

UNITED WE STAND, DIVIDED WE FALL – THE ROLE OF INTER-AGENCY COOPERATION IN ENFORCEMENT OF BID RIGGING CONSPIRACIES

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Abstract: **United We Stand, Divided We Fall – the Role of Inter-Agency Cooperation in Enforcement of Bid Rigging Conspiracies**

Public procurement plays an important role in economy of every country. The vast amounts of money awarded in public contracts, however, make public procurement extremely vulnerable to collusion among competitors and corruption of public officials. Although it is recognized that effective enforcement of these offences requires tight cooperation between competition agencies and other law enforcement authorities, there is still a lot of potential for improvement in many jurisdictions. The objective of this paper is to suggest key features of this cooperation which would facilitate effective catching of both colluding competitors and corrupt public officials involved in bid rigging schemes.

Keywords: public procurement; collusion; bid rigging; corruption; cooperation

Klíčová slova: veřejné zakázky; koluze; bid rigging; korupce; spolupráce

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1. INTRODUCTION

In a speech delivered at the Symposium on the Revised World Trade Organization (hereinafter referred to as “WTO”) Agreement on Government Procurement in September 2015, Director-General of the WTO Roberto Azevêdo said: *“Government procurement is hugely significant, not only in economic terms, but also because of the impact it has on both trade and development.”*¹

Procurement of goods and services by the public sector indeed represents an immensely important part of economy. According to the Organization for Economic Co-operation and Development (hereinafter referred to as “OECD”), public procurement on average accounts for approximately 13% of gross domestic product in its member states and 29% of general government expenditures.²

¹ AZEVÊDO, R. Remarks at Symposium on the Revised WTO Agreement on Government Procurement [online]. 17.9.2015 [cit. 2019-08-18]. Available at: https://www.wto.org/english/news_e/spra_e/spra79_e.htm.

² OECD. Fighting bid rigging in public procurement: report on implementing the OECD Recommendation [online]. 2016 [cit. 2019-08-18]. Available at: <http://www.oecd.org/daf/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf>.

Governments around the globe have introduced public procurement laws to ensure that public contracts are awarded in competitive tenders and that, as a result, public sector receives the best value for money. This, however, is often more a dream than a reality. As Lewis explains, “[p]ublic procurement is ... particularly vulnerable to corruption, collusion, fraud of various types and embezzlement because of the large amounts of money characteristically involved and the difficulties of supervising a large number and wide range of projects”.³

One of the most serious problems negatively affecting public procurement is collusion among competitors, who conspire to eliminate competition. This collusion typically takes the form of bid rigging cartel agreements, in which parties determine the future winner of a public contract and accordingly coordinate their steps in the bidding process. Considering the fact that these anticompetitive agreements significantly distort economic competition and inflate prices of public contracts, it is no surprise that bid rigging violates competition laws of most countries and often is punishable also by criminal laws.

Another major problem of public procurement is corruption of public officials, who may be tempted to abuse their power and influence the course or result of a public tender in exchange for a bribe. As the OECD has emphasized, “*The potential for corruption in public procurement exists in all economies and no sector is free from risks of corruption.*”⁴ Although corruption of public officials does not necessarily occur simultaneously with bid rigging, these two phenomena are often intertwined.⁵

With respect to the fact that bid rigging in many countries constitutes an antitrust as well as a criminal offense, and that bid rigging often occurs in tandem with corruption, it is widely recognized that effective enforcement of bid rigging cartels requires tight cooperation between competition agencies on the one hand and public prosecutors and other law enforcement authorities, such as specialized anti-corruption units, on the other hand.⁶ Although a relatively high level of cooperation and coordination has been achieved in some countries, there is still a lot of potential for improvement in many jurisdictions.

The main objective of this paper is to identify best practices in cooperation between competition agencies and other law enforcement authorities and suggest a model system of this cooperation which would facilitate effective catching of both colluding competitors and corrupt public officials involved in bid rigging schemes. This model system

³ LEWIS, D. Bid Rigging and its interface with corruption. In: GAL, M. S. et al. *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*. Cheltenham: Edward Elgar Publishing Limited, 2015, p. 203.

⁴ OECD. Bribery in Public Procurement: Methods, Actors and Counter-measures [online]. 2007 [cit. 2019-08-18]. Available at: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf>.

⁵ See for example the Petrobras scandal discussed in chapter 3.3 below.

⁶ One of the most visible proponents of inter-agency cooperation is the OECD, according to which “[c]o-operation between the various national enforcement agencies with jurisdiction over collusion and corruption in public procurement is paramount ...” (OECD. Roundtable on Collusion and Corruption in Public Procurement [online]. 2010 [cit. 2019-08-18]. Available at: <http://www.oecd.org/competition/cartels/46235884.pdf>).

could serve as an inspiration for countries, which struggle with public enforcement of bid rigging cartels due to insufficient inter-agency cooperation.

This paper is organized as follows. Part II discusses the problem of bid rigging from the perspective of competition laws. Part III deals with the issue of corruption in public procurement, including its relation to competition laws. Part IV summarizes the main reasons for cooperation between competition agencies and other law enforcement authorities in public enforcement of bid rigging cartels and related corruption offences, analyzes best practices from selected jurisdictions and outlines the key features of such cooperation. Last part V summarizes main points of the paper.

2. THE PROBLEM OF BID RIGGING IN PUBLIC PROCUREMENT

2.1 GENERAL OVERVIEW

Governments use competitive tender procedures to purchase desired goods or services from the bidder, which offers to perform the contract under the most advantageous conditions, typically for the lowest price. This goal, however, can be achieved *“only when companies genuinely compete (i.e., set their terms and conditions honestly and independently)”*.⁷

Whenever competitors agree to rig bids, competition for public contracts becomes distorted to the detriment of public sector, which ends up paying higher price or receiving lower quality. The ultimate victim of collusion in public procurement, however, is the taxpayer, because it receives from public sector less value for its contributions to public budgets.

