BÄR & KARRER BRIEFING JUNE 2026

SWISS FEDERAL SUPREME COURT CONFIRMS THAT SWISS ACT ON CARTELS ALSO CAPTURES SINGLE AND CONTINUOUS INFRINGEMENTS

In the *Engadin I* case, several construction companies had concluded multiple bid-rigging agreements, among others during the period from 2008 to 2012. The Competition Commission (COMCO) and the Federal Administrative Court held that these instances of conduct together constituted a so-called overall agreement (*Gesamtabrede*). Accordingly, the construction companies were sanctioned for an overall agreement spanning the period from 2008 to 2012. One of the appellants disputed whether the concept of the overall agreement exists in Swiss competition law (i.e. argued that this concept was not captured by the definition of "agreement" pursuant to Article 4(1) of the Cartel Act (CartA)). The Federal Supreme Court rejected this view and held that the concept of an overall agreement is captured by the definition of "agreement" under Article 4(1) CartA.

Also, for the first time, the Federal Supreme Court clarified the conditions under which consortia are permissible.

OVERALL AGREEMENT

ARTICLE 4(1) CARTA CAPTURES CONCEPT OF THE OVERALL AGREEMENT

Several construction companies had engaged in various bid-rigging agreements, among others during the period from 2008 to 2012. COMCO and the Federal Administrative Court concluded that these instances of conduct together constituted a so-called overall agreement that itself was subject to fines.

One of the appellants disputed whether the concept of an overall agreement was captured by Swiss competition law.

The Federal Supreme Court rejected this objection. It held that the concept of the overall agreement was captured by Swiss competition law and fell within the definition of an "agreement" pursuant to Article 4(1) CartA.

The Federal Supreme Court held that an overall agreement exists where there is consensus regarding the coordination of the parties' entire overall market conduct, i.e. a project-spanning coordination. Put differently, a corresponding overall plan (encompassing the individual agreements) must be pursued, which necessarily implies a corresponding overall intent (will and knowledge).[1]

The Federal Supreme Court further noted that the concept of the overall agreement corresponds to the concept of the single and continuous infringement in EU competition law (even though the prerequisites of both concepts differ).

Turning to the case at hand, the Federal Supreme Court held that the following three indications were sufficient proof of an overall agreement (the Federal Supreme Court conducted the review under the standard of arbitrariness):[2]

[1] See the judgments against the individual construction companies: Judgment of 19 March 2026, 2C_40/2024, cons. 5.8; judgment of 1 April 2026, 2C_70/2024, cons. 4.4; judgment of 1 April 2026, 2C_41/2024, cons. 5.3.

[2] Judgment of 19 March 2026, 2C_40/2024, cons. 6.4; judgment of 1 April 2026, 2C_70/2024, cons. 5; judgment of 1 April 2026, 2C_41/2024, cons. 5.3.

- The appellants' representatives had met three to four times per year to determine the "strategy" and to discuss early where forming a consortium might be opportune.
- The appellants had either formed a consortium at an early stage or submitted a so-called cover bid (*Stützofferte*) in favour of the other side to prevent the tender procedure from being cancelled due to an insufficient number of bids.
- The appellants had indisputably coordinated their bid prices in 13 cases.

The concept of the overall agreement has far-reaching practical implications:

NO REQUIREMENT TO PROVE INDIVIDUAL INFRINGEMENTS

First, in the case of an overall agreement, no proof is needed for the individual infringements encompassed by it. The competition authority does not need to prove the existence of each individual bid-rigging agreement if there is an overall agreement to enter into bid-rigging agreements. Proof of the overall agreement is sufficient.

LATER START OF LIMITATION PERIOD

Second, in the case of an overall agreement, the five-year limitation period does not start with the individual bid-rigging agreement but only at the end of the overall agreement.

The Federal Supreme Court reasoned that an overall agreement constitutes a continuous infringement. Accordingly, the five-year limitation period only starts to run once the undertaking concerned has ceased its participation in the overall agreement, thereby bringing the continuous infringement to an end.[3]

This means that instances of conduct that occurred significantly longer than five years before COMCO opened its investigation may still incur fines if the overall agreement ended less than five years before COMCO opened its investigation.

HIGHER FINES

Finally, in the case of an overall agreement, two factors tend to increase the fine compared to cases with individual bid-rigging agreements:

First, the calculation of the fine is not based solely on the contract value of the individual tender, but rather on the turnover of the undertaking in the entire market affected by the overall agreement. This regularly results in sanctions that are many times higher than those imposed for individual bid-rigging agreements.

Second, the duration of the finable conduct is generally longer in the case of an overall agreement. An individual bid-rigging agreement naturally has a duration of less than one year. An overall agreement, by contrast, may have been practised over several years. Generally, for each year that the overall agreement lasts, the fine is increased by 10%.

CONSORTIA

For consortia, the Federal Supreme Court held that a consortium is permissible where the number of bids submitted is not reduced due to the formation of the consortium, or where forming a consortium is necessary to submit a bid in the first place. This is the case, for example, where specialist knowledge is required that only one of the consortium members has, or where only the consortium meets the eligibility criteria or the required financial guarantees.

A consortium is problematic, on the other hand, when each consortium member could readily have submitted a bid individually.[4]

What matters, therefore, is whether the formation of the consortium is driven by legitimate and sound business considerations, or whether it serves merely to restrict competition. In the former case, the consortium is permissible; in the latter, the consortium is not permissible.[5]

[3] Judgment of 1 April 2026, 2C_41/2024, cons. 6.2 and 7.2.

[4] Judgment of 19 March 2026, 2C_40/2024, cons. 5.5.

[5] Judgment of 19 March 2026, 2C_40/2024, cons. 5.5.

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