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Separate Economic Rationale in Certain Bid-Rigging Schemes Involving Offer Withdrawal—A Critique of Polish Bid-Rigging Cases

Piotr Semeniuk[1]

I. INTRODUCTION

Bid-rigging, also referred to as collusive tendering, is a form of cooperation between suppliers that limits competition in tenders. Although tenders can be organized by both private and governmental entities, in this paper I will refer only to governmental tenders.

There exist numerous variations of bid-rigging schemes that fall under the definition of horizontal anticompetitive agreements. One may distinguish between bid suppression and complementary bidding.[2] The first practice occurs when competitors refrain from tendering or withdraw submitted bids in order to allow one of them (the bidder selected before) to win the tender. The second practice involves competitors submitting artificially high, or otherwise unacceptable, bids in order to allow the entrepreneur, who was selected in advance, to obtain the governmental contract. In both scenarios, companies, usually enjoying a significant portion of market shares in the relevant market, create appearances of hectic rivalry while in fact competition is scant and the public purchaser has no other option than accepting an artificially inflated bidding price.

There is nevertheless an indispensable element for every bid-rigging strategy—the scheme must make economic sense for each participant. Just as companies create cartels to maximize their profits, firms that help a successful bidder win a tender are not good Samaritans; they care primarily for their own well-being. This is why firms helping the successful bidder need to be rewarded for their help.

The reward may be double-sided: it either consists of compensation paid by the winning bidder to its collaborators (such compensation may take the form of "side payments" or "subcontracts"[3]) or it involves the collaborators waiting for their turn to be awarded yet another artificially inflated contract in a subsequent governmental tender. That is why scholars often say

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[2] Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUBLIC PROCUREMENT L. REV. 80 (2009). *See also*, Shaun Goodman, *Application of Article 101 TFEU* in: EU COMPETITION LAW, VOLUME III, CARTELS AND COLLUSIVE BEHAVIOUR: RESTRICTIVE AGREEMENTS AND PRACTICES BETWEEN COMPETITORS, BOOK ONE, 62-63. (Mari Siragusa, Cesare Rizza eds., 2012).

[3] Anderson & Kovacic, *id.* at 79.

that bid-rigging schemes "imply bid rotation."[4] The above statement is correct but with slight modification: bid-rigging schemes require bid rotation or any other form of compensation for the collusive bidders who did not win the particular tender.

To summarize, only those agreements (formal or informal), between undertakings participating in the tender, that offer an independent economic rationale (in other words, a form of reward) for each of the collusive bidders can be classified as bid-rigging and fall within the prohibition contained in Article 101 of the Treaty on the Functioning of the European Union. More regionally, the Polish doctrine of competition law, when discussing potential collusive tendering agreements between competitors prohibited under Article 6 of the Polish Act on the Protection of Competition and Consumers ("the Competition Act"), has in mind only such agreements that have an independent economic rationale for each company participating in a bid-rigging scheme.[5]

In the following paper I will briefly analyze all of the cases decided after the entry into force of the new Polish Competition Act[6] (i.e. 2007) until October 2012 in which the Polish Office of Competition and Consumer Protection ("the Competition Authority") invoked Article 6.1.7 of the Polish Competition Act (the provision that specifically addresses bid-rigging). I will argue that all of those cases followed a very similar pattern of behavior which I will refer to as "the Polish bid-rigging strategy" or "the Polish bid-rigging."

After describing this pattern, I will examine the Polish bid-rigging strategy in the light of the single economic entity theory. I will also conduct a simplified illustrative economic analysis that will show when participation in the Polish bid-rigging strategy might have an independent economic rationale for the bidders and what needs to be proven by competition authorities in order to demonstrate such a separate economic rationale.

At the end, I will argue that in three (and to some extent even in four) of the Polish bid-rigging cases the Polish Competition Authority lacked substantial competence to punish entrepreneurs for their alleged anticompetitive agreement.

II. POLISH BID-RIGGING CASES: GENERAL BACKGROUND

Article 6.1.7 of the Competition Act stipulates as follows:

> prohibited are agreements whose object or effect is to eliminate, limit or in other way infringe competition on relevant market which consist especially in (…) agreeing, by entrepreneurs participating in a tender or by these entrepreneurs and the entrepreneur organizing the tender, on the conditions of submitted offers, in particular with regard to the scope of works or price.

