

Bid-rigging and deterrence under EU law

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Treatment of bid-rigging under EU competition law

- Bid-rigging is a **violation of Article 101 TFEU**:
 - can take the form of price-fixing, market allocation, customer allocation, and/or information exchange (e.g., *Building and construction industry in the Netherlands (on appeal: SPO)*)
 - can take the form of **stand-alone conduct** (e.g., *Building and construction industry in the Netherlands*) or can form **part of a broader multi-form infringement** (usually market-sharing (e.g., *European sugar industry, Cast iron and steel rolls, Gas insulated switchgear (GIS)*), customer-sharing (e.g., *International removal services, Elevators and escalators, Automotive wire harnesses, Alternators and starters, Thermal systems, Envelopes*) or even supplier-sharing (*Italian raw tobacco*))
 - EU practice **does not distinguish between bid-rigging in public and private procurement**, either in the definition of the infringement or the imposition of sanctions (e.g., *Building and construction industry in the Netherlands, Preinsulated pipe, Gas insulated switchgear, and Elevators and escalators*, cases which concerned both public and private procurement)
 - not a separate violation for which a specific sanction applies under EU competition rules; **treated in the same way as other violations**, such as, price-fixing or market-sharing
 - national law in some EU Member States may provide for specific sanctions, including **criminal sanctions** on companies and/or individuals (e.g., Germany, Ireland, UK)

Sanctions for bid-rigging under EU competition law (1)

- Under EU competition law, the European Commission has the power to impose **fin**es for violations of Article 101 TFEU of up to **10% of the undertaking's group worldwide turnover in the preceding business year**
- Methodology for the calculation of fines is set out in the Commission's **2006 Fining Guidelines**
- Policy of the Fining Guidelines is to **achieve deterrence: specific deterrence** (*i.e.*, to appropriately punish the undertakings involved) and **general deterrence** (*i.e.*, to deter others from engaging in similar conduct)

Sanctions for bid-rigging under EU competition law (2)

- Fining Guidelines set out several factors to be taken into account in fine calculation:
 - **Relevant value of sales:**
 - “The value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area in the EEA” (point 13, Fining Guidelines)
 - Where individual value of sales does not appropriately reflect the weight of each undertaking in the infringement, a.o. in a bid-rigging case, **the Commission may use a proxy:**
 - in case of worldwide market-sharing: applying each undertaking’s worldwide market share to the aggregate of their EEA sales (point 18, Fining Guidelines) (e.g. *Power transformers*)
 - another proxy, e.g., *Automotive wire harness* case: for Furukawa (which had no EEA sales), the Commission applied Furukawa’s share of sales in Japan for an equivalent car model to the aggregate of the other cartelists’ EEA sales for that model
 - **Gravity of the infringement** (percentage of up to 30% of the relevant value of sales)
 - Bid-rigging always qualifies as **very serious** (regardless of geographic area covered or any particular impact established)
 - Typically, the Commission sets the gravity factor at 16%-18% of the relevant value of sales

Sanctions for bid-rigging under EU competition law (3)

- Fining Guidelines set out several factors to be taken into account in fine calculation:
 - **Duration** (multiplier per year of infringement)
 - **“Entry fee”** (point 25, Fining Guidelines)
 - additional amount equal to percentage (15%-25%) of relevant value of sales irrespective of duration of infringement
 - always applied in cases of bid-rigging
 - typically set at same level as gravity factor
 - **Aggravating circumstances**
 - recidivism: fine can be increased by up to 100% for each prior, similar infringement (e.g., in *GIS*, ABB’s basic amount of the fine increased by 50%; same for Hitachi and Melco in *Alternators and starters*)
 - leader or instigator (e.g. in *GIS*, fines of European producers were increased by 50%; same for ABB in *Preinsulated pipe*)
 - **Increase for deterrence** (point 30, Fining Guidelines)
 - applied where undertaking has particularly large turnover beyond goods or services concerned by the infringement (e.g., in *GIS*, multipliers of 1.25 to 2.5 were applied; in *Preinsulated pipe*, ABB faced a multiplier of 2.5 (1998, Fining Guidelines), in *Alternators and starters*, *Thermal systems*, *Optical drives and Power transformers*, multipliers of 1.1-1.2 were applied (2006 Fining Guidelines))
- The European Commission has a well-developed **Leniency Program**, providing for **immunity from fines for a whistleblower** and **significant reductions (up to 50%) in fines** for undertakings that subsequently cooperate with its investigation; in case of **settlement**, a 10% reduction is applied

