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**FIGHTING CORRUPTION AND PROMOTING COMPETITION**

**Contribution from Poland**

-- Session I --

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## **FIGHTING CORRUPTION AND PROMOTING COMPETITION**

**-- Poland --**

### **1. Introduction**

1. The presented study relates to the cooperation between competition law enforcers and anti-corruption law enforcers as well as their complementary efforts to promote competition and combat corruption in agriculture land dealings. Corruption has been constantly present in social life. It has been evolving at different times and occasions, along with its impact on the society and economy. The state regulations may play an important role in the creation of incentives for both collusion and corruption. However, it must be recognized that the state needs legal framework in order to guide investments towards generating positive rents for the society. As the presented example shows, in order to rationalise the characteristics of the agrarian structure in Poland, the state subsidises and supports small and medium farmers (owners of less than 300 hectares of farmland) in land purchase. In Poland, where the importance of this factor is compounded by the fact that due to the agrarian fragmentation and the diversity of the economic significance of farming, only a limited number of farms plays a key income role and seeks opportunities to strengthen the position on the market. Under Polish law, local farmers have special access to state-owned land and the opportunity to return as much as 75 percent interest on loans taken for the purchase of land. Therefore, the government facilitates the consolidation and expansion of farms. Poland argues that the economic crisis is an emergency, acting in favor of maintaining state aid and presents data which show a gradual expansion of medium-sized farms. Currently, the size of an average farm is 6.63 hectares - not enough to ensure the viability and fair income for farmers. In the years 2010-2013, by the cost of EURO 100 million the government enabled local farmers to buy about 600 thousand hectares of agricultural land. Thus, the population of households investing in land is fairly stable and expands the scale of production. On the other hand, such a system creates a playfield for farmers to collude and corrupt each other in order to buy land below its market price level.

2. Following a brief presentation of the provisions of the related acts and the case, one can find the assessment of the complementary role of both competition law and anti-corruption law enforcement. Moreover, in the study is analysed the effect of criminal accusation for obstruction of public procurements on the efficiency of Polish leniency programme in the area of tender collusion.

### **2. Legal and economic background**

3. The Polish Agricultural Property Agency (hereinafter: the Agency) performs the tasks based mainly on the Act of 19 October 1991 on the Management of Agricultural Property of the State Treasury and the Act of 11 April 2003 on Shaping the Agricultural System, mostly related to privatisation of state-owned property in agriculture and measures to improve the area structure of individual farms. Since its establishment, the Agency took over 4.74 million hectares of land, including 3.8 million from the former state-owned farms, and 0.6 million hectares from the National Land Fund. By the end of 2011, as a result of sales, free transfers and other permanent allocations, the resources of the Agency diminished by ca. 2.8 million hectares, i.e. almost 60% of the entire acquired area. The dominant form of land management was its sales; transfer of ownership covered more than 2.2 million hectares. The resources as of 31 December 2011 amounted to ca. 1.9 million hectares, including the fact that 76.8% of those lands were leased.

4. Creating and improving the structure of family farms is carried out through the sale and lease of real estate including limited tenders. The main principles of conduct for their preparation and offering rely on the following assumptions:

- Unallocated, undeveloped agricultural land with an area over 1 ha is first allocated to enlarge family farms, i.e. for this type of land the first tender for the sale is in any case a limited tender for individual farmers within the meaning of the agricultural system, intending to enlarge the family farm, if they reside in the municipality in which the property is located or offered for tender in the municipality bordering with the same municipality;
- An individual farmer, within the meaning of the Act on Shaping the Agricultural System, is a natural person who owns or leases agricultural land not exceeding 300 hectares, possess agricultural qualifications and is settled in the municipality where one of the agricultural properties, belonging to the family farm is located. Only an individual farmer may lead a family farm;
- Lists of real estates for sale by tender and calls for tenders shall be made public in rural administrative units, municipalities, agricultural chambers and branch offices (or their subsidiaries);
- In the first stage of a limited tender, the qualification of farmers to tender shall be held, afterwards the auction date is determined. Only previously qualified farmers can participate in it.