Article 6.1.7 pertains not only to tenders organized by public entities but also to tenders announced by private enterprises. Moreover, the provision at hand untypically covers not only agreements among competitors but also agreements between entrepreneurs participating in a

[4] Alberto Heimler, *Cartels in public procurement*, J. COMPETITION L. & ECON. (forthcoming).

[5] At least, none of the four main commentaries to the Polish Competition Act seems to describe a potential bid rigging practice that would not have an economic rationale for each of the bidders, *see*, e.g., T. Skoczny (ed.), *Commentary to Article 6 of the Polish Competition Act*, Legalis Electronic Database (access: 2012), Section G.1.6.

[6] Act of 16 February 2007 on Act on the Protection of Competition and Consumers (consolidated text: Journal of Laws 2007 No 50, item 331, with amendments).

tender and the tender organizer (public or private). However, some scholars claim, and I agree, that including agreements between the tender organizer and the tender participants under the scope of Article 6.1.7 is somewhat misplaced and such agreements should not be the concern of the Competition Act.

Since the entry into force of the new Competition Act (i.e. 2007) until the second quarter of 2012 there were six bid-rigging cases decided on the basis of Article 6.1.7 in Poland. All of them related to tenders organized by public entities and contemplated the alleged illegal agreements between tender participants. Each of these cases also bore one striking jurisdictional similarity: they were all decided by the regional divisions of the Polish Competition Authority and not by the central Warsaw office of the Authority.[7] Below I present the more comprehensive enumeration of the Polish bid-rigging cases:

- case RBG-27/2011[8] decided on December 2011 ("*Wood Logging*" case);
- case RKT-25/2011[9] decided on September 2011 ("*Road Signs*" case);
- case RKR-24/2011[10] decided on July 2011 ("*School Buses*" case);
- case RPZ- 31/2010[11] decided on December 2010 ("*Cleaning Services*" case);
- case RWR-24/2010[12] decided on October 2010 ("*Stamps for Post Offices*" case);
- case RPZ-12/2009[13] decided on August 2009 ("*Prison Sauerkraut*" case).

In each of these cases the Competition Authority imposed fines on tender participants who had allegedly engaged in bid-rigging. The goods and services contracted by public authorities in the particular tenders may be guessed from the conventional names I have assigned: there was a public administrator of a local forest seeking private companies to cut down abundant trees, an operator of regional roads wanting to find a contractor for the delivery and installation of miscellaneous road signs, two municipal schools searching for pupil transportation services, a city hall concerned about the cleanliness of its headquarters, regional branches of the postal monopolistic state-owned enterprise (which, for the purposes of the Polish Public Procurement Law, is classified as public entity) wishing to obtain the delivery of automatic stamps, and, last but not least, the Ministry of National Defense, together with the Ministry of

[7] The Polish Competition Authority consists of the central Warsaw office and of nine regional divisions of the Authority located in major Polish cities. Regional divisions investigate anticompetitive practices occurring on local markets. The divisions issue administrative decisions on behalf of the President of the Competition Authority.

[8] Decision of the President of the Office of Competition and Consumer Protection of 21 December 2011, RBG-27/2011, available in Polish at www.uokik.gov.pl.

[9] Decision of the President of the Office of Competition and Consumer Protection of 6 September 2011, RKT-25/2011, available in Polish at www.uokik.gov.pl.

[10] Decision of the President of the Office of Competition and Consumer Protection of 27July 2011, RKR-24/2011, available in Polish at www.uokik.gov.pl.

[11] Decision of the President of the Office of Competition and Consumer Protection of 24 December 2010, RPZ-31/2010, available in Polish at www.uokik.gov.pl.

[12] Decision of the President of the Office of Competition and Consumer Protection of 4 October 2010, RWR-24/2010, available in Polish at www.uokik.gov.pl.

[13] Decision of the President of the Office of Competition and Consumer Protection of 28 August 2009, RP-12/2009, available in Polish at www.uokik.gov.pl.

Justice, organizing tenders for vegetables supply, sauerkraut in particular, to various prisons, detention facilities, and military barracks.

Two of the cases involved only a single tender (*Stamps for Post Offices* and *Cleaning Services*), in four out of six cases there was more than one public tender (almost identical services or goods were sought by particular public bodies in these multiple tenders) that was subject to the investigation of the Competition Authority. Five out of six cases involved only two, allegedly colluding, entrepreneurs—in just one case (*Prison Sauerkraut*) three entrepreneurs were found to engage in bid-rigging.

