructure. In 2017, public procurement represented 11.8% of gross domestic product in OECD Members (ranging from 4.9% in Mexico to 19.5% in the Netherlands) and 29.1% of total government expenditures, making it a core economic activity.³

When bid rigging concerns a public procurement process, i.e. when suppliers rig their bids to decide, in advance, who will win in a tender for a public contract and how, public procurement becomes pointless, and the public budget as well as the quality of services rendered to citizens are harmed. Studies show that bid rigging in public procurement can increase prices by 20%⁴, and this percentage can be even higher: for example, Mexico's competition authority, COFECE, estimated that bid rigging

overcharge raised prices by 57.5% in the procurement of insulin.⁵ Combatting bid rigging is crucial to ensuring that public procurement procedures are competitive, and that the public sector has opportunities to achieve value for money. Recognising this, the OECD developed Guidelines for Fighting Bid Rigging in Public Procurement ("Guidelines") in 2009 and, in 2012, included and expanded them in an OECD Recommendation on Fighting Bid Rigging in Public Procurement ("Recommendation"). The Recommendation encourages jurisdictions to design public procurement to promote competition that is more effective and reduce the risk of bid rigging. This aims at deterring bid rigging at the front end of public procurement. The Recommendation also aims to help detection of collusion in tenders and its reporting to the competent competition authority. The Recommendation and In the last 10 years, the OECD Competition Division's Secretariat has conducted numerous projects on fighting bid rigging in public procurement, reviewing the quality of procurement law and soundness of procurement practices of public entities against the Recommendation.⁶ The Recommendation is currently scheduled to be updated to reflect developments of the last 10 years, and expand its scope with new policy recommendations to governments.

2. Competition enforcement to tackle bid rigging

Mature and developing competition authorities around the world prioritise investigating and prosecuting bid-rigging cartels, and demonstrate an appetite for enforcement.

2.1. The detection tools: leniency, third party whistleblowers, cartel screens

The most usual bid-rigging detection tool is leniency. Leniency programmes are ubiquitous: all OECD members have one. Leniency programmes are widely considered the most effective

³ OECD (2019), Government at a Glance 2019, OECD Publishing, <https://doi.org/10.1787/8ccf5c38-en>.

⁴ Smuda, F. (2015), Cartel Overcharges and the Deterrent Effect of EU Competition Law, <http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf>.

⁵ https://cofece.mx/wp-content/uploads/2017/11/HISTORIA_IMSS_080415.pdf

⁶ www.gvh.hu/en/press_room/press_releases/press_releases_2016/hungarian_success_in_the_icn_wbg_competition_advoc.html?query=kartell%20chat&query=kartell%20chat. GVH was awarded an honourable mention for this tool, in the 2016 International Competition Network and the World Bank Group advocacy contest.

tool for detecting cartels in mature jurisdictions.⁷

In certain economies with tight industry structures, high rates of family-owned businesses or with a less developed competition culture, leniency programmes may be less effective. In response, many jurisdictions established anonymous whistle-blower systems. For example, in Hungary, the GVH introduced an anonymous contact system for providing information and asking questions on cartels, called the cartel chat.⁸

Competition agencies increasingly complement their leniency and whistle-blower programmes by pro-actively checking procurement data to find incriminating errors cartelists make, like suspicious bidding and pricing patterns, and identify cases that deserve scrutiny.

These checks were initially conducted manually, on paper-kept data. Paper-based research remains an option, but the increasing availability of reliable electronic public procurement data and advances in digital data manipulation methods paved the way for competition authorities' development of digital screening tools to detect bid rigging (digital cartel screens).

To put it simply, screens are digital filters, which are designed on the basis of competition red flags and that competition authorities apply to digital procurement data to identify and quantify the probability of bid rigging and single out cases that merit enforcement attention. Such red flags might, for example, be independent bidders offering identical prices, sudden price increases, competitors normally active in the particular procurement market refraining from bidding, etc. There are different methods of digital screening, ranging from sophisticated software based on complex algorithms to simple statistical methods.⁹ As a general rule, screening is a repetitive exercise and can be resource-intensive. It is important to note that the finding of red flags show probability and do not constitute evidence of bid rigging, unless in extreme circumstances of undeniable overwhelming findings, and under specific conditions. Competition authorities should look at their screening findings, decide if they will open a case, and proceed with their usual investigation methods.

2.2. The importance of reliable procurement data for identifying bid rigging

In order for both digital and paper-based bid-rigging screening methods to be effective, data access and quality are crucial. First, competition authorities need access to the procurement data held by the procurement authorities in order to check them and apply their filters. Second, however sophisticated the screening method, its effectiveness depends on the quality of the underlying data to which screening is applied.

In OECD projects on fighting bid rigging in public procurement, the Secretariat consistently recommends that data should be consistent and error-free, so that data records can be linked and comparisons made, and time series constructed. For example, pricing data should be recorded in the same way (currency, denominations, corresponding units etc.); and fields should use common rules (naming conventions, coding etc.). Format is important: for example, detailed records in spreadsheets or databases are more user-friendly than electronic copies of contracts. Data should also fit the proposed analysis: for example, it is not enough to have records of contract award decisions, but also of all bids and bidders. Advocacy may be necessary to gather support by procurement bodies and discuss how procurement data should be collected and kept, and agree on access rights for competition authorities. In some cases, legislative change may be necessary, when procurement data are protected by law and cannot be disclosed to other public sector bodies like competition authorities.

2.3. Sanctions: administrative, civil and criminal liability; debarment from participation in tenders

Bid rigging is illegal in all OECD jurisdictions, and a criminal offence in 29 out of 37 Members.¹⁰ Out of these 29 Members, 19 have criminal sanctions for all hard-core cartels; the additional 10 that have criminal sanctions for bid rigging only, and punish other cartels with administrative sanctions.

Civil liability, through private damages actions seeking compensation for harm caused by cartels is picking up. In the European Union, the competition litigation landscape is changing through the application of the directive on antitrust

⁷ OECD (2018), Workshop on cartel screening in the digital era at www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm

⁸ 18 OECD Members (Australia, Canada, Chile, Denmark, Estonia, France, Greece, Iceland, Ireland, Israel, Japan, Korea, Mexico, Norway, Slovak Republic, Slovenia, United Kingdom and the United States) provide for criminal sanctions for all hard-core cartels, therefore including bid rigging. An additional 11 Members (Austria, Belgium, Colombia, Czech Republic, Finland, Germany, Hungary, Italy, Poland, Portugal and Turkey) provide for criminal sanctions for bid rigging cases only. See www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm0

⁹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014L0104>

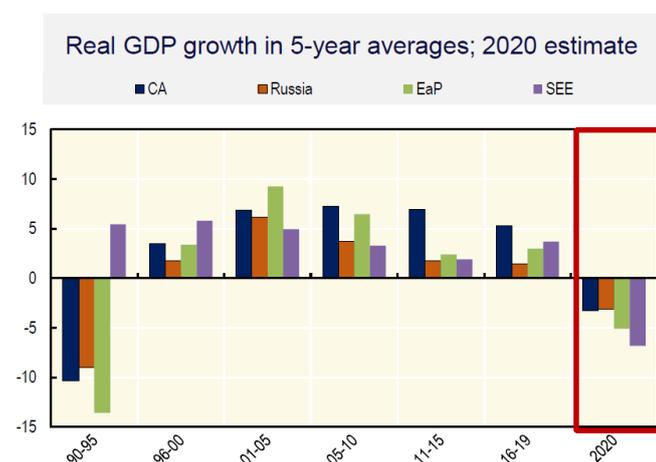
¹⁰ For example, the Danish competition authority published guidelines to help distinguish whether a joint bid is pro- or anti-competitive, and provide advice on information exchange in tenders; see Danish Competition and Consumer Authority (2020), Joint bidding under competition law, www.en.kfst.dk/nyheder/kfst/english/news/2020/20201211-new-guidelines-on-joint-bidding/ For guidelines issued by several competition authorities, see OECD (2016), Fighting bid rigging in public procurement: Report on implementing the OECD Recommendation, at www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf

damages actions¹¹, which aims to make it easier to sue for cartel-induced harm and introduces common standards for access to evidence, limitation periods, passing-on defences, standing of indirect purchasers, quantification of harm, joint liability, etc. In the case of bid rigging, the main harmed party, and therefore the plaintiff in such lawsuits, is the procurement authority itself. In such cases, support by the competition authority is crucial, to help the procurement authority put together the law suit, with sufficient information to be able to win the case.

In many jurisdiction, companies that have been found guilty of bid rigging can be debarred from participating in other tenders, for a period of time. Some jurisdictions impose debarment automatically, and some at the discretion of the procurement (usually) or competition (rarely) authority. For instance, discretion may be needed to assess how many companies would and should remain in the public procurement market, after debarment is imposed, to make sure that the market remains competitive and that supply is not endangered.

2.4. What competition authorities in the region have done and could do

As illustrated by the OECD report “Improving the Legal Environment for Business and Investment in Central Asia” (2021)¹², the economies of Eastern Europe and Central Asia entered a serious recession in 2020, following the Covid-19 pandemic. The impact seems to be more pronounced in Eastern Europe than in Central Asia and Russia (see Figure below).



Source: IMF (2021), World Bank (2021), Google (2020)

Source: OECD, “COVID-19 in Central Asia: Implications for Private Sector Development” (forthcoming)

Note: The Central Asia region (CA) comprises the countries of

Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan. The Eastern Partnership (EaP) involves Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine. The SEE (South East Europe) region encompasses the following economies: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, North Macedonia, Kosovo¹³, Montenegro, Romania and Serbia.

Competition authorities in the region are aware that it is even more important to ensure value for money in public procurement at times of economic recession and have set the fight against bid rigging as a priority for their action in the coming years.

In 2021, the Georgian National Competition Agency concluded an investigation into a case of bid rigging related to free community canteen services. In Romania, the Competition Council discovered that during a long period more than seven years some firms rigged public tenders for the acquisition of electric meters. In 2019, the Antimonopoly Agency of Kazakhstan carried out two major investigations on big rigging in public procurement for the supply of cars and trucks. Also in 2019, the Antimonopoly Committee of Ukraine fined participants in a collusion that affected seven tenders in the military defence sector, also thanks to the introduction of e-procurement in Ukraine, which allowed big data analysis and increased detection opportunities.

For their part, the Albanian Competition Authority and the Serbian Commission for the Protection of Competition have an appreciable record of formal proceedings tackling horizontal agreements, including bid rigging in public procurement. In 2018, the highest court in Serbia upheld a complex bid rigging decision by the Commission for the Protection of Competition on the procurement of consumable material for personal and collective hygiene by the Ministry of Defence.

The competition authorities of the region can further strengthen the fight against bid rigging. To this end, as discussed below, they should co-operate with the domestic public procurement bodies to reduce the risks of bid rigging through careful design of the procurement process, and to detect bid-rigging conspiracies if they occur.

3. Competition advocacy to prevent bid rigging

Competition law enforcement is regularly accompanied by advocacy initiatives undertaken by competition authorities to raise awareness on bid-rigging costs, promote competition in public procurement, and recommend good practices in the prevention and detection of collusion. Enforcement and advocacy are mutually reinforcing. Through their enforcement

¹¹ OECD Public Procurement Toolbox, Checklist for protecting competition when splitting contracts into lots, www.oecd.org/governance/procurement/toolbox/search/checklist-protecting-competition-splitting-contracts-lots.pdf

¹² <https://www.oecd.org/eurasia/improving-legal-environment-business-central-asia.htm>. The Improving the Legal Environment for Business and Investment Central Asia project looks to address the legal and regulatory frameworks for business and investment in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. The project report, discussed at a ministerial meeting in September 2020 and launched in April 2021, presents the findings of an assessment of ten dimensions of the legal environment that are crucial for a healthy business climate.

¹³ This designation is without prejudice to positions on status, and is in line with United Nations Security Council Resolution 1244/99 and the Advisory Opinion of the International Court of Justice on Kosovo’s declaration of independence

cases, competition authorities acquire experience and insights in markets prone to cartelisation, the likely incidence of bid rigging, as well the clues that bid rigging leaves behind. This knowledge can feed into advocacy initiatives. Likewise, advocacy can support the introduction of pro-competitive rules and practices, and trigger reporting to the competition authority by public procurement officials of bid-rigging suspicions.

3.1. Recommendations to policy makers

Some competition authorities are vested with the power to issue opinions and recommendations addressed to policy makers, proposing measures that promote competition and lift barriers to competition, including recommendations to amend the public procurement rules.

3.2. Guidelines and ad hoc advice to procurement officials

The Recommendation gives concrete examples of where the right balance between competition and procurement policies should be struck: for example, allowing joint bids by different suppliers, but only under pro-competitive conditions, or balancing transparency requirements, which are indispensable to fight against procurement corruption, with the right level of protection of information, in order not to facilitate collusion.

Competition authorities across the OECD issue guidelines to assist public procurement authorities in their work. The OECD Competition Committee (through Working Party 2 on Competition and Regulation) has issued detailed guidance on how to split contracts into lots¹⁴ and how to deal with abnormally low tenders.

3.3. Capacity-building

Training public procurement officials on the risks, costs, prevention and detection of bid rigging is extremely useful. Procurement officials are in the best position to limit and identify collusion in public tenders, as they have comprehensive knowledge of the relevant market, access to tender data and documents, and opportunities to observe patterns of behaviour in the bidding process. By acquiring appropriate knowledge, public officials can design tenders that make bid rigging difficult, and be aware of cases that merit reporting to the competition authority. The Recommendation encourages training public procurement staff in bid-rigging prevention and detection.

Likewise, training competition officials on public procurement law and practice allows them to build better enforcement cases, that are more likely to correctly identify and prove the competition offence and which will be able to withstand successfully judicial scrutiny.

All OECD projects fighting bid rigging conducts include extensive capacity building for senior public procurement officials on the risks and costs of bid rigging, the forms it can take, good practices to design competitive tenders and to detect collusion by bidders.

3.4. The importance of inter-institutional co-operation agreements

In country-specific projects, the Secretariat recommends putting in place formal co-operation agreements between the competition and procurement authorities that set out the terms of inter-institutional co-operation and specify types of support and joint activities.

In the context of a project on fighting bid rigging in the health sector in Peru, the Secretariat has prepared a draft agreement for the co-operation of Peru's Social Insurance agency EsSalud and the Peruvian competition authority Indecopi, to, on the one hand, promote competition and prevention of bid rigging in EsSalud's procurements, and, on the other hand, improve detection and investigation of bid rigging by Indecopi.¹⁵

3.5. What competition authorities in the region have done and could do

All competition authorities of Eastern Europe and Central Asia can formulate opinions and recommendations regarding laws or regulations that affect or may affect competition. In performing this duty, they usually co-operate with the government and regulatory institutions, including the domestic public procurement bodies.

Since 2019, the Albanian Competition Authority has in place a Memorandum of Understanding with the Albanian agency of public procurement on co-operation to fight against bid rigging in public procurement. Upon request by the domestic agency for public procurement, the Competition Council of Bosnia and Herzegovina recently analysed the rules on public tenders. The Commission for the Protection of Competition of North Macedonia published Guidelines for detecting bid rigging in public procurement, in co-operation with the Bureau for Public Procurement and, in 2019, issued a formal opinion on the national Law on Public Procurement. The Agency for Protection of Competition of Montenegro signed a Co-operation Agreement with the Public Procurement Administration in 2015. The Romanian Competition Council (RCC) compiled the Bid-Rigging Module (MLT) in 2010. Under this structure, RCC experts cooperate and exchange information with representatives of the national regulator on public procurement, the National Council for Solving Complaints, the Prime Minister's Control Body, the Romanian Court of Accounts, the Prosecutor's Office

14 OECD 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

15 www.oecd.org/fr/daf/concurrence/fighting-bid-rigging-in-the-health-sector-in-peru-a-review-of-public-procurement-at-essalud.htm

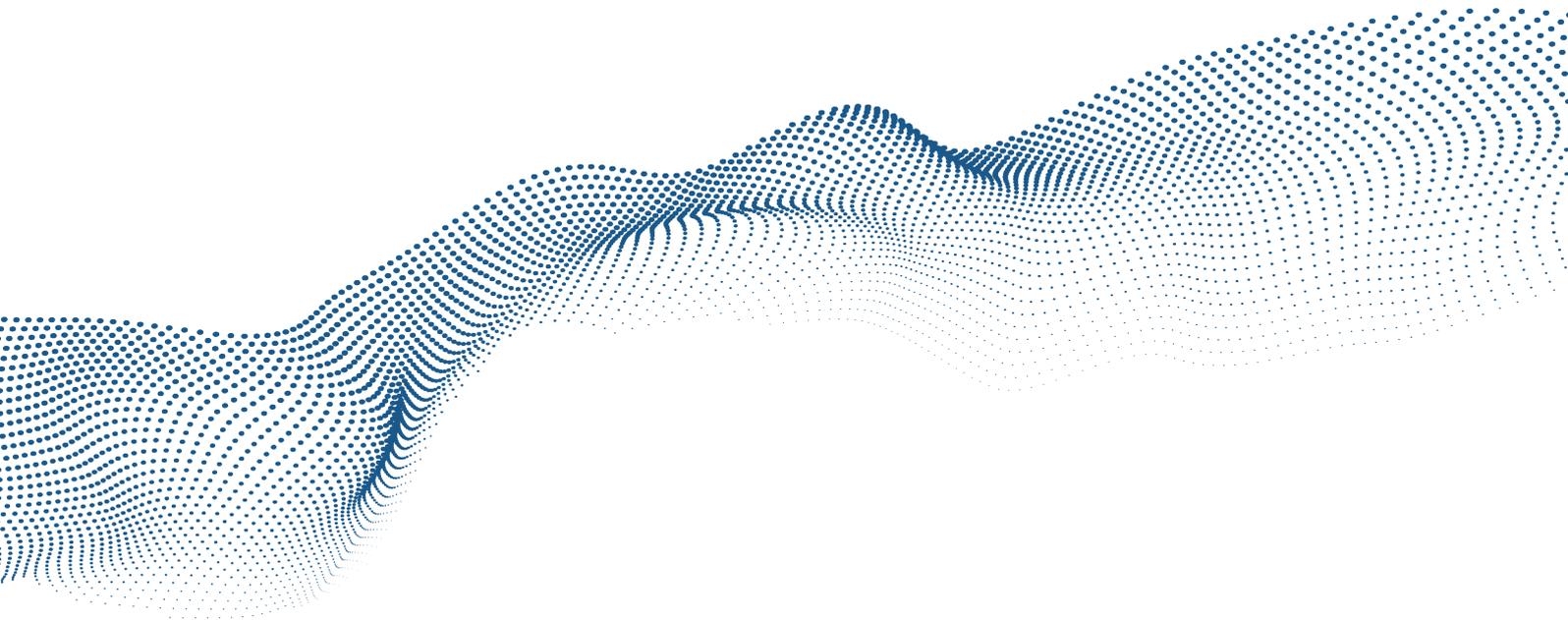
attached to the High Court of Cassation and Justice (Romanian Supreme Court), and the Antifraud Division.

These initiatives were often coupled with outreach initiatives aimed at raising competition culture and awareness. For example, the Serbian Commission for Protection of Competition organised several public events with other public authorities over the last few years, including public procurement officials. In 2019, the Georgian National Competition Agency held 26 seminars in the 11 regions of Georgia, in which the topic of cartels in public procurement was also highlighted.

4. Conclusions

Efficient and effective public procurement is crucial to provide citizens with essential services. Competitive procedures are the most effective way to identify the best suppliers and obtain fair and reasonable prices, while fighting corruption. However, the outcome of the procurement procedures may be affected by bid rigging.

We can expect that the recession caused by the Covid-19 crisis will further increase the relevance of robust public procurement. If the competition authorities are successful in their efforts to deter and detect bid rigging by a combination of enforcement and advocacy initiatives, they can help foster competitive markets and contribute to a quick, vigorous economic recovery.



Corruption, public procurement and competition in Eastern Europe and Central Asia

The Case of the Energy sector in Ukraine



Olga Savran,
Manager,
*Anti-Corruption Network for Eastern
Europe and Central Asia (ACN), OECD*



Oleksandra Onysko,
Junior Anti-Corruption Analyst,
Anti-Corruption Division, OECD



Tanya Khavanska,
Legal Analyst at Anti-Corruption
Division, OECD

Corruption has repeatedly been referred to as one of the reasons why the promised benefits of transition from a planned economy to a free market did not reach the citizens of Eastern Europe and Central Asia. Fighting corruption is an uphill struggle. Experience from several countries shows that petty or administrative corruption can be eliminated relatively easily through sectoral reforms and e-tools. High level political corruption is more difficult to tackle, since it is more difficult to detect and to address through existing corruption prevention and enforcement tools. Further, it is the high level corruption that channels large amounts of public funds to those in power and holds up economic and political development.¹⁶

Public procurement has always been known as a high risk area for corruption, and not only in Eastern Europe and Central Asia. Many studies have been pursued, and many tools designed to prevent corruption in procurement. E-procurement is becoming common in the region. In Ukraine, systems such as Prozzoro, and its civil society twin Dozzoro, have created transparency and helped save significant amounts of public funds. But e-tools alone cannot eliminate corruption in public procurement, as they too can be corrupted or circumvented by those holding important positions. For example, the Government of Ukraine has decided by a Decree to implement a very large infrastructure project outside the Prozzoro system.

Competition was not as central to public debates in the region as

corruption in the early years of economic transition. However, with growing public awareness and more transparent public data, e.g. through the disclosure of beneficiary ownership and investigative journalism, the spotlight has been on high-profile cases, which has made citizens aware of how high-level corruption works also by restricting competition.

In this piece, we explore the workings of corruption through the bid rigging of public procurement in the energy market in Ukraine. The forthcoming OECD/ACN study of corruption risks in the energy sector in Ukraine will shed more light on the situation and will provide a typology of corrupt schemes used in this sector.

It is common public knowledge in Ukraine that the energy sector is controlled by oligarchs large and small. Oligarchs usually have 'diverse portfolios' and control companies in other sectors, such as banking, transportation, agriculture, trade, and main TV channels, known as industrial-financial groups. Oligarchs also control their own factions in Parliament and the local administration. They have been able to capture the state, including law-enforcement and other control bodies. While at the national level these oligarchs are in a permanent struggle to control greater shares of different markets, at the regional level different groups cooperate by sharing the profits of the exploitation of final consumers among themselves. For example, according to the Anti-Monopoly Committee of Ukraine, the losses for consumers in Ukraine's energy market from increased prices and tariffs by monopolies account for 20% of GDP.¹⁷ Such oligarchic control in the energy sector leads to high prices for consumers, underinvestment into socially significant projects, and reinforces corrupt elites' control over both the economy and politics.

What is the significance of these problems for competition authorities? At first glance, competition is about preventing cartels

¹⁶ <https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf>, page 15

¹⁷ <https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf>, page 164

and market power, not about bribes, while public procurement is about the effective use of public funds for state needs, and anticorruption rules applicable to high level and political officials and political parties are enforced by specialised bodies. Anti-corruption, procurement and competition experts rarely find common grounds for cooperation, as they act for different public bodies and use different legal tools. And yet, the links between high level corruption and competition are strong and detrimental to society. This is made particularly clear by a case concerning transformers that was reported in the Ukrainian media.

In May 2015, the state-owned company NPC Ukrenergo announced tenders for the purchase of 27 transformers for 4,95 bln UAH. The purchase was supposed to be part of Ukrenergo's Investment Programme, which was approved by the energy sector regulator, the National Energy and Utilities Regulatory Commission (NEURC), only in July 2015. Foreign companies did not participate in the tender, which was announced before NEURC's (unexpected) approval, in part because it was financially risky to participate in a tender for which money had not been allocated from the budget. The Ukrainian company "Zaporizhtransformator" (ZTR) won a bid in which the price of the transformers was much higher than the average market price. In effect, in February 2015 "Zaporizhtransformator" exported the same type of transformers to Russia at a price that was almost seven times lower.

The possible embezzlement of almost 2 billion UAH created a media scandal. The case was detected by a civil society group and investigative journalists. When the scandal broke, the Anti-Monopoly Committee of Ukraine (AMCU) annulled the results of the tender for violation of the legislation on protection of economic competition by a successful bidder. The Kyiv Prosecutor office started criminal proceedings for embezzlement, misappropriation of public funds and abuse of office.

After NEURC's approval of the Ukrenergo's Investment Programme, Ukrenergo announced a new tender for the purchase of 22 transformers at 2 billion UAH, despite it being technically impossible to install even 6 transformers per year.

Since the AMCU prevented the acceptance of ZTR's proposal, in October 2015 changes were made to the tender documentation, the subject of procurement was divided into 3 lots, and qualification requirements were improved so as to stimulate the participation of foreign manufacturers. As a result, well-known manufacturers such as Siemens, ABB, Alstom, Kvant-Service (represented Hyundai) and Daewoo were invited to bid. After the results of the first tender were cancelled, the tender value

of the transformers was reduced to UAH 928 million. ZTR – the company that had originally bid – still won, but, due to transparent and competitive procedures, the price paid by the State fell to the market level.

Afterwards, ZTR still won a number of other Ukrenergo tenders conducted through the negotiation procedure, in which ZTR was the only bidder. Ukrenergo explained that a negotiation procedure was necessary for technical reasons. Eventually management changed, the transparency of Ukrenergo's tenders increased, and now this SOE buys the same services and products much cheaper than other players on the market.¹⁸

What are the challenges for anti-corruption, competition and procurement and other controlling bodies to join their forces in order to prevent or sanction such behaviour using their powers and resources? As noted above, they operate within different legal and institutional frameworks, and communication between them is not well established. For example, during the anti-corruption monitoring of Ukraine by the ACN, we did not see references to information from competition authorities as a regular intelligence source for opening criminal proceedings. Other reasons relate to the lack of independence, capacity and transparency of these bodies, which are key factors to enable them to implement their mandates without pressure from corrupt elites.

Going forward

Very often corruption and competition issues go hand in hand. Moreover, without the bribery of public officials or of the company's top management, it would even be impossible to break competition rules in some cases. At the same time, lack of competition allows corruption to flourish.

Both corruption and bid rigging in public procurement are difficult to prove due to the secretive nature of such arrangements and the parties efforts to conceal them. Therefore, it is essential to create mechanisms to improve the fight against such arrangements and improve coordination between enforcement bodies.

One clear such mechanism would be to oblige competition, public procurement or anticorruption authorities to alert each other when one of them discovers in the course of an investigation that there is a ground for suspicion of corruption or bid rigging. In Ukraine, such cooperation works only one way at present: the AMCU launches (or not) investigations based on the reports submitted by the National Anti-Corruption Bureau of Ukraine (NABU), while competition authorities usually do not notify anti-

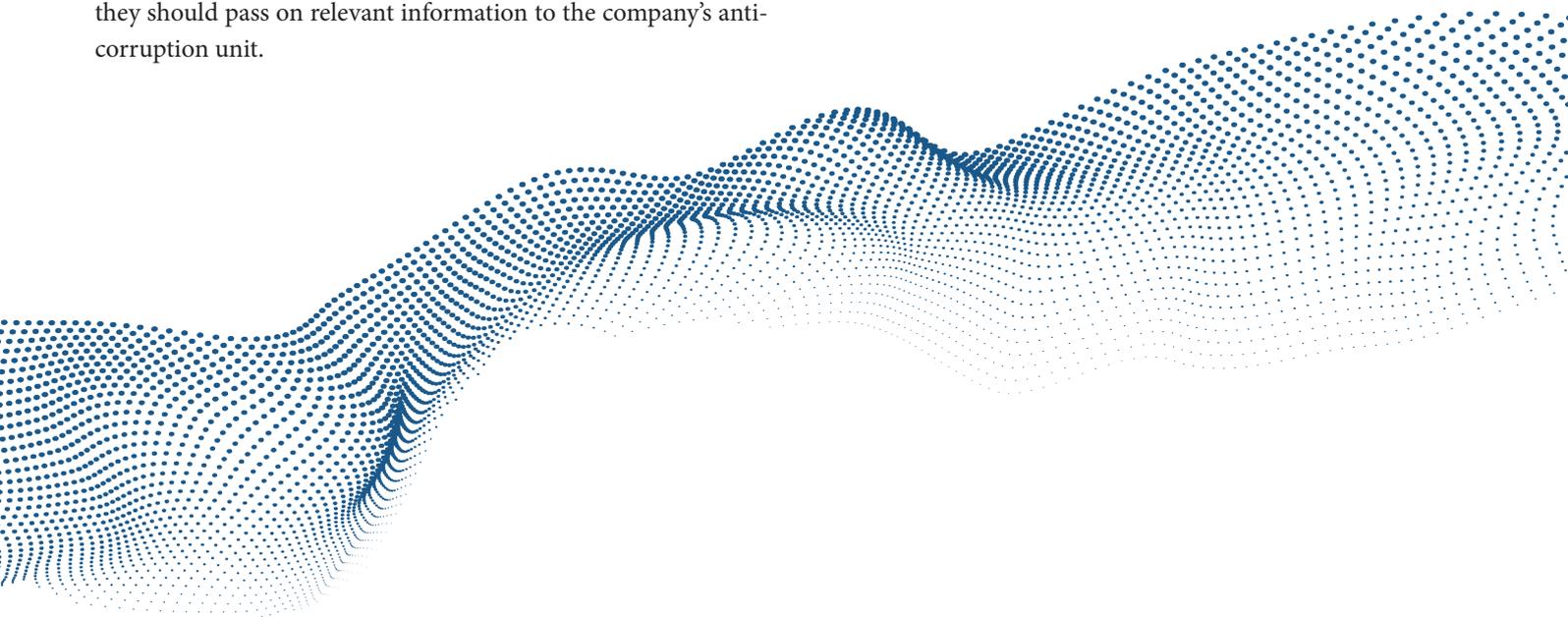
¹⁸ <https://expro.com.ua/en/articles/ukrenergo-case-successful-corporate-experience-vs-political-accusations>

corruption colleagues of any cases which could fall within their competence. Some sort of mandatory reporting by competition authorities to the anti-corruption bodies would increase the level of detection of corrupt activities in public procurement. It is also important to facilitate the use of investigative materials gathered by one of the authorities as evidence by another body investigating the same practice.

Joint trainings for staff of the anti-corruption law enforcement agencies and of the competition regulator would help create links between the relevant authorities and strengthen inter-agency cooperation. This may help avoid cases like the one where, e.g. in April 2021, the Kyiv District Administrative Court declared illegal the AMCU's procedural acts in a lawsuit against Ukrnafta because the AMCU had used data from the pre-trial investigation conducted by the NABU.

Tackling corruption in Ukrainian courts is yet another challenge which is of the utmost importance to address.

In addition, cooperation between procurement, audit and compliance colleagues at company-level is of paramount importance. It is in the interest of each company to make staff of these departments work as partners. In particular, if internal auditors or the procurement team pinpoint any possible fraud, they should pass on relevant information to the company's anti-corruption unit.



