Case number:	Vj-56/2004
Party:	**Adeptus Rt.,** **Betonút Szolgáltató és Építő Rt.**, **Debreceni Mély- és Útépítő Rt.,** **EGÚT Egri Útépítő Rt.,** **Hídépítő Rt**., **Hódmezővásárhelyi Útépítő Kft.**, **Hoffmann Építőipari Rt.,** **MÁV Hídépítő Acélszerkezet-, Híd- és Mélyépítő Kft.**, **Mélyépítő Budapest Építőipari, Kivitelező, Beruházó és Tervező Kft.,** **MOTA-Engil Beruházási és Építőipari Rt.**, **Strabag Építő Rt.,** **Swietelsky Építő Kft.,** **Vakond Kft.,** **Vegyépszer Rt.**
Type of case:	Restrictive agreement
Decision:	The Competition Council established that the practice of the undertakings mentioned above, continued in the frame of a cartel, was likely to restrict competition in the road- and bridge-building market and the market of renovations in Hungary, and imposed a HUF 1313 million (approx. EUR 5,3 million) competition supervision fine as a total on the defendant undertakings.
Date:	Budapest, 22 September 2005

Vj-56/2004

THE COLLUSION OF SEVERAL UNDERTAKINGS OF THE CONSTRUCTION INDUSTRY IN THE BIDDING PROCESS OF PUBLIC PROCUREMENT SERIOUSLY HARMED ECONOMIC COMPETITION IN 2001 AND 2002

(Restrictive agreements)

Summary

By its decision dated 22 September 2005, the Competition Council of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) established that the behaviour of the undertakings mentined above was capable of restricting economic competition in connection with the bids submitted as a response to an invitation to tender published by the Directorate for Road management and Coordination (Útgazdálkodási és Koordinációs Igazgatóság, UKIG) in 2001 and 2002 in the frame of public procurement procedures. The total of the fines imposed amounted to HUF 1313 million (approx. EUR 5,3 million).

Circumstances

The GVH commenced a competition supervision proceeding to establish whether the parties previously agreed between them about the identity of the bidder acquiring the construction works contract for the particular road- and bridge-building and renovation projects put to tender by UKIG, or they even agreed about the shares of the contractors and subcontractors of the expectable execution. The subject matter of the proceeding were the preliminary negotiations between the parties in connection with the invitations of tenders published in the Public Procurement Process Report in 2001 and 2002.

As shown by the evidences, the parties often met to announce which undertaking intended to win the following bidding process in the public procurement procedure, the amount of sharing it required of the following project, the type of work it whished to do, thereafter they harmonized tenders.

The investigation of the GVH revealed that during the investigated period between 2001 and 2002, six Hungarian projects were negotiated by the participants of the cartel, which behaviour not only allocated the market between the parties but also substantially reduced the risk posed to the loosing party, which constituted an important element of economic competition. This conduct may have had a price increasing effect on the market.

The reasoning of the defence and of the decision

The undertakings answered to the charges that according to Article 67 of the Hungarian Competition Act no investigation may be started where three years have elapsed, consequently some procedures, to which the investigation was extended in 2005, should be terminated. The Competition Council accepted this reasoning.

The undertakings were of the opinion that notes seized in another proceeding were not usable as evidence, but the Competition Council declared that the dawn raid of the Authority was executed according to law, and the Authority had the right to occupy notes capable for giving evidence of violation of the competition law.

The undertakings stated that the notes reflected personal ideas, consequently they could not be used as evidence against participants or of the statements made during the discussion. The Competition Council alleged that both notes seized in the procedure had the same content, moreover the parties submitted offers in which they indicated the prearranged price. These circumstances proved that notes contained facts.

In the eye of undertakings the aim of the discussions was to establish consortiums and agree with the potential subcontractors. The Competition Council did not accept this reasoning, since several companies took part in the negotiations, all of them were successful in the prequalification process, but those mentioned in the winner’s tender and later employed by the winner as subcontractors did not appear. The contractor failed to outline the piece of work, moreover the potential subcontractors declared what type of work and payment they wanted.

The undertakings referred to the Act on Public Procurement Procedures, which required the contractors to indicate the identity of those subcontractors in their offers, which engaged to execute more than ten percent of the project, that was the reason why they previously consulted about the projects. According to the opinion of the Competition Council, undertakings generally do not abide by this rule, as they employ subcontractors other than those mentioned in their offers, consequently undertakings are not allowed to cite a rule they do not comply with. On the other hand, the winner party provided a financial compensation to the loosing one, in return the loosing parties obliged themselves to retire from the market activity in the bidding process.

The undertakings were of the opinion that the looser parties would not have submitted tenders if they had previously agreed about the identity of the winner, since these procedures were time-consuming and required significant expenditures. The Competition Council examined the question why these agreements between undertakings in the road- and bridge-building and renovation industry became customary in practice in 2001 and 2002. The Competition Council highlighted that national resources were re-arranged in 2001 when motorway projects were promoted. Therefore road- and bridge-building and renovating undertakings had significant costs while they did not have incomes, except if they allocated the market. It was in their interest to keep up the appearance of competition, that was the reason why both the winning and the loosing parties submitted tenders even if they had no chance to win.

The undertakings alleged that they did not send any employees to the negotiations. In the eye of the Competition Council it would be unrealistic to suppose they took part in the negotiations as natural persons without having the knowledge of the companies.

The decision of the Competition Council

The Competition Council referred to Article 11 of the Competition Act in its decision, which said that agreements or concerted practices between undertakings, which had as their object or potential or actual effect the prevention, restriction or distortion of competition, should be prohibited. The prohibition applies, in particular, to the direct or indirect fixing of purchase or selling prices or other business terms and conditions, to the limitation or control of production, distribution, technical development or investment and to the collusion between competing undertakings. The Competition Council stated that the undertakings were required to make their decisions on their own.

The Competition Council established that the parties previously negotiated the projects and disclosed trade secrets, which had as their object the restriction of competition. Secondly, they allocated the market and prearranged the sharing of the subcontractors and the identity of the winner in the bidding process in several public procurement procedures with the same object. Thirdly, the defending parties executed the agreements they concluded on the negotiations. This behaviour substantially reduced the risk posed to the loosing party, the candidates were able to harmonize their conduct.

Based on the above reasoning in the trial held on 22 September 2005 the Competition Council established that the conduct of the undertakings mentioned above, continued in the frame of the

cartel, was likely to restrict competition on the road- and bridge-building and renovation market of Hungary, and imposed a HUF 1313 million (approx. EUR 5,3 million) competition supervision fine as a total on the defending undertakings. The Competition Council took into account as an aggravating circumstance that the said collusion between undertakings in the road- and bridge-building and the renovation industry became customary in practice in 2001 and 2002, furthermore this behaviour seriously injured the customers' interests.