

OECD-GVH RCC Newsletter

Issue No. 12, January 2019

Contents

Foreword	2
RCC Events October – December 2018	3
Programme 2019	5
OECD Competition Committee Meetings, 26 – 28 November 2018	7
OECD Global Forum on Competition, 29 – 30 November 2018	10
Fight Against Corruption and Competition Law – The Serbian Experience	12
The “Car Wash” Investigations in Brazil: Inception, Scope, and Implications for Competition Enforcement	16
Experience of €14,000	19
Albanian Case in a Bid Rigging Procurement Procedure – Fight Against Corruption ..	22
Double Blow to National Security	25
Economic and Legal Design of the Unfair Competition Act	29
Competition Rules in the Eurasian Economic Union	33
Literature Digest	36

Foreword

Dear Readers,

We are happy to provide you with the 2019 RCC programme in this Newsletter. The OECD-GVH Regional Centre for Competition in Budapest continues to aim to provide trainings targeted to your needs. With this in mind, we will hold a discussion with the Heads of Agencies in February 2019 in order to ensure that the RCC covers topics that are relevant to you. You will all receive invitations to send participants to the regular seminars in due course.

The articles in this Newsletter focus on competition and corruption, and you will see that the problem has multiple dimensions, as outlined in the contributions from Albania, Brazil, Lithuania, Russia, and Serbia. In addition, Kyrgyzstan has provided an article on its applicable law on unfair competition. This Newsletter will also mark the beginning of a small series of articles introducing the work of the Eurasian Economic Commission.

For the next Newsletter, please send us articles on market definition and market power, the role of generics and IP rights, merger control and abuse cases in **the pharmaceutical sector**. In addition, your experience with market studies, regulation and advocacy in this industry would be highly interesting. The deadline for handing in contributions will be 15 April 2019.

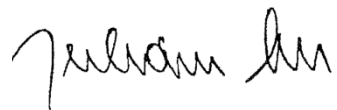
The “Literature Digest” at the end of this Newsletter introduces three articles on the costs of cartels and the fining of cartels. It shall provide you with some inspiration for your reading list.

As always, you will find summaries of the OECD Competition Committee meetings and the Global Forum for Competition in November 2018, 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! If you wish to publish an article about your agency’s work, please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (RCC - dalmay.andrea@gvh.hu).



Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

RCC Events October – December 2018

October 2-4

RCC – FAS Russia Seminar in Russia – Effective Cartel Enforcement

This seminar examined how cartels can be detected effectively, and what the first steps are when a suspicion arises. We looked at leniency, but also at proactive detection tools such as the analysis of public procurement data. Next steps involved covert market investigations, dawn raids and the type of evidence that should be looked for, as well as how this evidence should be organised in order to convince appeal courts. Lastly, we discussed recent developments relating to digitalisation and algorithms and their impact on cartel enforcement. Experts from OECD countries, together with FAS experts, presented their best practices and insights and addressed the problems and questions raised by the participants.



November 16 -17

Seminar on European Competition Law for National Judges – Competition Issues in the Digital Age

The seminar provided the participants with specific knowledge and practice related to issues arising from the impact of new technologies in the field of competition law. We discussed the difficulties faced when applying the traditional criteria of market definition and market power to dynamic markets, merger issues such as innovation and the formulation of commitments in digital sectors, platforms and e-commerce, including vertical restraints in online distribution; and finally issues related to Article 102 TFEU

including abusive practices and discriminatory behaviours, Standard Essential Patent (“SEP”) and FRAND disputes. The seminar was organised around hypothetical case exercises that gave national judges an opportunity to analyse major aspects that could be raised in antitrust litigation in the context of a real situation.



Programme 2019

13 February

Meeting of Heads of Agencies

Heads of the beneficiary authorities will discuss their enforcement and training priorities and needs with the GVH-OECD RCC staff. New features of RCC work will be presented and discussed.

11-13 March

Seminar on Vertical Sales Restrictions and E-Commerce

Selective and exclusive distribution systems, resale price maintenance, across platform parity agreements and various limitations on online sales can be ambiguous with regard to their competitive effects. This seminar will give a better understanding of the analysis of pro- and anti-competitive effects, and will look at the relevant case law with an emphasis on the EU experience and on e-commerce related questions. Experts from competition authorities will introduce their case experience and will practice the analysis of vertical sales restrictions with the participants in hypothetical case exercises.

16-17 April

GVH Staff Training

Day 1 - Review of 2018 and Selected Competition Problems

After a review of the developments in EU competition law in 2018, we will have a closer look at selected competition law topics. This will cover for example judicial review, recent merger developments, e-commerce, the ECN+ Directive, and consumer and competition issues in the digital age. Experienced practitioners from competition authorities and from private practice will discuss the topics with the GVH staff.

Day 2 – Trainings for Special Groups of Staff

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.

10-11 May

Seminar on European Competition Law for National Judges: Competition Economics

28 -30 May

RCC – FAS Seminar in Russia – Merger Control Investigations and Innovation, Kazan

Merger investigations require a complex skill set. In this seminar, we will look at theories of harm for merger cases, basic economic methods, investigative steps and measures, and at effective merger remedies. We will put a special emphasis on the adequate treatment of innovation in all steps of the merger review process. Merger control experts from OECD countries will present case studies, and the participants will practise their merger skills in hypothetical exercises.

10-12 September **Outside Seminar in Ukraine – Competition Enforcement and Advocacy in the Pharmaceutical Sector**

This seminar will cover a variety of topics in the pharmaceutical sector. We will look at market definition and market power, the role of generics and IP rights, merger control and abuse cases. In addition, the seminar will provide an overview of regulatory frameworks, and an introduction to competition assessment in the pharmaceutical sector. What kind of advocacy action promises to be successful and how can competition authorities co-operate effectively with regulators? Experts from OECD member countries will present and discuss their experiences with the participants.

15-17 October **Remedies and Commitments in Competition Cases**

Remedies and commitments will often be the proportionate solution to competition problems in merger as well as abuse of dominance cases. We will explore the use of structural and behavioural remedies and commitments. What are adequate solutions if a structural remedy is not possible, and how can we avoid price caps or behavioural measures that are hard to monitor and enforce? The seminar will encourage an exchange of experiences between the participants and aims to enrich the agencies' remedy toolboxes with the help of expert practitioners and in practical exercises.

16 – 17 November **Seminar on European Competition Law for National Judges: New challenges in the application of Art. 101 and 102 TFEU**

10-12 December **Competition Rules and the Energy Sector**

In this seminar, we will look at the energy sector and will investigate it under different angles. This will cover the interaction between regulation and competition law in energy markets; the role of innovation in energy market competition; issues of market definition; and merger control and abuse of dominance cases. Experienced practitioners will present case studies and will explain the main competition problems and recent developments.

OECD Competition Committee Meetings, 26 – 28 November 2018

Roundtable on Designing Publicly Funded Healthcare Markets¹

For many individuals, the provision of government-funded healthcare is the only realistic form of healthcare cover, which is essential for leading a productive, fulfilling, and satisfying life. While there is little guidance on where, or how, to introduce choice and competition in the provision of healthcare services, there has nevertheless been a steady movement towards the greater use of market mechanisms to improve the quality and efficiency of these services. This is important because the quality and efficiency of these services contribute to both productivity and inclusivity. However, it seems that the progress has recently slowed, and in some cases this progress on the pro-competitive reform of these services has even reversed. The roundtable discussion helped to share what has been learnt from the experiences in this area, highlighting both what has worked well and what has worked badly.

Roundtable on the Treatment of Privileged Information in Competition Cases²

Most OECD jurisdictions have specific rules on legal professional privilege, i.e. the protection of attorney-client communications and documents from forced disclosure to public bodies and third parties. However, the scope

¹ <http://www.oecd.org/daf/competition/designing-publicly-funded-healthcare-markets.htm>

² <http://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm>

of legal professional privilege and level of protection vary among jurisdictions. The conditions for asserting, and waiving legal professional privilege, and their implications for competition cases are assessed by competition authorities and, ultimately, courts. In jurisdictions recognising legal professional privilege, there must be procedures in place that allow parties to competition proceedings to claim privilege and resist the disclosure of potentially privileged information, as well as ways in which to review these requests. The roundtable examined the implications of the protection of documents produced in the context of the attorney-client relationship for companies and competition authorities, and obstacles to the exchange of information between jurisdictions with unequal levels of protection.

Roundtable on the Suspensory Effects of Merger Notifications and Gun Jumping³

Gun jumping is an important area of enforcement for many competition authorities, and has recently led to a number of decisions with high monetary fines. Gun jumping can be defined as the failure to notify a transaction under the merger control rules, or a late notification or breaches of the standstill obligations. The Roundtable discussed the practical and legal challenges of avoiding, detecting and punishing gun jumping and its treatment in different jurisdictions, as

³ <http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm>

well as authority priority setting in the prosecution of cases of gun jumping. It was also discussed how to reconcile the justified interests of pre-merger control regimes with the need of businesses to realise merger efficiencies in a timely manner. Particular attention was given to international mergers that require parallel notifications in different jurisdictions.

Peer Review of Brazil⁴

Following a request from Brazil to become an Associate of the Competition Committee, delegates undertook an in-depth review of Brazil's Competition Law and Policy. The review was performed based on a Secretariat report.

Discussion on Personalised Pricing in the Digital Era⁵

Digitalisation and the uprising of new data-driven business models have generated a lively debate between policy makers and scholars on the benefits and possible costs of personalised pricing practices. Personalised pricing can be seen as a form of price discrimination where customers are charged prices for the same product or services as a function of their willingness to pay, which can be estimated using personal data collected in digital environments. Consequently, personalised pricing results in each consumer paying a different price, and, in a digital era where data analytics and pricing algorithms are becoming common business practice, this could potentially lead to “perfect price discrimination”, with implications for

⁴ <http://www.oecd.org/fr/daf/concurrence/abus/countryreviewsofcompetitionpolicyframeworks.htm>

⁵ <http://www.oecd.org/daf/competition/personalised-pricing-in-the-digital-era.htm>

consumer welfare. In light of the ambiguous and multi-dimensional effects of personalised pricing, delegates from the Competition Committee and the Committee on Consumer Protection examined if and how competition and consumer policy can help to address some of the risks of personalised pricing, while preserving its economic benefits.

