

# OECD-GVH RCC Newsletter

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## Foreword

### Dear Readers,

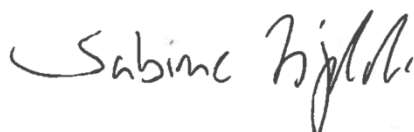
The RCC had an active start to the year with its first seminars. As you can see from the report on past and upcoming seminars, we began with an introductory seminar for young authority staff. It turned out to be one of the most challenging seminars. It is much harder to explain basic competition law concepts in a coherent and easily understandable manner than it is to chat about a specialist topic you and the audience already know quite a lot about. While by the end of the seminar we were all exhausted (both speakers and participants), we were also quite happy with what we had achieved together. Well done to your young staff, your future enforcers are extremely promising! If you would like to take a test that will tell you if you are a good enforcer yourself, have a look at our seminar materials, all available here for the RCC's beneficiary economies [http://www.oecdgvh.org/menu/news/New\\_03\\_2016.html](http://www.oecdgvh.org/menu/news/New_03_2016.html).

The following seminar on information exchange was one of the more specialised seminars, and we discussed a lot of relevant case experience. In June we tried yet another new topic, bid rigging and corruption, in the framework of the joint RCC-FAS Russia seminar held in Suzdal. A taste of the topics we discussed there can be obtained from the articles by Hungary and Croatia. Hungary describes its experience with cases of bid rigging that raised suspicions of corruption and Croatia shows a fine example of advocacy for better and more competition friendly public procurement procedures. Again, all seminar materials are accessible on [www.oecdgvh.org](http://www.oecdgvh.org).

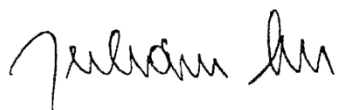
Our other articles cover a broad range of topics: Serbia gives insights into its first experience with dawn raids, an instrument that is available for uncovering anti-competitive conduct in most of your jurisdictions, but often underutilised. Russia summarises its newly released guidance on vertical competition restraints which may also serve as inspiration for other jurisdictions. As described in an article written by OECD experts on the newly released SEE Competitiveness Outlook, the guidance given to businesses on competition law should be improved. The competition chapter of the Outlook also calls for better regional co-operation to overcome enforcement difficulties that might be rooted in the small size of SEE jurisdictions. The article by József Sárai, head of the international section of the GVH, describes an informal but extremely useful tool for co-operation within the ECN, the "Request for Information". We suggest introducing such a mechanism for the RCC beneficiaries and will discuss this idea with you early next year.

As always, you will also find summaries of the OECD Competition Committee meetings that took place in June, with links to all the documents you might find interesting. Use them to benefit from the work and experiences of peer competition authorities and from the work products of the OECD.

We are happy to receive your comments and contributions! Please contact Sabine Zigelski (OECD – [sabine.zigelski@oecd.org](mailto:sabine.zigelski@oecd.org)) and Andrea Dalmay (RCC – [dalmay.andrea@gvh.hu](mailto:dalmay.andrea@gvh.hu)).



Sabine Zigelski  
OECD



Miklós Juhász  
President of the GVH

## RCC activities 2016

08 – 11 March

### Introductory Level Seminar - Basic Concepts and Procedures in Competition Law for Young Authority Staff

This beginner level seminar gave young authority staff the opportunity to become more familiar with basic competition law concepts. We highlighted cartels, mergers and abuse of dominance and addressed basic legal and economic theories as well as procedural requirements and the relevant case law. The international component of competition law enforcement was also presented. The participants had a chance to apply and deepen their knowledge in practical exercises and to become more familiar with new areas of competition law. Experienced practitioners from Italy, the US, Hungary and Luxemburg shared their knowledge and engaged in a lively exchange with the participants.



14 – 15 April

### GVH Staff Training

#### Day 1 - Review of EU Competition Law Developments and Selected Competition Topics

After a review of the developments in EU competition law in 2015 given by Professor Richard Whish, different topics like geographic market definition, application of behavioural economics, resale price maintenance and hub & spoke practices, and the in-house counsel experience were presented by experienced practitioners from competition authorities and from private practice and discussed with the GVH staff.

#### Day 2 – Trainings for Special Groups of Staff

In separate sessions we provided dedicated trainings and lectures for the merger section, the antitrust section, the consumer protection section and

the Competition Council of the GVH. The topics covered merger economics, resale price maintenance, compliance, fining and gun jumping, comparative advertising and unfair competition.



18 – 20 May

**Advanced Level Seminar – Information Exchange: Efficiency Enhancing or Cartel in Disguise?**

This seminar discussed different forms of information exchange: Formal and informal exchanges, direct and indirect exchanges and the unilateral disclosure of information and signalling. Information exchanges can be observed in horizontal and vertical relationships and in different organisational settings. We investigated which forms of information exchange warrant closer scrutiny by competition authorities. Experts from Israel, UK, Hungary and Luxemburg presented cases and engaged in hypothetical exercises with the participants. The recent EU case law was presented and discussed.



07 – 09 June

**RCC – FAS Joint Seminar in Russia – Fighting Bid Rigging and Corruption**

Public procurement accounts on average for 13 % of GDP in OECD countries. It is particularly vulnerable to fraud and corruption. Fighting and preventing bidders' cartels and corruption can result in huge welfare gains for societies.

This seminar introduced OECD instruments such as the Guidelines for Fighting Bid Rigging in Public Procurement and the Recommendation on Public Procurement. Competition authorities are well placed to play an important role in fighting bid rigging and corruption – by making extensive advocacy efforts and taking vigorous enforcement action, in co-operation with other relevant state actors. Together with international experts in this domain and with experts from FAS Russia we exchanged experiences and tried to foster a better understanding of mechanisms and symptoms of bid rigging and corruption and the instruments for fighting them.



**27 – 29 September**

**Outside Seminar in Serbia – Competition Advocacy**

Competition advocacy is a topic that can be approached from many different angles and which can address many different stakeholders. We will discuss and exchange experiences relating to the dissemination of competition advocacy to governments and policy makers, the legal community, small and large undertakings and to the wider public. This will include work with the media, competition assessment of laws and regulations, evaluation and promotion of a competition authority's activities, and ideas on how to establish and promote a culture of competition. As part of this programme, we will more closely investigate the use of market studies and sector enquiries. Experts from OECD countries will present their experiences and we will seek a rich exchange among all participating jurisdictions. This seminar will address senior authority staff, council members and/or press and media relations officers.

**06 – 08 December**

**Sector Event: Competition Rules and the Financial Sector**

This seminar will cover competition topics related to the financial sector. We will discuss merger control, cartels and abuse of dominance as well as the interplay with sector related regulation. Experienced practitioners and specialists from OECD countries will present on the various topics and will engage in discussions with the participants.