Tackling bid rigging in Serbia

B2M – A recent success story



Maja Dobrić,
*Independent Adviser,
Commission for
Protection of Competition,
Serbia*



Miki Vidaković,
*Senior Adviser,
Commission for
Protection of Competition,
Serbia*

Introduction

Public procurement amounts to approximately 8%¹⁹ of Serbia's GDP annually, making these markets a strategically important segment for continuous activities and efforts of the Commission for Protection of Competition (CPC).²⁰

The primary focus of the CPC in relation to public procurement is preventing and resolving bid rigging and collusion between independent bidders, whereas issues of potential corruption and protecting bidders' rights are forwarded to the competent authorities.

Bid rigging has been one of the key focuses of the CPC in the past decade and is considered one of the hardest forms of competition infringements.²¹ Approximately one in five of the CPC's infringement decisions relates to public procurement, as well as almost a third of competition-related court decisions. This kind of infringement has also been the first successful leniency application at the CPC and the primary focus of the majority of formal and informal complaints received by the CPC over the fifteen years of the authority's existence.

At the moment, the CPC has five ongoing bid-rigging investigations.

Changes to the legislative framework

When it comes to the procurement process itself, the new Law on Public Procurement in Serbia came into force in 2019 and regulates bidding terms in a slightly different manner than the previous law, although the competencies of the CPC in light of tackling competition infringements remain unchanged.

The legislative changes seek to increase efficiency and competition in public procurement procedures by reducing the administrative burden and participation costs, while increasing transparency and efficiency in implementing public procurement. The new

electronic system of public procurement and the newly improved publicly available Public Procurement Portal, launched in 2020, have significantly increased transparency of bidding outcomes and can be expected to aid the CPC in its efforts to tackle collusion in these markets.

Investigations and activities

In addition to monitoring and enforcement activities, the CPC has engaged in substantial advocacy activities when it comes to bid rigging. A decade ago, the CPC issued an instruction to procurers on how to detect possible rigged bids,²² based on the OECD Guidelines for fighting bid rigging in public procurement. In order to raise awareness of potential forms of bid rigging, the CPC has published various opinions on specific topics (such as consortium bidding, independent bids by related entities, urgent procurement etc), brochures and educational pamphlets, as well as adapted short videos on fighting bid rigging.²³

In addition, over the past decade, representatives of the CPC both organised and participated in various roundtables, trainings and joint projects with the public procurement authorities in Serbia as well as the Serbian Chamber of Commerce.

B2M and others

In a recent decision, the highest court in Serbia upheld a decision in a bid rigging case involving several companies and a complicated mechanism to rig the tender.²⁴

The case originated following a complaint forwarded to the CPC by the Public Procurement Office, involving a possible bid rigging in tender for the procurement of consumable material for personal and collective hygiene by the Ministry of Defence. The tender was organised for a three-year period and divided into 25 lots, according to the type of goods. The concept of this tender was very specific, as the Ministry of Defence intended to

¹⁹ Based on reports of the Public Procurement Office

²⁰ The views expressed herein are those of the authors and do not necessarily reflect those of the CPC

²¹ CPC guidelines available in Serbian: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/11/NOVE-SMERNICE-MAJ-2011.pdf>

²² Available in Serbian: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/Uputstvo-za-otkrivanje-namesteh-podnada-u-postupku-javnih-nabavki.pdf>

²³ Videos were adapted in cooperation with the CMA

²⁴ Decision no. 4/0-02-61/2018-26 of November 26, 2018, available here: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2019/01/26.11.2018-B2M-DECISI-ON-on-measures-for-protection-of-competition.pdf>

procure goods for a three-year period at a value of approximately 3,000,000 € + VAT. For each of the 25 lots, three most favourable bidders were chosen, and the most favourable of those three signed a 1-year contract. After the expiration of that contract, only those three bidders entered a new “mini-tender”, where they could not bid with less favourable conditions than in the initial bid. This complexity of the tender itself (in a manner that is not envisaged by the Law on Public Procurement) had an impact on the theory of harm and the approach taken when resolving the case.

Upon acquiring and analysing excerpts from the minutes of the bid opening, copies of all the bids and other tender documentation, a pattern emerged between the bidding strategies of several companies, which indicated possible collusion. A comparison of bids revealed a pattern containing the following:

- certain companies had a very similar price and other trade conditions (price difference from 0.05 RSD to 0.10 RSD (from 0.00042 € to 0.00084 €), whereas the price difference between items was always the same, and offers contained the same offer validity period and delivery period);
- companies with the identified pattern appeared in groups of three, with B2M as the best offer among those companies;
- almost all bids had the same manufacturers of goods, for each product;
- identical manufacturer specifications (usually given to bidders on request) were submitted;
- bids submitted directly several minutes before the deadline;
- only the representative of B2M was present on the bid opening held just after the deadline.

This pattern formed grounds for a reasonable assumption that the tender had been rigged, and the CPC initiated *ex officio* proceedings against five companies under the presumption of bid rigging; B2M was perceived as the leader of the group with four additional companies as “satellites”, appearing with B2M two at a time for each relevant lot and within the identified price pattern. This kind of grouping ensured that these companies would be the ones chosen initially and the ones that would bid in the subsequent mini tenders. During the proceedings, the CPC gathered both direct evidence and indirect evidence.

Upon initiating *ex officio* proceedings, the CPC conducted synchronised and simultaneous dawn raids at the premises of five companies, three of which were parties of the proceedings and two of which were affiliated undertakings of parties. At the time, this was the biggest dawn raid the CPC had conducted and the first time premises of third parties were raided. Also, it was the first time the CPC entered premises that were used as a person’s home, as one of the companies was registered and operated from the home of one of the owners. During the dawn raids, the CPC gathered documents, statements and e-mails, which were subsequently used as evidence.

Most of the evidentiary material was found at B2M’s premises, including part of an uncompleted offer of a “satellite” company, notes on price differences in offers of B2M and the “satellite” companies, documentation of “satellite” companies necessary for completing bids (including blanko memos and bank signature files), as well as e-mail correspondence (on Gmail accounts) with some other parties of the proceedings related to the submission of tender offers.

Dawn raids on the premises of other parties were also fruitful, as the CPC not only gathered e-mail correspondence (on Gmail accounts) between B2M and a “satellite” company related to the bid submission, but also other material related to past collusive tendering, which was helpful for studying the parties’ cooperation model.

Raiding the premises of third parties was a good call, as one of the employees of a “satellite” company used an e-mail of a third party (affiliated company) to make consultations with B2M regarding the contract signing for the tender after the most favourable offers were selected.

During the proceedings CPC took statements from representatives of the parties for further clarifications. A court appointed expert in the field of graphoscopy was engaged in the proceedings and determined with certainty that the same person wrote prices on several pages of the submitted bid documentation of two “satellite” companies.

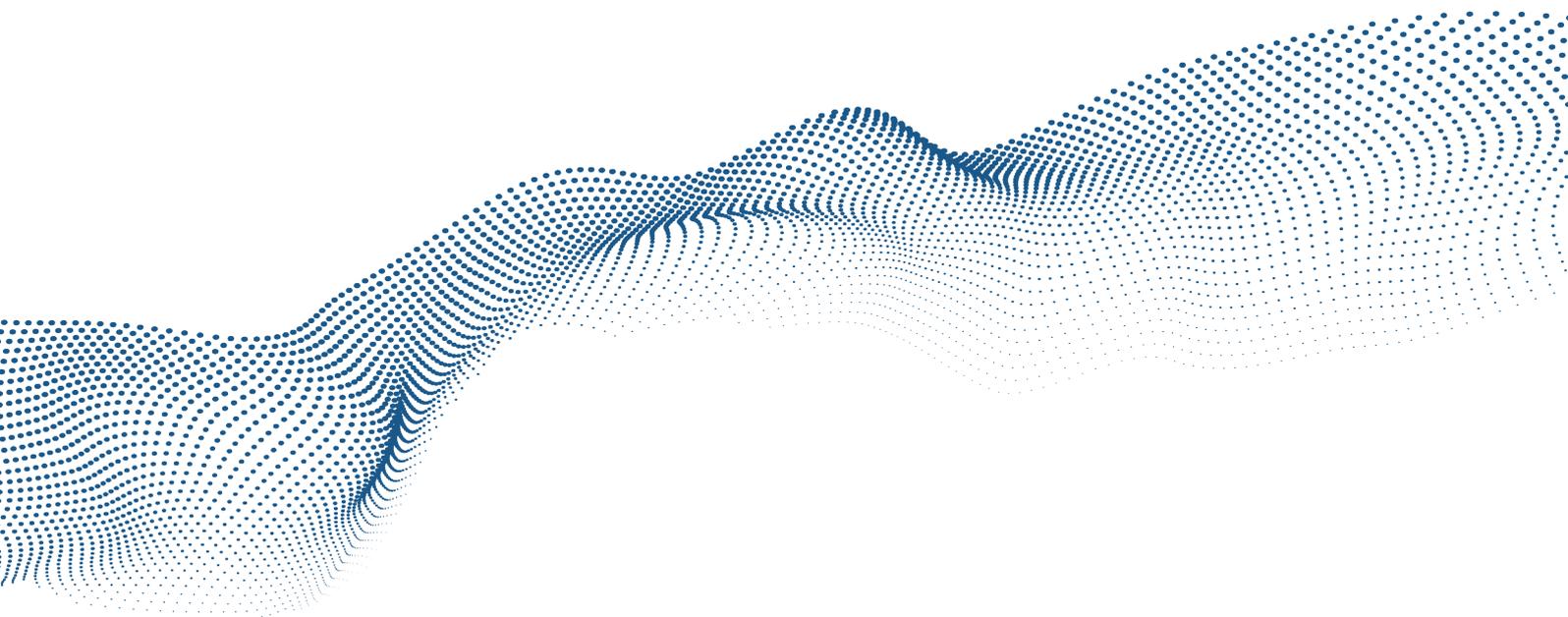
The gathered evidence enabled the CPC to confirm its theory of harm and establish the infringement for four companies, while terminating proceedings against a company which no longer fit the pattern. Despite most of the evidence being indirect, the CPC found that four companies had colluded to rig the tender. Collusion between B2M and two “satellite” companies was proven with direct evidence (with indirect evidence filling the gaps), while only indirect evidence was used to establish the participation of the final “satellite”. The CPC found that all of the evidence taken together in consideration amounted to collusive behaviour.

Administrative measures of protection of competition were imposed on the parties totalling 22.4 million RSD (cca 190,000 €), out of which B2M had to pay 18.7 million RSD (cca 160,000 €). The decision of the CPC was confirmed by the Administrative Court and by the Supreme Court of Cassation. After the CPC’s decision became final, the Higher Public Prosecutor’s Office - Special Department for the Suppression of Corruption requested the case documentation for the purpose of criminal proceedings.

Further steps and new challenges

After the CPC decision becomes final, occasional checks of behaviour of companies that infringed competition are performed through the publicly available Public Procurement Portal, administrated by the Office for Public Procurement. With a completely new Public Procurement Portal launched in the second half of 2020, monitoring became easier with the increased transparency and the wider availability of information regarding awarded tenders and concluded agreements, as well as consortium bidding. This updated system should enable the CPC to gather publicly available information with more ease and significantly contribute to the effectiveness of investigations.

The CPC has so far relied on expert witnesses in determining identical handwriting on several bids as a form of direct evidence of collusive tendering in multiple cases, which is why switching to electronically submitted bids could pose challenges when it comes to relying on this kind of evidence. However, given the extensive forensic training of case handlers and experience in dealing with digital evidence, as well as the transparency benefits of the new system, any potential shortcomings of the new system should easily be overcome. As an unexpected benefit, the significantly increased transparency and ease of access to information may act as deterrents in themselves when it comes to bid rigging.



Fight against bid-rigging in Romania – highlights of the recent enforcement and advocacy activity of the Romanian Competition Council



Irina Popovici,
Head of Cartel Unit,
Competition Council of Romania



Oana Neg,
Deputy Project Manager,
Big Data Project,
Competition Council of Romania

Introduction

Bid rigging has for many years been the subject of particular attention in Romania, in line with a broader trend to focus on fraud and organised crime in connection with public tenders and the use of public resources. Since 2010, the Romanian Competition Council (RCC) has had a specialised unit dedicated to bid rigging. Its main tasks are the investigation of alleged procurement cartels, co operation with other government institutions investigating unlawful procurement activities and advocating on the risks of bid rigging and measures to reduce those risks.

However, recent technological advances and economic dynamics have also been reflected in the behaviour adopted by some companies, which have proven to be creative when pursuing the goal of maximising their profit using unlawful means. As a direct consequence, the RCC and other relevant national authorities have been faced with the challenge of detecting new forms of bid-rigging and meeting the necessary standard of proof required by courts to demonstrate infringements and impose deterrent fines. Thus, in order to efficiently detect bid rigging, the RCC has prioritised the development of a systematic approach and methodology, as well the strengthening of cooperation between national authorities. In addition to the regular toolbox of any competition authority, in recent years the RCC has added to its portfolio proactive instruments to identify bid rigging ex-officio, such as cooperation with contracting authorities in evaluating suspect bids during the procurement stage or using Big Data technologies to perform screening and to generate alerts.

Ongoing projects pursued by the RCC include the use of a Big Data platform to integrate the above-mentioned matrix as part of an automatised process of detection, thus improving the detection ability of the RCC by generating so called “red flags” of possible cartels in general and bid riggings, in particular.

Cooperation with other authorities

In order to detect rigged bids, the competition authority cooperates with other public authorities and, for this purpose,

founded the Bid-Rigging Module (MLT) in 2010. Under this structure, RCC experts cooperate and exchange information with representatives of the national regulator on public procurement (ANAP), the National Council for Solving Complaints, the Prime Minister’s Control Body, the Romanian Court of Accounts, the Prosecutor’s Office attached to the High Court of Cassation and Justice (Romanian Supreme Court), and the Antifraud Division. Within the cooperation with the ANAP, the RCC contributed to the reform of the Public Procurement Law; the new law entered into force in 2016. In its current form, the law has a series of provisions which have contributed to the advocacy and enforcement efforts of the RCC.

First, it stipulates a series of mandatory grounds for exclusion from public procurement procedures for companies whose performance in previous tenders/contracts was suboptimal or whose actions may raise suspicions about their integrity. Among these cases are situations in which companies have committed severe professional misconduct that casts doubt on their integrity, i.e. violations of competition law. The legislation mandates that these violations be acknowledged by adequate means of proof, such as a decision of a court or administrative authority. Exclusion based on this ground operates for a three-year term with important consequences on the activity of the companies concerned. To ensure the proportionality of the exclusion measure in relation to each company, the law establishes the possibility of „self-cleaning” through concrete measures taken in order to prove credibility.

Considering the important consequences of such an exclusion on the activity of economic operators, one important recent initiative taken by the ANAP and the RCC was to publish a joint opinion which aims to provide more guidance to contracting authorities on ways in which companies may prove rehabilitation. In order to avoid any disproportionate exclusion from tenders, the contracting authorities have also the possibility to seek specific guidance from the RCC on the case at hand. Second, the law introduces the possibility for contracting authorities to seek guidance from the RCC also on evaluating suspect bids in ongoing procurement procedures. The RCC opinion is not mandatory, so the decision to act upon our advice lies with

the contracting authority. On the other hand, the RCC retains discretion to open an investigation if new elements of the case arise later on.

Although at first this setup might have looked very resource-intensive for RCC, this legal provision proved to yield benefits for both contracting authorities and the competition authority, since experience showed that what is obvious for one authority might not be obvious for another. It provided better awareness for contracting authorities, while bringing a lot of insight into the public procurement cases for the RCC, which gained access to a lot of specific aspects, documents and data for ulterior screening. Some of these opinions later led to bid rigging investigations.

Screening public procurement procedures – the Big Data project

In order to fight abuse in public procurement, Romania put the introduction and implementation of e-procurement on the top of its list of priority reforms. As a result, since January 2007, all public procurement announcements of the Romanian government have to be published on the national portal “e-Licitatie” (www.e-licitatie.ro) and are transferred to the EU Official Journal. It has hence become easier and faster for companies in Romania to participate in public procurement by simplifying access to information and to the bidding process, which is especially important for SMEs. It has also provided authorities in the Bid Rigging Module with an important source of information for monitoring the public procurement market.

With the emergence of Big Data technologies, given that the RCC has access to the data stored in the national portal, the RCC saw new opportunities of analysis, which required new methods to identify, collect, structure and analyse data.

After some preliminary attempts at designing a simpler system for creating bid rigging alerts based on e-procurement data, in 2018 the RCC started implementing a Big Data project. The Big Data platform is intended to create faster, better and pro-active decision making by making use of screening tools in: bid-rigging screening, cartel screening and advanced analytics, merger control with a focus on properly identifying control holders or previously un-notified transactions, sector inquiries for the structural assessment of industry sectors to flag industries which are more prone to collusive practices, and networks of firms for the use of social networks to identify structures or connections between firms that may go undetected by traditional analytic tools (with considerable less resources).

The system will also give the possibility to streamline and automate internal processes/business flows of the authority, to have shorter administrative procedures, efficient resource and knowledge management and it will be capable of processing large amounts of structured and unstructured data.

Based on the preliminary work done at the start of the project, which included a collaboration with a team of academics and a review of the initial list of algorithms developed internally, the Big Data system is designed to signal three main categories of red flags for the bid rigging analysis (depending on the quality and availability of data).

Price based

If bid prices are available, bid price distribution can flag high-risk tenders. For example, constant price differences between the lowest bids, and extremely small, or extremely high bid price ranges can signal coordinated prices.

Bidding patterns

Bidding patterns can flag some of the most elementary rigging techniques, like withheld bids. For example, an increased share of single-bidder contracts in a given region or a sudden drop of the number of bids received in a market from one year to another are indicators that are calculable and traceable over time in an automated way.

Market structure

Data on public contracts contain key market characteristics such as product or regional codes. While both have inaccuracies (for example, buyers often fail to categorise their tenders to the corresponding codes, categories are also not accurate enough), they allow categorising tenders into markets. High or increasing market concentration or overly stable market structures can flag coordinated bidding - especially if they are associated with increased contract level risks.

Most of the statistics and indicators (especially the automatically calculated ones) are based on public procurement data. The variables that are useful to filter the relevant subsets of contracts are the following:

- CPV code
- Geographical area - based on NUTS-codes, buyer city or postal code
- Contract size - based on final contract size or estimated contract size
- Tender date - call for tender publication date or contract award publication date
- Companies - based on company names or company IDs
- Buyer name - based on buyer names or company IDs
- Procedure type
- Bid status: winning/losing bid
- Tender/contract ID

Further dimensions that are useful filters include, among others:

- Company financial statistics
- Company management (e.g. filter companies that are linked to the same managers even if not at the same time)
- Company ownership (e.g. filter companies that have explicit cross-ownership links)

Examples of bid rigging cases

Relatively recent cases at the level of the Romanian market demonstrated that some undertakings are able to adapt their strategy and manifest their interest to be involved from the first stages of drafting the requirements of the public procurement procedure. This early involvement gives them the possibility to introduce limiting criteria that would favour them and would exclude other competing companies from the process. Once competitive pressure is removed, it is easier for the involved companies to create and maintain a stable environment for their anticompetitive agreement and to share contracts between themselves, at the highest price.

A relevant example is the case concerning electric meters in Romania. The RCC discovered that during a long period (2008-2015), within the process of public tenders organised mainly by Electrica for the acquisition of electric meters, the undertakings AEM S.A., ENERGOBIT S.A., ELSTER ROMETRICS S.R.L., LANDIS+GYR AG and ECRO S.R.L. replaced the competitive process with an anticompetitive agreement through which they shared the contracts, including when the organiser split the contracts into lots, and agreed not to compete against each other. In each case where they were the only bidders, they offered the highest price for their bids, close to the maximum amount afforded by the contracting authority. Each time the presence of another company outside their agreement was announced, their financial offers dropped by up to 40% in order to ensure success and discourage any attempt of external competition. During the infringement time, the involved undertakings also used bilateral contracts for selling and buying electric meters between them as a compensation mechanism.

Their behaviour lasted for more than 7 years and was facilitated by some employees of the contracting authority. It is worth mentioning that the higher costs resulted from the bid-rigging were not borne by the contracting authority but were passed on

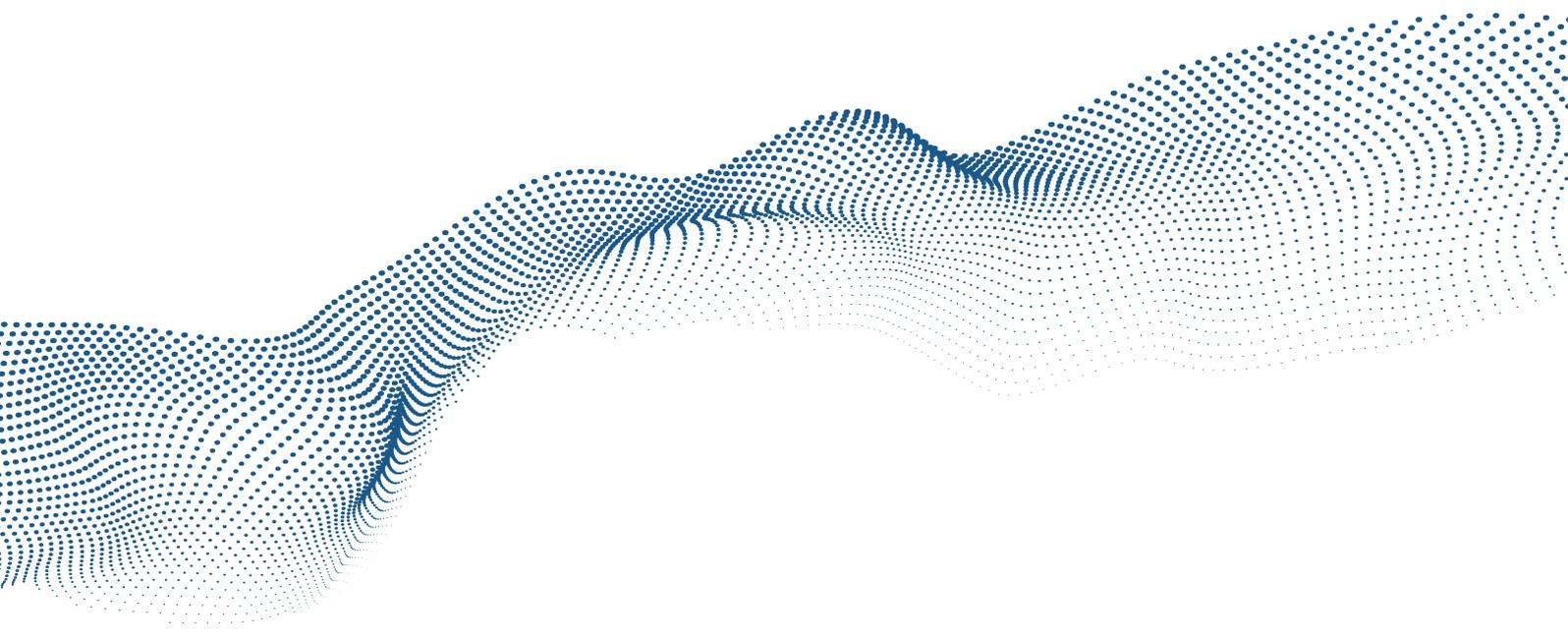
to the final consumer in the electricity invoice.

The RCC imposed fines totalling approx. EUR 15.8 million.

Another relevant example illustrating the adaptive behaviour of companies when it comes to eluding the competitive process is the case concerning the construction and repair of the streets of Pitesti County.

In 2018, the local public contracting authority (the Public Domain Administration of Pitești) issued the documentation and opened the procedure for the public acquisition of relevant services. In order to stimulate competition and encourage SMEs to participate, the public procedure was split into five lots. During the investigation, the RCC found that 5 companies (Construct Steel Market S.R.L., Construcții Drumuri și Lucrări de Artă S.R.L., Comesad Drumuri S.R.L., General Trust Argeș S.R.L., Selca S.A) had replaced the normal competitive approach with an agreement infringing competition rules by forming an apparently legal association which became the sole bidder for each of the lots. In reality, the execution of the contracts corresponding to each of the five lots was performed by each company that was part of the association. The price of the single bid for each lot was at the maximum amount offered by the contracting authority.

The RCC determined that the companies had infringed competition law and applied a total fine of approx. EUR 468.000. It is important to mention that three of the companies acknowledged their participation in the cartel and settled with the RCC, benefitting from a reduction of the fine.



Bid-rigging in Ukraine: Flavoured products



Ms. Olga Nechytailo,
State Commissioner,
Antimonopoly Committee of Ukraine

The topic of procurement for the needs of the military-defence sector has been one of the leading in the media space in recent years. In our army, the needs have increased several times, even tenfold. Therefore, the transition in 2016 to an open procurement system has already yielded considerable positive results. The Ministry of Defence immediately became the leader, in general, in terms of budget savings and transactions concluded among the ProZorro participants after this system started working.

Thus, the Law of Ukraine, which coordinates public procurement, requires procurement procedures to be carried out through the electronic procurement system ProZorro. The main goal of the ProZorro electronic public procurement system is to prevent corruption by increasing market transparency and creating a competitive environment for obtaining the best offer. The electronic public procurement system allows the participants of the procedure to take part and compete for victory in the tender in an interactive real-time manner by using the interface of the electronic platform.

The e-procurement system is an effective means of detecting and combating corruption thanks to numerous tools for monitoring and analysing public procurement. Thus, all procedural actions of participants and customers are strictly regulated by the law and are recorded by the system. All information generated as a result of the purchase, including the proposals submitted by the participants, is stored in ProZorro for 10 years and is available for public viewing. In addition, the system is also unique in its structure, because it works in cooperation with three parties - the state, business and the public.

The introduction of the functionality of the ProZorro web portal allows the Antimonopoly Committee of Ukraine (hereinafter – the Committee) to visually observe the progress of the procurement procedure and identify signs that may indicate possible bid-rigging.

An important area of the Committee's work is to prevent violations related to anti-competitive concerted actions, or more simply, to prevent bid-rigging between companies. Such actions distort competition. At the same time, bid-rigging

activities occur in various markets and in the course of public procurement for budget funds. As a general rule, bid-rigging in public procurement ends with the imposition of multimillion fines by the Committee on the violators. What is important, besides the punishment in the form of a fine, the decision of the Committee deprives violators of the right to participate in public procurement for 3 years.

A striking example of this can be seen in the following case.

According to the decision of the Antimonopoly Committee of Ukraine dated 04.04.2019 № 200-p,²⁵ the actions of PE „ZBALANSOVANE KHARCHUVANNIA”, LLC „STIL HLOBAL KALM”, LLC „VIYSKTORH”, LLC „UKRPRODAKORDOR”, LLC „PRODVSESVIT”, LLC „STATPOSTACH”, LLC „ARTA-HRUP”, LLC „STRATTON INFO” (LLC „AVIKA”), LLC „HEUS-HRUP”, LLC „REKTAN”, LLC „TRANS LOHISTYK TSENTR”, LLC „LATORITSA-TEMP”, PE „ARTEK-SOIUZ”, LLC „VALETA S”, LLC „REHIONALNA KEYTERYNHOVA KOMPANIJA”, LLC „OLMIRA”, PE „INTERA”, LLC „VIZYT”, LLC „PYRIATYNSKIY DELIKATES”, LLC „STRATTON SILVER” (LLC „VKF „SAVA”), LLC „CHAS MRIY”, and LLC „IMPEL GRIFFIN GROUP” were recognised as amounting to violations of the legislation on the protection of economic competition, provided for in paragraph 4 of part two of Article 6 and paragraph 1 of Article 50 of the Law of Ukraine „On Protection of Economic Competition”, in the form of anti-competitive concerted actions concerning the distortion of seven tenders on contract catering in Kyiv, Zhytomyr, Chernihiv, Poltava, Sumy, Cherkasy, Rivne, Ternopil, Khmelnytsky, Chernivtsi, Zakarpattia, Ivano-Frankivsk, Lviv, Volyn, Kharkiv, Donetsk, Luhansk, Dnipropetrovsk, Zaporizhia and Kherson regions.

The defendants were fined a total of UAH 865 million (almost USD 32 million²⁶) for the violation.

According to the results of the case, it was established that the concerned companies had distorted the results of six procurements, which was confirmed by the following facts.

In total, 93 proposals were submitted to participate in the tender, and 25 economic entities took part in it. Out of the submitted proposals, 74 proposals were withdrawn by the participants. Participants refused to participate in the procurement procedure, withdrawing their offers, thus acting in the interests of the winner of these tenders, which did not reduce its price offer during the tender and had the highest price offer. Hypothetically, the participants could have refused to participate in the tender if there were objective circumstances not related to the existence of bid-rigging. However, in this case, such refusals, firstly, would not have a massive character, and secondly, the actions of the participants would not have been simultaneous

²⁵ <https://amcu.gov.ua/npas/rishennya-200-r-vid-04042019>

²⁶ According to the exchange rate of the National Bank of Ukraine as of the date of the decision.

and/or synchronous in time.

A specific circumstance indicating the coordination of behaviour was the fact that in the case where participants participated in several tenders and then refused their offers – the letters of refusal to participate in negotiations of such participants were registered on one date or such participants refused to participate by one letter for all tenders.

Based on the results of the analysis and collection of evidence in the case, it was established that the defendants, in addition to general coordination during participation in the bidding, coordinated their actions within certain groups. For the investigation of this case, some of the defendants were divided into conditional groups, based on a combination of circumstances:

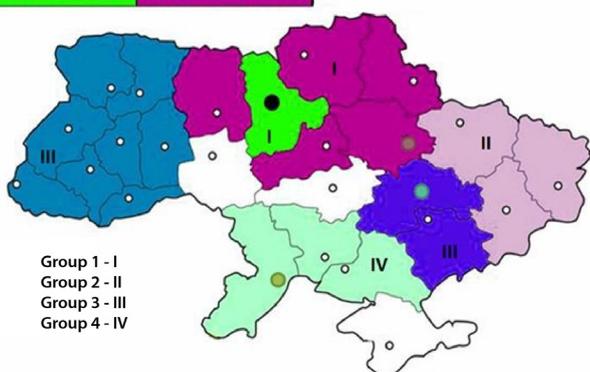
Group I. LLC „VIZYT”, LLC „UKRPRODAKORD OR”, LLC „STATPOSTACH”, LLC „ARTA-HRUP”.

Group II. LLC „VKF „SAVA”, LLC „REHIONALNA KEYTERYNHOVA KOMPANIJA”, LLC „AVIKA”.

Group III. LLC „TvRANS LOHISTYK TSENTR”, LLC „PRODVSESVIT”, LLC „VIYSKTORH”, LLC „CHAS MRIY”, LLC „HEUS-HRUP”, LLC „REKTAN”.

Group IV. LLC „LATORITSA-TEMP”, LLC „VALETA S”, PE „ZBALANSOVANE KHARCHUVANNIA”, PE „ARTEK-SOIUZ”.