Discussion on Quality Considerations in the Zero-price Economy⁶

The question of zero price products is not entirely new to competition and consumer protection enforcers. However, digital platforms have introduced a range of new business models that require competition authorities to examine zero price markets more often, and address novel questions, sometimes not squarely falling within their traditional domain, such as privacy protection. Building on previous OECD discussions on big data, multi-sided markets and the non-price effects of mergers, the roundtable covered three primary questions associated with quality in zero price markets: what constitutes a dimension of quality competition in a zero price market? If these dimensions of quality are to be considered by competition authorities, how can competition authorities overcome the challenges associated with competition analysis in the zero price economy and adapt their analytical tools? How should demand-side concerns in the zero price economy be addressed? Delegates from the OECD Consumer Protection and Competition Committees explored the various markets in which firms decide to set prices to zero in order to obtain consumer data, attract consumers' attention to advertisements, or establish a relationship with consumers, which

⁶ <http://www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm>

can then be used to sell complements or premium services. They also examined the data protection and consumer protection issues associated with quality in the zero price economy, with the purpose of identifying suitable policy solutions to address the identified demand-side problems and develop pro-competitive, consumer welfare-enhancing solutions.

Roundtable on Excessive Pricing in Pharmaceutical Markets ⁷

Competition enforcement against excessive pricing in pharmaceutical markets takes place at the intersection of two challenging topics for competition law. In the absence of exclusionary conduct or cartelisation, excessive pricing is often viewed as a temporary and self-correcting market failure, or, conversely, as a problem to be addressed through sector-specific regulation. As a result, competition authorities only exceptionally bring excessive pricing cases. On the other hand, markets for pharmaceutical products have important features that led them to be highly regulated. This regulatory thicket significantly affects how competition takes place and when competition enforcement is appropriate in the pharmaceutical sector. This Roundtable discussed various issues that arise as regards to the excessive pricing of pharmaceutical products. These included the appropriateness of antitrust enforcement against purely exploitative practices in a research-intensive sector; suitable methodologies to identify excessive pricing in this sector; the interaction between competition law and sectoral regulation; the various tools available to competition authorities to promote competition and lower

prices in pharmaceutical markets; and market developments more generally.

⁷ <http://www.oecd.org/daf/competition/excessive-pricing-in-pharmaceuticals.htm>

OECD Global Forum on Competition, 29 – 30 November 2018

Discussion on Competition and Fair Societies⁸

The Global Forum on Competition explored the concept of fairness; it discussed whether and how it can relate to competition, and what fairness can mean in practical terms to competition enforcers. The term “fairness” is referenced by many antitrust enforcers but does not have a universal definition, particularly in the competition context. Fairness, while innate to most individuals, is fluid, subject to the influence of many factors: culture, education, experience, society. Behavioural scientists and psychologists have attempted to examine how fairness works, and how it is defined in markets. Concerns with fairness in societies may reflect a growing, and positive desire to reduce societal inequalities and to ensure that opportunities are shared more broadly across society, whether amongst individuals or firms. It was discussed how fairness can be interpreted by competition authorities and judges, without becoming moralistic or undermining the proven criteria that underpin competition enforcement.

Session on the Relation between Gender and Competition⁹

Competition policy is usually thought of in terms of consumers and firms, governments and regulators. Traditionally, consumers have been considered only with regard to their

willingness to pay, their (rational) preferences, and their ability to substitute between the products offered by firms. Meanwhile, firms are treated as entities that are defined by the profit-maximising objectives of their owners, and only rarely seen as groups of people. Competition policy is therefore largely gender blind and prides itself on its objectivity. The Global Forum held a discussion on the topic to explore whether a gender lens might in fact help deliver a more objective competition policy by identifying additional relevant features of the market, and of the behaviour of consumers and firms. It was also discussed whether a competition perspective can help inform policymaking on gender equality.

Session on the Benefits and Challenges of Regional Agreements¹⁰

Regional Competition Agreements (RCAs) hold great potential for both developed and developing jurisdictions by promoting convergence in competition laws and instruments, ensuring effective and efficient cross-border enforcement, and by supporting young authorities in their efforts to create a competition framework coherent with international standards. However, serious obstacles to the success of RCAs can undermine the harvesting of these benefits. The discussion explored the potential benefits, obstacles and challenges of RCAs, and examined the different types of existing RCAs. The session focused specifically on RCAs

⁸ <http://www.oecd.org/competition/globalforum/how-can-competition-contribute-to-fairer-societies.htm>

⁹ <http://www.oecd.org/daf/competition/gender-and-competition.htm>

¹⁰ <http://www.oecd.org/daf/competition/benefits-and-challenges-of-regional-competition-agreements.htm>

amongst jurisdictions that are located in the same geographical region. Such agreements are particularly relevant as economies are usually more integrated with other countries within the same region and may have similar levels of development, and even similar legal cultures, creating conditions conducive to co-operation.

Session on Authorities' Investigative Powers in Practice ¹¹

When carrying out investigations competition authorities must engage in intensive evidence and data gathering. Consequently, competition authorities are armed with various investigative powers ranging from voluntary interviews to searches on non-business premises. Participants discussed practical issues and shared best practices regarding the use of investigative powers through three breakout sessions. Breakout session 1 discussed challenges and best practices regarding unannounced inspections in a world where information is mostly produced and stored digitally. Breakout session 2 explored requests for information, one of the most often used investigative powers, while breakout session 3 was devoted to due process and the protection of the rights of subjects and third parties without hindering effective investigations.

Session on Competition Law and State-Owned Enterprises ¹²

Like private firms, state-owned enterprises (SOEs) might seek to maximise profit, even if they ultimately re-invest the surplus that they earn. Alternatively, their objective might be to expand their output, or they may have

¹¹ <http://www.oecd.org/daf/competition/investigative-powers-in-practice.htm>

¹² <http://www.oecd.org/daf/competition/competition-law-and-state-owned-enterprises.htm>

another goal. Regardless of their objectives, there remains a risk that their actions, agreements and mergers may sometimes harm consumers, causing competition agencies to sometimes investigate their behaviour. However, in undertaking such investigations there will be particular challenges, some relating to the status of these organisations, some to their different objectives, which may affect the analytical tools that an authority uses. This session looked at investigations into anticompetitive conduct, mergers, and agreements by SOEs, both those owned or controlled by a competition authority's own government, and those owned or controlled by other governments. In particular, it examined the type of conduct they engaged in, the rationale for doing so, the key analytical questions that arose in these cases, and the way in which their status and objectives affected those investigations. The main challenges when enforcing competition law against SOEs and ways to address them were identified.

High Level Meeting of RCC Beneficiary Agency Heads

The day before the Global Forum on Competition, on 28th November, the OECD held a High Level Meeting of RCC Beneficiary Agency Heads that brought together high-level representatives from the authorities of the Region as a forum to share experiences and discuss a topic of common interest: how corruption can affect a competition authority's work in many ways. Corruption can facilitate cartel schemes in public procurement processes and enforcement needs to be aware of the additional challenges this creates. Corruption can also affect the work of an authority directly and all competition authorities need safeguards against corruption. This meeting provided an opportunity to exchange experiences and to discuss approaches.

Fight Against Corruption and Competition Law – The Serbian Experience



Ivana Rakić, PhD
Commission for Protection of
Competition of the Republic of
Serbia
External Associate, Institute of
Comparative Law, Belgrade
ivana.rakic@kzk.gov.rs

Introduction

In the Republic of Serbia corruption is one of the major challenges faced by society and fighting corruption is one of the strategic governmental goals, as corruption is observed as an obstacle to the economic, social and democratic development of the Republic. The general objective of the National Anti-Corruption Strategy for the period 2013-2018 was to eliminate corruption as much as possible, and there is a strong awareness and political will to make substantial progress in the fight against corruption.

According to [Transparency International's 2017 Corruption Perception Index](#), Serbia ranked 77th of 180 countries, with a score of 41 out of a possible 100 points. Hence, the Government must keep the fight against corruption among its priorities. Corruption not only leads to an impoverished society and state, but also to a drastic drop in public confidence in democratic institutions, as well as to a decrease in the security and stability of the economic system.

Legal framework for fighting corruption

The Serbian legal framework for fighting corruption consists of numerous laws, but the concept and the constituent elements of corruption still have not been defined in a

unique and uniform way. A definition that has been used in the Republic of Serbia so far can be found in the [Law on the Anti-Corruption Agency](#) ("Official Gazette of the RS", No. 97/08 53/10, 66/11, 67/13, 112/13, 8/15), and defines corruption as a relation based on the abuse of an official or social position or influence, in the public or private sector, with an aim to gain personal benefit or benefit for others.

The National Anti-Corruption Strategy recognises the following areas as the most important for reform: political activities; public finance; privatisation and public-private partnerships; judiciary; police; spatial planning and urban development; health care system; education and sport, and media.

Several authorities specifically work on fighting and preventing corruption but the Anti-Corruption Agency has the main responsibilities in this area, dealing with corruption issues in a comprehensive manner. The Anti-Corruption Agency is a dedicated corruption prevention state body established in 2009; it is an autonomous and independent authority that co-ordinates the national anti-corruption strategy and has a range of other preventive functions. It is accountable to the National Assembly, to which it reports annually on its operations.

