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## **Global Forum on Competition**

### **COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT**

#### **Contribution from Romania**

-- Session V --

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## COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

### -- Romania --

#### 1. Size and Policy Objectives

1. Public procurement plays a major role in most economies. In OECD countries, public procurement accounts for 15% of GDP and in the new EU member states like Romania the number is approximately 16%.

2. The most important objectives which may be identified in Romanian legislation concerning public procurement, namely OUG 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts are the following:

- Promoting the competition between the economic operators;
- Guaranteeing equal treatment and non-discrimination of economic operators;
- Ensuring transparency and integrity of the public procurement process;
- Ensuring the efficiency and the efficient use of public funds

3. Given the extent and complexity of public procurement, this activity is particularly vulnerable to abuse.

#### 2. Corruption

4. Corruption discourages investment, lowers efficiency and erodes democracy. There are many things that can disable an economy but perhaps nothing is more damaging than corruption. Emerging economies particularly are easy targets because they are in a transition state and thus in continuous transformation.

5. Paolo Mauro<sup>1</sup> found out that corruption is more likely to appear where governments have unlimited powers to grant privatisation and extraction rights and to exercise price controls.

6. Daniel Teodorescu<sup>2</sup> and other researchers surveyed local public administration officials in 2005 and with a error margin of +-1.2% found out the following causes of corruption in Romania: lack of consistency in applying the reform system (i.e. privatisation), lack of traditions that support a market economy, present administration system reluctant to change, low salaries in the public sector, lack of financial discipline in the public system, and fluctuations in the number of civil servants.

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<sup>1</sup> Mauro, Paolo. Corruption and growth, *The Quarterly Journal of Economics*, 110(3), 1995.

<sup>2</sup> Daniel Teodorescu, *Romanian Journal of Forecasting* 4/2007.

7. Several key success factors are required to fight corruption in public procurement. The OECD's *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, issued by the OECD Anti-Corruption Division (Directorate for Financial and Enterprise Affairs) highlights three factors in particular:

- Design and implement the right procurement and anti-corruption legislations, enhance enforcement, clear rules on sanctions and penalties are crucial;
- Develop networks of experts with judicial and technical skills to improve prevention and detection within public procurement administration;
- Generate awareness building among staff of procurement administrations and society (private sector) of the effects of bribery and how to apply procurement rules and control mechanisms;

8. Moreover, transparency, accountability, control and professionalism are key factors in promoting integrity and fight corruption in public procurement.

9. In the Romanian Competition Council (hereinafter referred to as RCC)'s view, the anti-corruption provisions which can be found in the Romanian public procurement law (e.g. blacklisting of companies previously involved in corruption) contribute to enhance the transparency and integrity of public procurement. Conflict of interest provisions for civil servants that can be found in the Romanian public procurement law are also important measures to detect and prevent corruption.

10. In addition, the 2006 amendments brought to the Romanian legislation in public procurement in order to eliminate any interference between the different types of public procurement and align the laws to the European Community Directives led to the creation of a well functioning single public procurement authority, namely the National Authority for the Regulation and Monitoring of the Public Procurement (hereinafter referred to as NARMPP), with clear responsibilities in this field, which include monitoring and control of contract allocation.

11. Publication of the awarding contracts to guarantee transparency and to uncover possible irregularities in the awarding of public contracts is also extremely useful.

12. Moreover, in order to fight abuse in public procurement, Romania put the introduction and implementation of e-procurement on the top of its list of priority reforms. As a result, since January 2007, all public procurement announcements of the Romanian government have to be published on the national portal "e-Licitatie" ([www.e-licitatie.ro](http://www.e-licitatie.ro)) and are transferred to the EU Official Journal. It has hence become easier and faster for companies in Romania to participate in public procurement by simplifying access to information and to the bidding process, which is especially important for SMEs.

13. The legislation relating to public procurement provides for the possibility to exclude any enterprise or supplier from participation in the tendering process who has been convicted in the last 3 years of an offence concerning professional ethics, has been found guilty of grave professional misconduct, or it was convicted, in the last 5 years, by definitive court judgement, for participation in a criminal organisation, for corruption, for fraud and/or for money laundering proven by any means which the contracting authority can justify.

