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Hungary

The Hungarian Competition Authority's recent practice on bid rigging – the ANZSO decision

The Hungarian Competition Authority terminated proceedings initiated against four undertakings, active in the valuation of real property, for alleged bid rigging. We highlight below the main competition law issues that arose in the case and discuss what may be learned from them.

Facts of the case

The Hungarian State Holding Company ('SHC'), as a contracting authority, published over the course of a number of years tender notices for the valuation of agricultural land and other real property in the ownership of the Hungarian state. In the course of a public procurement procedure relating to the tender notice published at the end of 2009 for the valuation of agricultural land ('Agricultural Tender'), certain candidates withdrew their bids after the publication of the result of the first phase of the negotiated procedure and certain successful tenderers refused to conclude the agreement with the SHC.

On 15 June 2010, the Hungarian Competition Authority ('GVH') carried out an unannounced inspection at the premises of the tenderers (FHB Ingatlan, ANZSO, Landimpex and Patria Consult)¹ and initiated competition supervision proceedings *ex officio* because it suspected that an anti-competitive agreement existed between the tenderers in allegedly fixing bid prices and allocating parts of the tender. Although the relevant conduct of the tenderers was only specified in connection with the Agricultural Tender, the decision initiating the competition supervision proceedings indicated a wider scope of the investigation, extending to all public procurement procedures published by the SHC in 2008 and 2009 for the valuation of agricultural land and other real property in the ownership of the Hungarian state.

Legal assessment

It is settled case law of the GVH and the courts that in the event of bid rigging, the public procurement procedure itself constitutes the relevant market and the

market share of the undertakings must be established on the basis of the number of submitted bids.² It is also settled case law of the GVH that if there is an agreement restricting competition by its object (ie, price-fixing or market sharing agreements), the market share of the undertakings and the definition of the relevant market is less important.³ Although the exact definition of the relevant market and the market share of the undertakings is irrelevant, if the suspicion is that a price-fixing or market sharing agreement exists, the GVH insists on examining market conditions, in particular in order to establish whether the agreement was of a horizontal nature (ie, whether the undertakings were competitors). Furthermore, it is settled case law of the European Court of Justice⁴ and the GVH⁵ that in order to assess whether the object of an agreement is anti-competitive, what must be examined, *inter alia*, is the content of its provisions, the objectives it seeks to attain and the economic and legal context it is a part of.

One of the significant features of the market was that due to differences in the applicable regulations and in the methods of valuation, the valuation of agricultural land and the valuation of other real property constitute separate markets. Therefore, undertakings active in the land valuation services may not be necessarily rendered competitors of undertakings active in the valuation of agricultural land. Even within a separate market of valuation of agricultural land, there are significant differences, in particular with respect to costs of the valuation, depending on the features of the actual agricultural plot (eg, the geographical position or the size influences costs and plots including forests require additional expertise).

Another significant feature of the market was that banks that generate most of the turnover of undertakings active in land valuation services use subcontractors on a regionally exclusive basis. As a matter of fact, ANZSO and Patria Consult concluded several subcontractor agreements in connection with land valuation services with FHB Ingatlan with respect to different counties and different projects.



HUNGARY

The actual circumstances of the public procurement procedure were also relevant. The Agricultural Tender was a two-phase negotiated procedure, where the contracting entity (in this case SHC) published the aggregate result of the participation requests of the candidates, enabling the candidates becoming tenderers to adjust (finalise) their bid in the course of the second phase of the public procurement procedure.

Landimpex submitted that it had no contractual or business relationship with FHB Inगतlan or any other tenderer, and furthermore, that it had not concluded the contract on the basis of the Agricultural Tender because the agreement offered by SHC deviated significantly from the draft agreement published with the Agricultural Tender. Patria Consult submitted that although it was the subcontractor of FHB Inगतlan, it had not communicated with FHB Inगतlan regarding the Agricultural Tender and that it had not concluded the contract on the basis of the Agricultural Tender because the deadline for conclusion had expired due to prolonged negotiations with SHC.