In November 2016, the National Assembly adopted the new [Law on Organisation and Competence of State Authorities in Suppression of Organised Crime, Terrorism and Corruption](#) ("Official Gazette of the RS", No. 94/16) in order to establish specialised anti-corruption prosecution units and judicial

courts, mandate the use of task forces, and introduce liaison officers and financial forensic experts. The Law came into effect on 1 March 2018 and introduced several important changes, such as the establishment of special departments for suppressing corruption (the Anti-Corruption Departments) at the Ministry of Interior, the public prosecutor's offices and courts that will focus on all criminal offences related to mid- and low-level corruption cases. The investigative and prosecutorial bodies dealing with high-level corruption cases shall remain the existing special departments for combating organised crime. In addition, special auxiliary units shall be established within the Anti-Corruption Departments, such as Task Forces, Financial Forensic Divisions and Liaison Officers.

The [Criminal Code](#) specifies a large number of potential offences that can be used to prosecute corruption, such as giving or accepting a bribe, abuse of office, conclusion of restrictive agreements, abuse in public procurement processes, trade in influence, abuse of economic authority, fraud in service, and embezzlement. Finally, the Law on the Anti-Corruption Agency contains provisions regarding conflict of interest.

In terms of international anti-corruption co-operation, Serbia participates in a number of international programmes and is a signatory to the international conventions against corruption.¹³ Serbia is also an active member of the [Group of States against Corruption \(GRECO\)](#), and implements its

¹³ The United Nations Convention against Corruption, The United Nations Convention against Transnational Organized Crime and the Protocols Thereto, The Council of Europe Criminal Law Convention on Corruption, The Council of Europe Civil Law Convention on Corruption, The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, The European Convention on Mutual Assistance in Criminal Matters with additional protocol.

recommendations on the fight against corruption. In May 2018, the Government set up a special co-ordination body to deal with GRECO recommendations.

Interface between corruption and competition law

Public procurement and bid rigging are considered to be a typical domain in which the issues of fighting corruption and competition law cross paths. The Commission for Protection of Competition of the Republic of Serbia (hereafter, Commission) has constantly been taking various actions to ensure competition in public procurement although bid-rigging cases do occur. Most recently, the Commission established that four companies have infringed competition by rigging the bid in the process of public procurement of services for regular maintenance of railway wagons for coal. The Commission established that these companies have agreed on price fixing in a bid rigging scheme.¹⁴

Bid rigging is one of the most severe competition infringements in Serbia and is a prohibited restrictive agreement pursuant to Article 10 of the [Law on Protection of Competition](#) ("Official Gazette of the RS", no. 51/09, 95/13), for which a fine of up to 10% of the total turnover of an undertaking may be imposed. In addition, the Commission is empowered pursuant to Article 167 of the Public Procurement Law ("Official Gazette of the RS", No. 124/12, 14/15, 68/15) to ban a bidder or an interested party from participating in future public procurement procedures for up to two years, where it determines that the bidder or the interested party has violated competition rules in a public procurement procedure.

¹⁴ See Decision no. 4/0-02-76/2017-21 of December 8, 2017, <http://www.kzk.gov.rs/kzk/wp-content/uploads/2018/01/Re%C5%A1enje-TENT.pdf>.

In detecting bid rigging, the Commission uses the most modern methods, owing to the co-operation established with the UK Competition and Markets Authority.¹⁵ The Commission has begun to use a digital programme that assists in detecting possible collusion of bidders in public procurements, by entering various parameters, such as prices.

In order to detect this kind of competition infringement, the Commission adopted the [Instructions for Detecting Bid Rigging in Public Procurement Procedures](#) (in line with the [OECD Guidelines for fighting bid rigging in public procurement](#)), which enables the Commission to require the assistance of the Public Procurement Office. The drafting of the specifications and the terms of reference should be designed in a manner that avoids bias, as this is a stage of the public procurement cycle which is vulnerable to fraud and corruption. In addition, when designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. Transparency requirements are indispensable for a sound procurement procedure that aids in the fight against corruption.

Given this relationship between collusive conduct and corruption, the Commission constantly undertakes activities to maintain and improve its relationships with procurement and anti-corruption authorities to ensure a continuous dialogue and to provide an information exchange. This co-operation is covered by Agreement on co-operation, signed by the Commission with the

¹⁵ See CMA's 'Screening for Cartels' tool (<https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool>). See also CMA's contribution to the [OECD's January 2018 Workshop on cartel screening in the digital era](#).

Anti-Corruption Agency and the Republic Commission for Protection of Rights in Public Procurement Procedures, which provides for continual co-ordination of anti-corruption activities in the public procurement system through exchange of information, experiences and professional knowledge, and for the creation of a joint database on charges indicating corruption in public procurements.

In order to create public awareness about bid rigging and to explain the benefits of competitive markets to the public, the Commission also conducts advocacy activities through seminars or working groups, through the media, or on its website.¹⁶ In addition, some videos (short films) about competition law awareness are uploaded to the YouTube.com website, one of which is dedicated to bid rigging.¹⁷

The Commission's internal rules regarding corruption, fraud and related practices

The Commission is among the public authorities which are in the corruption risk

¹⁶ See <http://www.kzk.gov.rs/seminar-o-francuskim-iskustvima-u-zas>; <http://www.kzk.gov.rs/japanska-iskustva-u-zastiti-konkuren>; <http://www.kzk.gov.rs/trening-program-borba-protiv-kartela-i-namestanja-javnih-nabavki-u-japanu-trenutni-i-buduci-izazovi>; <http://www.kzk.gov.rs/komisija-koristi-najsavremenije-met>; <http://www.kzk.gov.rs/nova-promotivna-kampanja-komisije>; <http://www.kzk.gov.rs/saradnja-komisije-sa-upravom-za-javne-n>; <http://www.kzk.gov.rs/zastita-konkurencije-i-borba-protiv-korupcije-u-postupcima-javnih-nabavki>; <http://www.kzk.gov.rs/predsednik-komisije-ucestvovao-na-st>; <http://www.kzk.gov.rs/stav-komisije-o-primeni-clana-10-zakona-o-zastiti-konkurencije-kod-povezanih-lica-u-postupcima-javnih-nabavki>; <http://www.kzk.gov.rs/predavanje-predstavnika-komisije-na-seminaru-kako-primeniti-izmene-i-dopune-zakona-o-javnim-nabavkama-i-zakon-o-zastiti-konkurencije-u-postupcima-javnih-nabavki>.

¹⁷ See <https://www.youtube.com/watch?v=RZmC-C6JPs0>.

area as it adopts decisions with far reaching economic consequences, including heavy fines on undertakings. Therefore, the Commission not only looks outward in its fight against corruption, but it also applies safeguards against the risks of corruption within its own organisation.

Firstly, the Law on Protection of Competition itself contains general rules about the incompatibility of functions and operations (Article 27) and conflicts of interest (Article 28). During their mandate, the President of the Commission and the members of the Council cannot perform other public functions or professional activities, except scientific activity, teaching activity in institutions of higher education and activities related to professional development. They cannot be members of bodies of political parties, nor may they publicly advocate the programmes or positions of political parties. The President of the Commission and any member of the Council, whose membership has terminated, cannot represent parties in a procedure before the Commission, for at least two years after the termination of membership. In addition, the provisions of the law governing conflicts of interest shall also apply to Technical Service employees.

Secondly, the Statute of the Commission imposes a general obligation on the President, Council members and Technical Service employees to protect business secrets and imposes transparency obligations.

Thirdly, the Commission enacted Rules of Procedure regulating its work and a Code of Ethics, the latter of which sets out the expected standards of behaviour and conduct of members of the bodies and employees of the Commission, in order to preserve the dignity of the organisation, independence and impartiality, employees' awareness of their responsibilities when performing their tasks, as well as their professional integrity.

Finally, the Commission adopted the Integrity Plan – a document which was elaborated as a result of the Commission's self assessment of its exposure to the risks of the emergence and development of corruption, and exposure to unacceptable ethical and professional practices.

The “Car Wash” Investigations in Brazil: Inception, Scope, and Implications for Competition Enforcement



Paulo Burnier da Silveira
Commissioner
Brazilian Competition Authority –
CADE
pburnier@unb.br

Introduction

This paper addresses the so-called “Car Wash” investigations in Brazil: the largest corruption scheme uncovered in Latin America. First, the paper describes the inception of the investigations which began with preliminary investigations into a minor money laundering suspicion in 2013. Then, the paper analyses the competition scope of these investigations, considering that they cover several areas including corruption, money laundering, and competition issues. Finally, the paper sets out the likely future implications of these investigations, in particular in relation to public government procurement in Brazil and certain positive externalities for other Latin American economies.

Inception

The “Car Wash” (or “Lava-Jato” in Portuguese) operation relates to a series of ongoing investigations in Brazil, covering a wide range of topics that include corruption, money laundering and competition issues. It started in 2013 with a preliminary investigation into a minor money laundering suspicion. The name “Car Wash” was given because the investigation began by focusing on a small office providing foreign currency exchange and money transfer services located at a gas station in Brasilia, which also provided car wash services for its customers. The initial

phase of the investigation aimed to uncover illicit payments and foreign transfers operated by this office in Brasilia.

In March 2014, through lawful telephone and e-mail interceptions, the first indication of corruption was identified when it was uncovered that one of the main persons under investigation for money laundering had apparently given an expensive, imported automobile to a senior director of Petrobras, the Brazilian state-owned company. This development, later confirmed through criminal plea bargain agreements in 2014, marked the first shift from a small financial investigation to a wider money laundering and possible corruption scheme investigation. The possible corruption scheme included politicians appointing key persons to senior positions at Petrobras, and those persons, in turn, supposedly serving as intermediaries in bribe negotiations. The bribes consisted of a certain “commission” in government contracts that would later serve to finance certain political parties, including for campaigning purposes. In addition, the investigation uncovered signs that certain construction companies were colluding during public tenders to divide the market and raise both their profits and the corresponding bribes that were given to politicians.

In total, the investigations targeted four groups that could have been involved in these schemes: financial operators, managers at Petrobras, politicians, and businessmen mainly from the construction industry.

Competition scope

As mentioned above, although the “Car Wash” operation was not originally related to competition issues, the investigations suggested that construction companies were colluding to divide markets and fix prices in several government procurements. This explains the involvement of the Brazilian Competition Authority (CADE) in the investigations carried out by different government bodies including the Public Prosecutor’s Office, the Comptroller General’s Office and CADE itself.