## OECD Competition Committee Meetings, 13 – 17 June 2016

### Roundtable on Disruptive Innovations in Legal Services <sup>1</sup>

Legal services in many jurisdictions are beginning to experience fundamental changes as a result of innovations and business models. These changes are driven by increased online service delivery, the availability of ranking and review information, the unbundling of services and the automation of service delivery. This roundtable discussed the ways in which regulatory frameworks are being challenged by innovation in legal services, and the role competition authorities can play in this dynamic environment. The discussion focused especially on the following subjects:

- a. Recent developments and innovations in legal services markets;
- b. Challenges to regulatory frameworks from recent innovations (specifically, exclusivity, qualitative entry restrictions, quantitative entry restrictions and self-regulation); and
- c. Recent competition authority involvement, and future competition advocacy opportunities, in legal services markets.

### Presentation of the Mexico Market Examinations Manual <sup>2</sup>

This session saw a presentation and a discussion of the new Mexican Manual for

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<sup>1</sup><http://www.oecd.org/daf/competition/disruptive-innovations-in-legal-services.htm>

<sup>2</sup>[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2(2016)4&docLanguage=En)

Market Examinations. The Manual was developed by the OECD Secretariat at the request of the Mexican Ministry of the Economy, under the framework of the agreement signed by the Ministry and the OECD in December 2014 to make requests to the two Mexican competition institutions, COFECE and IFETEL, including to issue decisions on market conditions, on the granting of concessions; or to open a market study. The discussion focused on the way in which the Manual provides methodological and theoretical guidance for examining a market, a sector of the economy, or a particular cross-cutting issue present in various markets.

### Roundtable on Public Interest Considerations in Merger Control <sup>3</sup>

The roundtable discussed public interest considerations included in merger control rules (“public interest clauses”), how they are applied and by whom, and the relevant challenges that competition authorities face. The discussion also explored circumstances where merger assessment indirectly takes into account the public interest through factors like broad efficiency claims or failing firm defence. The discussion drew on a Background Paper by the Secretariat and country submissions.

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<sup>3</sup><http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>

## Roundtable on Jurisdictional Thresholds and Local Nexus in Merger Control <sup>4</sup>

Given the increasing number of merger control regimes around the world and the limited resources of competition authorities, it is important that authorities only review those mergers that have a real impact in their jurisdiction. In order to ensure this, the OECD and the ICN have issued guidelines on notification thresholds and local nexus. This roundtable provided an overview of the merger control thresholds and local nexus criteria currently in place, and discussed legal changes in countries since 2005, when the OECD adopted the Recommendation on Merger Review.

## Roundtable on Fidelity Rebates <sup>5</sup>

Fidelity rebates or loyalty discounts allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make. They are often introduced as discounts on an existing price (rather than a way to introduce a higher penalty price for disloyal buyers), and can therefore stimulate demand for a seller's product in addition to achieving other goals. However, in some circumstances they can prevent rivals to a firm with market power from competing effectively. For example, they may increase the rivals' costs, increase the actual price that buyers pay for rival products, or reduce the firm's prices to a level at which equally efficient rivals cannot remain within the market. There have long been important differences in the way in which different

agencies have assessed fidelity rebates and this Roundtable offered a timely opportunity to examine these different approaches and to look at the practice of agencies and courts.

## Roundtable on Commitment Decisions in Antitrust Cases <sup>6</sup>

The Committee took stock of experiences with the use of commitment decisions in antitrust cases. This is a relatively new power for many competition authorities, with the number of agencies obtaining this power significantly increasing in the last decade, in parallel with the number of commitment decisions adopted by such agencies. These are legally binding commitments that parties offer to a competition authority during an antitrust investigation to eliminate the grounds for the enforcement action to continue. By addressing the concerns that an agency has, a commitment decision allows an investigation to be brought to a close more swiftly. Experiences in this area are still relatively recent and there are still a number of OECD countries which do not have this power. The Roundtable offered an opportunity to take stock of agencies' experiences, to identify the different powers that agencies have and look at the different conditions that agencies must meet before they can rely on these powers.

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<sup>4</sup> <http://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm>

<sup>5</sup> <http://www.oecd.org/daf/competition/fidelity-rebates.htm>

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<sup>6</sup> <http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm>



## Basic Building Blocks of Competition Policy Support Competitiveness in South East Europe



**Jakob Fexer**  
**Patrik Pruzinsky**  
**Alice Golenko**  
OECD Policy Analysts,  
SGE/GRS/SEE  
[jakob.fexer@oecd.org](mailto:jakob.fexer@oecd.org)  
[patrik.pruzinsky@oecd.org](mailto:patrik.pruzinsky@oecd.org)  
[alice.golenko@oecd.org](mailto:alice.golenko@oecd.org)

The OECD South East Europe Regional Programme has recently launched its flagship publication [Competitiveness in South East Europe: A Policy Outlook 2016<sup>+</sup>](#) (*Competitiveness Outlook*), which holistically assesses policy performance to support competitive economies and foster private investment, including competition policy. The global financial and economic crisis has exposed deficiencies in the underlying economic and political institutions across the world which facilitate economic growth. South East Europe (SEE) was not spared from the effects of the crisis – traditional sources of growth have stalled and pressure to advance the transition from planned to market economies has increased.

Integrated policy reform to build a competitive, knowledge-based economy is key to leverage the region's rich endowment in natural and human resources to support sustainable, inclusive economic growth.

This first edition of the *Competitiveness Outlook* seeks to support policy makers in Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Kosovo<sup>7</sup>, Montenegro, and Serbia in reaching this goal by assessing and benchmarking their performance against their regional peers and good practices adopted by OECD countries.

### Methodology and process

This publication addresses 15 policy dimensions critical to competitive economies that draw on the South East Europe 2020 Strategy, a regional growth strategy coordinated by the Regional Cooperation Council and adopted by SEE governments in 2013 (Table 1). Because competition policy is crucial in facilitating sustainable growth, a chapter is devoted to it.

<sup>+</sup> Full reference: OECD (2016) *Competitiveness in South East Europe: A Policy Outlook*, OECD Publishing, Paris.  
<http://dx.doi.org/10.1787/9789264250529-en>.

Please note that this article is based directly on the content of this publication. The tables and graphs and large portions of the text have been reproduced here in an unmodified manner. A shorter brochure can be found at:  
[http://www.oecd.org/investmentcompact/Competitiveness\\_Policy\\_Outlook\\_brochure.pdf](http://www.oecd.org/investmentcompact/Competitiveness_Policy_Outlook_brochure.pdf).

