

e-Competitions

Antitrust Case Laws e-Bulletin

Utilities & Cartels

Cartels in the utility sectors: An overview of EU and national case law

ANTICOMPETITIVE PRACTICES, BID RIGGING, CARTEL, EXCHANGE OF INFORMATION, JOINT-VENTURE, UTILITIES, PRICE FIXING, SANCTIONS / FINES / PENALTIES, FOREWORD, JUDICIAL REVIEW, PRICE INCREASE

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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e-Competitions Special Issue Utilities & Cartels | 23 January 2020

1. Introduction

Events over the past few years in liberalised utility sectors have brought into sharp focus the relative importance of the public sector either as the unwitting facilitator of collusive practices or as the party harmed most directly by such practices because it accounts for a significant proportion of demand for goods and services in most economies. The focal points of the public sector in many such actions is illustrated by the Ordinance issued in May 2018 by the Hong Kong Competition Commission, which guides public bodies and law enforcers in identifying signs of anti-competitive practices in the marketplace (especially in the form of big-rigging, market sharing and price fixing). [7]

2. Emerging Themes

The key themes which have emerged over the past few years and which are covered in part by the contributions to this publication include:

- the continuing importance of bid-rigging cases as a central plank of most antitrust enforcers' enforcement strategies;
- the escalation in enforcement in an EU Member State such as Italy against collusive practices affecting utility sectors;
- the increasingly sector-specific application of competition rules; and
- issues related to the burden of proof and the quality of evidence used to substantiate collusion allegations.

Each of these recurring themes is discussed below.

2.1 Bid-rigging for public services

It has been a characteristic of the past decade that the bulk of cases brought under Article 101(1) TFEU and its national equivalents relate to bid-rigging. The last few years are no exception to this trend. Thus, in various decisions adapted by Competition Authorities around the world:

- Bulgaria's Competition Authority fined 24 firms around € 200,000 in December 2019 for taking part in cartels with the aim of manipulating two public tender awards pursuant to a national energy efficiency programme. [2]
- Croatia's Competition Authority fined five regional firms in July 2019 for price-fixing in the sewage treatment market, [3] by effectively raising prices for their sewage treatment services by over 100%.
- The Moldovan Competition Authority granted in July 2018 a leniency applicant immunity from fines [4] in a bid-rigging case involving the procurement of works on the water and sewage system of a particular Moldovan county.
- The Indian Competition Authority in May 2018 granted penalty reductions to 4 out of 6 firms guilty for cartel behaviour in the rigging of bids for the establishment of waste processing plants over the course of five tenders run by a particular Indian city. [5] The bid-rigging arrangements were the subject of a leniency order, in what amounted to the third such order issued by the Authority at the time.
- The Indonesian Commission for the Supervision of Business Competition (the KPPU) penalized two construction firms € 133,141 in April 2019 for violating Indonesian competition rules by conspiring to rig bids on a construction project, having previously fined the same firms for bid-rigging in January 2019. [6]

These cases raise the number of interesting substantive and procedural issues. *First*, they not only illustrate the importance of bid-rigging as a major competition focal point of enforcement, but they also confirm the view that bid-rigging is a "by object" competition offence. *Second*, there is now a clear trend for members of bid-rigging schemes to rely on the leniency programmes established across the world as the basis upon which to insulate themselves from the most damaging aspects of a competition law investigation. *Third*, by acting in such a way as to facilitate a bid-rigging scheme, the actions of a public authority (*i.e.*, a sort of 'vertical' conspiracy) is something that might also fall, as a matter of principle, within the remit of an antitrust investigation. *Fourth*, as is reflected in the Moldovan case, shareholding links between separate bidders will clearly be considered to be an exacerbating factor in the assessment of the gravity of the bid-rigging offence. *Fifth*, as the Croatian case illustrates, a bid-rigging offence can be substantiated even if the final bids are different in terms of total price, as long as the defendant firms are shown to have agreed on at least one element of that overall price.

2.2 Heightened enforcement in Italy

A jurisdiction such as Italy has witnessed a severe spike in antitrust enforcement activity against collusive practices over the past few years. Moreover, the relative importance of bid-rigging as a proportion of all collusive actions brought under Article 101(1) TFEU or its Italian equivalent is illustrated in the table below, which summarises the total number of successful prosecutions of collusive conduct brought in Italy alone over the course of 2019.