In 2016, CADE announced that it was investigating more than 30 alleged cartels arising from the “Car Wash” investigations. During the first stage of investigations, construction companies were accused of bid-rigging in oil and gas related markets, such as the construction of power plants. Petrobras argued that it was a victim of cartels amongst construction companies as they had divided markets and fixed prices. At the second stage, the investigations expanded to other construction projects. Notable examples related to the construction of football stadiums and railroads – all of which involved significant public investments and were subject to wide-spread public interest; specific examples concerned the planning of both the 2014 FIFA World Cup in Brazil and the 2016 Olympic Games in Rio de Janeiro.

The “Car Wash” operation is responsible for the significant increase in the number of leniency applications received by CADE in recent years in Brazil. Over 42 leniency agreements were signed between 2015-2017, which corresponds to around half of the total number of the leniency agreements ever signed by CADE since the first one in 2003.¹⁸

¹⁸ See the chart at the end of this article.

CADE has signed a total of 85 leniency agreements in the 15 years of operation of the leniency programme for cartel enforcement. The numbers above only include the first-in applicants, as subsequent applicants may apply for settlement, but not for leniency in Brazil. The leniency programme may grant full immunity in both administrative and criminal matters, whereas the settlement programme only allows for a fine reduction.

Future implications

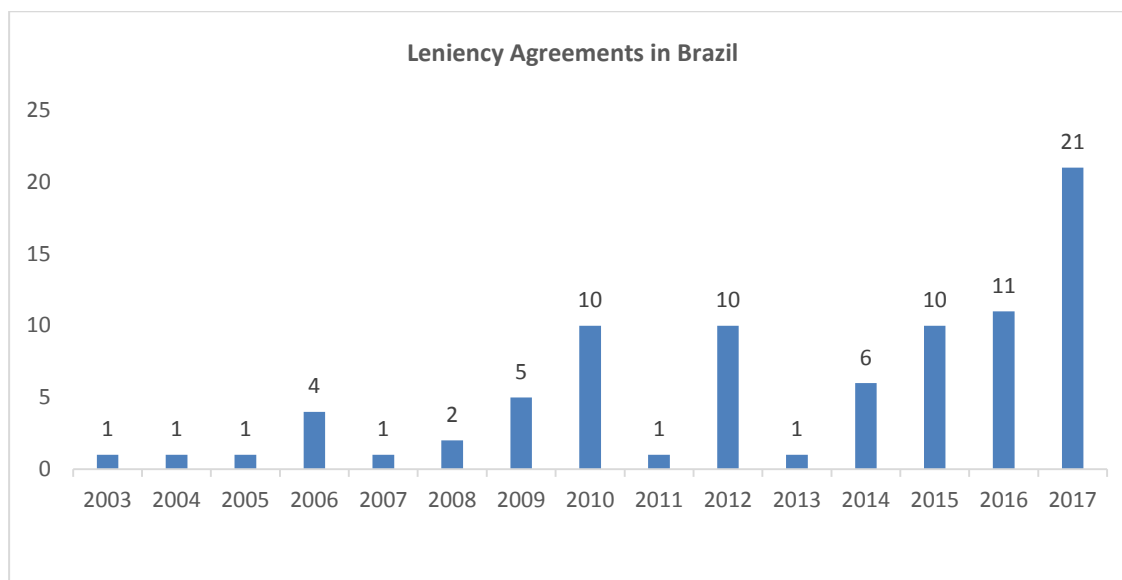
The “Car Wash” investigations have had a significant impact on cartel enforcement in Brazil. The investigations have highlighted the importance of leniency programmes for the detection of cartels. They have also captured the attention of a greater audience, including the business community, political stakeholders, and consumers, as high-profile cases were reported by both the specialised and general press. In addition, the “Car Wash” operation has had a regional impact on neighbouring countries. Some of these countries have already initiated related investigations based on the facts and allegations that surfaced during the “Car Wash” investigations, including bid-rigging and corruption allegations.

Another effect of the “Car Wash” cases has been increased investment in compliance programmes. Companies are now more aware that prevention is better than cure, as cartel sanctions often include hefty fines. In Brazil, CADE has attempted to encourage and support the compliance efforts of the private sector. CADE is of the opinion that a neutral and comprehensive competitive environment is the utmost goal of competition authorities. One concrete example of this effort can be seen in the [Guidelines on Compliance Programs](#), which were published by CADE in 2016 in both Portuguese and English.

The success of leniency programmes powered by the “Car Wash” cases has also led to new challenges. The main point of concern is the need for internal co-operation with other investigative bodies, including the Public Prosecutor’s Office, the Comptroller General’s Office, and the Court of Accounts. These are the institutions with jurisdiction to investigate certain aspects of the illegal practices in question, such as fraud in tender proceedings and corruption allegations. Recently, leniency instruments have been introduced in these institutions to serve as additional enforcement tools. This creates the possibility of placing

multiple leniency applications with different investigative bodies, which highlights the need for co-operation between CADE and these institutions.

In conclusion, the “Car Wash” investigations have transformed the way in which leniency agreements are perceived in Brazil. The investigations have also fostered significant support for the fight against cartels, in particular bid-rigging. The full impact of these investigations is yet to be determined but certain benefits have already been widely observed.



Source: CADE

Experience of €14,000



Daumantas Grikinis
Senior Adviser
Anti-competitive Agreements
Investigation Division
Competition Council of the
Republic of Lithuania
Daumantas.Grikinis@kt.gov.lt
www.kt.gov.lt

April 2015 marks an unprecedented event in the history of the Lithuanian Competition Council (LCC) – an attempt to bribe an LCC official. The LCC’s case handler refused to accept a bribe of EUR 14,000 from the CEO of a company that was offered in exchange for a favourable decision in a suspected bid rigging case. The attempt to bribe the LCC’s official resulted in a suspended two-year custodial sentence and a fine of EUR 3,700 for the CEO.

What happened?

In March 2015 the LCC launched an investigation into a suspected bid-rigging agreement between companies selling agricultural machinery. A few days after the dawn raids had been carried out, the LCC’s officer in charge of the case was approached by the CEO of one of the companies and offered a bribe of EUR 14,000, the size of his annual salary. The request of the CEO was simple – the investigation should either show that “no infringement was found”, or the fines should be reduced significantly. The LCC’s official immediately informed the anti-corruption agency – Special Investigation Service (SIS) – about the offer, which prompted the SIS to launch a pre-trial investigation. The secret co-operation between the LCC’s official and the SIS lasted for more than three months, during which there were 10 meetings with the CEO (all of them recorded), more than 20 phone calls (all

of them wire-tapped), as well as a number of meetings between the LCC’s official and the SIS in order to agree upon their actions. Three months later, after the necessary evidence had been gathered, the CEO was detained. In December 2016 the SIS completed the pre-trial investigation, and in April 2018 the Court of Appeal of Lithuania issued a final decision sentencing the CEO to a suspended two-year custodial sentence and a fine of EUR 3,700.¹⁹

In addition, the liability of the companies participating in the tender was established. In December 2016 the LCC imposed fines of EUR 33,400 and EUR 70,400 on two bid-riggers.²⁰

Outcome

Despite these unpleasant events, the outcome was more positive than one could have expected. First and most importantly, a very clear message was sent – companies cannot simply escape the LCC’s scrutiny and their liability for competition law infringements this way. As it was pointed out many times by the LCC, leniency is a much safer and more effective way of dealing with the negative consequences of a competition law probe. A clear signal was sent to the public as well – the LCC is a transparent and independent institution that can be trusted.

Secondly, the LCC and the SIS successfully co-operated and assisted each other in the SIS’s pre-trial investigation and the LCC’s antitrust investigations. During its investigation, the SIS

¹⁹ 10/04/2018 Decision of the Court of Appeal of Lithuania
<http://eteismai.lt/byla/4335805246400/1A-220-307/2018>

²⁰ 05/12/2016 Decision of the LCC No. 2S-15 (2016)
<http://www.kt.gov.lt/en/news/competition-council-disclosed-an-anti-competitive-agreement-in-public-procurement>

gathered important evidence for the LCC's investigation – it recorded a meeting between the LCC's official and the CEO where the latter was explaining the “scheme” of the agreement, namely that the other company under investigation was a *friend* that had been asked to submit a cover bid (because *this is how it's done in all tenders*), and how it would be *awfully wrong* if they were to be fined for this kind of help. Moreover, the SIS wiretapped phone calls between the CEOs of two companies where they were discussing their “progress” in the communication with the LCC and how they would collect money in case of a favourable decision. This information was transferred to the LCC and was later used as additional evidence in the LCC's case. The LCC successfully concluded the bid rigging case and fined two companies EUR 70,400 and EUR 33,400. This case was one of the first instances where the LCC used evidence from a criminal procedure in its antitrust proceedings. The use of such evidence was heavily criticised by the parties in question, however, Vilnius Regional Administrative Court upheld the LCC's decision²¹. The LCC's right to use evidence obtained from criminal proceedings was also confirmed by the Supreme Administrative Court of Lithuania (the highest administrative court) in other cases.

Thirdly, close co-operation between the LCC and the SIS did not end with the pre-trial investigation. The SIS is very active in combating corruption in public procurements, and while carrying out its investigations it often collects direct evidence of collusion between suppliers, for example, phone calls, and meetings between companies' representatives. However, this evidence is not

²¹ <http://www.kt.gov.lt/en/news/vilnius-regional-administrative-court-uab-nbsp-zagares-inzinerija-and-uab-nbsp-rovaltra-rigged-their-bids>

used anywhere as it usually does not fall within the scope of the SIS's investigations (the SIS is mostly concerned with the actions of public officials). What's more, the SIS's officials were mostly unaware of the LCC's work, namely what constituted a restrictive agreement, what the level of proof is, how much evidence is necessary to launch an investigation, etc. The co-operation between the LCC's and the SIS's officials during the bribery case allowed both institutions to acquire more knowledge about each other's work, procedures and most importantly, created a sense of trust, which is a major consideration when working with an institution that deals with extremely sensitive and secret investigations. The LCC started intensive advocacy targeted at SIS's officials during which the LCC's work, and possible areas for co-operation were explored. The LCC carried out trainings not only for the central office of the SIS, but also met with the SIS's officials in every region of Lithuania. The results were rather surprising – every single regional office of the SIS had cases where direct evidence of collusion (price-fixing, market sharing agreements) was gathered, however, the SIS's officials were simply unaware of co-operation possibilities.

