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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT – THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING COMPETITION

-- Germany --

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The attached document is submitted by Germany to Working party No. 3 of the Competition Committee FOR DISCUSSION under item VI of the agenda at its forthcoming meeting on 5 June 2007.

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1. Principles of German Public Procurement Law

1. The German public procurement law traditionally focuses primarily on the public sector as the contracting entity by setting clear-cut requirements for the award of public contracts. In this context the prime objective of the rules regulating public procurement is to oblige the contracting entity to conduct purchases based on the principle of economic efficiency. A set of principles serve to implement this objective and characterise German public procurement practice: the civil law principle, the competition and transparency principle, the principle of long-term efficiency and the principle of decentralised procurement.

2. Above all the competition and transparency principle and the principle of decentralised procurement also contribute to maintaining competitive structures in the procurement markets. Under the principles of public procurement law anti-competitive and unfair practices are thus to be combated. Furthermore public procurement law provisions include rules under which tenders that involve inadmissible anti-competitive agreements will be excluded from the award procedure.

3. It is the responsibility of the public procurement tribunals to monitor compliance with these principles. The three public procurement tribunals of the Federation[1] are set up at the Bundeskartellamt. They are responsible for reviewing, upon request, whether public contracting entities have met their obligations in the award procedure.[2] The tribunals are entitled to take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected.

4. The organisational structure of the public procurement tribunals is comparable to that of a court. The tribunals do not receive any political instructions and their decisions are made by a collegiate body consisting of a chairman and two associate members. In comparison with other jurisdictions, this is a very specific feature of the German system, i.e. the fact that first-instance reviews of a decision under public procurement law are carried out by independent tribunals, and not by the contracting entity itself. This guarantees a high degree of transparency in the review of public procurement decisions.

5. In exercising their tasks the public procurement tribunals have the same investigatory powers as the Bundeskartellamt itself. They thus have very extensive powers to obtain information and are even entitled to search the business premises of companies concerned. In practice, however, in cases of suspected collusive tendering, the Bundeskartellamt and not the public procurement tribunals takes action and follows up the suspicion, conducting the respective searches, etc., as collusive tendering is punished as a violation of general competition law.

6. Thus, in practice the public procurement tribunals focus on the enforcement of provisions under public procurement law, and the Bundeskartellamt on the enforcement of general competition law, particularly cartel law.

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1 Apart from these there are also public procurement tribunals at German *Länder* level. However, their number varies greatly across the different *Länder*.

2 Review by the public procurement tribunals presupposes that certain thresholds are met. These thresholds, which are based on directives of the European Union, are, at present, as follows: 130.000 € as regards public service and supply contracts awarded by the highest administrative authorities of the Federal Republic of Germany, 200.000 € as regards such contracts awarded by other public entities and 5 Mio. € as regards public works contracts.

2. The prosecution of collusive tendering under competition and criminal law

7. Collusive tendering is prohibited by the ban on cartels according to Art 81 EC Treaty and Section 1 of the Act against Restraints of Competition (ARC). In the past years the Bundeskartellamt has fined several cartels which operated in bidding markets (e.g. removal services, ready-mixed conrete, firework devices, etc.).

8. A particular characteristic of bid rigging is that it is the only cartel agreement in Germany which is also prosecuted as a criminal offence (Section 298 of the Criminal Code).[3] In this case the public prosecutor's office is responsible for prosecuting the individuals involved, and the Bundeskartellamt prosecutes the companies.

9. The Bundeskartellamt's investigation powers and techniques in the process of uncovering collusive tendering are identical with those in other cartel proceedings. As mentioned before, these include extensive investigation powers such as e.g. the right to conduct searches. In uncovering cartel agreements, and thus also collusive tendering, the Bundeskartellamt also benefits from its in-depth market knowledge in all industry sectors which results from the sector-specific structure of its Decision Divisions. The various markets are thus continually and carefully monitored. And finally the leniency programme is also applicable in bid rigging cases. In Germany this has already contributed to uncovering cartels in a large number of proceedings.

3. Design of public procurement proceedings to generate optimal competition

10. Although, as a rule, it is the public procurement tribunals' task to enforce the provisions relating to the award of public contracts, there are sometimes cases in which the Bundeskartellamt sets very specific conditions for award proceedings in order to create or maintain competition.