Bid rigging can generally occur in any industry and in connection with any public contract awarded in a tender procedure. However, engineering and construction industries are usually mentioned as the ones most affected by bid rigging. This is the case especially when large contracts are at stake, because *“often the tenderee will have a powerful bargaining position and the contractors feel the need to concert their bargaining power”*.⁸

2.2 COMMON FORMS OF BID RIGGING ARRANGEMENTS

In practice, bid rigging may take many different forms, all of which aim to remove element of competition from public procurement and increase profit of the cronies. A common feature of these cartel agreements is their secrecy and absence of written form. Because of this, bid rigging cartels are usually hard to detect.⁹

⁷ OECD. Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement [online]. 2012 [cit. 2019-08-18]. Available at: <http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf>.

⁸ WHISH, R. – BAILEY, D. *Competition Law*. 8th ed. Oxford: Oxford University Press, 2015, p. 571.

⁹ See WEISHAAR, S. E. *Cartels, Competition and Public Procurement: Law and Economics Approaches to Bid Rigging*. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 83.

The simplest form of bid rigging is level tendering, in which “*the firms invited to tender agree to quote identical prices, the hope being that in the end each will receive its fair share of orders*”.¹⁰ However, level tendering is not very common, because situation where several independent competitors submit identical offers is extremely suspicious and could alert both the contracting authority and competition authorities.¹¹ Colluding tenderers instead employ more sophisticated methods, which usually include one or more of the following:

- *Cover bidding*. This practice, also known as complementary, courtesy or shadow bidding, covers a situation where members of the cartel submit bids which are intentionally designed to fail. Such bids may, for example, contain too high price, contradict criteria of the tender or reserve conditions unacceptable for the purchaser. The aim of cover bids is to create a false impression of competition, while, in fact, the winning bid has been determined in advance. According to the United States Department of Justice (hereinafter referred to as “DOJ”), complementary bidding schemes are the most frequent method of implementation of bid rigging cartels.¹²

- *Bid Suppression*. Under this arrangement, also called bid limiting, one or more members of the cartel who would otherwise be likely to participate in a public tender refrain from submitting a bid or withdraw their already submitted bids to ensure that bid made by another member of the cartel will succeed. In other words, bid suppression is an agreement not to compete for a given public contract. Bid suppression may be also in practice accompanied by unfounded bid protests seeking denial of an award to a non-conspirator.¹³

- *Bid rotation*. For a bid rigging cartel to stay functional, it is necessary that all participants have their share of the cartel’s ill-gotten gains. This can be achieved by agreed bid rotation, where all members of the cartel take turns in winning public contracts. Rules of rotation may vary depending on circumstances of each case, and typically are based on criteria such as size of the contract (e.g., larger contracts are awarded to bigger companies), size of members of the cartel (e.g., bigger companies win more contracts), geographic location of projects, or chronological order.¹⁴

- *Market allocation*. Another form of bid rigging is allocation of market among colluding competitors. Members of the cartel can for example agree that public contracts awarded by certain customers or in certain territory will “belong” to one member, whereas contracts awarded by other customers or in other territories will “belong” to other cartel members. Members of the cartel then refrain from submitting competitive bids on contracts assigned to others, or submit cover bids only.¹⁵

¹⁰ WHISH – BAILEY, c. d., p. 571.

¹¹ Id.

¹² DOJ. Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For [online]. 2015 [cit. 2019-08-18]. Available at: <https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>.

¹³ GOLDBERG, P. – ANDERSON, M. – AUBERTINE, A. Bid Rigging Detection in Government Construction Contracts [online]. 2004 [cit. 2019-08-18]. Available at: http://www.osbar.org/_docs/sections/antitrust/attr_cle_bid_rigging.pdf.

¹⁴ See CARLIN, F. – HAANS, J. Bid-Rigging Demystified. *The In-House Perspective*. 2006, Vol. 2, Iss. 1, p. 12.

¹⁵ See OECD, *supra* note 7.

Due to the fact that collusion requires participation of more competitors, but only one can win a given contract, mechanisms for distribution of the increased profit among all cartel members have to be put in place. If the participants do not simply take turns in winning contracts, they often create complicated systems of mutual compensations.

One of the most common compensation schemes involves subcontracting, where the winning bidder allows other members of the cartel to perform parts of the contract as its subcontractors. Other possibility is that the winning bidder “resells” the contract to the second-best bidder, who can still perform the contract with profit. Last but not least, the winning bidder may simply compensate other members of the cartel by paying agreed sums of money.

2.3 ANTITRUST LAWS AND BID RIGGING

Bid rigging has been long considered as one of the most serious “hard core” antitrust offences along with price fixing, output restrictions or market allocation.¹⁶ The seriousness of bid rigging was aptly described by Lewis: “*If hard-core cartel conduct is understood to be the most egregious antitrust offence, then bid rigging in public procurement is possibly the most egregious form of hard-core cartel conduct.*”¹⁷

In the United States, bid rigging schemes are on federal level caught by the Sherman Act. According to its Section 1, “*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*”¹⁸

An agreement among independent competitors to rig bids is considered *per se* unlawful,¹⁹ which means that such agreements require “*little or no economic analysis to determine their negative impact on consumers and/or competitive process*”.²⁰ Furthermore, a bid rigging arrangement cannot be justified by arguing, for example, that the agreed prices were reasonable or that the agreement was necessary to avoid ruinous competition.²¹ Because the cartel offense can be established both by direct evidence (e.g., testimony of one member of the cartel) or circumstantial evidence (e.g., pattern of concerted conduct), proof of a written agreement or an express agreement is not required.²²

Investigation and criminal prosecution of Sherman Act violations is the exclusive responsibility of the Antitrust Division of the DOJ. Recent investigations of the Antitrust Division of the DOJ show that enforcement of bid rigging cartels is one of its top priorities.²³

¹⁶ See, e.g., OECD. Recommendation of the Council concerning Effective Action against Hard Core Cartels [online]. 1998 [cit. 2019-08-18]. Available at: <https://www.oecd.org/daf/competition/2350130.pdf>.

