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SERIAL OFFENDERS: INDUSTRIES PRONE TO ENDEMIC COLLUSION

Contribution from Switzerland

-- Session IV --

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WHY DO SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION?

-- Switzerland --

I. Introduction

1. The Competition Commission (referred to hereinafter as COMCO) is the authority tasked with applying the Federal Act on Cartels and other Restraints of Competition (hereafter LCart)¹. Since 1 April 2004, COMCO can use fines to punish companies in breach of LCart, especially in the event of unlawful agreements to fix prices and allocate markets or trading partners. The revision of the Act in 2004 also introduced a leniency programme granting partial or total immunity to any companies which voluntarily come forward with information on infringement of competition law and co-operate with the authority. After a short presentation of cases which have involved the construction sector on several occasions, the factors likely to lead to persistent collusion are covered. Lastly, some of the ramifications on the implementation of law are presented.

II. Sectors subject to persistent collusion

2. Over the past ten years, COMCO has not had to deal with significant cartels in the chemical industry or food sector, which were two of the three sectors listed in the OECD's call for input. In contrast, however, COMCO has been faced with several cases in the construction sector (structural work and finishing) and public procurement. The following list gives a short overview of the outcomes of the main cases in the construction sector²:

- Bid rigging in road construction and civil engineering in the canton of Ticino (2007)³: An agreement to share assignments between 17 Ticino enterprises governed by a convention and a volume quota system per firm. The enterprises were not punished as they abandoned the agreement before the revised Act containing sanctions for this infringement came into force. This ruling has entered into force.
- Unlawful agreements between electricity firms in the canton of Bern (2009)⁴: Bid rigging between the seven largest Bernese electrical installation firms. All the firms co-operated with

¹ <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html>

² All of the rulings of COMCO are published in Law and Policy on Competition (LPC – DPC in French), in the language of the original procedure. LPC is available online on www.comco.ch, in the “Documentation” section.

³ Ruling in Italian in LPC 2008/1, p. 50, in German p. 84. For a detailed presentation of the case, see Switzerland's contribution to the OECD policy roundtable on construction (2008) <http://www.oecd.org/regreform/sectors/41765075.pdf>.

⁴ DPC 2009/3, p. 196 ss.

COMCO under the leniency programme and received fines totalling around 2 million Swiss francs (approximately the same amount in euros). This ruling has entered into force.

- Bid rigging in road construction and civil engineering in the canton of Aargau (2011)⁵: 17 companies were sanctioned for around 100 cases of unlawful agreements on process and allocations in tenders between 2006 and 2009. The imposed fines amounted to a total of around 8 million Swiss francs. Four appeals were lodged against the fines and the appeal proceedings are still pending. Some of the companies co-operated with the authority under the leniency programme.
- Bid rigging in road construction and civil engineering in the canton of Zurich (2013)⁶: 12 construction firms received fines totalling approximately 500 000 Swiss francs for around 30 unlawful agreements to allocate markets between 2006 and 2009. This ruling has entered into force.
- Bid rigging in construction (roads, civil engineering and construction) in the canton of Graubünden (2012)⁷: This investigation, which opened in 2012, is into around thirty companies actively involved in construction in the canton of Graubünden, which is the largest canton in Switzerland in terms of surface area and located in a mountainous region. The investigation is still pending before the authority. Unannounced inspections have been carried out twice (extension of geographic scope of the investigation).
- The reporting system of cantonal business associations (2014)⁸: The cantonal business associations used a reporting system enabling companies to announce their intention to bid for construction contracts. Through the system, members of the association were able to use the Internet site to find out before the deadline which companies intended to submit an offer. This system encouraged bid rigging in the cantons of Aargau and Zurich. In some cantons, the system was still being used in 2014. Following investigations in the cantons of Aargau and Zurich, the opening of a preliminary investigation into these reporting systems led to all of the cantons abolishing the system (with one exception).⁹
- Bid rigging in road construction and civil engineering in the region of See-Gaster (opened in 2013)¹⁰: This investigation, opened in 2013, was into eight companies actively involved in road construction and civil engineering in the region of See-Gaster and its surroundings (the canton of St. Gallen and the canton of Schwyz). The investigation is still pending before the authority. Unannounced inspections have been carried out twice (extension of the investigation).
- Tunnel clearing (2015)¹¹: Three companies were co-ordinating the allocation of public tunnel cleaning contracts in several regions of Switzerland This is not a typical case in the construction

⁵ DPC 2012/2, p. 270 ss

⁶ DPC 2013/4, p. 524 ss.

⁷ See Annual Report 2014 of the Competition Commission, DPC 2015/1, p. 60.

⁸ DPC 2014/2, p. 373.

⁹ One association adapted its reporting system in a manner consistent with LCart.

¹⁰ See Annual Report 2014 of the Competition Commission, DPC 2015/1, p. 60.

¹¹ DPC 2015/2, to be published.

sector but in a sector with some similar characteristics (public procurement). This ruling has entered into force.

- **Landfills and gravel (opened in 2015):** This investigation is into several companies active in the canton of Bern on suspicion of unlawful agreements and/or abuse of a dominant position. The investigation is still pending before the authority.

3. As this list reveals, the road construction and civil engineering sector has been the subject of five investigations by the authority over the past 10 years (Ticino, Aargau, Zurich, See-Gaster and Graubünden). The five investigations concern the same sector in five different Swiss cantons. Three investigations have been completed. The other two, highly complex, investigations are still ongoing.

4. One construction business, which operates at the national level, was or is involved in all five procedures through the different branches or subsidiaries of a sole group present in various cantons. Some companies were or are involved in two or three of the investigations in the cantons of Aargau, Zurich and See-Gaster. This is due to the geographic proximity of the four cantons covered by the investigations.