ID: UA-2016-02-22-000303-b ID: UA-2016-02-22-000316-b ID: UA-2016-02-22-000310-b ID: UA-2016-02-22-000309-b
 ID: UA-2016-02-22-000325-b ID: UA-2016-02-22-000319-b



According to the materials of the case – confirmed by the collected evidence and an economic analysis of the behaviour of the defendants – the following circumstances were identified: the refusal of the defendants to conclude contracts; synchronicity of the defendants; the presence of economic relations in the form of mutual settlements; interaction and the presence of common economic interests within the groups of respondents; the unity of interests of the defendants within certain groups on a territorial basis; the defendants were aware of the participation of each other in the bidding and agreed among themselves to behave in a manner that ensured victory in Bidding № 1 and № 2 – for LLC „VIZYT”, in Bidding № 3 and № 5 for - LLC „HEUS-HRUP”, in Bidding № 4 – for LLC „AVIKA”, and in Bidding № 6 – for PE

„ARTEK-SOIUZ”.

This meant that the winning entity in each group dishonestly won the relevant bid.

In particular, during the investigation of the case it was established that in the aggregate evidence testify to the defendants’ anti-competitive concerted actions outside certain groups, in particular: the existence of stable economic relations, and the presence of the founders of individual companies in different determined groups. This together created the conditions for the coordination of behaviour between them and the groups to which they were assigned.

Thus, thanks to the digitalisation of public procurement through the operation of the ProZorro web portal and other electronic services created based on big data analysis, the officials of the Antimonopoly Committee of Ukraine have significantly strengthened their ability to identify indicators related to the violation of the legislation on the protection of economic competition in the form of anticompetitive concerted actions, in particular, by identifying relationships between bidders; evaluation of formal signs of a corruption; automatic search for purchases by CPV code; automatic search for information about suppliers, successful purchases and conditions of tender documents; automatic constructor of approximate specifications of the subject of procurement etc.

No smoke without fire or the curious case of proving cartels in public procurement in Georgia



Salome Kavtaradze,
*Economic Competition Protection
Department, Georgian National
Competition Agency*



Zinaida Chkhaidze,
*Legal Department, Georgian
National Competition Agency*

Introduction

According to the annual report 2019 of the State Procurement Agency of Georgia, in 2019 the total amount of money spent on public procurements was 11% of GDP (5,332,804,815 GEL). For a country like Georgia, with an emerging economy, these numbers are significant. It also implies that even before the economic shock of the COVID-19, public procurement was an attractive way to generate income for an increasing number of businesses.

Since economic development in 2020 decreased due to the pandemic, public procurement acquired a whole new meaning and became more attractive for more companies. While this fact suggests that there might be more competition on the market, it also means there might be more possibility for infringements. Conspiracies affecting public procurement can be particularly harmful since these conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.²⁷ Consequently, fighting bid rigging in public procurement is one of the priorities of the Georgian National Competition Agency (hereinafter - Agency).

With this article, we aim to share information about the investigation and advocacy initiatives of the Agency – including the existing legal framework and cooperation with public procurement body – aimed at preventing and tackling bid rigging.

Legal Framework

In 2020, Georgian Law on Competition underwent some major amendments, which were aligned with best European practice. Amendments came into force on the 4th of November 2020. Before these amendments, Article 7 (restrictive agreements, decisions, and concerted practices) of the Law of Georgia „On Competition” included a subparagraph on the violation of competition rules in public procurement. More precisely, it was prohibited for undertakings or other parties participating in public procurement to agree among themselves on the terms of

a tender proposal in order to ensure material gain or advantage, which substantially prejudiced the legal interests of the purchasing organisation. While working on the amendments, it was decided that it was unnecessary to retain the mentioned subparagraph independently, as other subparagraphs in Article 7 were capable of tackling the bid rigging issue. Consequently, the mentioned subparagraph was removed as part of the amendments, and nowadays all of the cases regarding bid rigging fall under the definition of restrictive agreements, decisions, and concerted practices (price-fixing, limiting production, markets, technical development, or investments, sharing markets, etc.). Moreover, with this amendment Article 7 of the Law of Georgia “On Competition” was brought into line with Article 101 of the Treaty on the Functioning of the European Union.

Furthermore, violation of the rules of public procurement is a criminal offence. The respective rules are regulated by Article 1951 of the Criminal Code of Georgia, according to which “In the case of participation in the procedures provided for by the Law of Georgia on Public Procurement, a preliminary agreement between the entities participating in a procurement process or any other agreement for gaining a material benefit or advantage for themselves or the other persons which results in a substantial violation of the legitimate interests of the contracting agency shall be punished by a fine or house arrest for a term of six months to two years, or by imprisonment for up to two years.”

Even though the Law of Georgia „on Competition” and Criminal Code of Georgia tackle the different aspects of infringements in public procurement, the Agency actively cooperates with the Prosecutors office of Georgia, since every proved infringement of the Competition rules may also lead to a criminal offence.

Advocacy

One of the main priorities of the Georgian National Competition Agency is to actively advocate competition policy – that is to explain to the main stakeholders the benefits of proper and effective Competition Law and Policy enforcement.

Cartels/bid rigging in public procurement is one of the Agency’s

²⁷ OECD, Guidelines for Fighting Bid Rigging in Public Procurement, 1. Available at: <https://www.oecd.org/daf/competition/cartels/42851044.pdf>

main advocacy subjects. Unfortunately, the spread of COVID-19 took its toll on the organisation of the advocacy initiatives in 2020, but we can say that 2019, unlike 2020, was a fruitful year. For example, in 2019, with the support of GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) seminars on competition legislation and its enforcement issues were held for the representatives of the local self-government. In the framework of the seminars, the topic of cartels in public procurement was also discussed. In total there were held 26 seminars in the 11 regions of Georgia, attended by 780 participants. This was, so far, the biggest advocacy campaign to raise awareness about competition issues in public procurement, which hopefully will have tangible results and will reduce the risk of bid rigging.

Case Study

The Georgian National Competition Agency recently concluded an investigation into a very complex case in which it proved a cartel in the free community canteen services related to public procurement.²⁸

Before delving into the facts of the case, we would like to provide you with some general background information. In Georgia, socially vulnerable people are provided with free community canteen services (under certain conditions) daily. The relevant city halls are responsible for procuring the mentioned services. For example, in Tbilisi, the free community canteen services are procured by the territorial bodies of the Tbilisi City Hall - Tbilisi district administrations. In total, there are 10 administrations in the Tbilisi district. The canteen services are procured through public tenders. The tender is announced/conducted once a year through the Georgian Electronic Government Procurement System.

In December 2019, an application submitted to the Agency stated that seven undertakings participating and winning the free community canteen services tenders in Tbilisi had shared the relevant market. In February 2020, the Agency launched an investigation against these undertakings.

In the course of the investigation, two facts in particular caught the Agency's attention. First, undertakings only participated (and won, since in most cases they were the only participant) in the public tenders that were specifically related to "their" districts. These undertakings never competed with each other. Second, because one company that won public tenders in three districts could not fulfill its obligation, the relevant administrations were forced to terminate the contract with the company and announce a new public tender. Even though the strongest competitor left the market and there was an opportunity to enter the new market, only one company (out of 5) participated and won all three tenders.

During the investigation, it was also established that characteristics of the relevant market (free community canteen services market)

were capable of fostering collusion. These characteristics were, for example, the existence of a small number of companies, little to almost no entry to the market, a constant, predictable flow of demand from the public sector, and repetitive bidding. Besides, the market is very transparent since the public tenders are announced/held via the electronic system, information about bidders, bids, etc. is public.

The investigation team definitely saw smoke, but we had to make sure that there was an actual fire. We were lucky enough to find that fire during the interviews we conducted when two companies/respondents mentioned that the competitors had held a series of meetings during which they had discussed entering into a new market/participating in the tenders. Their confession was perfectly aligned with the behaviour of all the respondent companies on the relevant market/in public tenders. The above-mentioned enabled the Agency to prove that the respondents (4 companies out of 7) had agreed and shared the market in public procurement. The Decision was recently partially challenged in court, and we are looking forward to the court's ruling because the decision will also be very important for future cases.

Conclusion

As Benjamin Franklin said: "there is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government." The accuracy of these words can be observed in the public procurement process, where otherwise good companies tend to easily and frequently try to manipulate the process for their gain. Since manipulations affecting public procurement can be particularly harmful, it is crucial that all relevant public institutions – and especially the competition authority – have in place effective mechanisms (legal or practical) for preventing and tackling bid rigging. It is extremely difficult for the competition authority to achieve great goals in the fight against bid rigging when it is acting alone, as enforcement in most cases takes time. In this regard, the importance of cooperation between the Georgian National Competition Agency and the State Procurement Agency of Georgia has to be highlighted, as it gives us the opportunity to avoid the risks associated with infringements of competition law. We do hope that the mentioned cooperation will become more active so that we will have greater opportunities to prevent and tackle bid rigging in public procurement. However, until this takes place, in order to prevent bid rigging in public procurement the Agency shall continue to monitor public tenders and organise various advocacy events on this issue, as well as on the leniency topic with the active involvement of the business sector.

28 Decision of the Georgian National Competition Agency of 9 March 2021, available at: <https://competition.ge/decisions/anti-competitive-agreements/by-prohibition>

Bid-rigging albanian case



Prof. Dr. Juliana Latifi,
Chairwoman
Albanian Competition Authority



M.Sc. Mimoza Kodhelaj,
Director
Albanian Competition Authority

1. Legal bases

The Albanian law no. 9121/2003 “On competition Protection”, as amended, considers bid-rigging in any of the forms of bid-rigging schemes – that is cover bidding, bid suppression, bid rotation, market allocation – to be a violation of Article 4 of the law on “prohibited agreements”. The Albanian Competition Authority (ACA) has the legal power to investigate and punish bid-rigging cases. Furthermore, the ACA has in force the Guideline (2011)²⁹ “Fighting bid-rigging in public procurement” which is approximated to the same OECD Guideline of 2009.

Since 2019, the authority has a Memorandum of Understanding with the Agency of Public Procurement, according to which both institutions aim to cooperate on the fight against bid-rigging in public procurement procedures. Law no. 9643/2006 “On public Procurement”, as amended, and other sub-legal acts foresee that economic operators (undertakings) engaged in bid-rigging may be excluded for up to 3 years from tendering in future bids.

The Competition Commission may open a preliminary investigation by itself or on the basis of a complaint submitted by other interested parties or institutions. Generally, a preliminary investigation lasts 3 months. The Competition Commission may subsequently decide to open an in-depth investigation where there are signs of distortion of competition. In-depth investigations last up to 6 months. In prohibitive agreement cases involving bid-rigging, in its decisions the Competition Commission may impose fines, stipulate conditions and obligations, and provide recommendations to public institutions and contracting authorities; alternatively, undertakings may voluntarily offer commitments.

The Regulation “On commitments procedures³⁰” approved by Competition Commission Decision no.437/2016, determines the rules and procedures that apply in such cases. Undertakings may submit commitments at any stage of the investigation procedures; therefore, the ACA does not perform all procedural steps of the investigation procedures. The Competition Commission takes into consideration the commitments which become binding for undertakings upon their approval.

²⁹ <http://caa.gov.al/uploads/publications/brochure.pdf>

³⁰ Approximated with EC Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25) (32003R0001); EC Antitrust Manual Procedures 2012, EC Notice “On best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU” (2011/C 308/06)

2. The bid-rigging case in the purchase of food procurement market for Nurseries and Kindergartens at the Municipality of Tirana

In March 2021, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana submitted – through an official letter – some findings to the ACA that were considered as suspicious violations of competition in the procurement procedure concerning the „Purchase of food for 2021”, which was divided into 5 (five) Lots. For the same procurement procedures, the Public Procurement Commission decided to suspend the administrative review of complaints submitted by the economic operators M.C.Catering and Eagle Cons and to request the ACA to initiate an administrative investigation regarding these findings, the results of which were to be sent to the Public Procurement Commission at the end of the investigation.

The ACA evaluated the information provided by both the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana and the Public Procurement Commission. In the procurement procedures where the economic operators M.C.Catering and Eagle Cons participated, the ACA noticed that:

- Both economic operators bidding at the same Lot had the same head office premises with a common address;
- The statements of both operators revealed that the persons acting in the capacity of administrator and sole partner of the respective operators (Eagle Cons and M.C. Catering) were brother and sister;
- There was a small difference in the value between bids;
- Both economic operators, bidding at the same Lot, had authorised the same person to carry out the sampling procedures at the Institute of Food Safety and Veterinary; The verification procedure of the samplings submitted by both bidders revealed that 16 out of 22 items were the same items, which had the same label, producer, and expiration date;

After evaluating these documents, the ACA concluded that the above-mentioned suspicious behaviour may give rise to competition concerns in the form of a covert bid-rigging scheme

between Eagle Cons and M.C.Catering economic operators, participants in the food procurement procedure conducted by the Contracting Authority, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana, and may constitute the prevention, restriction or distortion of competition under Article 4 of the law no. 9121/2003; consequently, the ACA held that the behaviour should be investigated.

Given this situation, the Competition Commission decided to open a preliminary investigation through decision no.785 dated 25.03.2021 “On the opening of the preliminary investigation in the procurement market concerning the „Purchase of food for 2021”, Lot I, Lot IV and Lot V, conducted by the Contracting Authority, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana”. The investigation would have lasted 3 months.

The ACA performed the necessary dawn raids on both operators, sent a Request for Information to the above institutions, and received documentation on bids from all other economic operators bidding at the same procurement procedure.

During the investigation, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana deposited an official letter stating that there is an emergency and extreme need for the daily supply of food to nurseries and public kindergartens in Tirana and that he is waiting for the conclusion of the ACA’s investigation so that he can continue the procurement procedures. Under these emergency circumstances, as well as taking into consideration that cases ending with commitments can bring a rapid and effective change in the market, the ACA identified that the above competition concerns could be eliminated if undertakings would be willing to file commitments.

In April 2021, the undertakings M.C. Catering and Eagle Cons voluntarily submitted their commitments to address the competition concerns in the procurement market under investigation, along with their immediate commitment to fulfill these commitments. According to the statements of both undertakings, their behaviour in the procurement procedures under investigation had been misinterpreted as a result of the family connection they have with each other.

Specifically, the undertakings M.C. Catering and Eagle Cons offered the following commitments:

1. The undertakings had and will bid independently, without consulting, communicating, agreeing or coordinating bids with any other competitor, regarding: prices; methods; factors or formulas used for the calculation of the price; purpose or decision to submit or not submit a bid; submission of a bid that does not meet the requested specifications concerning the quality, quantity, specifications or other specific requirements related to products or services of the procurement procedure;

conducts which violate law no. 9121/2003;

2. The undertakings operated and will operate with their employees, independently as above;

3. Given that the shareholders of both undertakings are family, namely brother and sister, in compliance with law no. 9121/2003, to avoid any misunderstanding, the undertakings commit to not bid in any procurement procedure according to the object of activity of the respective undertakings, simultaneously with two different bids, even though they are two undertakings that are independent from each other.

The above commitments have been taken by the undertakings under investigation for the future. The commitments are clear, self-executing, and have been voluntarily filed by the undertakings.

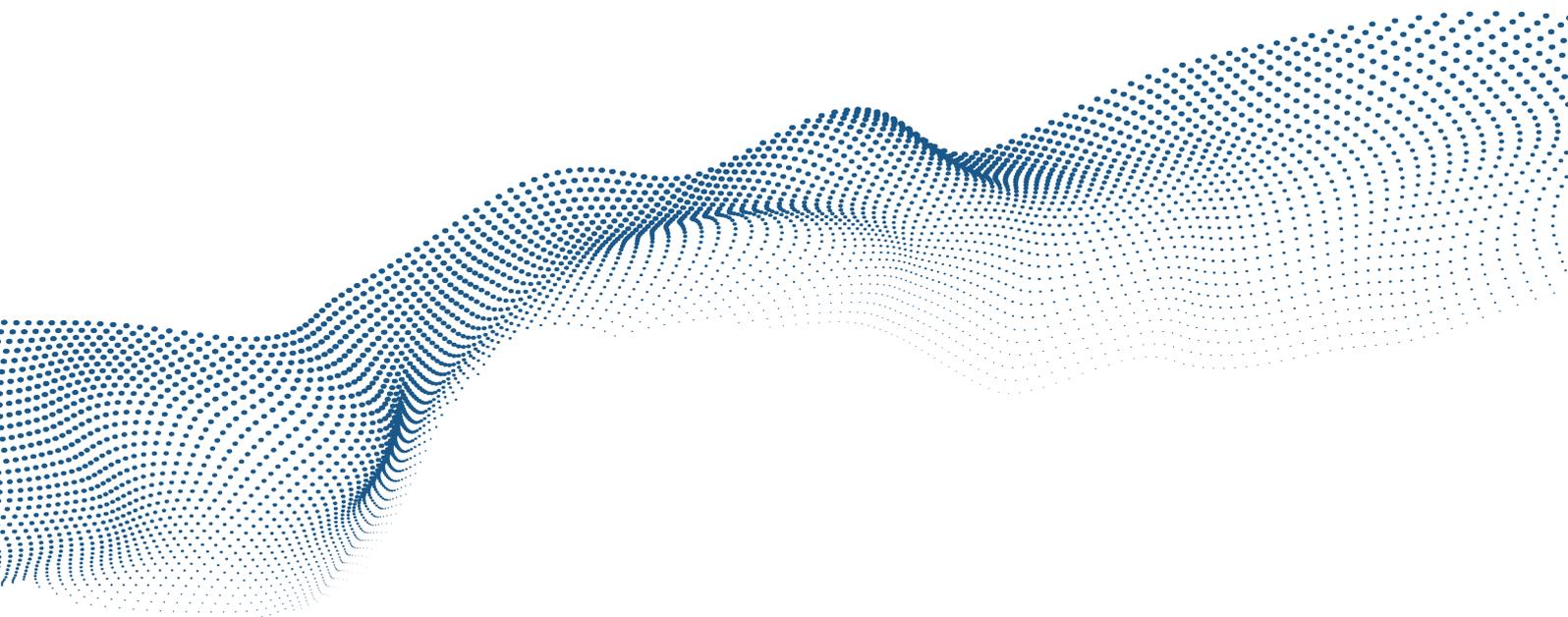
The commitments voluntarily offered by the undertakings M.C. Catering and Eagle Cons were assessed by the Competition Commission as appropriate to eliminate the competition concerns, as the competition between undertakings in the market becomes effective when these undertakings operate independently, without consultation, without communication and without making agreements with each other. Especially when the undertakings commit to not bid simultaneously with two different competitive bids in the same procurement procedure in procurement procedures relevant to their activities, thereby ensuring the maintenance of effective competition in all procurement markets where these undertakings bid.

The Competition Commission through decision no. 796 dated 29.4.2021 “On the closure of the preliminary investigation in the public procurement market concerning the “Purchase of foods for 2021”, Lot I, Lot IV and Lot V, conducted by the Contracting Authority, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana, and the approval of commitments as mandatory in the form of conditions and obligations for M.C.Catering and Eagle Cons” decided:

- To close the preliminary investigation in the procurement market concerning the „Purchase of food for 2021”, Lot I, Lot IV and Lot V, conducted by the Contracting Authority, the General Directorate of Nurseries and Kindergartens at the Municipality of Tirana; To approve the commitments filed by the undertakings M.C. Catering and Eagle Cons, as mandatory in the form of conditions and obligations.
- To continuously monitor the implementation of this decision by the undertakings M.C. Catering and Eagle Cons and.

3. Final remarks

The fight against bid-rigging is a challenge that needs essential cooperation between public institutions to find effective ways of detecting and prevent anti-competitive practices. From the undertakings' perspective, filing commitments can be very attractive as they avoid in-depth investigations and potential fines, whereas from the competition authority's perspective they can be used to remedy antitrust concerns.



New steps in the fight against bid rigging (Automotive procurement cartel)

Introduction and methods to combat cartels in bidding and work to be done



Bolat Sambetov,
*Deputy Chairman of Agency for
the Protection and Development of
Competition of the Republic of Kazakhstan*



Aidos Abdikarim,
*Chief expert, Investigation Department
of Agency for the Protection and
Development of Competition of the
Republic of Kazakhstan*

In the Republic of Kazakhstan, the mechanism of antimonopoly control over procurement and tendering has been in place since the second half of 2018 in accordance with the instructions of the First President of the Republic of Kazakhstan – N. Nazarbayev: anti-monopoly requirements for procurement and tendering have been introduced, administrative liability for their violation has been determined, the antimonopoly agency has introduced a mechanism to monitor tenders for compliance with legislation for the protection of competition, including as regards collusion. Over the past three years, more than 80 investigations of collusion have been initiated, of which more than 45 have been related to government procurement of medical equipment, vehicles, and office equipment. The approach to identifying and suppressing cartel agreements in purchases and through tenders has been developed. The total amount of contracts concluded through tender purchases, in which signs of collusion have been found, exceeds 100 billion tenge.

In a mixed economy the State, in making its purchases, acts as the largest consumer for a number of sectors of the economy, thus making procurement a powerful tool for supporting entrepreneurship.

At the same time, the main principles of the current public procurement system are optimised, resulting in the efficient spending of money and fair competition among potential suppliers.

The Presidential Decree has also defined, as the main goals of the State's competition policy, the implementation of measures of state support for entrepreneurship in order to develop small and medium-sized businesses, support of the emergence of new market participants, along with ensuring equal access to public procurement.

In this regard, the following measures are being considered to prevent bid rigging and increase the transparency of public procurement:

- reduction of reasons for purchases from one source;
- legislative approval of regulation for preliminary qualification criteria for access to tenders;
- elimination of customer practice of consolidating lots;
- increasing transparency in the requirements as regards work

experience and financial stability of suppliers of goods, use of conditional discounts dependent on work experience and contributions to the state budget.

Combating bid rigging

As to methods of combating bid rigging, there are two main mechanisms employed in Kazakhstan:

1. The so-called „Dawn Raids” - unannounced inspections by the antimonopoly authority, that is, without prior notification of the market participants about the upcoming inspections. These actions allow vital documents to be obtained, such as e-mails or minutes of meetings, and the detection of different competing bids on one and the same computer and other facts indicating collusion. At the same time, such visits allow groups of ordinary employees to be questioned about cooperation with other cartel participants. In most cases, ordinary employees are not aware that these actions are illegal and can provide corroborating evidence of a cartel conspiracy.
2. „Leniency requests” - this method gives any cartel participant the right to voluntarily withdraw from the cartel agreement with minimal consequences; the withdrawing cartel participant may obtain a reduction of the administrative fine or even complete immunity from liability, if it cooperates and submits substantial evidence to the antimonopoly authority. Thus, a leniency policy is applied to such market entities.

At the same time, despite these enforcement methods, the introduction of procurement monitoring has demonstrated that an increasing number of long-term collusive anti-competitive agreements (on average up to 2-3 years) are being established. Currently tens and even hundreds of procurement contracts are obtained by one cartel.

The National Chamber of Entrepreneurs of the Republic of Kazakhstan „Atameken” (hereinafter - NPP „Atameken”) has implemented a project to create a portal for a Unified Procurement Window, integrating together most of the procurement portals of Kazakhstan. Currently the Agency for the Protection and Development of Competition of the Republic

of Kazakhstan, together with NPP Atameken, are developing within the framework of the Unified Procurement Window a search system aimed at identifying cartels digitally. This system will be a powerful tool for analysing and identifying conditions of bid rigging, in particular by:

- determining procurements where there is no competition between suppliers;
- identifying the same registration data of suppliers;
- analysing the purchases of certain suppliers;
- analysing the average mediated price of goods;
- identifying purchases from two or more suppliers that have identical fixed IP addresses;
- identifying purchases where certain suppliers did not offer any price reduction from the amount initially allocated by the customer.

Thus, these work products provide the antimonopoly authority of Kazakhstan with the possibility to keep pace with the current best practices for combating cartels at procurement tenders.

Investigating transport vehicle tenders

As a result of the legislative implementation of the procurement monitoring mechanism in the second half of 2018, the following year two major investigations were launched into violations of the competition protection legislation of the Republic of Kazakhstan in public procurement for the retail supply of cars and trucks.

I. Based on the results of the investigation in respect of Sky Motors LLP and GazKomTechnika LLP, it was established that from 2016 to 2018 these market entities, while participating in public procurement procedures for the retail supply of cars and trucks, distorted the results of these public procurement tenders by collusive anti-competitive agreements.

Under this agreement, Sky Motors LLP and GazKomTechnika LLP reached an agreement on coordinated joint participation in public procurement procedures, which was proven by the following facts:

- identical IP addresses were used for submitting application documents;
- similarity of the design and content of the company Charters, exacerbated by the presence of the same grammatical errors;
- applications on behalf of one employee for the two organisations;
- testimony of company employees concerning pre-agreed conditions on the submission of an intentionally doomed to lose offer by one of the partners;
- technical specifications containing exactly the same texts;
- location of offices at one address.

Consequently, on the basis of all the evidence presented, the antimonopoly body initiated administrative proceedings resulting in the imposition of an administrative penalty in the amount of 487.5 million tenge in total against the two market

participants (1.1 million dollars), along with the confiscation of the monopoly profit obtained as a result of monopolistic activities totalling another 16.4 million tenge (37.8 thousand dollars).

However, the administrative proceedings were terminated by the courts due to the large profit obtained, and a decision was taken that criminal action was justified. The case was sent to the law enforcement agencies of the Republic of Kazakhstan for consideration of the possible criminal responsibility of the perpetrators.

II. An investigation was carried out concerning the actions of Gayardo-Auto LLP and GazKomTechnika LLP. It was established that these market participants had participated in public procurement procedures for the retail supply of cars and trucks from 2017 to 2020 and had distorted the results of these public procurement tenders through an anti-competitive agreement.

Within the framework of this agreement, Gayardo-Auto LLP and GazKomTechnika LLP reached an agreement on coordinated joint participation in public procurement procedures, as evidenced by the following facts:

- identical IP addresses from which the application documents were submitted;
- similarity of the design and content of the company Charters, exacerbated by the presence of the same grammatical errors;
- the bank guarantees were issued on the same day;
- applications were submitted on the same day, and the time lapse between the two submissions was 1 minute;
- same representative and same chief accountant;
- technical specifications containing exactly the same texts;
- the offices were located at the same address.

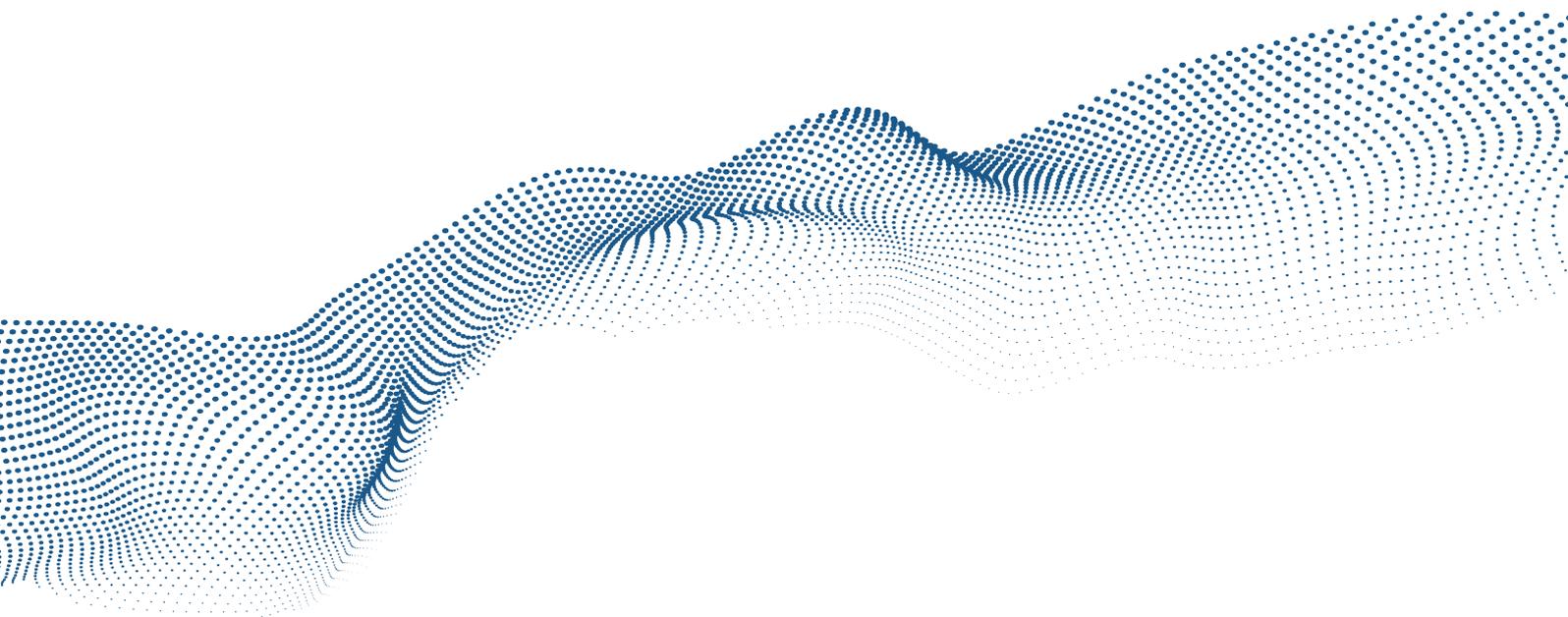
Consequently, on the basis of all the evidence presented, the antimonopoly body initiated administrative proceedings resulting in the imposition of an administrative penalty in the amount of 3.4 billion tenge in total against the two market entities (7.9 million dollars), along with the confiscation of the monopoly profit derived from monopolistic activities in the amount of 17.4 million tenge (40.1 thousand dollars).

However, the administrative proceedings for this case were also terminated by the courts due to the large profit obtained, and a decision was taken that criminal action was justified. The case was sent to the law enforcement agencies of the Republic of Kazakhstan for consideration of the possible criminal responsibility of the perpetrators.

new suppliers. All of the above would be useful to minimise the conditions conducive to cartel agreements at tender auctions.

Conclusions

Summing up, we can state with confidence that what is required is a reasonable combination of administrative measures, measures to create favourable conditions for equal access to public procurement for new players, further development of the public procurement sector, support for small and medium-sized businesses, and an increase in the number of potential.



Bid-rigging in Hungary: The basic principles of detecting public procurement collusion and the cooperation with public procurement bodies



Attila Karsay,
*Case Handler, Cartel Detection
Section, GVH*

Competition authorities around the world are dedicating significant resources to uncovering restrictive agreements related to public procurement. Certain authorities are using 'old school', traditional investigation methods, while others are taking action with the help of sophisticated statistical methods against the most severe restrictive market practices. However, it is necessary for the competent competition authority to acquire public procurement data and information in the most accurate manner possible and within the framework of appropriate cooperation arrangements in the case of all investigation methods, not only the two mentioned above.

