Remedies in Antitrust under EU and Slovak Law*

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Summary: Competition is indispensable for proper function of market economy. In order to secure that competitive process is not harmed, competition authorities on both EU and national level observe conduct of undertakings. In case of a distortion of competition, the competition authorities are entitled to impose remedies. This article deals with the legal regulation of remedies within EU law and Slovak law, completed by discussion on significant cases and relevant opinions of scholars. It concentrates on antitrust part of competition law, providing complex view on the problematics. The discussion is supplemented by presentation of legal regulation of public procurement and cases, which were concerned with both antitrust and public procurement issues, bid rigging in particular. The dangerousness of this practice is confirmed by a recent Slovak case on luncheon vouchers, which is analysed in the last part of the article.

Keywords: Structural Remedies – Behavioural Remedies – Public Procurement – Slovak Competition Law – Luncheon Vouchers

1. Introduction

Generally, legal rules shall secure proper and smooth functioning of economic and social relations. If these rules are infringed, law should provide for a proper tool correcting the malfunctioning relation arising from infringement. Consequently, the wished setting of economic and social relations is restored.

The importance of competition law for proper functioning of economic relations is undoubtable. It enables the market economy to function in a desirable

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manner through protection of competitive process on market.[1] It should rectify deformations on market, such as abuse of dominant position or cartel agreements. The latter anticompetitive practice is particularly dangerous, as the competition between undertakings is only pretended. This is even aggravated if the cartel takes a form of bid rigging, i.e. that the agreement between undertakings is concerned with their behaviour in tendering procedures. If public procurement is at stake, the efficient use of public resources is directly endangered.

This article deals with these issues, particularly with remedies. It focuses on antitrust part of competition law, i.e. on abuse of dominant position and on agreements between undertakings. It deliberately leaves apart merger control and issues related to state aid. Aside from antitrust issues, the article zeros in on public procurement and the remedies which are beneficial from both the antitrust and the public procurement point of view. It presents the examples of cases which were related to both areas of law. From jurisdictional point of view, the article presents the situation in the EU and in the Slovak Republic, whereas it compares the legal regulation and practice.

In order to discuss the abovementioned issues, the article is organised as follows. First, the article gives a general introduction into the public procurement and competition law in relation to sustainable development. Second, remedies in antitrust part of competition law are presented. The theoretical background is supplemented by discussion on the most important case law. Third, the article focuses on public procurement, its legal regulation and presentation of significant bid rigging cases. Four, a recent Slovak case related to luncheon vouchers is analyses with a special attention given to the bid rigging part of the collusive behaviour.

2. Role of the Public Procurement and Competition in the Sustainable Development

Definition of sustainable development usually puts in harmony economic and social development with preserving environment for the next generations. Although emphasis is given on environmental protection goals, equally important is, how economic development is managed. Smart, sustainable and inclusive growth is emphasized also in Europe 2020 Strategy[2] and is attainable when combined with

[1] CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law. Third edition*. Cambridge: Cambridge University Press, 2014, p. 944.

[2] Europe 2020, Commission Communication of 3 March 2010. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020

the most efficient use of public funds; public procurement is indispensable to achieve this goal. The EU internal market is based on the principles of market economy with the significant role of competition functioning as the principal and decentralised self-regulator of the market due to the main economic functions it fulfils. Therefore, solving of important economic questions (what to produce and for what price, which production requires optimal costs, what is the optimal allocation of resources etc.) is a task for effective competition.[3] Not to forget, it is also a question of appropriate legal regulation. For example, one of definitions of public procurement define this term as a system designed with the objective to simulate competitive constraint in the relations where goods, works or services are purchased by public sector.[4] So, competition is undoubtedly a very important principle governing the public procurement process as a whole.

The importance of public procurement has grown gradually with the development of internal market. Although the EU regulation of public procurement appears in the later development of the EU law, a proper attention has to be paid to its impact. Expenditures on public contracts represent 10 – 15 percent of gross domestic product nowadays, based on OECD data. Therefore, efficient use of public resources[5] strengthens the role of competition also in this important sphere; competition has to bring more transparency and to enable access to all potential competitors.[6]

Public contracts have to comply with the principles of the TFEU[7] and, in particular, four freedoms of the internal market[8] and "principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Public procurement has to be opened up to competition."[9]

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3 SELDON, A., PENNANCE, F. G. *Everyman's Dictionary of Economics*. London: J. M. Dent and Sons, LTD, 1965, p. 80–82.