3.1 Bidding consortia

11. To mention is the case law which specifies the conditions under which bidders are allowed to submit a joint bid in an auction. Such bidding consortia can be found in virtually all auction markets but are most frequent in the construction industry. A bidding consortium between two or more significant competitors typically violates the ban on cartels if both companies would have submitted a bid absent the agreement to bid jointly. Setting up a bidding consortium is therefore a cartel agreement if bidding separately would have been a viable and rational business decision and if the agreement appreciably restricts competition. Bidding consortia can also fall under the scope of German merger control.

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[3] Section 298 of the German Criminal Code (StGB): **"Section 298 Agreements in Restriction of Competition upon Invitations to Tender**

(1) Whoever, upon an invitation to tender in relation to goods or commercial services, makes an offer based on an an unlawful agreement which has as its aim to cause the organizer to accept a particular offer, shall be punished with imprisonment for not more than five years or a fine.

(2) The private awarding of a contract after previous participation in a competition shall be the equivalent of an invitation to tender within the meaning of subsection (1).

(3) Whoever voluntarily prevents the organizer from accepting the offer or from providing his service, shall not be punished under subsection (1), also in conjunction with subsection (2). If the offer is not accepted or the service of the organizer not provided due in no part to the contribution of the perpetrator, then he will be exempt from punishment if he voluntarily and earnestly makes efforts to prevent the acceptance of the offer or the providing of the service."

Case example: Prohibition of joint participation by Rethmann and Tönsmeier in GfA Köthen[4]

12. Rethmann, Tönsmeier and the public-owned GfA Köthen were active in various local disposal markets, especially in the market for the collection and transport of residual waste, waste paper and other types of waste. In a tender to privatise GfA Köthen, Rethmann and Tönsmeier submitted a joint bid. In November 2004, the Bundeskartellamt prohibited the joint participation of Rethmann and Tönsmeier in GfA Köthen. Both the formation of a bidding syndicate by Rethmann and Tönsmeier and the formation of a joint venture constituted illegal anti-competitive agreements within the meaning of the ban on cartels. As a result of the formation of the bidding syndicate only one joint bid was submitted in the tender to privatise GfA Köthen instead of two independent bids. Rethmann, the second-largest German waste disposal company, and Tönsmeier, a well-established medium-sized enterprise, would both have been able to submit an independent bid. According to the Bundeskartellamt's evaluation Rethmann and Tönsmeier would also have coordinated their competitive behaviour in the relevant geographic market after the merger as a consequence of the formation of the cooperative joint venture. Furthermore, the merger would have strengthened a dominant oligopoly in the markets for the collection and transport of residual waste and waster paper in a geographic area of approx. 100 km surrounding the District of Köthen.

3.2 Auctioning obligations as a remedy in antitrust enforcement and merger control

13. In some cases the obligation to conduct an auctioning process can be an effective remedy in antitrust enforcement. In the Bundeskartellamt's practice there are some relevant cases of this, both in abuse control and merger control. Generally speaking, this kind of remedy can be effective if it serves to open up markets and thus promotes competition on a long-term basis. Within the context of German merger control, remedies imposed in a clearance decision must not be aimed at subjecting the merging companies to a permanent control of conduct. The Bundeskartellamt can thus only clear a merger subject to structure-related remedies. These may be structural remedies in the narrower sense (e.g. selling parts of the company) or remedies aimed at opening up markets by reducing barriers to entry. The latter may include auctioning obligations. Two relevant cases are reported below.

Case example: DSD cost savings through auctions[5]

14. Under the German Packaging Ordinance companies are obliged to take back and dispose of the packaging which they have brought into circulation. The end consumers do not pay directly for the waste disposal but rather the disposal costs are borne by the company circulating the packaging. The company circulating the packaging discharges its obligation to take back and dispose of the packaging by contracting DSD (or other companies) to do this. At the time when the take-back obligations were introduced, the German industry - backed and supported by politics - set up the company DSD ("Dual System Germany") to fulfil the obligations. The result was a monopolist with a cartel-like ownership structure. Its shareholders consisted of companies from the waste management sector and large companies from trade and industry. The waste management companies were at the same time procurers of DSD as they collected and sorted the packaging waste on DSD's behalf. From the early nineties when the company was set up, DSD enjoyed a "quasi-monopoly" in the market for taking back sales packaging. The Bundeskartellamt initially tolerated DSD's competition law infringements, but made it clear that tolerance would only be temporary. Due to its market power and interlocking interests, DSD's incentives to reduce its costs were weak.