The primary purpose of this article is to shed light on the extent to which the parties on the public procurement and competition authority sides are able to complement each other's work beyond simple data exchange, thus improving the efficiency of budgetary spending and promoting market competition.

The Hungarian public procurement system

In order to clarify the contents of this article, it is necessary to briefly describe the Hungarian public procurement system. In Hungary, the supervision and oversight of public procurement procedures are performed by multiple authorities and governmental organisations; however, the primary objective of each of the following independent organisations is to fulfil the specified activities within their own scope of competence: The Public Procurement Authority, the Office of the Deputy State Secretary for Public Procurement Supervision of the Prime Minister's Office, and the Hungarian Competition Authority.

The responsibilities of the Public Procurement Authority are to effectively cooperate in the development of public procurement policy, as well as to facilitate and promote legal public procurement behaviours pursuant to Act CXLIII of 2015 on public procurement, thus ensuring the clear and transparent spending of public funds.³¹ The Arbitration Committee operating

as part of the Public Procurement Authority resolves any legal disputes related to public procurement and design competition procedures.³²

The Office of the Deputy State Secretary for Public Procurement Supervision of the Prime Minister's Office supervises and oversees the public procurements and contracts of the budgetary entities under the control and oversight of the Government, the institutions thereof, and certain business entities under state ownership, among others.

The Hungarian Competition Authority conducts proceedings with respect to cases related to competition law that fall within its scope of competence pursuant to the provisions of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, such as cartel and other restrictive agreements, antitrust cases, merger control, and certain cases connected to consumer protection and economic advertising activities.³³

The significance of cooperation with the Public Procurement Authority and the Prime Minister's Office is that these organisations are in the possession of documents related to public procurement that, after appropriate processing, may allow the Competition Authority to achieve important progress during its own investigations.

In the period following April 2020, the Hungarian Competition Authority has been paying special attention to ensuring more effective cooperation with both the Public Procurement Authority and the Prime Minister's Office; new cooperation agreements have been concluded and old ones renewed to achieve this goal.

The establishment of cooperation arrangements with public procurement bodies

Like all specialised activities, public procurement procedures and cartels have their own experts as well. Therefore, it is not necessarily expected from a public procurement specialist to be fully up to date on the latest development shaping the mainstream thinking in competition law circles and vice versa; it is not expected from a competition law expert to conduct an entire public procurement procedure while lacking the necessary experience in organising such matters. However, both parties need to be aware of the basic concepts and schools of thought on legal application with respect to the other field.

At the time of the first personal contact, it is definitely necessary for the competition authority to describe the essential workings

³¹ Source: <https://www.kozbeszerzes.hu/kozbeszerzesi-szervezetek/#kozbeszerzesi-hatosag>

³² Source: <https://www.kozbeszerzes.hu/kozbeszerzesi-szervezetek/#kozbeszerzesi-dontobizottsag>

³³ Other authorities: The Government Control Office, the State Audit Office, the Directorate General for the Auditing of European Funds

of (public procurement) cartels and their most common forms; although in the latter case, I would not recommend dogmatic trainings that strictly adhere to the textbook material. The reason for this is that the primary function of organisations dealing with public procurement is related to the orderly implementation of public procurement procedures and not to the investigation and comprehensive elimination of the associated cartel activities; therefore, they cannot be expected to dedicate significant human resources to activities related to detection. In my opinion, the appropriate results can be achieved by presenting practical examples and cases that are easy to judge on the basis of whether bid rigging behaviours were certainly observed or not. The aim of the competition authority in such cases can be to pass on knowledge to the public procurement experts so that they are able to detect and place into the appropriate context the most common bid rigging behaviours. I believe that these processes can be best implemented within the framework of a supervisory model incorporated into the processes themselves and not by searching for targeted cartel behaviours. The so-called red flags can prove helpful in this task, which indicate typical public procurement cartel activities. In addition to the GVH's own detection and investigation activities, the primary source of such red flags can also be the Guidelines compiled by the OECD.³⁴

I consider it an important factor to define bid rigging behaviours correctly during such conversations, thus allowing misunderstandings to be avoided. Every branch of science and legal field has its own terminology and set of technical terms; therefore, the possibility of a misunderstanding cannot be excluded. Let's imagine: perhaps the reader can also find expressions in their own first language which would have a different meaning in a competition law and a public procurement context. In general, it can be said that the science of competition law has hijacked certain terms from the following: anti-competitive, restriction of competition (restrictive market practices), fair competition. As an expert familiar with competition law, I interpret these terms as clearly referring to behaviours of competing undertakings that infringe competition law, primarily price-fixing, market sharing, and other restrictive agreements they concluded. On the other hand, to an expert in public procurement, whether we are talking about a decision-maker, an inspector, or an organiser representing the contracting authority, the term 'competition' has a significantly wider meaning.

While writing this article, the author visited the website of the Arbitration Committee, explicitly looking for decisions labelled with the tag 'competition'. In a decision selected randomly, the contracting authority of the procedure applied suitability requirements deemed unnecessary, which resulted in fewer market players (bidders) being able to submit valid bids during

the procedure; therefore, the Arbitration Committee established that the contracting authority failed to comply with the obligations thereof concerning fair competition. Based on the point of view of the competition authority described earlier and the above example, a difference in approaches is outlined, which can be a source of the misunderstandings referred to above. Naturally, these are not differences that cannot be eliminated; however, one of the parties definitely has to take the first step.

I consider clearing up the topic of undertakings belonging to the same group or being independent from each other similarly important. It is not necessary for public procurement bodies to perfectly understand the rules based on merger control provisions; however, they have to be aware of the fact that undertakings belonging to the same group cannot be considered independent from each other; therefore, it is not possible for them to conclude a cartel agreement with each other from a competition law point of view.

Collection of relevant information

The collection of data is part of a process that allows us to draw appropriately substantiated conclusions in the end with respect to a potential bid rigging behaviour. At this stage of the process, we are already past the preliminary screenings performed by public procurement bodies; however, this is not a prerequisite for requesting the appropriate documents. Based on my past experience, I do not consider it subservient to compile an itemised list that contains all of the important documents to be reviewed, as otherwise this experiment would not be completely objective due to the possible differences between legal systems and public procurement environments.

My basic assumption rests on the idea that the colluding bidders, lacking a necessarily 'cautious' attitude, may commit some kind of mistake that may point to the existence of the restrictive agreement. We have to rely on such mistakes and in order to proceed, we must necessarily 'come across them'. Since the illegal nature of collusion related to public procurement procedures is more and more well-known around business circles, the guilty parties are making more and more attempts to cover their infringing behaviour, primarily through the destruction of evidence.

Based on the mistakes committed by the bidders, it is possible to identify similar 'infected' public procurement procedures, reasonably expanding the scope of the investigation and shortening the list of undertakings potentially involved in the infringement. Certain more experienced colleagues working at the competition authority may have already experienced the situation where public procurement procedures were identified that gave a strong indication of a rotating winner or any other type of public procurement cartel or repeating pattern; however,

³⁴ <https://www.oecd.org/daf/competition/cartels/45263580.pdf>

initiating a formal investigation was not a realistic option without a mistake being made by the bidders.

The collection of data and information that cannot be found in public databases or that are not directly accessible to the competition authority is an important part of the investigation phase. The publicly available Hungarian public procurement database (the Electronic Public Procurement System and for public procurement contracts, the CoRe) includes the following important documents: the invitation to tender/participate, amendments; preliminary dispute resolution requests; summary, decisions of the contracting authority; contract. This list shows that neither the bids, nor the supplementary data provided are public, even though the preparation of these requires the greatest level of autonomy on the part of the bidders. Experience shows that errors can be found most easily in documents prepared with larger autonomy. More complex procedures include a large amount of documents; however, the majority of these are irrelevant in terms of detecting bid rigging behaviours. One of the effects of appropriately cooperating with public procurement bodies could be that the organisations involved would no longer overwhelm each other with unnecessary data requests and irrelevant documents.

Based on the experiences of the last few years, procurement procedures the value of which does not reach the minimum threshold required for the initiation of a public procurement procedure may be considered a significant blind spot. In the Hungarian legal system, this does not mean that the procurement procedure can be performed without any competition whatsoever; however, bidders are not required to provide the level of transparency mandated in the case of regular public procurement procedures. The detection of ‘infected’ procedures is perhaps the most complicated here; it is frequent for such procurements to enter the field of view of the competition authority only after the formal procedure has already been initiated.

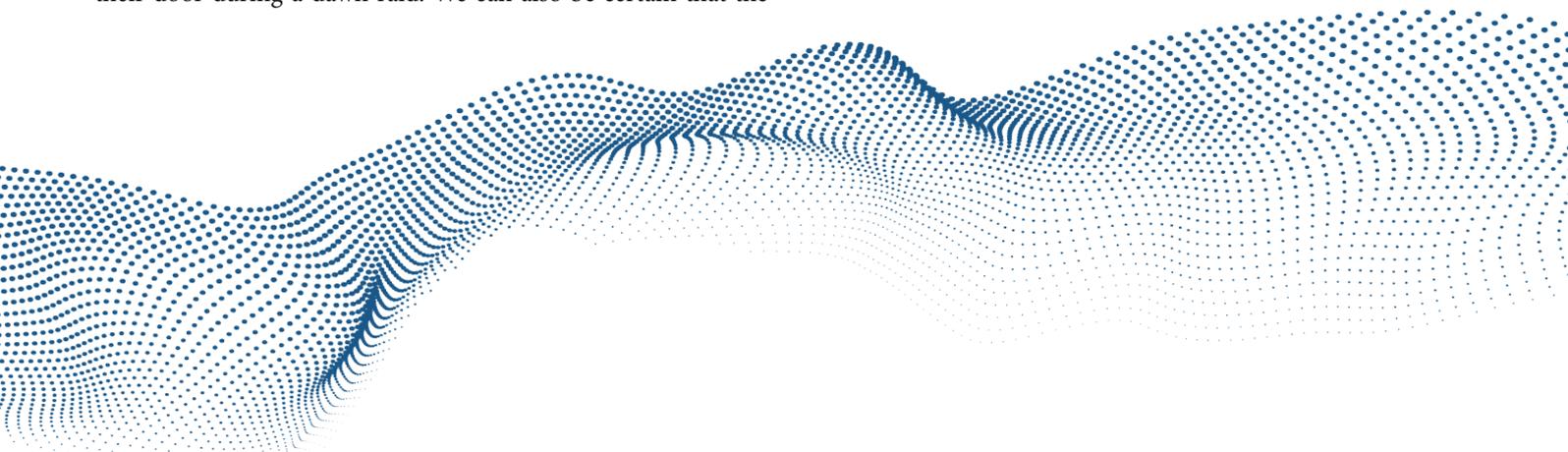
Based on the above, a clear conclusion can be drawn. As I have alluded to earlier, the undertakings and individuals participating in bid rigging are becoming more and more cautious and careful and they are able to destroy any evidence suggesting an infringement, at least until the competition authority knocks on their door during a dawn raid. We can also be certain that the

larger the undertaking participating in a cartel is, the more it will try to protect itself, as part of which the implementation of the cartel becomes nothing more than a means to an end. The latter requirement should not be forgotten either, with special regard to the unfair influence exerted on the contracting authorities, which is aimed at restricting competition in a wider sense. In my opinion, any form of bid rigging behaviour thus constitutes a part of a larger whole; therefore, my colleagues working at the competition authority cannot forego understanding the big picture, which allows their own investigations to be placed in an appropriate context as well.

We must also discuss the topic of evidence and the evaluation thereof. The competition authorities of the EEA Member States are developing detection methods based on statistical calculations more and more frequently. The Swedish and Swiss competition authorities have especially achieved impressive results with these methods. In this regard, it emerges as another question how the decision-making bodies dealing with a bid rigging case, such as the competition council operating within the GVH and later the court in the case of Hungary, evaluate the detected patterns.

The Hungarian case law follows a more conservative but more substantiated direction with respect to this issue by not accepting, as evidence, mathematical/statistical calculations that appear too abstract. An approach similar to the procedural principle of *in dubio pro reo* is strictly in effect within the Hungarian legal system since courts are only willing to accept direct or very clear indirect evidence as a basis for the guilt of an undertaking. Although patterns and mistakes made by bidders reinforce assumptions and can imply an infringement, in themselves, they do not have sufficient and ‘final’ probative force. The Hungarian courts so far have been less open to evidence based purely on natural science and statistics; however, this has primarily historical reasons.

My conclusion is that competition authorities definitely have to base their evidence-collection process on proof that ensures that an actually infringing behaviour can clearly be attributed to one of the involved undertakings (e.g. email, text messages, metadata) since only these provide sufficient certainty. The supporting role and acceptance of mathematical/statistical patterns is increasing day by day; however, they are not yet capable of reaching the certainty of a ‘smoking gun’.



The Hellenic Competition Commission's practice in bid-rigging cartels in the construction sector



Kelly Benetatou,
Vice-President, Hellenic Competition
Commission



Lefkothea Nteka,
Partner, D.K. Avgitidis & Associates Law
Firm, Ex Commissioner- Rapporteur,
Hellenic Competition Commission

Introduction

Already since the inception of the economic crisis faced by the Greek economy in the period 2010-2019, the Hellenic Competition Commission (HCC) reshaped its strategic objectives and re-aligned its priorities, among others, as to the sectors of the economy to be investigated.³⁵

Bid-rigging practices in tenders for construction works became a top priority. On the one hand, road building played an important role in the economic growth of Greece; the proper development of the transport network could lead to significant reductions in the cost of transportation and boost the integration of various regions within the country.

On the other hand, inefficient or non-competitive public procurement tenders had a significant cost for the state budget. Greek public authorities are the principal buyers of construction and infrastructure building services. In 2019, approximately 9.3% of GDP (around €20 billion per year) was spent by the Greek public authorities on the purchase of construction services and works, while at the EU level the total expenditure on public procurement amounts to approximately €2 trillion per year (around 14% of GDP).³⁶ According to estimates, improving public procurement systems can yield significant savings as even a 1% efficiency gain could save up to €20 billion per year at the EU level.³⁷

Against this background, the HCC initiated several investigations in public tenders for infrastructure works, sustaining thus a long line of cases in the construction sector. It has since issued 8 decisions on 6 cases regarding bid-rigging practices in public tenders. Three of the cases investigated concerned the construction sector, and in two of them settlement decisions were adopted under the settlement procedure for settling parties. The total fines imposed so far in all 6 cases amount to 102.9 million Euros.

Enforcement efforts have been coupled with targeted advocacy initiatives, such as the publication in 2014 of a “Guide for Public Procurement Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders”.

The bid-rigging cartel for high value tenders

The bid-rigging cartel case for high value tenders is the biggest cartel case that the HCC has dealt with so far. The Authority imposed the highest total amount of fines so far in the context of one case, €82 million to settling parties and €20 million to non-settling parties, and the largest fine on one single undertaking, €38.5 million. Moreover, it is the first case where it successfully applied its leniency programme and initiated a settlement procedure. Furthermore, it is the first case where the HCC granted fine reductions to two construction groups, after having thoroughly assessed their applications invoking their inability to pay.

In particular, at the beginning of 2013, following several news articles alleging collusion between companies in the Greek construction sector, the HCC conducted on-site inspections at the premises of several construction groups in order to investigate collusive tendering in high value public infrastructure projects. Several critical pieces of evidence were gathered during the on-site inspections, such as the diaries of two high ranking employees of one of the construction groups under investigation, which detailed meetings of the tenderers (participants, dates, tenders, allocation of projects, etc); tables assigning rights, amounts, and percentages to the construction groups involved in the allocation of tenders; and signed subcontracting agreements bearing blanks where essential elements of the contracts should have been mentioned, such as the dates of the subcontracts, and the number and the dates of the contracts signed with the procurement authority. These contracts, signed prior to the submission of the bids, were granted to cover bidders, as a form of compensation or even as a safeguard in case the designated winning bidder did not abide by the pre-agreed rotation or distribution of additional profits. Moreover, over 500 gigabytes of electronic files were collected, including e-mails.

A few days following the on-site inspections, one of the construction groups involved in the collusion schemes applied for leniency. A second round of targeted on-site inspections followed, with the aim of collecting specific evidence, including

³⁵ The views expressed are personal and do not reflect the position of the Hellenic Competition Commission.

³⁶ See European Semester Thematic Factsheet - Public Procurement, 2017.

³⁷ Visit https://ec.europa.eu/defence-industry-space/funding-and-grants/public-procurement_en

records of the arrival and departure of high-ranking employees of the construction groups under investigation at the offices of one of the undertakings involved, which was the regular meeting point of the tenderers during the latest period of the cartel.

The investigation focused notably on tenders for road construction, rail transport, metro rail, concession projects and public-private partnerships (PPP) that took place over three decades starting in 1981. Detailed data on tens of construction tenders were gathered from procurement authorities through requests for information in order to establish the timeline of the procurement procedures. The HCC requested information regarding, among others, the public announcement of the projects; the publication date of the tender invitations; the dates of the submission of the bids and any relevant postponements; the identity of the winning bidders; the identity of any subcontractors; and the stage and conclusion of the works.

Extended depositions were given by the legal representatives and employees of the construction groups under investigation, including the leniency applicant.

The Statement of Objections, addressed to 60 construction groups and companies, both Greek and European, was issued in April 2016. It covered a period of 27 years.

Shortly after the introduction of a settlement procedure for cartels in Greece in May 2016, the key participants in the cartel, i.e. Greek construction groups of considerable size and expertise in public works, filed for settlement. Several smaller in size construction companies followed. The HCC initiated settlement talks in September 2016. These were concluded in February 2017, following over one hundred technical meetings between the case-team and the representatives of the settling parties.

The settlement decision was adopted in March 2017. In April-May 2017, the standard oral hearing process took place for the non-settling parties and the respective decision was adopted in July 2017.

According to the decisions published in July 2018 and February 2019 respectively, the HCC found that two major collusion schemes regarding tenders for public works of infrastructure had taken since the 1980s, the first spanning from 1989 to 2000³⁸ and the second from 2005 to 2012. Several other tenders were the object of collusive tendering on one-off occasions, during the years 1981-1988 and 2001-2002.

According to the decisions, each of the two major collusion schemes constituted a single and continuous infringement on account of, among others, the common allocation techniques used throughout each distinct period; the objectives pursued (maintaining the status-quo and raising prices offered for public works); and the identity of the companies and their employees having participated in the cartels' meetings. During the five years

that had elapsed between the two major periods (2000-2005), the construction sector in Greece had gone through a major re-shuffling, mainly after a wave of concentrations due to the then newly introduced more austere regulatory framework regarding the classification of construction companies.³⁹ As a result, the number of construction companies licensed to participate in high value tenders diminished from approximately 40 to 10.

According to the decisions, during the period from 1989 to 2000, the then forty construction companies licensed to participate in high value tenders coordinated their business conduct on responses to invitations to tender, mainly for major highways, by allocating among themselves, in rotation, then imminent public works; by agreeing, prior to the submission of the bids in each tender which company would submit the winning bid; by submitting cover bids; and by suppressing bids. To more effectively achieve coordination in view of their number, the construction companies involved were split into teams of equal capacity, based on their turnovers; assigned team-leaders; divided high value invitations to tender in projects' groups, according to the invitations' anticipated publication time; and allocated projects in two levels, first among the teams and then within each team.

Projects were allocated based on a point system, under which each company was entitled to a share of the value of each tender allocated between the members of the cartel (theoretical quota allocated to each team and each team-member). The size of the share was calculated taking into consideration each company's turnover. Through bid rotation and priority lists, each company was allocated projects of a value equal to its theoretical quota under the point system. In case of deviations between theoretical quotas and actual shares allocated, correction mechanisms were in place, mainly in the form of awarding subcontracts or setting-up construction consortiums.

During the period from 2005-2012, the major Greek construction companies and a few European companies colluded to allocate tenders, notably for the metro rail projects of the period 2005-2006, the PPPs of the years 2008-2009 and high value infrastructure works of the period 2011-2012. The collusive scheme was implemented through regular meetings of high-ranking employees of the Greek construction companies, while employees of European companies involved in the cartel participated in fewer meetings. During these meetings, the cartelists agreed on which companies would form the designated winning consortium; drafted prior to each tender subcontracts bearing no date, signed only by the winning consortium, as a form of guarantee for cover bidders; and monitored the interest of any third company to participate in the tender. The value of the projects was allocated among them based on their turnover

38 For this period the HCC's right to impose a fine had been time-barred.

39 In Greece, in order to participate in public tenders for works and designs, individuals and companies are required to belong to registries and register in categories depending on the nature of their activities (e.g. road works and hydraulic projects), their experience, staffing and financial standing.

and market share, thus maintaining the status-quo. Metro rail projects were further allocated in such a way that at least one metro rail project was assigned to each cartel member, as experience in the construction of metro rail lines was deemed necessary for participation in any future metro rail tenders.

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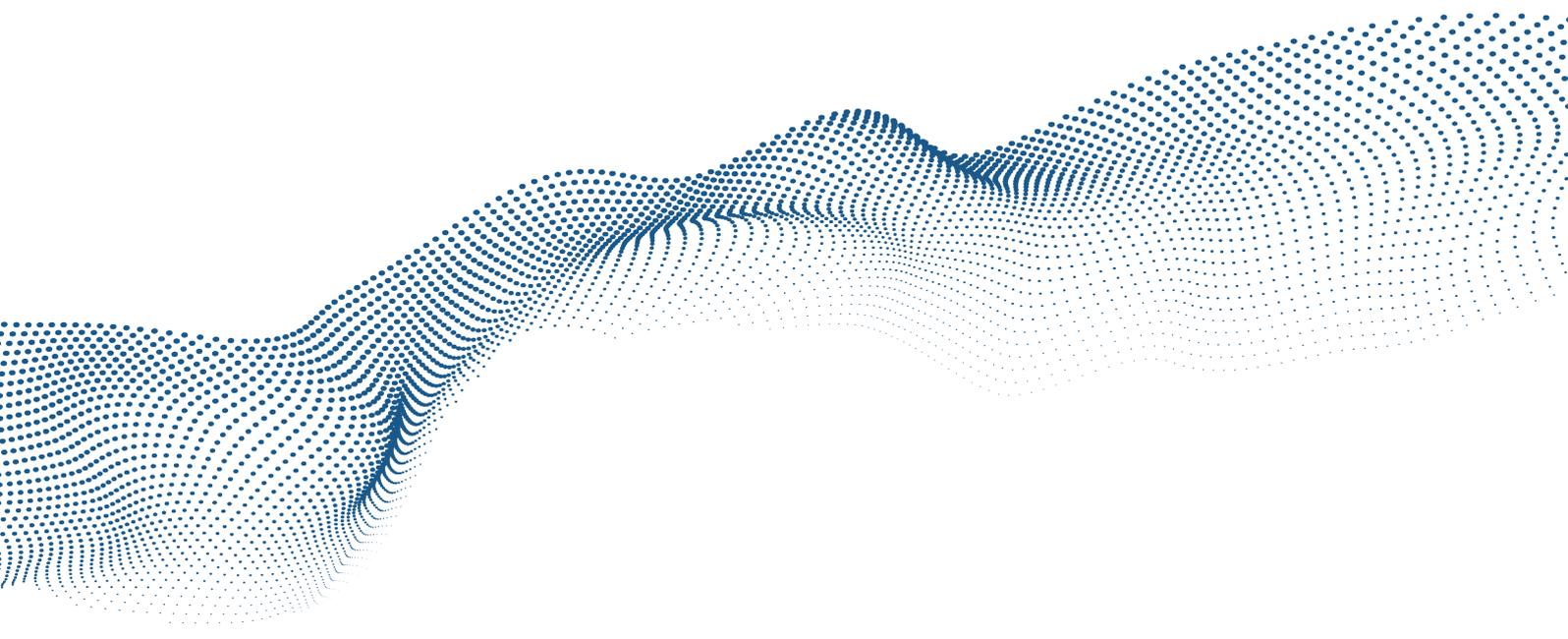
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⁴⁰ The subcontracts were handed over for safekeeping to one of the cover bidders.

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Conclusion

The subsequent cases investigated by the HCC demonstrated that the bid-rigging practices identified above were widely spread and occurred in all types of procurement procedures and in all industries, irrespective of the size of the tenderers and the value of the contracts.



An overview of the Hong Kong experience in fighting bid-rigging



By Hong Kong Competition Commission

Bid-rigging is one of the most common types of anti-competitive conduct around the world and it has long been a subject of grave public concern in Hong Kong, China. However, before the Competition Ordinance (**Ordinance**) came into full effect in the city, agreeing not to compete on a tender was not illegal unless the agreement also included elements that contravened other laws (e.g. bribery or intimidation). The Ordinance imposes a paradigm shift and requires certain changes to long standing business practices and business culture in Hong Kong.

Since its inception, the Hong Kong Competition Commission (**Commission**) has spared no efforts in combating bid-rigging cartels not only through enforcement, but also through advocacy and policy advisory initiatives. This article outlines some of the Commission's major initiatives in tackling this deep-rooted problem which may bring significant harm to consumers and the economy as a whole.

Extensive outreach and advocacy on multiple platforms

Touching first on advocacy, which the Commission considers to be particularly important at the introductory stage of a new law. Since the enactment of the Ordinance, the Commission has been actively engaging the public and businesses through direct engagement, educational initiatives and thematic campaigns across multiple platforms, with the aim of raising community awareness and understanding of the Ordinance and encouraging compliance.

Although bid-rigging cartels can occur in any market or sector where tender processes are used, the problem seemed to be particularly acute in the residential building renovation and maintenance sector in the city. This was reflected by anecdotal reports and other market intelligence received by the Commission. Against this background, the Commission conducted a study into certain aspects of the residential building renovation and maintenance market followed by a multi-pronged "Fighting Bid-rigging Cartels" Campaign in mid-2016. This first major advocacy project of the Commission aimed at raising public awareness of bid-rigging in general and educating on how to detect and prevent it.

The release of the study findings, which were consistent with public concern about pervasive bid manipulation activities, drew massive attention in the media and wider community. Riding on the noise created by it, the Campaign was rolled out with a TV announcement and brochures outlining common types of bid-rigging and tips for procurement officers to safeguard the tender process. A series of educational videos were produced to facilitate easy understanding of these messages and a "Fighting Bid-rigging Cartels" Information Centre was launched on the Commission's website featuring all relevant materials as a "one-stop shop" for all stakeholders. The Campaign was also supported by extensive outdoor and online advertising

To further educate and reach out to the community, roving exhibitions were staged across the city. Thematic seminars on fighting bid-rigging cartels targeting different audiences including procurement practitioners in both the private and public sectors, property management companies and property owners were held in collaboration with professional bodies and relevant government departments to spread the message.

As a further initiative of the Campaign, the Commission published a set of model Non-collusion Clauses and Non-collusive Certificate in December 2017 for procurers to incorporate into their tender documents and contracts so as to safeguard the procurement process against cartel conduct.

To sustain the impact, the Commission continuously reaches out to property owners and building management personnel across the city by speaking at regular briefings on building renovation and management organised by District Councils and Home Affairs Department in different districts. The Commission has also been in collaboration with the Urban Renewal Authority and Buildings Department to give talks and workshops on effecting tendering and building management.

Enforcement

The Commission's advocacy efforts were successful, not only in raising public awareness, but also in bringing complaints of bid-rigging to the Commission's attention. A most notable example is that of a procurement officer who attended a seminar by the Commission came and who a few days later approached the Commission with evidence of suspicious bidding behaviour in a tender they had just concluded, which eventually led to Hong Kong's first competition case.

That case involved five technology companies concerning a tender related to the supply and installation of a new IT system for the Hong Kong Young Women's Christian Association (YWCA). The Commission commenced proceedings in the Competition Tribunal (**Tribunal**) in March 2017. In May 2019, the Tribunal found four of the technology companies liable for contravening the Ordinance by engaging in bid-rigging, and the companies were ordered to pay a pecuniary penalty as well as the Commission's costs of proceedings in a judgment handed down in December 2020. This case was notable not just for being the Commission's first case before the Tribunal but also for including a form of vertical bid-rigging. The upstream supplier of the software was part of the bid-rigging arrangements by arranging for the submission of dummy bids to ensure that the hardware provider they favoured was awarded the contract.⁴¹

In March 2020, the Commission filed another cartel case which involved alleged price fixing, market sharing, and/or bid rigging among some leading textbook retailers in the city in relation to the sale of textbooks to local primary and secondary school students. The Commission's case is that the alleged arrangements, which were arrived at prior to the full implementation of the Ordinance, were continued by the charged retailers after the Ordinance came into full effect. It is also the first time that the Commission seeks to hold a parent company liable for its exercise of decisive influence over subsidiaries directly involved in the conduct.⁴² The case is currently at the interlocutory stage.

Bid-rigging, being a form of cartel conduct and regarded as "Serious Anti-competitive Conduct" under the Ordinance, remains an enforcement priority of the Commission.

Policy advisory initiatives and public sector engagement

As in other jurisdictions, public procurement accounts for a significant proportion of the demand for goods and services in the city's economy and the activities and functions of the public sector affect the daily lives of everyone in the territory. It is therefore very important for public officers to be equipped with the knowledge of how to identify potential collusive conduct in their work and to stay vigilant in detecting potential contraventions of the Ordinance.

To this end, the Commission published a "Guide to Competition Ordinance" in May 2018 to assist personnel from the government, public bodies and law enforcement agencies in understanding the key elements of the Ordinance and in identifying signs of anti-competitive practices in the marketplace, such as bid-rigging,

market sharing and price fixing. The Guide is also supplemented with a quick checklist as a first step to assist policymakers in assessing the competition impacts of new, or existing, policies and initiatives.

Besides producing educational materials, the Commission, in collaboration with the Government Logistics Department, held a seminar on safeguarding the procurement process for the government's procurement staff. This was followed by a series of tailored workshops for the public sector led by two internationally renowned competition experts. Senior executives from the Commission also shared their experiences and perspectives on competition law enforcement in Hong Kong.

It is also the Commission's established practice to collaborate closely with relevant government departments, public bodies and other law enforcers to ensure that government procurement programmes and initiatives are safeguarded from collusion. Most recently, in response to the COVID-19 pandemic, the Commission issued two statements to warn participants in the government's anti-epidemic subsidy programmes about the importance of complying with the Ordinance and being vigilant against potential anticompetitive practices that may undermine procurement processes. The Commission also worked closely with public bodies which are tasked with administering these programmes to ensure that they take competition concerns into consideration; furthermore, it provided advice and training on collusion prevention so that the public money being channelled to alleviate the unusual hardship faced by the business sector will not be exploited by cartelists.

Looking ahead

The Commission believes that its multi-pronged approach in combining advocacy, enforcement and advisory efforts is effective in the deterrence and detection of bid-rigging. The Commission's early successes in the Tribunal have helped establish the foundations on which future cases can be built and the Commission will use the full extent of its powers to end such practice. It will also carry on its innovative advocacy efforts as well as collaboration with other law enforcement agencies and public bodies to ensure a coordinated and effective approach to tackling bid-rigging cartels in Hong Kong.

