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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## **Working Party No. 3 on Co-operation and Enforcement**

### **Criminalisation of cartels and bid rigging conspiracies – Note by Poland**

9 June 2020

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<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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## *Poland*

### 1. Introduction

1. Public procurement is one of the key economic activities of states<sup>1</sup>. It was designed for efficient government money spending and effective investment. Competition in public procurement, just like in any other types of transactions, promotes benefits such as lower prices, improved quality, higher productivity or increased innovation<sup>2</sup>.
2. Bid rigging, in the horizontal dimension, constitutes a practice preventing, restricting or in other way distorting competition in favour of mutual coordination between contractors, including potential contractors, in public procurement in order to affect its result. Therefore, entities being parties to such prohibited agreement create only an illusion of competition in a public procurement procedure. In that regard, bid rigging conspiracies are one of the most hardcore anti-competitive agreements, restricting competition by their object. By doing so, colluding contractors are going directly against what the contracting authority is trying to achieve through a procurement procedure, i.e. the best possible price and quality of the contract.
3. Polish authorities operating within the areas of competition law, public procurement and criminal law are well equipped with instruments to combat bid rigging. Measures to counteract bid rigging within the Polish legal system are included in the Act of 16 February 2007 on Competition and Consumer Protection<sup>3</sup>, the Act of 29 January 2004 – Public Procurement Law ( hereinafter: “PPL”)<sup>4</sup>, and the Act of 6 June 1997 – Penal Code<sup>5</sup>. Efforts to counteract bid rigging have been a priority of the Polish anti-trust authority – the President of the Office of Competition and Consumer Protection (hereinafter referred to as “President of UOKIK”) – for many years<sup>6</sup>.

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<sup>1</sup> G. Piga, T. Tatrai (eds.), *Public Procurement Policy*, Routledge 2016, p.1.

<sup>2</sup> OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, <https://www.oecd.org/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>.

<sup>3</sup> The Act of 16 February 2007 on Competition and Consumer Protection (consolidated text, Dziennik Ustaw 2019, item 369, as amended).

<sup>4</sup> The Act of 29 January 2004 – Public Procurement Law (consolidated text, Dziennik Ustaw 2019, item 1843).

<sup>5</sup> The Act of 6 June 1997 – Penal Code (consolidated text, Dziennik Ustaw 2019, item 1950).

<sup>6</sup> During the last decade, the President of UOKIK has issued over 60 decisions regarding bid rigging, in cases: RKR-1/2019, DOK-1/2019, RKT-1/2019, RWR-1/2019, RPZ-8/2019, RŁO-7/2019, DOK-2/2019, RGD-12/2019, RGD-13/2019, RGD-11/2019, DOK-3/2019, RKR-3/2018, RGD-5/2017, RWR-6/2017, DOK-2/2017, RPZ-5/2017, RWR-1/2017, RKT-4/2017, RŁO-8/2017, DOK-3/2016, RWR-8/2016, RLU-7/2016, RLU-5/2016, RGD-4/2016, RKR-10/2016, RKR 18/2015, RKT 19/2015, RKT 14/2015, RŁO 11/2015, RŁO 06/2015, DOK 02/2015, RGD 01/2015, RKR 08/2015, RPZ 32/2014, RPZ 30/2014, RLU 29/2014, RGD 21/2014, DOK 11/2014, DOK 10/2014, DOK 09/2014, DOK 08/2014, DOK 01/2014, RKR 35/2014, RKR 30/2014, RKR 21/2014, RBG 47/2014, RPZ 50/2013, RBG 47/2013, RŁO 58/2013, RŁO 59/2013, RŁO 60/2013, RŁO 61/2013, RŁO 62/2013, RKR 51/2013, RLU 40/2013, RLU 37/2013, RKT 46/2013, RWR 31/2013, RPZ 28/2012, RWR 31/2012, RLU 38/2012, RLU 31/2012, RBG 27/2011, RKT 25/2011, RKR 24/2011. All decisions are available at: [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf).