### 3. The case

5. Right before the auction organized by the Agency for sale of agricultural property in Unislaw on 30<sup>th</sup> April 2013, three farmers, who had been prequalified for the tender (Dariusz M., Robert S. and Stanislaw N.) had agreed that only Dariusz M. would make an offer while the others would give up bidding the highest price offered for the real estate sale. Eventually, Dariusz M. was selected. He offered the price resulting from the first increment of price namely 11.320 PLN/ha (2.700 EUR/ha). In exchange for withdrawing from the bidding, Stanislaw N. was supposed to receive the amount of PLN 10.000 (EUR 2400) and Robert S. 5 ha of agricultural land.

6. The restriction of competition on the local market for agriculture land dealings was obvious when one of the participants in collusion obtained the sale price significantly different from the market price. This was based on the analysis of land prices in the province. The President of the Office of Competition and Consumer Protection (hereinafter: the President of UOKiK) estimated that the average price in the province for agriculture land with similar parameters obtained in the limited tender in terms of competition could be 31.280 PLN/ha (7.450 EUR/ha). This means that the price achieved during the auction was significantly lower than the average price of comparable land which undoubtedly indicates that it was significantly ranged below competitive levels.

7. In the presented case, the fact of anti-competitive collusion and its course were mostly established on the basis of two applications for leniency made by Robert S. and Stanislaw N.

8. It should be taken into account that collecting evidence in cartel cases causes considerable difficulties (for example there was no written evidence of the existence of the agreement) and it is necessary to rely largely on the statements of leniency applicants. Nevertheless, in the presented case, the statements of leniency were not treated as the sole and sufficient evidence of a prohibited agreement. The fact that they are direct evidence is undisputed, it is clear from its very nature - direct source of information "not contaminated" by the coverage of the course of events by third parties. However, the fact that there is

direct evidence does not indicate automatically whether such a statement can be considered reliable. Therefore the President of UOKiK supported such statements with its own findings of facts, which led to determine the factual circumstances.

9. The issue falls under the scope of the Act of 16 February 2007 on Competition and Consumer Protection (hereinafter also: Antimonopoly Act). Article 6(1)(7) of the Act prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market, *inter alia*, agreements consisting in collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price. Furthermore, bid-ridding is enumerated among the most serious and detrimental anticompetitive practices, recognized as severe cartels, and it is excluded from the *de minimis* doctrine. Fraudulent tendering may cause enormous harm to the economy, and for this reason it is of a great importance to combat this kind of pathology. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay above market rates. Antitrust protection of tender proceedings against prohibited agreements aims at protecting the regularity of the economy in a free market economy. Simultaneously, in the case of public procurement, it contributes to the improvement of public property management.

10. It must be also indicated that under Polish law, tender conspiracies are also criminal offences. According to Article 305 of the Criminal Code, a person who, in order to gain material benefits, thwarts or impedes a public tender or concludes an agreement to the detriment to the property owner or a person, or an institution on whose behalf the tender is made, is subject to 3 years of imprisonment.

#### **4. How, if at all, can competition law enforcers and anti-corruption law enforcers complement each other's efforts to promote competition and combat corruption?**

11. Most of the bid rigging cases reviewed earlier by the President of UOKiK regarded providing services to public institutions. The Office of Competition and Consumer Protection has limited competences for prosecuting criminal offences, including bribery. The problem of corruption had not been involved. Pursuant to Article 304 Paragraph 2 of the Criminal Procedure Code, state or local government institutions which in connection with their activities have been informed of an offence prosecuted *ex officio*, shall be obligated to immediately inform the state prosecutor or the Police thereof. Following this provision, the President of UOKiK is responsible for reporting crimes encountered while conducting proceedings.

12. The President of UOKiK, however has strengthen its efforts in protection of competition in public procurement. For example on 12th October 2012 in cooperation with the Faculty of Law and Administration of the Nicolaus Copernicus University of Toruń, UOKiK organized a conference on effective ways of identifying and eliminating bid-rigging. The invited guests included a representative of the OECD, representatives of competition authorities from EU member states, as well as experts from Polish institutions engaged in law enforcement. Later that year, the President of UOKiK concluded with the Head of the Internal Security Agency an agreement on cooperation in crime prevention and other violations of law, and occurring in the course of trade risks infringing in the interests of businesses and consumers. Similar agreement was sign with the Attorney General on 15 January 2013.