4 KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 23 and literature there cited.

5 Bid rigging can raise prices up to 10 percent or even 30–70 percent. ZEMANOVIČOVÁ, D., BLAŽO, O. Kartelové dohody vo verejnom obstarávaní – prečo a ako sa brániť. Verejné obstarávanie. *Právo a prax*, 2014, no. 3–4, p. 5–7. In: Blažo, O. Obmedzenie účasti na verejnom obstarávaní ako nástroj ochrany hospodárskej súťaže. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 4–12, p. 5.

6 TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471.

7 Treaty on Functioning of the European Union.

8 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC., Recital, No. 1.

9 Ibid.

2.1. Collusion in public procurement

Considering competition in different stages of procurement cycle is very important, as there are several factors that can lead to collusive behaviour.[10] Concentrated and homogenous markets as well as some types of public procurements, usually characterised by a limited number of the same tenderers taking part in procurement process, are prone to collusion.[11] Cartel agreements concluded in such markets, as a part of antitrust regulation, raise prices artificially and lead to ineffective use of public funds denying the sense of public procurement completely.[12] Based on agreement between/among competitors determining the winning bid in advance, they also bring deformation to the market itself as an undesirable side effect. For all these reasons it is the key role both of competition authorities and of administrative bodies in field of public procurement to fight against collusive behaviour using different remedies.

2.2. Nature and forms of bid rigging

Bid rigging is understood as a very dangerous form of competition restriction with regard to the amount of contracts concluded depending on results of public procurement. Following its nature,it is a horizontal cartel, having either a special legal regulation[13] or caught by other cartels forbidden per se, first of all price cartels. Collusive tendering or bid rigging is caught also by Article 101 (1) TFEU. The essence of this kind of collusion is rooted in adjusting bids in a manner designating the winning bid in advance.<?> Tenderers can agree to quote identical prices or at least to notify intended quotas to each other[14], others may use the rotation system, "in which case a firm whose turn it is to receive an order will ensure that its quote is lower than everyone's else's."[15] Also other forms can be

[10] KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 24 and literature there cited.

[11] RAUS, D., ORŠULOVÁ, A. *Kartelové dohody*. First Edition. Prague: C. H. Beck, 2009, p. 124.

[12] KALESNÁ, K. Tendrové kartely a ich špecifiká. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 23–31, p. 24 and literature there cited.

[13] E. g. section 4, para 4 lit. f) of the Slovak Act No. 136/2001 Coll. on Protection of Competition as amended.

[14] WHISH, R., BAILEY, D. *Competition Law.* Eight Edition. Oxford: Oxford University Press, 2015, p. 571–572.

[15] Ibid., p. 572.

applied. Besides rotation system, market segmentation compensation principle, supplementary bids and controlled bids are usually mentioned.[16]

Raus and Oršulová offer basic characteristics of these diverse forms. They define rotation system similarly to Whish and Bailey; if it is applied, bids are on regular basis distributed among all economic operators. The tenderer whose turn it is, presents the most convenient bid while the bids of other tenderers are only formal. Market segmentation based either on geographical principle or segmentation of contracting authorities or types of orders provides each of the tenderers with the market being solely at his disposal. Compensation principle is based on compensation afforded to those tenderers who resign on presentation of their bids either in form of financial compensation or in form of sub-deliveries. Principle of supplementary bids enables the supposed winner to get a contract with a pre-agreed price beyond competition level. Other economic operators offer higher prices. Principle of controlled bids is based on exclusion of the potential tenderers from the public procurement and participation of those who are allowed to participate, usually under condition of paying a kind of entrance fee.[17]

The authors stress, there are several pre-conditions of bid rigging. All economic operators, or at least majority of those interested in public procurement should participate on collusive behaviour. Collusion is typical for long-term agreements enabling each of operators to get a turn.[18]