14. Actually, all competitors for a project are required to give a written statement on their own liability subject to the sanctions enforced upon the act of forgery in public documents that they have not been convicted in the last 3 years by definitive court judgement, for an act that does not correspond with the professional ethics or for a grave professional misconduct and that they have not been during the last 5

years, sentenced under final judicial ruling of a court for having participated in activities of criminal organisations, for corruption fraud and/or money laundering respectively.

15. In the case of malfeasance of procurement officials, sanctions under criminal law are possible: under section 254 (taking a bribe), section 255 (offering a bribe) and section 256 (promising or receiving undue advantages) of the Criminal Code.

16. For taking a bribe, the procurement official may be punished with imprisonment from 3-12 years and the interdiction of certain rights while in the case of offering a bribe, an individual may be punished with imprisonment from 6 months to 5 years. In the case of promising, offering or giving money, gifts and other benefits, directly or indirectly, to a person who has influence or induces the believe that has influence over an official, that specific official is punished with imprisonment from 2 to 10 years.

17. The prosecutor's offices attached to the courts of law or the National Anticorruption Department may be entrusted to investigate corruption cases according to the dispositions of the Criminal Procedure Code and the Law no. 78/2000 with the subsequent amendments and completions. In general, all cases of high-level corruption fall under the competence of the National Anticorruption Directorate, which is established as a legal entity within the Prosecutor's Office at the High Court of Cassation and Justice (HCCJ). The Romanian Competition Council has not any competence in criminal suits.

18. Moreover, in May 2007, the National Integrity Agency (ANI) was set up, an independent anti-corruption agency designed to remedy shortcomings in the monitoring of conflicts of interest and public officials' assets. The law no. 144/2007 establishing the agency provides that penalties for illicit enrichment, conflict of interest and incompatibilities are beyond the agency's competence, so files would be forwarded to the Prosecutor's Office, disciplinary commissions or fiscal authorities. The ANI can impose fines only for failure to submit documents or for overstepping deadlines for submitting declarations.

### **3. Collusion**

19. Cartels are forbidden by the Romanian Competition Law no. 21/1996. Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violations of the competition, such as:

*[...] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:*

- *Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, mark-ups, as well as any other terms of trading;*
- *Limiting or controlling production, distribution, technological development or investments;*
- *Allocating distribution markets or supply sources according to territorial criteria, sales and purchase volume or other criteria;*

*[...]*

- *Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.*

20. Moreover, the “*de minimis*” threshold for agreements between competitors is not applicable to the agreements regarding prices, sharing the markets and the procurements.
21. Usually, the industries characterised by fringe competitors, high barriers to entry in the respective bidding market, the presence of industry associations, little or no innovation are especially vulnerable to bid-rigging schemes. In addition, more predictable procurement schedules, the regularity of public purchases, few if any alternative products or services that can be substituted for the product or service that is being purchased are preeminent factors that could facilitate collusion in public procurement.
22. In Romania, it appears that the most vulnerable public sector to bid-rigging practices was the health sector. Thus, in 2008, the RCC sanctioned with fines of approximately Euro 22.6 million four pharmaceutical companies for sharing the publicly funded section of the insulin market in the context of a national tender organised in 2003 by the Ministry of Health. The collusive practice in this case aimed at sharing the diabetes product portfolio of a drug manufacturer between 3 distributors.
23. In another important case, 3 distributors who participated in a bid-rigging on the relevant market of dialysis products and equipment in the context of the electronic national tender organised by the Ministry of Health and the National Health Insurance House in 2003 were sanctioned in 2008 with fines exceeding in aggregate Euro 1.5 million.
24. In both cases, the RCC issued a recommendation to the Ministry of Health to conduct annual tenders, under the National Diabetes Programme, respectively the Nefrology-Dialysis Programme as the legal framework provides so that the access of the existing or potential undertakings to the markets is allowed.
25. At present, Romanian rules on public tendering do not require a certification of independent bid determination or a statement of non-collusion to accompany the tender.
26. However, the RCC’s participation as an observer in the OECD Competition Committee’s *Roundtable: Public Procurement – The Role of Competition Authorities in Promoting Competition* (2007) was very positive since has led to many tips on possible anticompetitive practices.
27. For instance, one lesson we learnt from the 2007 OECD roundtable discussions relates to the usefulness of Certificates of Independent Bid Determination (CIBD) and their application in the fight against bid rigging within certain OECD member countries.
28. Acknowledging the importance of introducing such a certificate, the RCC advocated for the introduction of such an obligation in a letter sent by the president of the RCC to the president of NARMPP in the summer of 2009. On that occasion, several strengths of such a document have been highlighted by the RCC such as (i) its informative role about the illegality of bid rigging among the bidders, (ii) prosecution of bid riggers potentially easier, (iii) possibility to apply additional penalties, including possibly criminal penalties, for the filing of a false statement by a conspirator, and (iv) prosecution of a firm that attempts to rig bids becomes possible, even when other bidders do not agree to the proposed scheme.
29. Following recent discussions between high level officials of the RCC and NARMAPP that took place at the RCC’s headquarters about the ways and means to strengthen the inter-institutional co-operation, NARMAPP is now considering using a CIBD in procurement efforts due to bid rigging concerns. Also, the discussions resulted in a mutual agreement with respect to the content of the draft of Memorandum of Co-operation.