¹⁷ LEWIS, c. d., p. 200.

¹⁸ 15 U.S. Code § 1.

¹⁹ GOLDBERG – ANDERSON – AUBERTINE, c. d.

²⁰ MURRAY, S. B. Bid-Rigging Remains Focus of DOJ Antitrust Criminal Enforcement: Businesses Need to Ensure Their Compliance. *The Metropolitan Corporate Counsel*. 2013, January, p. 17.

²¹ DOJ, *supra* note 12.

²² *Id.*

²³ See MURRAY, c. d., p. 17.

Pursuant to Section 1 of the Sherman Act, an illegal bid rigging cartel constitutes a felony punishable by a fine of up to \$100 million for corporations, and a fine of up to \$1 million or imprisonment not exceeding 10 years (or combination of both) for individuals.

In the European Union, bid rigging is caught by the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”). Its Article 101(1) prohibits “*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market ...*”.

Similarly to the US, where bid rigging is per se illegal, the European Commission considers bid rigging as a restriction of competition by object, which does not require proof of actual anti-competitive effects.²⁴ Contrary to the US, where per se violations cannot be justified, parties to an agreement violating Article 101(1) TFEU may still try to justify it under Article 101(3) TFEU.²⁵ Satisfaction of the conditions set out in Article 101(3) TFEU by bid rigging agreements, however, can be almost certainly ruled out. As Whish and Bailey point out, “[i]t is unlikely that collusive tendering would satisfy Article 101(3)”.²⁶ Analogically to the US, there is no need to prove a formal written or express agreement among the colluding competitors; evidence of an informal agreement, decision of trade association or concerted practices will suffice to establish violation of Article 101(1) TFEU.

According to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, both the European Commission and national competition authorities and national courts have the competence to investigate and prosecute violations of Article 101 TFEU. National competition authorities and national courts are obliged to apply Article 101 TFEU whenever its provisions are applicable.²⁷ However, if the European Commission decides to initiate proceedings, the respective national competition authorities are relieved of their competence to apply Article 101 TFEU.²⁸

If the European Commission discovers a bid rigging cartel violating Article 101 TFEU, it may impose a fine on each participating undertaking and association of un-

²⁴ European Commission. Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice. Commission Staff Working Document [online]. 2014 [cit. 2019-08-18]. Available at: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

²⁵ According to Article 101(3) TFEU, the prohibition under Article 101(1) TFEU may be declared inapplicable if the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

²⁶ WHISH – BAILEY, *c. d.*, p. 573.

²⁷ *Id.*, p. 78–79.

²⁸ See Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

dertakings not exceeding 10% of its total turnover in the preceding business year.²⁹ Contrary to the US, fines imposed by the European Commission are not of a criminal law nature³⁰ and the European Commission does not have the authority to seek imprisonment of members of the cartel. However, bid rigging cartels may be criminally punishable under national laws of some European countries.³¹

2.4 EXAMPLE OF BID RIGGING – GAS INSULATED SWITCHGEAR

A major bid rigging cartel has been discovered and prosecuted across the European Union in 2007 in connection with the award of contracts for gas insulated switchgear.³²

Participants of this bid rigging conspiracy agreed among themselves on who would offer what price in tenders for gas insulated switchgear so that each contract was awarded to a pre-determined member of the cartel. The arrangement existed at least from 1988 to 2004 and was implemented almost worldwide. Bid rigging in this case primarily took the form of market sharing combined with highly sophisticated fee system.

The investigation showed that members of the cartel had numerous meetings in various airport centers and hotels and once a year had a main meeting to confirm the continuation of the cartel and to establish a general strategy for the future. Members of the cartel later became less cautious and started to communicate also via e-mails and mobile phones.

This bid rigging cartel case is a great example of cooperation among multiple competition authorities. The case was first examined by the European Commission,³³ whose decision was subsequently confirmed by the European Court of Justice.³⁴ In addition to the European authorities, the cartel was investigated and fined also in individual member states, such as the Czech Republic and Hungary. Notably, the Czech Office for the Protection of Competition imposed the highest fine for violation of competition laws in its history.³⁵

It should also be noted that the cartel probably would not have been detected without the cooperation of one of the members of the cartel within the so-called leniency program who decided to admit its participation in the agreement and provided the European Commission as well as the Czech Office for the Protection of Competition with crucial

²⁹ See Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

³⁰ See Article 23(5) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

³¹ Individuals participating in bid rigging arrangements may be held criminally liable and sentenced to prison for example in the United Kingdom.

³² A summary of facts of the case is available for example here: Czech Office for the Protection of Competition. Historická sankce za kartel o rozdělení trhu [online]. 12.2.2007 [cit. 2019-08-18]. Available at: <https://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/418-historicka-sankce-za-kartel-o-rozdeleni-trhu.html>.

³³ Decision of the European Commission in case COMP/F/38.899 of January 24, 2007.

³⁴ Judgment of the European Court of Justice in connected cases C-239/11 P, C-489/11 P and C-498/11 P of December 19, 2013.

