



SWISS COMPETITION COMMISSION FINES CON- STRUCTION COMPANIES

1st AGON WORKING PAPER
1.2.2012

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I. SUMMARY¹

1. The Swiss Competition Commission (COMCO) determines unlawful agreements affecting competition between several companies of road construction and civil underground engineering².

II. CASE

A. Parties

a) Defendants:

- Cellere AG, St. Gallen
- Cellere AG, Aarau
- Daedalus Holding AG, Sursee
- Sustra AG, Schöftland
- ERNE Holding AG, Laufenburg
- ERNE AG Laufenburg
- Gebrüder Meier AG, Birrhard
- Ernst Frey AG, Kaiseraugst
- Gewerbezentrum Unterfeld AG, Döttingen
- Birchmeier Hoch- und Tiefbau AG, Döttingen
- Granella Holding AG, Würenlingen
- Granella AG, Würenlingen
- Hubschmid Beteiligungs AG, Nesselbach
- H. Graf AG, Zufikon
- Hüppi AG, Wallisellen
- Implen AG, Dietlikon
- Implen Bau AG, Buchs
- Knecht Brugg Holding AG, c/o Knecht Bau AG, Brugg
- Knecht Bau AG, Brugg
- Meier Söhne AG, Schwaderloch
- Bauunternehmung G. Schmid AG, Wittnau
- KUPERA Holding AG, c/o Otto Notter AG, Hoch- & Tiefbau, Wohlen
- Käppeli Bau AG, Wohlen
- Treier AG, Schinznach-Dorf

¹ AGON-Authors: Patrick L. Krauskopf & Fabio Babey

² Swiss Competition Commission, Decision, 16/12/2011, available online www.comco.ch

- Umbricht Holding AG, c/o Dominik Umbricht, Untersiggenthal
- Umbricht AG, Turgi
- Neue Bau AG Baden, Baden
- Walo Bertschinger Holding AG, Zürich
- Walo Bertschinger AG, Zürich
- Ziegler Holding AG, Liestal
- Ziegler AG, Liestal

All of the defendants are companies of road construction and civil underground engineering.

B. Market

2. For a civil engineering company the competitors can change for each project. Competitors are only the companies in question of which an offering company knows or must assume that they have the capabilities and the capacities to execute the tendered project. Thus it follows that in the present study, each construction project can be considered as a separate product market. Additionally the geographic market in this case is therefore to be limited to the location of each specific project, maximal to be exceeded to the area of the Canton of Aargau.

C. Behavior/agreement under scrutiny

3. Unlawful agreements among competitors affecting competition.

D. Actual infringement

4. Unlawful agreements affecting competition between several companies of road construction and civil underground engineering, particularly:

- *Submission / Acceptance.* The term submission is used in the following for the procurement of civil works, from the tender to award the contract. It can be helpful to distinguish between public and private tenders. The submission is in the government sector largely dictated by law. In submissions of private contracts, however there is more leeway. Via the exclusion of the most expensive providers, the circle of offerors is restricted continuously to finally award the constructing company.
- *Protection.* Under protection or protection acquisition behavior is understood, how the consultation participants determine the company, which will directly benefit from the arrangement, as it should receive the contract of the awarded submission. The agreement is usually about the price and allows the protected company to submit the lowest price of all consultation participants, which usually leads to the award of the contract to the protected company.
- *Offer support.* Under a support offer (or sham offer) an offer is understood to which the consulting participants agreed and which has a higher price than the offer of the protected company. A support offer is therefore submitted to keep up appearances and

seeks to control the offer in favor of the protected company. If a company does not submit a bid because of the agreement it would be called an entry waiver or a bid-suppression.

5. The COMCO investigates against the defendants due to agreements in accordance with Article 5 par. 3 lit. a and c and par. 1 Cartel Act regarding price and award agreements, exchange of information on quotation prices and conditions, participation in tenders and the allocation of orders and customers.

E. Chronicle

6. **Background.** Trigger of the present study was an indication of a consumer/a company (in the following called X). X firstly appeared in March 2008 by an e-mail to the COMCO with information about unlawful agreements between several companies of road construction and civil underground engineering. In a second e-mail in May 2008 and a letter of June 2008 X confirmed the mentioned version and added further information. During a meeting with representatives of the COMCO in March 2009, X explained and clarified the situation orally. As a consequence, X answered phone calls at three specific questions on specific companies. X's data were credible and free from contradictions and stood - where on that date verifiable elements - out to be correct. COMCO assured X the protection of his / her anonymity.

