

Damages claims by contracting authorities in bid-rigging cases

Presentation LEAR Conference

4 July 2017, Dr Hanna Schebesta, Assistant Professor Law and Governance



PP and Antitrust linkage high on the agenda

- Guidelines for detecting bid-rigging by almost all competition authorities globally and international efforts (OECD roundtable)
 - Main recommendation: procurers should report suspicions and collected evidence to the competent competition authority
- **Little attention to damages claims by procurers**



International
Competition
Network

OECD Guidelines for Fighting Bid Rigging in Public Procurement



oe.cd/gfbr

Complementarity of remedies

- Exclusion from the tendering procedure (Article 57(4)d Directive 2014/24) for distortion of competition
- Criminal sanctions
 - E.g. § 298 German Criminal Code: monetary sanction or prison sentence of up to 5 years
- Fines
- ... Damages actions?
- Settlements

What can damages claims deliver that sanctions/fines cannot?



Why enable damages claims?

The **function of damages**

- Punishing the offender (retributive)
- Preventing future offenses (preventive)

→ **Sanctions/fines equally effective**

- Repairing damage sustained (compensatory)

→ **Damages claims have more immediate compensatory effects**

Damages claims by contracting authorities in Germany

- New legal framework (Amendments to the Antitrust Act)
- Few cases of successful claims by contracting authorities and cartels

New provision § 33a GWB Antitrust Act (DE) entry into force June 2017

- Intentional or negligent infringements of Articles 101 and 102 TFEU create a **duty to compensate the resulting harm**; § 33a(1)
- There is a **rebuttable presumption** that a cartel causes damage; § 33a(2)
 - but recognition of **passing-on defence**; § 33c
- The **quantification** of damages according to § 287 of the Civil Procedure Ordinance; § 33a(3)
- **Limitation period** of 5 years § 33h from knowledge

Proving damages is a twofold challenge

Constitutive stage

- Prove that damage was sustained (principally/as a substantive or material criterion for giving rise to a successful cause of action)

Quantification stage

- Quantify the damage sustained (quantification)

Fire-fighting vehicle cartel

- Vehicles procurement procedure (value 120.163,24 EUR)
- Cartel of four biggest producers



Issue 1: presumption of damage?

OLG Karlsruhe Urt. v. 31.7.2013



- Court: price-fixing in tender created presumption of damage
 - General presumption that cartels result in surcharges
 - Recognized pricing umbrella effect
- New §33a and 33c supersede this case law
- Legal uncertainty:
 - Relevance of the passing on defence?
 - Evidentiary burden (diverging case law)

Issue 2: advantage of liquidated damages?

OLG Karlsruhe Urt. v. 31.7.2013

- Liquidated damages, contract contained the clause that when the contractor violated competition rules, 15% of the billing sum would be due
 - In this case, 15% of 120.163,24 €
- **Clause made quantification of damages easy**
- **Divergent case law as to the general validity of the clauses: Rail Cartel and Fire-fighting vehicle II: non-validity as no general price increase may be assumed**



Link between cause of action and claimable damage

Damages claims arise out of specific causes of action

- Contract clauses – contractual damages (e.g. liquidated damages in German fire-fighting vehicles case)
- Competition law damages
- More specific legal frameworks (e.g. in the US the False Claims Act; allowed for treble damages over \$103 million in a sewer construction case)
- Culpa in contrahendo/pre-contractual liability?

Can damages deliver?

Generally there are only few, although successful cases; policy documents (OECD) indicate reluctance of government agencies to pursue damages claims

- Legal uncertainty persists as to proving the damage
- Doubtful validity of contractual clauses
- Litigation costs

→ Depends on the case, but systematically strengthening the institutional framework seems more effective in terms of enforcement