<sup>7</sup> 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.

| SEE 2020 Strategy pillar | Competitiveness Outlook 2016 policy dimension   |
|--------------------------|---|
| I. Integrated Growth     | 1. Investment Policy and Promotion<br>2. Trade Facilitation and Promotion   |
| II. Smart Growth         | 3. Education and Competences<br>4. Research, Development and Innovation<br>5. Digital Society<br>6. Cultural and Creative Sectors |
| III. Sustainable Growth  | 7. Transport<br>8. Environmental Policy<br>9. Access to Finance<br>10. Tax Policy<br>11. Competition Policy                       |
| IV. Inclusive Growth     | 12. Employment Policy<br>13. Health Policy  |
| V. Governance for Growth | 14. Effective Public Services<br>15. Anti-corruption Policy   |

Table 1. SEE 2020 Strategy pillars and corresponding *Competitiveness Outlook 2016* policy dimensions

To ensure a balanced view of performance, the *Competitiveness Outlook* used a participatory approach where regional policy networks and organisations, policy makers, independent experts, and the private sector shared their information and perspectives. The assessment was carried out in three phases:

1. Assessment framework design phase (January 2014 – June 2014)

In consultation with regional organisations and OECD sector experts, the OECD drew up assessment frameworks totalling over 300 qualitative and quantitative indicators to evaluate policy development and measure policy outputs.

2. Evaluation phase (July 2014 – December 2014)

The SEE economies carried out self-evaluations of the policy assessment frameworks, co-ordinated by regional organisations. At the same time, the OECD conducted independent evaluations of the

policy assessment frameworks with local experts.

3. Consolidation phase (January 2015 – September 2015)

A series of stakeholder meetings – including representatives from SEE governments, regional organisations, academia and civil society – were held to reconcile the differences between self and independent evaluations.

Following these three phases, the OECD analysed the results and drafted the publication taking stakeholder reviews into account. The final publication was launched in Paris on 26 February 2016 and in each SEE economy in the following two months.

**Competition policy in South East Europe**

A chapter in the *Competitive Outlook 2016* is devoted to competition policy as a fundamental area to support competitive economies. Competition policy facilitates competitive business environments that enable new firms to challenge incumbents,

efficient ones to grow and inefficient ones to exit. By reducing anti-competitive private and public practices, firms compete primarily on the quality of their products and services, thus incentivising improvement and innovation. Hence, competition policy is particularly important for SEE economies to advance in their transition to competitive, knowledge-based economies.

The chapter on competition policy uses a tailored questionnaire developed in partnership with the OECD Competition Division to broadly measure the scope and strength of competition policy regimes rather than a complete and detailed account. It has a much stronger focus on the *de jure* characteristics of a regime than on its *de facto* enforcement and implementation. Each of the 67 questions addresses a foundational competition policy criterion grouped in four policy areas:

1. The scope of action policy area assesses to what degree the competition authority is invested by

law with the power to investigate and sanction anti-competitive practices.

2. The anti-competitive behaviour policy area describes the development of policy to prevent and prosecute abusive practices, and anti-competitive vertical and horizontal agreements and mergers.
3. The probity of investigation policy area examines the independence and accountability of institutions which enforce competition law and how fair their procedures are.
4. The advocacy policy area looks at further action to promote a competitive environment.

### Key Results

The analysis of these policy areas shows that the six SEE economies have most of the basic building blocks for a functional competition policy regime in place, though some gaps persist (Figure 1). These building blocks form a base for improving enforcement activities and records.

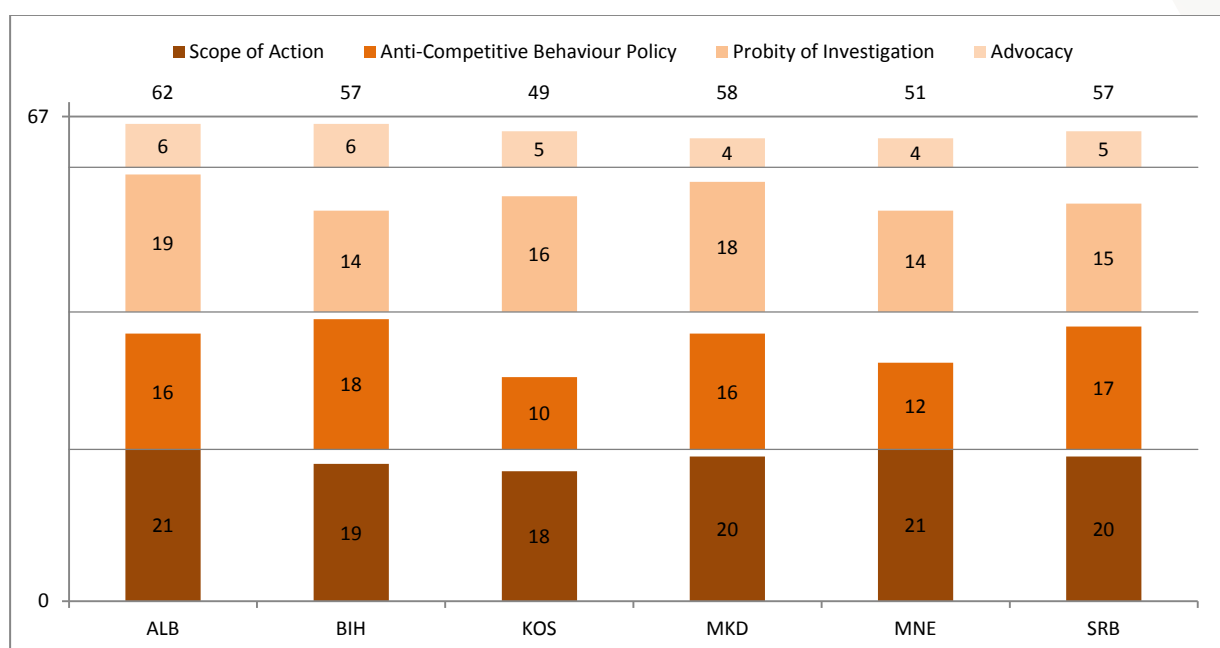


Figure 1. Adopted competition criteria by policy area

Reflected in the probity of investigation policy area, competition authorities are formally independent and governments have not formulated binding directions on competition enforcement. Formal independence is the first step in safeguarding competition authorities from political and special interest influence and establishing trust with businesses that rules apply equally to all.

All six SEE economies have introduced policies that enable the competition authorities to investigate and impose, or ask the courts to impose, sanctions on firms that exhibit anti-competitive behaviour. Potential anti-competitive behaviours considered are exclusionary conduct by dominant firms, mergers, vertical agreements and horizontal agreements including cartels.

Despite the established legal foundations of competition policy in the region, the enforcement record of competition law appears to remain limited. As the enforcement track record is one of the most important indicators of an effective competition regime, strengthening it emerges as a priority for SEE competition authorities.