It was agreed that both institutions would exchange information gathered during their investigations which might be of particular interest to one another. The SIS has now become one of the most important sources of information, providing information on potential bid rigging cases, as well as direct evidence of collusion. This co-operation allows significant savings in terms of human resources and time – in some circumstances the SIS provides such a coherent story and valuable evidence that the LCC does not even need to carry out dawn raids to prove an infringement. The LCC has successfully concluded a number of cases based on

information gathered during the SIS's pre-trial investigations and almost always has at least one ongoing case based on this kind of co-operation. In the beginning of 2017, the LCC went even further and initiated a new project – the creation of a co-operation model between the LCC, the SIS and the Public Procurement Office, the latter of which is the main institution responsible for public procurement. The goal of this project was to foster co-operation between the three institutions by informal communication, information sharing, common investigations and common training plans in order to optimise current resources, as well as to discourage companies from engaging in anti-competitive or corrupt behaviour in public tenders. This project led to regular meetings, reciprocal consultations and common investigations.

Lastly, these events led to a review and analysis of the highest risk areas, as well as the creation of various internal procedures relating to the investigative processes of the LCC aimed at minimising the possibility of potential corruption, which took the form of an increased number of people at every stage of the procedure to limit the exposure of single staff members to the risk of corruption. The LCC reviewed how the investigators are assigned, who has access to the case file or information gathered during the investigation, how the meetings with the companies' representatives are organised and established different safety measures in each step of the investigation.

Final notes

Individuals working at a national competition authority face hard decisions every day. Certain individuals might even determine the future of an authority. If the integrity and the

independence of the decision-making process is compromised, it might take years to rebuild it. Thankfully, in the present case the right choices were made and this story had nothing but positive outcomes for the LCC.

Albanian Case in a Bid Rigging Procurement Procedure – Fight Against Corruption



Prof. Dr. Juliana Latifi
Chairwoman
Albanian Competition
Authority
Juliana.Latifi@caa.gov.al



M.Sc. Mimoza Kodhelaj
Chief Economist
Albanian Competition
Authority
Mimoza.Kodhelaj@caa.gov.al

Introduction

The Albanian legal framework against corruption is based on the following: International Treaties: (1) “Civil Law Convention on Corruption” - ratified with law no.8635/2000;²² (2) “United Nation Convention against Corruption” - ratified with law no.9492/2006.²³

National legal framework: (1) Law no. 9508/2006 “For the collaboration of the public in the fight against corruption”;²⁴ (2) Law no.10192/2009 “On the prevention and fight against organized crime and corruption, through preventive measures against assets”, as amended;²⁵ (3) Law no.95/2016 “For the

²² Ligji nr. 8635/2000 “Për ratifikimin e konventës civile për korrupsionin” [2000] Official Journal no.

²³ Ligji nr. 9492/2006 “Për ratifikimin e konventës së kombeve të bashkuara kundër korrupsionit” [2006] Official Journal no. 27.

²⁴ Ligji nr. 9508/2006 “Për bashkëpunimin e publikut në luftën kundër korrupsionit” [2006] Official Journal no.37.

²⁵ Ligji nr.10192/2009 “Për parandalimin dhe goditjen e krimit të organizuar, trafikimit, korrupsionit dhe krimeve të tjera nëpërmjet

organisation and functioning of the institutions to fight corruption and organised crime”;²⁶ (4) Law no. 60/2016 “On whistleblowing and protection of whistleblowers”.²⁷

Other measures in place are the “National Inter-Sectorial Strategy 2015-2020 against corruption”²⁸ and the “National Action Plan for the Inter-sectorial Strategy against corruption”.²⁹

1. Procurement and Corruption

Procurement procedures in Albania are administered through a central electronic system by the Public Procurement Agency (hereinafter PPA). Since 2008 this electronic system has allowed for simple and faster procedures. Each contracting authority (hereinafter CA) can easily archive and search for information in the system.

Thus, any CA can check a large amount of information because the system is interconnected with the database of the

masave parandaluese kundër pasurisë”, as amended [2009] Official Journal no.181.

²⁶ Ligji nr.95/2016 “Për organizimin dhe funksionimin e institucioneve për të luftuar korrupsionin dhe krimin e organizuar” [2016] Official Journal no.194.

²⁷ Ligji nr. 60/2016 “Për sinjalizimin dhe mbrojtjen e sinjalizuesve” [2016] Official Journal no.115.

²⁸ Strategjia Antikorrupsion, available at: http://www.mod.gov.al/images/PDF/Strategjia_Antikorrupsion2015_2020.pdf, accessed 12.11.2018.

²⁹ Vendim nr. 241, datë 20.4.2018 “Për miratimin e planit të veprimit 2018-2020, në zbatim të strategjisë ndërsektoriale kundër korrupsionit, 2015-2020”, available at: http://www.qbz.gov.al/botime/fletore_zyrtare/2018/PDF-2018/68-2018.pdf, accessed 12.11.2018.

National Central of Business,³⁰ and it can identify each operator by a special unique identification number. The system functions as a centralised server-user model, where all the procedures are registered in a server called the “black box”, which is separated from the main server and which cannot be accessed by the system administrators. The “black box” server is subject to other auditing and controlling institutions such as the Procurement Advocate, the Supreme State Audit and the Unit of Anti-Corruption at the Prime Minister’s Office.³¹

Procurement regulations are displayed on the official website of the PPA. The website also shows a list of companies that have committed irregularities during the procurement process. In practice, the companies that have broken the procurement rules - in the form of bid rigging - are excluded from public procurement.³²

Bid rigging in a public procurement procedure occurs when the operators competing on a certain bid, in order to obtain illicit financial gain, agree through a secret agreement to increase the price or decrease the quality of a product or service that is being purchased by a buyer (contracting authority) via a procurement procedure. In such cases, the Competition Authority has the right to investigate the public procurement procedure.³³

2. Procurement and Competition

³⁰ See, www.qkb.gov.al

³¹ See, <http://www.app.gov.al/t%C3%AB-tjera/trajnime/pyetje-t%C3%AB-shpeshta/>

³² *Ibid.*

³³ Guideline “Fighting bid-rigging in public procurement”, available at: <http://caa.gov.al/uploads/publications/brochure.pdf>, accessed 12.11.2018.

Based on article 4 “Prohibited agreement” of law no. 9121/2003 “On Competition Protection”³⁴ as amended, the Albanian Competition Authority (hereinafter ACA) is obligated to investigate and fight the collusive behaviour of operators in all markets, including public procurement.³⁵

In order to fight bid rigging effectively, the ACA has an established co-operation with the PPA. The Competition Authority may initiate a case for bid rigging on its own initiative or at the request of the PPA, the Supreme State Control, as well as any interested entity.

If the Secretariat of the Competition Authority detects signs of bid rigging during the investigation procedure, it refers the case to the Competition Commission - which has the right to decide.

The decision of the Competition Commission will be sent to the PPA, which has the legal obligation to exclude the operators from future public procurement for up to 3 years.³⁶

During the period of 2013-2018, the ACA made decisions relating to public procurement in the following areas:

- security services and physical security;³⁷
- construction roads and the definition of the rules regarding the division into lots;³⁸
- improvement, restoration of vertical/horizontal signage in national roads and improvement of road safety;³⁹

³⁴ Ligji nr. 9121/2003 “Per mbrojtjen e konkurrencës”, as amended [2003] Official Journal no.71.

³⁵ *Op.Cit.*, note 12.

³⁶ *Op.Cit.*, note 11.

³⁷ Decision of CC: no. 287, dated 04.06.2013; no.317, dated 23.05.2014, available at <http://www.caa.gov.al/decisions/list>

³⁸ Decision of CC no. 358, dated 16.04.2015, available at <http://www.caa.gov.al/decisions/list>

³⁹ Decision of CC no. 409, dated 21.03.2016, available at <http://www.caa.gov.al/decisions/list>

-storage of buildings in 2015;⁴⁰

-consultancy services.⁴¹

3. A bid rigging case - “Repairs of office buildings in the Administrative Unit Lukovë”, Municipality of Himarë.

Case: The Public Procurement Agency (PPA) sent a request to the Competition Authority that concerned the examination of “Bid rigging” in the public electronic procurement system relating to “Repairs of office buildings in the Administrative Unit Lukovë”, Municipality of Himarë. The request was based on the audit report of the Supreme State Audit for this procurement, after it was suspected that there may have been a violation of Article 4 (prohibited agreement) of Law no.9121/200.

Four operators participated in the procurement procedure - “Repairs to office buildings of the Administrative Unit Lukovë”, Municipality of Himarë. The winning operator “A.E.K & CO” SHPK, was suspected of bid rigging. It had uploaded a document from another operator, “Tea-D” SHPK, to the electronic system from its own account when participating in the same procedure.

3.1 The decision of the Competition Commission:

The scheme of the bid, used by “Tea-D” SHPK and “A.E.K & CO” SHPK, was one of cover bidding. Under this scheme, one of the competitors agreed to submit a bid that was higher than the other bidder’s bid, in order to give the impression of a real offer and sincere competition.

In conclusion, from the assessment of the behaviour of “Tea-D” SHPK and “AEK & CO” SHPK and the documents collected during the preliminary investigation procedure, it was

found that this was an agreement which amounted to a prohibited agreement within the meaning of Article 4, point 1, letter (a) of Law no. 9121/2003.

