



Assessment and enforcement of bid-rigging practices by the European Commission

Alexandros Papanikolaou, DG COMP
St. Martin's Conference
Brno, 15 November 2018

Bid rigging under Article 101

- Secret conspiracies to raise prices or lower quality of goods or services offered in tenders
 - Hardcore infringement assessed and sanctioned as a cartel (Article 101(1))
 - Price fixing, market or customer allocation (including information exchange)
 - No distinction between public and private procurement at EU-level in competition assessment, monetary sanctions (*GIS, Elevators/Escalators, Pre-Insulated Pipe*)
 - But special EU public procurement rules (exclusion of cartel tenderers, etc.) may apply
 - Stand-alone (*Greek contractors*) or part of multi-faceted infringement (*Gas Insulated Switchgear, Elevators/Escalators, Retail Food Packaging*)
 - Specific sanctions in some MS (incl criminal sanctions on companies or individuals)
- Joint bidding and consortium agreements (non-cartel, individual self-assessment)

Typology of bid rigging agreements 1

- Incumbency principle / "rule of respect": Supplier with important links to a customer protected from competition by other participants
 - *Maritime Car Carriers*, para 56: "The parties shared the common understanding not to undercut each other's prices in the responses to certain RFQs and other requests from vehicle manufacturers, either by refraining from quoting or by quoting higher than the incumbent carrier, and to respect each other's positions concerning specific vehicle manufacturers and/or routes."
 - *Occupant Safety Systems*, para 34: "[...] the relevant competitors coordinated in an attempt to ensure that the supplier who had won the award for [...] the previous model (that is to say the incumbent supplier) would also supply the OSS for the new model."
- Multiple, inter-dependent tenders subject to rigging
 - *RFP*, para 73: "The tenders of the three major GDO clients always took place in November and December and in the same chronological order[...]. As a consequence, the discussions concerning the [first] tender usually concerned also the other two tenders, as the allocated quotas were mutually dependent."

Typology of bid rigging agreements 2

- "Fake" bids/quotes to conceal coordination
 - *Elevators and Escalators*, para 161: "The agreed winner would inform the other three of its price and the others would regularly submit complementary bids/offers. The agreement was that the complementary bids/offers would be too high to be accepted."
 - *GIS*, para 122: "If an agreement could be reached that the project should be awarded to a participant, it would be discussed against which price the nominated winner would bid. Moreover, he could ask another undertaking to make a 'supporting bid' in order to leave an impression of genuine competition."
- Exchange of sensitive market information
 - Prices submitted in recent tenders or intended in future ones; intentions for specific customers; confidential information received from customers

Detection tools

- Commission's Leniency programme
 - Immunity from fines for companies who self-report participation in infringements and cooperate fully and continuously with investigation; reductions in fines available for further participants whose cooperation constitutes significant added value
- Commission's whistleblower initiative
 - Anonymous online portal to submit tips (all EU languages, examination by dedicated experienced team)
 - Non-anonymous channels available (email, phone line)
- Complaints
 - Procurement officials trained to look for potential coordination?
 - OECD Guidelines for Fighting Bid Rigging in Public Procurement
- Market monitoring and screening tools
 - UK, Switzerland screening tools
 - Publicly available information (e.g. TED)



Sanctions 1

- Commission's 2006 Fining Guidelines
 - Value of sales in goods or services directly or indirectly related to infringement
 - Proxy may be used if value of sales not representative, e.g. point 18 for worldwide market sharing agreements
 - Gravity of the infringement (percentage of value of sales)
 - Bid-rigging is hardcore cartel conduct (minimum 15% gravity, increased to reflect other factors (geographic scope, multi-faceted nature, etc.))
 - Duration of individual participation
 - Entry fee (additional amount aimed at deterrence): typically equal to gravity percentage, effect of adding one year to duration
 - Adjustments (aggravating/mitigating, increase for deterrence)
 - Immunity, leniency (up to 50%) and settlement (10%) reductions
- Directive 2014/24/EU on public procurement
 - Art. 57(4)(d): contractors may be excluded where contracting authority has sufficiently plausible indications to conclude contractor has entered into agreements restricting competition
 - Art. 57(6): self-cleaning to overcome grounds for exclusion (compensation, cooperation with investigations, steps to ensure future compliance)

Sanctions 2 – Value of sales

- How to calculate value of sales for fining purposes in bid-rigging agreements?
 - "Losing" bidders have no sales for the relevant tender
 - If typical VoS calculation results in under-deterrence or non-representative fines, the Commission can assign a fictional value of sales to an undertaking
 - *Braking Systems*, infringement 2: Collusion between Bosch and Continental for supplies to VW resulted in no sales made by Continental. Commission assigned a fictional value related to Bosch's value of sales by a ratio of worldwide turnover of both companies (although Continental got immunity under Leniency Notice).
 - *Thermal Systems*, infringement 4: only 1 of 4 participants had EEA sales. VoS of other three calculated as equal shares of sales of the 1 (to the extent they participated for specific products).
- Relevant reference period for VoS
 - Normally the last full year of participation in infringement
 - If not representative due to fluctuations or other factors, can take e.g. average of all years or of months of participation (for short infringements)
 - *Thermal Systems*, infringement 3: Collusion took place in 2009 but affected contract ran 2012-2015. Average of sales during period of contract was used.



Thank you.