### **Main Recommendations**

Moving forward, the six SEE economies can take further action to strengthen their competition policy regimes by focusing on improving enforcement in particular, but also by checking legislation and engaging in regional approaches.

Regional competition authorities could develop guidelines on enforcement practices to better inform and guide the business sector and civil society and minimise room for discretion. Guidelines should draw on economy and regional experience as well as OECD good practices.

Competition authorities could also expand the use of market studies in co-operation with

government bodies to identify unnecessary obstacles to competition in public policies and suggest effective ways to address them. Updating legislation and regulation to facilitate competition strengthens the overall business environment.<sup>8</sup>

Furthermore, competition authorities could reinforce intra-regional co-operation in competition policy by building on their biannual meetings at the [Sofia Competition Forum](#) by expanding co-operation to the operational level through joint market studies training and staff exchanges. This could occur through the Sofia Competition Forum, the [OECD-GVH Regional Centre for Competition in Budapest](#) or another initiative.

### **Learn more**

[The OECD South East Europe Regional Programme](#) has assisted economies in the region with policy advice on their broad economic reform agenda since 2000. With support from the European Commission and in partnership with the Regional Cooperation Council and other regional organisations, SEE governments and the private sector, the OECD has offered recommendations on how to remove sector-specific policy barriers to competitiveness, increase domestic value added and deepen regional economic integration. The work has had considerable impact in the region, helping identify reform priorities, fostering implementation and bringing SEE closer to both OECD and EU standards.

<sup>8</sup> For more guidance on competition assessment and market studies, see here: <http://www.oecd.org/daf/competition/assessment-toolkit.htm> and <http://www.oecd.org/daf/competition/competitionlawandpolicyinlatinamerica.htm>

## A Tried and Tested Way of Informal Co-operation Among Competition Authorities\*



**József Sárai**  
Head of Section  
International Section  
Hungarian Competition  
Authority (GVH)  
sarai.jozsef@gvh.hu

**The ECN – the European Competition Network – composed of the competition authorities of the European Commission and of the 28 Member States has been operating since 1 May 2004. Although the cooperation within the ECN is highly regulated by Council Regulation 1/2003/EC<sup>9</sup> and the so-called “Co-operation Notice”<sup>10</sup>, over the years a spontaneous form of co-operation has evolved serving the exchange of experience among the members of the ECN. The article reports about the lessons of this informal co-operation called “informal RFIs”.**

Since the establishment of the ECN, the co-operation of the Network’s member institutions has been taking place under highly regulated circumstances. The co-operation

\* The author is the head of the International Section of the Hungarian Competition Authority. The views and opinions expressed in this article may not in any circumstances be regarded as stating an official position of the Hungarian Competition Authority.

<sup>9</sup> Council Regulation (EC) 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 04/01/2003, p. 1–25.]

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN>

<sup>10</sup> Commission Notice on cooperation within the Network of Competition Authorities [OJ C 101, 27/04/2004, p. 43-53.]

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427%2802%29&from=EN>

provided for under this framework takes a number of forms, such as the following: ECN members inform each other if they initiate an antitrust case proceeding under European competition law, they may reallocate a case from one authority to another, it is possible to exchange information which the receiving authority may use as evidence in its own proceeding, they may help each other by undertaking investigative measures at the request of a partner competition authority, etc.

In addition to these well-formalised rules on co-operation, the practicalities of real life resulted in the development of another, much more informal co-operation mechanism. This development can be traced back to a few years after the ECN began to operate, to around 2007 or 2008. One of the ECN member authorities was faced with a professional problem and thought that perhaps the experience of other ECN authorities could help. So, a round-message detailing the basic parameters of the situation was sent around the ECN and this requesting authority asked for the help of all the other competition authorities. At the beginning these requests (later called: informal requests for information, “informal RFIs”) were quite rare, with a frequency of 1-2 informal RFIs per month. Later the NCAs recognised the rationale of this co-operation and the frequency of sending / receiving informal RFIs has now increased to 1-2 per week.

Of course, this increased demand to reply to informal questions in such a great number has increased the workload of the NCAs to a great extent. Moreover, in the earlier days some NCAs sent these requests to more than one electronic mailbox of the other authorities, i.e.

there may have been several addressees of the same list of questions at one NCA. Sometimes this led to funny situations: the requesting authority received more than one set of replies from the same authority, from time-to-time with minor or more substantial discrepancies among the replies. Another problem was that some of the requesting authorities listed several questions (within the same topic), which again resulted in a huge workload for those authorities that had experience on the given subject and replied to the RFI.

Consequently, in order to keep the proliferation of the informal RFIs under control, within the ECN some “internal regulatory measures” were taken in around 2009-2010. These measures were aimed at limiting the number of the questions (within the same topic) and sought to guarantee that the requesting competition authority only sent the RFI to one person within the given requested authority. Furthermore, the requirement that the knowledge / information gained through the RFI by the requesting competition authority should be shared among all the members has gradually evolved. Therefore, the following internal soft rules were elaborated to achieve all these goals:

- an informal request for information template was elaborated. If anybody intends to send an informal RFI within the ECN, s/he has to fill in the template, by giving her / his name and contact parameters, the name of the requesting competition authority, a description of the situation in the context of which the questions are posed and the questions themselves. As regards the questions, only 3 questions may be asked (within an individual RFI). Finally, the deadline for responding to the RFI must also be

given, and must be at least 3 weeks long.

- a list of persons at the NCAs, as contact persons for the informal RFIs was elaborated, thereby eliminating the problem stemming from the previous practice that more than one colleague received the RFIs at the same authority and worked on the replies in parallel, sometimes giving different answers.
- the requesting authority has the obligation to upload both the informal RFI and more importantly also the summary of the replies to the internet-based intranet of the ECN. This has two distinct advantages: on the one hand it may prevent the same or very similar questions from being asked again within the ECN, and on the other hand the informal RFIs contribute to the increase of the “institutional memory” of the whole ECN.

Over the years there have been numerous informal RFIs circulated among the ECN member authorities on various topics, like market definition of specific products / industries, about procedural issues, institutional setup, legislator solutions, assessment of particular behaviours, etc.

Although the system described above has developed in the ECN, in the last few months at the GVH (Gazdasági Versenyhivatal – Hungarian Competition Authority) we have sporadically received similar initial inquiries from non-ECN member competition authorities. This phenomenon raises the question as to whether it would be worthwhile elaborating the system on a much wider basis than the ECN, i.e. on an ICN level.