13. Cooperation with many institutions provided evidence for the existence of cartels in different sectors of economy. In December 2011 information obtained from public prosecutor's office gave grounds for taking actions against producers of specialist products for coal mining. In the course of explanatory proceedings, UOKiK was cooperating with the Internal Security Agency. It revealed that three companies - Minova Ekochem, A. Weber and Schaum-Chemie Mikołów – had entered into a tender collusion, fixed prices and shared the market. The prohibited agreement regarded tenders held by mines and mining

companies for the supply of **polyurethane adhesives** as well as phenolic and urea foams. These products are used for preventing fire and methane hazards underground, e.g. isolation of main gates, filling the space between roof bars, rock-mass consolidation, filling slots and isolating crossing beds with hallway excavation, and are sold mainly by way of tenders held by mines and coal companies.

14. Additionally at the end of 2011, the Marshall Office of Dolnośląskie Voivodeship held a tender for the delivery of IT equipment to schools and libraries involved in the project *Dolnośląska e-szkola (e-school in Dolnośląskie voivodeship)*. Its participants were, among others, three consortia created by the following companies: Itsumi and KEN Solutions, Integrit and Dreamtec Solutions, as well as Incom and Dreamtec. Based on media reports, UOKiK instituted the proceedings to verify if these undertakings had made unlawful agreements. In the course of proceedings, UOKiK undertook cooperation, *inter alia*, with the Central Anti-Corruption Bureau. The collected information clearly showed that these consortia had entered into tender collusion so that the ordering party would select the more expensive offer.

15. In the presented case the party to the agreement, Robert S., after applying for leniency also notified the fact of collusion and corruption to the Agricultural Property Agency, which remitted the bribery matter to the state prosecutor. Both institutions, the President of UOKiK and the Police (the state prosecutor supervised work of Police Department for Fighting Corruption) carried out separate and independent investigations with the strong emphasis on collecting their own evidence according to the appropriate procedures, for the President of UOKiK it is the Act on Competition and Consumer Protection and Civil Procedure Code but for the state prosecutor it is Criminal Procedure Code.

16. Nevertheless, the competition law enforcers and anti-corruption law enforcers complement each other's efforts by exchanging information and mutual consulting. This was possible despite the fact that general provisions of the Antimonopoly Act prohibit the application of evidence collected within competition cases in proceedings conducted upon other legal acts. However, the Antimonopoly Act contains a list of exceptions from this general rule. Pursuant to Article 73 Section 1, information received in the course of the proceedings may not be used in any other proceedings based on separate provisions, subject to Sections 2 to 4. Section 2 envisages that the provision of Section 1 shall not apply to penal proceedings exercised by a public-complaint procedure, or fiscal penal proceedings.

17. The President of UOKiK was also granted access the file of the Police investigation by making and presenting photocopies of the above. This was made possible mainly because of the above-mentioned agreement between the President of UOKiK and the Attorney General.

18. During the antimonopoly proceeding the Attorney General, Dariusz M. applied for its suspension claiming that administrative proceedings shall be suspended when the examination of the case and the decision stems from a preliminary ruling by another authority or court. In the opinion of the President of UOKiK, completion of the investigation by the state prosecutor is not decisive for the anti-competitive nature of the challenged agreement. At the same time, the President of UOKiK is required to establish the facts on their own. Consequently, there were no grounds to suspend the proceedings.

19. As a result, the President of UOKiK finalized its antimonopoly proceedings by issuing the decision finding the collusion and the state prosecutor charged the parties for offences envisaged in Article 305 of Penal Code.

20. Cooperation of competition law enforcers and anti-corruption law enforcers to promote competition and combat corruption, as described above, enabled the efficient confrontation with threats to fair and free trade. At the same time, it raises doubts of competition law doctrine. Mostly because Polish leniency programme does not apply to individuals, who are not entrepreneurs, such as senior managers or employees of entrepreneur applicator for leniency, who were directly involved on behalf of the