- *June 8th, 2009.* Based on the information from X, and after further investigation the Secretariat in consultation with a member of the Presidium opened two investigations under Article 27 KG - a possible competition agreements against companies of road construction and civil underground engineering in (i) the Canton of Zurich (No. 22-0384), and (ii) (the present case) against companies in Aargau (No. 22 - 0385).
- *June 9th, 2009.* The Secretariat participated in a coordinated effort with the police and IT specialists at the same time searches of premises at companies in the canton of Aargau and the Canton of Zurich.
- *August 19th, 2010.* The investigation was extended to other companies.
- *August 25th, 2010.* COMCO sent all 17 parties a questionnaire.
- *June 7th, 2011.* COMCO sent the parties the proposal for an opinion with a deadline until July 8th, 2011. Several parties requested an extension of the deadline until September 9th, 2011, which was granted in all cases.
- *September 2nd, 2011.* The Secretariat invited the parties to register themselves at the scheduled hearing before the Competition Commission.
- *November 4th, 2011.* The Secretariat granted the parties a deadline until November 16th, 2011, to take place at the hearings.
- *December 12th, 2011.* COMCO consulted about the case.
- *December 16th, 2011.* COMCO decided the case.

- The following companies appealed against the decision of the COMCO at the Federal Administrative Court:
 - Cellere AG
 - Cellere AG, Aargau
 - Granella Holding AG
 - Granella AG
 - Umbricht Holding AG
 - Umbricht AG
 - Neue Bau AG
 - Erne Holding AG
 - Erne AG
 - Gebr. Meier AG

III. JUDGMENT/DECISION

A. Procedural Findings

7. *Birchmeier-Liste.* The search warrant dated on June 9th, 2009 began at 09.00 o'clock at Birchmeier AG. Shortly before the office of Mr. Birchmeier was searched, he handed to the Secretariat a red folder who had been in his office. In this folder, there was a handwritten list ("Birchmeier-Liste") that provides information on agreed projects. The nine-page handwritten list shows more than 150 projects to which Birchmeier AG each a supporting quotation submitted. Each row represents a project and runs on the client, the building project, the quotation sum of Birchmeier AG, the protected competitors and date. The Birchmeier-Liste is for the present study of substantial importance and a reliable evidence.

8. *Bonus Report.* (i) Birchmeier AG was the first company that submitted a bonus report (even during the house search). Since then Birchmeier AG supported COMCO in clarifying the unlawful agreements. The immediate cooperation for the present study was of great benefit. For these reasons, Birchmeier AG fulfills the conditions for full immunity in the meaning of Art. 8 par. 3 and 4 lit. b SVKG and is dispensed from any sanction. (ii) On the following day (June 10th, 2009), Knecht and Meier Söhne showed their willingness to cooperate. COMCO judged the cooperation of Knecht and Meier Söhne as important. In addition all acquisitions and supporting quotes from the COMCO were admitted from G. Schmid. This fact has been viewed positively by the COMCO. The COMCO requested a penalty reduction of 50% for Knecht and Meier Söhne as well as a reduction of 20% for G. Schmid. (iii) Implenia announced its full cooperation on June 10th 2009. Implenia has sought the Secretariat to assist in verification of the facts. The contribution of Implenia were not of high importance and the COMCO therefore

requested a penalty reduction of 10% for Implenia. (iv) Umbricht decided only at the end of the process to cooperate with the Secretariat. For this reason, the input of Umbricht for the COMCO was limited useful, as the arrangements were by then already sufficiently proven. To appreciate the willingness to cooperate in the form of admissions anyway, COMCO requested for a penalty reduction of 5% for Umbricht. (v) Neue Bau AG was very late cooperating with the competition authorities and provided no significant contribution and no decisive evidence. But the behavior of Neue Bau AG has supported the argument yet, so their contribution is still included and awarded a penalty reduction of 5%.

B. Substantial Findings

9. *Agreement/Collusion Art. 5 par. 3 lit. a and c Cartel Act.* COMCO concluded that the unlawful agreements between several companies of road construction and civil underground engineering eliminate effective competition within the meaning of Art. 5 par. 3 lit. a and c Cartel Act.

10. *Agreement/Collusion Art. 5 par. 1 Cartel Act.* Even if an elimination of effective competition can't be proofed, there is neither sufficient inside nor outside competition to ensure effective competition. This circumstance could not be outweighed by justifiable reasons. The quantitative analysis of the elements of materiality therefore leads to the conclusion that the restriction of competition is significant within the meaning of Art 5 par. 1 Cartel Act.