2.3. Role of Competition Authorities and Types of Remedies

Some problems of effective market functioning cannot be solved by competition itself. To keep a convenient market structure requires sometimes market interventions or protection of effective competition itself. This is a task both for sector regulators (ex ante regulation) and competition authorities as enforcers of competition law (ex post regulation). But this separation is not always feasible in practice.[19] "Competition authorities often end up doing supervisory work akin to what regulators do."[20]

Competition authorities who are in charge of the effective competition have to identify and analyse competition problems. But it is surely not enough to investigate the relevant market and to identify a competition problem if "a suitable

[16] RAUS, D., ORŠULOVÁ, A. *Kartelové dohody*. First Edition. Prague: C. H. Beck, 2009, p. 122–123.

[17] Ibid., p. 122–123.

[18] Ibid., p. 123–124.

[19] NIELS, G., JENKINS, H., KAVANAGH, J. *Economics for Competition Lawyers.* Second edition. Oxford: Oxford University Press, 2016, p. 362.

[20] Ibid.

remedy cannot be found"[21], because "remedies matter a great deal for the effectiveness of competition law enforcement."[22]

Due to the importance of remedies, competition law is now more focused on the design of remedies depending on competition problem to be solved. Remedy can be understood in a wide sense, comprising not only fines imposed to punish offender and to prevent competition law infringements in the future but also other remedies intended either to shape undertaking's conduct or to change the market structure, private damages actions not to be forgotten.[23] Depending on the character of infringement in bidding market, fines belong to the most frequently imposed remedies punishing collusion in the public procurement. Except for them, exclusion of offenders from the future tenders, as a special remedy, can also be applied.

Apart from fines and damages, recovery remedies are usually categorised to two main types – behavioural and structural remedies. Some authors offer another categorisation, finding "four types of remedies:

1. orders to cease the infringement and not to commit it again;
2. behavioral remedies;
3. structural remedies, including break-up remedies; and
4. flanking measures."[24]

3. Antitrust Remedies

3.1. Overview of Behavioural and Structural Remedies

"A behavioural remedy requires the undertaking concerned to perform certain acts or refrain from certain acts relating to its behaviour on the market, for example with regard to prices, supply obligations, product characteristics, contracts, or internal organisation measures (eg. Chinese walls)".[25] Compared to that, structural remedies are intended to change a market structure using different measures (e.g. transfer of property rights, assets, transfer of business unit, dissolution, divestiture etc.)[26]. Unlike behavioural remedies "a structural remedy does not

[21] Ibid., p. 360.
[22] Ibid., p. 360.
[23] Ibid.
[24] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p. 6.
[25] Ibid., p. 9.
[26] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 731.

require any further monitoring“[27], it modifies property rights and it is“based on the ‘clean break principle’.“[28]

Although frequently used, dichotomy of structural vs. behavioural remedies has its opponents. Lévêque considers this categorisation to be “oversimplifying and confusing“<?> and proposes his own criteria of categorisation.

Controversy of this dichotomy can be shown also based on analysis of the Microsoft Case.[29] This case is often referred to as “Microsoft saga“[30] and it opened undoubtedly discussionon character of remedies imposed by this decision. The Commission contested in its decision two types of Microsoft’s conduct infringing in its opinion Art. 102 TFEU: first, the refusal to disclose to other companies the information and technology indispensable for interoperability of the operational systems; second, the prohibited tying of Windows Media Player with Windows operational system for clients’ PC. As far as imposed remedies are concerned, the Commission ordered to provide other competitors with necessary information and unbundling of WMP with Windows operational system distribution. Decision also provided introducing of special supervision mechanism to ensure fulfilment of Microsoft’s obligation.[31]

A number of questions were evoked by this decision. “Is unbundling media Player from the operating system a structural remedy? It splits up a product, but doesn’t affect structure of the defendant company... Nor does it affect the structure of the market: …“[32] Similarly, what about interoperability remedy? Is it structural in its nature? Marsden argues, it is not a structural remedy, requiring only access to information, being thus closer to behavioural remedies.[33] And finally, “so is the case then «after Microsoft» there is no room for structural remedies in Article 82 cases?“[34]

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[27] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p. 10.