Another specificity of these cases was that the alleged colluders were far from monopolizing any of the analyzed tenders, a characteristic feature that one would expect from a canonical bid-rigging scheme.[14] To the contrary, in each of the discussed tenders the fined entrepreneurs faced vigorous competition from other private entities that were not subject to the subsequent antitrust investigation.

One factual feature of Polish bid-rigging cases is also appealing. The bidders were small, individually registered entrepreneurs, and their mutual relationship was very close. In *Stamps for Post Offices*, in *School Buses,* and in *Road Signs* the two entrepreneurs were married. In *Cleaning Services* the bidders were two sisters and in *Prison Sauerkraut* the three entrepreneurs privately formed an almost complete household: they were spouses and a son. Only in *Wood Logging* were the two bidders not family members, but rather closely related individual entrepreneurs (perhaps friends, as the evidentiary materials seem to suggest).

Fines imposed by the regional divisions of the Competition Authority in each of the cases ranged from 1.000 PLN (approximately 250 EUR) to 130.000 PLN (approximately 32,000 EUR). None of the cases were appealed successfully (two appeals have been already dismissed by the court, one case was not appealed at all, and three appeals are pending but, pursuant to the author's personal view, these appeals will be most likely rejected by the court).

III. THE POLISH BID-RIGGING STRATEGY

A. Description of the Strategy

Having presented the general background of Polish collusive tendering, the specificity of the alleged conspirators' conduct needs to be examined. In particular, one needs to focus on the economic rationale underpinning the activities of the alleged bidding conspirators.

In each of the tenders at stake the practice consisted of the following: the alleged conspirators submitted two (or three in *Prison Sauerkraut*) bids with different prices and withdrew the lower bid if this bid was chosen by the procuring public authority. As a consequence, the conduct of the Polish bid "riggers" constituted neither complimentary bidding nor bid suppression, as far as these textbook forms of bid-rigging involve monopolizing the

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[14] In "canonical" bid-rigging cases companies engaging in bid-rigging possess significant market shares in relevant markets. Therefore, bid-rigging is often accompanied by horizontal anticompetitive agreements that happen "outside" the particular tender, such as market sharing or price-fixing. Bid-rigging cases decided so far by the European Commission involved bid-rigging schemes adopted by companies which together possessed significant market shares in relevant markets. Under such factual patterns bid-rigging was usually accompanied by market sharing and price-fixing. For brief analysis of the European bid rigging cases *see*: Siragusa, Rizza, *op. cit.*, at 64-66.

particular tender with the offers agreed in advance. The Polish bid-rigging hardly witnessed any tender monopolization.[15] There were usually only two—in one case three—colluding offers and the alleged conspirators faced competition within the tender proceedings.

What, then, was the purpose of the Polish bid-rigging strategy? This purpose was to indemnify one's offer; in other words, to increase one's chances of winning the tender. This is what differentiates the Polish bid-rigging strategy from traditional bid-rigging, the latter being conceptually more similar to a cartel where the goal of the bidders is to inflate the price above competitive levels.

How was the purpose of purpose of the Polish bid-rigging achieved? Consider an example in which there are four participants submitting their offers in a governmental tender: entrepreneurs A, B, C, and D. Imagine that A and B adopt the Polish bid-rigging strategy. A and B don't know how their competitors are going to behave, i.e. which prices they are going to charge. Of course A and B would like to charge the government as high a price as is possible (this would maximize their profits), but at the same time A and B are afraid that C or D will offer lower prices and obtain the governmental contract leaving A and B with no contract and no profits whatsoever. How are A and B going to overcome this dichotomy between their desire to obtain the highest price and their desire to win the tender?

One way is to submit two offers with different prices: Let's say A submits the offer with a price of 50 PLN while B submits the offer with the price of 100 PLN. Now imagine Scenario 1 in which, after opening A's and B's competitors' offers, it turns out that these offers charge 150 PLN and 75 PLN. As a result, A wins the tender with the lowest bid. Now imagine Scenario 2 in which C and D turn out to submit prices of 150 PLN and 125 PLN. A still wins the bid with the lowest offer but, if A were to withdraw his offer, the tender would be won by B who will be able to charge 100 PLN and therefore will obtain higher profit than A would have obtained otherwise.