³⁵ Czech Office for the Protection of Competition, *c. d.*

evidence. This is a perfect example of effectivity of leniency programs and their role in combating bid rigging cartels.

3. THE PROBLEM OF CORRUPTION IN PUBLIC PROCUREMENT

3.1 INTERPLAY BETWEEN CORRUPTION AND BID RIGGING

Corruption in public procurement is generally viewed as one of the most significant problems of national economies. Indeed, “[f]or many nations, corruption remains the single greatest obstacle to economic independence and the development of a sustainable social infrastructure”.³⁶ It is estimated that corruption may increase the total cost of public contracts by 20% to 25%, and in some cases even by 50%.³⁷ However, it would be naive to think that corruption is limited only to developing countries. As an EU-wide survey conducted in 2013 has shown, for example, approximately 45% of respondents in the EU believe that corruption is widespread among officials awarding public contracts.³⁸

Although corruption and collusion in public procurement can occur separately, experience from various countries (including, for example, the United States) gathered by the OECD suggests that they often work in tandem and have a mutually reinforcing effect.³⁹ As Lewis puts it, this combination of collusion and corruption is “particularly toxic”.⁴⁰

The cooperation of bid rigging cartels with corrupt officials can be highly beneficial to both parties. The ways a corrupt public official can help bid rigging cartel are many. For example, the official may discuss its intent to procure certain goods with the cartel and then tailor conditions of the tender to the capabilities of the cartel’s members so that competitors outside the cartel cannot succeed. Corrupt officials can also help with enforcement of the cartel agreement by threatening to disqualify any potential defectors from its future tenders. Or, in case the cartel does not submit the winning bid, the corrupt official can grant them a “right of first refusal,” i.e. a chance to submit a new bid surpassing the originally winning bid.⁴¹

³⁶ ZUBERI, S. J. The High Cost of Controlling Corruption: the Achilles’ Heel of the OECD-DAC Methodology for Assessment of National Procurement Systems. *Public Contract Law Journal*. 2010, Vol. 40, No. 1, p. 211.

³⁷ European Commission. EU Anti-Corruption Report [online]. 2014 [cit. 2019-08-18]. Available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

³⁸ European Commission. Special Eurobarometer 397 Corruption Report [online]. 2014 [cit. 2019-08-18]. Available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf.

³⁹ See OECD. Roundtable on Collusion and Corruption in Public Procurement [online]. 2010 [cit. 2019-08-18]. Available at: <http://www.oecd.org/competition/cartels/46235884.pdf>.

⁴⁰ LEWIS, C. D., p. 198.

⁴¹ LENGWILER, Y. – WOLFSTETTER, E. Bid Rigging: an Analysis of Corruption in Auctions. Discussion paper No. 39, May 2005 [online]. 2005 [cit. 2019-08-18]. Available at: <http://www.sfbtr15.de/uploads/media/39.pdf>.

In exchange for helping the cartel, the corrupt public official seeks to extract part of the ill-gotten gains appropriated by the cartel.⁴² Although personal greed is usually considered as the main driving force behind bribery in public procurement, the motivation of officials to accept bribe for helping colluding competitors can reflect also other factors such as frustration from insufficient recognition by supervisors or strong personal relations with members of the cartel.⁴³ Furthermore, the OECD has observed that corruption in public procurement is in many countries (such as Brazil – see below) used as a means of diverting public funds to finance political parties and their campaigns.⁴⁴

3.2 ANTITRUST LAWS AND CORRUPTION OF PUBLIC OFFICIALS

Corrupt behavior of public officials is typically the domain of criminal (or anti-corruption) laws, which are almost always enforced by public prosecutors.⁴⁵ However, a research conducted by the United Nations Conference on Trade and Development (hereinafter referred to as “UNCTAD”) has shown that some countries address the problem of corrupt public officials also in their competition laws.⁴⁶ These countries include for example the following:

- Japan has enacted a special Act against bid rigging, which specifies four types of involvement of central or local government employees in bid rigging. If the Japan Fair Trade Commission finds any involvement described in the Act, it may *inter alia* demand that the heads of respective ministries or agencies (i) implement improvement measures necessary for eliminating the involvement in bid rigging, or (ii) take disciplinary actions against the responsible employees.⁴⁷
- In Greece, involvement of state officials in bid rigging cases may constitute a criminal offence pursued by the criminal prosecutor. However, the competition commission is obliged to notify the public prosecutor of all decisions finding and sanctioning cartel-type infringements.⁴⁸
- In Lithuania, the competition council has a duty to inform other state bodies (including special body investigating corruption cases) if the competition council by

⁴² LAMBERT, A. – SONIN, K. Corruption and Collusion in Procurement Tenders. *Center for Economic and Financial Research* [online]. 2003 [cit. 2019-08-18]. Available at: <http://www.cefir.ru/papers/WP36.pdf>.

⁴³ OECD, *supra* note 4.

⁴⁴ *Id.*

⁴⁵ See FOX, E. M. – HEALEY, D. When the State Harms Competition – The Role for Competition Law. *Antitrust Law Journal*. 2014, Vol. 79, No. 3, p. 783.

⁴⁶ See UNCTAD. Competition laws’ prohibitions of anti-competitive State acts and measures: Volume 1: Summary of answers to questionnaire [online]. 2015 [cit. 2019-08-18]. Available at: <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/TheState.aspx>; UNCTAD. Competition laws’ prohibitions of anti-competitive State acts and measures: Volume 2: Appendix of sample statutory excerpts [online]. 2015 [cit. 2019-08-18]. Available at: <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/TheState.aspx>. The project was coordinated by Eleanor M. Fox and Deborah Healey and is elaborated in FOX – HEALEY, *c. d.*

⁴⁷ UNCTAD. Competition laws’ prohibitions of anti-competitive State acts and measures. Volume 1: Summary of answers to questionnaire [online]. 2015 [cit. 2019-08-18]. Available at: http://unctad.org/en/PublicationsLibrary/ditclp2015d3_en.pdf.