Nevertheless, there may be room for adaptation by the beneficiary institutions of

the OECD-GVH Regional Centre for Competition in Budapest as well. The “know-how” is given – it might be easily adjusted to the co-operation of the RCC-beneficiary

competition authorities. It remains to be seen whether the RCC website could be used for registering the “RCC informal RFIs” in a similar way as is done in the ECN.

## Antimonopoly Regulation of Vertical Agreements in Russian Legislation



**Artem Molchanov**  
Head of Section  
Legal Section  
FAS Russia

On January 5 2016, a set of amendments to the Law on Protection of Competition (the so-called ‘fourth antimonopoly package’) entered into force. The bill was designed to improve antimonopoly legislation in Russia on the basis of international best practice. It aims to reduce the administrative constraints on business and in parallel to reduce state participation in the economy.

Legislative confirmation of the status of the Presidium of the Federal Antimonopoly Service was part of these amendments. The Presidium is a collective body that is authorised to provide explanatory comments on the most important and topical issues of antitrust enforcement.

A number of the first explanatory comments issued by the Presidium took the form of clarifications related to the antimonopoly regulation of ‘vertical agreements’, including those with dealers.

Russian antimonopoly legislation defines the term ‘vertical agreement’ as an agreement between economic entities, one of which purchases the goods and the other provides (sells) the goods. As is clear to see the definition is quite broad.

This definition of ‘vertical agreement’ may cover legal relations arising between a retailer and an individual - consumer who purchases goods for his/her own household needs.

‘Vertical agreements’ are agreements between economic entities at different levels of the supply chain, under which the conditions that the entities will carry out the purchase, sale or resale of certain goods or services are set.

The most common examples of ‘vertical agreements’ are those between buyers and sellers (producers), for example, distribution or dealer agreements, aimed at distributing (marketing) products, including through the organisation of a dealer network.

Russian antimonopoly law does not prohibit ‘vertical agreements’ as such. It sets certain restrictions that are prohibitive. These restrictions, the so-called ‘vertical restrictions’, should not be included in any ‘vertical agreement’.

In accordance with Article 11, Part 2, paragraph 1 of the Law on Protection of Competition, the prohibition covers those ‘vertical agreements’ between economic entities that lead or could lead to the establishment of the resale price of the goods, except if the seller sets the buyer a maximum resale price for the goods. This is the so-called resale price maintenance.

As prescribed in Article 1, Part 2, paragraph 2 of the Law on Protection of Competition, ‘vertical agreements’ between economic entities are prohibited if such agreements impose on the buyer an obligation not to sell the products of an economic entity, which is a competitor of the seller. This is known as the so-called ‘exclusivity’ of the seller.

At the same time the Law on Protection of Competition provides for an exception to the prohibition on the establishment of ‘exclusivity’ of the seller: this rule does not apply to an agreement in which the sale of the



goods by the buyer is carried out under the trademark or by some other means of individualisation of the seller or the manufacturer.

'The fourth antimonopoly package' deleted from the definition of a 'vertical agreement' the mention that an agency contract is not a 'vertical agreement'.

This exception does not alter the criteria used for defining a 'vertical agreement', and it does not mean that an agency contract is a 'vertical agreement'. If an agent enters into a contract on behalf of a principal to supply certain goods or a sales contract, then it is this contract for supplying goods or the sales contract, rather than the agency agreement, that constitutes a 'vertical agreement'.

'Vertical agreements' can be considered permissible in accordance with the criteria of admissibility laid down by the Law on Protection of Competition.

In particular, 'vertical agreements' carried out in writing (except 'vertical agreements' between financial organisations), are permitted if these agreements are contracts of commercial concession.

In addition, 'vertical agreements' between economic entities (except 'vertical agreements' between financial organisations), are permitted if the share of each of them on the particular product market, where the "vertical" agreement is taking place, does not exceed twenty percent.

The law also stipulates other conditions for the recognition of these agreements as permissible, in particular if such agreements do not make it possible for individuals to eliminate competition on the relevant market, do not impose on the parties to the agreement or third parties restrictions that do not meet the objectives of such action (inaction), agreements and concerted

practices, transactions or other actions, as well as if their effect leads or may lead to:

- 1) improvements in production and sale of goods or promotion of technical and economic progress or increasing competitiveness of Russian products on the global market;
- 2) obtainment of gains (benefits) by buyers, commensurate with the gains (benefits) obtained by the economic entities as a result of such action (inaction), agreements and concerted practices, transactions.

Economic entities can expect to have their actions (agreements) recognised as permissible, if all of the conditions and the achievement (possibility of achievement) of the results described above are present in their entirety.

The Law on Protection of Competition also provides economic entities which are hoping to enter into an agreement that is recognised as permitted, with the right to submit a request in written form to FAS for verification that the draft agreement is in compliance with the antimonopoly legislation in force.

Determination of the agreement as permitted precludes subsequent action against its members in connection with its implementation if all terms of the agreement are being complied with.

One way to minimise the risks of antimonopoly action and the recognition that the behaviour of the entities that are dominant on the market amounts to an acceptable way of doing business, is the introduction by the economic entities of their own trade practice rules, followed by their submission to FAS Russia. The purpose of such trade practice rules is to increase the transparency of companies to their counterparts, the prevention of possible

abuses, including through the imposition of discriminatory conditions for consumers.

Trade practice rules are found in a document that defines the basic principles for the sale of goods by economic entities dominant on a particular product market.

It should be noted that the adoption of trade practice rules by economic entities and the submission of such trade practice rules to FAS Russia is of a voluntary nature (on the own initiative of an economic entity).

Also worth mentioning separately are the Codes of Conduct of producers (sellers) in various sectors. The adoption of such a code of conduct is also a voluntary act. FAS Russia gives its assessment of the draft Codes from the point of view of their compliance with the law and the accepted ways of doing business.

An example can be cited - the Code of Conduct for automakers and car dealers that was adopted by the participants of the European Business Association. For example, in accordance with paragraph 7 of the Code of Conduct participants should not impose on their official dealers fixed resale prices for the automotive products being sold, nor the cost of standard hour of work for non-warranty repairs. The only exceptions are when maximum resale prices are imposed.

The automakers' Code of Conduct ensures that the basic principles of good faith and pro-competitive strategies are implemented in the market. The task of the antimonopoly body is to monitor the implementation of the Code and, if necessary, make appropriate adjustments.

Such Codes are expected to be adopted in other sectors as well.

Currently, a 'Code of good faith practices in the pharmaceutical industry' has been prepared in co-operation with the Federal Antimonopoly Service of Russia and the European Business Association. The Code is a set of rules for acceptable behaviour for the participants of the pharmaceutical market. It is expected to also cover other participants active on the market of medication.

In general, the approaches taken to the antimonopoly regulation of 'vertical' agreements in the Russian legislation now define the definition of prohibited 'vertical' restrictions more clearly and describe a wide range of conditions for admissibility and methods to ensure the prevention of anti-competitive violations.

