

When Is Participation In A Bid-Rigging Cartel Deemed To Have Ceased To Exist?

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On 14 January 2021, the Court of Justice of the European Union (“CJEU”) confirmed that participation in a bid-rigging cartel ends when the basic characteristics of the contract between the “successful” tenderer and the contracting (public) authority are determined (C-450/19 – Kilpailu- ja kuluttajavirasto, ECLI:EU:C:2021:10). This has a major impact on the limitation period, which generally starts to run on the day following the day on which the infringement was committed.

In this article, I will briefly analyse this issue as addressed by the Finnish courts and the CJEU’s decision, followed by a comparison with Czech case law. Finally, I will also focus on the private enforcement of competition law and its relevance to bid-rigging cases.

Public tender in Finland

In 2007, the Finnish national electricity transmission operator launched a public tender for the construction of a high-voltage transmission line in Finland. Entel Group Oy won the contract. Six years later, the company Empower Oy submitted a leniency application to the Finnish Competition and Consumer Authority (“NCA”), revealing bid-rigging practices with undertaking Entel (agreements on prices, margins and market sharing). The Finnish NCA intended to fine Entel EUR 35 million, for its single and continuous competition law infringement from October 2004 to March 2011. The Finnish court on appeal disagreed with the argumentation presented by the NCA, dismissing the application for the fine and ruling in favour of Entel because the case was already time-barred (under Finnish law, the power of NCA to impose fines or penalties for infringing substantive rules governing competition is subject to a five-year limitation period). Subsequently, the Finnish Supreme Administrative Court referred the question to the CJEU, asking for the clarification of the exact moment when the competition infringement was committed.

CJEU decision

There are two solutions to this question; only one is in compliance with EU law. Either the NCA analyses all the economic effects of the bid-rigging cartel (generally such effects continue until the work in question is completed/final payment is made) or the NCA focuses exclusively on the tender procedure. In the case at hand, the CJEU ruled in favour of the latter, and therefore the infringement is committed once the manipulation of a tender procedure is complete. However, it should be noted that this case concerns a single bid-rigging infringement, and the CJEU did not elaborate on the question of continuous bid-rigging infringement (agreement on rigging several bids and creating a bid-rigging succession scheme). In addition, in such cases, the limitation period commences on the date the infringement ceases. However, the EC has previously treated this deadline as the date when the Commission’s investigation commenced unannounced inspections (Elevators and escalators, [OMP/E-1/38.823](#)). The question of whether such a type of infringement is considered continuous or single but repeated has therefore not yet been completely answered. However, the CJEU ruling might pave the way for future argumentation in favour of single, repeated infringement (e.g. in the Czech NCA’s decision in [Swietelsky and others, S426/2012/KD](#)).

The CJEU provided general guidance, as cases must be assessed individually and in the light of all particular circumstances. Therefore, the exact moment when the participation in the bid-rigging cartel occurred may vary from case to case, but always at the latest at the time when the essential characteristics of the contract (mainly the price), have been definitively determined, and the contracting authority has already been deprived of an opportunity to obtain goods, works or services in question under normal market conditions.

This ruling is welcomed because it supports legal clarity regarding limitation periods for bid-rigging cases. I fully support the CJEU decision; an undertaking is not harming competition after the bid submission for the simple reason that there is no longer any competition on the market anymore (the public authority usually cannot replace the successful supplier and, on the other hand, the chosen supplier usually cannot terminate the agreement). In the Czech Republic, the single bid-rigging cartel agreement ceases to exist as of the date when a/the bid is submitted (Autocont [S0257/2017/KD](#), Garden Studio [S230/2012/KD](#)). The tenderer usually encloses an already signed contract, which is then signed by the public authority at the end of the public procurement procedure. For dynamic purchasing systems, the bid-rigging cartel is present until the contracting authority issues its decision on the winning offer.

The Finnish, German and Latvian Governments considered that setting too short a duration period for the infringement would jeopardize the efficiency requirements laid down in Article 101 of the TFEU. The CJEU has confirmed Advocate General Pitruzzella’s opinion (ECLI:EU:C:2020:698) that the effective enforcement of Article 101 of the TFEU cannot justify an artificial extension of the duration of the infringement in order to initiate proceedings (principle of legality).

The above governments also contested that the economic effects would have harmful consequences, in particular in the form of higher electricity distribution rates charged to consumers (harm to the consumer). The CJEU observed that a distinction had to be made between the restrictive effects of a cartel on competition (exclusion of competing tenderers and limiting the contracting authority’s ability to obtain the contracted goods, works or services under conditions of effective competition) and more far-reaching economic impacts to the detriment of other market participants.

Private enforcement

Although the limitation period for NCAs/EC commences after the conclusion of the contract, consumers and even the contracting authority may claim damages in a national court. The limitation period for an action for damages is preserved thanks to extensive CJEU case law (Manfredi, C-295/04 – C-298/04, ECLI:EU:C:2006:461; Cogeco C-637/17, ECLI:EU:C:2019:263) and Article 10 of Directive 2014/104/EU. The CJEU always emphasizes that the duration of the limitation period in cases of competition law private enforcement cannot be so short that it renders the exercise of the right to claim compensation practically impossible or excessively difficult. Generally, it is understood that the limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

- of the behaviour and the fact that it constitutes an infringement of competition law;
- of the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

A claimant’s “knowledge” is usually understood to commence once the final decision is made by the national competition authority or by a reviewing court. The Finnish national electricity transmission operator/consumers might therefore consider filing a private antitrust action after the final decision of the Finnish court. There is already a similar damage case arising from cartel agreements in Finland ([Vantaan kaupunki vs Skanska Industrial Solutions Oy](#) and others).

Conclusion

The CJEU’s decision creates legal clarity and puts further pressure on the national NCA/EC to investigate quickly (not only) bid-rigging cases and to take carefully formulated decisions so harmed consumers and other stakeholders can fully exercise their right to seek damages.