

Organisation de Coopération et de Développement Économiques Organisation for Economic Co-operation and Development

19-Feb-2014

English - Or. English

# DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE

**Global Forum on Competition** 

#### FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from the Czech Republic

-- Session I --

This contribution is submitted by the Czech Republic under Session I of the Global Forum on Competition to be held on 27-28 February 2014.

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### JT03352745

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#### FIGHTING CORRUPTION AND PROMOTING COMPETITION

### -- Czech Republic --

- 1. According to recent studies corruption still represents a serious issue for a lot of countries and therefore efficient enforcement of anticorruption strategies is a frequently discussed topic within international cooperation platforms. Effective anticorruption law enforcement requires an active cooperation of particular governmental bodies including competition authorities as fair competition forms an integral part of possible anticorruption strategies.
- 2. In the Czech Republic, corruption is defined as an abuse of the position which is connected with distortion of the principle of impartiality of the decision-making process and motivated by gaining material profits<sup>1</sup>. From the competition perspective the issue of public procurement is considered to be one the vulnerable areas to corrupt conduct. The following contribution is focused on the fight against corruption and the position of the Office for the Protection of Competition (hereinafter referred to also as "the Office") of the Czech Republic in this area. The significance of cooperation of governmental bodies is pointed out as well as the importance of balanced approach to law enforcement regarding different aspects of such problematic matter. The text is below does not intend to provide exhaustive description or definitions of such matter. It seeks to outline major corruption issues from the perspective of protection competition and public procurement.

## 1. Fighting corruption in the Czech Republic

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- 3. In the Czech Republic, fight against corruption represents one of strategic governmental goals as the presence of corruption may restrict the function of democratic institutions and market economies by distorting fair competition. Each sector of public administration has established a strategy for fight against corruption; however, assessment from the year 2013 of the situation in the Czech Republic conducted by Transparency International shows that further improvements have to be achieved<sup>2</sup>. Also regional surveys show that the level of corruption is still assessed as quiet high in the Czech Republic.<sup>3</sup>
- 4. The leading agency in the field of fighting corruption is governmental Department for Coordination of Fighting Corruption (hereinafter referred to as "the Corruption Department"). In general the Corruption Department seeks to minimize the possibilities for corruption in all levels of public bodies and to increase the transparency in public administration. The Corruption Department does so by evaluation of the issue of corruption and by proposing new measures and legal provision to the government

As defined by the Ministry of the Interior (<a href="http://www.mvcr.cz/clanek/faq-vymezeni-pojmu-jak-definovat-pojem-korupce.aspx">http://www.mvcr.cz/clanek/faq-vymezeni-pojmu-jak-definovat-pojem-korupce.aspx</a>)

According to the Corruption Perception Index rating, the Czech Republic gained 48 from the total of 100 points (http://www.transparency.cz/cpi-2013/).

See Eurobarometr survey: <a href="http://ec.europa.eu/public\_opinion/archives/ebs/ebs\_374\_en.pdf">http://ec.europa.eu/public\_opinion/archives/ebs/ebs\_374\_en.pdf</a>)

in compliance with the governmental Anticorruption Strategy for 2013-2014<sup>4</sup>. Pursuant to the Anticorruption strategy, among the main goals that should be achieved (among others) falls the adoption of efficient acts on public administration, on public spending and related efficient supervision of public procurement.

5. As an integral part of the fight against corruption the work of The European Anti-Fraud Office (OLAF)<sup>5</sup> should be mentioned in this context too. OLAF is European Union's agency focused on, among others, corruption in use of European funds. It is empowered to conduct inspections at national level wherever the EU budget is at stake. For this purpose, OLAF may conduct on-the-spot checks and inspections on the premises of economic operators, in close cooperation with the competent Member State and third-country authorities if necessary. In recent years OLAF investigated several cases of alleged illegal use of European funds in the Czech Republic. Particular programs of Ministry of Industry and Trade, Ministry of Education, Youth and Sports, Ministry of the Environment and Ministry of Transport have been investigated.