4. From among the aforementioned, the areas of anti-trust and criminal law in particular require efforts to ensure greater synergy, at least at the same level as can be currently observed between competition protection law and public procurement law.

## 2. Legal framework – scope of provisions

5. The scope of the bid rigging prohibition and related sanctions arising from these two sets of rules of law, i.e. anti-trust law and criminal law, reflect common areas as well as certain differences.
6. Pursuant to Article 6.1 (7) of the Act on Competition and Consumer Protection, it is *expressis verbis* prohibited to enter into agreements which have as their object or effect elimination, restriction or any other distortion of competition on the relevant market, in particular ones where undertakings bidding in a procurement procedure or such undertakings and an entity organising that procedure collude to agree on the terms and conditions of bids to be submitted, especially as regards the scope of works or the price.
7. Bid rigging conspiracies have been recognised as one of the most hardcore anti-competitive agreements, which pursuant to Article 7 of the Act on Competition and Consumer Protection cannot be excluded on the basis of the *de minimis* principle.
8. As regards the extent of the aforementioned prohibition on bid rigging, the competition law sanctions any collusive agreements between bidders, as well as agreements between bidders and procurement procedure organiser, with the stipulation that these entities have the status of an undertaking (pursuant to Article 4 (1) of the Act on Competition and Consumer Protection).
9. Pursuant to Article 6.1 (7) of the Act on Competition and Consumer Protection, the prohibition applies to agreements concerning any terms and conditions of bids to be submitted under the procurement procedure. These may be terms and conditions concerning the price or extent of work or any other parameters of bids to be submitted. It is irrelevant whether these terms are considered by the procurement procedure organiser as key or secondary. It is also of no significance whether such an agreement had an effective impact on the results of the procurement procedure.
10. The prohibition on bid rigging established in Article 6.1 (7) of the Act of Competition and Consumer Protection applies to public procurement procedures organised pursuant to the provisions of public procurement law as well as procurement procedures organised by private entities.
11. Moreover, this prohibition applies to agreements intended to affect the results of a procurement procedure, regardless of the stage in time of the procedure at hand (including ones in preparation).
12. Similarly, for the application of the bid-rigging prohibition provided by the Act of Competition and Consumer Protection, a form in which an agreement was reached is irrelevant. With regard to this issue, in one of the latest decisions concerning bid rigging the President of UOKiK found that 6 entities taking part in a public procurement procedure for an airdrop of vaccines against rabies have formed a cartel in the form of consortia bidding. These undertakings have agreed that they will not compete against each other and

- will submit joint bids. If one of them wanted to bid on a contract on its own or be a subcontractor for another entity, it had to obtain approval from the others<sup>7</sup>.
13. Where the President of UOKiK finds that an undertaking has entered into a bid rigging agreement, a financial penalty of maximum 10% of the concerned undertaking's turnover earned in the financial year preceding the year in which the penalty was imposed may be imposed (Article 106 of the Act on Competition and Consumer Protection).
  14. In connection with the entry into force of amendments to the Act of Competition and Consumer Protection of 10 June 2014<sup>8</sup>, the liability of natural persons was introduced. Upon Article 6a of the Polish Act on Competition and Consumer Protection, persons managing the undertaking may be found liable for the entry into an anti-competitive agreement by that undertaking, if their actions or omissions have led to the violation of the prohibition to enter into anticompetitive agreements. The Office of Competition and Consumer Protection may impose a fine of up to PLN 2,000,000 (EUR 500,000) on an individual (Article 106a of the Act on Competition and Consumer Protection). However, both of the aforementioned provisions explicitly exclude the possibility of finding liability or fining managers responsible for bid rigging.
  15. Proceedings held by the President of UOKiK in cases concerning anticompetitive practices require ensuring a high standard of evidence due to the quasi-penal nature of fines imposed on undertakings. As stated by the Supreme Court, "rules for the judicial review of a decision issued by the regulatory authority [*President of UOKiK*] in this respect should meet requirements equivalent to those applicable to the court adjudicating a criminal case"<sup>9</sup>.
  16. As regards criminal law, the primary provision that criminalises bid rigging conspiracies is Article 305 § 1 and § 2 of the Penal Code. Pursuant to Article 305 § 1 of the Penal Code, criminal liability is borne by the one who (i) for the purpose of material gain (ii) enters into an agreement with another person, (iii) acting to the detriment of the owner of assets or a person or institution for the benefit of whom (iv) the (public) procurement procedure is held<sup>10</sup>. However, if the aggrieved party is someone other than the State Treasury, the offence is prosecuted at the request of the aggrieved party.
  17. Article 305 of the Penal Code applies to entry into a conspiracy by natural persons, not undertakings<sup>11</sup>.
  18. As regards the subject-matter of the aforementioned provision, some difficulties of interpretation may be encountered in both doctrine and case law. The highest number of