The Competition Commission, with decision no. 535 dated 17.07.2018,⁴² established (1) the invalidity of a prohibited agreement between “Tea- D” SHPK and “A.E.K & CO” SHPK in the public procurement procedure, and imposed (2) fines on “Tea-D” SHPK and “A.E.K & CO” SHPK for serious breaches of competition, namely Article 4, paragraph 1, letter (a) of Law no. 9121/2003, to the amount of 100,000 Lekë for “Tea-D” SHPK and to the amount of 100,000 Lekë for “A.E.K & CO” SHPK.

⁴⁰ Decision of CC no. 407, dated 08.03.2016, available at <http://www.caa.gov.al/decisions/list>

⁴¹ Decision of Cc no. 441, dated 22.11.2016, available at <http://www.caa.gov.al/decisions/list>

⁴² See <http://www.caa.gov.al/decisions/list/page/1>

Double Blow to National Security



Fatima Konieva
Head of Digital Investigation
Unit
Anti-Cartel Department
FAS Russia
konieva@fas.gov.ru

Anti-corruption and competition policies overlap and are connected in many aspects. Thus, the Organization for Economic Cooperation and Development (OECD) has done a substantial amount of work to establish the relationship between competition and corruption. For example, in 2014, at the Global Forum on Combating Corruption and Supporting Competition (OECD, 2014), OECD members discussed how anticompetitive behaviour and corruption interact in business licensing procedures or other types of regulation to limit market entry, along with more general links between corruption and anti-competitive behaviour.⁴³

Similar phenomena can be seen in the Russian Federation. Three main areas of influence of corruption on competition can be distinguished: creation of barriers to entry into markets, creation of discriminatory conditions, and collusion in tenders in public procurement (bid-rigging).⁴⁴

⁴³ More detailed information about the Forum can be found on the OECD site:
<http://www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm>.

⁴⁴ Егорова М.А. Актуальные вопросы современного конкурентного права. Сборник научных трудов / М.А. Акимова, А.В. Белицкая, В.С. Белых и др.; отв. ред. М.А. Егорова. М.: Юстицинформ, 2017. Вып. 1. 288 с.//СПС КонсультантПлюс.

Corruption and cartels - a threat to national security

Considering the links between corruption and cartels, this article will look in more detail at the relationship between procurement cartels (bid-rigging) and corruption. This is due to the fact that, firstly, a significant number of cartels and other anticompetitive agreements are identified annually in Russia, of which more than 80% of cartel cases are bid-rigging: 310 cases (86%) in 2017, and 300 (89.2%) in 2016.⁴⁵

Secondly, and closely related to these disappointing statistics, bid-rigging is rightly attributed to be a danger to the economic and national security of the country,⁴⁶ threatening both business interests and consumers, and also causing significant damage to the budget of the state and of state-owned companies.

Procurement in important areas such as defence, construction or medicine will be more costly and will lead to a misallocation of resources.

Public and corporate procurement should be a mechanism to save funds, as well as to reduce the risk of corruption in auctions. These goals

⁴⁵ FAS Russia Report on the State of Competition in the Russian Federation in 2017. [E-resource]
URL: <https://fas.gov.ru/documents/658027>

⁴⁶ Cartels: the results of FAS Russia work in 2017 and plans for 2018 (internet interview with Head of Department for prevention of cartels of the Federal Antimonopoly Service of the Russian Federation А.П.Тенишев) // СПС КонсультантПлюс. 2018; Тенишев А.П., Бандурина Н.В. Картелизация как фактор снижения эффективности государственных расходов в сфере закупок // Вестник АККОР. 2016. № 4. С. 57-62; Кинев А.Ю., Тенишев А.П. Об уголовной ответственности за картели // Юрист. 2017. N 1. С. 7 - 13. // СПС КонсультантПлюс.

can only be achieved if there is real competition between participating companies, integrity of customers and bidders, along with transparency of procurement procedures.

Collusion in bidding at auctions (tenders, requests for quotations, requests for bids) occurs, for example, when undertakings that should compete with each other for contracts agree on prices, to extract excess profits or to obtain other benefits. If corruption is involved, both the official who makes procurement decisions and the company that is conspiring with him are interested in a contract that would provide the highest profit to the company. For the official this means a larger bribe, for the company - more profit. In other words, a potential mechanism for saving budget funds becomes a source of kickbacks. Thus, in conjunction collusion and corruption lead to a "dual" threat to the national economy. A high level of corruption is more likely to lead to anti-competitive actions on the part of market participants.

In addition to the negative impact on prices, we witness a number of other dangerous consequences of bid-rigging, which sometimes may not seem so obvious, but present serious threats. Public funds lost to bid rigging and corruption will not be available for the implementation of socially important and strategic tasks of the State; the phenomenon will reduce the quality of goods (works, services), and restricts choices for consumers by excluding bona fide market participants, and numerous other negative consequences.

Practice

Corruption offenses can take different forms, for example, commercial bribery, receiving or giving bribes.

An analysis of the practice of the anti-monopoly authority in cartel cases confirms the rather sad conclusion concerning the

relationship between anti-competitive agreements and corruption. Thus, often the actions of officials who are accomplices in restricting competition are also subject to article 290 of the Criminal Code of the Russian Federation (taking a bribe). As an example, it is worth mentioning the high-profile criminal case that was initiated in the Republic of Khakassia (in parallel the antimonopoly service also investigated a case of violation of the antimonopoly legislation, initiated against the same persons).

In its decision, FAS Russia found 13 companies to be in violation of clause 2 of part 1 of article 11 of the Law on Protection of Competition by entering into and participating in an agreement (cartel) between competing economic entities. This led to price maintenance at tenders for the supply of medical products, pharmaceuticals and consumables to state budgetary public health institutions of the Republic of Khakassia in 2016. The organiser of the procurement and 4 companies were also found to have been in violation of clause 1 of part 1 of article 17 of the Law on Protection of Competition, by concluding and implementing jointly an agreement between the organiser of the tenders and the bidders, resulting in restriction of competition in procurement tenders.

The agreements were implemented through meetings, telephone conversations and participation in electronic auctions. The result of the implementation of these anti-competitive agreements was price maintenance in 29 electronic auctions.

The following constituted evidence of these violations:

- documents (information) submitted on requests and determinations of FAS Russia, including those received from e-trading platforms;

- materials of criminal case investigations (including evidence obtained in the course of police investigative activities);
- results of the analysis of the state of competition;
- results of economic expert assessment.

According to the results of the economic expert assessment, it was determined that in a number of electronic auctions the price of contracts did not match the estimated market price of contracts and exceeded it substantially (in some cases by up to 60%).

According to the information in the criminal case files, the parties to the agreement maintained a table that was a kind of a report and contained information on a number of companies, on auctions previously won by these companies, the auction number, the title/name of the auction, the initial maximum contract price, the cost of the contract, the name of the company, as well as information on the amounts of money transferred in the form of a 10% “kickback” from the total cost of the contracts concluded as a result of the auctions won.

The setting of an excessive level of the initial maximum price for the contracts may, among other things, indicate that the difference between the market price and the price of the contract could be precisely the source of those 10% “kickbacks”.

The public procurement staff involved abused their official authority by acting deliberately, out of mercenary motives and according to a pre-planned criminal scheme. They prepared auction procedure documents containing inaccurate and preferentially targeted information for undertakings under their control (applications, technical tasks, commercial proposals, etc.) to ensure an overvalued initial (maximum) contract price. This allowed them to restrict competition and

to significantly increase the contract price and minimize its reduction during the bidding process. They systematically ensured winning bids at a price significantly higher than the market value, for a number of undertakings controlled by the members of that organised group, as well as to competing organizations, provided that those repaid part of the money in “kickbacks.”

One of the participants of the organized group Mr. B., an official of a state authority of the Republic of Khakassia, personally received a cash bribe for facilitating access to state contracts of 17,500,000 rubles. This is defined in the Criminal Code as “excessively large scale”. A criminal case has been initiated against B., including in respect of part 6 of Article 290 of the Criminal Code of the Russian Federation.

The example provided, as well as the analysis of the practice of the antimonopoly service, allows the conclusion that the detection of corruption can be a signal to check the procurement procedures for symptoms of a cartel, since one crime is often complemented by the other or lurks in the background.

In conclusion, the causal link between competition and corruption has become obvious. The development of competition reduces the risk of crimes of corruption, while accordingly the growth of corruption reduces the level of competition. Just like cartels, corruption has a significant negative impact on consumers, business and the economy. The fight against cartels and combating corruption are not mutually exclusive. It is necessary to coordinate such efforts in order to better protect the state procurement procedures and to increase the intensity of competition.

Sources:

1. Federal Law of 26.07.2006 No. 135-FL “On Protection of Competition”, “Rossiyskaya Gazeta”, N 162, 07.27.2006, “Meeting of the

Legislation of the Russian Federation”, 31.07.2006, N 31 (1 h.), Art. 3434, Parliamentary Newspaper, N 126-127, August 3, 2006.

2. “Criminal Code of the Russian Federation” dated 13.06.1996 No. 63-FL, “Collection of Legislation of the Russian Federation”, 17.06.1996, N 25, Art. 2954, Rossiyskaya Gazeta, N 113, 06/18/1996, N 114, 19.06.1996, N 115, 06/20/1996, N 118, 06/25/1996.

3. Artyushenko D.V. The role of competition authorities in combating corruption and embezzlement at auctions. Topical issues in the fight against corruption in the constituent entities of the Russian Federation: materials of

the conference on theory and practice (Kazan, November 9, 2016) - Kazan, 2016. pp. 27-32.

4. Egorova M.A. Current issues of modern competition law. Collection of research papers / M.A. Akimova, A.V. Belitskaya, V.S. Belykh and others; rep. ed. M.A. Yegorova. M.: Yustitsinform, 2017. Vol. 1. 288 p. / ATP Consultant Plus.