If there is an agreement between A and B, A will then withdraw his offer which will maximize A's and B's common profits (later on I will argue that such a scheme itself does not constitute an agreement, but rather is a unilateral policy of one entrepreneur, unless there is some compensation between A and B).

Such an agreement was found to be reached between the entrepreneurs in the Polish bid-rigging cases. The Polish bid-rigging strategy was not aimed directly at monopolizing the tender and charging the governmental authority an excessive price. The aim was rather to increase the chances of winning the tender with the highest possible price by overcoming—to some extent—the uncertainty of the bidders' competitors pricing behavior and placing hypothetical A and B in an competitive advantage vis-à-vis their competitors (since competitors suffer from exactly the same dichotomy between the desire to both obtain a high price and win the bid). Of course, the government was also harmed at the end (in Scenario 2 in which A withdrew his lower offer).

It was precisely this strategy that I call the Polish bid-rigging strategy.

[15] Note, however, that I don't argue that a bid-rigging strategy can be harmful only if all bidders, who participate in a tender, collude. Potential harm to procuring authority depends on how differently situated the bidders are. Even the collusion between two bidders in a tender involving many bidders can be harmful if the two colluding bidders are able to submit offers which are more advantageous than their competitors' offers.

B. Single Economic Unit

My argument is that, in the majority of the Polish bid-rigging cases, the practice at bar does not constitute bid-rigging as prohibited by competition rules, but is rather a unilateral conduct that is not captured by the prohibition contained in Article 6.1.7 of the Polish competition statute.

If entrepreneurs who are parties to an alleged anticompetitive agreement don't have "independent economic justification" or "independent economic motivation" for their conduct, such conduct does not qualify as an agreement under most competition law regimes. Absent such independent economic motivation, the entrepreneurs' separate legal forms are irrelevant as to possible application of antitrust provisions of prohibited collective actions.

This concept is well grounded in the "single economic unit" doctrine developed by the European Court of Justice ("ECJ"). Although on its face an undertaking might have "separate legal personality," if the undertaking "enjoys no economic independence,"[16]" its conduct falls outside of Article 101 (1) of Treaty on the Functioning of the European Union.[17]

Here, it is also worth noting that, in the light of the ECJ case law, the analysis of an entrepreneur's economic independence comes down to behavioral rather than structural circumstances (yet, structure can be a reliable presumption for behavior). Structural ties between undertakings, such as ownership of 100 per cent of stock, create "a rebuttable presumption that the parent exercises decisive influence over the subsidiary[18]" and, hence, that undertakings are not "separate."

Circumstances decisive for the analysis of independence are nonetheless behavioral and include factors such as whether or not undertakings "adopt the same course of conduct on the market[19]" and whether or not an undertaking "enjoys real autonomy in determining [its] course of action in the market.[20]" So far, EU courts of the European Union have not applied the single economic entity doctrine to factual patterns involving natural persons acting as single entrepreneurs—this is quite understandable given the magnitude of cases being resolved on the European level. The European Court of Justice, however, made it explicitly clear that this doctrine applies both to corporate entities and to natural persons.[21]

To conclude, as it was aptly put by the American Supreme Court judge, Justice Stevens, "the relevant inquiry, therefore, is whether there is a contract, combination … or conspiracy amongst separate economic actors pursuing separate economic interests."[22]

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[16] Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export,* http://eur-lex.europa.eu, ¶8.

[17] Cases 56 and 58/64, *Consten and Grundig*, http://eur-lex.europa.eu. *See also* Alison Jones, Brenda Sufrin, *EU Competition Law*, 4th Edition, Oxford University Press 2008, pp. 134-139. The single economic entity doctrine was confirmed and extended in the precedent *Viho* judgment, see case C-73/95, *Viho Europe BV v Commission*, http://eur-lex.europa.eu.

[18] Jones, Sufrin, *EU Competition…*, p. 138.

[19] Case T-325/01, *Daimler Chrysler AG v. Commission*, http://eur-lex.europa.eu, ¶85.

[20] *Viho*, ¶16.

[21] *Daimler Chrysler*, ¶85.

[22] *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201, 9 (2010).