⁴⁸ *Id.*

carrying out its tasks notices infringements of other laws, such as public procurement fraud or corruption.⁴⁹

The question is whether competition laws should provide an additional legal basis besides criminal law for holding corrupt public officials liable for their involvement in bid rigging schemes. According to Fox & Healey, antitrust coverage of complicit state officers would be both beneficial and natural, especially given their role in facilitating anticompetitive conduct.⁵⁰ Furthermore, the additional threat of competition liability could act as a decisive factor in deterring public officials from participating in anticompetitive conduct.⁵¹

In my view, extending antitrust liability to public officials involved in bid rigging schemes would represent an unprecedented shift in antitrust law and policy. So far, application of antitrust laws has been limited only to the violating competitors, and other participating persons have been left aside. Even though some authors (see above) apparently support extension of antitrust liability to public officials, it is in my opinion not necessary that corrupt public officials are accountable under competition laws. As long as criminal prosecution of corrupt public officials is efficient (and this efficiency can be achieved especially by close cooperation between competition authorities and public prosecutors as discussed in chapter IV below), adding additional threat of antitrust liability might be redundant. Furthermore, the simultaneous threat of criminal and antitrust liability could in my opinion be questionable from the perspective of constitutional law and principles, which generally do not allow the concurrent imposition of multiple penalties for a single violation of law.

Nevertheless, it appears that imposing separate antitrust liability on corrupt public officials could indeed be desirable in cases “*where the offenses are rampant and the public prosecutor cannot be counted on to do the job, whether for reasons of integrity, competency, or overburden*”.⁵² This seems to be the case for example in Peru, where corruption related to public procurement represents up to 30% of the total amount spent in public procurement, but often remains unpunished.⁵³ In its submission to the research conducted by UNCTAD, Peru expressly stated that it would help the detection of these illegal practices if competition law allowed the competition authority to investigate and sanction public officials involved in practices which restrict competition in public procurement.⁵⁴

3.3 EXAMPLE OF CORRUPTION IN INTERNATIONAL CONTEXT – PETROBRAS SCANDAL (BRAZIL)

A huge scandal involving corruption, bribery, money laundering and collusion has been recently discovered in Brazil. During the so-called Car Wash Investigation officially launched by Brazil’s federal police in March 2014, Brazilian authorities

⁴⁹ Id.

⁵⁰ FOX, – HEALEY, c. d., p. 805.

⁵¹ Id.

⁵² Id.

⁵³ UNCTAD, supra note 46.

⁵⁴ Id.

have found that managers of the state-run oil company Petrobras and some of the largest construction and engineering companies colluded in order to artificially inflate prices of contracts awarded by Petrobras and kick back a portion of the profit to high-ranking politicians and other officials.⁵⁵

In the antitrust branch of investigations, the Brazilian competition authority CADE investigated whether up to 21 companies and 59 individuals participated in a bid rigging scheme affecting contracts worth ca \$8.9 billion.⁵⁶ According to plea bargains obtained by CADE from some of the defendants, the companies involved in bid rigging cartel “*would determine among themselves the winners of each bid, and how much each would charge Petrobras for the services rendered*”.⁵⁷ One of Petrobras’s directors testified that the companies typically aimed to make profit ranging from 10% to 20% above costs.⁵⁸

This collusion was actively facilitated by managers of Petrobras and apparently supported by major political parties. According to a former Petrobras manager, the “*winning bidders were also required to add an average of 3% as a ‘political adjustment’*”.⁵⁹ This money was then transferred to political parties and used in their political campaigns.⁶⁰

Operation Car Wash is considered as “*the most complex investigation involving corruption and cartel conduct ever uncovered in Brazil*”.⁶¹ Given its staggering scale, it is a perfect example of how interconnected bid rigging and corruption can be and why cooperation between competition authorities and other law enforcement agencies is so important.

4. INTER-AGENCY COOPERATION: A KEY TO EFFECTIVE ENFORCEMENT

4.1 REASONS FOR COOPERATION

My argument is that effective enforcement of bid rigging cartels as well as related corruption offences requires a coordinated action of antitrust agencies and other law enforcement authorities, such as criminal prosecutors and anti-corruption units, because each of these authorities possesses irreplaceable skills that are vital for detection, investigation, and prosecuting of this type of illegal conduct.

⁵⁵ CONNORS, W. Things to Know About Brazil’s Corruption Scandal. *The Wall Street Journal* [online]. 2016 [cit. 2019-08-18]. Available at: <http://blogs.wsj.com/briefly/2016/03/04/5-things-to-know-about-brazils-corruption-scandal/>.

⁵⁶ PENTON, K. Brazil Probes \$8.9B Bid-Rigging Plot for Petrobras Deals. In: *Law360* [online]. 2015 [cit. 2019-08-18]. Available at: <http://www.law360.com/articles/741619/brazil-probes-8-9b-bid-rigging-plot-for-petrobras-deals>.

⁵⁷ DE ALMEIDA, M. A. – ZAGARIS, B. Political Capture in the Petrobras Corruption Scandal: the Sad Tale of an Oil Giant. *Fletcher Forum of World Affairs*. 2015, Vol. 39, p. 93.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ CALLIARI, M. – CRUZ, T. L. Tectonic Shifts in the Blink of an Eye: Antitrust, Anti-Corruption and Cooperation in Brazil Post-Petrobras. *Competition Law International*. 2015, Vol. 11, No. 2, p. 147.