5. Cartels: the results of the work of the FAS Russia for 2017 and plans for 2018 (online interview with A.P. Tenishev, head of the anti-cartel Department of the Federal Antimonopoly Service of the Russian Federation) // ATP Consultant Plus. 2018.

6. Kinev A.Yu., Tenishev A.P. On criminal liability for cartels // Lawyer. 2017. N 1. P. 7 - 13. // ATP Consultant Plus.

7. Tenishev A.P., Bandurina N.V. Cartelisation as a factor in reducing the efficiency of public spending in procurement // Bulletin A

Economic and Legal Design of the Unfair Competition Act



Nazyna Alikulova
Head of Division
Advertisement, Consumer's Right
Protection, Unfair Competition
and International Relations
Division at State Agency of
Antimonopoly Regulation Under
Government of Kyrgyz Republic
nazik200380@mail.ru

This article examines the legal framework, the legal assessment as well as actual incidents of acts of unfair competition. Different types of infringements will be discussed and the concept of "unfair advertising" will be highlighted. Problems are identified and recommendations for solving them are offered.

The Kyrgyz Republic sees many incidents of unfair competition. Kyrgyz firms engage in various forms of unfair competition, as in a time of economic transformation, there is a lack of a sufficiently developed system of normative legal acts and a not yet fully developed market mechanism. Observed forms of unfair competition are:

- secret collusion to increase the price of certain goods and services on the market (repeatedly identified were unions of cellular operators);
- charging of dumping prices for products (such actions are often taken by owners of bakeries, who sell bakery products cheaper than their cost);
- falsification of well-known brands of goods (cases of falsification of well-known brands of Russian macaroni have become more frequent);
- defamation of the reputation of competitors on social networks, etc.

The State Agency for Antimonopoly Regulation under the Government of the Kyrgyz Republic is responsible for monitoring compliance with the rules on fair competition and for the suppression of acts of unfair competition in the country. Its activities are based on the Law of the Kyrgyz Republic "On Competition" of July 22, 2011, No. 116.

The law establishes the key criteria for the development and the protection of the competitive environment on the territory of the Kyrgyz Republic. It is aimed at:

- suppression of acts of formation of monopolistic associations and dishonest actions against competitors;
- ensuring the conditions for the normal functioning of markets for goods and services, as well as resources in the Republic [Doc 3, p. 128].

In accordance with the norms of the legislation of the Kyrgyz Republic, unfair competition can be interpreted as any acts done by entities engaged in economic activities aimed at acquiring additional advantages in the market that are contrary to the provisions of the regulatory legal acts of the Kyrgyz Republic and to business traditions, etc. [Doc 1, p. 4]

There are several types of unfair competition prohibited by the legislation of Kyrgyzstan:

- 1) unauthorised copying of products of other companies;
- 2) illegal use of foreign trademarks and brands;
- 3) violation of the patent right for inventions, developments, samples;
- 4) distribution of distorted and unreliable information about competitors;

- 5) disclosure of industrial and commercial secrets of competitors;
- 6) disruption of economic activities of competing undertakings;
- 7) influence on the employees of a competitor in order to induce them to perform their official duties poorly, and to commit acts of sabotage;
- 8) dissemination of information capable of misleading consumers;
- 9) establishment of dumping prices for goods.

It should be noted that the State Agency of the Kyrgyz Republic on Antimonopoly Policy is primarily engaged in the issuance of regulations and rarely takes action in relation to the actual regulation of acts of unfair competition. Thus, in 2017, out of the 91 companies against which a case was initiated for a violation of competition laws, only 6 were related to acts of unfair competition (Table 1).⁴⁷

The total number of cases of violations of the antimonopoly legislation of the Kyrgyz Republic is gradually decreasing, and the share of these cases relating to detected acts of unfair competition is also decreasing. This is not because their actual number has decreased. In fact, this is due to inadequate tools for identifying such crimes.

Incidents of unfair advertising form a significant part of unfair competition acts. Such behaviours can be found when businesses promote their products on the market and at the same time provide the public with unreliable, false, inaccurate, or unethical information. Some of the actions are [4, c. 39]:

- to discredit citizens and companies that do not use the advertised goods;

⁴⁷ Please see the table at the end of the article.

- to compare an advertised product with the competitors' products and a description of its undeniable advantages;
- to mislead the public about the quality characteristics of the advertised product or service, etc.

It is important to note that companies violating the laws on unfair competition face administrative and criminal penalties and may have to compensate victims for their financial losses due to such illegal acts (Table 2).⁴⁸

As mentioned earlier, the activity of the State Agency for Antimonopoly Regulation of the Kyrgyz Republic is limited to initiating and participating in the development of normative and legal documentation, keeping registers and controlling the activities of natural monopolies [2, Art. 3.], the elimination of administrative barriers to entry to the market, and to stimulating the development of the SME segment for increasing competition, etc.

Although Kyrgyzstan is now carrying out measures to regulate unfair competition, the presence of a wide range of problems reduces their effectiveness:

- 1) the legislation of the Kyrgyz Republic is not in line with the current level of competition development;
- 2) weak evidence to prove an anticompetitive behaviour/act of unfair competition;
- 3) insignificant sanctions for acts of unfair competition;
- 4) lack of the antimonopoly body's right to conduct unannounced inspections on the premises of economic entities.

In line with opinions of economists and the results of our own study of the functioning of the market in Kyrgyzstan, we propose a comprehensive system of measures to

⁴⁸ Please see the table at the end of the article.

eliminate unfair competition in the economy of the Kyrgyz Republic and to prevent future violations, namely:

- improving the antimonopoly legislation by increasing the powers of the state body that controls the functioning of natural monopolies;
- creation of equal conditions for the work of all companies of different levels and scale of activity in the market, and facilitating access to state tenders for small and medium-sized companies, as well as providing support for their work in the market;
- control over the development of the monopolisation process, including monitoring of mergers and acquisitions, as well as stimulating the development of SMEs;

- effective management of natural monopolies, including the optimisation of their pricing policies;

- regulation of foreign economic activity to create conditions for protecting the domestic market from the competition of imported goods.

In conclusion, the creation of a fair competitive environment presupposes the prevention, restriction and the suppression of the monopoly power and of the dishonest methods employed by companies to attract customers' attention to themselves through harsh criticism and an indication of the shortcomings of competing companies.

Table 1. Results of state antimonopoly regulation*

Index	2013	2014	2015	2016	2017
Total number of crimes under antimonopoly legislation, units.	216	335	267	53	91
Number of acts of unfair competition, units.	9	13	-	-	6
Share of acts of unfair competition,%	4.16	3.8	0	0	0.65

*The table was compiled by the author on the basis of the Review "Regulation of Unfair Competition and Unfair Advertising in the CIS". - Dentons, 2017.

Table 2. Forms of criminal and administrative liability for the use of unfair competition mechanisms*

Types of liability	Penalty	Article
Administrative	Up to 10 000 som ⁴⁹ for individuals and up to 100 000 som ⁵⁰ for legal entities	Article 314 of the Administrative Code of the Kyrgyz Republic
Civil liability	Compensation for losses caused to a natural or legal person in full	Article 16 of the Civil Code of the Kyrgyz Republic
Criminal liability	Imprisonment for up to 3 years, and community service	Article 218 of the Criminal Code of the Kyrgyz Republic

* The table was compiled by the author on the basis of the provisions of the Criminal Code of the Kyrgyz Republic and the Administrative Code of the Kyrgyz Republic.

⁴⁹ 10 000 Kyrgyzstani Som are equal to approximately € 124.68 on the 14th of October 2018.

⁵⁰ 100 000 Kyrgyzstani Som are equal to approximately € 1, 246.88 on the 14th of October 2018.

Competition Rules in the Eurasian Economic Union



Armine Hakobyan
Deputy Director
Department for Competition and
Public Procurement Policy
Eurasian Economic Commission

This publication opens a series of articles on the Eurasian Economic Union (EAEU). The first article in this series provides a general overview. It presents brief information about the EAEU bodies, its structure, competition law and its functions in competition enforcement. Further publications will focus in more detail on specific issues relating to competition in the EAEU.

The Eurasian Economic Union is a regional integration association of a purely economic nature. The EAEU was established in 2014 on the basis of the Treaty on the Eurasian Economic Union. Currently, there are five Member States in the EAEU: the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation.

The Eurasian Economic Commission (EEC) is the permanent executive body of the EAEU. The EEC Board consists of 10 Commissioners (Ministers). Each member state has two ministers, and one of the ministers acts as the chairman of the EEC Board. The powers of the EEC relate, among others, to competition enforcement and public procurement issues, which fall under the activities of the EEC in its work relating to competition and antitrust regulation. There are two departments in the EEC; one is responsible for competition and public procurement policy, and the other

monitors compliance with the general rules of competition.

The Court of the EAEU is a special body in charge of dispute resolution between EAEU Member states and/or their undertaking, and of the interpretation of legal acts issued by the EAEU bodies. The EAEU Court is composed of representatives of the Member States. Both Member States and economic entities may apply to the Court of the EAEU.

The Member States have agreed on the general principles and rules of competition, which are included in Section XVIII of the Treaty, and on the manner in which they are to be applied – as specified in Annex 19 to the Treaty. These rules contain provisions of a classic nature, such as a prohibition on abuse of dominance and on anti-competitive agreements in cross-border markets. In addition, bans on the co-ordination of economic activities and on unfair competition, including misrepresentation, the dissemination of false, inaccurate or distorted information, incorrect comparisons, etc., are provided for in the Treaty. This approach is illustrative for the republics of the former Soviet Union and Eastern Europe. Such rules exist in the legislation of all five EAEU Member States. It should be noted that the Members have limited the powers of the EEC in regulating economic concentrations (mergers and acquisitions), with such powers remaining with the national bodies of the Member States in accordance with national legislation.

In order to harmonise national laws with regulations and standards adopted by the EAEU, the EEC monitors the legislation in the Member States and takes appropriate measures to resolve inconsistencies if they occur.