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<sup>7</sup> Decision of the President of UOKiK No. DOK-2/2019 (the decision is not final). Decision can be found at: [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf/1/3FBAB5E632431339C1258518002D9920?editDocument&act=Decyzja](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/3FBAB5E632431339C1258518002D9920?editDocument&act=Decyzja).

<sup>8</sup> The Act of 10 June 2014 amending the Act on Competition and Consumer Protection and the Act – Code of Civil Procedure, *Dziennik Ustaw* 2014, item 945.

<sup>9</sup> Decision of the Supreme Court of 21 April 2011, case file No. III SK 45/10, LEX No. 901645.

<sup>10</sup> See also M. Minkiewicz, *Ochrona zamawiającego przed znowami przetargowymi w polskim prawie karnym, antymonopolowym oraz prawie zamówień publicznych*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2015, No. 4 (4).

<sup>11</sup> However, liability for a committed offence referred to in Article 305 of the Penal Code may also be borne by an undertaking – pursuant to provisions laid down in the Act of 28 October 2002 on the Liability of Collective Entities for Offences Punishable by a Fine (*Dziennik Ustaw* 2020, item 358).

discrepancies arises from the interpretation of the term “public procurement”<sup>12</sup>. In addition, the practical application of Article 305 of the Penal Code shows some interpretative vagueness of causative acts which comprise the offence. This may lead, in consequence, to the discontinuation of proceedings or the issuing of different judgements in relation to the similar facts<sup>13</sup>.

19. It happens also that it is impossible to punish a specific person under criminal law due to the fact that they do not meet the statutory requirements to be recognised as having committed an act – such as e.g. the purpose of material gain, or having caused damage to the contracting authority – despite being in obvious contradiction with competition law<sup>14</sup>.
20. Currently, a criminal sanction prescribed for a bid rigging offence under Article 305 § 1 and § 2 of the Penal Code is imprisonment for up to 3 years.
21. The plan of amendments to the Penal Code announced to be implemented in the spring of 2018, under the name “*Justice and Security*”, included in the draft Act of 13 June 2019 amending the Act – Penal Code and Certain Other Acts<sup>15</sup> provides for the introduction of a number of modifications to Article 305 of the Penal Code in its current wording<sup>16</sup>. Firstly, the term “public procurement”, which caused serious interpretative doubts, was replaced with terms “tender” and “public procurement procedure”. It was also clearly indicated that bid rigging with regard to tenders that are both: on-going and those only being prepared will be penalised. In addition, two major changes raising the maximum statutory sentence were introduced, i.e.: the maximum sentence of imprisonment was raised to up to 5 years; and what is more acting for the purpose of material or personal gain became grounds for raising the maximum sentence – up to as many as 8 years of imprisonment. Increasing the severity of criminal sanctions may have a positive deterring effect.
22. The procedure, forms and conditions for awarding public procurement contracts in Poland is regulated by the Act of 29 January 2004 – Public Procurement Law. The Act applies when a public procurement contract is awarded by one of the entities specified in the Act (these are primarily public finance sector entities or entities with public assets at their disposal), and the subject-matter of the agreement are deliveries, services or construction works. Pursuant to the Act, public procurement contracts should be awarded in compliance with the principles of equal treatment, universality, impartiality and objectivity, transparency, written form and fair competition.
23. The principle of fair competition is *inter alia* implemented through exclusion grounds from public procurement procedures. Compulsory exclusion grounds include, but are not limited to, cases where:

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<sup>12</sup> See M. Makowski, *Ochrona prawnokarna postępowania o udzielenie zamówienia publicznego*, Prokuratura i Prawo 2017, nr 7–8.; K. Buczkowski, „Zmowy przetargowe” jako jedna z postaci przestępstwa z art. 305 k.k., PRAWO W DZIAŁANIU. SPRAWY KARNE 23/2015.