Although this argument may seem obvious – and many jurisdictions (including, for example, the US, Canada or quite recently Brazil) indeed have achieved a high level of cooperation between competition agencies and other law enforcement authorities – there are still a lot of countries, mainly developing, in which such cooperation is insufficient. With these countries in mind, I summarize below the main reasons why tight cooperation between competition agencies and other law enforcement authorities can significantly contribute to effective enforcement of bid rigging cartels.

The undeniable successes of the United States in cartel enforcement are usually attributed to a number of reasons, however these reasons stand out: the use of criminal investigative techniques and assistance of FBI agents in cartel investigations.⁶² Effective investigation and the possibility to make use of a “*full arsenal of criminal investigatory powers*”⁶³ indeed seem to play a vital role in detecting and prosecuting antitrust violations.

However, experience from various countries shows that competition authorities oftentimes lack the necessary investigatory tools to uncover and prosecute bid rigging cartels. In Russia, for example, the competence of competition authorities is limited to requests of information from undertakings or individuals and inspections of business premises.⁶⁴ However, no evidence gathered during these inspections can be used in criminal investigations, because proceedings opened by competition authorities and public prosecutors are completely separate.⁶⁵ Consequently, it is not surprising to learn that Russian competition authorities view their insufficient investigative powers as a “*major obstacle for opening and investigating criminal cases*”⁶⁶ and that “*over 80% of petitions of competition authorities for opening criminal cases are ignored or returned with irrelevant justification...*”⁶⁷

Similarly, it seems to be a common practice in some African countries that their competition authorities prefer to hand over possible bid rigging cases to anti-corruption officials rather than initiate their own investigation, because the anti-corruption officials have greater investigatory powers and resources.⁶⁸

Another major reason for close cooperation between competition authorities and public prosecutors is that public prosecutors often lack specific economic and legal knowledge necessary to prosecute antitrust violations. It has been observed that “*general prosecutors ... may feel ill-equipped to take on cartel cases due to their unfamiliarity with competition law issues*”.⁶⁹

This insufficient expertise of public prosecutors may lead to their disinterest in criminal prosecution of antitrust offences and eventually result in undesirable decriminalization of cartels. Such was the case, for example, in Austria, where criminal enforcement

⁶² WHELAN, P. *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*. Oxford: Oxford University Press, 2014, p. 260.

⁶³ MOSUNOVA, N. An Examination of Criminalization of Russia’s Anti-Bid Rigging Policy. *Russian Law Journal*. 2015, Vol. 3, No. 4, p. 67.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ LEWIS, c. d., p. 212.

⁶⁹ WHELAN, c. d., p. 282.

of cartels failed due to insufficient efforts of public prosecutors, which were attributable to a “*realization that taking such cases involves the accumulation of human capital that, given the low number of criminal cartel cases, would not be of much use in future*”.⁷⁰ For similar reasons, criminalization of cartels failed also in the Netherlands.⁷¹

Frequent intersection of collusion and corruption also warrants enhanced coordination of public authorities. Although cases of corruption and cases of collusion are typically prosecuted by independent agencies, “[c]lose cooperation between the competition authorities and those responsible for policing corruption is essential”.⁷² Based on the fact that proof of collusion may be often uncovered during investigation of corruption and vice versa, sharing of information and evidence between competition authorities and anti-corruption agencies can significantly contribute to successful fight against both corruption and collusion. This coordination is especially important in jurisdictions where one of the authorities – usually the competition agency – has less investigatory powers than the authority tackling corruption.⁷³

Based on the above, it is clear that tight cooperation between competition agencies and other law enforcement authorities, such as public prosecutors and anti-corruption units, is essential for successful enforcement of bid rigging cartels and related instances of corruption. This cooperation, if properly implemented, would allow competition agencies to take advantage of investigatory powers of other law enforcement agencies as well as use information and evidence gathered by them. On the other hand, competition agencies may contribute with specialized knowledge and expertise and other information and evidence gleaned during their own investigations.

4.2 EXAMPLES OF COOPERATION IN SELECTED JURISDICTIONS

For the purposes of this paper, I analyzed several different jurisdictions with relatively high level of cooperation between competition agencies and other law enforcement authorities to identify specific features of this cooperation in each individual jurisdiction. A brief overview of my findings follows.

- In the Czech Republic, cooperation between the Office for the Protection of Competition (hereinafter referred to as “Office”) and police forces (especially the Police’s Department for Fighting Corruption and Financial Criminality) has been long established. Employees of the Office share their knowledge and expertise when requested by the police.⁷⁴ The Office also informs the police about commencement of every investigation concerning putative bid rigging cartel. In one bid rigging case concerning property management, the Office’s investigation was prompted by information provided by the police. In that case, the Office successfully defended its

⁷⁰ WHELAN, *c. d.*, p. 281.

⁷¹ See WHELAN, *c. d.*, p. 282.

⁷² LEWIS, *c. d.*, p. 212.

⁷³ See OECD, *supra* note 39.