The powers of the EEC and of the competition authorities of the Member States to address violations of competition rules are clearly delineated. The EEC has been empowered to address violations in cross-border markets. Exceptions are made for financial markets that are subject to regulation exclusively by national law. Cross-border markets are markets that span the territories of two or more Member States. National competition authorities address violations in the territories of the Member States in accordance with national legislation.

For violations of the general rules of competition, both individual business entities and national competition authorities may apply to the EEC. The EEC also has the authority to conduct investigations on its own initiative. Decisions are made by the EEC Board, based on the results of investigations. If there is a violation by an economic entity, the EEC Board makes a decision on the actions the offender is to take in order to restore competition and on the liability of the offender.

Sanctions for violations of competition rules in cross-border markets comprise financial penalties, and the perpetrators of an offence may be legal entities, individual entrepreneurs or corporate executives. For the abuse of a dominant position and anti-competitive agreements, the fines range from 0.3 per cent to 15 per cent of the revenue gained, but not less than 100,000 RUB for legal entities; and from 20,000 RUB to 150,000 RUB for corporate executives and individual entrepreneurs. In cases of unfair competition, the fines range from 100,000 RUB to 1,000,000 RUB for legal entities, and from 20,000 RUB to 1,100,000 RUB for corporate executives and individual entrepreneurs. For the unlawful coordination of economic activities, the fines range from 200,000 RUB to

5,000,000 RUB for legal entities, from 20,000 RUB to 75,000 RUB for individuals, and from 20,000 RUB to 150,000 RUB for corporate executives and individual entrepreneurs. A fine can also be imposed for a failure to submit information to the EEC or for the late submission of requested information, as well as for the submission of obviously inaccurate information. The fines in these cases range from 150,000 RUB to 1,000,000 RUB for legal entities, from 10,000 RUB to 15,000 RUB for individuals and from 10,000 RUB to 60,000 RUB for corporate executives and individual entrepreneurs.

A programme for the mitigation of responsibility (Leniency Programme) is provided for in the EAEU Treaty and a procedure for its application is currently being elaborated.

Taking into account that some problems may arise in the process of exercising powers in competition enforcement, a number of warning and caution instruments have been developed by the EEC that enable the faster termination of violations and the restoration of competition in the market. This works as follows:

While reviewing statements or complaints, if signs of a violation of the general rules of competition in cross-border markets are detected, a Note of Warning is issued by the EEC to an economic entity, whose actions are considered to be possible violations. At this time the violation has not yet been proven, but there is a strong reason to assume that there is such a violation. The Note of Warning requires the entity in question to terminate the actions (inactions), which contain signs of violation, as well as to eliminate the causes and conditions that contributed to such a violation, and to take measures to eliminate the consequences of such actions (inactions). After issuing a Note of Warning, the potential

offender of the law has a choice: either to fulfill the conditions specified in the note of warning and avoid possible fines, or not to agree with the conditions specified in it. In the first case, the EEC assesses whether the conditions laid down in the Note of Warning have been fulfilled and, if they have been fully implemented within the time specified in it, the EEC does not further consider the claim and/or complaint. In case of non-execution of the Note of Warning, an investigation is carried out, and if a violation can be proved, a fine will be imposed. A Note of Warning is only issued for certain violations, such as abuses of dominant positions, unfair competition and the coordination of economic activities. The Note of Warning does not apply to abuses of a dominant position in the form of setting monopolistic high or low prices, as well as to anti-competitive agreements, or if a Note of Warning has been issued in the previous 24 months, or a decision has been made about a violation of the law.

By issuing a Note of Warning, a possible violation of the law can be dealt with in a less severe manner, as it signals in a public statement that a certain behavior may amount to a violation of the law. Similar approaches are used in the EAEU Member States.

The EEC and its national competition authorities cooperate closely in competition enforcement; they hold joint consultations and meetings with the aim of improving the

law within the EAEU and ensuring the effective implementation of the powers of the EEC.

To achieve this objective, regular meetings at the level of heads of national competition authorities with a member of the Commission Board (Minister) in Charge of Competition and Antitrust Regulation are held, the so-called “5 + 1 format” meetings.

In order to increase the competition law awareness of the business community, intensive work is done to advocate and promote competition. A Public Consultations instrument was created within the EEC Competition and Antimonopoly Regulation Cluster. Public Consultation meetings are held systematically in the EAEU countries, where representatives of the EEC explain in detail the rules of competition to business representatives, where responsibility lies for violations the rights of market participants, and other important business issues.

The EEC does not hesitate to engage in discussions relating to current issues of competition during various international events. Therefore, it actively participates in international events, cooperates with competition authorities of third countries and with international organisations.

Detailed information about the activities of the EEC, its structure, regulations and current events can be found on its official website <http://www.eurasiancommission.org>.

Literature Digest



Dr Pedro Caro de Sousa
Competition Expert at the
OECD, Paris
Pedro.CARODESOUSA@oecd.org

This issue of the Literature Digest for the January 2019 issue of the RCC Newsletter focuses on the imposition of fines for competition law infringements. More detailed reviews of the papers on fining practices discussed below – together with reviews of numerous other academic papers – can be found at www.antitrustdigest.net.

[John Connor 'Cartels Costly for Consumers'](#)

John Connor developed a database of private international cartels and maintained it for many years, with the database only recently being transferred into the care of the OECD. This working paper builds on that database to review the harm caused by 1,100 private international cartels that were discovered between January 1990 and the middle of 2015, and compares the fines imposed on the discovered cartels with the economic injuries suffered as a result of their existence.

He finds that the sales affected by the international cartels discovered during this period conservatively amounted to US \$13.6 trillion. The mean average of sales per cartel was US \$21 million, and this average rose fast during the relevant time period. Assuming, as most experts do, that only somewhere between 10% and 30% of all hidden cartels ever come to light, the likely total global affected commerce by cartels is somewhere between US \$64 and US \$189 trillion.

International cartels overcharge customers on average about 19%. This overcharge rate varies little across geographic regions, but the average hides great variation in the sizes of overcharges by cartels. Approximately 5% of all cartels are able to achieve overcharges of 200% or more – a tripling of prices. Taking the average international cartel overcharge of 19%, it is estimated that during 1990-2014 overcharges totalled \$2.6 trillion.

The world's antitrust authorities have responded to the discovery of international cartels primarily by imposing fines, totalling US \$101 billion as of April 2015. This means not only that the harm caused by cartels is immense, but also that the global antitrust fines imposed on international cartels were less than 1% of the economic injuries sustained.

Such large discrepancies between the harm caused by international cartels and the amounts of the sanctions imposed are likely to have implications for the design of optimal sanction mechanisms. However, this is a topic that is beyond the scope of this paper.

[Damien Geradin and Katarzyna Sadrak 'The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions between 2000 and 2017'](#) TILEC Discussion Paper No. 2017-018

This paper reviews how the fine amounts of the fines imposed in 110 cartel and 11 abuse of dominance decisions adopted between January 2000 and March 2017 were calculated by the European Commission.

It identifies a two-step methodology that the Commission applies when determining fine

amounts. First, the Commission defines the basic amount of the fine as a percentage of the volume of sales in the affected market. This percentage depends on the seriousness of the infringement in question – to which an ‘entry fee’ may be added in the context of cartels – and is then multiplied by the number of years that the infringement lasted. At a second stage, a number of adjustment factors are taken into account, most of which relate to the type and seriousness of the infringement. A number of other factors are also considered, such as ensuring that fining maxima are not exceeded, ensuring deterrence (particularly when the companies have a particularly large turnover beyond the sale of goods or services to which the infringement relates), and taking into account whether infringing companies are able to pay the fine.

The analysis shows that the Commission has made significant use of the aggravating and mitigating circumstances listed in the Fining Guidelines to adjust the basic amount of the fine. It finds that the most common aggravating factors are recidivism, ring-leading/coercion, and refusal to cooperate with the investigation. The most common mitigating circumstances are cooperation with the investigation, limited involvement in/lack of implementation of the infringement, immediate termination of the infringement, and the involvement of a public body or existence of a special regulatory regime.

The paper also looks at the impact of leniency and settlement procedures, and how fine amounts have been increasing in recent years. This is a very well-researched paper, which provides an extremely detailed overview of EU practice as regards to the setting of fines – including two tables that list all fining decisions adopted since 2000, and the

aggravating and mitigating factors that were applied in each of them.

[Yannis Katsoulacos, Evgenia Motchenkova and David Ulph ‘Penalizing on the basis of the severity of the offence: A sophisticated revenue-based cartel penalty’](#)

This working paper focuses on how to design optimal fining mechanisms for competition law infringements. It describes how the calculation of fine amounts has four different starting points around the world: the harm caused by the cartel, profits derived from the cartel, the revenue of the cartelists, and the amount of cartel overcharges.

The authors consider that a penalty regime is better if it is easier to implement, it generates less legal uncertainty and it has a superior overall welfare impact. However, those methods that increase legal certainty and are easier to implement (e.g. setting fines by reference to the infringing parties’ turnover) are the least able to reflect the welfare effects of a cartel (e.g. actual harm, profits or overcharge of a cartel).

The authors advocate the adoption of a sophisticated revenue-based penalty regime, in which the penalty-base is the revenue of the cartel, adjusted to reflect the cartel overcharge rate. They consider that fines imposed following such an approach will better reflect the harm caused by a cartel without giving rise to significant legal certainty concerns.

This paper provides a good overview of the literature on monetary sanctions for antitrust infringements, and suggests an interesting new way to set out the amount of such sanctions. However, the authors may be too confident that their approach is simpler to implement than the alternatives. Legal certainty concerns are likely to continue to arise given the difficulties inherent in

identifying overcharges. These difficulties are further compounded in competition offences other than cartels – which raises the additional problem that adopting this proposal would require one to justify adopting different fining policies for cartel and non-cartel infringements. Nonetheless, the authors' argument deserves attention and further research.



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

Andrea Dalmay, Senior Consultant, GVH

dalmay.andrea@gvh.hu