<sup>13</sup> M. Sieradzka, *Przestępstwo zmowy przetargowej [Bid rigging offence]*, C.H. Beck 2016. See also M. Makowski, *Wejście w porozumienie na szkodę zamawiającego – (de)penalizacja zmwów przetargowych w systemie zamówień publicznych*, “Palestra” 2014, No. 3–4.

<sup>14</sup> M. Sieradzka, *Przestępstwo zmowy przetargowej [Bid rigging offence]*, C.H. Beck 2016.

<sup>15</sup> Draft bill available at: <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=3451>. The said draft bill was then submitted by the President of the Republic of Poland to the Constitutional Tribunal for the purpose of examination of its compliance with the Constitution (for reasons not related to the proposed amendments to Article 305 of the Penal Code).

<sup>16</sup> M. Makowski, W przetargach musi się dużo zmienić. Również w karaniu, Rzeczpospolita - Opinie, 08.02.2019.

- the contractor has been convicted by a final decision for a criminal offence referred to in Article 305 of the Penal Code (Article 24.1 (13)(a) of the PPL);
  - a member of the managing or supervisory body of the contractor, a partner in a general partnership or limited liability partnership, or a general partner in a limited partnership or a limited joint-stock partnership, or a proxy of the contractor has been convicted by a final decision for a criminal offence referred to in Article 305 of the Penal Code (Article 24.1 (14) of the PPL);
  - the contractor has entered into an agreement with other contractors with the purpose of disrupting competition between contractors in a contract award procedure, provided that the contracting authority is able to prove this with adequate evidence (Article 24.1 (20) of the PPL).
24. One of the principles protecting competition in procurement procedure is also the requirement pursuant to which the contractor may only submit one bid (Article 82.1 of the PPL), which at the same time prevents the submission of multiple separate bids by contractors linked by direct economic ties within a capital group. Moreover, pursuant to Article 24.1 (23) of the PPL, contractors who submitted separate bids, partial bids or requests to participate in a procedure while being members of the same capital group as defined in the Act on Competition and Consumer Protection are subject to exclusion from the contract award procedure, unless they demonstrate that the links between them do not disrupt competition in the contract award procedure.

### 3. Areas of synergy

#### 3.1. Cooperation between authorities – exchange of information and evidence

25. Despite different legal bases described above, including the extent of liability for bid rigging under competition protection law and criminal law, authorities established to combat bid rigging cooperate with each other.
26. Evidence obtained in criminal proceedings may, in particular, affect evidentiary findings in proceedings concerning anticompetitive agreements held by the President of UOKiK. This is particularly important in those cases where a given action can be effectively prosecuted and punished by the President of UOKiK, but it would not be possible under the Penal Code, in particular because of the failure to meet the criteria of a crime.
27. In this regard, the President of UOKiK should be allowed to use evidence collected by the criminal law enforcement authorities - including those from operational control, such as wiretapping.
28. Information from an investigation conducted by the Appellate Public Prosecutor's Office in Warsaw, related to the procurement procedures for fingerprints readers, including information concerning the organisation and course of that procurement procedure as well as copies of explanations submitted in the aforementioned investigation by suspects enabled the President of UOKiK to initiate antitrust proceedings and then issue a decision DOK-8/2014 finding a bid rigging.
29. In addition, the mutual exchange of information on suspicious behaviour contributes to increasing the detection and sanctioning of collusive tendering. For this purpose, the President of UOKiK began cooperation with the majority of the institutions responsible for counteracting bid rigging, e.g. by conducting trainings. What is more, the President of

UOKiK signed memoranda of cooperation with the Internal Security Agency and the Public Prosecutor's Office.

