

# Penalty for first Czech Bid Rigging Case Confirmed by Court

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Bid rigging has for a long time been a merely theoretical example of criminal liability in Czech Antitrust law without any actual cases decided. Until 2010 with the introduction of criminal liability for hard-core horizontal cartels, this was one of the very few cases of cartels where one could actually think of criminal liability of the acting persons.

Following a police raid in 2006, however, the Czech Antitrust Office in 2010 (file No. S159/2009/KD) handed out penalties in the overall amount of about EUR 200,000 to five participants in a bid rigging cartel. While this certainly was not the first one to exist in the Czech Republic, this was the first one to be sanctioned by the Antitrust Office.

The background is a tender for accommodation-related services issued by the Czech Ministry of Defense in 2005. The original number of 12 participants was decreased by lottery to five. The five parties, under the leadership of one ring leader, agreed in detail the offers and even exchanged draft papers to be handed in the tender. Evidence of the cartel documented in very explicit e-mail exchanges by the five participants was gained in the police raid and through some witness statements during investigations. For the acting persons, bid rigging seemed to be quite a normal activity with little awareness of committing a criminal act.

The Office issued fines in the amount of 3 % of the turnover of the participants which lead to the paradox consequence that the ring leader despite having its penalty increased by 30% for this function, paid considerably less than other parties to the cartel.

The argument that individual participants have been persecuted under criminal law as natural persons was refuted by the appeal proceedings as not creating a *ne bis in idem* -situation. Both the appeal in the administrative proceedings as well as the proceedings at the administrative court (decided June 2013) confirmed the original decision by the Office.

During the ongoing crisis of the Czech construction sector, despite all attempts to achieve higher transparency in public tenders, the economic situation will force more desperate actions by (not only) small construction firms trying to gain any turnover in order to survive. Therefore the Czech Republic should welcome the message by the court that bid rigging may be sanctioned not only as a criminal act but also lead to considerable penalties.

Hopefully, this will also serve as an incentive to the Czech Antitrust Office to look more intensely into bid rigging cases, particularly as it serves also as the Czech Republic's appeal authority for public tenders. With the present track record of overall only 4 first instance-cartel decisions each in 2010 and 2011 and only one in 2012, and moreover most of them being vertical cartels, the dissuasive effect of the antitrust law was in the past for this part of economic activity obviously often neglected.

But encouraging new signs exist. One decision with a penalty of about 4 Mio EUR (waste disposal) was already issued in 2013. Overall in 2012 four proceedings in bid rigging cases have been started and the President of the Office has declared bid rigging to be one of the Antitrust Office's focuses for the present year.