Possible exclusion from participation in public procurement procedures under EU public procurement law (1)

- Article 45 (*"Personal situation of the candidate or tenderer"*) of now repealed **Directive 2004/18/EC of 31 March 2004** on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts:
 - "2. Any economic operator may be excluded from participation in a contract where that economic operator:*
 - (c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;*
 - (d) has been guilty of **grave professional misconduct** proven by any means which the contracting authorities can demonstrate"*
- ECJ, 18 December 2014, Case C-470/13, **Generali-Providencia**: **possible to exclude** from a tendering procedure *"an economic operator who has committed an infringement of **competition law**, established by a judicial decision having the force of res judicata, for which a fine was imposed"*

Possible exclusion from participation in public procurement procedures under EU public procurement law (2)

- Article 57 ("*Exclusion grounds*") of **Directive 2014/24/EU of 26 February 2014** on public procurement:

" 4. Contracting authorities **may exclude or may be required** by Member States **to exclude** from participation in a procurement procedure any economic operator in any of the following situations:

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has **sufficiently plausible indications** to conclude that the economic operator has **entered into agreements with other economic operators aimed at distorting competition**"

Possible exclusion from participation in public procurement procedures under EU public procurement law (3)

- What does "Contracting authorities may exclude or may be required by Member States to exclude" mean?
 - Depending on the implementation into national law, **the exclusion may be mandatory or voluntary**
- However, **contracting authorities should comply with the principle of proportionality** (See, recital 101 to Directive 2014/24/EU)
 - Is a mandatory exclusion proportionate?
 - ECJ, 14 December 2016, Case C-171/15, *Connexion Taxi Services*: appears to confirm mandatory exclusion is possible provided proportionality is observed when seriousness of misconduct is assessed; new rules also require self-cleaning option
- Duration of exclusion:
 - Article 57(7): "By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that **period shall not exceed [...] three years** from the date of the relevant event in the cases referred to in paragraph 4."

Possible exclusion from participation in public procurement procedures under EU public procurement law (4)

- New in Directive 2014/24/EU: **self cleaning** (Article 57(6)):

“ Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

*For this purpose, the economic operator shall prove that **it has paid or undertaken to pay compensation in respect of any damage caused** by the criminal offence or misconduct, **clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.***

*The measures taken by the economic operators shall be **evaluated taking into account the gravity and particular circumstances** of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.*

[...].”

Possible exclusion from participation in public procurement procedures under EU public procurement law (5)

- Possible incentive to apply for leniency
 - However: **is applying for leniency sufficient?**
- Link with **Directive 2014/104/EU of 26 November 2014** on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
- If Directive 2014/24/EU is applied in **too broad a manner, there may not be enough economic operators left** on the market in certain situations (Hungary, for instance, had to abandon its mandatory exclusion for this reason)

Risk of overdeterrence

- While ensuring sufficient deterrence, need to guard against **over-deterrence**
- Stringent sanctions and broad definition of infringement under Article 101 TFEU can produce a **chilling effect**: companies may avoid competing for business due to uncertainties and severe consequences of making an incorrect assessment
 - e.g., avoid joint bidding or subcontracting where parties cannot cover full tender due to uncertainty as to whether their conduct escapes Article 101 TFEU and whether they have sufficient evidence to establish this *ex post* in the event of an investigation
- Risk of **companies being put out of business** by high fines or exclusion from future tenders
 - In case of mono-product/service companies in particular, due to the methodology of the Fining Guidelines, fines can easily reach the 10% group worldwide turnover ceiling
 - An inability to pay (ITP) mechanism exists, but it is extremely difficult to benefit from and ITP claims rarely succeed
 - Exclusion from future tenders under public procurement rules: can be a risk in sectors that survive on public procurement (e.g., public works construction sector)
 - Some protections apply where company “self-cleans”
- Interaction with **national criminal law on bid-rigging may affect undertakings’ ability and incentive to cooperate** with the European Commission under its Leniency Program
 - e.g., complexities in securing the cooperation of individuals implicated in bid-rigging