IV. ECONOMIC RATIONALE OF THE POLISH BID-RIGGING STRATEGY

Coming back to bid-rigging, it seems that if one bidder's behavior does not have any economic justification other than a desire to further the economic interest of another bidder, this bidder does not enjoy economic independence and cannot be a party to an anticompetitive agreement with the latter bidder. In such case, both bidders would belong to "single economic entity." The crucial point arises at this moment and one should ask whether, in the example of cooperation between hypothetical A and B, there was an independent economic rationale for both A and B to engage in the Polish bid-rigging strategy. Absent such independent economic rationale, A and B would constitute a single economic entity.

Of course one may claim that there was such a rationale because in Scenario 1 it was A who got the contract and in Scenario 2 it was B; therefore, there was an incentive for both A and B to "collude" since one of them might have gotten the contract at the end, depending on the occurrence of a particular scenario. But such an understanding of independent economic rationale is persuasive only on the surface and once we dig into the problem, this explanation collapses.

Remember that A and B do not know what prices are going to be charged by their competitors and, consequently, they do not know which of the Scenarios, 1 or 2, will be brought into life. Now, imagine that the probability of the occurrence of either Scenario 1 is 40 percent and the probability of occurrence of Scenario 2 is 40 percent (in 20 percent of cases one of the competitors will charge a price below 50 PLN, the lowest price that in the hypothetical can be charged by either A or B).

In the case of both Scenario 1 and Scenario 2 the following strategies might be applied by A and B in non-coordination circumstances (assuming that the prices that might be chosen by A and B are only 50 PLN and 100 PLN):

- both A and B submit the price of 100 PLN;
- both A and B submit the price of 50 PLN;
- A submits the price of 100 PLN and B submits the price of 50 PLN;
- A submits the price of 50 PLN and B submits the price of 100 PLN.

Assume also that should A and B submit equal offers, and these are the lowest offers, the public entity will choose the A's offer in 50 percent cases and the B's offer in 50 percent cases (the decision of the public entity will be then based on qualitative criteria).[23]

[23] Note interestingly that, from the game-theoretic perspective, the game between A and B would be a classical prisoners' dilemma game, assuming that A and B face no competition in the tender. Slightly modifying our example (by excluding A's and B's competitors from the tender), the possible actions by A and B are as follows. If A and B both submit offers of 100 PLN, the outcomes of the game for the players will be 50 PLN, 50 PLN (assuming both A and B will have 50 percent probability of obtaining the contract for the price of 100 PLN), i.e. the total welfare generated for A and B will equal 100 PLN. If A and B submit offers of 100 PLN and 50 PLN, the total welfare generated will also equal 100 PLN (the outcomes for the players will be: 100 PLN, 0 PLN or 0 PLN, 100 PLN). If A and B both submit offers of 50 PLN, the outcomes will be 25 PLN, 25 PLN (50% percent probability times the price of 50 PLN) and the total welfare will be 50 PLN. Such game, being a prisoners' dilemma game, has only one Nash equilibrium and each player has only one dominant strategy (this dominant strategy consist in submitting the offer

Under Scenario 1 (which represents 2/5 of but-for-worlds), the following are the chances of winning the contract:

- in 37.5 percent cases (6/40 of total but-for worlds) that A wins the contract with the price of 50 PLN;
- in 37.5 percent cases that B wins the contract with the price of 50 PLN;
- in 25 percent cases that neither A or B wins the contract;

Under Scenario 2 (in which none of A's and B's competitors offer a price below 100 PLN):

- in 37.5 percent cases that A wins the contract with the price of 50 PLN;
- in 37.5 percent cases that B wins the contract with the price of 50 PLN;
- in 12.5 percent cases that A wins the contract with the price of 100 PLN;
- in 12.5 percent cases that B wins the contract with the price of 100 PLN.

Therefore, in the case of non-cooperation, both A's and B's potential revenues would be 20 PLN (6/40 times 50) + (6/40 times 50) + (2/40 times 100).

Now examine the Polish bid-rigging strategy in which A always submits the offer with the price of 50 PLN, B always submits the offer with the price of 100 PLN, and A always agrees to withdraw his offer absent any compensation. Under Scenario 1, A will obtain 40 percent of potential contracts with the price of 50 PLN, which amounts to potential revenues of 20 PLN. Under Scenario 2 B will get 40 percent of potential contracts with the price of 100 PLN, which amounts to potential revenues of 40 PLN.