entrepreneur in prohibited anti-competitive agreement. This is due to the fact that Polish competition law does not provide for financial sanctions or criminal penalties imposed on individuals (not undertakings) for participation in the practice of restricting competition. In line with the doctrine, it seems, however, that the legislature creating the Polish leniency programme, perhaps overlooked the fact that collusion tender referred to in Article 6 Paragraph 7 of the Antimonopoly Act, as the only practice restrictive of competition referred to in Article 6 of this Act, if it appears in connection with a public contract may meet the criminal offense of Article 305 of the Penal Code punishable by imprisonment for the period of 3 years. No guarantee to individuals involved in the collusion in public tender of freedom from the criminal proceedings, when the undertaking (for whom or on whose behalf the individuals acted in a collusive tendering) apply for leniency, may result that the Polish leniency programme in its current form practically does not apply to bid rigging.<sup>1</sup> This is due to the fact that information obtained in the course of antitrust proceedings, including this generated by the leniency, according to the above mentioned Article 73(2)(1) of the Act of Competition and Consumer Protection can be used in criminal proceedings. Any request made by the prosecutor or the court to communicate antitrust investigation file concerning bid rigging (at public auction) create the President's of UOKiK legal obligation to make information obtained also in the framework of the leniency programme available to the prosecutor or the court. In this context, doctrine advocates the use of higher standards of evidence and standards of protection of the rights of individuals (and individual undertaking) in the course of proceedings with the object of collusion in public tenders. Those standards should probably meet the standards applied to criminal proceedings. Otherwise, the right to defend individuals accused of a crime with Article 305 of the Criminal Code could be refuted, if the President of UOKiK communicates to the state prosecutor any information, materials, evidence gathered in the course of an antitrust investigation. It should be noted that in the proceedings before the President of UOKiK (both explanatory and antimonopoly), the undertaking has a general obligation to cooperate with the President of UOKiK and among other things, to deliver all information and documents.<sup>2</sup>

21. Additionally, as long as:

- natural persons involved in the conspiracy collusion (at public auction) will not have immunity from threatening them with criminal penalties in the case of undertaking, for whom they work within the framework of collusion, apply for leniency;
- President of the Office shall be obliged to transfer to the prosecutor or the court antitrust case file containing the information and evidence obtained under the leniency programme,

22. an increase in the number of leniency applications in bid-rigging cases seems rather unlikely.<sup>3</sup>

23. The presented case proves that at least some of the above-mentioned doubts are invalid. First of all, it must be noted that leniency applications are not limited by the threat of criminal liability. The criminal law also provides for the opportunity to avoid punishment for the person involved in bribery connected with public tender. The perpetrator is beyond punishment if the “active regret” provision is met – the person giving the bribe reveals all relevant circumstances to the law enforcement agencies before the agencies detect them. The impunity clause does not apply to individuals accepting bribes (unless they themselves are petitioners in their own case – like Robert. S in the given case.). However, this group is also

<sup>1</sup> B. Turno, *Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji (Leniency. Leniency programme in Polish competition law)*, p. 455.

<sup>2</sup> B. Turno, *Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji (Leniency. Leniency programme in Polish competition law)*, p. 457.

<sup>3</sup> R. Molski in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz (Act of competition and consumer protection. Commentary)*, red. T. Skoczny, A. Jurkowska, pp. 1667-1668.

offered an opportunity to mitigate the penalty or even suspend its execution. The court applies extraordinary mitigation of penalty, or may even conditionally suspend the execution of the penalty, with respect to the perpetrator, who co-operating with others in the perpetration of an offence, reveals information pertaining to the persons involved in the offence or essential circumstances of the offence to the agency responsible for its prosecution. Upon a motion from the state prosecutor, the court may apply an extraordinary mitigation of the penalty or even conditionally suspend the execution of the penalty with respect to the perpetrator who irrespective of any explanation provided in his case revealed and presented essential circumstances, not previously known to the agency responsible for prosecution.

24. All the above-mentioned assertions show that co-operation between competition authority and the agencies fighting with corruption is possible and gives results, probably stemming also from positive competition existing between these institutions. In particular, the mutual support and assistance is required in the branches especially vulnerable to the corruption and restriction of competition because of the existence of specific legal background. It must be recognised that the state is entitled to regulate some branches in the public interest. Owing to that fact, the state institutions, taking harmonised actions, shall ensure an appropriate level of fairness and competition in those areas. Nevertheless, there are general positive results of such a co-operation, it must be noted that it always bring a lot of new challenges, for example spotting differences in criminal and civil law procedures.