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4 The full text of the Bundeskartellamt decision of 16 November 2004 is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B10-74-04.pdf

5 For more details see press release of 12 October 2004 which is available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_10_12.shtml

15. In order to partially allay the competition concerns of the Bundeskartellamt, DSD decided in early 2003 to implement for the first time a transparent and non-discriminatory system of awarding service contracts to the waste disposal companies.[6] The first call for tenders did not bring about any real competition in bidding for many contract areas, with the result that in 2004 DSD had to put out a second invitation for tender for almost half of all its contract areas. In this second invitation for tender DSD, at the Bundeskartellamt's recommendation, had considerably improved the basic conditions for competition, above all for small and medium-size disposal companies, which thus had an increased chance of success. As a result, from 2005 the costs of collecting and sorting, in comparison to the charges paid up to 2003, were reduced by approx. 200 mio. Euro, which corresponded to a reduction of more than 20 per cent.

Case example: Joint venture clearance subject to auctioning conditions[7]

16. In December 2003, the Bundeskartellamt cleared the planned project of DB Regio AG (DB Regio) and üstra Hannoversche Verkehrsbetriebe AG (üstra), to combine their local public transport activities in the greater Hanover area in a joint venture. Clearance was made, however, under the dissolving condition that contracts for local public transport services in the Hanover region be awarded through competitive procedures.

17. DB Regio provides all local passenger rail services in the relevant Hanover market area on the basis of a transport contract with the Hanover regional authorities, the duration of which is limited to the end of 2006. In addition it is also active in local public road transport in the greater Hanover area via its regional bus subsidiaries. üstra is by far the leading municipal transport company in the greater Hanover area. On account of a considerable overlap in their areas of operation their combined market shares reach a level of well above 80 per cent in the Hanover market area.

18. The auctioning conditions ensure that the market is opened up gradually. Accordingly, as soon as the current contracts expire, at least 30 per cent of DB Regio's local passenger rail services and at least 50 per cent of üstra's bus transport services have to be awarded in a Europe-wide award procedure with effect from 1 January 2007 and 1 January 2010, respectively. By 1 January 2013 at the latest the Hanover regional authorities, as the contracting entity for local public transport, have to award all bus transport services provided by üstra and all local passenger rail services provided by DB Regio in the region in a Europe-wide competitive procedure.

4. Education and cooperation with procurement officials

19. The Public Procurement Tribunals do not provide any specific training for the contracting entities. However, within the framework of outside scientific activities, their staff members give numerous presentations at selected meetings, at national and supranational level, where they specifically introduce the German system of review procedures applicable to the award of public contracts. At these events the tenderers' reliability and the issue of inadmissible anti-competitive agreements are also often discussed. Relevant information on procurement law are available on the Bundeskartellamt's website (www.bundeskartellamt.de), e.g. the Information Leaflet on the legal protection available in the field of

6 It should be noted that this was only one among several actions that DSD had to take. The most significant change DSD had to make was to dissolve its cartel-like ownership structure by the end of 2004.

7 The full text of the Bundeskartellamt decision of 2 December 2003 is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B9_91_03.pdf

public contracts[8] and the Discussion Paper on the assessment of bidding syndicates in the tendering of local transport services[9].

20. In the case of malfeasance of procurement officials sanctions under criminal law are possible: under Section 332 (taking a bribe), Section 334 (offering a bribe) and Section 353b (violation of official secrecy and of a special duty of secrecy) of the Criminal Code.

21. Particularly in the case of malfeasance in the procurement process it has proved to be of advantage that the German public procurement tribunals act as an independent review authority, and that reviews are not carried out by the contracting entities. Irregularities within contracting entities can thus be uncovered and prosecuted more effectively. In 2004, for instance, the Bundeskartellamt initiated criminal proceedings against a procurement official on charges of violation of official secrecy. During the award procedure and an ensuing review procedure a tenderer referred to very detailed internal administrative information (technical details from bids submitted by other tenderers and the contracting entity's calculation of costs). This gave rise to the suspicion that a procurement official had illegally passed on information from the award proceedings to this tenderer. Ultimately, however, the proceedings were discontinued due to lack of sufficient evidence.

8 Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06Informationsblatt__E.pdf.

9 Available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Bietergemeinschaften_PosPapier.pdf.