

SINGLE ECONOMIC UNIT DEFENCE IN PUBLIC PROCUREMENT CASES – WHAT COULD BE THE TOOLS TO FILL IN THE EXISTING BID RIGGING GAP?

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11th Baltic Competition Conference

10 September 2014, Vilnius

Bid rigging (collusive tendering)

- Practice analogous to price fixing
 - Tenderers form a ring whose members agree not to bid against each other either by avoiding the tender or by placing false bids
- Practice that takes many forms
 - Bid rotation, bid suppression, subcontracting, complementary bidding, market allocation
- The European Commission's policy – *European Sugar Cartel (1973)*
 - In a system of tendering, competition is of the essence
 - If the tenders submitted by those taking part are not the result of individual economic calculation, but of knowledge of the tenders by other participants or of concertation with them, competition is prevented, or at least distorted and restricted

Unfair practices engaged by related companies

- It is not prohibited for related companies to participate in public tenders – *Assitur* case (C-538/07)
 - EU law precludes a national provision which lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure
- However, in practice bidders pretend to be competitors, although no real competition between them exist
 - They belong to the same corporate group or are mutually interdependent in other way
- Contracting authorities lack powers (and willingness) to verify Certificates of Independent Bid Determination

Single economic unit – concept of competition law

- Settled case law of the CJEU
 - The concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal
 - Unity of conduct on the market overrides the formal legal separation between companies resulting from their separate legal personality
 - Agreements and concerted practices between the parent and subsidiary forming part of the same economic unit fall outside of Article 101 TFEU
- Case law of the Supreme Administrative Court of Lithuania is based on relevant EU law provisions

Single economic unit defence in practice – examples

- *Milsa and Torita* case (2013)
 - Companies were not fined as they formed a single economic unit
 - Case is currently pending before the Supreme Administrative Court of Lithuania
- *Specialus montažas and Eksortus* case (2011)
 - The Supreme Administrative Court of Lithuania dismissed arguments relating to mutual interdependence of these companies
- *Eurointegracijos projektai* case (2006)
 - The Supreme Administrative Court of Lithuania dismissed arguments relating to mutual interdependence of companies fined for bid rigging

Is it possible to set aside single economic unit arguments in bid rigging cases? 1/2

- Establishment of single economic unit
 - Case-by-case assessment
- *Assitur* case (C-538/07)
 - <...> without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure
- AG Stix-Hackl opinion in *Sintesi* case (2004)
 - The principle of competition is one of fundamental principles of EU law on the award of public contracts
 - This principle is aimed at relations between the undertakings themselves and there is to be parallel competition between them when they respond to a call for tender

Is it possible to set aside single economic unit arguments in bid rigging cases? 2/2

- Position of the Supreme Administrative Court in *Specialus montažas* case (2012)
 - Entities participating in public tenders should be considered as competitors, because submission of bids *per se* indicate that tenderers act as competitors
 - The court's argumentation is based on the core principles of public procurement
- Position of the Supreme Court of Lithuania – *Pontem* case (2014)
 - Public Procurement Act contains an implicit fair competition requirement
 - Tenderers are under mandatory requirement to act as competitors

Certificate of Independent Bid Determination (CIBD)

- OECD Guidelines for Fighting Bid Rigging in Public Procurement
 - CIBD may act as an instrument to effectively reduce communication among bidders
- It was decided to exclude CIBD from the Lithuanian public procurement framework
- However, CIBD can be very effective tool
 - CIBD can act as an evidence of the fact that bidders consider themselves as competitors
 - Prosecution of CIBD violations can be a possibility where absence of proof of an agreement makes it impossible to charge an antitrust violation
- Need for the reform of public procurement rules?
 - Substantive rules
 - Procedural rules

Which role for the Lithuanian Competition Council?

- Soft law instruments
 - Control List for the Purposes of Identification of Restrictive Agreements in Public Procurement (www.kt.gov.lt)
 - Needs more detailed description of factors relevant for the establishment of a single economic unit
 - Guidance on the concepts of undertaking and single economic unit
 - Similar to that provided for the purposes of state aid rules (2014)
- Issues to be considered
 - Resources
 - GCR Rating Enforcement 2014
 - The authority with the smallest budget in our rankings
 - Timing
 - Existing problems originate in public procurement law

Thank you for your attention!

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