

Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Meeting on: Bid-rigging in relation to the public sector procurement process

Competition and Consumer Protection Commission - Opening Statement by Brian McHugh

Wednesday, 6 December 2023

Good afternoon, Chair and members of the Committee,

My colleagues and I welcome the opportunity to brief the Committee on the practice of bid-rigging. First let me introduce myself and my colleagues. My name is Brian McHugh, Chair of the Competition and Consumer Protection Commission (CCPC). I am joined today by Úna Butler, Commission Member with responsibility for the CCPC's Cartels Division, and by Eksteen Maritz, Director of the CCPC's Cartels Division.

The CCPC is responsible for enforcing and promoting compliance with competition, consumer protection and product safety law. Our vision is for open and competitive markets where consumers are protected and businesses actively compete.

Effective competition directly benefits consumers because firms try to win consumers' business through lower prices and/or improved quality of goods and services. As the statutory body responsible for enforcing Irish and EU competition law, the CCPC protects this competitive process and ensures that markets work to the benefit of consumers. Competitive markets drive improvement, innovation and productivity in our economy to the benefit of everyone.

Competition law forbids two broad types of behaviour –

Firstly, anti-competitive agreements between two or more independent firms such as agreements between competitors to fix prices, share markets or restrict output. These agreements are commonly referred to as cartel agreements.

Secondly abusive practices by firms which hold dominant market positions. Such practices could include predatory pricing or refusal to supply.

Bid-rigging, the topic we are here to discuss today, is a serious form of cartel behaviour. It happens when a number of suppliers try to influence the outcome of a tender process through agreeing not to bid against one another or otherwise co-ordinate their bids. In these cases, the winning tender price may be higher than the price that would be reached through competitive tendering. Bid-rigging results in the State and businesses paying more.

It is, by definition, difficult to estimate the incidence of bid-rigging cartels as large efforts are made to keep the conspiracies hidden. But research and empirical studies have shown that, internationally, the average overcharge in detected cartels is in the order of 20% to 30% and that discovered cartels generally last, on average, four to seven years.

In Ireland, we understand that public bodies spend an estimated €20 billion annually on goods, services, works and capital projects. This means that the potential impact of bid-rigging in public procurement, if even only a small percentage of procurement processes were subject to bid-rigging, could be extra costs for Irish taxpayers of tens or even hundreds of million every year.

We have seen internationally that bid-rigging cartels can be very large. For example, the ongoing Austrian construction cartel investigation involves several dozen companies under investigation by the Austrian competition authority, multiple fines imposed by the Austrian Cartel Court and multiple

further cases pending. The contracts affected were worth up to €61 billion. We have no reason to believe the potential for cartel behaviour is significantly less in Ireland compared to internationally.

Where the CCPC has evidence of anti-competitive conduct, it conducts investigations and takes appropriate enforcement action. Cartels are heavily sanctioned under the Competition Act, including custodial sanctions of up to 10 years in prison.

The biggest challenge in cartel enforcement is detection. Cartel behaviour by its nature is very difficult to detect. Cartels are secretive and hidden. The offending behaviour is very deliberately concealed.

Competition agencies – including the CCPC – therefore use a range of detection tools to uncover cartels. The CCPC operates a Cartel Immunity Programme in conjunction with the Director of Public Prosecutions. Under this programme, the DPP can grant full immunity from criminal prosecution to the “first in” i.e. the first member of a cartel who comes forward to the CCPC, admits their participation in the cartel and cooperates with the CCPC investigation. As of 27 September, the CCPC also operates an Administrative Leniency Policy and can give full immunity from administrative fines to the first cartel member to come forward and reduced fines to second and subsequent applicants. It mirrors a successful programme operated by the European Commission. The purpose of these programmes is to allow the CCPC to detect cartels and gather important evidence to help the CCPC to build its case.

The CCPC also has a confidential anonymous whistleblower platform known as “WhistleB” (<https://report.whistleb.com/ccpc>). This allows members of the public to share information and evidence about illegal cartel behaviour with the CCPC via an anonymous mailbox accessible on our website. It allows encrypted two-way communication between the whistleblower and the CCPC while retaining the whistleblower’s anonymity.

However, we are always looking to improve our ability to detect cartels and while we work closely with procurement agencies such as the Office of Government Procurement (OGP), it would not be appropriate to expect them to identify sophisticated bid-rigging activity along with their other roles. Internationally, an additional important tool for detection is to screen public procurement data. Screening involves competition agencies proactively analysing tender data to identify elements or patterns that may indicate bid-rigging and can lead to formal investigations.

A system of screening for bid-rigging has been applied in many countries including South Korea, Brazil, Finland, Germany, Denmark, Netherlands, Norway, Portugal and Switzerland. It has produced some success in identifying cartels and, crucially, encouraged firms to seek leniency before they were detected. As well as detection, just knowing the national competition authority is screening bids provides a strong deterrent effect.

In Ireland, a report published by the Hamilton Review Group in December 2020 made a number of recommendations specifically in relation to bid-rigging, including that legislation be introduced to enable the collection, collation and analysis of all public procurement data to detect and deter bid-rigging.

The CCPC agrees that legislative change is needed to provide a robust regime to screen for bid-rigging. We have had positive engagement with our parent department – the Department of Enterprise, Trade and Employment, (DETE) on developing such legislation and we would hope there is strong support, including from this committee, for this legislation. In addition, we will continue to work closely with the OGP to ensure that structures are in place to allow efficient access to relevant data under the new legal arrangements.

Enabling access to public procurement data would be the first step in implementing the Hamilton Review’s recommendation. This will allow the CCPC to develop and apply its screening tools across the range of public procurement markets. The CCPC has already been engaged with colleagues from

international competition agencies on data management, formatting and developing analytical techniques to detect potential bid-rigging patterns. This is a priority project for the CCPC and with our forensic technology resources and skills, we are confident we will be ready to begin screening as soon as the data is available.

To summarise, one of the CCPC's key objectives is to detect cartels, bring the behaviour to an end, and take appropriate enforcement action against those involved. The CCPC has put tools in place to allow it to detect and pursue cartels, but more can be done. Bid-rigging is an extremely harmful form of cartel. It causes serious harm to the public purse and the economy more broadly. Access to public procurement data would allow the CCPC to further identify and pursue this harmful conduct where it has occurred and would act as a deterrent to those considering undertaking such harmful behaviour.

My colleagues and I look forward to answering any questions the committee may have.