Such a solution makes sense for B (profit equaling 50 PLN is better than profit equaling 20 PLN) but makes little sense for A. It is true that both in the case of the adoption of the Polish bid-rigging strategy and in the case of independent tender behavior, A's revenues are the same. However, in the Polish bid-rigging strategy A must perform the contract in 4/10 (16/40) of the but-for worlds, and, while behaving independently, A actually performs the contract only in 14/40 of the but-for worlds. Bearing in mind that performance of the contract always involves some cost, although A's revenues are equal regardless of if he engages in the Polish bid-rigging strategy or not, A's profits will be lower under the Polish bid-rigging strategy.[24]

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of 50 PLN), while the outcome of the game is Pareto inferior (*see e.g.* MASSIMO MOTTA, COMPETITION POLICY. THEORY AND PRACTICE 542-551 (2004). Therefore, it would be in the interest of both A and B to agree on mutual cooperation and to submit offers of 100 PLN (allowing the procuring authority to choose the winning offer on the basis of criteria other than price). The prisoners' dilemma perspective explains why A and B might want to coordinate their behavior by submitting higher anticompetitive offers or agreeing on a minimum price of an offer (this can happen even if A and B face some competition in the tender) but it does not explain why either A or B might want to unilaterally withdraw his offer after it is chosen by the procuring authority. Later in this paper I will argue that, absent any form of compensation between A and B, there is no incentive for either of them to withdraw the offer after it was chosen by the procuring authority.

[24] Assume that A's and B's costs are 25 PLN. In this case A's profits, absent engaging in the Polish bid rigging strategy, will amount to 12.25 PLN (20 minus 14/40 times 25) and A's profits, if adopting the Polish bid rigging strategy, would amount to 10 PLN (20 minus 16/40 times 25). B's profits will be respectively: 20 minus 14/40 times 25 = 12.25 PLN; and 40 minus 16/40 times 25 = 30 PLN.

However, the numbers presented above, such as potential profits and turnovers, are based on random assumptions.[25] These assumptions are meant only to illustrate how A and B might calculate in particular circumstances. Since neither A nor B knows the probability of Scenarios 1 and 2, they might adopt manifold strategies.

Also, the prices of 50 PLN and 100 PLN are random. In fact, one can easily change these numbers (prices offered by A and B, probability of Scenarios 1 and 2, and A's and B's particular bidding strategies) to effectuate a model in which both A and B will benefit from engaging in the Polish bid-rigging strategy or, alternatively, to a model in which A will be better-off and B will be worse-off once adopting the Polish bid-rigging strategy.

Nevertheless, one outcome is impossible regardless of the numbers: when A and B are considered to be one entity, they cannot be, in any hypothetical, worse-off after adopting the Polish bid-rigging scheme as compared to independent behavior. This is because in Scenario 2, in which A withdraws his offer and B obtains a better governmental deal, there is a transfer of additional wealth from the public entity to B. Therefore, total potential profit of A and B achieved by engaging in the Polish bid-rigging strategy will be always higher than the A's and B's total profit earned under competitive circumstances.

This is why it makes an economic sense for a unilateral economic entity (i.e. for A and B treated as one entity) to adhere to the Polish bid-rigging strategy. Why is this strategy is not reasonable for A and B independently? When Scenario 2 occurs and A withdraws his offer, the whole additional wealth is transferred from the public entity solely to B. A gets nothing from the surplus generated by the Polish bid-rigging scheme. What is then A's incentive to withdraw his offer in Scenario 2 instead of winning the tender? There is no such incentive unless A is somehow compensated for his behavior in Scenario 2 (withdrawing the offer). How high must be such compensation? In theory anything above zero.

Of course, the compensation does not have to be pecuniary, it may also involve B subcontracting certain works to A, if it is B who obtains the contract in Scenario 2. However, in order to prove that the adoption of the Polish bid-rigging strategy has an independent economic rationale for both A and B treated separately, the Competition Authority must prove that the alleged conspirators (A and B) agreed on some compensation paid from B to A.[26]

This compensation requirement would be satisfied if:

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[25] In the discussed hypothetical, these assumptions were, first, that the probability of the occurrence of Scenarios 1 and 2 is respectively 40% percent and, second, that both A and B will submit offers of 100 PLN and 50 PLN in 50% of cases respectively.