[28] Ibid., p. 10.

[29] CFI Decision in Case T-201/04, 17. 9. 2007, Microsoft corp. v. European Commission ECLI:EU:T:2007:289.

[30] ŠMEJKAL, V., DUFKOVÁ, B. *Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže*. Prague: Univerzita Karlova v Prahe, Právnická fakulta, 2015, p. 144.

[31] Ibid.

[32] MARSDEN, P. *Article 82 and Structural Remedies After Microsoft.* [online]. Available at:https://www.biicl.org/files/3554_art_82_and_structural_remedies_(marsden).pdf, p. 1.

[33] Ibid.

[34] Ibid., p. 3.

3.2. Remedies in Antitrust Cases

Power to apply structural remedies in antitrust cases was conferred to the Commission by Regulation 1/2003[35]. Article 7 (1) states that the Commission "may impose ... any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end." But "structural remedies can only be imposedwhere there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy."[36] And the exact wording of this provision leads often to the conclusion of preference for behavioural remedies over structural remedies, but "Regulation No. 1/2003 does not prefer or prioritise behavioural remedies over structural remedies."[37]

Recital 12 of Regulation 1/2003 describes structural remediesas "changes to the structure of the undertaking as it existed before the infringement was committed." R. O'Donoghue and J. Padilla add that these "changes to the structure of a company may range from a complete break-up or dissolution to the divestiture of a particular unit or holding or less intrusive measures such as accounting separation."[38]

The authors state that structural remedies are subject to three conditions that must be fulfilled cumulatively before any structural remedy may be imposed:

1) "structural remedies are a remedy of last resort, i.e. behavioural remedies would be insufficient;
2) structural remedies must be effective; and
3) structural remedies must be proportionate."<?> It means, there must be a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.[39]

When imposing structural remedies it should be taken into account what are the consequences for the third parties, for efficiencies realised by the firm and for the consumers.[40] Equally important might be if undertaking can be broken

[35] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[36] Art. 7 of Regulation No. 1/2003.

[37] RITTER, C. How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements? *Journal of European Competition Law & Practice*, 2016, p. 1–12, p.10.

[38] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 731.

[39] Recital 12 of Regulation 1/2003.

[40] O'DONOGHUE, R., PADILLA, J. *Law and Economics of Article 82 EC*. Oxford and Portland, Oregon: Hart Publishing, 2006, p. 734–735.

up naturally or if it is a unified company where structural remedy of this kind is impossible.[41]

Although there is still "asymmetry between the relatively frequent use of structural remedies in merger cases on the one hand and their sparse use in antitrust and in particular abuse of dominance cases on the other hand"[42], there is undoubtedly a significant role for structural remedies in competition law[43]. Their imposing should be considered in a remedy design stage also from efficiencies point of view.[44]

3.3. Remedies in Slovak Law

The regulation of antitrust law is governed by Competition Act[45]. The Antimonopoly Office of the Slovak Republic ("AMO") is the national competition authority enforcing competition law within Slovakia. The powers of the AMO are similar to the powers of the Commission, power to impose remedies included. However, the Competition Act does not provide for a special provision on remedies similar to Article 7 of the Regulation 1/2003. Nevertheless, pursuant to section 22 para. 1 lit. d) of Competition Act, the AMO is empowered to issue a decision that certain activity of an entrepreneur is forbidden, as well as it imposes an obligation to refrain from such activity and to repair the illegal state. Apart from this general provision, there is only one special remedy in the antitrust part of Slovak competition law. The remedy is related to prohibition to participate in tendering proceedings and is discussed below.

4. Public Procurement

4.1. Collusive Tendering in EU case law

The Commission has investigated bid rigging several times. Just to mention few examples of collusive tendering in EU case law, the outline of the most outstanding cases is given. First of all, it is the famous *GIS cartel*, in which the

[41] Ibid. On these grounds the structural remedy in the above mentioned Microsoft case was rejected. (Ibid., p. 736).