30. Finally, because bid rigging may occur alongside other crimes, such as fraud, money laundering, tax violations and public corruption, efforts have been made to strengthen the relationship between the RCC, public prosecutors and the Ministry for Home Affairs. The goal of this strand of work was to explain the legal standards for a violation of the competition law and to raise awareness of indicators of bid rigging.

31. Yet, the RCC signed a Memorandum of Co-operation with the Ministry for Home Affairs that creates incentives also for the effectiveness of the RCC's investigative work, especially with regard to conducting dawn-raids.

#### **4. Fighting Collusion and Corruption**

32. Fighting cartels is a high priority within the RCC. Currently 75% of the RCC's resources are devoted to cartel investigations.

33. The Romanian legislation in the competition field provides high sanctions in the case of cartels, including bid-rigging schemes. These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to the undertaking part of the cartel. These are culpable of committing a contravention.

34. However, there are situations which permit the sanctioning of an individual, when they participate with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1), which includes bid-rigging practices. These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined. The criminal action starts following the Competition Council's notification.

35. To improve the capacity to detect cartels, including bid-rigging, the RCC has improved the transparency of the leniency programme and introduced the marker system following the ECN leniency model. Moreover, at the end of 2009, the RCC set up the Leniency Unit that now represents the legal contact point between the RCC and possible whistleblowers.

36. In the corruption area, individuals engaged in bribery or corruption, are also able to receive leniency. According to the Law 78/2000 on preventing, discovering and sanctioning corruption, the perpetrator is not punished if he/she denounces to authorities the deed before the criminal investigation body is notified for that specific deed.

37. Yet, only one bid-rigging case gave rise to corruption suspicions and consequently to an opening of a criminal file by the Romanian Anticorruption Body. Ultimately, however, the proceedings were discontinued due to lack of sufficient evidence.

#### **5. Advocacy**

38. One way to ensure the efficiency of public procurement by a national competition authority is to exercise an active role within the public procurement procedures and in particular, in the auction design.

39. The intervention of the Romanian Competition Council may be *ex officio* or upon notification by or complaint of a natural or legal person who wishes to ensure the protection and stimulation of competition, a normal competitive environment and promotion of consumers' interest on the public procurement market.

40. Over the past 3 years, the RCC has increasingly been active in the public procurement area in terms of its enforcement and advocacy activities.

41. In terms of its advocacy activity, in several occasions, the RCC pointed out that what matters in order to reduce the risk of collusive practices are the procedures that the public contractors follow when calling for a tender. In particular, the calls do not have to contain unjustified restrictions that would automatically exclude on a discriminatory basis some companies.

42. For instance, in 2006, the Competition Council was asked for a point of view regarding a public procurement procedure for the award of a public supply contract i.e. the acquisition of office equipment consumables. Actually, a group of 8 producers and distributors of rechargeable /compatible consumables and the European Toner & Inkjet Remanufacturers Association (ETIRA) brought to the attention of the Council that in several cases, the terms of the tender dossier did not allow for the participation in the auction of remanufacturers, since only the original brand products were considered acceptable.

43. In analysing the substitutability of the relevant products, the Competition Council found that the equipment manufacturers do not impose the mandatory use of original consumables. This means the users may replace used consumables with remanufactured or compatible ones without breaching the clauses of the service contract with the OEM.

