



O'MELVENY & MYERS LLP



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ST. MARTIN CONFERENCE 2011
20 YEARS OF CZECH COMPETITION LAW

BID RIGGING – CARTELS IN PUBLIC PROCUREMENT

November 2011



- **The Legal Context**

- European Union
- the National Level

- **Addressing the issues**

- Identifying potential issues
- Promoting compliance

- **Appendix**

The Legal Context – European Level

- Article 101 TFEU: Bid rigging as an anticompetitive agreement amongst competitors
 - Viewed as a hard core infringement - „agreement with the object of restricting competition“
 - Exemption under Art. 101 (3) TFEU generally unavailable
- Infringement captured as a matter of administrative law – no criminal sanctions for undertakings
- No sanctions for individuals

The Legal Context – National Level

Competition Law:

- Sec 1 GWB
 - Viewed as a hard core infringement - „agreement with the object of restricting competition“
 - administrative sanction
 - primary responsibility: individual participant
 - secondary responsibility: undertaking concerned

Criminal Law

- Sec 263 StGB: Fraud („Submissionsbetrug“)
 - but requirements may not be met or may be difficult to prove
 - requires identification of actual monetary damage (by comparing the bid with the hypothetical market price - easy where winning bidder includes payments to other bidders in his bid)
 - requires erroneous perception of facts by the person selecting the winning bidder
 - penalty for the individual: Up to 5 years or fine (10 years in serious cases - esp. where damage is significant or misuse of position of public authority)
 - no criminal sanction for the undertaking but administrative fine of up to 1 million EUR Sec 30 OwiG
- Sec 298 StGB: Restriction of competition in the context of a tender procedure
 - does not require the establishment of actual damage
 - applies where a bid is submitted for goods or services that is based on an illegal agreement that aims to direct the organizer of the tender to accept a specific bid
 - Penalty: Up to 5 years or fine

Civil Law:

- Undertakings remain liable for damages caused by their employees

The Legal Context – Some issues

- How broadly should „bid rigging“ be defined?
 - Include private as well as public tenders?
 - Include only tenders that follow a formal procedure?
 - Include vertical arrangements?
- Relationship between competition law and criminal law
 - Which substantive rules apply (exclusively or cumulatively)?
 - Which procedural rules apply?
 - Which authority has jurisdiction (exclusive or concurrent)?
- Relevance of immunity / leniency rules existing in competition law for criminal prosecution
- Jurisdictional issues – relationship between European and national laws
- Jurisdictional issues – bid rigging in relation to foreign tenders?



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Identifying potential issues

- Bid rigging occurs in many different scenarios
- Certain factors may increase the inclination to rig bids
 - homogenous products or services
 - small (and well known) number of competitors
 - recurring bid situations
 - existence of structural overcapacity
 - similar cost structures
 - market transparency
- Some industries are particularly prone to suffer from bid rigging
- Acknowledge that bid rigging is often tolerated by procurement officers
 - various factors may be relevant: long standing relationships and sympathy for struggling industries
 - bribery may accompany bid rigging

Promoting compliance

- Fostering an understanding of the scope of the prohibitions, in particular as they may
 - not require the *intention* to overcharge,
 - not require *actual damage* to be shown, and
 - apply to private as well as official/government tenders
- SMEs
 - are often involved in bid rigging situations – but may find it more difficult to adopt compliance related measures

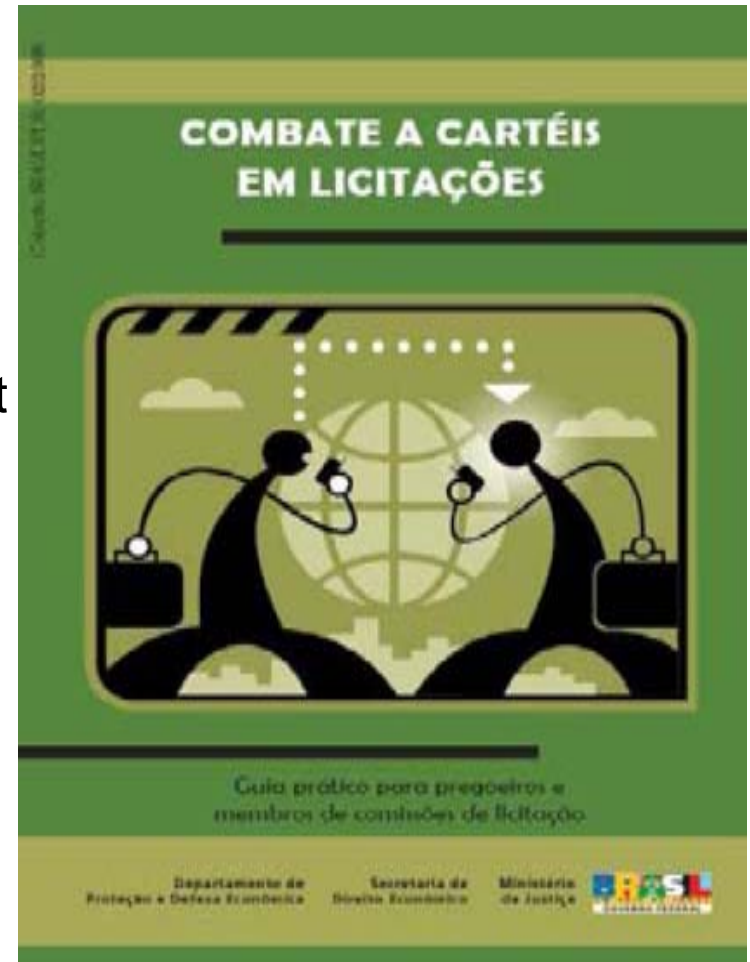
Promoting compliance

- Creating a culture of compliance
 - clearly define & spell out the order of importance: compliance comes before profits
 - there must not be any exceptions
 - requires firm commitment of senior management
 - training and repetition are cornerstones – a one off message to employees is insufficient
 - rules must be backed up by a system of incentives and potential penalties
 - but must acknowledge the need to operate in a given cultural and commercial environment

- Compliance efforts must include internal audits

Promoting compliance

- Advocacy and information
 - has an important place in helping to create an environment that values compliance
 - may involve market participants and legal community
 - also needs to include procurement officials
- Ideally, a multi-pronged approach to support the advocacy effort
 - electronic / printed information materials
 - outreach events (general and customized events for important public purchasers)





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S. 263 CC - Fraud

- (1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.
- (3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender
 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;
 2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;
 3. places another person in financial hardship;
 4. abuses his powers or his position as a public official; or
 5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.
- (4) ...
- (5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from six months to five years.
- (6) ...



S. 298 CC - Restricting competition through agreements in the context of public bids

- (1) Whosoever upon an invitation to tender in relation to goods or commercial services makes an offer based on an unlawful agreement whose purpose is to cause the organiser to accept a particular offer shall be liable to imprisonment not exceeding five years or a fine.
- (2) The private award of a contract after previous participation in a competition shall be equivalent to an invitation to tender within the meaning of subsection (1) above.
- (3) Whosoever voluntarily prevents the organiser from accepting the offer or from providing his service shall not be liable under subsection (1), also in conjunction with subsection (2) above. If the offer is not accepted or the service of the organiser not provided regardless of the contribution of the offender he shall be exempt from liability if he voluntarily and earnestly makes efforts to prevent the acceptance of the offer or the provision of the service.





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