The closest relationship seemed to have existed between ANZSO and FHB Inगतlan. Although the focus of the investigation was the Agricultural Tender, other public procurement procedures published by the SHC were also investigated as the scope of the investigation was extended on the basis of the decision of the GVH initiating the competition supervision proceedings. In the public procurement procedure relating to the tender notice published at the end of 2008 for the valuation of agricultural land, FHB Inगतlan was the successful tenderer and ANZSO was a notified subcontractor. Since FHB Inगतlan did not have sufficient financial standing and ANZSO did not have sufficient references, they could not be considered to be competitors and their cooperation was undisputed. It was actually this participation that enabled ANZSO to compete with FHB Inगतlan the following year in the Agricultural Tender. FHB Inगतlan and ANZSO also cooperated in the public procurement procedure relating to the tender notice published at the end of 2009 for the valuation of other real properties in the ownership of the Hungarian state, again due to the rigorous conditions set forth in the tender notice.

In the Agricultural Tender, FHB Inगतlan and ANZSO were competitors, where ANZSO submitted a bid with respect to each of the 118 separate lots of the tender. After the first phase of the negotiated procedure, ANZSO

withdrew two-thirds of its bids, a decision which ANZSO attributed to cost savings. ANZSO submitted that it dropped the bids with respect to lots that were not in a single county and lots that involved the valuation of agricultural plots with forests. In the end, ANZSO won most of the lots where it had continued to bid and concluded a contract with SHC.

The GVH concluded that sufficient evidence could not be found that could support the facts alleged in the decision initiating the competition supervision proceedings, in particular evidence showing the alleged illegal contact between the tenderers and it was unlikely that the continuation of the proceedings would lead to a different conclusion.

On 15 December 2010, the GVH adopted a decision terminating the competition supervision proceedings.

Conclusions, comments

Although the case ended with the termination of the proceedings by the GVH, it is not the finding, rather the particular circumstances of the case and reasons of the termination that are noteworthy.

The initiation of the proceedings in itself showed that any prima facie suspicious conduct in the course of public procurement procedures may lead to an investigation by the GVH, a tendency that should be kept in mind by companies that produce some of their turnover through public contracts.

Utmost care should be provided for with respect to evidence used in competition supervision proceedings and parties must step up proactively in connection with any seized documents that could be considered suspicious by the competition authorities. It is recommended that companies provide to the GVH the context of the documents along with reasonable explanations. Such action is vital to achieve termination in the investigation phase. If there is no suspicious document that could be rendered as direct evidence of an agreement, competition authorities may still deem the conduct of the involved undertakings a concerted practice. Since concerted practices may only be established if there is no reasonable explanation for the parallel conduct of undertakings other than collusion,⁶ parties must focus on providing adequate explanations of their market conduct.

According to settled case law, there is an infringement of competition law if

two independent undertakings without objective economic reasons form a consortium in order to participate in a public procurement procedure in which they could participate with a prospect of being successful individually.⁷ Therefore, on the one hand, in a bid rigging context, providing adequate reasoning for the cooperation of two individual undertakings is crucial. On the other hand, the cooperation of two individual undertakings may only be anti-competitive if they have a prospect of being successful individually.

Due regard must be paid to the regulatory context in bid rigging cases. Informational exchanges between competitors concerning prices may be held to be a hardcore restriction of competition, since it enables the application of different price levels that would prevail in the absence of such exchange.⁸ Nevertheless, in negotiated procedures, competitors may lawfully obtain information on the bid prices submitted by their competitors in order to adjust their own bids in the second phase of the procedure.

Although it is settled case law of the GVH that if contractors and subcontractors

conclude mirror contracts, according to which both undertakings may end up in either position (contractor or subcontractor) regarding one and the same project, their conduct may be qualified as anti-competitive.⁹ Although a subcontractor agreement existed between FHB Ingatlan and ANZSO and it could have been a *prima facie* reasonably foreseeable scenario that ANZSO would become the contractor of FHB Ingatlan in the Agricultural Tender, due to a thorough analysis of the circumstances of the case, no such finding was made.

Notes

- 1 Salans acted as legal counsel for one of the undertakings involved in the proceedings.
- 2 See Judgment No EBH 2009.2023 of the Hungarian Supreme Court.
- 3 See Decision No Vj-195/2007 of the GVH.
- 4 See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291.
- 5 See Decision No Vj-180/2004 of the GVH.
- 6 See Decision No Vj-138/2002 of the GVH.
- 7 See Decision No Vj-149/2003 of the GVH.
- 8 See Decision No Vj-56/2003 of the GVH.
- 9 See Decision No Vj-154/2002 of the GVH.