III. Factors likely to cause persistent collusion

5. The first three investigations in the road construction and civil engineering sector were opened following indications received from a third party (and not following a request for leniency). One investigation was opened following the statistical analysis of public procurement bids, and another was opened following a request for leniency. The authority did not open investigations in this sector because of factors specific to the market. However, some of the characteristics of said market, along with the fact that unlawful agreements have already been uncovered in previous investigations in the same sector, supported the authority's decision to open the investigations.

6. The factors likely to cause persistent collusion, which are often mentioned in OECD publications and documents, are also applicable to our five investigations, i.e.:

- **Regional markets/Barriers to entry:** The five investigations involved local and cantonal markets. The costs generated by having a business located far from a construction site form a barrier to entry to the market. The distance between the construction site and the asphalt production centre is also decisive. Few new companies have entered these markets;
- **Relatively homogeneous products/scarcé innovation:** While admittedly there are examples of innovation in this sector (e.g. recycling of materials in civil engineering), on the whole innovation is rare and products remain relatively homogeneous;
- **Structural ties:** Businesses in this sector often own a share of an asphalt plant, a key input for their activity. These cross-shareholdings facilitate persistent collusion in the downstream market;
- **Frequent, multi-market contacts:** It is often the same businesses which are invited to take part in tender procedures by the public procurement authorities. Consequently, they are frequently dealing with their competitors. In addition, regular meetings between competitors (e.g. on a weekly basis) can facilitate persistent collusion;

- **Public sector demand is relatively stable:** The cantons and communes have a stable minimum budget for building and maintaining roads over the years, which facilitates the sustainability of persistent collusion;
- **The presence of an association:** The Société Suisse des Entrepreneurs (SSE – Swiss Contractors’ Association), whose cantonal offices operate an online reporting system providing information on intentions to bid for specific contracts, helped facilitate persistent collusion in some cantons. Even after intervention by the authority as part of the preliminary investigation in 2014, some cantonal associations still found it difficult to understand the need to abolish the reporting system.

IV. Ramifications for the implementation of law

7. It is difficult to say whether the fines imposed in the sector by COMCO are dissuasive enough. Since 2003, COMCO has been running an extensive awareness-raising campaign in the construction sector, in particular through the Société Suisse des Entrepreneurs. This association has itself published newsletters to inform its members and organised awareness sessions.

8. In 2009, the first sanctions were handed down in the construction sector. The fact that fines for bid rigging are not yet firmly enforced in Switzerland and confirmed in the appeal courts creates further legal uncertainty as to the application of LCart for bid rigging. These doubts may possibly result in fines for the sector not being dissuasive. Nevertheless, the legal procedure, the unannounced inspections and the cost of legal representation in the proceedings before COMCO can prove dissuasive, as the costs can sometimes exceed the fine imposed by the authority (especially for small companies).

9. **Repeated infringement** is considered to be an aggravating circumstance provided for in the Ordinance on Sanctions.¹² Accordingly, Article 5.1.a. of the Ordinance includes as an aggravating circumstance in the calculation of sanctions the fact that the business “has repeatedly infringed the Cartel Act”. To date, COMCO has not enforced this provision. The fact that some businesses have already been convicted in previous proceedings has not been taken into account. The non-application of the criterion of repeated infringement may be due to the fact that the businesses in question were subsidiaries or branches of the same group but working in other cantons. The same legal and natural persons were not necessarily involved, so the outcome would be an increased fine for an offence committed by a sister firm. In addition, the investigations were not systematically opened against the parent company. In recent investigations, the ruling has also been addressed to the parent. This has a direct repercussion as compliance programmes are generally determined at group level.

10. Furthermore, **excluding repeat offenders** from the leniency programme does not currently seem to be a solution for fighting repeated infringement. Indeed, repeat offenders are necessary for opening investigations or proving offences have occurred. What is more, the repeat offenders and their lawyers are the best placed to know what COMCO expects from them under the leniency programme.

11. Another ramification for implementing law is the importance of **raising the awareness of the procurement authorities**. Generally, this must be done in advance¹³, but also after procedures. The procurement authorities are able to alter some of the characteristics which favour collusion, such as regularly inviting the same businesses to submit an offer, or restricting the number of businesses through

¹² <https://www.admin.ch/opc/en/classified-compilation/20040326/index.html>.

¹³ See advocacy initiatives on bidding, Annual Report 2015 of the Competition Commission, DPC 2015/1, p. 35 ss (French) and p. 72 (English).

the criteria in their tenders. Accordingly, COMCO sent a letter to all the procurement authorities for tunnel clearing contracts in Switzerland following its investigation in order to alert them to factors which may be conducive to collusion and which they can influence.

12. International co-operation: Because there were no international cartels involved, there was no international co-operation. However, rulings and cases concerning the same sector in other countries have been used for informative purposes and sometimes referred to explicitly in rulings. For example, a case in the construction sector in the UK in 2009 served as the model for our first bid rigging cases sanctioning road construction. That said, the different legal framework between the countries meant that the ruling was only of limited use in determining the sanction. In particular, the definition of relevant market is important in Switzerland as the authority has to demonstrate the significance of the agreement on the relevant market. In the case of the reporting system, the authority notably used a 1976 publication from the OECD¹⁴ on bid rigging to refer to the fact that similar systems abroad had been judged illegal and sanctioned. Cases from the United Kingdom, the Netherlands and France were referred to in the preliminary investigation report into the reporting system, either because a similar system existed, or because providing information on potential bidders before the deadline had been forbidden.¹⁵

¹⁴ Bid rigging, Report by the Committee of Experts on Restrictive Business Practices, Paris 1976.

¹⁵ DPC 2014/2, p. 380 and 381.