

Competition Commission scrutinises industry associations

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Introduction

In April 2018 the Swiss Competition Commission (ComCo) issued a decision (*Engadin I*) concerning alleged anti-competitive agreements in the construction industry that was broadly covered in the Swiss media. The investigation was not only directed against construction companies, but also against the construction industry association of Grison (GBV), which ComCo held responsible for allegedly being a co-originator of competition law violations.

The *Engadin I* decision demonstrates that ComCo is willing to examine more closely the activities in and by industry associations.

Investigation procedure

Engadin I is part of a series of investigations in the context of bid rigging in the construction industry of the canton of Grisons that were triggered after a local construction company had blown the whistle.

On 30 October 2012 ComCo formally opened the first investigation and conducted numerous dawn raids at the premises of various companies in the segments of building construction and civil engineering, road and pavement works, as well as related upstream and downstream markets.

While evaluating the initial findings of the ongoing investigation, ComCo extended the investigation twice to additional companies, so that in the end there were 10 individual investigations. According to the authority, the recently published *Engadin I* decision alone was based on several million pages of documents and more than 120 individual investigative measures, including:

- dawn raids;
- approximately 40 interrogations;
- three leniency applications with 17 written supplementary explanations;
- approximately 40 requests for information; and
- approximately 25 requests for administrative assistance (see ComCo's press release of 26 April 2018 regarding *Engadin I*).

Until now, the investigation into Grison's construction industry was one of the largest cartel investigations in Switzerland. While the decision has not yet been released publicly, the ComCo's press statements contain some additional information.

Role of industry association

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The *Engadin I* decision was directed against construction companies and the construction industry association of Grison. ComCo held that the GBV had knowingly organised and chaired meetings from 1997 to 2008, during which the allocation of certain individual construction projects and bid amounts had allegedly been discussed.

Even though GBV did not act as construction services provider, according to ComCo its behaviour had created the basis for the allocation of projects and price agreements between the construction companies within the framework of association meetings.

For its involvement as co-ordinator of the proceedings, GBV was not penalised, but obliged to bear the costs of the proceedings in the amount of approximately Sfr35,000 to Sfr40,000. Presumably, in future ComCo will want to proceed in a similar manner with other associations that could be involved in unlawful activities.

Industry associations in Swiss competition law

The Cartel Act is aimed at companies, or respectively at undertakings in the general meaning of competition law. Unlike in some foreign competition law systems (eg, the European Union or Germany), business associations' decisions are not expressly included in the definition of potentially unlawful agreements in the Cartel Act. However, if the members of the association are companies, the activities of the association may nevertheless come under investigation.

Under certain circumstances, the affected association may indirectly fall under the competition authority's scrutiny as a 'platform' for possible competition law violations by member companies or because of supporting activities (eg, by organising and chairing meetings in *Engadin I*). If the association itself acts as an undertaking in the meaning of competition law and enters into unlawful agreements or abuses its market position, the Cartel Act may be applied directly.

In its 26 April 2018 press release, ComCo took the view that the collaboration of GBV and the involved member companies qualified as unlawful agreement restricting competition. However, ComCo conceded that the law does not provide penalties for agreements with an association. Nonetheless ComCo obliged GBV to pay a part of the procedural costs for its role as pivotal supporter of the competition law violation.

Comment

Engadin I is another reminder that association activities do not escape falling within the scope of Swiss competition law and that ComCo is willing to investigate association activities. Even if in Switzerland the association itself does not necessarily face a penalty, the mere fact that the association is involved in an investigation procedure carries the risk of reputation damage for the association.

However, in *Engadin I* ComCo did not go as far as the European Commission and the European courts in *AC Treuhand* (Case C-194/14 P), in which it was held that a cartel facilitator, which arranged and participated in meetings, could be fined as a cartel facilitator.

Beyond that, as *Engadin I* has demonstrated, there is a risk that ComCo will try to at least partially impose procedural costs on the association due to supporting activities. Therefore, it is even more important for associations and companies to ensure that association activities, which are important for the economy, comply with what is allowed under Swiss competition law.

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