### 3.2. Leniency programme

30. Leniency programme is a key tool for detection of cartels, and thus contributes to efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. The Polish leniency programme is detailed in Chapter 2, Section VII of the Act on Competition and Consumer Protection.
31. Leniency programme is functioning properly as regards anticompetitive agreements in general, however the instrument is not yet completely effective with respect to bid rigging conspiracies. This may be due to the fact that, as it was described above, bid rigging conspiracies are the only type of anticompetitive agreements which apart from administrative liability under the Act on Competition and Consumer Protection is also subject to liability under the Penal Code. Therefore, participants in bid rigging conspiracies may not be interested in benefiting from the leniency programme, which consists solely in the immunity or reduction of a fine imposed by the President of UOKiK, and doesn't affect the criminal liability.
32. Positive changes in that respect will result from the implementation of Directive 1/2019 ("Directive ECN+").
33. The harmonisation of leniency programmes provided for in Articles 17-22 of the Directive includes ensuring adequate protection of undertakings applying for leniency.
34. As stated in recital 64 of the Directive, legal uncertainty as to whether natural persons (including those on managerial positions and workers who do not perform managerial functions) are protected from individual sanctions for their participation in a secret cartel is a factor that discourages potential leniency applicants. In Article 23, Directive ECN+ harmonises protection of current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities from both criminal and administrative sanctions and specifies the conditions which must be met in order for a natural person to be protected.
35. Under Polish law, Article 113j of the Act on Competition and Consumer Protection introduces a rule that an application for leniency submitted by an undertaking also covers persons holding managerial positions of that undertaking. This means that these individuals are also protected against fines imposed in proceedings before the President of UOKiK pursuant to Article 106a. Therefore, to that extent, Article 113j of the Act on Competition and Consumer Protection constitutes a partial implementation of Article 23.1 of the Directive, which provides for the protection of natural persons against administrative sanctions.
36. As regards the protection of individuals against criminal sanctions, the future transposition of Article 23.2 of the Directive into Polish legal system should translate into protection against criminal liability upon Article 305 of the Penal Code - insofar as the offence overlaps with a bid-rigging prohibition specified in Article 6.1 (7) of the Act on Competition and Consumer Protection or constitutes a breach of Article 101 of the Treaty. In this respect legislative changes should be introduced in order to exclude the punishability of a natural person who committed an offence referred to in Article 305 of the Penal Code, when an undertaking for which that natural person operated filed a leniency application to the President of the Office of Competition and Consumer Protection.

### **3.3. Liability of natural persons under the Act on Competition and Consumer Protection – *ne bis in idem* issue**

37. As a rule, exclusion of Article 6.1 (7) (providing for the prohibition of bid rigging agreements) from the possibility of assigning liability and fining natural persons upon Articles 6a and 106a of the Act on Competition and Consumer Protection effectively eliminates possible overlaps between competition law provisions and criminal provisions imposing criminal sanctions on individuals.
38. In this context, is also necessary to underline the facultative nature of sanctions imposed by the President of the Office of Competition and Consumer Protection.

## **4. Conclusions**

39. The degree of synergy between competition law and criminal law in counteracting bid rigging agreements in Poland is currently quite high.
40. Lawmakers have rightly observed the need to introduce amendments to provisions concerning bid-rigging offences in penal law.
41. It is necessary to foster further cooperation between authorities competent to counteract bid rigging, and especially mutual exchange of information and evidence, in order to improve the effectiveness of identifying conspiracies. The expected development of case law should contribute to the removal of all doubts as to the ability of the President of UOKiK to use evidence collected in the course of an operational control within the criminal proceedings.
42. An expected positive change will also be the implementation of Article 23 of Directive ECN+, which will provide protection for members of senior management and employees of the applicant for leniency against sanctions imposed in criminal proceedings, which will translate into a higher attractiveness and effectiveness of the leniency programme.