This practice helps to improve the preventive function of antimonopoly control.

## Dawn raids: Experience of the Serbian Commission for Protection of Competition



**Nina Vasić, LL.M. (Finance)**  
Adviser  
Commission for Protection of  
Competition  
nina.vasic@kzk.gov.rs

The year 2015 proved quite significant for the Commission for Protection of Competition of the Republic of Serbia (hereinafter: the Commission), as it was the year in which the Commission used a very important, but dormant investigative tool in its practice, known as the dawn raid. Although the competency of the Commission to conduct these unannounced inspections was introduced in 2009 by the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", no. 51/2009 and 95/2013, hereinafter: the Law)<sup>11</sup>, other preconditions such as the possession of IT Forensic Tools, adequately trained staff and a sufficient enforcement record, were not yet in place at the time, which had prevented the Commission from using this tool earlier.

In June 2015, the conditions were ripe and the Commission carried out its first two dawn raids on the premises of companies active in the wholesale and retail sale market of electronic cigarettes and liquids for electronic cigarettes. The investigations were initiated on the grounds of a suspicion that each of the concerned undertakings had entered into

<sup>11</sup> The full text of the English translation of the Law (the version in Serbian language being the legally binding one) can be found at the following link: <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/07/ZAKON-O-ZASTITI-KONKURENCIJE-ENGL-PDF-FORMAT.pdf>

agreements with its own trading partners to set minimum prices for retail trade, in breach of Article 10 of the Law, which prohibits restrictive agreements of this kind.

The legal basis for the Commission's action, in addition to the aforementioned Article 10 of the Law, was Article 53 of the Law, which sets the conditions for conducting unannounced investigations and at the same time supplies the Commission with the corresponding powers. According to Article 53 of the Law, if there is a reasonable belief that there is a danger that evidence in the possession of the party or a third party may be disposed of or altered, a dawn raid may be performed. The Law also specifies that a dawn raid shall be carried out via an unannounced inspection of the premises. During this dawn raid information, documents and objects can be found on the premises of the searched party and the searched party is notified of it only at the time and place of inspection, i.e. on the spot.

Once the Commission has made a formal decision to conduct an unannounced inspection in line with Article 53 of the Law, it has various investigatory powers at its disposal, described in Article 52 of the Law. These powers include carrying out an unannounced search of the business and/or residential premises, sealing the business premises and/or documents for the duration of the inspection, retaining, copying or scanning the business documentation, interviewing the party or its representatives, etc.

During the first two dawn raids it conducted in June 2015, the Commission used multidisciplinary teams (comprising lawyers,

economists and an IT specialist), IT forensic tools and copied relevant business documentation. Both cases were characterised by full co-operation of the parties to the proceedings and thus there was no need to resort to measures envisaged by Article 54 of the Law, such as police engagement, the provision of a court order, etc. Nonetheless, it is important to mention that the Commission had thoroughly prepared for these first dawn raids. In addition to conducting an initial case analysis and engaging employees from different organisational units (with differing educational and professional backgrounds), the Commission compiled information to be presented to the parties at the beginning of the dawn raids. This leaflet included information about the Commission's role, the nature and scope of its powers, its obligations and the rights of the parties to the proceedings, etc. This proved useful because the parties did not seem to possess much prior knowledge about the dawn raid institute and procedure. Furthermore, the Commission employees in charge of the dawn raid action also allowed the parties sufficient time to secure the presence of their attorneys.

The final outcomes of these cases were different: while the first dawn raid case resulted in an actual finding of a breach of Article 10 of the Law, the second dawn raid, which was conducted very close in time to the first one, resulted in the termination of proceedings, since no breach could be established.

The next case in which the Commission conducted a dawn raid occurred in November 2015 and involved the companies Philip Morris Services LLC and British American Tobacco South East Europe LLC (in Belgrade). Their premises were examined by two separate teams of the Commission on the same date. In this case, the Commission

initiated action based on the suspicion of the existence of concerted practices between the aforementioned undertakings with regard to an exchange of information concerning their pricing policies. What was notable and different in this case, compared to the first two dawn raids, was that the level of knowledge of the parties to the proceedings about the Commission and its powers was much higher. Also, one of the companies secured the presence of 6-7 attorneys. Nonetheless, the parties to the proceedings were once again co-operative and an IT forensic search was successfully carried out by the Commission employees, which provided a good basis for further examining the case which is still ongoing (suspected competition infringement).

Based on the described experiences, in the forthcoming period the Commission expects to make use of the dawn raid instrument whenever the legal conditions are met, as it is one of the most efficient instruments for dismantling secret cartels and discovering other forms of competition infringements. At the same time, the Commission hopes to see more cases of the use of the leniency programme by the undertakings. Such a programme exists under Serbian competition law, but has never been used so far. Namely, Article 69 of the Law envisages that an undertaking (a party to the restrictive agreement as defined under Article 10 of the Law) which is the first to report to the Commission the existence of a restrictive agreement or the first to provide proof based on which the Commission can reach a decision on the existence of such an agreement, can be released from the payment of the fine set in the competition infringement measure. The Law also prescribes other conditions which should be met in such a case and provides a possibility for a reduction of the fine if the conditions for full immunity are not fulfilled.

However, since this instrument has not been used by the undertakings so far, the Commission's plan for the near future is to engage in greater advocacy efforts aimed at

acquainting the business community in Serbia with the leniency institute, the relevant legal provisions and the advantages they offer.

## Fostering Interaction: Competition Creates More Efficient Public Procurement Markets



**Ljiljana Pavlic**  
Member of the Competition Council  
Croatian Competition Agency  
ljiljana.pavlic@aztn.hr

Over the last year the Croatian Competition Agency (CCA) has continued its competition advocacy work alongside its enforcement of competition law. Competition agencies have to raise the awareness of other institutional stakeholders about how competition policy interacts with their own tasks, policies and goals. The CCA has competence, among other things, to issue opinions in relation to competition issues. Competition advocacy plays an important role and describes those activities of competition authorities related to the promotion of more competitive markets while using non-enforcement mechanisms. More specifically, the formalities of competition and public procurement legal frameworks and their interpretations change constantly. Effective public procurement that benefits all market participants and society as a whole is a common goal for both competition and procurement policies. Therefore, it is of vital importance for the two institutions to co-operate in order to organise the procurement process correctly and in a pro-competitive way from the start.

The Croatian State Commission for the Supervision of Public Procurement Procedures is empowered to apply public procurement rules in Croatia. However, as explained, there is a growing need for support from the competition side.