Date	Total Fines	Sector	Allegation
January 2019	€ 678 million	Banking/car manufacturing (12 banks / 8 car manufacturers)	Car financing cartel over the period 2003–2017
February 2019	€ 67 million	Helicopter operations (8 helicopter operators / 1 trade association)	Fixing of transportation prices and rigging of bids to provide firefighting services
May 2019	€ 235 million	Facilities management services (energy, cleaning and maintenance)(8 firms)	Bid rigging in providing public offices with facilities management services for a €2.7 Billion contract
May 2019	€ 67 million	Sports media agencies(3 firms)	Bid rigging to distribute overseas broadcasting rights to Italy's top football leagues
August 2019	€ 287 million	Corrugated cardboard(23 firms)	Two separate cartels to fix prices and to divide markets
December 2019	€ 30 million	Private security providers(5 firms)	Bid rigging in relation to 10 public works contracts over a 5-year period (including the Milan Expo of 2015)

The Italian Job – 2019

The Italian bid-rigging cases reflect the use of a web of complex bilateral relationships which can consist of a combination of *ad hoc* joint bidding, the formation of broad consortia, the subcontracting of services to one another (often involving a compensatory fee to the subcontractor for their loss of the primary contract), and mechanisms to deter bidding or to dilute the strength of certain bids. The effect of such mechanisms, in each case, is to dampen the competitive effects that would otherwise be expected from the bidding process. In the judicial appeals which will inevitably follow in such complex cases, one can expect that the key lines of defence will include the argument that the patterns of interaction do not support the “simple and continuing infringement” alleged by the Competition Authority over the full period under investigation. In one particular case, it is clear that the regulatory conditions imposed under the bidding mechanism itself might have acted as a likely constraint on the absolute freedom of the parties to bid competitively in all respects.

2.3 Sector-specific application of competition rules

In a trend that is increasingly likely to escalate, sector-specific regulators are increasing their interest in preventing anti-competitive actions, at least where they have had competition powers conferred upon them.

Thus, the United Kingdom’s energy regulator, OFGEM, fined two energy providers in May 2019 for operating a market-sharing scheme, in addition to the consultancy firm that provided their customers with software in order to facilitate their collusion. [7] The suppliers were fined €933,000 for colluding to allocate among themselves domestic UK consumers of gas and electricity. In turn, the consultancy firm was fined € 22,700 for designing and implementing software that would assist them to collude (i.e., by allowing the acquisition of certain customers to be blocked and customer lists to be shared ; in other words, by facilitating ‘algorithmic collusion’). [8]

In a more conventional use of competition powers by Korea’s Fair Trade Commission, four telecommunications firms were fined a total of € 10.3 million for their part in a bid rigging scheme for 12 government agency contracts in the period April 2015-June 2017. [9] The most serious offender was referred to the country’s Public Prosecutor for a criminal investigation, which

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compromised its ability to enter into the Internet banking business. According to the implemented scheme, winning and losing bids were predetermined, with the losers either playing no role in the tender or a passive role, in compensation for fictional or unreasonably high leasing charges paid with respect to access to one another's infrastructure.

Another case with a particularly sector-specific application of competition rules involved the German Cartel Office's fining decision of around € 100 million imposed on three of Germany's car manufacturers for their information exchange regarding the imposition of uniform surcharges on so-called "long-steel products". The offences stretched over the period 2004-2013 and were reflected in the positions expressed by the car manufacturers in their twice annually held meetings with steel producers. [10]

2.4 The Burden of Proof

Competition regulators around the world take varied approaches to the compilation of evidence that can support an allegation of collusion that would satisfy a court on appeal.

Thus, by way of example, the European Court of Justice has ruled that an appeal from one member of a cartel in the *Power Cables Case* [11] was partially upheld on the ground that the General Court had relied on an "unsubstantiated presumption" that the defendants' conduct covered certain power cable accessories, [12] in addition to the power cables in relation to which it had sought immunity. [13]

In South Africa, the Competition Tribunal overruled the Decision of the Competition Commission [14] in its entirety to the effect that 5 ferry operators had met to agree on ferry prices for a Robben Island museum tender held in 2015. According to the Tribunal, in the face of evidence submitted by the defendants justifying their prices by reference to factors unrelated to cartel-like behaviour, the Commission could not sustain its case in the absence of direct evidence of what was discussed at the relevant meeting between the ferry operators.