## 2. Role of the Office for the Protection of Competition in fighting corruption

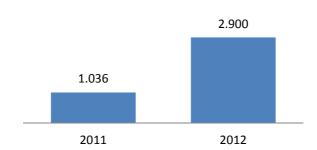
- 6. As one of the competences of the Office is the public procurement supervision, the Office could be identified as one of the active players in enforcement of anticorruption strategies. The issue of awarding procedures of public contracts is dealt by the Public Procurement Section; however the Competition Section is also crucial in this context as related bid rigging agreements are investigated by the Cartel Department within the Competition Section.
- 7. The Public Procurement Act represents one of the tools which help to prevent corruption, conflict of interest and favouritism in public procurement procedures. The last amendment of this Act entered into force in 2012. The need of this amendment was defined in the Government Anticorruption Strategy for the years 2011 and 2012 (hereinafter referred to as "Strategy")<sup>6</sup> as a task with high priority. One of the most criticized problems represented the lack of transparency of both the awarding of the public contracts, selection of bidders, and the procurement itself.
- 8. As stated in the Strategy, one of the frequent issues and potential weak points in public procurement is tender criteria being determined by the procuring entities. These criteria may be set to favour one single bidder and, as a result, the winner is determined from the very onset. Tailored-made criteria do not only limit fair competition but provides the possibility to corruption emergence. Provisions of the Public Procurement Act prohibit such practice; however decision making practice of the Office proves that procuring entities are tempted to violate the act. In order to solve this problem, the Office set as one of its priorities to strictly enforce prohibition of limiting and discriminating criteria as more transparency in the process of determining and evaluating procurement tender criteria may significantly limit corruption opportunities and increase competition in the public procurement process.
- 9. The amendment of the Public Procurement Act brought the substantial change of the financial thresholds. The bottom threshold for below-the-threshold public contracts was reduced from 6 million CZK to 3 million CZK (from 240,000 EUR to 120,000 EUR) for public works contracts and from 2

Anticorruption Strategy of the Czech Republic for 2013-2014 (<a href="http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2013-2014/Strategie-2013-a-2014---aktualni-verze">http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2013-2014/Strategie-2013-a-2014---aktualni-verze</a> 1.pdf).

<sup>&</sup>lt;sup>5</sup> European Anti-Fraud Office of the European Commission (http://ec.europa.eu/anti\_fraud/index\_en.htm)

The Government Anticorruption Strategy for the years 2011 and 2012 is available at: <a href="http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2011\_2012/Protikorupcni-strategie-puvodni-zneni---anglicka-verze.pdf">http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2011\_2012/Protikorupcni-strategie-puvodni-zneni---anglicka-verze.pdf</a>

million CZK to 1 million CZK (from 80,000 EUR to 40,000 EUR) for public supply and service contracts. The aim of the reduction in limits was the increase in the number of public contracts which fall under the award procedures stipulated by the Public Procurement Act and thus the increase in the transparency. Under the amended Act, the contracting entities are obliged to follow stricter rules when awarding public contracts which might have been previously awarded only according to their own discretion. The consequence of this change was also an increased number of proposals and submissions received by the Office. In response to the growing number of initiated administrative proceedings and expansion of the Office's agenda, it was a key task for the Office to ensure adequate resources to cope with these changes also at the organisational level. The number of employees working for Public Procurement Section was therefore increased by 70% last year.



Graph 1: Increase in the Number of Public Contracts Investigated upon Complaints

- 10. However, as the awarding procedure does not represent the sole problematic issue of public procurement the Office is also focused on the issue of potential collusive conduct among tenderers, called bid rigging agreements. As cooperation with public procurement authorities could be crucial when investigating alleged bid rigging agreements, the Office benefits from possessing such competencies under one roof.
- 11. The Office does not enforce only the approach focused on punishing detected bid rigging agreements but is also active in prevention towards the procuring entities. The Office regularly organizes seminars and conference where the issue and related disadvantages of existence of bid rigging are explained. Features and signs of potential collusive conduct of bidders during the awarding process are described as well and the procuring authorities are advised how to proceed in such situations.