[26] Note that A and B do not necessarily have to agree on a compensation explicitly. A might also somehow unilaterally signal to B that, in exchange for withdrawing his offer in one tender, he expects B to return the favor back in subsequent tenders. For the purpose of this article there is no fundamental conceptual difference between a mutual understanding between entrepreneurs regarding certain conduct achieved by explicit agreement and a similar understanding achieved through "signaling." Note, however, that an understanding achieved through signaling might be contentious from the antitrust perspective for the same reasons why tacit collusion is usually not captured by competition laws. Depending on the factual setting, one may argue that in case of signalizing there is no sufficient "meeting of the minds" between the entrepreneurs and, therefore, there is no agreement from the antitrust point of view. For more on "signalizing" in bid-rigging, see e.g. Peter Cramton & Jesse A. Schwartz, *Collusive Bidding: Lessons from the FCC Spectrum Auctions*, 17 J. REGULATORY ECON. 229-252 (May 2000).

- in cases of a single tender, the Competition Authority showed that, either B paid some money to A, or B subcontracted some of the obtained governmental works to A;
- in cases involving multiple tenders the Competition Authority showed that:
  - there was at least one tender in which it was B and not A who submitted the lower offer (the actual withdrawal of the offer does not have to be proven as long as in this tender both A's and B's offers were beaten by their competitors) or, absent such proof, that:
  - either B paid some money to A or B subcontracted a portion of any of the obtained bids in any of the multiple tenders to A.

V. THE THEORY APPLIED TO FACTS

In light of thethese conclusions from the previous paragraph, involving a hypothetical A and B, one can now scrutinize the actual six Polish bid-rigging cases and determine if it is possible to identify an independent economic rationale for the alleged conspirators.

The least problematic factual circumstances involved *Cleaning Services*. In this case there was just one tender attended by the two, allegedly conspiring, sisters and no proof of any compensation. Given previous considerations, one can then conclude that *Cleaning Services* involved no agreement but rather a bidding strategy adopted by a single economic entity.

In *Stamps for Post Offices* the Competition Authority imposed a fine for the alleged bid-rigging that occurred in only in one tender. The Competition Authority also examined other three tenders in which the spouses lost the contract to their competitors. In each of the analyzed bids (in one of which the offer withdrawal actually took place) it was always the husband who submitted the higher bid. Consequently, it follows that the wife must be found to be an independent entrepreneur; therefore, similarly to *Cleaning Services*, there was no prohibited agreement in *Stamps for Post Offices*.

School Buses involved a little more complicated factual background. Four tenders were investigated in this case. In one of the first three, facts were relatively lopsided: the wife offered a lower price and withdrew her offer—this allowed the husband to obtain the bid for a higher price. The fourth tender was divided into several routes (the routes were to be covered by bus transportation services). The wife won one route and the husband won two. Nevertheless, the fourth tender did not seem suspicious for the Competition Authority, which stated that "the documentation (submitted by the bidders in the four tender) did not allow to embrace this tender by the investigation of potential anticompetitive conduct.[27]" For that reason, there was also no proof of a separate economic rationale for each of the two bidders in *School Buses*: such rationale was absent for the wife. The fact that the wife won a part of the fourth tender did not itself show that the husband had rewarded the wife for the withdrawal of her offer in previous bids.

In *Road Signs* and *Wood Logging*, which involved multiple tenders, the bidders were switching their offers in the following way: in some tenders the offer of the first bidder was higher and in others the offer of the latter bidder exceeded the first bidder's offer. Those facts

[27] Decision of the President of the Office of Competition and Consumer Protection of 27 July 2011, *op. cit.*, at 8.

alone prove that there existed a potential separate economic rationale for each bidder, hence one can find a potential anticompetitive agreement between the bidders (again, it is not necessary to prove that each bidder managed to withdraw his offer at least once[28]—it is enough to show that in theory, given the bidders lack of knowledge about their competitors' offers, each bidder at least once contemplated the possibility of withdrawing his lower offer).

Prison Sauerkraut, as it was mentioned before, dealt with an alleged agreement among three bidders (wife, husband, and their son), each of whom was fined separately. The evidence presented by the Competition Authority to justify its decision shows that, although two of the bidders (the son and the mother) rotated the conditions and subsequent withdrawals of their offers, one bidder (the husband and simultaneously the father), in each of the analyzed tenders always submitted the lowest offer, which was subsequently withdrawn. Such conduct proves that the father should be treated as a separate entrepreneur and, as a result, should not have been fined by the Competition Authority.