44. Therefore, the terms of the tender dossier were not justified and were considered restrictive from the competition point of view. Requiring from the potential bidders a compatibility certificate for the consumables in question may represent an entry barrier, thus restraining potential bidders from participating in the auction and not granting equity of chances for all.

45. This point of view of the Competition Council was transmitted to the producers' group and professional association in question, as well as to the contracting authorities. It was also made publicly available, through the Competition Council's website. As a result, the design of the auctions was improved, restoring free competition on the relevant market and providing fairness of opportunity for all potential tenderers.

46. More recently, in two other cases, namely the Romanian oncology products market and the paraclinical medical investigation services market, the RCC initiated investigations in order to review a potential breach by the public authorities with duties in the health field of article 9 of the Romanian Competition Law which prohibits any actions of the local or central public administrative bodies that have as their object or may have as their effect the restriction, prevention or distortion of competition. Based on these investigations, the RCC issued several important recommendations aimed at restoring the competitive environment.

47. In the case of the oncology products market, the RCC recommended the Ministry of Health to enforce the removal of the B3 form from the standard documentation for the drafting and presentation of bids within the public procurement for the national health programmes in order to allow the occurrence of real competition between distributors within tenders. The B3 form which actually represents a document issued by the producer and attesting the authorisation of the distributor in view of the delivery of products may have represented an instrument at the hand of the producer, which could have chosen to authorise only certain distributors by discriminating others, a situation that would remove the competition among distributors. The Competition Council recommended also the amendment of chapter III - Sole Source Negotiation Procedure of the Regulations on public procurement conducted in the sanitary field in view of redefining the sole source in the sense that the sole source should refer not only to the situation in which not only there is a sole producer, but also the situation in which there is a single distributor of a certain drug on the Romanian market. The final recommendation was that there should be ensured an annual conduct of tenders for the prevention and control programme of oncology pathology with a view to opening the market not only for the existing producers and distributors, but also for those that have entered the market recently.

48. In the investigation concerning the paraclinical medical investigation services market, the RCC noted that the Ministry of Health and the National Health Insurance House created a competitive advantage to the Euromedic Romania SRL imaging reference centre, thus disadvantaging the other paraclinical medical investigation centres operating on the market by means of a discriminatory regulatory framework and by undertaking some specific obligations towards Euromedic, based on documents concluded by Euromedic such as promoting and recommending the medical services provided by Euromedic so that Euromedic received a substantial amount of work; granting medical or non-medical support; maintaining the exclusivity of Euromedic for the supply of imaging diagnosis services within the Fundeni Clinical Institute.

49. Noting the breach of the transparency, equal treatment of all bidders and the principle of free competition, RCC expressly requested the Ministry of Health and the National Health Insurance House to take actions for the removal of the undertaken obligations that granted a competitive advantage to Euromedic.

50. One important recent initiative taken by the RCC in order to increase the awareness of collusion in public procurement consisted in sending official letters signed by the president of the RCC to all contracting authorities with the purpose of disseminating the Guidelines for Fighting Bid Rigging which were approved by the OECD Competition Committee in February 2009. The main objective followed by the RCC with that occasion was to get procurement officials more engaged in detecting bid rigging, to help them better understand what evidence to look for, and what steps they might take to prevent bid rigging from occurring. The key message the RCC sent through this dissemination activity was that contracting authorities should watch for anticompetitive practices such as collusive tendering and any evidence of suspected collusion in tendering should be brought to the attention of the RCC. The checklist is now placed prominently on the RCC's website portal.

51. Another initiative of the RCC for improving the efficiency of the public procurement process envisages the creation in 2010 of a special unit within the RCC for the specific purpose of fighting bid rigging in public procurement. An important early goal of the unit will be to establish a close working relationship between officials within the RCC and key officials within other parts of the Romanian government with attributions in public procurement.

52. Moreover, as part of its outreach programme, the RCC will organise this spring a number of presentations for officials from Governmental Departments including Ministry of Finance officials responsible for procurement policy, state bodies and agencies. The presentations will focus on two particular issues: "Bid-rigging: When it is likely to happen? How is it investigated" and "The relationship between procurement policy and competition policy" aiming at fostering a better understanding of how procurement processes may impact on competition and value-for money. The main idea behind these advocacy activities which will be carrying on in the upcoming period is to increase the awareness of cartel behaviour and to foster a working relationship between procurement officials and the RCC.