By contrast, an expansive approach was taken by the Competition Authority in Turkey [15] to the notion of what constitutes a 'cartel'. According to the Authority, five local shipping lines colluded to exchange future pricing plans for two separate shipping routes in Turkey. This finding was made, irrespective of the one-off nature of the information exchange, the ambiguous nature of the exchange and the surrounding circumstances faced by the industry. Similarly, in reversing a Judgement of the District of Odense, the High Court of Eastern Denmark held in January 2020 that two construction companies should pay fines amounting to approximately 430,000 and 267,000 Euros for their exchange of prices and coordinated bids in relation to several construction contract bids for educational institutions. [16]

By the same token, the scope afforded to damage claimants has been recently opened up by the European Court of Justice, [17] when it ruled on 12 December 2019 that the right to cartel damages would be "seriously undermined" if it were limited only to suppliers and customers present in the cartelised market. The Court's Ruling was made in the context of a reference from Austria's Supreme Court, where the issue had arisen whether the Austrian public authority could claim damages because it subsidised buyers of a cartelised product. Even in the absence of a direct cartel link, the Austrian public authority might be entitled to compensation if it could be proven that it had actually suffered loss because it could have made more profitable investments than the social housing loans in which it had engaged. In addition, the Dutch Supreme Court has accepted the applicability of the so-called "passing on" defence in private enforcement litigation in the context of a civil damages claim arising from an action brought by an electricity firm against a firm engaged in a gas-insulated switchgear cartel. [18]

3. Conclusions

After decades of competition being introduced into utility sectors, the character of collusive practices in these sectors increasingly resembles the form which they take in other sectors. A significant point of departure, however, is the fact that the case precedents from around the world confirm that bid-rigging continues to assume centre stage in the competition law enforcement priorities of Competition Authorities where utilities are involved. The other side of this enforcement coin is that the spotlight is falling very clearly on the involvement of public authorities in the bid-rigging process, whether as inadvertent facilitators of such collusive practices or as the parties most directly and adversely affected by such anti-competitive practices.

At the same time as Competition Authorities unearth ever-more intricate patterns of behaviour to implement such practices, courts of review in various parts of the world are subjecting Competition Authorities to higher evidentiary standards in fact-finding and the proof of a theory of harm arising from such practices. Pressure is also mounting, given the complexities of many utility sectors and their particular economic dynamics, to adapt competition policy in ways in which the unique sector-specific nature of certain conduct can be addressed effectively.

[1] Hong Kong Competition Commission (Hong Kong), “*Handy Guide to Competition Ordinance for Public Sector*”, 11 May 2018, see **Hong Kong Competition Commission**, *The Hong Kong Competition Commission publishes a guide to competition ordinance for public sector, 11 May 2018, e-Competitions Bulletin May 2018, Art. N° 87287*.

[2] See Bulgarian Competition Authority, Decision No 1312 / 05.12.2019, available at: <http://reg.cpc.bg/Decision.aspx?DecID=300056616> ↗.

[3] See Croatian Competition Authority (Zagreb), *Daska, Krtolin, Jole, Garma-promet and Kula*, Press Release, 25 July 2019, see **Croatian Competition Authority**, *The Croatian Competition Authority fines companies for price fixing cartel in the sewage treatment market (Daska / Krtolin / Jole / Garma-promet / Kula), 25 July 2019, e-Competitions Bulletin Utilities & Cartels, Art. N° 91576*.

[4] See Moldovan Competition Authority, *Litarcom, Capillati, Ecosem Grup*, DA-39/ 17-53, 5 July 2018, See **Alexandr Svetlicinii**, *The Moldovan Competition Authority grants immunity from fine to a leniency applicant in a bid rigging case (Litarcom / Capillati / Ecosem Grup), 5 July 2018, e-Competitions Bulletin Leniency, Art. N° 88553*.

[5] See Competition Commission of India, Case No. 50/2015, *Nagrik Chetna Manch / Fortified Security Solutions*, 1 May 2018, see **Man Mohan Sharma**, *The Indian Competition Authority grants penalty reductions to 4 out of 6 members of a cartel guilty of bid rigging public tenders for setting up solid waste processing plants (Nagrik Chetna Manch / Fortified Security Solutions), 1 May 2018, e-Competitions Bulletin Utilities & Cartels, Art. N° 87452*.

[6] See Indonesian Commission for the Supervision of Business Competition, Decision No. 9/KPPU-PR/IV/2019, 10 April 2019, available at: http://www.kppu.go.id/id/wp-content/uploads/2019/04/Press-Release-No.9-KPPU-PR-IV_2019.pdf ↗.

[7] See OFGEM Decision, *Economy Energy, E (Gas and Electricity) and Dyball Associates*, 30 May 2019, available at: https://www.ofgem.gov.uk/system/files/docs/2019/07/decision_on_economy_energy_-_e_gas_and_electricity_-_dyball_associates_infringement_of_chapter_i_ca98_doorstep_sales_redacted_decision_document_26_july_2019.pdf ↗.