[42] MAIER-RIGAUD, F P. Behavioural v. Structural Remedies in EU Competition law. In: Lowe, P., Marquis, M., Monti, G. (ed.). *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law*. Oxford and Portland, Oregon: Hart Publishing, 2013, pp 207–224, p. 207.

[43] Ibid., p. 222.

[44] Ibid.

[45] Act No. 136/2001 Coll. on Protection of Competition as amended.

most important world GIS producers agreed on common strategy on allocation of GIS projects and price coordination, market division, maintenance of the pre agreed quotas and collusive behaviour in public procurement. This collusive behaviour was punished by imposing fines to the actors participating on market cartelisation, public procurement included.[46]

Another good example is *Schindler case*[47], referred to also as *Elevators and escalators case,* where Commission imposed severe fines on several undertakings for bid rigging, price fixing and exchange of information in relation to the installation and maintenance of lifts and escalators in some EU Member States.[48] There are many other cases where the Commission condemned practices designed to rig tenders and imposed substantial fines, e. g. *Wire harnesses*.[49]

4.2. Legal Regulation of the Public Procurement

As already mentioned, public procurement regulation represents in the EU a relatively new phenomenon. This legal regulation was undoubtedly inspired by fulfilling goals of the EU internal market, as public contracts with up to 15 percent of GDP are nowadays a very important market where a significant part of undertakings' activities is carried out. Therefore, it is necessary to make competition in this market transparent and accessible to all potential competitors. As primary EU law does not enable direct European regulation, the legislative initiative is targeted on harmonisation of procurement law of the Member States. Starting point of harmonisation legislation is abolition of discrimination and effective functioning of basic freedoms in general.[50]

The latest development is represented by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("the Public Procurement Directive").[51] The

[46] Court of Justice, Judgement in cases C-247/11 P and C-253/11 P of 10 April 2014, AREVA, SA, ALSTOM SA and others v. European Commission. EU: C: 2014:257.

[47] Court of Justice, Judgement in case C-501/11 P of 18 July 2013 – Schindler Holding Ltd. and others v. European Commisssion. EU:C:2013:522.

[48] WHISH, R., BAILEY, D. *Competition Law. Eight Edition*. Oxford: Oxford University Press, 2015, p. 572.

[49] Ibid., p. 573.

[50] TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471.

[51] Harmonization in sphere of public procurement begins with the directive No. 77/62, followed by directives 88/295, 92/50, 93/37, 93/38, 93/36. Except for directive 2004/18/EC also a sectoral directive 2004/17 was issued in 2004. Other four directives were repealed. Tendency was to simplify the legal regulation dissolved in many directives and therefore lacking a clear and transparent character. (TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 5. Edition. Prague: C. H. Beck, 2014, p. 471)

main objective of the harmonisation is to award concrete contractsbased on objective criteria and with regard to price-quality ratio.[52]

Competition as one of the main principles of public procurementhas to be observed in different stages of the public procurement cycle and in the whole design of the public procurement process.[53] In this regard the selection of the potential tenderers, exclusion of some economic operators included, plays undoubtedly an important role. In this respect, special attention has to be drawn to Art. 57 (4) of the Directive determining that "contracting authority may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: […]

d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure... cannot be remedied by other, less intrusive measures."

Any economic operator that should be otherwise excluded may provide evidence of taking "concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct."[54]

Determining of the maximum period of exclusion if no measures specified in paragraph 6 are taken by the economic operator is left to the Member States, but it "shall not exceed five years from the date of conviction by final judgement... and three years from the date of the relevant event in the cases referred to in paragraph 4."[55]

In Slovakia, system established by the Public Procurement Directive was transposed to the bill of the new Public Procurement Act[56], the grounds of exclusion, possibility of exclusion and also measures of economic operators to prevent the future misconduct included. Bill was objected by the AMO that proposed to amend the Competition Act completing thus the bill on public procurement. This new provision, i.e. section38h of the Competition Act, is based on the obligation of AMO to exclude economic operators participating on bid rigging when imposing fines for this kind of competition law infringement[57]. Participation on leniency program and corresponding reduction of fine for