⁴¹ Competition Commission v Nutanix Hong Kong Limited and others (CTEA 1/2017)

⁴² Competition Commission v. T.H. Lee Book Company Limited, The Commercial Press (Hong Kong) Limited, Sino United Publishing (Holdings) Limited and Hui Chiu Ming (CTEA 2/2020).

Bid rigging investigations – The Israel Competition Authority experience



Mr. Haim Arbib Adv.,
*Head of the Investigations and
Intelligence Department, Israel
Competition Authority*

Over the years, the Israeli Competition Authority (ICA) has gathered practical experience investigating bid-rigging cartels in various markets. The successes, and sometimes failures, have left us with insights into this unique type of investigation.⁴³

As it would be impractical to discuss the entire collective knowledge in this field, this document has a more modest aim. It will elaborate on some of the major lessons learned at the ICA on this subject, which we hope may be of assistance to peer agencies.

Illegal restrictive arrangements between competitors, commonly known as ‘Cartels’, are considered criminal offences under Israeli law.⁴⁴ Such arrangements are punishable under the Competition Law by up to 5 years’ incarceration.

The word cartel comes from the Italian word *cartello*, which means a „leaf of paper” or „placard”. The Italian word became *cartel* in Middle French, which was borrowed into English. Its current use in the Mexican and Colombian drug-trafficking world comes from the Spanish word *cartel*. In English, the word was originally used for a written agreement between warring nations to regulate the treatment and exchange of prisoners.⁴⁵

Modern day ‘cartels’ of the type investigated by the ICA are divided into two categories. The first are ‘typical’ cartels and the second are bid-rigging cartels.

A „typical cartel” takes the form of an arrangement between competitors regarding the usual and day-to-day sale of their products. Competitors agree either on prices, market allocation, quality of service, etc. Under Israeli law, any arrangement between competitors regarding these criteria is deemed restrictive to business practices and is subject to criminal enforcement. The violation is complete once the agreement has been reached, irrespective of whether it is carried out or not.

The ICA’s experience shows that more often than not, the highest levels of the company are involved in the illegal arrangement. The arrangement itself is kept secret and is only shared with a few people within each company. In these circumstances, theoretically, once a clandestine meeting to fix prices has been concluded, a cartel could survive without being

discovered and without leaving a trace. Luckily for enforcers, this is often not the case. In reality, competitors distrust each other, and mutual deceit is common between members of the cartel. As competitors frequently try to swindle one another and are motivated to enhance their revenues at the expense of others, communication regarding the enforcement of the cartel is likely to be found, if one looks hard enough.

Bid-rigging cartels are different. These mostly involve large scale public tenders issued by government agencies and municipalities. Public interest in these cases is high, as the cartel gains are at the public’s expense and result in higher taxes due to elevated expenditure.

Unlike a long-standing typical cartel, bid rigging cartels mostly revolve around a single tender at each moment. This important attribute influences the way we investigate these types of cartel. Unlike typical cartels, bid-rigging cartels occur at a specific moment in time – mostly near the publication of a public tender, or immediately after. At this time, potential members of the cartel must decide on the practical aspects of the collusion – who will win, how the profits will be distributed, etc. This is the only time that such potential members take the risk of participating in illegal communications.

Several characteristics of the relevant market and the way in which the tender is issued, either increase or decrease the chances for a ‘successful’ bid-rigging cartel:

Pre-existing business relations between competitors – such relationships increase the chances that they will be involved in a cartel. If the competitors already have working relations, know one another and have formalised lines of communications, it is easier for them to use this infrastructure to facilitate the cartel. The Bakeries Cartel investigated in 2010 is a good example of this characteristic. The 4 largest bakeries in Israel took advantage of a meeting of a bakers association of which they were members and stayed in the same meeting room to formalise the price fixing of basic breads. The investigation, which had been initiated due to a public tender, led to the uncovering of the illegal communication and, consequently, to the uncovering of a „typical cartel”. Notably, and ironically so, the tender itself was not part of the final indictment.

The frequency of the publication of a certain tender and even the existence of regular intervals between publications has also been found to affect the incentives to participate in such cartels. Infrequent and unique

⁴³ Although I rely on my experience as Head of the Intelligence and Investigations Department of the Israeli Competition Authority (ICA), this article reflects my own opinions and does not represent, in any way, the official stance of the ICA or the state of Israel.

⁴⁴ Restrictive arrangements are defined under para. 2 of the Israeli Economic Competition Law 5748-1988. For the English version (unofficial) see: <https://www.gov.il/en/departments/legalInfo/competitionlaw>

⁴⁵ „Definition of CARTEL”. www.merriam-webster.com. Retrieved 2019-11-29.

tenders, published only once in several years – typically for large scale projects – create higher incentives to participate in cartels. This is true especially for big government contracts that have no equivalent in the private sector. Companies have a lot at stake regarding each tender and are more prone to illegal arrangements, as equivalent tenders will not be easy to find if they lose the tender. In these cases, we may see an arrangement where one party will forfeit winning the tender in return for either monetary compensation or compensation in the form of the subcontracting of similar scale projects.

Frequent and regular tenders are also problematic, as they provide a stable background for companies to allocate the market between the different competitors. The Tree-Pruning Cartel investigation⁴⁶ found that the regularity of the tenders made it easier for members to divide the market between themselves. In this market, tree pruning tenders to protect electricity infrastructure and protect against fire hazards were the target of a wide scale cartel. Since tenders were issued every two or three years for each area, a member of the cartel would intentionally lose one year, knowing that he would win the same tender issued next year, or win a tender issued for a different area for the same amount, and so on. ‚Fair’ allocation was easy to track and the cartel died out only due to the investigation. This cartel was so damaging to the market that in some cases prices from the cartel were up to 3 times higher than regular market value, returning to the normal amount only after the investigation.

Although it is often assumed that the higher the number of potential competitors, the lower the chances of an effective cartel, our experience has shown that this consideration – although important – has less influence than the regularity and frequency of the tenders. The Tree-Pruning Cartel was comprised of over 30 companies and 60 members and was effectively controlled by a coordination mechanism, which included intermediaries, arbiters and more. If it were not for a disgruntled member of the cartel, we are doubtful that the arrangement would have stopped.

The nature of the product to be supplied in the tender also influences the possibility of bid rigging.

Tenders regarding non-branded products or work products that can be completed by many different people are easier to cartelise. For example, infrastructure tenders – which allow the job to be divided among several contractors able to do the same job – enable competitors to reach an agreement where one competitor will be the actual winner, even though the tender has been divided beforehand as part of the cartel and will be implemented using subcontracting agreements after the tender has been won. Subcontracting, which is a legitimate business practice, is taken advantage of and the focus of the investigation is therefore

proving its existence prior to the win and as part of the cartel. If a losing competitor suddenly appears as a sub-contractor, this may be indicative of a cartel: if the job is worthwhile after subtracting payment to an intermediate – why was a better offer not submitted in the first place?

For these reasons, frequent, irregular tenders – between non-familiar parties, issued by many parties and for varied amounts – serve as an obstacle for bid-rigging cartels. Members know that losing one tender still leaves them with options. Balancing which member got its fair share of the market becomes more difficult to the changing value of each tender. Irregular publication of tenders, although bureaucratically difficult for the issuers, can cause an even bigger headache for any potential violator.

Before we conclude, in addition to everything mentioned above, it is also important to note that previous years have shown that bid rigging cartels can exist even when some competitors refuse to participate, taking into consideration the repetitive nature of tenders. Although cartel members prefer that all parties to a potential tender are part of the cartel, cartel members have ways of dealing with ‚problematic’ competitors. By agreeing that only one member of a cartel will give a competitive price while others bid higher prices, they force the non-member of the cartel to either win with an extremely low price – which is unsustainable on a long-term basis – or constantly lose until they ‚come to their senses’. If, at the end of the day, the refusing party does not issue a bid in the tender and the winning member of the cartel forfeits the tender, the next agreed winner after this member – which has already issued a higher bid that is more profitable to the cartel – becomes the new winner. It is a win-win situation for the cartel, and a lose-lose situation for the public.

Attempts at requiring collateral from issuing parties for their bids in order to incentivise them not to forfeit have proven less successful, as forfeiters either find ‚legitimate’ reasons for their forfeiture or are willing to pay the collateral, as the dividend from the cartel still leaves them with profits to spare.

In conclusion, bid-rigging cartels are a unique form of cartel, with specific characteristics which are important to identify. The details of the relevant market and the identification of the particular patterns of the cartel, have particularly significant implications in the framework of a bid-rigging investigation, as different patterns mean different modus operandi of the cartel. Accordingly, an in-depth study of the market may help an agency to uncover collusion.

⁴⁶ The Tree Pruning Cartel was a long-standing cartel between dozens of companies in Israel including bid rigging, price fixing and market allocation of public tenders for the pruning of trees required for fire control and electricity safety in Israel. See: <https://www.gov.il/en/departments/news/treepruningcartel>

Fighting bid-rigging in Italy



Alessandra Tonazzi,
*Director of the EU and International
Affairs Directorate of the Italian
Competition Authority*



Michele Pacillo,
*International Affairs,
Italian Competition Authority*

Introduction

This article discusses how the Italian Competition Authority (hereafter the Authority or the AGCM) detects and prevents bid-rigging by advocating for the better design and implementation of tender procedures.⁴⁷

Public procurement of goods and services for the public administration ranges across several economic sectors and affects around 10% of the Italian GDP. Therefore, efficient and effective tendering procedures are key to ensuring that goods and services are procured at the best value for money and that savings are made for the public budget, contrasting corruption and promoting competition.

Public spending and infrastructure investment will be indeed a key driver of the recovery after the Covid-19 sanitary and economic crisis in the years to come. The Covid-19 emergency has deeply affected public procurement in Italy by drastically reducing the recourse to competitive tendering procedures; for instance, with respect to the health supplies of protective devices and medical equipment (value of 3€bn), the majority of public contracts have been awarded through procedures with no publication of the tender (77%) or through direct awarding (20%), mainly by central purchasing bodies or central bodies (around 57%).⁴⁸ However, the renewal or extension of existing contracts needs to be limited in time and scope to what is strictly necessary to respond to the emergency situation in order to prevent corruption and collusion from undermining the positive contribution of public procurement to economic recovery.⁴⁹

In this context, competitive tendering processes and procurement are fundamental to ensure that public money is well spent and competition is not undermined.

Bid-rigging has long been an enforcement priority of the AGCM; between 2015 and 2020, nearly half of the cartel investigations concluded by the Authority (16 out of 34 cases) concerned collusive conduct in public procurement. 2015 was a record year for the enforcement practice of the AGCM, as 8 bid-rigging

cartels were cracked down (out of 14 anticompetitive agreements ascertained).

After an overview of the legal framework (section 1), the article first discusses some issues encountered in enforcement and related mainly to the detection of bid-rigging schemes; incentives to report to the AGCM can be low despite the availability of leniency programmes, since colluding bidders operate in small markets where they know each other, and they risk facing criminal charges (section 2). To fill this gap in self-reporting, the Authority's strategy has been to engage with other actors, such as procurement agencies, to advocate for tender design that minimises the risk of collusion as a preventive measure (section 3) and to strengthen its detection capabilities by cooperating with procurement agencies and, given also the criminal nature of bid-rigging in Italy, public prosecutors (section 4). The article concludes with some recommendations on how to foster bid-rigging detection and prevention.

1. The legal framework in Italy

Public procurement is a relevant part of the Italian economy and affects several economic sectors. In 2020, the value of all public contracts was around 10% of the GDP (227 €bn). The procurement is organised in an extremely decentralised way: in 2020 there were 25,700 tendering authorities involved in 4.95 million tendering procedures.⁵⁰

The main piece of legislation regulating public procurement is the Italian Public Contracts Code (Legislative Decree no. 50 of 2016), whose enforcement and supervision are entrusted to the Anti-Corruption Authority (ANAC).

Bid-rigging is one of the most serious infringements of the Italian Competition Act (Art. 2 Law 287/90) and the Treaty of the Functioning of the European Union (Art. 101 TFEU); the conduct can attract administrative pecuniary sanctions of up to 10% of the companies' turnovers in antitrust proceedings and even higher amounts in proceedings for private damage actions.

Furthermore, the guidelines for the Italian Public Contracts

47 The views expressed here are the authors' and do not necessarily reflect those of the Italian Competition Authority.

48 See the data reported by the Anti-Corruption Authority (ANAC) in a webinar: https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/AttivitaInternazionale/14_07_WebinarSeriesDay4_sito.pdf

49 See OECD (2020), The role of competition policy in promoting economic recovery, www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf

50 See ANAC database on public contracts, available at: <https://dati.anticorruzione.it/superset/dashboard/appalti/>

Code envisage that antitrust liability (as established by an infringement decision of the AGCM and upheld via judicial review) is one of the factors that tendering authorities may take into consideration when it comes to excluding a company from participating in public tenders in Italy.⁵¹

Bid-rigging is also a criminal offence (Art. 353 of Italian Criminal Code), and criminal sanctions can be imposed on individuals by the Courts. As a consequence, employees and directors of companies involved in a bid-rigging conspiracy may be subject to criminal penalties even though their companies have been granted full or partial leniency by the AGCM.

This is a relevant issue in Italy given that the AGCM has the duty to inform the public prosecutor of any criminal offence, and the public prosecutor can ask the AGCM for all the documentation of the case, including documents obtained under the leniency programme. As a consequence, incentives to cooperate with the Authority under a leniency programme are rather low.

Given this context, the AGCM has advocated for an enhanced interplay between criminal and civil proceedings; namely, the granting of full leniency from criminal actions to the first applicant to the Italian leniency programme.

This solution is envisaged by Directive (EU) 2019/1,⁵² which is currently being transposed in Italy; the new EU framework requires Member States to ensure that employees and directors of companies benefitting from immunity are also immune from the administrative and criminal law consequences of the offence, provided that the request for immunity precedes the commencement of criminal proceedings and that the persons concerned cooperate actively with the national competition authorities.

Outside bid-rigging cases, the Authority can only carry out its advocacy role vis-à-vis the ANAC and other interested stakeholders, such as procurement agencies and public prosecutors.

2. Enforcement issues

The enforcement practice of the AGCM has highlighted several issues. First, as noted above, the lack of a legal interplay between the leniency programme and the criminal consequences for individuals flowing from some competition infringements may undermine the incentives to apply for leniency and adversely affect the agency's ability to detect and prosecute bid-rigging

⁵¹ Companies can put in place self-cleaning measures (e.g., the adoption of a compliance and/or a leniency programme) to show their integrity and reliability, thus avoiding their debarment. See the Guidelines n. 6 of the Anti-Corruption Authority (ANAC), Linee Guida n. 6 – Indicazione dei mezzi di prova adeguati e delle carenze nell'esecuzione di un precedente contratto di appalto che possano considerarsi significative per la dimostrazione delle circostanze di esclusione di cui all'art. 80, comma 5, lett. c) del Codice, 2018.

⁵² Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33, available at: <https://eur-lex.europa.eu/eli/dir/2019/1/oj>

⁵³ See, for instance, Supreme Administrative Court (Consiglio di Stato) rulings no. 5885, 5898, 5900, 5884, 5897, 5899, dated 6 October 2020, with respect to the AGCM case I796 – Servizi di supporto e assistenza tecnica alla PA (concerning bid-rigging in the market for support services and technical assistance to public administrations in the management of EU funds). The Authority found evidence of anomalous bidding behaviour by the parties (e.g., cover bids) and evidence of contact between them (e.g., arrangement of meetings to discuss issues related to the tender, and also documents showing simulations of the allocation of lots prior to the tender).

cartels. Out of six cartel investigations prompted by a leniency programme between 2015 and 2020, only one case – described at the end of this section – concerned public procurement. Moreover, the Italian economic landscape is populated by many SMEs, which may not have access to the legal advice they require in order to become acquainted with the leniency notice and approach the agency.

Second, incentives to apply for leniency may also be weakened by the presence of a plurality of public procurement agencies in Italy, meaning that many tenders involve markets that have a regional or local dimension in which the few market operators know each other and regularly participate in various tenders. Such multi-market contacts are likely to facilitate collusive behaviour as part of multi-regional schemes to allocate lots or tenders. Furthermore, the fragmentation of public tenders can make it more difficult for the Authority to assess whether the particular rigged tender is part of a wider collusive plan involving other tenders.

Third, another important challenge for effectively prosecuting big-rigging cartels as a competition offence is related to the standard of proof: the experience of the AGCM shows that consolidated collusive schemes do not necessarily require explicit contacts between the bidders and this raises investigative and evidentiary issues for the Authority, in the absence of contributions from leniency applicants. Several investigations were launched on the basis of suspicious patterns signalled by procurement agencies; however, as clarified by the Courts, circumstantial evidence is rarely sufficient on its own to prove an anti-competitive conduct and indicia of suspicious bid patterns ought to be corroborated by proof of contacts between parties and anticompetitive intent, in a way that the allegation of the AGCM is the only one capable of explaining the facts or in any case clearly preferable to any alternative hypothesis (the so-called principle of “narrative consistency”).⁵³

Fourth, in the AGCM enforcement practice some bid-rigging schemes were implemented through recourse to bidding consortia or sub-contracting, two tools envisaged by the Italian Public Contracts Code. According to a general principle established by the Italian case law, contractual institutes including those envisaged by the Public Contracts Code, although abstractly neutral and legitimate, can be used in a distorted manner for anticompetitive goals, for instance as a cover or a vehicle for

a cartel agreement. The Authority has the burden of proof to demonstrate that a bidding consortium or sub-contracting is being used to eliminate competition in the tender procedure. In particular, the Authority ought to consider the following elements: the rationale of the conduct, the efficiency defence, the structure and characteristics of the relevant market and the intended use of the contractual institute.

An interesting example is provided by the AGCM investigation on a cartel affecting the outcome of a tender procedure for the provision of cleaning and maintenance services for public offices throughout Italy (Case No. I808).⁵⁴ In April 2019, the AGCM found that the four main market players had formed a number of distinct temporary associations of undertakings that exchanged information about their bidding strategies during meetings and through subcontracting. These exchanges were part of a concerted practice by which the bidding consortia submitted bids that had no overlap, according to a so-called “chessboard” pattern. The Authority found that bidding consortia and subcontracting were used within their intended purpose but in a distorted manner: bidding consortia to define a lot sharing scheme and subcontracting as a compensation mechanism for those companies not bidding. The AGCM issued an infringement decision and imposed a sanction of €235 million in total.

The First Instance Court, while annulling the infringement decision vis-à-vis three companies for insufficient evidence (only circumstantial), confirmed the violations charged against the other companies although it lowered the imposed sanctions. In particular, the Court found that the endogenous and exogenous evidence relied upon by the AGCM was relevant and significant.⁵⁵ First, the Authority correctly found numerous anomalies in the bids submitted by the companies; second, the Authority’s findings were based on documentary evidence (such as emails and documents seized at the companies’ premises), as well as on wire-tapping records retrieved in the parallel criminal proceedings. The case is now pending before the Supreme Administrative Court.

3. Advocacy in public procurement

Since its establishment in 1990, the Authority has prioritised advocacy initiatives aimed at preventing bid-rigging and has advised procurement agencies with the understanding that well-designed tenders not only foster competition by favouring the participation of new potential bidders, but also contribute to increasing the transparency of the public administration as an indirect way of preventing or detecting corruption, saving public spending and opening-up concentrated sectors to competition (i.e., liberalisation).

Tenders can be viewed as incomplete contracts, characterised

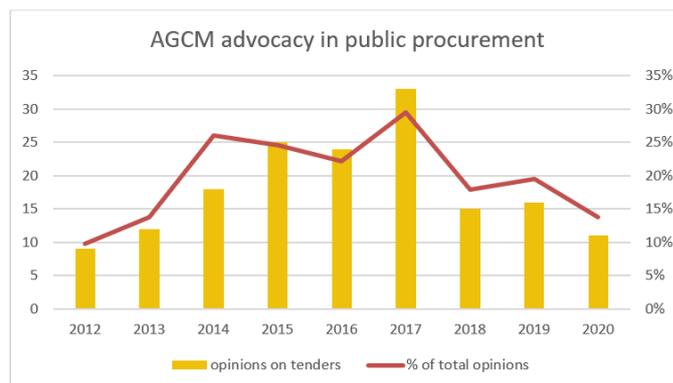
by information asymmetry and investment risk, therefore, the design of tenders can be challenging especially when public procurement is highly fragmented at regional and local level and procurement officials lack the relevant skills and expertise.

The AGCM carries out its advisory role by providing opinions to procurement agencies with respect to:

- contract design: definition of the object; technical requirements; allotment criteria;
- tender design: participation/selection criteria; awarding mechanisms; assessment criteria of technical and economic requirements.

Opinions are rendered to Consip, the central government procurement agency, on a regular basis while opinions to local tendering authorities can be delivered either ex-officio or at their request.

As Graph 1 shows, the Authority’s advocacy intervention in this area has been a relevant part of its overall advocacy activity, ranging from 10% and 30% of the overall advocacy opinions delivered by the Authority.



The most frequent types of design issues tackled by the AGCM in its opinions concern tender participation and award criteria, followed by participation in bidding consortia and allotment design.

With respect to tender participation criteria, the AGCM has advocated for the technical and financial requirements of potential bidders to be impartial and reasonable, established ex-ante and made known to participants, and strictly related to the tender object, actual value of the contracts and relevant experience. For instance, the Authority found that in some cases the tendering agencies did not describe the requested or desirable features of the products or services to be procured but instead identified them with specific existing branded ones. Similarly, the AGCM outlined that turnover thresholds for tender participation were in some cases set in a disproportionate manner, with no reference to the value of the contract and the contract period.

⁵⁴ See AGCM case: I808 - GARA CONSIP FM4 - ACCORDI TRA I PRINCIPALI OPERATORI DEL FACILITY MANAGEMENT, final decision No. 27646 of 17 April 2019 and published in the AGCM Bulletin No. 19/2019, available on the AGCM website.

⁵⁵ See the rulings of TAR Lazio (First Instance Court) no. 8767, 8768, 8774, 8775, 8776, 8777, 8778, 8779, 8781, 8770, 8772, 8779, 8765, 8769, dated 27 July 2020.

In relation to award criteria, the Authority has advised the use of the lower bid criterion in tenders for homogenous products or services, while the best economic offer criterion is considered to be more appropriate when qualitative aspects are prevailing. In setting the scoring system, tendering agencies should balance bid performance with the fulfilment of technical/qualitative criteria.

The Authority has also underlined in its advocacy efforts that the purpose of temporary bidding consortia is to increase the number of potential bidders by allowing the participation of firms specialised in different areas. The Authority's practice appears to suggest that bidding consortia with members that are individually able to satisfy the technical and financial requirements should be looked at with some caution, as they could potentially serve as a collusive device, even if this concern is not recognised in the 2014/24/EU Directive on public procurement.

Finally, the Authority has outlined some aspects of allotment criteria, recommending that the number of lots should be generally lower than the number of bidders, firms controlling or participating in other bidding firms should not be allowed to participate and a higher number of lots can be valuable to capture a more differentiated demand.

4. Cooperation to foster detection

With a view to improving its ability to detect bid-rigging cartels, the Authority has adopted a multi-faceted strategy, involving increasing cooperation with major stakeholders, namely public procurement agencies, public prosecutors and the agency supervising all public tenders in Italy, the ANAC.

Cooperation with public procurement agencies

The Authority has long recognised the importance of raising awareness among procurement officials of bid-rigging schemes and their negative consequences on public administrations as well as on the overall State Budget.

With this in mind, the AGCM has established a partnership with the central government so that all the tenders issued by Consip, the central government procurement agency, are reviewed by the Authority before their launch.

Furthermore, in 2013 the Authority issued a handbook⁵⁶ based on the [OECD Guidelines for Fighting Bid Rigging in Public Procurement](#) to help procurement officials to identify market characteristics that are more prone to collusion, recognise suspicious bid patterns and other anomalous conducts that may signal collusive behaviour and report these findings to the Authority. The handbook has been widely promoted and disseminated to procurement agencies, which were reassured about the continuation of the tendering procedures in cases where suspicious bid patterns are identified, as the latter would represent only initial indicia of wrongdoing and not necessarily

trigger an antitrust investigation by the AGCM.

This initiative towards tendering authorities has led to an increasing number of complaints to the AGCM about suspected bid-rigging schemes and, as mentioned above, in 2015 the AGCM investigated 8 bid-rigging cartels.

Cooperation with public prosecutors

Another important facet of the AGCM strategy is cooperation with the public prosecutors.

Indeed, some of the AGCM's bid-rigging cases started following criminal investigations into corruption in public procurement. For instance, in the bid-rigging case on facility management tenders mentioned above, the AGCM cooperated with public prosecutors in Rome, who were investigating the same conduct in connection with criminal proceedings, and it relied on a leniency application submitted by one of the parties to the cartel as well as on wire-tapping records provided by the public prosecutors. In this regard, the First Instance Court reiterated the principle that wiretapping records that have been lawfully acquired in the context of a criminal investigation pursuant to the procedural rules concerning the gathering of evidence may be used by the AGCM in antitrust proceedings.

In other cases, the AGCM transmitted its infringement decisions to the competent public prosecutor due to the statutory obligation to report alleged criminal offences, including bid-rigging.

Recognising the increasing importance of cooperation with public prosecutors, in January 2018 the AGCM signed a Memorandum of Understanding (MoU) with the Public Prosecutor's Offices of Rome and Milan to increase the effectiveness of prevention and fight against corruption in the public administration. The MoU sets up an operational framework for the exchange of information on criminal and administrative proceedings within the respective areas of responsibility.

Cooperation with the Anti-corruption authority, the ANAC

The ANAC is responsible for the enforcement of the anti-corruption legislation and the compliance with the Public Contracts Code, which contains all the provisions related to the design and execution of public tenders by all procurement agencies in Italy.

Shortly after its establishment, in 2014 the two authorities signed a MoU to foster information exchange and cooperation. Indeed, the ANAC manages the National Database on Public Contracts, which contains an extensive amount of data on major tenders; such data, in the AGCM experience, can be very helpful in delineating the broader picture beyond a suspected collusive episode at a single tender level. A pilot project between

56 See AGCM resolution dated 18 September 2013, available at the following link: https://www.agcm.it/dotcmsDOC/allegati-news/Delibera_e_Vademecum.pdf

the Authority and the ANAC to design screening devices for public tenders was carried out in previous years but was abandoned because results were disappointing due to gaps in the ANAC database, which only contains information about winning bids.

Concluding remarks

Fostering the detection of competition offences in public procurement is a challenging task for the Authority for the issues discussed in the above sections. To address such a challenge, there are several areas where improvements could be made.

First, it is important to boost the adoption of leniency programmes by raising awareness of their benefits, especially among SMEs, and by strengthening the incentives to collaborate with the AGCM, particularly in the context of bid-rigging violations. In this regard, the transposition of Directive (EU) 2019/1 in the Italian framework will likely increase reporting to the Authority, thanks to the granting of immunity from criminal charges to the individuals of companies that apply for leniency.

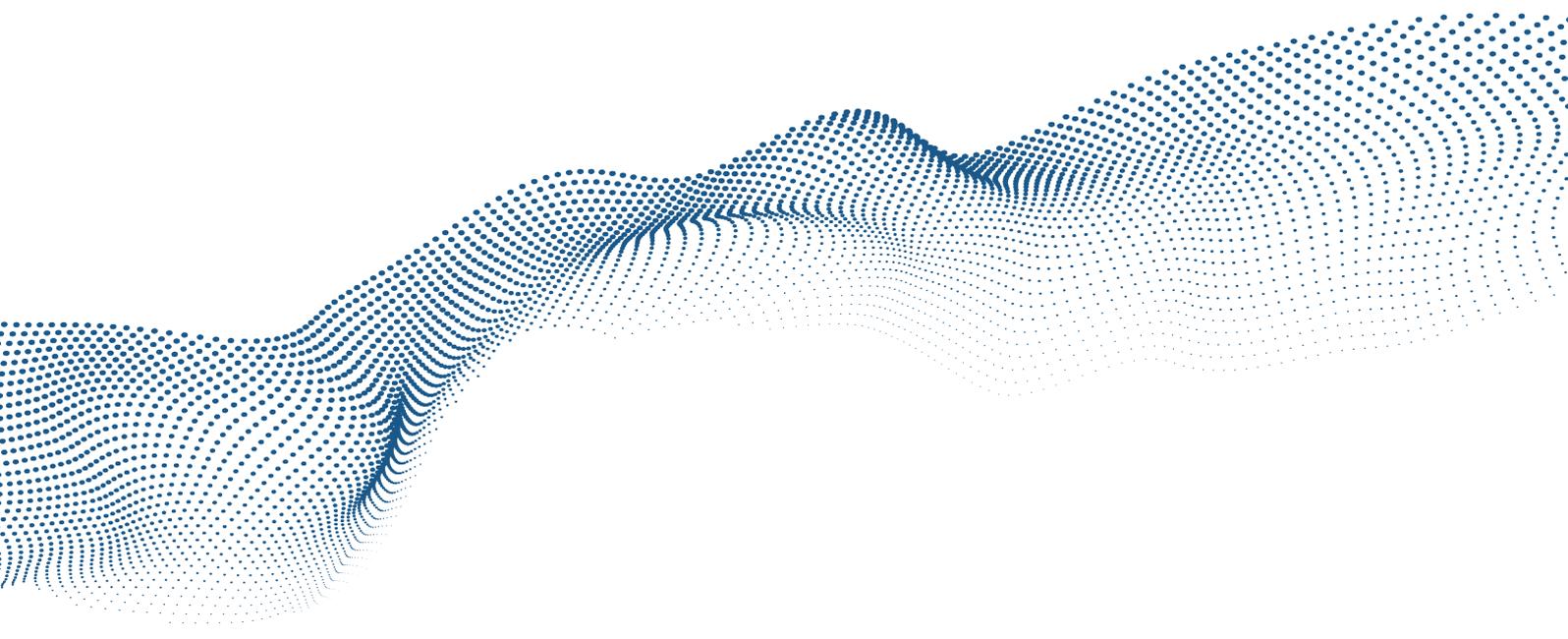
Second, the excessive fragmentation of public procurement in Italy, the low technical skills of the procurement officials and a complex legal framework full of exemptions and loopholes make the Italian procurement system prone to risks of corruption and inefficiency. As part of the government efforts to simplify the general framework on public procurement, the [national recovery and resilience plan](#) sent by the Italian government to the European Commission in May 2021, in the context of the Next Generation EU (a temporary recovery instrument

approved by the EU to address the challenges posed by the pandemic), contains important measures: rationalisation of procurement agencies and training of their officials together with an enhancement of the public contracts database that is managed by the ANAC. These measures, if implemented, will help make the procurement system more transparent, thereby reducing the scope for collusive behaviour and corruption.

Another important suggestion to foster the detection of bid-rigging is to extend cooperation with the public prosecutors of other main cities in Italy, with a view to raising awareness of the competition-related aspects of bid-rigging and encouraging information exchange with the Authority.

