Challenges of Interplay between Competition Law and Public Procurement

Recent trends

Deutsche Bahn AG, Legal Department

Thilo Reimers

Vilnius, September 10th, 2014

Agenda

1. Selected competition law issues in public procurement
2. Cartel identification and cartel damage prevention at Deutsche Bahn

Selected competition law issues in public procurement (1)

General overview: Three core issues

- **Dealing with hard core cartels**
  - Prerequisites for awarding contracts to past offenders (“self-cleaning”)
  - Development of “damage prevention systems” by private companies

- **Dealing with multiple bidders**
  - Parallel bids by two group companies
  - Parallel participation as a bidder and a subcontractor of another bidder

- **Dealing with (bidding) consortia**
  - Joint bidding with one or more other undertaking(s)

Selected competition law issues in public procurement (2)

In particular: Dealing with (bidding) consortia

- **General legal criteria** (see e.g., para 237 EU Horizontal Guidelines)
  - Consortia generally considered admissible, if the consortium allows the respective companies to *participate in projects that they would not be able to undertake individually*.

- **Warning signs** for competition concerns (see e.g., OECD Bid Rigging Guidelines, 2009)
  - Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
  - The winning bidder repeatedly subcontracts work to unsuccessful bidders.
  - The winning bidder does not accept the contract and is later found to be a subcontractor.

- **Recent trend**
  - Develop specific workshop program and guidance for procurement personnel as part of an overall “Damage Prevention System”

Agenda

1. Selected competition law issues in public procurement
2. Cartel identification and cartel damage prevention at Deutsche Bahn

Cartel identification and damage prevention at Deutsche Bahn (1)

Deutsche Bahn is increasingly focusing on damage prevention

- **Traditional focus** has primarily been **on private damage claims**

- **Focus has shifted** to more prominently **include** cartel identification and **damage prevention**
  - DB Germany-wide one of the biggest buyers of goods and services
  - Studies estimate that cartels lead to substantial price increases
  - Possibly high number of undetected cartels

- DB has in 2013 developed a **“Damage Prevention System”** that focuses on
  - Risk identification (monitoring agency practice, screening tools)
  - Risk classification (four risk groups),
  - Risk reduction (tailor-made measures for each risk group).

Cartel identification and damage prevention at Deutsche Bahn (2)

DB Mobility Networks Logistics

In particular: Application of screening tools and interaction with competition agencies

- **Application of screening tools**
  - Structural screening as part of DB's overall product market research and analysis
    - Criteria: market concentration / market entry barriers / product homogeneity, etc.
    - Regular assessment of product groups
    - Assessment may lead to "risk market classification" for certain markets
  - Consequences of risk market classification
    - Negotiation of additional contractual clause that stipulates compliance measures

- **Interaction with competition agencies**
  - Options in case of internal cartel suspicion (confront suppliers vs. file complaint)
  - As internal risk prevention programs become more sophisticated, the number of complaints to competition / enforcement agencies might increase