Summary of the Decision no. 44/29.11.2013

(1) By Order no. 388/27.10.2009, the President of the Romanian Competition Council disposed opening an ex officio investigation having as object the possible infringement of art. 5 (1) letter f) of the Competition Law and art. 81 (1) of the Treaty (in presently, art. 101 (1) of the Treaty) by S.C. Transcarpat Sportours International S.R.L. from Romania, J.P. Sauer&Soehn GmbH from Germany, San Swiss Arms AG from Switzerland and Brugger&Thomet AG from Switzerland during participating at the public procurement procedures organized in 2005, 2006 and 2007 by the Army Department – U.M. 02550 Bucharest within Ministry of National Defence for the acquisition of infantry weapons and optical equipment.

(2) The Romanian Competition Council sent the investigation report and its resume to the representatives of the European Commission, for consultation, and at the end of the teleconference that took place on the 18th of April 2012, the European Commission's representatives considered that no more objections/comments are necessary.

(3) The involved parties are four undertakings, two of them are from member states of the European Union, respectively S.C. Transcarpat Sportours International S.R.L. from Romania (hereinafter TRANSCARPAT) and J.P. Sauer&Soehn GmbH from Germany (hereinafter SAUER)1, and the other two are from the extracommunity territory, respectively San Swiss Arms AG from Switzerland (hereinafter SWISS) and Brugger&Thomet AG Switzerland (hereinafter BRUGGER-THOMET)2.

(4) The Romanian Ministry of National Defence (hereinafter M.Ap.N.) organised public procurement procedures for the acquisition of infantry weapons and optical equipment for each of the years 2005, 2006 and 2007. The relevant market was defined for each year the public procurement took place, namely, as a whole, „the market of the infantry weapons and optical equipment, acquired through the public procedure organised by M.Ap.N. in ...”.

Taking into consideration that these products could be owned only by specialised entities with defence and national security competences, the demand was launched by M.Ap.N. and the offer was represented by those participants who proved that they may fulfill the qualification and selection criteria, provided by the tender documentation for each public procurement procedure. Finally, the number of participants was reduced. The geographic dimension of the relevant market was national and M.Ap.N. acquired these products for its military entities, localised nationwide.


1 Presently, SIG SAUER GmbH& Co.KG
2 Presently, B&T AG
(6) The concerted practice was committed by means of TRANSCARPAT that represented the other three undertakings at the tenders but, in the same time, competed with them at the tender organised in 2005. TRANSCARPAT was empowered by SAUER, SWISS and BRUGGER-THOMET to represent them to the tenders in front of the contracting authority; based on the mandate, its role was limited in placing the envelopes that consisted in the qualifications documents and the bids, participating at the contracting authority’s meetings and presenting some explanations regarding the submitted bids.

(7) Although the mandate was a limited one, in fact a concerted practice between the undertakings took place, and TRANSCARPAT actively involved in the whole procedure, drafted and signed the bids for the other three undertakings during 2005-2007. Moreover, in 2005, although TRANSCARPAT drafted and knew the content of the bids, it competed with the undertakings it represented, initially in association with BRUGGER-THOMET, and afterwards on its behalf and finally in association with SWISS.

(8) That way, TRANSCARPAT, with the undertakings’ approval, knew simultaneously the content of the bids and had access to all the commercial, financial and technical data from the other three undertakings’ bids, addressed to the contracting authority concerning details from the bids and was the direct beneficiary of all the information and, by means of it, the exchange of confidential information with the involved parties took place. As an evidence, there are two documents, as part of the case file, consisting in empowering TRANSCARPAT by SWISS and BRUGGER-THOMET to sign, on their behalf, their financial bids and allowed it the access to all the confidential information, especially the bidding products and prices.

(9) The investigation revealed that SAUER, SWISS and BRUGGER-THOMET tacitly or by negligence agreed that TRANSCARPAT drafted their bids, each of them and implicitly all the bids, in order that the independence element of each bid was inexistent, and the concerted element became evident. The parties were involved in this anticompetitive behaviour and invoking the lack of any direct agreement, proved by the existence of at least one contract between the competitors or by an exchange of information doesn’t absolve them of responsibility, the agreement is, by its object, an illicit one. The investigation didn’t lead to any direct evidence consisting in plans, meetings (such as letters, facsimiles, e-mails etc) in order to additionally prove the infringement. The lack of direct evidence wasn’t an impediment in proceeding the investigation, taking into consideration that in the competition practice it was already statuated, as a principle, that when there are no direct or convincing evidence, the circumstantial evidence will be taken to account, meaning the interference between the actions of the involved parties from the market conditions’ point of view. The circumstantial evidence of the concerted practice was the financial bids themselves, with the bidding products and prices, drafted by TRANSCARPAT for all the involved parties for 3 years. Analyzing the bids submitted by the undertakings, a rigged scheme was drafted for each tender that shows the way the undertakings bidded each time different products so the competition on each product between them was inexistent.

(10) The case file contains a letter of TRANSCARPAT that states that, regarding its participation to the tender in 2005, „[...] our company did not submit an individual bid, not generally or specially, for the lots where it submitted the bid on the producer behalf, as a
representative of the producer”, explanation that confirms that TRANSCARPAT intended not to bid the same products, for it as well as for the undertakings that TRANSCARPAT represented.