[52] Recital, N. 90 of the Public Procurement Directive.
[53] E. g. Art 18 of the Public Procurement Directive.
[54] Ibid., Art. 57 (6).
[55] Ibid., Art. 57 (7).
[56] Act No. 343/2015 Coll. on Public Procurement as amended.
[57] Collusion of the economic operators in public procurement is prohibited as a special agreement on restriction of competition [Section 4 para 4 lit. f) of the Competition Act].

infringement[58] is a ground not to exclude an economic operator from public procurement[59]. Settlement procedure[60] leads to reduction of the period of exclusion from three years to one year only. The exclusion period is dated on the time of validity of the decision to prevent shortening of the exclusion period.[61]

5. Collusive Tendering in Slovakia

After presentation of the theoretical background of antitrust remedies and legal regulation of public procurement, it is apt to supplement the discussion with a real case from practice where the bid rigging took place. A very important decision related to both remedies and public procurement was concerned with luncheon vouchers. The decision of the AMO No. 2016/HK/1/1/004 from 11 February 2016 ("the DOXX decision") was addressed to entrepreneur DOXX – Stravné lístky, spol. s r.o., Edenred Slovakia, s. r. o., LE CHEQUE DEJEUNER s.r.o., SODEXO PASS SR, s. r. o. and VAŠA Slovensko, s. r. o. ("the entrepreneurs") and it declared that the entrepreneurs coordinated their practice and applied a common commercial strategy, hence they infringed section 4 of the Competition Act by object.

Although the DOXX decision is 450 p. long, the most relevant issues from the DOXX decision will be presented below. The AMO applied both the Slovak Competition Act and European competition law too. This was due to the fact that the trade between Member States was potentially affected, even though the territory of only one Member State was at stake.[62]

As to the relevant market, the AMO determined two relevant product markets due to the fact that there were two separated infringement committed by the entrepreneurs. The first product relevant market was determined as the market of emitting, distribution and sale of luncheon vouchers and beneficial vouchers, including services related to this. This market was related to agreement by which the entrepreneurs divided the market. The second relevant market, the market of emitting, distribution and sale of luncheon vouchers, including services related to this, was concerned with limitation of the number of luncheon vouchers in commercial chains.The geographical market was determined as the Slovak Republic.

[58] Section 38d para 2 of the Competition Act.
[59] Section 38h para 2 of the Competition Act.
[60] Section 38e of the Competition Act.
[61] BLAŽO, O. Obmedzenie účasti na verejnom obstarávaní ako nástroj ochrany hospodárskej súťaže. In: Považanová, K. (ed.). *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku*. Bratislava: UK Právnická fakulta, 2015, p. 4–12, p. 9–10.
[62] DOXX appeal decision, p. 27, 28.

It was stated in the DOXX decision that the listed entrepreneurs coordinated their practice on the relevant product market of emitting, distribution and sale of luncheon vouchers and beneficial vouchers, including services related to this. The AMO claimed that, between 2009 and 2014, the entrepreneurs implemented a common commercial strategy which consisted in non-competing strategy. In particular, the entrepreneurs were not approaching clients of competing entrepreneurs and they were not offering them zero fees, benefits and bonuses. The entrepreneurs were also coordinating their acting within public tendering procedures and similar tendering procedures. In short, the entrepreneurs divided market[63]. Apart from this practice, the entrepreneurs also limited the number of luncheon vouchers in the commercial chains[64], which was the second committed practice.

In relation to the tendering procedures, the Antimonopoly Office analysed almost 300 public procurements on the relevant market between the years2011 and 2014.[65] The analysis indicated that the relevant market was divided among the entrepreneurs. The particular clients were supplied by a particular entrepreneur, despite the fact that there were conditions for competing for the clients.[66]

The object of the tendering procedures were luncheon vouchers and other vouchers as well as related services.[67] As the entrepreneurs categorised their clients as "ours; free; those of the competitors", this division also applied in tendering procedures. Depending on the category, the particular entrepreneur adapted its willingness to participate as well as its price and commercial conditions. The aim was to secure that the winner of the tendering procedure is the prior designated entrepreneur.[68]

The persistence of the division of the market was secured by communication among the entrepreneurs, agreeing on participating in a tendering procedure by a "no bid" or a "cover bid".[69] The revised tendering procedures were related to, for example, the Centre of Scientifi-Technical Information SR (*Centrum vedecko-technických informácií SR*), Municipal authority Čaklov (*Obecný úrad Čaklov*); State Fund of Housing Development (*Štátny fond rozvoja bývania*), Water-economic Construction (*Vodohospodárska výstavba*), Railways of the

[63] The DOXX decision, para 66 et seq.