To summarize, only in two out of the six analyzed Polish bid-rigging cases there was sufficient evidence of independent economic motivation to impose a fine on each of the alleged tender conspirators. In three cases the gathered evidence did not support the existence of any agreement at all and, in one case (*Prison Sauerkraut*), only two of the three fined bidders deserved the austere treatment by the Competition Authority.

The family relations between the bidders certainly add flavor to the above conclusions. One can easily imagine a situation in which a far-sighted husband asks his wife to sign some papers that will transform her into a proud individual entrepreneur and subsequently uses his "second identity" in order to increase his chances of obtaining the public bid. However, for the sake of avoiding unnecessary doubts and potential critique, I must underline that, of course, close family relationships between the bidders do not themselves suffice to find the existence of a single economic unit and the lack of an independent economic rationale. The lack of separate economic motivation must be examined through the analysis of entrepreneurs' strategies in tenders at stake. Marital or parental affection between bidders can only serve as an indicator of a potential entrepreneurial unity but must not be itself the proof of this unity.

VI. CONCLUSIONS

Sadly, in every Polish bid-rigging case, the Competition Authority was only concerned about the transfer of wealth from public entity to the alleged conspirators. However fraudulent such transfer may be, the Polish bid-rigging strategy itself, absent some compensation between the bidders, does not prove the existence of a separate economic rationale for the investigated bidders.

There may be different legal provisions that address such unilateral fraudulent conduct[29] but, as long as the conduct is unilateral and does not constitute an agreement between

[28] Although this was actually the case in *Road Signs* and *Wood Logging*.

[29] One might, for example, contemplate potential criminal liability under Article 305 § 1 of the Polish Criminal Code (consolidated text: Journal of Laws 1997 No 88, item 553, with amendments). Article 305 § 1 stipulates that a crime is committed when "a person frustrates or hinders public tender in order to obtain financial benefit." Also Article 89.1.3 of the Polish Public Procurement Law (consolidated text: Journal of Laws 2010 No 113, item 759, with amendments allows "public entities to reject a tender if its submission is an act of unfair competition within the

independent economic entities, it should not be captured by Article 6.1.7 of the Polish Competition Act.

Unfortunately, the Polish Competition Authority disregarded any considerations about the potential lack of the bidders' independence and, paradoxically, pointed at the close relationships between the alleged conspirators in order to support finding of collusion.[30]

I argue that, on the contrary, in cases involving the Polish bid-rigging, if close family relationships between the allegedly colluding entrepreneurs exist, they should rather serve as evidentiary indicium suggesting lack of separate economic rationale. The presence of such "family" evidence ought to divert investigating attention to the possibility of unitary conduct. And, if the Competition Authority is unable to find any compensation between the bidders (in form of a money transfer, subcontracting, or bid rotation), it should refrain from enforcing antitrust rules, at least those rules that prohibit anticompetitive agreements.

The Polish bid-rigging cases and the specificity of the bidders' conduct involved in those cases surprisingly escaped public attention. This was partially due to the fact that those cases pertained to relatively insignificant entrepreneurs, and partially because the fined entrepreneurs, apparently feeling remorseful of the fraudulent nature of their conduct and trusting the legal expertise of the Polish Competition Authority, did not always bring appeals to the court (or, if such appeals were brought, the entrepreneurs did not waste additional financial resources on seminal legal representation).

Given the repetitious pattern of the entrepreneurial bidding practices described in this paper I suspect that the peculiarity of the Polish bid-rigging might be, in fact, not a peculiarity at all, but present for other European jurisdictions. Such bid-rigging strategies could be being adopted in other national public procurement sceneries involving petty entrepreneurs and regional divisions of national competition agencies. I therefore hope that the conclusions reached in this paper might turn out to be helpful for addressing subsequent "Polish bid-rigging schemes," in any country they are to occur.

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meaning of the provisions concerning the combating of unfair competition" (the unilateral practice described in this paper will most likely qualify as "act of unfair competition" under the Polish law of combating unfair competition).

[30] Decision of the President of the Office of Competition and Consumer Protection of 24 December 2010, *op.cit.*, at. 23.