Finally, the use of big data, algorithms and artificial intelligence is certainly bringing innovation in this area too; as companies find new forms of cartelisation, competition authorities are reacting by experimenting with new digital detection tools, adapting their investigative strategies and evidence gathering instruments. Therefore, it is important for competition authorities to closely monitor these developments and learn from the experiences of the authorities that have started using these tools (which have been debated in international fora), such as the OECD and the ICN.⁵⁷

⁵⁷ See for instance the recent ICN project on The impact of digitalization in cartel enforcement- Scoping paper, 2020, available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/06/CWG-Big-Data-scoping-paper.pdf>.



Fighting bid rigging in the U.S.



Michelle Rindone,
*Assistant Chief
in the Antitrust Division's
International Section,
US Department of Justice*



Carolyn Sweeney,
*Counsel to the Antitrust Division's
Assistant Attorney General,
US Department of Justice*

Every day, governments around the world conduct bidding to procure critical goods and services. The OECD has estimated that, on average, 12% of the GDP in OECD countries are spent on public procurement and an even greater percentage of GDP is spent on public procurement in developing countries.⁵⁹ Moreover, eliminating bid rigging could reduce procurement costs by 20 percent or more.⁶⁰ Safeguarding these precious funds from bid rigging is one of the most important goals of a competition agency.⁶¹ As part of the U.S. Department of Justice, the Antitrust Division dedicates substantial resources to deterring, detecting, investigating, and prosecuting bid rigging in a wide range of industries, placing special attention on bid rigging in public procurement.

To increase the effectiveness and efficiency of its public procurement enforcement efforts, the Division recently created the Procurement Collusion Strike Force (PCSF).⁶² The PCSF is a coordinated interagency partnership, which currently includes nearly 500 members from 48 agencies and offices, including U.S. Attorneys' Offices, the Federal Bureau of Investigation (FBI), and the Inspectors General, or investigative teams, of multiple federal agencies.⁶³

The PCSF strives to deter bid rigging by increasing awareness among various stakeholders. This includes connecting with federal, state, and local procurement officials to assist with evaluating and structuring their procurement processes to remove vulnerabilities, as well as connecting with government contractors, trade associations, and attorneys who practice in this area to educate them about the significant penalties for bid

rigging in the United States. To date, the PCSF has trained more than 12,000 agents, investigators, analysts, auditors, attorneys, and procurement officers from more than 500 offices and agencies.

The PCSF outreach is a substantial, but worthwhile undertaking. The PCSF has enhanced the Division's detection capabilities, and has resulted in opening more than 30 investigations since November 2019. These investigations span a range of industries from defense and national security to infrastructure. Some of these investigations focus on bid rigging impacting small geographic areas of the United States, whereas other investigations are global.

The PCSF investigations are in addition to investigations that result from the Division's leniency program, which is one of its most important investigative tools for detecting cartels, including bid rigging.⁶⁴

The PCSF also aims to facilitate more effective and efficient detection, investigation, and prosecution of bid rigging. One of the main ways the PCSF accomplishes this objective is to assist procurement officials in identifying collusion "red flags."⁶⁵ Under U.S. law, a bid-rigging conspiracy is an agreement among horizontal competitors about bids or offers that are to be submitted to or withheld from a third party. Although the agreement itself is quite simple, bid rigging can take many forms, such as competitors agreeing to take turns winning bids (also known as bid rotation), competitors agreeing to submit intentionally high bids, or otherwise unacceptable bids (also called complementary,

58 The views expressed herein are their own and do purport to represent those of the U.S. Department of Justice.

59 OECD, Competition, Fighting Bid Rigging in Public Procurement, available at: <https://www.oecd.org/competition/fightingbidrigginginpublicprocurement.htm>.

60 *Id.*

61 *Id.* The OECD estimates that eliminating bid rigging could drop prices for public procurement by 20% or more.

62 U.S. Department of Justice, Antitrust Division, Procurement Collusion Strike Force, available at: <https://www.justice.gov/procurement-collusion-strike-force>.

63 The United States is divided into 94 federal districts to assist with the enforcement of federal laws. As part of the U.S. Department of Justice, U.S. Attorneys' Offices are responsible for federal law enforcement in their district.

64 Under the Antitrust Division's leniency program, corporations and individuals who report their cartel activity and cooperate in the Division's investigation can avoid a criminal conviction, fines, and prison sentences if they meet the requirement of the program. Further information about the leniency program is available at: <https://www.justice.gov/atr/leniency-program>.

65 See Red Flags of Collusion (June 2015) and Video: Recognizing Antitrust Conspiracies and Working with the Antitrust Division (November 2019), both available on the PCSF webpage available at: <https://www.justice.gov/procurement-collusion-strike-force>

courtesy, cover or token bids), and competitors agreeing to refrain from bidding.⁶⁶ Other bid rigging red flags may include a losing competitor receiving a subcontract award from the winning competitor, bid prices suddenly increasing without explanation, or similarities in the bids themselves, such as typos or metadata indicating that all the bids were prepared by the same bidder. When a red flag is detected, the PCSF and the partner complaint centers or hotlines serve as avenues for reporting misconduct. When potential illegal conduct is identified, prosecutors and agents from the PCSF's partners are jointly mobilized to investigate and, if validated, prosecute the illegal conduct.

The PCSF also leverages data analytics tools of its investigative partners to identify potential bid rigging red flags in government procurement data. During 2020, the PCSF began a data analytics dialogue among its partners by organizing several webinars. More than 1,000 data scientists, analysts, and auditors attended. Afterwards, the PCSF attorneys engaged with dozens of agency data analytics teams to encourage them to build or enhance tools to detect bid rigging, and offered additional training in detecting suspicious bid patterns. The PCSF attorneys also provided valuable introductions between the various partner data analytics teams.

The Division's newest public procurement initiative involves expanding the PCSF's efforts internationally through PCSF: Global, which the Division started laying the groundwork for in 2020. In June 2020, the Division submitted a note to the OECD's Competition Commission Working Party 3.⁶⁷ In September 2020, the Division organized a PCSF Showcase adjacent to the International Competition Network's virtual annual conference.⁶⁸ A goal of PCSF: Global is to continue to build connections among enforcement counterparts to detect and investigate bid rigging stemming from the substantial amount of U.S. funds spent abroad.

The Division's Korea Fuel Services investigation, one of the most significant procurement-related cases in its history, is an example of the Division's international efforts.⁶⁹ This investigation arose from a hotline complaint made to one of the Division's law enforcement partners, which then organized agents from the FBI, the U.S. Department of Defense Criminal Investigative Service, the Defense Logistics Agency, the U.S. Army Criminal

Investigative Command, and the U.S. Air Force Office of Special Investigations to investigate. The investigation uncovered bid rigging among four South Korean oil refineries, and their agents and employees, who agreed to rig bids on contracts to supply fuel to U.S. military installations located in South Korea. The conspiracy lasted for more than a decade, from at least 2005 through 2016, and continued through numerous bidding cycles, which were usually spaced a few years apart.

As detailed in the public charges, two U.S. Department of Defense agencies purchased fuel through a process that was intended to be competitive. The Defense agencies purchased different types of fuel for different locations, and allowed the bidders (South Korean oil refineries) to choose which component (also known as line item) on the contract to bid on. The Defense agencies then awarded the contract based on the lowest bid price and the bidder's past performance. Rather than compete, however, the bidders discussed and agreed which oil refinery would win each line item in the bid solicitation, and at which price. By sharing the winning price, other bidders were in a position to submit intentionally losing bids, or to refrain from bidding on the line item that had been allocated to another bidder.

This case demonstrates the effectiveness of collaboration among agencies, as well as the usefulness of hotline and complaint centers. As a result of this collaboration, the investigation resulted in criminal charges against five corporations (four oil refineries and one corporate agent), which paid over \$150 million in criminal fines. The Division also charged seven individuals for their roles in the illegal conduct.

This case also illustrates several bid rigging red flags. Since it was too costly to buy fuel outside of the region, the number of bidders was limited to oil refineries in South Korea. The fuel industry also provided incredibly high barriers to entry into the market. In addition, it was well known that the U.S. military purchased fuel every few years. The regular bidding cycles allowed the bidders to pre-determine their market shares down to the very line item.

During the global pandemic, public procurement enforcement efforts have not slowed and the Division continues to detect and

66 See Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For (February 2020), available at: <https://www.justice.gov/atr/file/810261/download>; An Antitrust Primer for Law Enforcement Personnel (September 2018), available at: <https://www.justice.gov/atr/page/file/1091651/download>

67 Criminalization of Cartels and Bid Rigging – Note by the United States (June 2020), available at: <https://www.justice.gov/atr/page/file/1316546/download>

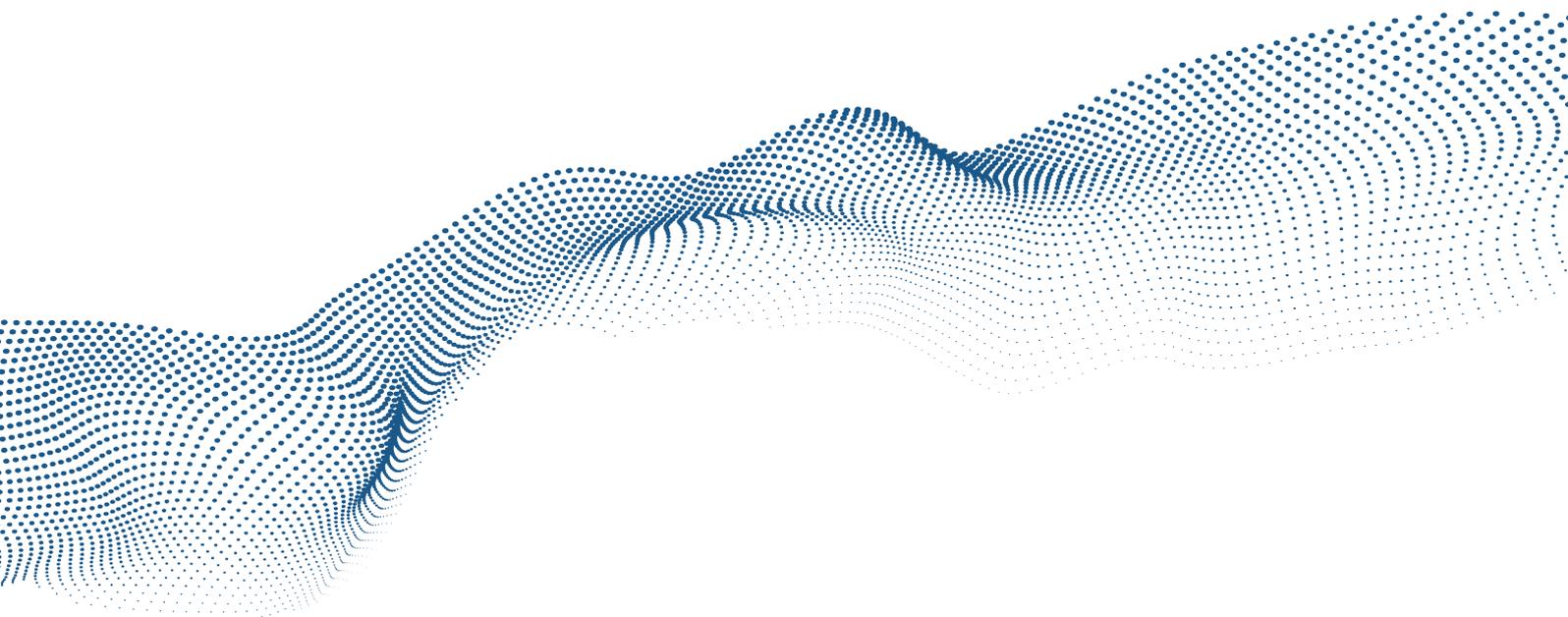
68 PCSF Showcase (September 2020), video available at: <https://www.ftc.gov/news-events/audio-video/video/international-competition-network-2020-virtual-conference-day-3> (at 2:55:00); slides available at: <https://www.justice.gov/atr/page/file/1317471/download>

69 Three South Korean Companies Agree to Plead Guilty and to Enter Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (November 2018), available at: <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>; DOJ Agrees to Civil Settlement with Additional Firm Involved in Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (April 2020), available at: <https://www.justice.gov/opa/pr/doj-agrees-civil-settlement-additional-firm-involved-bid-rigging-and-fraud-targeting-defense>

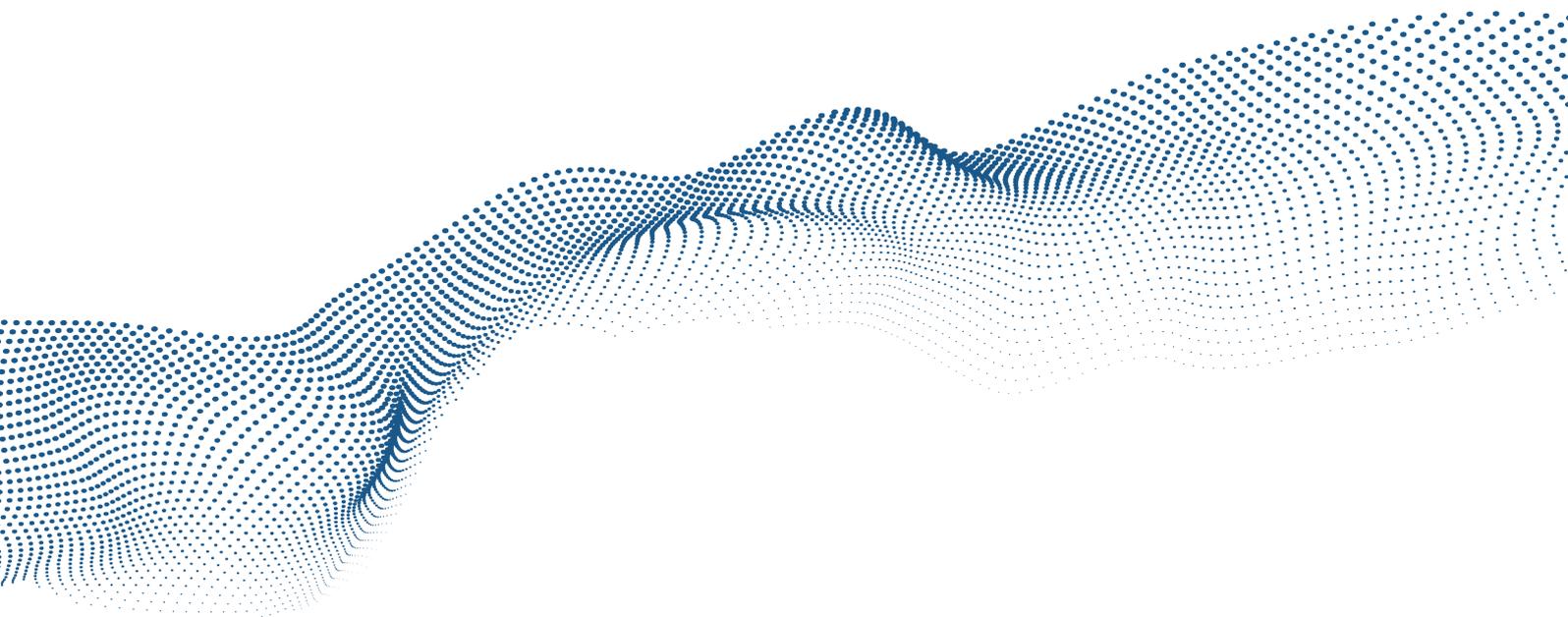
investigate cases like Korea Fuel Services. Emergency projects often arise in the context of public procurement, particularly those related to disaster relief. Unfortunately, such exigencies create ample opportunities for bid rigging. Indeed, this is one of the many reasons why the Division is on high alert during the current pandemic.

In addition to prioritizing outreach and providing virtual training for its domestic partners during the pandemic, the Division also began providing technical assistance to its international counterparts through entirely digital communications platforms, including several programs on bid rigging. Administering these programs virtually made them more accessible, allowed more Division staff to attend and provide their expertise, and led to increased attendance from participating countries.

During the pandemic and beyond, the Antitrust Division welcomes the opportunity to share its bid rigging experience and expertise through the OECD Regional Competition Center in Budapest and with the individual competition agencies in its vicinity.



News from the Region



Legislative reforms in the field of economic competition in the Republic of Armenia



*State Commission for the Protection
of Economic Competition of Armenia*

The Law on Protection of Economic Competition (hereinafter referred to as “the Law”) of the Republic of Armenia was adopted almost 21 years ago, on 6 November 2000. Since then, it has undergone many changes, and it is the basic law regulating the field of economic competition. Despite the amendments, the Law still needed significant reforms.

Consequently, in 2020 the State Commission for the Protection of Economic Competition of the Republic of Armenia (hereinafter referred to as “the Commission”) elaborated a package of legislative amendments aimed at improving the current regulation and aligning it with international best practice. The new Law on Protection of Economic Competition (hereinafter referred to as “the new Law”) was adopted by the National Assembly of Armenia on 3 March 2021, signed by the President of Armenia on 30 March 2021, and will enter into force on 31 May 2021.

It is worth mentioning that the amendments envisage significant changes in the legislation on economic competition, which will take the legislation and the activities of the Commission to a qualitatively new level in line with international best standards and principles. Most importantly, the amended Law will ensure that there is a predictable and effective administration process for the benefit of businesses, the state and citizens.

Some of the most important changes brought about by the new Law are presented below:

1) Strong negotiating position

The new Law provides for the introduction of the institution of a strong negotiating position and prohibits the abuse of a strong negotiating position.

The introduction of the institution of a strong negotiating position is due to the fact that in the sphere of retail trade the economic competition is being restricted or prohibited as a result of the abuse of a strong negotiating position of the buyer/acquirer (for example, in trade networks) and unfair commercial activities in the relationship of trade network-supplier; however, the current Law does not stipulate the possibility of prohibiting the abuse of strong a negotiating position by economic entities.

It is worth mentioning that the necessity to establish such legal regulations aimed at prohibiting the abuse of a strong negotiating position is set out in a number of reports of the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD); furthermore, the legislation of about 40 developed and developing countries contains provisions on this topic.

2) Administrative proceedings conducted by the Commission

Currently, according to the Law, the Commission carries out proceedings of a completely different nature – proceedings for violations of the Law, proceedings for the assessment of concentrations and proceedings for the provision of opinions. However, the implementation of these proceedings – which have significant differences – is subject to the same procedural regulations according to the Law, which creates problems for both the Commission and the participants of the administrative proceedings.

As a result, the new Law differentiates between the proceedings conducted by the Commission by defining their specific features.

3) Sanctions

When determining the amount of fines for violations of the Law, the current Law sets out their maximum thresholds, which weakens the possibility of achieving the preventive goal prescribed by the Law, since it sometimes provides for sanctions that are lower than the financial gain obtained from violating the Law, thereby enabling economic entities to obtain a profit from their violation of the Law. Such provisions undermine the whole policy of the protection of economic competition, since all taken measures do not serve their purpose. The Law also does not provide for the necessity to establish a procedure for determining the criteria for the application of sanctions.

The possibility of setting clear criteria for the selection of sanctions by the Commission is defined by the new Law.

4) Simplified procedure for assessing concentrations

The Law provides for a unified procedure for the assessment of economic concentrations, while in some cases this process can also be carried out in a simplified procedure, thereby saving the resources of the Commission and participants of the proceeding; an in-depth investigation is not required in relation to concentrations concerning certain product markets because concentrations in these markets do not – as a general rule – have an impact on the markets in question.

The new Law stipulates that the mixed concentration and concentration of economic entities involved in the group of persons shall be permitted under the simplified procedure, where no grounds for rejecting the concentration *prima facie* exist.

5) Introduction of expedited proceedings

According to the new Law, within a period of two weeks after receiving the decision to initiate proceedings for an offence in the field of economic competition, the respondent in the proceedings may – in case of admitting the fact of the offence and having eliminated the consequences of the offence – file with the Commission a motion to have the proceedings expedited.

If a decision to expedite proceedings is rendered, actions aimed at examining the case on the merits shall not be carried out and only the circumstances mitigating and aggravating the liability shall be assessed. The Commission shall render a decision as a result of the proceedings within a period of one month from the day of adopting the decision to expedite proceedings, without convening a sitting to hear the participants of the proceedings.

Moreover, the new Law stipulates that when imposing a sanction as a result of expedited proceedings, the sanction may not exceed half of the most severe sanction provided for the given offence. Consequently, when a sanction is imposed as a result of expedited proceedings, the aim is to ensure predictable and effective administration for the benefit of the economic entity, the state and the citizen.

6) Monitoring system

During the year, the Commission receives numerous complaints from citizens on pricing violations by economic entities.

The Law does not provide for the possibility of conducting monitoring on a regular basis (ongoing monitoring). Legislative reforms provide for the possibility of conducting continuous monitoring to control commodity prices.

7) Operational intelligence activities

In most cases, it is impossible for the Commission to exercise its powers and achieve its goals unless it cooperates with the authorities responsible for carrying out operational intelligence activities, as such cooperation is essential not only to identify violations of the law in the field of economic competition, but also to prevent them. Particularly, anticompetitive agreements are concluded in almost all cases, and other violations of the Law in most cases are carried out by secret oral agreements, while the Commission's only instrument to detect and confirm violations of the Law is to acquire documentary evidence by requesting information and conducting inspections with limited powers. In this context, it becomes difficult and, in most cases, impossible to prove the fact of violation of the Law and the administrative

proceeding is terminated, even though there are reasonable grounds for assuming that a violation of the Law has occurred.

The new Law provides for a mechanism of cooperation with the authorities carrying out operational intelligence activities.

8) Ensuring the regulatory framework to enable the Commission to adopt normative legal acts

According to Parts 1 and 2 of Article 6 of the Constitution of the Republic of Armenia, state and local self-government bodies and officials shall be entitled to perform only such actions for which they are authorised under the Constitution or Laws. Based on the Constitution and Laws, and with the purpose of ensuring the implementation thereof, bodies provided for by the Constitution may be authorised by Law to adopt secondary regulatory legal acts, authorising norms must comply with the principle of legal certainty.

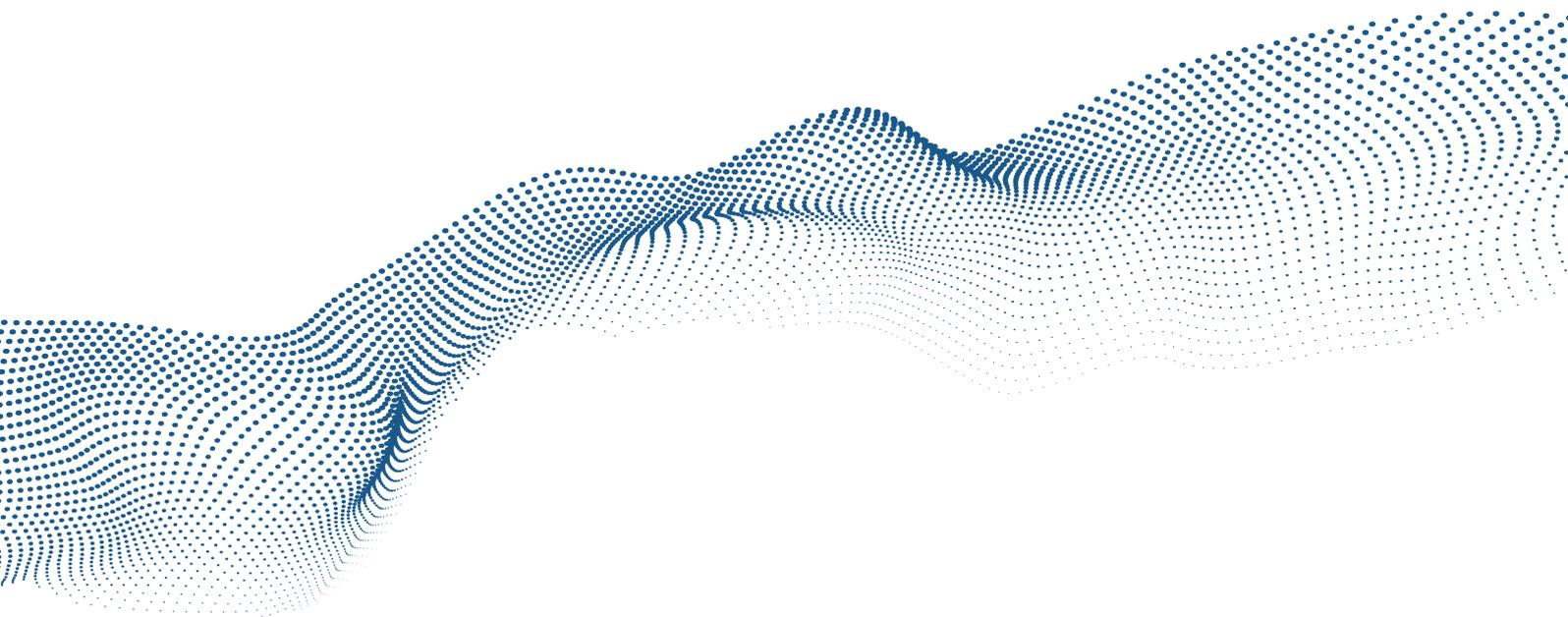
For the implementation of the full-value activities of the Commission, a number of by-laws are required, for the adoption of which the Constitution provides for the mandatory existence of clear and direct authorising norms; meanwhile, these norms are not enshrined in the Law.

Thus, the normative bases of the by-laws to be adopted by the Commission have been defined.

9) Envisaging cooperation with the Commission in the context of applying sanctions

The other change concerns the implementation of the Commission's decision in cases where 75 percent of the fine imposed by the decision of the Commission is paid by the economic entity subject to liability within a period of two months after the entry into force of the decision, the obligation to pay the fine shall be considered as duly performed.

News from the OECD



Insights from the OECD competition week of June 2021

Compliance programmes, competition enforcement and regulatory alternatives, data portability and interoperability, potential competition, methodologies to measure market competition



Carlotta Moiso,
Junior Competition Expert, OECD

Competition authorities around the world face many challenges in their efforts to protect consumers from anti-competitive practices. While some of these challenges have been known for a long time, others are new and constantly evolving with the dynamic competitive environment. Both old issues and new issues were discussed during the June 2021 Competition Week. The Competition Committee and its two Working Parties came together and had a set of meetings on 7-11 June.

The first roundtable explored the relationship between economic regulation and competition policy and looked, in particular, at the role that regulation can play in competition enforcement and at how regulation can both substitute and complement competition enforcement in practice. Competition law and regulation can address different concerns. In fact, while both can seek to control the acquisition and exercise of market power, regulation can address a wider set of issues and pursue other social goals. They adopt means that differ in terms of scope, timing, methods, flexibility, and types of obligations imposed. Given all these differences, one may think that these are two alternative instruments and that there may in fact even be some tension between them on occasions. However, when they have the same goal, they can also be used complementarily. This ambivalent situation is in practice dealt with by the adoption of different institutional mechanisms whereby the overlaps are either avoided or embraced and exploited. Despite the existence of such mechanisms, the overlaps open the gate to mutual influences. For example, regulation can and often follows from competition intervention; at the same time, regulatory reforms can influence competition enforcement, and competition enforcement in turn can influence the substance of regulation insofar as regulation can adopt competition law concepts and approaches. Finally, regulation can also influence the substance of competition enforcement. As a result of the dichotomy characterising competition law and regulation, a number of legal instruments expressly adopt a ‘hybrid’ nature, reflecting both competition and regulatory characteristics. Such legal

instruments are typically adopted to address the limitations of competition and regulatory approaches and combine the virtues of each approach. In conclusion, although the relationship between economic regulation and competition policy is complex, there can be mechanisms to exploit it and optimise results.

The second roundtable explored the nexus of agency and business efforts to achieve compliance with competition rules and how they can, and should, reinforce each other. The debate around whether competition authorities should incentivise and reward business compliance efforts is still open and has led to a diversified range of compliance policy developments. Many competition authorities have invested significantly in guidance on competition compliance, and many take active steps to incentivise compliance programmes, or to include them as mandatory conditions in infringement decisions or different types of negotiated procedures. Some agencies even engage in evaluating compliance programmes outside the immediate enforcement context. Unfortunately, despite the considerable resources invested, there is some evidence – albeit limited – indicating that business representatives’ knowledge of competition law requirements and reporting opportunities remains limited. Cartel statistics are of limited analytical value in assessing the effectiveness of agencies actions, as finding a causal relationship between compliance programmes and market competition is virtually impossible. Another interesting point discussed during the roundtable relates to the possibility of deriving compliance insights from initiatives implemented in public procurement and anti-corruption. Finally, the conversation focused on the main elements of effective compliance programmes, which were identified as the following: detection and facilitation of prompt reporting; senior management involvement; monitoring and auditing; compliance incentives; and third-party compliance. Although jurisdictions take different approaches when it comes to these elements, they can make the difference between an effective and a “paper” programme.

The discussion then moved on to data portability, interoperability, and digital platform competition, and addressed questions such as: What competition issues can data portability and interoperability address? What forms can these measures take? What are the practical and legal barriers to adopting these measures? What are the limitations of these measures in addressing competition problems? Digital platforms’ strong economies of scale and

scope, network effects, and user lock-in effects may contribute to durable market power. Data portability – i.e. the ability of users to request that a data holder transfers to them or a third party data about them in a structured, commonly used and machine-readable format – can reduce the switching costs that users face when using a new platform, whether they are switching platforms or multi-homing across multiple platforms. This can facilitate new entry and enable comparison services. However, the effectiveness of data portability will depend on the context of the market, the design of the measure and the existence of complementary measures. On the other hand, measures related to interoperability – i.e. the ability of different digital services to work together and communicate with one another – promote competition by reducing barriers to entry related to network effects, unbundling, and enable multi-homing. However, their implementation through standards may risk hampering innovation, impose burdens on new entrants, and may be of limited effectiveness if users exhibit a low tendency to switch. Therefore, data portability and interoperability measures require careful design. They have been implemented through various mechanisms, such as competition law enforcement, competition authority market investigations, sector-specific regulation and other broad-based regulation. These differ in terms of the design of measures, their scope, and the objectives for which they have been imposed. The main implementation challenges related to these measures consist in defining the range, format and frequency of data to be included in data portability measures, as well as defining the scope of interoperability measures in relation to whether the aim is to promote competition between or within ecosystems. Finally, portability and interoperability measures are likely to involve some degree of standard-setting, which – when mandated through enforcement or regulatory action – is likely to require oversight, clearly defined decision-making powers, and funding decisions. Ultimately, data portability and interoperability measures, if carefully designed, can help overcome competition barriers.