⁷⁴ OECD. Fighting Corruption and Promoting Competition: Contribution from the Czech Republic [online]. 2014 [cit. 2019-08-18]. Available at: <https://www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm>.

right to use evidence obtained by the police (e-mail correspondence among colluding competitors) within criminal proceedings in its own administrative proceedings.⁷⁵

- In the United States, the investigation and prosecution of bid rigging conspiracies has involved joint efforts by the Antitrust Division of the DOJ, the FBI and the U.S. Attorney’s Office for a long time.⁷⁶ Quite recently, the DOJ announced the formation of a new Procurement Collusion Strike Force focusing on deterring, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant and program funding. According to DOJ, the Procurement Collusion Strike Force will be “*an interagency partnership consisting of prosecutors from the Antitrust Division, prosecutors from 13 U.S. Attorneys’ Offices, and investigators from the FBI, the Department of Defense Office of Inspector General, the U.S. Postal Service Office of Inspector General and other partner federal Offices of Inspector General*”.⁷⁷ The Antitrust Division often receives leads from government agents investigating other conduct (like fraud, money laundering, or public corruption) who then discover evidence of bid rigging cartels.⁷⁸ In cases involving corruption, the FBI assists the Antitrust Division through its International Corruption Unit which supervises investigation of both alleged antitrust offences and corruption of public officials and fraud against the U.S. government. The reason for grouping these activities under the International Corruption Unit is that investigation of one of these activities may lead to discovery of evidence concerning the other activity.⁷⁹
- In Brazil, the Administrative Council for Economic Defense (hereinafter referred to as “CADE”) has developed extensive collaboration with other Brazilian law enforcement agencies, including State and Federal Prosecutors, Federal Police, and the Office of the Comptroller General, which has jurisdiction over corruption offences.⁸⁰ Cooperation between CADE, criminal prosecutors and Office of the Comptroller General typically involves exchange of information and evidence collected in their respective legal spheres when dealing with cartels. CADE also coordinates its leniency program with leniency programs of other authorities. CADE may also conduct joint or parallel investigations with prosecution services, which may include dawn raids to collect evidence concerning bid rigging.⁸¹ The Federal Police may assist CADE in dawn raids to fulfill search and seizure warrants.⁸² Furthermore, the Office

⁷⁵ OECD, *supra* note 74.

⁷⁶ MURRAY, *c. d.*, p. 17.

⁷⁷ DOJ. Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding [online]. 5.11.2019 [cit. 2019-11-30]. Available at: <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>.

⁷⁸ DOJ. An Antitrust Primer for Federal Law Enforcement Personnel [online]. 2005 [cit. 2019-08-18]. Available at: <https://www.justice.gov/atr/antitrust-primer-federal-law-enforcement-personnel-revised-april-2005>.

⁷⁹ OECD, *supra* note 2.

⁸⁰ International Competition Network. ICN Anti-cartel Enforcement Template (Brazil) [online]. 2017 [cit. 2019-08-18]. Available at: <http://en.cade.gov.br/anti-cartel-enforcement-template.pdf>.

⁸¹ *Id.*

⁸² *Id.*

of the Comptroller General has trained employees of CADE to increase its capacity to open formal investigation of bid rigging.⁸³

- In Sweden, the Swedish Competition Authority (hereinafter referred to as “SCA”) cooperates with National Anti-Corruption Unit comprised of prosecutors investigating bribery cases. This cooperation involves the exchange of anonymized information regarding suspected markets and pre-studies conducted by the respective authorities. Representatives from both authorities meet approximately every six weeks to discuss issues and developments which might be of interest to the other authority. The authorities also organize mutual education activities where employees of the SCA educate police officers how to recognize signs of bid rigging and employees of the Anti-Corruption Unit teach case-handlers at the SCA how to recognize signs of corruption.⁸⁴
- In Canada, the Competition Bureau (hereinafter referred to as “Bureau”) has partnership with several Canadian police forces, including white-collar investigation police units. Evidence of cartel activity obtained by these police units in the course of their investigations can be used by the Bureau in its antitrust investigations.⁸⁵ The Bureau and the police collaborate during various phases of joint and parallel investigations, including during executing searches and seizure of records, conducting wiretaps, performing handwriting analysis, voice recognition analysis etc.⁸⁶ Some officers of the Bureau have been working directly with police forces at their offices on common investigations. By this personal cooperation, police officers and officers of the Bureau can share their best practices and learn new investigative techniques.⁸⁷
- In Latvia, the Competition Council of Latvia (hereinafter referred to as “Council”) has a long history of cooperation with the Corruption Prevention and Combating Bureau (hereinafter referred to as “Bureau”). The cooperation between the Council and the Bureau usually takes the form of meetings, during which employees of both agencies share information that might be useful for the other agency.⁸⁸ In one case, the Council initiated investigation based on information provided by the Bureau. The Council was given access to the criminal case investigated by the Bureau and used some of the evidence obtained by the Bureau (transcripts of the overheard phone conversations) in its own investigation.⁸⁹

⁸³ Id.

⁸⁴ OECD. Fighting Corruption and Promoting Competition: Contribution from Sweden [online]. 2014 [cit. 2019-08-18]. Available at: <https://www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm>.

⁸⁵ OECD, *supra* note 2.

⁸⁶ PECMAN, J. Co-operation between anti-corruption and competition authorities. In: *Government of Canada – Media centre* [online]. 2016 [cit. 2019-08-18]. Available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04114.html>.

⁸⁷ OECD. Fighting Corruption and Promoting Competition: Contribution from Canada [online]. 2014 [cit. 2019-08-18]. Available at: <https://www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm>.

⁸⁸ OECD. Fighting Corruption and Promoting Competition: Contribution from Latvia [online]. 2014 [cit. 2019-08-18]. Available at: <https://www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm>.

⁸⁹ OECD, *supra* note 39.

- In Japan, the Japan Fair Trade Commission (hereinafter referred to as “JFTC”) works closely with the Public Prosecutor’s Office. The two authorities exchange opinions and information related to each case that the JFTC considers worthy of criminal prosecution. The JFTC and the Public Prosecutor’s Office have also introduced a special procedure for criminal accusation, which has contributed to the exchange of information and parallel investigations between the JFTC and the Public Prosecutor’s Office. The two agencies also exchange personnel to gain new experience and improve investigative skills.