In 2015, the CCA issued two opinions related to public procurement with a focus on two

issues – the antitrust single entity doctrine and the technical specification in tenders.<sup>12</sup>

Regarding the single entity, the CCA explains whether the situation in which two bidders act in the public tender, where one is the parent of the other, may result in a violation of competition rules.

The question of whether a group of bidders constitutes a single entity or multiple independent entities that compete on the market is the fundamental issue here.

According to the Competition Act, a subsidiary that has no real freedom to determine its course of action on the relevant market forms a single economic entity together with its parent company by virtue of common control.

In a case where bidders can show that they form a single entity, they thus lack the capacity to conspire, as they form a single entity, and horizontal agreement antitrust rules do not apply. The rationale behind it is that a single entity is incapable of conspiring with itself, as there can be no illegal co-operation between companies when these companies are found to be part of the same economic entity.

It is also obvious, that in a situation where only two undertakings bid in the public procurement procedure and they have to be regarded as one undertaking according to the antitrust single economic entity doctrine, a public procurement procedure makes no sense.

Also in a situation where there are more than two undertakings involved in a public procurement procedure and not all of them

<sup>12</sup> <http://www.aztn.hr/en/cca-on-competition-in-public-procurement-through-non-discriminatory-technical-specifications/>

fall under the single entity doctrine, Article 8 of the Competition Act on prohibited agreements does not apply to those belonging to the same entity, and only applies to agreements between different entities.

The CCA points out that competition rules only apply to agreements between two or more independent undertakings.

Moreover, the CCA expresses the view that where, due to technical reasons, exclusive rights or similar reasons, the contract that is the subject of the public procurement procedure can only be carried out by one economic entity or group of undertakings, the tenderer should pay special attention in the early pre-tender phase of the public procurement process. The CCA deals with this issue by stating that at an early stage it is advisable for the contracting authority to consider all the relevant facts about the market in question and the overall context so that it can design a bid that does not result in any harmful effects for market participants and consumers.

However, any agreement or concerted practice involving two or more independent undertakings that restricts competition between them by co-ordinating their bids in advance to obtain the public contract at more advantageous conditions would constitute a prohibited agreement under the competition law provisions.

The CCA issued another opinion on technical specifications in public procurement because they can give rise to possible restrictive effects on competition.

The CCA essentially refers to the approach set forth by the [Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement](#).

Namely, Article 42 paragraph 5 of the Directive stipulates that where a contracting

authority refers to technical specifications (i.e. national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems, national standards, etc.), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the bidder proves in its bid by any appropriate means, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications. Furthermore, Article 58 stipulates other selection criteria like suitability to pursue the professional activity, economic and financial standing and the technical and professional ability of the bidder. Pursuant to the Directive all requirements shall be related and proportionate to the subject-matter of the contract.

From a competition point of view, it is advisable for the contracting party to set the criteria of the tender so as to avoid any distortion of competition and to ensure the equal treatment of all undertakings. For technical specifications this means that they shall afford equal access of bidders to the procurement procedure and shall not have the effect of creating unjustified obstacles. They should rather aim at reducing barriers to entry and increasing bidders' participation. Therefore, the CCA reasons that technical specifications must not be prepared so that they exclude specific bidders, or be defined to the advantage of certain bidders or in a way that would completely exclude a certain product/service from the public procurement procedure. The tender process shall be designed in a way that ensures a level playing field for all undertakings via the stipulation of equal conditions for access to and participation in the tender.

One important tool that can be used to improve public procurement processes and to make sure they do not unnecessarily restrict competition is the [OECD Guidelines for Fighting Bid Rigging in Public Procurement](#). They include advice on better tender design and on detection of illegal bidding practices.

The legal frameworks of EU competition law and public procurement law are both

designed to create more competitive markets, but many questions arise. Often the answers are not clear and can be contradictory. The CCA and the State Commission for the Supervision of Public Procurement Procedures try and tend to reinforce each other's interpretations. The more we clarify any ambiguity between the policies in question, the more we will establish practices that will foster competition.



# The Correlation of Bid Rigging and Corruption in Public Procurement Tenders in Hungarian Competition Law Practice\*



**Leó Göncz**  
Case Handler  
Cartel Unit, Antitrust Section  
Hungarian Competition  
Authority (GVH)  
goncz.leo@gvh.hu

## Definition of terminology, behavioral patterns

There are various definitions which may be used to describe corruption. However, there are some basic criteria which are common to all existing approaches. Any active or passive behavior by any employed personnel of the State of Hungary (public servants, public employees, or anyone acting on behalf of the state), targeted toward achieving illegal financial gain or any ill-gotten endowments falls under the definition of corruption.

Based on this definition, corruption linked to public procurement activities includes the involvement of the employee of the state or local government or the executor of the public procurement in such a way that the outcome of the procurement procedure is influenced by the employee's personal interests. One typical example could be the exclusion of some bidders from a tender by the unjustified narrowing of the tender criteria so that only those in cahoots with the public procurement official are able to meet the criteria to successfully participate in the bidding process. Hence, corrupt behavior goes hand in hand with the limitation of competition, unjustifiably high bidding prices, and the eventual deterioration of the quality of the services rendered.

A different form of co-ordinated activity is bid rigging, which abolishes competition between the bidders. There are many forms of bid rigging among tender participants; however, each form leads to the pre-determination of the winner, the winning bid-price, and influence on the tender strategy of the other bidders.

Corruption and bid rigging are two distinct behavioral patterns, but may go hand in hand and can be mutually reinforcing. In both cases, the involved parties have vital interests to keep their activities confidential.

## Competence of the Hungarian Competition Authority

Based on the experience of the Cartel Unit of the Antitrust Section of the Hungarian Competition Authority (hereinafter referred to as GVH), the bid rigging behavior found in Hungarian public procurement procedures may go along with other behaviors suggesting corruption. However, the GVH is only authorized to investigate purported bid rigging activities and has no competence to probe possible corruption cases, therefore the GVH does not extend its evidence-gathering activities to any corruption leads. The investigative authorities (police and prosecutor) have the power to conduct criminal proceedings for corruption. These authorities are entitled to apply special tools (e.g. wiretapping). Therefore corruptive behavior was never described in GVH files.

What the GVH can do is to report its suspicions to the responsible authorities. In all cases, where the GVH presumes that a corruption aspect might have occurred, it

makes the necessary steps. Due to a well-established co-operation with the police, the GVH may also report those (vague) suspicions, where the legal standard of an official complaint is not met. This means that the GVH does not have to fully meet the legal standard when reporting a suspicion.

Contacts with the authorities have often shown that the reported corruption leads have already been on the radar of the responsible authorities, and in several cases the investigative authorities conducted parallel criminal investigations independently of the GVH in relation of the audited public procurement procedure.