## 3. Balanced approach to law enforcement

12. The definition of corruption may slightly differ among countries and different kinds of conduct are considered to be corrupt. In the Czech Republic, anticompetitive practices are assessed as corrupting mainly in cases dealing with public procurement; however alleged infringements investigated in antitrust cases could also be defined as malfeasance conduct under certain circumstances. As mentioned above attention has to be paid to awarding procedures of public contracts as well as to agreements among bidders. Therefore, both vertical and horizontal agreements may represent the issue for anticorruption strategies. The focus of competition authorities should be balanced and at the same time tailored to the specific needs of their market environment.

From 1 January 2014, the financial thresholds for mandatory award procedure stipulated by the Act will be returned to the levels which were applied before the amendment as a new, so called technical amendment, will enter into force.

13. In recent years, one of the Office's top priority areas has been represented by fight against bid rigging agreements in public procurement as this still has constituted quite serious problem. Cooperation of the Public Procurement Section and Competition section is crucial for the activities and particular investigations of each section. Resources are dedicated to investigations of both horizontal and vertical agreements equally as both issues are crucial for the development of fair market environment. Therefore, as regards the focus on horizontal agreements or vertical relations it could be said that the Office stands for a balanced approach in tackling competition concerns and corruption arising from anticompetitive conduct.

## 3.1 Bid rigging in the city of Litoměřice property management

- 14. A case example of the Office's fight against collusive agreements among tenderers is the case of bid rigging in the city of Litoměřice property management. The Office proved the existence of concerted practices of five tenderers in the award procedure concerning public contracts for the operation of lodgings at the operating centers of the Military Accommodation and Construction Administration in the city of Litoměřice
- 15. According to the Office's findings, after the contracting authority invited five tenderers to submit their bids, one company drafted bid prices for the other companies and sent them to the others by e-mail. Competitors then submitted bids with prices agreed in advance. As a consequence, the contracting authority did not receive bids that were the product of fair competition among tenderers and the contract was won by a predetermined tenderer.
- 16. The Office therefore classified the conduct of the parties as a bid rigging agreement. This type of agreement generally combines a price agreement with a market sharing agreement, i.e. the two types of most serious hard-core restrictions of competition, the essence of which is to eliminate competition between tenderers and ensure the income of bidders. Usually such conduct does not include influencing the contracting decision-making authority; however companies are motivated by ensuring or increasing of their material profit (as it is presumed that the existence of bid rigging increases the price of the contract by 10 15%) which could be assessed as malfeasance conduct as well.
- 17. Mentioned case is significant also from the perspective of cooperation of governmental bodies as one of the most serious objections repeatedly raised by the parties to the proceedings throughout the entire first-instance and appeal proceedings concerned the impossibility of using e-mail correspondence among the parties obtained by the Police of the Czech Republic within criminal proceedings as evidence in administrative proceedings by the Office. However, the possibility to use such evidence was proved and the significance of cooperation of such authorities for the successful law enforcement was pointed out.

#### 4. Cooperation of governmental bodies

- 18. As stated above, for a success of each anticorruption strategy, cooperation of governmental bodies and coordination of their activities are crucial. In the Czech Republic, the Police's Department for Fighting Corruption and Financial Criminality is the main player in investigating the alleged corrupt conduct in general and its cooperation with the Office has been well-established. Assistance of the Office to the Police's anticorruption department is of a great benefit when the area of public procurement or alleged bid rigging agreements becomes a part of the Police's investigation and such assistance and expert knowledge of the Office's employees is appreciated by the Police.
- 19. Well established mechanism of information sharing and coordination of specific activities of law enforcers can improve efficiency of law enforcement and also save public resources when preventing a parallel investigation of particular conduct. The Office does not need a court warrant or police assistance

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for conducting its investigation, however, the cooperation with police could be very important for detection of bid rigging agreements connected with corruption.

20. In the Czech Republic, as an example of connected competition and public procurement law enforcement practice could be mentioned the "black list" provision. If an undertaking breaches the Act on Public Procurement, the undertaking in question, apart from a fine imposition, is forbidden to submit bids for the period of three years. This rule applies for undertakings convicted of participation in bid rigging agreements (as defined in the Competition Act) connected with public procurement awarding procedure