4.3 MODEL SYSTEM OF COORDINATION

Based on the examples of coordination between competition agencies and other law enforcement authorities analyzed above, it is possible to infer some common features of a successful model of coordination. These features are discussed below. It should be noted, however, that some of these features may not be suitable for all countries, because every jurisdiction is unique (for example, in terms of legal system, existing institutions, and available resources) and thus may have different needs and possibilities.

Perhaps the most frequently highlighted aspect of a successful cooperation between competition agencies and other law enforcement authorities is the exchange of information among all interested parties. Due to the fact that one agency may come across information important from another agency’s point of view, it is vital that the agencies actively share such information as soon as possible. The ideal system of exchange of information would in my opinion be a combination of an automated exchange and an *ad hoc* exchange, where certain types of information would be shared automatically (e.g., commencement of investigation of a bid rigging case would always be reported to public prosecutor, as is the case in the Czech Republic) and other information would be shared as needed (e.g., accidental discovery by the competition agency of evidence of possible corruption of public officials).

Another important feature of cooperation between competition agencies and other law enforcement authorities is the possibility to conduct joint or parallel investigations. Close collaboration of different authorities on complex cases involving bid rigging, corruption and possibly other illegal conduct brings undeniable synergies, because employees of those authorities can immediately share their findings, expertise and perspectives and thus increase the chances of successful investigation of all participating authorities. A good example is the United States, where the International Corruption Unit of the FBI may supervise investigations of bid rigging and related corruption of public officials. Similarly, joint investigations of the Petrobras scandal conducted by multiple authorities in Brazil have proved to be very fruitful.

The gas insulated switchgear cartel case in Europe and the Petrobras scandal in Brazil also highlighted the importance of leniency policies and their coordination among authorities participating in complex investigations. If two or more authorities (such as the competition agency and the anti-corruption authority in Brazil) have a leniency program in place, it is critical that these authorities adopt a common position so that

the violators know what to expect if they decide to turn themselves in. Without such coordination, the violators could be discouraged from applying for leniency with one authority because they would fear prosecution by other authorities.

Furthermore, many competition agencies have rather limited investigatory powers. A good system of cooperation should thus enable such competition agencies to make use of investigatory capabilities of other law enforcement authorities. For example, if a competition agency needs direct evidence of a conspiracy between competitors, it would be useful if it could request the police to employ appropriate investigative techniques and obtain such evidence. The example of Canada shows that competition agencies can make use of as specific investigative techniques as wiretaps, handwriting analysis, or voice recognition analysis.

The possibility of sharing evidence between competition agency, public prosecutors, and other law enforcement authorities is another important part of a successful system of enforcement of bid rigging cartels and related corruption offences. Experience from many countries (e.g., Latvia, Canada, and Brazil) shows that competition authorities often rely on evidence obtained by public prosecutors. Exchange of information as well as joint or parallel investigations would not be too beneficial if one authority could not use evidence obtained by another to establish liability of the perpetrators in its own proceedings. It is thus necessary that the legal system allows for such sharing and use of evidence (see the example of the Czech Republic, where the competition agency's right to use evidence obtained by the police was challenged in court).

However, the possibility of sharing evidence between competition agency, public prosecutors, and other law enforcement authorities should not deprive the suspects of their right of defense guaranteed by constitution law. Evidence obtained by the respective authorities in violation of law therefore should be admissible and the suspected violators should in any case have the right to challenge the validity or admissibility of such evidence as well as present their own evidence and be defended by an attorney.

In order to facilitate prosecution of corruption and other criminal offences related to bid rigging, competition agencies should be willing to share their unique knowledge and expertise in the area of antitrust conduct with other law enforcement authorities. Similarly, anti-corruption units and public prosecutors should share their specific knowledge and expertise with competition agencies. This mutual exchange of knowledge and expertise could for example take the form of mutual education activities organized in Sweden, where employees of competition agency educate employees of other authorities how to recognize signs of bid rigging and employees of other authorities show employees of competition agency how to recognize corruption and other criminal activities. Another possibility would be temporary exchange of personnel among the authorities (e.g., Japan) or direct collaboration of employees of different authorities in the same offices (e.g., Canada).

Last but not least, many competition agencies (e.g., in Brazil or Canada) appreciate the assistance of police forces in activities involving direct confrontation with suspect violators, such as dawn raids, searches, and seizures of records. A good system of enforcement of bid rigging cartels should thus give competition agencies the option to request such assistance.

5. CONCLUSION

Effective public procurement is one of the cornerstones of economic development, both on national and international level. However, experience from various jurisdictions shows that public procurement is especially prone to collusion among competitors, who conspire to remove the element of competition from public tenders. These bid rigging cartels are often facilitated by corrupt public officials, who want a share of the cartel's ill-gotten gains.

Successful enforcement of bid rigging cartels and related corruption offences occurring in public procurement requires tight cooperation between competition agencies and other law enforcement authorities. Although some countries have achieved a relatively high level of cooperation, many other jurisdictions are not doing so well.

Drawing on experiences from several different jurisdictions, this paper suggests key features of cooperation among competition agencies and other law enforcement authorities, which support effective prosecution of both bid rigging cartels and corrupt public officials.

These features include the following: exchange of information among participating authorities, possibility to conduct joint or parallel investigations, adoption of leniency policies and their coordination among all investigating authorities, ability of competition agencies to make use of investigatory powers of other law enforcement authorities, possibility to use evidence obtained by another authority provided that right of defense and other constitutional rights are observed, mutual exchange of knowledge, expertise and personnel, and assistance of police forces in activities involving direct confrontation with suspect violators.

Based on experience from developed countries in Europe and beyond discussed in this paper, I believe that implementation of the above suggested key features of cooperation among competition agencies and other law enforcement authorities would significantly help less developed countries struggling with enforcement of competition laws in their fight against bid rigging conspiracies.

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