(11) TRANSCARPAT filled in the bids using its own model form, different from the standard one provided in the tender documentation. Consequently, all of the participants’ forms were identical and called “Prices Centralizer”, and included the products and the bidding prices. Therefore, the TRANSCARPAT forms provided the following information: there was an extra column, called “State of Origin”; (ii) the bidding prices are written in a reverse order than it was provided in the standard form. Thus, different from the standard form, on the upper row, the prices in Euro were provided, and on the lower one, the prices in Lei; (iii) The standard form includes an error in the numbering of the columns, respectively, the column no. 5 is missing, whereas in the forms completed by TRANSCARPAT the latter column is numbered; (iv) in the 2007 forms completed by TRANSCARPAT, two columns were eliminated, respectively the one entitled “EXW unit price” and “EXW total price”. This form that was amended every year the public procurement procedures took place, also constitutes unequivocal evidence of the fact that the involved parties exchanged sensitive information through TRANSCARPAT. For a period of three years, each party submitted form entitled “Prices Centralizer”, included amendments that were different from the ones provided in the standard form issued by the contracting authority.

(12) When drafted the bids, TRANSCARPAT communicated at least with three undertakings informations relating to products and the prices were going to bid for these products and if this communication didn’t exist, as stated by involved parties and TRANSCARPAT had drafted the bids at its own initiative over three consecutive years, so the undertakings did not compete each other at the product level, involved parties who accepted this way of working and have consciously or recklessly left TRASCARPAT to decide for them and in this way parties became involved in anti-competitive behavior which led to the cancellation of competition at the product level and damage competitive nature of public procurement procedure. TRANSCARPAT knew that undertakings represented by it do not compete one at the other at the product level, exchange of information between them was made in radial flow (to and from TRANSCARPAT with these three undertakings) and not in circular flow from one undertaking to another. In this case (radial flow ), all information reached to all parties connected to this flow.

(13) Although TRANSCARPAT claimed that SAUER, SWISS and BRUGGER-THOMET are world-renowned manufacturers of various types of armament each of them producing a different type of weapon from the other, the investigation has shown that this area is not as strict as it was defined by TRANSCARPAT. So TRANSCARPAT claimed that SAUER produces semi-automatic pistols cal.9mm, SWISS produces semi-automatic assault weapons 5,56mm NATO and grenade launchers cal.40mm that can be attached to the assault weapons, such as semi-automatic sniper rifles 7,62mm NATO, and BRUGGER-THOMET produces shotgun with repetition 7,62mm NATO AND 338 Lapua Magnum and automatic pistols (machine gun) cal.9mm, while there are documents from the case file that demonstrates that SAUER has participated in other public procurement procedure as a producer/trader of precision rifles (so not only semi-automatic pistols cal.9mm) and BRUGGER-THOMET produces and sells also semi-automatic pistols cal.9mm (not only automatic pistols/ machine gun cal.9mm).
Investigation showed that the parties could compete one on the other, at least, for the item high precision sniper rifle, caliber 7.62x 51mm, at the tender from 2007, when contracting authority has requested this product in two sizes, semiautomatic shotgun caliber 7.62x 51mm with sniper sights by day/night and a high precision sniper rifle caliber 7.62x 51mm and when SAUER didn’t bid, SWISS bid the product with the first name and BRUGGER-THOMET bid the product with the second name. In this way, the two bidders have not competed each other on the same product.

Although SAUER and SWISS invoked membership in the same group of companies, namely international group TWE L&O Group, so they can’t be considered competitors and consequently are not applicable the provisions of the Competition Law, the investigation disclosed that at the tender from 2005 SWISS bid in association with TRANSCARPAT, and the presence of a third parties in association with a member of a group, influences the competitive behavior of the association, common competitive behavior being agreed by the parties to this association, independence of behaviour established within the group. Following, SAUER and SWISS, although are part of the same group, participated as distinct economic entities, expressing their willingness to act independently on the market, as competing undertakings, and therefore were responsible for anti-competitive behaviour, falling under competition rules. More than that, anti-competitive behaviour, was not analyzed within the group, but also in the relationship with the other two involved companies.

Starting with 01 January 2007, Romania became member of EU and from that moment the EU competition rules are directly applicable. Therefore after accession date, competition authorities and courts of the Member States must apply art.101 from TFUE to agreements, decisions of associations of undertakings or concerted practices which may affect trade between Member States, when apply national competition law to these agreements, decisions or concerted practices.

Regarding the application of the Community provisions to acts committed before the accession to the EU, Community case law establishes that TFUE provisions on competition area applies to acts committed before accession date only if these create effects after accession date also. In this case participation with rigged bids on public procurement procedures started in 2005 and ended in 2007. In conclusion, since 01 January 2007, article 101 of the TFEU has been applied only to the offence which is subject of this research.

Therefore, the analysis of the evidence has shown that the investigated undertakings have participated with rigged bids at the public procurement procedures organized by M.Ap.N in the period 2005-2007, breaching therewith the provisions of art. 5 (1) letter f) of the Law and the provisions of art. 101 (1) TFUE.

The infringement held upon the 4 undertakings refers to the concerted practice consisting of participation with rigged bids by sharing the offered products - accomplished by exchanging sensitive information intermediated by TRANSCARPAT- at the public procurement procedures organized by M. Ap.N. – Department for weapons – U.M. 02550 Bucharest for the acquisition of products belonging to the category “infantry weapons “and
“optical equipment”. The infringement held upon the undertakings took place in the period 2005-2007, therefore, it constitutes a single, complex and continuous act.

(21) According to the provisions of art. 20 (1) and (4), the provisions of art. 45 (1) letter d) and those of art. 5 (4) of the Law, the Plenum of the Competition Council decided to sanction the four undertakings by applying a fine representing 4% of the total turnover obtained by each undertaking in the preceding business year (2012). When calculating the percent, the Plenum considered the high gravity of the infringement. Moreover considering the average duration of the infringement (1 to 5 years), the fine was increased by 50%.