11. *Sanction Art. 49a par. 1 Cartel Act.* Unlawful agreements based on Art. 5 par. 3 lit. a and c Cartel Act and Art. 5 par. 1 Cartel Act can be sanctioned in accordance with Art. 49a par. 1 Cartel Act. COMCO sanctioned 17 companies with fines between CHF 3'748.— and CHF 1'437'623.—.

IV. COMMENTS

A. Procedural Issues

12. *Jurisdiction.* A defendant has observed that COMCO was not a tribunal within the meaning of Art. 6 ECHR and has not the expertise to make a decision in these proceedings. ECHR recently ruled that the imposition of a penalty by an administrative authority in the first instance does not contravene Art. 6 par. 1 ECHR, as long as the decision may be reviewed by a court that meets all of the convention guarantees. The Federal Administrative Court as reviewing instance fulfills these requirements.

13. *Birchmeier-Liste.* Several enterprises question the credibility and reliability of the Birchmeier-Liste. The Birchmeier-Liste is for the present study an important and reliable evidence. It arose during the consultation activity and was not created after the investigation opened. It rests therefore not on memories of long-ago figures. According to his own statements Mr. Birchmeier has always immediately after a consultation session, i.e. in the following 24 to 48 hours, made the entries, usually before the offers were made.

B. Substantial Issues

14. *Coordinated practices.* Granella argues that no coordinated practices existed. COMCO had just noticed that in this case there had been an exchange of information that would normally be considered as trade secrets. This exchange of information can't be defined as a coordinated practice. COMCO argued that a coordinated practice can be assumed if a behavioral voting takes place, for which the exchange of that information was causal. It can be assumed that behind the information exchanges usually stood the implicit agreement to also use the information accordingly. Otherwise, the exchange of information would have been stopped immediately.

C. Other Observations

15. *SBV (Swiss Construction Association).* The SBV operates through various offices of the cantonal or regional associations the Internet platform <www.infobau.ch>, which is accessible to members of the SBV with a password. According to Article 6 of the Competition Rules SBV members of the SBV who intend to submit a bid share this intention with the competent authority of the SBV promptly after receipt of the tender documents. Likewise, the competent authority has to be informed when the SBV member changes his mind and will not submit a bid (Art. 6.2 Competition Rules SBV). The list of players registered for a specific project can be viewed at any time by any member of the SBV online. As a result, the reporting office invites the companies to a meeting to which the offer texts and principles to be purged. This assembly is particularly clarifying technical questions relevant to the project (Articles 8 and 9 Competition Rules SBV). A necessary, but not sufficient condition to an agreement affecting competition within the submission beings is the knowledge of which companies intend to participate in a submission. A preliminary investigation of COMCO in 2003 showed that the members of the SBV were committed under sanction threat to report their tender participation. Based on a suggestion of the Secretariat the SBV deleted the threat of sanctions for the breach of this duty from its charter. However, the SBV members are still bound to report their participation in a submission. Even meetings among submission participants are provided. Based on this behavior of the SBV COMCO takes into consideration the opening of a preliminary investigation. On how to proceed in this matter, COMCO will decide at a later date.

16. *Group of Companies.* The Federal Administrative Court has held in its recent antitrust jurisprudence, it could be assumed due to the wholly belonging of a subsidiary to the parent company, as well as various personal links between these companies that the subsidiary is legally, but not economically, independent. Consequently it will be regarded as a group. Based on this, the Federal Administrative Court regards the parent company as the addressee imposed upon the sanctioning.

17. According to the practice of the European Commission and the Court of Justice, the parent company is liable for antitrust violations of its subsidiary if the parent company is in a position to exert a decisive influence over the subsidiary and has exercised this option actually. It is settled case law, that there is a (rebuttable) presumption that these requirements are met, if the subsidiary is 100% owned by the parent company. The ECJ further clarified that interference by the parent company to the subsidiary in strategic affairs are sufficient and it is in par-

ticular not required that the influence exerted on the concrete business in which the antitrust violation has occurred. This practice leads to the result that a parent company only in truly exceptional circumstances shall not be liable for its subsidiaries, one of which it holds all shares. Thus in European antitrust law, the parent company is liable based on the same criteria, which were also considered relevant by the Federal Administrative Court. According to these models the parent company may be regarded as material addressee and sanctioned as soon as is expected of a group relationship.