[64] The DOXX decision, para 335 et seq. The aim here was to prevent the owners of restaurants to use luncheon vouchers in supermarkets instead of paying provisions to the entrepreneurs. See the DOXX decision, para 406.

[65] Before the year 2011, there was insufficient amount of data available, hence, the Antimonopoly Office could not conduct the analysis.

[66] The DOXX appeal decision, para 98.

[67] The DOXX decision, para 38.

[68] The DOXX decision, para 156.

[69] The DOXX decision, para 157.

Slovak Republic, Bratislava (*Železnice Slovenskej republiky, Bratislava*), Railway Company Slovakia (*Železničná spoločnosť Slovensko*).

The fact that the tendering procedures were spoiled by the entrepreneurs was taken into account in the assessment of the severity of fines for the entrepreneurs. The Antimonopoly Office highlighted that cartel agreements eliminate the competitive pressure between participants and that the particular participants do not propose independent bids. Due to this the entrepreneurs' clients, i.e. public procurers, assumed that they could choose from competing bids, however, the entrepreneurs knowingly substitute competition by a cooperation among themselves. In case of public procurements, it is necessary to stress that cartel agreement can lead to inefficient use of public sources. Therefore, the harm to public interest was in higher intensity.[70]

The Council of the Antimonopoly Office as the appeal tribunal issued decision on appeal No. 31/2017/ODK-2017/KH/R/2/025 on 11 September 2017 ("the DOXX appeal decision"). The Council imposed the sanction not to participate in public tendering procedure for three years, even though this sanction was incorporated into Competition Act as of 18 April 2016, i.e. after the first instance decision was issued and before the DOXX appeal decision was issued. However, a similar decision was incorporated in Act No. 25/2006 on public tendering procedures as amended, even before 18 April 2016. Consequently, the Council did not consider imposing of such sanction to be retroactive.

6. Conclusion

This article presented remedies in Slovak and EU antitrust law. It may be concluded that, from regulatory point of view, Slovak law does not provide for remedies as they are established in the Article 7 of Regulation 1/2003. On the other hand, the Slovak Competition Act prescribes the use of a special behavioural remedy related to public procurement. Exclusion of economic operators from public procurement is a special remedy among antitrust remedies, as to its nature being close to behavioural remedies. In Slovakia, it is imposed by AMO together with a fine punishing participation in bid rigging on obligatory basis.

From the point of view of legal practice, the Slovak legal practice does not in general differ from the EU case law, meaning that structural remedies dominate in merger cases rather than in antitrust cases. In antitrust cases the competition authority usually prohibits the conduct infringing the competition rules and it imposes corresponding fines to punish the infringement at stake and to prevent

[70] The DOXX decision, para 1395, 1396.

its repeating in the future. Other remedies are rare, although there are cases including abusive behaviour of network industries in liberalised markets, where structural remedies might be suitable for a final solution of behaviour detrimental for competition.[71]

Nevertheless, it is inevitable to stress that to prosecute bid rigging cases is a difficult task for competition authorities. As it flows from the DOXX decision, the AMO needed to gather considerable amount of data and spent significant amount of time and personal efforts in order to prove the existence of the cartel. Taking into account the sources of the AMO, it is probable that many dangerous bid rigging will survive unpunished. Therefore, the enhanced cooperation between authorities supervising public procurements and competition authorities should definitely take place.

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[71] ECN Recommendation on the Power to Impose Structural Remedies, p. 3. Available at: http://ec.europa.eu/competition/ecn/structural_remedies_09122013_en.pdf

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