

**Resume of
Decision no. 72/2012**

regarding the infringement of the provisions of article 5 (1) letter f) of the Competition Law no. 21/1996, republished, with subsequent amendments and completions and of article 101 (1) of the Treaty regarding the functioning of the European Union, by S.C. T.M.U.C.B. S.A. and S.C. MOLDOCOR S.A. that participated at *“Giurgiu Ruse 20” gas transport pipeline (object: Transport pipeline of high pressure natural gas between SRMP Giurgiu and left shore Danube and Giurgiu Gas Measuring Station)* public procurement procedure organized by S.N.T.G.N. TRANSGAZ S.A. Medias in 2011

By the President Order no. 759/29.09.2011, the Competition Council launched an ex officio investigation having as object the alleged infringement of the provisions of article 5 (1) letter f) of the Competition Law no. 21/1996, republished, with subsequent amendments and completions (hereinafter referred as *law*) and art. 101 (1) of the Treaty regarding the functioning of the European Union (TFEU) by some undertakings that participated at some public procurement procedures organized by S.N.T.G.N. TRANSGAZ S.A. Mediaş (hereinafter referred as TRANSGAZ) and S.N.G.N. ROMGAZ S.A. Mediaş (hereinafter referred as ROMGAZ) during 2009-2011 in order to allocate some contracts on natural gas connections, modernization and maintenance of related plants.

Directorate for Investigating Organized Crime and Terrorism (hereinafter referred as DIICOT), subordinated to Prosecutor’s Office attached to the High Court of Cassation and Justice, referred to the Competition Council regarding some possible agreements between some undertakings, through their decision markers (associates/presidents/administrators), consisting in participating with rigged bids in some public procurement procedures organized by TRANSGAZ and ROMGAZ during 2009-2011. These agreements have been materialized in informal acts on the content of the submitted offers and on the way they supported these offers during the procedures so, simulating the competition, the contracts would have been won according to their prior conventions.

In the present case, the contracting authority was TRANSGAZ, a Romanian legal person owned by the Romanian state through Ministry of Economy, Commerce and Businesses. TRANSGAZ has as the main activity the transport through pipelines, transport, control and international transit of natural gas, research, projecting in the field of natural gas transport and assures the access without discrimination to the national system of natural gas transport pipelines.

In order to allocate this contract, the contracting authority selected the open tender procedure based on “the lowest price” criteria. This procedure took place during January – June 2011 and the anticompetitive agreement of participating with rigged bids in this public procurement procedure was materialized between T.M.U.C.B. and MOLDOCOR.

The communication and sending sensitive information between these two competitors were achieved by using the e-mail and further sending the information that were part of the bid.

T.M.U.C.B. has sent the financial information from its own bid to its competitor, MOLDOCOR that has used them for its own purpose when it determined the material costs taking into consideration the unit prices determined by T.M.U.C.B.

Two out of seven competitors unlawfully cooperated prior to the submission of the tender proposals, however neither of them won the bid (the winner was a third neutral party). They agreed to exchange information before the date when the outcome of the tendering procedure was known. There must be a common will to restrain competition on a market.

During the dawn raid on the 3rd of November 2011 at MOLDOCOR's headquarter, the competition inspectors raised from the Secretary Office an e-mail sent from the Technical Director of T.M.U.C.B.

Three days before opening the submitted bids, the director informed the representatives of MOLDOCOR by e-mail that he was going to send the financial bid, that MOLDOCOR was expecting.

By its content, the e-mail proves that T.M.U.C.B. and MOLDOCOR had an agreement prior to submit their bids, when they agreed on sending sensitive commercial information regarding the content of their offers, information that were going to be used in drafting their own bids in a manner that would allow them to artificially raise their winning chances by distorting the competitive character of the procedure in order to damage the other participants at the procedure.

After receipt the dates from T.M.U.C.B.'s financial bid, MOLDOCOR set its own material unit prices by using an unitary reducing percent of 1% applied to its competitor's unit prices. When we compared the prices determined by the two competitors drawn in Form C6, we noticed that material unit prices are correlated, MOLDOCOR reducing them by 1% than T.M.U.C.B. Form C6 represents The list of material resources expenditures and consists in a centralizing list with the materials they used, and for each material the name, the parameters, the quantity, the unit price, the total value and the supplier are mentioned.

The Romanian Competition Authority analysed all the common positions (over 700) where MOLDOCOR decreased by 1% its bid than T.M.U.C.B., selecting materials (steel, cement, chalk, concrete, gravel, sand, rock, mortar, wood, brick, pottery, carton, pipe, cable, electrods, curbs, slabs etc) and inventory objects (air installations, luminaires, sanitary installations, taps, sockets, cubits, drawing rules, inlets etc).

Such behaviour constitutes infringement by object, no matter the undertakings that exchanged information represented only a part of the total number of bidders and no matter they finally did not win the contract. The very fact that they agreed to behave anti-competitively during the bidding process is sufficient to prove the infringement of competitive law.

Submitting bids to a public procurement should represent the manifest of a plurality of independent wills. If they represent the result of a concerted commercial bids, even if it's a

partial one, they have the capacity of deceiving the contracting authority regarding the nature, scope and intensity of competition.

According to the Community practice, in order for an agreement to be able to limit competition, it is sufficient its vocation to forge the structure of the market and competition itself. By artificially reducing the competitive intensity that should have been manifested between independent undertakings, this agreement falls under the Romanian competition law.

The total amount of penalties imposed to these two undertakings was 13,620,003 lei (aprox. 3.1 million euros).