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DAF/COMP/WP3/WD(2010)71

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Jun-2010

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/WP3/WD(2010)71
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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- Hungary --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.

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JT03285305

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1. Since the experience of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) regarding the issues the roundtable aimed at to discuss, this short contribution covers only a subset of them. It focuses the disqualification aspect of the topic – including its interplay with leniency – and to a lesser extent it also deals with the issue of incentivizing public procurement officials.

1. Bidder disqualification and leniency

“Are firms and/or individuals who have violated laws against bid-rigging subject to bidder disqualification/debarment for future government procurement programs in your jurisdiction? If so, how does your jurisdiction handle leniency applicants: are they disqualified, suspended, or punished in any way along with other members of the price-fixing agreement, or does your leniency program insulate them from disqualification/debarment penalties?”

2. Bidder disqualification as a consequence of bid-rigging (or other kind of competition law infringement) in some form has been present in the Hungarian public procurement law since the 1990's. It has evolved over time, partly reflecting experience and advocacy of the GVH, but has always concerned firms (not individuals) and temporary suspension from public procurement tenders for five years.

3. Public procurement tenders are regulated by the Public Procurement Act,¹ which is fully harmonised with the relevant directives of the European Union. It follows from its principles that normally, procurement agencies cannot exclude an otherwise capable and qualified bidder from a tender. However, according to a Public Procurement Act provision,² a bidder can be excluded if two conditions are met. First, the bidder infringed Article 11 of the Hungarian Competition Act³ (or the corresponding provision of the European Union competition law) in a bidding process, and this is established by the definitive and executable decision of the GVH (i.e. a decision which either was accepted by the parties, or challenged, but approved by the court(s)). Secondly, the court or the GVH has imposed a fine on the particular firm. This implies, that full leniency applicants are granted immunity from this provision, and as a consequence from disqualification. The exclusion is not compulsory, it is only an option that is available for public procurement agencies and can be used by them depending on their considerations.

4. It is worth outlining the evolution of the provision and the main reasons behind the changes. Originally, in the 1990s, it concerned any infringement of the Competition Act, and entailed compulsory disqualification. This arrangement obviously was both disproportionate and contra productive, it even produced perverse results. For example, firms if found using false advertisement had to be excluded from public procurement tenders for five years, because misleading practices were (and are) also covered by the Competition Act. Although, aimed at protecting competition through deterrence, it could harm competition when major market participants were excluded for a minor offence, whether or not related to cartels or even antitrust. This was aggravated by certain characteristics of GVH enforcement at that time, like the strong role of complaints, limited opportunities for both case selection, and for not fighting until the end minor in cases which technically infringed Competition Act provisions, combined with a less effect based approach and analytical toolkit. In certain areas not only an increase in concentration in public tenders might happen as a consequence (i.e. less bidders to compete, or even an effective monopoly), but situations could occur, where no legally qualified bidders were available at all, if the market was highly concentrated even before.

¹ Act CXXIX of 2003 on Public Procurement.

² Article 61.

³ Act LVII of 1996 on The Prohibition of Unfair and Restrictive Market Practices.

5. In the early 2000's, the provision became more targeted and less rigid. Public procurement agencies were able to exclude a bidder, but they had a choice in terms of balancing the various competitive and other effects of exclusion. Also, the bidder had to infringe a subsection of the Competition Act, prohibiting collusion between competitors in the context of a bidding process, in order to be potentially disqualified.

6. In about the same time period, for unrelated reasons, the GVH started to successfully discover and prosecute cartels, including major ones, especially various sorts of explicit collusions related to public procurement. In addition, the GVH drastically increased the fines imposed on firms involved in such practices. As one of the consequences of this improved enforcement activity, it became clear that the danger of becoming disqualified really matters for firms, and therefore it had the potential to significantly contribute to the objectives of the GVH cartel enforcement by establishing a strong deterrence.

7. Practice showed however, that the particular arrangement could provide a strong disincentive for leniency applicants, and therefore it can create an obstacle for an effective leniency policy. This way it did not facilitate, but on the contrary, might undermine GVH cartel enforcement. The reason was that by taking part in the leniency program, firms could avoid the high fines, but not the even much more threatening prospect to be excluded from public tenders for five years. Another controversy – still unresolved, but not directly connected to antitrust enforcement – was that making exclusion from the tenders discretionary might lead to arbitrary decisions by public procurement agencies and so might facilitate corruption.

8. In 2005, upon the GVH's recommendation, the Public Procurement Act was amended and the provisions got its current state. The present arrangement keeps the room to manoeuvre for public procurement agencies, but more importantly, it includes a second condition related to the fine, which provides a safe harbour for full leniency applicants, while other perpetrators are still facing a strong deterrence.

9. There is no disqualifications of individuals as a sanction for bid-rigging under the Hungarian competition law. In 2008, a modification of the Competition Act included a mechanism, by which senior managers (like CEOs) would have been automatically disqualified from exercising the same function in any corporations in Hungary for a period of years, if their firm was found to have infringed the provisions of the Competition Act or that of the TFEU prohibiting cartels. This provision was not designed in the context of fighting collusion in public procurement, and did not aim disqualification from public procurement. Rather it emerged as an attempt to find an effective sanction (other than financial or criminal) for individuals in cartel cases in general. However, this part of the amendment has not entered into force, due to issues about its incompatibility with the Constitution of Hungary.

2. Incentivizing public procurement officials to focus on bid-rigging

"What options are available to align the incentives of officials responsible for public procurement with those of antitrust officials in the effort to eradicate anticompetitive bid-rigging and collusive tendering practices? Are training programs alone sufficient, or should they be supplemented with other employment awards or incentives, or special recognition for defense of taxpayer interests? How can competition enforcers develop positive relationships with public procurement officials and address possible anxieties about additional oversight of the procurement process?"

10. The GVH does not have much experience in giving the right incentives, information and skills for public procurement officials to make them fight cartels. In Hungary, in addition to occasional contacts between the GVH and certain central procurement agencies, and parts of the administration responsible for

financing large public procurement projects, the topic is also covered by a “continuous road-show” supported by the GVH reaching out to local governments. The GVH, in co-operation with the Public Procurement Authority, has recently translated and published the OECD *“Guidelines for Fighting Bid Rigging in Public Procurement”*, into Hungarian, and intends to disseminate its content, perhaps partly in the form of trainings.

11. In terms of incentives beyond training and information, the possibility of using and granting informants of cartels is worth to be mentioned. Informants are individuals who provide the GVH with valuable evidence or information about yet undiscovered cartels. They not only enjoy a high degree of protection of their identity, but may also get a share of the fine imposed on the perpetrators. Informants might be employees of firms involved in a cartel, their relatives, or, procurement officers, including public procurement officials. The general idea emerged originally as part of a broader government effort to fight corruption, but the rules involving cartel informants are tailor made. This instrument has become available relatively recently, therefore the GVH has very little experience about it.

12. Anecdotes suggests, that collusive schemes and corruption – or other deviation from the true principles of the public procurement law – involving public procurement agencies or their officials, are not always connected in the way that collusion of suppliers comes first and corruption second to cover the collusion part. It might also be initiated by the agency or its officials to make sure the desired flow of money or the desired allocation of business opportunities among firms, sometimes serving as an instrument of industrial planning or subsidisation, without making such considerations explicit. In situations like these, methods aimed at fighting cartels in public procurement directly, especially methods that would rely on public procurement officials might not be fully adequate.