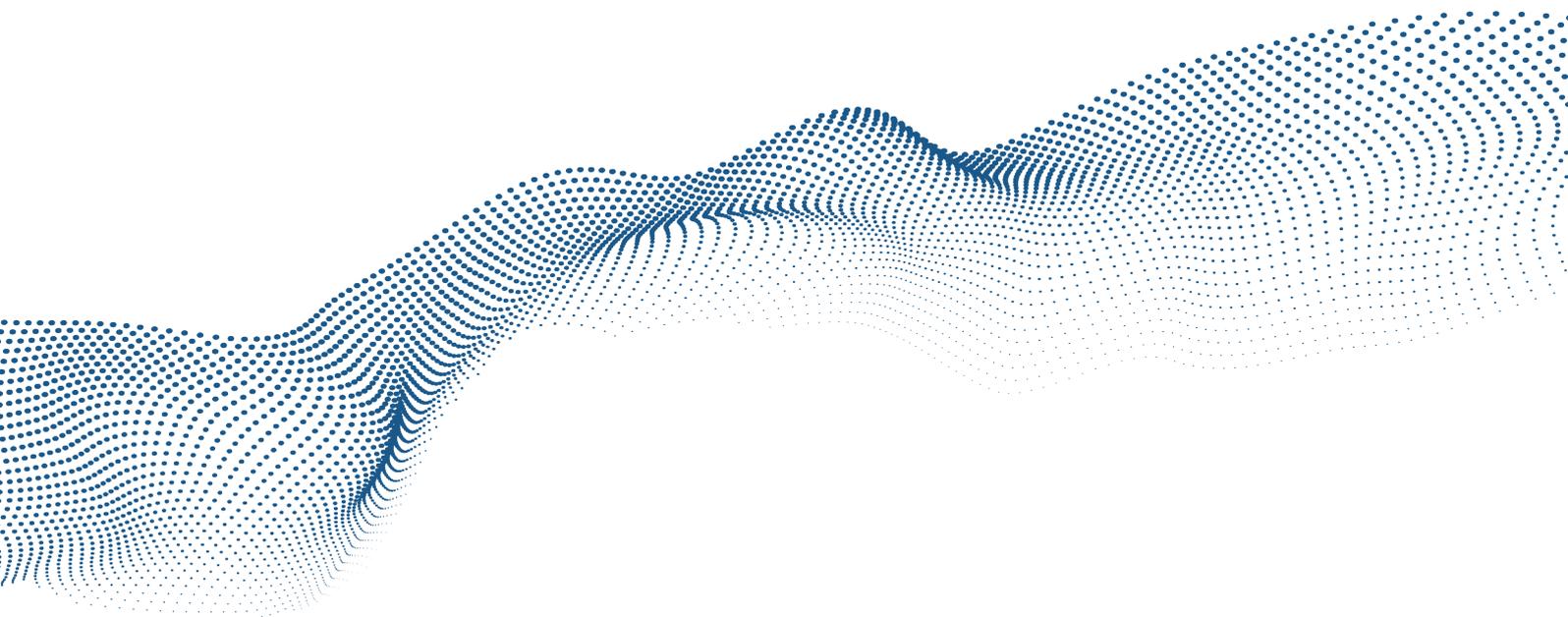
The following roundtable focused on the concept of potential competition, its limits, its relationship with barriers to entry, how the likelihood is assessed, strength and timing of potential constraints, and the thresholds used to make decisions. Potential competition could be defined as a competitive constraint on a firm's behaviour that might potentially arise but that has not yet actually done so. Potential competitive constraints are likely to be important in many markets, such as pharmaceuticals, biotechnology, medical technology and agriculture. Theories of harm to potential competition concern, among other, killer acquisitions, vertical mergers, exclusionary practices, and anticompetitive agreements. Both losing an actual constraint and losing a potential constraint have an impact on price, quality and innovation. However, the impact of the former, despite being certain, would likely be much less significant than the (uncertain) impact of the latter. Therefore, it is important to

assess the likelihood and strength of potential competition. One feature of the market that can influence the strength of a potential competitive constraint are barriers to entry into the market and their existence is one of the elements that agencies will rely on to assess the likelihood of entry in the context of the alleged theory of harm. Other analytical tools to assess the likelihood and the strength of a constraint that are already available might include the additional weight placed on credible contemporaneous internal documents, progress against regulatory checkpoints, understanding of business models and of competition to innovate and existing best practice to pro-actively explore alternative counterfactuals. Other suggestions involve the use of what in some jurisdictions might be newer tools. Once the likelihood and the strength of the potential constraint have been assessed, these need to be compared with defined thresholds to understand if the constraint is relevant for a decision. Different thresholds have been suggested for each one of the possible theories of harm. Finally, the focus moved to the timeframe adopted to evaluate potential competition. Although there are some benefits from adopting a short timeframe, its extension could be useful, as it would introduce greater flexibility. Although it is difficult to conclusively identify and analyse potential competition and its prospective impact, competition authorities have different tools at their disposal to successfully do so.

The final hearing explored tools that policy makers and enforcers can use to reliably measure, track and compare the competitive intensity of a market. After starting the discussion with the identification of two different concepts of competition – i.e. competition as a static state and competition as a process of rivalry – the conversation focused on the description of the most commonly applied measures of competition and on the identification of their main advantages and limitations. There exists a plurality of measures of competition: structural measures (including the concentration indices, the Herfindahl-Hirschman Index, and entry and exit measures); dynamic measures (such as entry rates, churn, volatility of market shares concentration and rank); performance measures (such as mark-ups, profit measures, H-Statistics and the Boon indicator); and survey measures (covering consumer and business perception of competition). These indicators can provide useful information, but they also present limitations and careful interpretation is generally necessary, especially when they are considered in isolation. Therefore, the safest approach is to examine a plurality of different measures. Moreover, when measuring market competition, authorities should consider the level of data aggregation, as the data readily available may not be fit for purpose. Similarly, they should bear in mind that the geographical market can expand beyond or beneath the national economy and that the importance of imports, exports, and multinational firms should be taken into account. Finally, authorities should not forget about the dynamic aspects of competitive rivalry and should therefore look beyond static measures of competition. The last consideration of the

discussion was that the choice of the measures of competition that an authority will employ will largely depend on the purpose for which it is attempting to measure competition. This can be to apply competition law in markets affected by mergers and potential abuse of dominance; assess whether pro-competitive intervention is needed and whether such intervention is likely to be net beneficial; or to assess ex-post the effectiveness of a competition policy of an authority.

The June 2021 confirmed that the Competition Week is a successful platform for dialogue and exchange, as it brings together the experiences and opinions of competition experts, who discuss novel and recurring topics to a diverse and large audience of policy makers, regulators, academics, and practitioners. The roundtables and the hearings reminded the participants that competition policy and competition enforcement are constantly evolving in response to a dynamic and active environment, and that competition authorities should be aware of the changes and should prepare to respond to long-standing needs as well as to new necessities.



OECD competition trends

oe.cd/comp-trends

Competition enforcement around the world



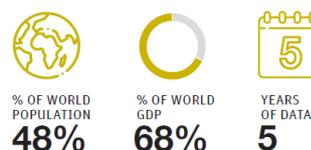
Wouter Meester,
Competition Expert, OECD

In the past 50 years competition law enforcement has increased significantly around the world. In 1970, only 12 jurisdictions had a competition law, and only seven had a functioning competition authority. Today, more than 135 jurisdictions have a competition law regime, and a large majority of these have an active competition enforcement authority. The proliferation over time of competition laws and competition enforcers around the globe has led to a vast amount of activity in terms of investigations, decisions, advocacy initiatives and events. Collating and analysing reliable competition data is crucial to better understand this global activity, identify possible trends and track the status of and developments within competition law and policy at a global level.

Since data is at the heart of the work of the OECD in designing and developing evidence-based policy advice, it launched an initiative in 2018 to develop a unique multi-year database on economic and legal indicators related to competition authorities (CompStats). This database provides accessible, reliable and up-to-date statistics and facts about global competition enforcement trends, including on cartels, abuse of dominance cases and merger reviews. Competition authorities and policymakers around the world can use such data and trends to compare and monitor their competition law and policy activities with those of others.

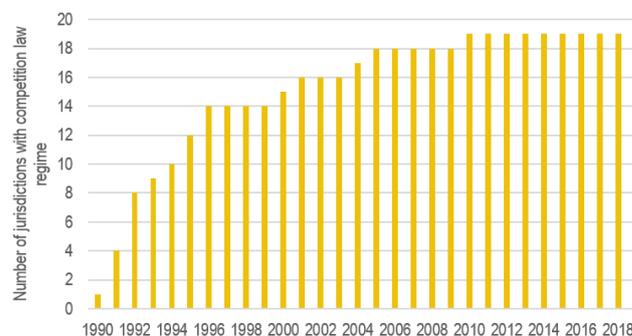
The OECD initiative includes an annual publication ([OECD Competition Trends](#)); so far, two editions have been published (2020 and 2021). In 2021, CompStats includes 5 years of data, covering 56 countries that represent 48% of the world's population and 68% of world GDP (see figure 1).

Figure 1: Key facts about the OECD CompStats Database



Eastern and Southeast Europe and Central Asia experienced its own wave of new competition law regimes, particularly between the years of 1990 and 2000 (see figure 2). This makes an analysis of the abovementioned statistics all the more relevant for the region. This article will discuss some important highlights of the report Global Competition Enforcement Update (GCEU) 2021.

Figure 2: Development of competition law in Eastern and Southeast Europe and Central Asia

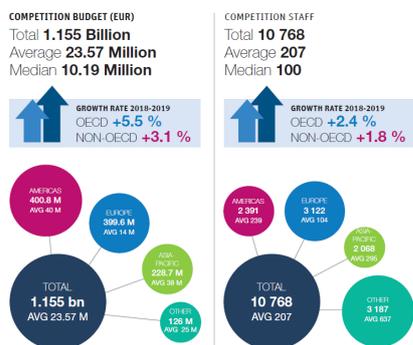


Increasing resources

The effectiveness of a competition law primarily depends on its ability to be efficiently enforced through the allocation of sufficient funds and adequate resources to competition authorities. In 2019, the 56 competition authorities included in the CompStats database had a total budget of 1.1 billion euros and had around 10 800 staff members working on competition.

Significant differences between jurisdictions and regions exist (see figure 3). One can correct for the size of the economy or the size of the jurisdiction. For instance, in 2019 the average competition budget per 1 million euros GDP varied between approximately 15 and 25 euros, and the average competition staff per 1 million inhabitants between 3 and 10.

Figure 3: Overview of competition resources, 2019



Large amount of global enforcement activity

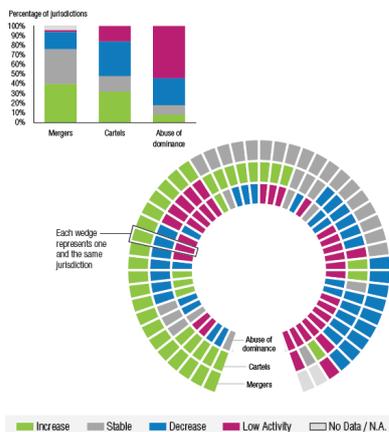
In 2019, a total of 9 297 decisions (abuse of dominance, cartel and merger decisions) were taken by the 56 jurisdictions (see also figure 4).

Figure 4: Overview of competition enforcement activity, 2019



Overall, many jurisdictions saw an increase in mergers between 2015 and 2019, while less countries dealt with more cartel cases in the same period and abuse of dominance cases only increased in a small number of jurisdictions (see figure 5).

Figure 5: Change in enforcement activity by jurisdiction, 2015-2019



Note: Each wedge of three/four rectangles represents the development of the respective indicators in one of the

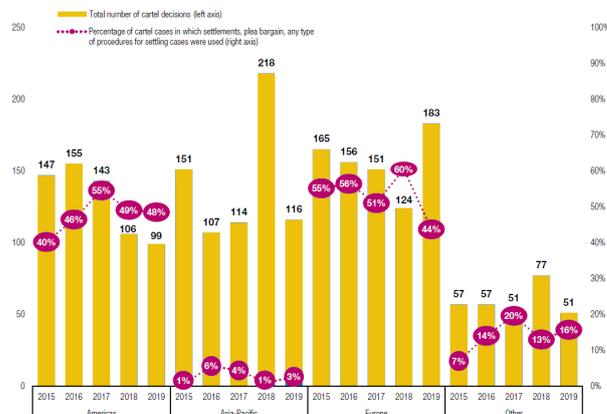
jurisdictions. The development was calculated by using the average annual growth rate (AAGR) by jurisdiction. (“Increase” indicates an AAGR-increase of 5% or more, “stable” indicates an AAGR-change between -5% and 5%, “decrease” indicates a AAGR-decrease of 5% or more, “low activity” indicates insufficient activity to calculate a meaningful change, and “No data/N.A.” indicates that no data is available or that this indicator is not applicable for the particular jurisdiction.)

Cartels

Competition authorities dedicate a substantial part of their resources to the detection, investigation and prosecution of collusive practices. Cartels and anticompetitive agreements are a common type of illegal conduct, which can cause significant economic harm. However, as collusive agreements are typically established in secret they are hard to detect and prosecute.

On average, most geographic regions have seen a slight decline in the average number of cartel decisions per competition authority between 2015 and 2019. Europe is the only region where jurisdictions on average took more cartel decisions in 2019 compared to previous years. The share of cases in which

Figure 6: Total number of cartel decisions and the percentage of cases with settlements, 2015-2019



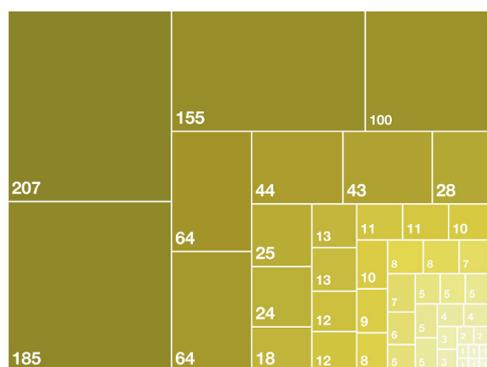
As evidence of illegal agreements and communications between cartelists can be hard to uncover, different investigative tools and powers help competition authorities to detect violations and law infringements, such as leniency programmes and dawn raids. Leniency programmes have been widely adopted by competition authorities over the past 20 years. Despite this extensive adoption of leniency programmes, the number of leniency applications has been decreasing for all jurisdictions over the past 5 years, from 570 leniency applications in 2015 to a total of 230 applications in 2019. Similarly, dawn raids were considered a fundamental tool for effective enforcement, especially for cartel cases, in order to obtain direct and supporting evidence. Around 400 dawn raids were conducted by the 56 jurisdictions in 2015, but this number dropped by 34% in 2019 to 273.

Abuse of dominance

In most jurisdictions, abuse of dominance cases are less numerous than cartel cases and merger cases, possibly for the simple reason that they can be extremely complex to build. Possibly abusive business conduct may often also enhance market efficiency and benefit consumers. A thorough, economic analysis of the anticompetitive effects of alleged abusive conduct is often required, even when a firm clearly enjoys a dominant position.

In 2019, the 56 jurisdictions concluded 212 abuse of dominance cases (compared to 449 cartel decisions). Moreover, this number represents an overall decrease of abuse of dominance cases of 17% compared to 2015. Five jurisdictions were responsible for 67% of the abuse of dominance cases concluded between 2015 and 2019, while over half of the jurisdictions concluded fewer than five cases in those five years (see figure 7).

Figure 7: Total number of abuse of dominance decisions by jurisdiction, 2015-2019

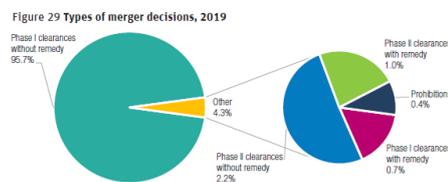


Mergers

Effective merger review is an important component of any competition regime. It can help prevent consumer harm from anticompetitive transactions that reduce competition among rival firms and foreclose competitors. Almost all competition law regimes provide for merger control, although the exact implementation can differ substantially between jurisdictions.

Jurisdictions in the database received more merger notifications in 2019 than in 2018, with a total of 9 272 notifications received in 2019. The vast majority of these mergers were deemed not to have anticompetitive effects, as almost 96% of them were cleared without an in-depth investigation and without remedies, and only 0.4% (or 27) of the over 8 500 merger decisions resulted in a prohibition (see figure 8). A small number of jurisdictions were responsible for a large share of the remedy decisions, with two jurisdictions responsible for 26% of the decisions with remedies, and seven jurisdictions for 52%, while over half issued either no remedy decisions or only one.

Figure 8: Types of merger decisions, 2019

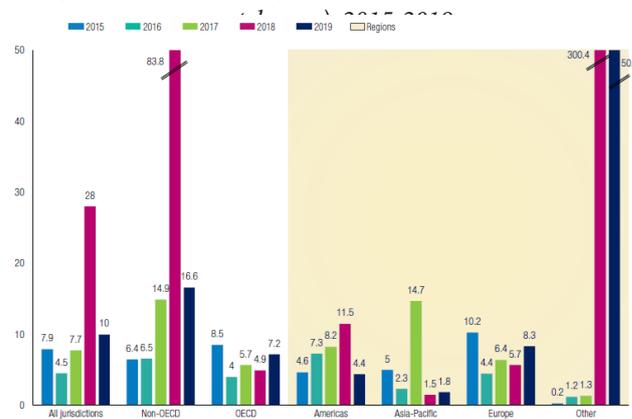


Fines

The total fines imposed for cartels and abuse of dominance amounted to approximately 9.3 billion euros in 2019. Approximately 7.1 billion euros were imposed in 449 cartel decisions, while approximately 2.2 billion euros were imposed in 212 abuse of dominance cases.

While competition agencies should not have the objective of “earning back” their budgets, it is useful for governments to be aware of the public value of competition authorities’ activities. Governments may be more likely to allocate more resources to competition authorities if they provide a return not only in terms of enforcement and deterrence, but also in terms of monetary gains and compensation from fines, which normally enter the public purse. On average, between 2015 and 2019, fines for cartel and abuse of dominance infringements were 10 times higher than the average budget of all agencies (see figure 9).

Figure 9: Fines-to-budget ratio (abuse of dominance and

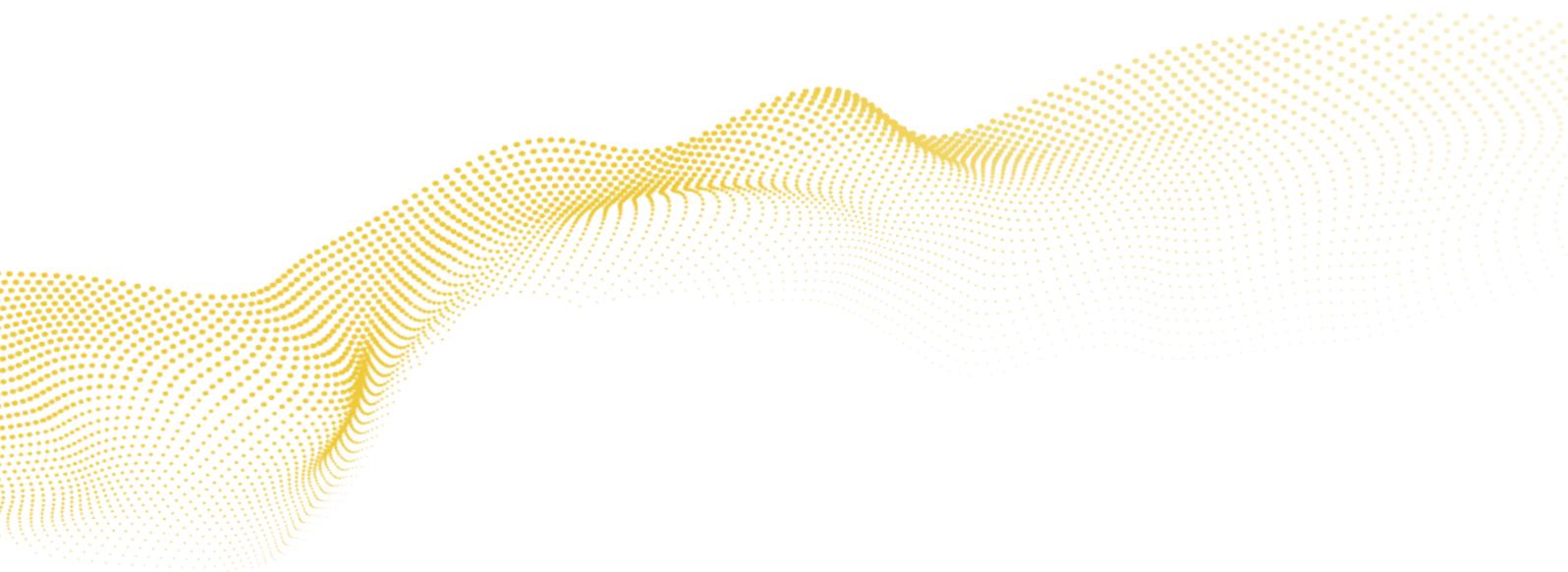


Conclusion

As the role and scope of competition law and policy continue to evolve, competition authorities must constantly develop their tools and learn from each other. It is important for policy makers and competition enforcers to stay up-to-date with the different ways in which competition law and policy is applied throughout the world. OECD CompStats and OECD Competition Trends should help them to do so.

If you are keen to join this initiative of supporting data-driven competition policy, we invite you to participate in the CompStats database by filling out the questionnaire on the following link <https://oe.cd/CompStats-2015-20>.

Inside a Competition Authority: Bosnia and Herzegovina



THE COMPETITION COUNCIL OF BOSNIA AND HERZEGOVINA AND ITS RECENT ACTIVITY

1. THE INSTITUTION

The Chairperson

Mr. Stjepo Pranjić, PhD, President of the Competition Council of BiH.

1st June 2020 – 1st June 2021

The members of the Board

Mrs. Adisa Begić, a lawyer,

Mrs. Arijana Regoda Dražić, MSci,

Mr. Amir Karalić, PhD,

Mr. Ivo Jerkić, an economist,

Mr. Nebojša Popić, MSci.

The members of the Council are appointed for a six-year term.

The last mandate began in 2016/2017 and will end in 2023.

The head of the staff

There is no head of the staff.

Appointment system for the Chairperson and other key roles

Under Article 22 “the Council of Competition consists of six members who are appointed for a term of six years with the possibility of another re-election.”

The appointment of the Competition Council is carried out in the following manner:

- Three members of the Council of Competition are appointed by the Council of Ministers of BiH
- Three members are appointed by entities’ governments.

In general, the Council of Competition has the competence to make bylaws (under provisions of the Competition Act), regulate definitions and calculate methods for particular activities, decide on requests for the initiation of proceedings and conduct such proceedings, issue administrative acts for the completion of proceedings before the Competition Council, provide opinions and recommendations on all aspects of competition, either ex officio or upon the request of state authorities, economic entities or companies. The Council also adopts internal documents about internal organisation, gives initiatives for the amendments of the Act on Competition, provides opinions on draft regulations in other fields which may have an impact on market competition, and also cooperates with national and international institutions in the field of competition policy and law.

Decision-making in competition cases

The Council of Competition brings final decisions on different aspects of competition. However, the unsatisfied party may file an appeal to the Court of Bosnia and Herzegovina.

Agency’s competences in competition

- Antitrust (agreements and abuses of dominance)
- Mergers and acquisitions
- Advocacy to other public bodies

Relevant competition legislation.

The most relevant competition legislation is as follows:

The Act on Competition (“Official Gazette of BiH”, No. 48/05, 76/07 and 80/09), and 12 bylaws. They can be found on the website of the Council www.bihkonk.gov.ba

The provisions contained in the above stated legislative acts are to a great extent approximated with EU competition law.

It is to be noted that there is ongoing work on the new draft of the Competition Act.

Other competences

The most important CC activities have been described above.

Number of staff of the authority

Case handlers (economists and lawyers): 11

Other civil servants: 5

Supportive technical staff: 4

Number of staff working on competition

Total and break down between case handlers/managers and administrative/support staff.

For the case handlers/managers, please complete the following table.

Competence	Number of case handlers/managers
Antitrust	11
Mergers and acquisitions	0
Market studies	0
Advocacy to other public bodies	1
State aid	0
TOTAL	12

Accountability

The Competition Council of BiH drafts annual reports on

its work and submits them to the Council of Ministers of BiH, which is responsible for adopting them.

2. ANTITRUST ENFORCEMENT OVER THE LAST 24 MONTHS

Cartels

Number of cases

Infringement decisions	0
- With fines	0
- Without fines	0
Non-infringement decisions	0
Other (specify)	0
TOTAL	0

Fines

0.

Leniency applications

0.

Dawn raids

0.

Main cases

Non-cartel agreements

Number of cases

Infringement decisions	3
- With fines	3
- Without fines	0
Commitment decision	0
Non-infringement decisions	0
TOTAL	3

Fines

BAM 108,618.

Dawn raids

NA.

Main cases

Decision defining that the Government of the Federation of Bosnia and Herzegovina, through adoption of the Decision on bringing the Program of expenditures of financial means, along with criteria for distribution of “Subsidies to private undertakings and entrepreneurs – incentives for the veterinary medicine” as defined in the Budget of the Federation of Bosnia and Herzegovina for 2019 for the Federal Ministry of Agriculture, Water management and Forestry. The Decision provided for the

imposition of a fine and required the relevant Ministry to adjust the disputable provisions of the Programme within a certain period of time to ensure that private medical institutes are also entitled to carry out sanitary checks.

Abuses of dominance

Number of cases

Infringement decisions	1
- With fines	1
- Without fines	0
Commitment decision	1
Non-infringement decisions	2
Other (specify)	Decision on extension of deadline for bringing final decision (1)
TOTAL	4

Fines

20.000 KM.

Dawn raids

0.

Main cases

In the procedure against the undertaking “Central Heating” (a share holding company in Tuzla), the Competition Council identified that the above-stated undertaking had abused its dominant position in the heating distribution market in the City of Tuzla.

The Competition Council, through the Decision concerned, imposed to the service provider the obligation to adjust such disputable provisions with the Act on Competition, i.e. every provision that contained elements of infringement were to be amended. The Decision also provided for the imposition of a fine on the share holding company “Centralno grijanje” d.d. Tuzla, pursuant to Article 48 paragraph (1) item b) of the Competition Act, for infringing the provisions of Article 10 paragraph (2) item d) of the Competition Act.

3. JUDICIAL REVIEW OVER THE LAST 24 MONTHS

Outcome of the judicial review by the Supreme Administrative Court

Entirely favourable judgments (decision entirely upheld)	18
Favourable judgments but for the fines	NA
Partially favourable judgments	NA
Negative judgments (decision overturned)	12
TOTAL	30

Outcome of the judicial review by the first instance Courts

Entirely favourable judgments (decision entirely upheld)	0
Favourable judgments but for the fines	0
Partially favourable judgments	0
Negative judgments (decision overturned)	0
TOTAL	0

In this part, we would like to express our dissatisfaction regarding the work of the Court of BiH in the area of competition policy and law. Unfortunately, when it comes to competition policy and law, competition cases have not been able to be effectively dealt with due to the fact that administrative procedure can be initiated before the Court of BiH. The Court of BiH decides on procedural and not procedural issues and very often takes years to come to a decision. There are a number of specific judgments by the Court of BiH (CRUMB GROUP, EUROHERC OSIGURANJE, an insurance company against the Agency for Insurance of BiH) that we are not very proud of. In the case of EUROHERC INSURANCE d.d. Sarajevo, the Court of BiH in its latest judgment dated 21 January 2021 ordered the Competition Council to revise the Decision dated 25 February 2015 and to act upon the request of the undertaking EUROHERC INSURANCE d.d. Sarajevo, which was filed due to the suspected existence of a restrictive agreement contrary to Article 4 paragraph 1) items a), b) and d) of the Law on Competition.

4. MERGER REVIEW OVER THE LAST 24 MONTHS

Number of cases

Blocked merger filings	
Mergers resolved with remedies	1
Mergers abandoned by the parties	
Unconditionally cleared mergers	8
Other (specify)	Rejected for nonexistence of obligation to notify: 10
TOTAL CHALLENGED MERGERS	19

Main cases

1. In December 2020, the CC brought a Decision on the authorisation of a concentration in the market of non-life insurance in the territory of Bosnia and Herzegovina, which concerned the acquisition of individual control of the undertaking ASA FINANCE d.d. Sarajevo over the undertaking Central Osiguranje d.d. Sarajevo.
2. In May 2020, the CC brought a Decision allowing the concentration in the bus passenger transport market in Bosnia and Herzegovina, which resulted in the acquisition of control of the undertaking Sejari d.o.o. Sarajevo over the undertaking Centrotrans-Eurolines d.d. Sarajevo.

5. ADVOCACY OVER THE LAST 24 MONTHS

Main initiatives

One of the most important obligations of the CC is the constant promotion of competition under Article 1 of the Competition Act. Raising the business community's awareness of the existence of the Competition Act and of the competences of the CC is a constant task. It should also be noted that the President of the CC is a university professor who delivers lectures on competition policy and law, thereby spreading the promotion of this concept in academia.

Results

The very growing number of competition cases before the CC underpins this position.

6. MARKET STUDIES OVER THE LAST 24 MONTHS

Main initiatives

Market studies were conducted individually within the framework of specific case investigations in different areas of market competition.

Interview with the Chairperson: Mr. Stjepo Pranjić



Mr. Stjepo Pranjić,
PhD, President of the
Competition Council of BiH

What are the main challenges that your authority is facing? What are your priorities for the near future?

The current Law was adopted back in 2005 and was subject to minor amendments in 2007 and 2009. The experience stemming from the implementation of the Law prompted proposals for its amendment. In particular, individual state officers experienced in the application of the legal provisions in specific cases voiced their concerns about the current Law and submitted, in writing, shortcomings about the current text of the Law to the President of the Council. The aim of this submission related to legal gaps and doubts (e.g. typos or inadequately worded-phrases, vagueness, ambiguity, polyvalence, and thus the incompleteness of certain legal norms) when it comes to the application of the law.

Having in mind the stated, and other deviations that are not substantially harmonized with the *acquis* in terms of Article 70 of the SAA, the Council formed a working group tasked with creating a new or amended competition Law. The biggest challenge in this process is to solve the problem of the so-called “ethnic veto” with regards to the principle of the constitutive structure of BH. Then, in the second instance, to solve the problem of the right to appeal or judicial protection on the merit. The Court of Justice of the EU in the second instance examines the facts and conclusions, i.e. the measures and sanctions imposed by the European Commission (the “EC”). In addition, in EU countries there are courts or chambers specialising in competition law with judges trained to decide on cases competently. From the above, it can be concluded that securing the right to a legal remedy, as a right of full jurisdiction, is a necessity. Even more problematically, the right to a remedy is not ensured as a legal and factual issue within the existing law, which may constitute a violation of the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”).