### **Typical scenarios for parallel bid rigging and corruption**

Different behavioral patterns exist in parallel bid rigging and corruption cases.

In the first scenario, the corruption serves the bid rigging activities directly. The public procurement body participates in the bid-restricting procedures. The procurement official is notified of the pre-existing pact between bidders and of the designated winner. The procurement official responsible for the tender then sets the award criteria in compliance with the bid rigging agreement to favour the predetermined winner, in exchange for personal gains. Such a pact between the involved parties could be brokered either before the tender is released or during the process itself.

In the second scenario, the bid rigging parties are themselves the tool for corruption. In such an instance, the public procurement officer who, in return for having their interests fulfilled or receiving rewards, negotiates with the bidders well before the tender is released in order to assure favorable conditions for the said bidder by limiting/narrowing the criteria range for participation. Since at least three bidders are required for conducting a public

procurement procedure, the designated winner has to convince other parties to submit "supporting" bids, and he has to carry on the bid rigging negotiations. In this situation the negotiation with the officer always precedes the bid rigging consultations.

In other situations the designated winner has already participated in the preparation of the tender documents to ensure the success of such a bid that was otherwise unjustifiably higher than bids from other competitors. The influence on the tender process may affect any aspect of the tender such as the definition of the reference criteria, making the evaluation procedures biased or subjective, or too narrowly specifying the items to be procured. Following this, the preferred bidder will carry on negotiations with the other prospective bidders so that the predetermined bidding behavior will be cemented between the winning party and the party calling for tender.

In the extreme, a procurement body may appoint the company that will win a given project before any formal tender is released and only then will a tender be released for "show" or relevant documents will be forged. The designated winner can use many different ways to ensure that competing bidders willingly co-operate in the "show" tender by providing "supporting" bids. The corruptive influence of the public procurement officer cannot exempt those taking part in the bid rigging from competition law liability.

### **Presentation of specific scenarios**

The following patterns have been found that gave rise to a suspicion of corruption (which was subsequently reported to the competent authorities).<sup>13</sup>

<sup>13</sup> The author of this article acknowledges the presumption of innocence of any person or undertaking. Any reference to corruption does not

- 1) The procurement body was incapable of providing the mandatory 10% upfront financial contribution of its own and secured financial support by an independent intermediary. The three bidders made bid rigging agreements, and based on their bid rigging agreements two participants submitted void tenders. Following the announcement of the outcome of the tender, one of the bidders with a void tender signed a contract for financial support with the intermediary. According to the provisions of the financial support contract this bidder provided financial support to the intermediary with an amount equivalent to 10% upfront payment. The intermediary transferred this amount to the procurement body. Simultaneously the winning bidder contracted that particular competitor as a sub-contractor.
- 2) The negotiation process among the competitors concerned several public procurement tenders; the bidders had been notified by the procurement agencies well before the tenders were publicly released. Subsequently, the competitors had divided the projects among themselves. All of the procurement agencies sent out the tender documents to the designated winners well in advance for review. The designated winners had shaped the requirements of each bid so that it excluded other prospective bidders because they could not meet the requirements of the tender. All of the designated winners were capable to meet the requirements of each tender's

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mean that the person or undertaking has actually committed a punishable act, unless a binding court judgment has ruled so.

announced criteria. After delivery of the invitation to the tender “the bidders in the inner circle” adjusted their bidding behavior so that the “designated companies” would win the tender.

- 3) On one particular market it was a general phenomenon that the procurement officials responsible for tender invitations were also in charge of drafting the technical specifications of the tenders. Often, suppliers have paid travel costs for participation in foreign conferences for these officials, or provided financial support to foundations in support of the procurement body or granted them other benefits to ensure that future technical specifications would specifically cater to their abilities. It seems to have become standard practice over many years that certain bidders would always win a certain contract. In a particular public procurement case concerning the abovementioned market it has become clear that the procurement body issuing a tender had involved several bidders well before the release of the given tender to assist in drafting the product specifications. The tender covered several product groups, the bidders had to submit separate bids for each product group. The potential bidders involved in this process this way had a chance to negotiate with one another during the drafting of the specifications which part of the tender would be won by which company, thus customising the specification to the designated winner. After the tender invitation the bidders continued their collusion, and finally the bidders also influenced the evaluation procedure so that the final evaluation would favour them.
- 4) The procurement agency asked an external consultant to prepare the

technical specification of the tender. Before the consultant prepared the specification, he mapped the needs and capacities of the potential bidders. The consultant prepared the specification in line with the needs of these bidders and informed them. The prospective bidders, with the coordination of the consultant, carried out several negotiations with the procurement agency and its supervisory body. Despite these discussions, the reference requirements were not narrowed for the selected bidders. The selected bidders then conducted negotiations with the supervisory body to ensure that the tender criteria would exclude other bidders. A few days later, under command of the supervisory body, the procurement agency finally modified the tender criteria so that the circle of participants would be limited to the designated participants. Finally, the designated bidders divided the tenders among themselves with the assistance of the consulting company.

**Outlook:**

In the experience of the GVH the investigative authorities (police, public prosecutor) and the GVH have contributed tremendously to uncover such illegal activities. As often bid rigging and corruption seem to go hand in hand, the co-operation between the organisations has proven necessary and effective because it provides evidence

obtained by a wide range of prosecutorial tools (unannounced inspections, wiretapping, and so on) and later shared between the authorities. For this reason a legal environment supporting a simplified and harmonized co-operation between the enforcement bodies is essential.

Leniency systems, the recruitment of whistleblowers and the so-called screening or monitoring of procurement results could also prove to be efficient tools against bid rigging and corruption. Once such investigative tools become known to those involved in corruption or bid rigging, participants may be deterred from using illegal methods. For prevention purposes, authorities could communicate such deterrent tools to market participants and procurement authorities. Another preventive instrument would be trainings for procurement officials and companies involved in bidding processes, together with their supervisory authorities. The GVH held competition law trainings for public procurement officials and issued guidance on signs of bid-rigging. This could greatly improve their effectiveness at identifying bid rigging and corruption activities. Simplifying public procurement tenders and making them more transparent, along with restrictions on subjective aspects of the decision making and evaluation procedures could further diminish the scope of bid-rigging and corruption activities.

**CONTACT INFORMATION**

**OECD-GVH Regional Centre for Competition in Hungary (Budapest)**

Gazdasági Versenyhivatal (GVH)

Alkotmány u. 5.

H-1054 Budapest

Hungary

**Sabine Zigelski**, Senior Competition Expert, OECD

[sabine.zigelski@oecd.org](mailto:sabine.zigelski@oecd.org)

**Andrea Dalmay**, Senior Consultant, GVH

[dalmay.andrea@gvh.hu](mailto:dalmay.andrea@gvh.hu)