[8] A different approach to the impact of a third party ‘facilitator’ can be seen in the treatment by the Indian Competition Commission of the role played by an oil marketing company in deciding the price in the context of a bid-rigging investigation. According to the Competition Commission, despite the quoting of identical prices by the oil producer tenderers, given the oligopolistic nature of the affected market, it was only the oil marketing company that was determining the price. See Competition Commission of India, Prathima, No. 04 of 2014, 15 November 2019, see **Pallavi Shroff, John Handoll, Naval Satarawala Chopra, Shweta Shroff Chopra, Harman Singh Sandhu, Manika Brar, Aparna Mehra, Gauri Chhabra, Yaman Verma, Rohan Arora**, *The Indian Competition Commission decides that quoting identical rates in tenders to oil marketing companies does not necessarily amount to a cartel (Prathima), 15 November 2019, e-Competitions Bulletin November 2019, Art. N° 92620*.

[9] See Korea Fair Trade Commission, “*KFTC sanctions four companies for bid rigging in state projects*”, Decision No. 350, 26 April 2019, available at: http://www.ftc.go.kr/solution/skin/doc.html?fn=a8ae82193d7374879f699bbeac0b23409a696001466c9c97e53f1f9f4a3c53c&rs=fileupload/data/result/BBSMSTR_00000002402/ ↗.

[10] See German Competition Authority (Bonn), *Bayerische Motoren Werke / Daimler / Volkswagen*, Press Release, 21 November 2019. See **German Competition Authority**, *The German Competition Authority fines car manufacturers for anticompetitive practices in the purchase of steel (BMW / Daimler / Volkswagen)*, 21 November 2019, *e-Competitions Bulletin November 2019*, Art. N° 92510.

[11] A European Commission Decision of 2014 imposed fines of € 302 million on 11 power cable manufacturers. See **Jean-François Bellis**, *The European Commission fines eleven producers for operating a cartel on the high-voltage power cable market (ABB / Nexans)*, 2 April 2014, *e-Competitions Bulletin April 2014*, Art. N° 66907.

[12] See Case T-438/14, *Silec Cable SAS and General Cable Corp. v Commission*, 18 July 2018, EU:T:2018:447, partially set aside in Case C-599/18 P, 14 November 2019, EU:C:2019:966.

[13] This can be contrasted with the strong evidence addressed by the French Competition Authority, which in December 2018 imposed a fine of € 189 million on six household appliance manufacturers for participating in two distinct cartels, especially where the evidence involved clear examples of monitoring results to ensure compliance with the agreed collusive outcomes. See French Competition Authority, *BSH, Candy Hoover, Eberhardt Frères, Electrolux, Indesit and Whirlpool*, 18-D-24, 5 December 2018, see **Richard Burton**, *The French Competition Authority fines household appliance manufacturers for price-fixing (BSH / Candy Hoover / Eberhardt Frères / Electrolux / Indesit / Whirlpool)*, 5 December 2018, *e-Competitions Bulletin December 2018*, Art. N° 88968.

[14] Competition Tribunal of South Africa, Case No. CR067May17, 14 August 2019, available at: https://res.cloudinary.com/gcr-usa/image/upload/v1566303165/Robben_Island_judgment_jpdpr.pdf.

[15] See Turkish Competition Authority, Decision No. 19-16/229-101, 18 April 2019, available at: <https://www.rekabet.gov.tr/Karar?kararId=b01dedac-4794-4f65-8b0d-466ae04bd424>.

[16] See Eastern High Court, the prosecution vs H. Skjode Knudsen A/S and Jorton /S, Case no. 10-2399/2018, 7 January 2019.

[17] See Case C-435/18, *Otis and Others*, 12 December 2019, EU:C:2019:1069. See **Martin Favart**, *The EU Court of Justice rules that a public body indirectly affected by a cartel can claim compensation for losses resulting from an antitrust infringement (Otis)*, 12 December 2019, *e-Competitions Bulletin January 2020 - II*, Art. N° 92929.

[18] See Dutch Supreme Court, TenneT / Gas-insulated Switchgear, ECLI:NL:HR:2016:1483, 8 July 2016, see **Martin Favart**, *The Dutch Supreme Court accepts passing-on defense in private enforcement litigation (TenneT/ Gas-insulated Switchgear)*, 8 July 2016, *e-Competitions Bulletin July 2016*, Art. N° 80696.