Furthermore, the Commission should translate into norms the principle of the independence of the Council so that it is no longer just a platitude and solve the structural problem of the law in terms of separating the function of conducting proceedings from the decision-making function (separate inquisitorial from the accusatory principle). This would ensure that there is no place for pronouncing the famous local proverb “*Kadija te tuži, kadija*

te sudi” (meaning that the person suing you is also the judge in the case). In fact, this structural change is necessary given that there are judgments of the European Court of Human Rights (the “ECHR”) in competition protection cases (e.g. *Dubus v. France*) according to which, *inter alia*, a violation of Article 6 is considered to have been committed when fines are imposed by a body that combines the roles of investigator, prosecutor and judge. In a figurative sense, this would mean that the Council cannot initiate proceedings, conduct investigations, and impose penalties which, according to the above-mentioned case law, have the character of a criminal offence. This means that all of the provisions of Article 6 of the Convention have to be applied in competition cases, in light of the severity of the threatened fines prescribed by Article 48 of the Law, their retributive and preventive character, i.e. the example of the Council imposing a multimillion fine on a legal entity in the banking services market. When compared with the fines that may be imposed on legal entities according to the BH Criminal Code, which range from BAM 5,000 to BAM 5,000,000, it is already certain that the ECHR would consider the position of the party before the Council from the point of view of the accused in criminal proceedings.

Our number one priority is the adoption of the new Competition Act. The President of the Competition Council of Bosnia and Herzegovina, Stjepo Pranjić, PhD, as a participant in the Fifth Meeting of the Stabilisation and Association Committee between the European Union and Bosnia and Herzegovina, which was held on 26 November 2020, informed the representatives of the European Commission that a new text of the draft Law on Competition was being drafted. During his presentation at the Fifth Meeting of the Stabilisation and Association Committee between the European Union and Bosnia and Herzegovina, the President of the Competition Council of Bosnia and Herzegovina promised to submit it to the European Commission after drafting. The procedure for drafting the text of the Draft Law on Competition within the Competition Council of Bosnia and Herzegovina is briefly explained below.

The Competition Council of Bosnia and Herzegovina adopted an initiative to amend the Law on Competition in the Work Programme of the Competition Council of Bosnia and Herzegovina for 2020. In this regard, the President of the Competition Council of Bosnia and Herzegovina issued Decision No. 01-02-1-167- 1/20 of 6 August 2020, which formed a working group tasked with drafting an integral part of the draft Law on Competition.

The working group – the members of which were recruited internally – is composed of those civil servants who work in proceedings before the Council of Competition of Bosnia and Herzegovina in order to apply the current Law on Competition

to specific cases (case studies) and members of the Council of Competition of Bosnia and Herzegovina who submitted a written proposal for amendments to the current text of the Competition Law, including the President of the Competition Council of Bosnia and Herzegovina. The Chairman of the Working Group is the President of the Competition Council of Bosnia and Herzegovina. When drafting an integral part of the Law on Competition, the Working Group harmonised the text of the draft Law on Competition with the primary and secondary sources of competition law of the European Union.

In particular, I must point out that, in accordance with the recommendation of the European Commission from the Fifth Meeting of the Stabilisation and Association Committee between the European Union and Bosnia and Herzegovina, the provision in the current Competition Law stipulating that a final decision on the Competition Council must include votes by one member from each constituent people (the so-called national veto) was suspended, even though this principle stemming from the Constitution of BiH has been preserved.

In accordance with the discussion and agreement from the mentioned Fifth Meeting, the President of the Competition Council of Bosnia and Herzegovina provided the text of the draft Law on Competition and the Table of Harmonisation of the draft Law on Competition with acquis of the European Union within the meaning of Article 70 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part. The Competition Council expects the comments of the European Commission on the submitted draft Law on Competition, as well as its support in the further procedure for the adoption of the draft Law on Competition by the legislative authorities in Bosnia and Herzegovina.

What are the points of strength and of weakness of your authority?

With regards our authority's points of weakness, I can say that the first barrier is the so-called "ethnic veto". This is a voting regime according to which one councilor from each constituent nation must vote for the decision of the Council in order for it to be adopted. This problem is compounded by the fact that there is no guaranteed right to appeal. Abuse of the so-called "ethnic veto" is also one of the significant indicators that the principle of the independence of the Council has been violated.

Although Article 21 of the Law generally stipulates that the Council is an independent body that will ensure the consistent application of the Law throughout BH and that it has exclusive competence to decide on the existence of prohibited competitive activities in the market, this is not translated into norms in order to protect against the actions of persons in councilor election procedures, types (collective or individual mandates) and the duration of the mandate, the manner of decision-making, etc.

In fact, an individual norm should stipulate that the Council members must be appointed to this position without limitation of mandate and exclusively on the basis of references from competition law, i.e. that 2/3 of the members must be from the legal profession. The mandate should be standardised in order to continuously exercise the powers of a Council member from the first election until the fulfilment of the legal conditions for retirement. After the appointment, the function of a Council member may be terminated in accordance with Article 23 of the Law. The exercise of the powers of a Council member is in fact the performance of the function of an administrative judge. Article 22 of the Law stipulates that councilors shall be elected from among recognised experts in the relevant field and shall have a status that is equal to that of administrative judges. Legal matters decided by the Council are decided by the European Court of Justice in Luxembourg, and once elected the judges of this court are not subject to any restrictions on the exercise of these functions. The independence of the Council is also guaranteed by Article 71 paragraph 3 of the Stabilisation and Association Agreement (SAA), i.e. *all state bodies and other persons are obliged to maintain confidence in the independence and impartiality of the Council by their actions and conduct*. The Council is neither a ministry nor an administrative organisation; it is not established by the Law on Administration, and instead its competencies and activities are regulated by a *lex specialis* or the Law.

I must point out that the internal organisation and systematisation of the work and tasks of the Council have become very strained due to the increased number of proceedings before the Council, especially in terms of the number of experts and the structure of internal units. These units are organised on the classical principles of administration instead of being organised on the principles of competition activity. For example, a department for prohibited agreements should be organised on the principle of determining prohibited competitive acts.

As regards to our authority's points of strength, I would say that overall our authority is pretty successful. In fact, the protection of competition on the BH market is somewhat better than the economic and political situation of BH and of the performance of the economic and political institutions of BH. First, the existence of the Competition Law and the Council has a preventive effect on legal entities in terms of compliance with competition rules. They know that a fine or other penalty, e.g. reversal of business management decisions, may be imposed if they commit a competition law violation. In this way, the Council is present in the market and forces companies to be competitive. Otherwise, they would be sanctioned by the law of supply and demand or exiting the market. In this sense, the Council contributes to the development of the BH economy and society in general.

Over the last two years, what are the decisions

adopted by the authority that make you particularly proud, and what are the cases that could have been conducted better?

I am especially proud of the decisions set out below.

1. In the procedure against the undertaking “Central Heating” (a share holding company in Tuzla), the Competition Council identified that the above-stated undertaking had abused its dominant position in the heating distribution market in the City of Tuzla. The undertaking concerned is the only distributor of central heating energy in the City of Tuzla, and it applied the provisions of general act providing conditions of the tariff buyer exclusion from the heating system under which the service beneficiary cannot be excluded from the system without the consent of other beneficiaries or unless all other beneficiaries are excluded. The general act also provided for the obligation to pay for all the costs after the beneficiary is excluded from the heating system.

Central Heating required the beneficiaries of the central heating service (where consumption and billing is carried out per MWh) to obtain the consent of all other beneficiaries registered to the joint measuring system if they wanted to be disconnected and excluded from the system. The Competition Council determined that this resulted in the imposition of additional conditions that were not related to the contractual relationship between the parties, as it meant that the service beneficiaries depended on “good will” or third party interests if they wanted to cancel the central heating service, which is prohibited under the Competition Act and constitutes an abuse of dominant position.

A similar situation occurred as regards to the beneficiaries of central heating in a joint consumption spot, representing one energetic unit, to which the expenditure and price of heating were calculated per m². These beneficiaries were unable to cancel the central heating service unless all of the service beneficiaries were excluded from the system. In the period between 2017 to 2019, 76 beneficiaries of the central heating system connected to a joint consumption spot – which represents an energetic unit – where consumption and pricing were calculated per m² asked to be excluded from the central heating system. The beneficiaries argued that they were not using their apartments (since most of them were living abroad) and therefore should not have to pay for the heating services, and that nobody lived in the apartments due to legal disputes, etc. Furthermore, some of the beneficiaries asked, in their requests to be excluded from the heating system, for at least a reduction in the amounts billed to them or for the installation of individual measuring devices. However, since such provisions were not stated, the beneficiaries were not able to be excluded from the central heating system, which was absurd because those who requested to be excluded from the central heating system were not living in their apartments and yet they had to pay the same amount as those who lived there during the

whole heating season.

The Competition Council took into account the fact that the agreement on heating energy supply had been concluded between the heating energy distributor and the beneficiaries of the heating system. Therefore, the subject of the agreement, as well as rights, liabilities, and termination of the agreement by the distributor or beneficiaries must not be dependent on a third party, since the agreement does not refer to a third party; consequently, the behaviour of a third party cannot be a determining factor in the exercise of any rights stemming from the agreement, especially if a beneficiary of the central heating service is willing to terminate this service. Such a condition makes the termination of the agreement practically impossible, and it not only creates a financial obligation for one party but also brings into question the equality of the contracted parties.

The Competition Council, through the Decision concerned, imposed an obligation on the service provider to adjust the terms of the agreement that were contrary to the provisions of the Act on Competition, i.e. every term that contained an infringing element was to be amended.

2. In January 2021, the Competition Council brought a Decision, within the procedure initiated to establish the existence of an illegal agreement in the market of veterinary services concerning veterinary laboratory diagnostics in the territory of the Federation of BiH. The Decision in question established that the Government of the Federation of BiH, by adopting the Decision on the adoption of the Programme for expenditure of means along with criteria for distribution of „subsidies to private undertakings and entrepreneurs – subsidies to veterinary medicine“ defined by the Budget of the Federation of Bosnia and Herzegovina for 2019 to the Federal Ministry of Agriculture, water-management and forestry („Official Gazette of FBiH“, No: 37/19). In the part of the Programme relating to the identification of organisations receiving the transfer, the Federal Ministry of Agriculture, Water-Management and Forestry – by adopting and applying Article 10 paragraph (1) of the Recommendations for the implementation of measures to eradicate and prevent infectious diseases and parasitic animal illnesses for 2019 – (“Official Gazette of the Federation of BiH”, No. 52/19) prevented, restricted and distorted competition in the market of veterinary laboratory diagnostics in the territory of the Federation of Bosnia and Herzegovina, by limiting and controlling the market within the meaning of Article 4 paragraph (1) item b) of the Competition Act, which represents a restrictive agreement. The provisions of the above stated acts were declared anti-competitive *ex lege*, and a fine was imposed on the Federal Ministry of Agriculture, Water-management and Forestry. The Competition Council concluded that the such provisions created discriminatory provisions at the cost of private undertakings,

namely certified labs.

The procedure was initiated against the Government of the Federation of Bosnia and Herzegovina and the Federal Ministry of Agriculture, Water management and Forestry on the request of the Veterinary Laboratory MULTI LAB d.o.o. Tuzla (a limited liability company), Plane bb, Tuzla. In the concerned procedure, it was established that the existing regulations in the area of veterinary services at state and federal level did not ban the work of private veterinary labs, namely, these labs were not operational outside the system, which meant that the diagnostic examination of animal blood samples was legal. Furthermore, it was stated that referential labs were to supervise the private labs, at least once a year, and private labs were disabled equal participation. Therefore, the Government of the Federation of BiH and the competent Ministry failed to take into account the principles of market competition so that all the labs fulfilling the prescribed conditions, as in case of the private veterinary lab MULTI LAB, would be able to access the relevant market of veterinary lab diagnostics in the territory of the Federation of BiH. In its Decision, the Competition Council stated that all of the concerned authorities must modify their regulations to ensure that they are in line with the core principles of the protection of market competition, according to which no provisions should be adopted that may result in market participants being placed in an equal position.

3. The Competition Council of Bosnia and Herzegovina, on 22 April 2021, adopted a Decision in the procedure initiated upon the request of the undertaking **Mtel a.d. Banja Luka (a share holding company)**, Banja Luka. The procedure aimed to establish that the business entities **United Media S.a.r.l.** Boulevard Pierre Frieden 43, L-1543 Luxembourg and **Sport Klub d.o.o.**, 71000 Sarajevo were in a dominant position within the meaning of Article 10 paragraph (2) items b) and c) of the Act on Competition.

In the Decision concerned, the Competition Council established that the economic entity **United Media S.à.r.l., through its business representative "Sport Klub" d.o.o. Sarajevo (a limited liability company)**, had abused its dominant position in the market of Bosnia and Herzegovina, within the meaning of Article 10 paragraph (2) items b) and c) of the Act on Competition, through refusal to conclude distribution agreement of DTH system of transfer with the economic entity Mtel a.d. Banja Luka, Banja -Luka, Bosnia and Herzegovina. United Media S.à.r.l. has been ordered, via its business representative "Sport Klub" d.o.o. Sarajevo, to provide Mtel a.d. Banja Luka – within 60 days – a commercial/technical offer for the distribution of Sport Klub channels for DTH system of transfer, and to amend the general conditions so that they define, in a transparent and non-discriminatory manner, the method for submitting an offer and

concluding an agreement for DTH system of transfer.

A fine was also imposed on the undertaking United Media S.à.r.l., which must be paid within the set deadline.

As regards to the cases that could have been dealt with better, I would particularly like to mention a Decision adopted in April 2018. In this decision, the Competition Council terminated the procedure against the economic entities Addiko Bank d.d. Sarajevo, Addiko Bank a.d. Banja Luka and Agency for Banking of the Federation of Bosnia and Herzegovina and Agency for Banking of the Republic of Srpska, which was initiated upon the request of the Association of the loan beneficiaries "Švicarac". The procedure aimed to establish that the above-mentioned entities had engaged in unlawful competition practices..

The applicant claimed that the economic entities Addiko Bank d.d. Sarajevo and Addiko Bank a.d. Banja Luka had infringed the Law on Competition, specifically Article 4 paragraph (1) items a), b), c), d) and e) of the Competition Act, by concluding restrictive agreements. Consequently, it asked the CC to establish that the concerned entities' Loan Agreements containing CHF clauses amounted to restrictive agreements and, furthermore, that these agreements constituted an abuse of dominance. The competition restrictions related to the determination of specific bans, sanctions, deadlines as well as measures for removal of detrimental consequences of such behavior, and that Agency for Banking of the Federation of BiH and Agency for Banking of the RS, through non acting, namely omitting the prescribed supervision and control of legality of operations of economic entities Addiko Bank d.d. Sarajevo and Addiko Bank a.d. Banja Luka, as well as omitting to give specific instructions and for non taking up measures to protect consumers' rights (including the Applicant), along with economic entities Addiko Bank d.d. Sarajevo and Addiko Bank a.d. Banja Luka, achieved „joint actions“ and „explicit and tacit deal“ having characteristics of restrictive agreement, in accordance with Article 4 paragraph 1) items a), b), c), d) and e) of the Competition Act.

What is the level of competition awareness in your country? Do policy-makers consider competition issues? Is competition compliance a significant concern for businesses?

One of the most important obligations contained in Article 1 of the Law is the duty imposed on the Council to promote the protection of free market competition (i.e. competition advocacy). The number of cases pending before the Council provides an indication of the level of awareness of the business community about the existence of the Competition Law, which sets out the rules of competition and the powers of the Council to protect these rules. A Council member oversees 3-5 cases on a continuous and permanent basis. This information per se provides the answer to your question. There is sufficient awareness of the importance of doing business in accordance

with competition law among market participants, whether they come from the private or public sector.

If you could make one major change in your national competition law tomorrow, what would you choose?

I would definitely choose the amendment of the text of Article 22, the composition of the Council of Competition) which states that the Competition Council consists of six members who are appointed for a term of six years with the possibility of being relected once. Namely, the limitation of mandates for members of the Competition Council should be removed, for the reason that nomination of members of the Council is carried out by entity governments and Council of Ministers of BiH, to be more precise by individuals who are not prominent experts in the area of competition policy and law, but rather politicians from the ruling parties.

Do you find that international and regional cooperation is helpful? Is it working well?

Yes. The Council is obliged, pursuant to Article 25 paragraph 4 of the Law, to cooperate with international and national organisations in the field of competition, on the basis of which it may provide and request data and information related to factual or legal issues. The Council implements this obligation by being a member of the International Competition Network (ICN) and the European Competition Network (ECN). The status of a network member results in global, regional and bilateral cooperation obligations with competition regulaltors from all around the world, including Europe. In order to improve cooperation between institutions for the protection of market competition freedom, the Council has so far signed Memorandum of Understanding Agreements with the competition authorities of Croatia, North Macedonia, Bulgaria, Serbia, Turkey, Slovenia and Montenegro. Also, last year, a Memorandum was signed with the Secretariat of the Energy Community in Vienna.

What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for its improvement?

I have only positive things to say about the work of the OECD-GVH Regional Centre for Competition.

The RCC video project “Key competition topics explained in a few minutes”

The OECD-GVH Regional Centre for Competition has developed a set of short, focused videos that explore key competition notions. The videos provide a summary of the key messages conveyed in our seminars and offer our beneficiary competition authorities, as well as any competition explorer, additional and engaging training opportunities. All videos are available in both English and Russian.

“Bid rigging and competition policy” is the topic of the third and latest RCC training video, which was launched in June 2021.

The first video focused on **antitrust commitments**. Launched in February 2021, it has scored more than 1.3 thousand views (900 for the English version and 400 for the Russian version), qualifying as the most viewed OECD video on competition in 2021.

The second video addressed **competitive neutrality**. Notably, in May 2021 the OECD Council adopted a Recommendation on Competitive Neutrality, which establishes a set of principles ensuring that governments’ actions are competitively neutral and that all enterprises face a level playing field, irrespective of factors such as the enterprises’ ownership, location or legal form. The RCC video provides a comprehensive overview of these issues in only 6 minutes. Published in late April 2021, the video has already reached 600 views (500 for the English version and 100 for the Russian version).

The last born is the video on bid rigging in public procurement. The English version was published on 15 July and reached 500 views in only 10 days. The Russian version will follow shortly.

1		Bid rigging and competition policy explained in 7 minutes OECD Competition Division
2		Нейтральность конкуренции разъяснение за 6 минут OECD Competition Division
3		Competitive neutrality explained in 6 minutes OECD Competition Division
4		5-минутное объяснение антимонопольных обязательств OECD Competition Division
5		Antitrust commitments explained in 5 minutes OECD Competition Division

Literature digest



Pedro Caro de Sousa,
Competition Expert, OECD

This issue of the Literature Digest for the July 2021 issue of the RCC Newsletter looks at three papers on bid rigging. In addition, I suggest you refer to the OECD's Recommendation and Guidelines on fighting bid rigging in public procurement. It is available at <https://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm>, where you will also find examples of OECD work in this area.

More detailed reviews of the papers discussed below – and of other papers – can be found at www.antitrustdigest.net.

Robert D. Anderson, Alison Jones and William Kovacic 'Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement' (2019) 26 Geo. Mason L. Rev. 1233

Governments around the world spend an estimated US\$9.5 trillion on goods and services each year. This accounts for roughly one third of government expenditures (29.1% on average in OECD countries) and 10% to 20% of total gross domestic product ("GDP") in many nations. Furthermore, public procurement is an essential input to the delivery of broader public services and functions of government that are vital for growth, development and social welfare.

Conventional responses to the problems of corruption and supplier collusion in public procurement comprise two broad sets of tools. The first, focusing on corruption, involves measures to increase the transparency of public procurement and to strengthen the accountability of responsible public officials for malfeasance. The second, aimed at preventing supplier collusion, focuses on the effective enforcement of national competition (antitrust) laws. However, measures to increase the transparency of public procurement and to strengthen the accountability of public officials cannot completely eliminate the vulnerability of public procurement systems to corruption and may render public procurement systems more susceptible to supplier collusion than private sector purchasing.

This paper seeks to develop a more comprehensive and holistic approach to public procurement, and it proposes a set of measures that can deter and increase the resistance of these systems to supplier collusion without necessarily increasing their vulnerability to corruption.

In short, the paper argues that, to combat big rigging, we must look beyond sanctioning corruption and anticompetitive practices. We also need to design tenders in a pro-competitive way. In developing this argument, this paper provides an analysis of bid rigging and the problems it creates from a competition and corruption perspective. It is recommended reading for anyone interested in the topic, and it provides a wonderful source of analysis, literature and practical examples.

Albert Sanchez-Graells on 'Competition and Public Procurement' (2018) Journal of European Competition Law & Practice 9(8) 551

This piece surveys the interaction between competition and public procurement law in Europe. It discusses recent examples of competition enforcement against bid rigging throughout Europe and concludes that a continued focus on competition enforcement against bid rigging is appropriate given trends towards less competitive tenders for public contracts over the past decade. At the same time, recent judicial setbacks show that competition authorities need to properly base their findings on adequate theories of harm and complete factual investigations.

The paper also discusses efforts by competition authorities to detect and prevent bid rigging from taking place. As regards detection, it discusses some initiatives by competition authorities to screen actively for bid rigging in detail (an example of which can be found in the paper below). As regards prevention, competition authorities have been active in developing guidelines on the application of competition law to joint tendering and subcontracting arrangements and in disseminating these guidelines through advocacy efforts. The paper discusses a number of such guidelines and efforts in detail, and extracts lessons for the future.

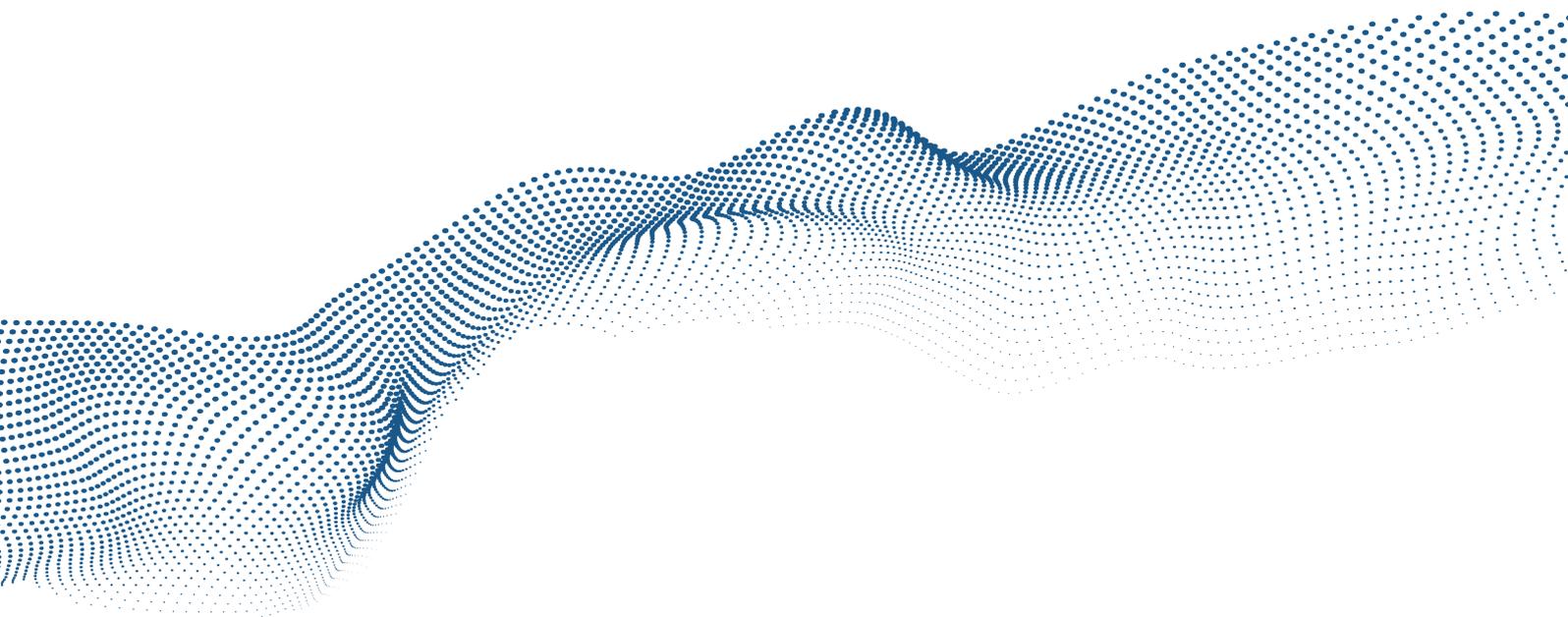
Finally, the paper also looks at competition-oriented developments in EU public procurement case law. This includes a detailed and in-depth discussion of how public procurement law can be influenced by competition law, in ways that may limit the possibility for bid rigging and facilitate antitrust investigations.

This is a very interesting and practical paper, which is likely to be of interest for anyone working in this area. It benefits greatly from having been written by a leading European expert on public procurement rather than by a lawyer that is purely specialised in competition law. This allows the paper to offer an integrated perspective on public procurement and how best to combat bid rigging, according to which it is not only essential for competition law and public procurement law to be coherent but also for competition and public procurement authorities to cooperate with one another.

David Imhof, Yavuz Karagök and Samuel Rutz ‘Screening For Bid Rigging—Does It Work?’ (2018) *Journal of Competition Law & Economics* 14(2) 235

This paper proposes a method to detect bid rigging that is particularly well suited to address the problem of partial collusion, i.e. collusion that does not involve all firms and/or all contracts in a specific dataset. It explains how the authors applied mutually reinforcing screens to a dataset on Swiss road construction procurement in which no prior information about collusion was available and how this method succeeded in isolating a group of “suspicious” firms. It further describes how the screen led the Swiss Competition Commission (COMCO) to opening an investigation and sanctioning the identified “suspicious” firms for bid rigging.

In addition to providing an example of a method developed and deployed by a competition authority to identify bid rigging in the real world, this paper provides an interesting overview of available cartel screens and of the literature concerning them. The authors successfully demonstrate the benefits of developing and deploying suitable screens to identify collusion.



Good luck, dear Milán!

As incredible as it may sound, Milán and I have been working together on a daily basis for more than one year without ever meeting in person. I have no idea whether he is as tall as a basketball player or as short as an elf, although I lean to the former... Weirdness of these crazy Covid-19 times!

Milán took over the responsibility for the RCC in the worst possible moment – when the sanitary crisis hit and forced us to move our Budapest seminars to a virtual format. He had to learn quickly, because the RCC is a complex machinery and we were sailing in uncharted waters.

He exceeded our expectations. In a short time, we were able not only to offer a decent alternative to the seminars in Budapest, but also to go on the offensive and develop the RCC training video project, while completing the transition of our newsletter to a fully-fledged review on competition policy as you can read it now. We have also foreseen a number of other initiatives that will hopefully see the light of day soon.

As an Italian saying goes, you can recognise a winning horse at the start of the race, and Milán is a winning horse. He is smart, careful and reliable. He has always considered the views of more experienced colleagues, but has increasingly added his personal ideas and style.

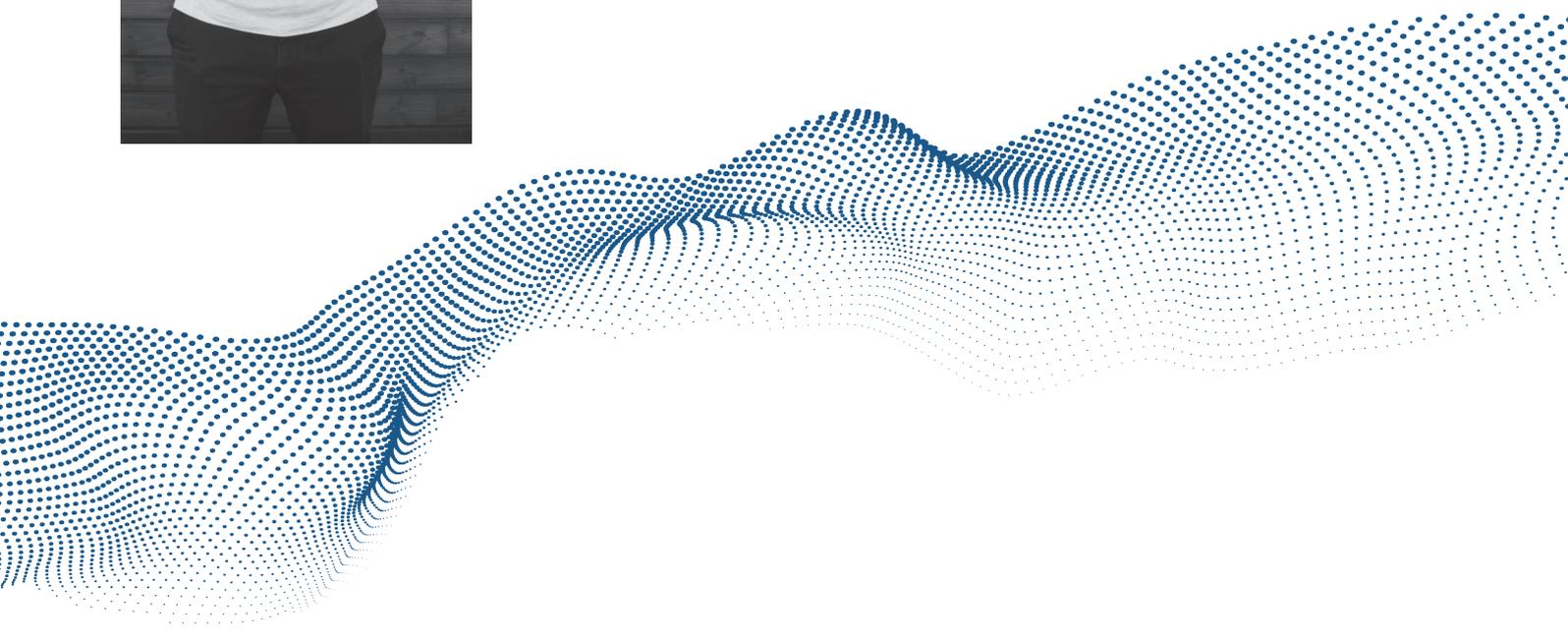
Above all, almost 30 years of work has taught me that the most important factor for professional satisfaction is human relations. It is even more important than the substance of your job. Working with Milán, although only virtually, has been a pleasure. I have admired his kindness, openness and human touch.

Now Milán is leaving the GVH and hence the RCC is losing another fundamental asset. I hope that he will hold great memories of this period and that the experience he has acquired will be helpful for his future professional and personal challenges.

Thank you very much and good luck, dear Milán!



Renato Ferrandi



CONTACT INFORMATION

OECD-GVH Regional Centre for Competition in Budapest (Hungary)
 Gazdasági Versenyhivatal (GVH)
 Alkotmány u. 5.
 H-1054 Budapest
 Hungary



Renato Ferrandi,
Senior Competition Expert, OECD
renato.ferrandi@oecd.org



Gabriella Szilágyi,
Head of Section,
International Section, GVH
szilagyi.gabriella@gvh.hu



Milán Bánhegyi,
OECD-GVH Coordinator,
International Section, GVH
banhegyi.milan@gvh.hu



Orsolya Hladony,
Assistant, International Section, GVH
hladony.orsolya@gvh.hu



Translation from and into Russian by
Taras Kobushko.