Self-assessment of the legality of joint bids – a tricky task for the courts

SWEDEN

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When are joint tenders restrictive of competition by object? Courts in all three Scandinavian countries, as well as the Court of Justice of the European Free Trade Association States ('the EFTA court'), have recently mulled over this question and delivered diverging answers that will puzzle self-assessing companies pondering whether or not to submit a joint bid.

The question is of utmost importance since a significant chunk of the European economy is based on tenders for public or private contracts, and many of these involve joint tenders.

On the one hand, it is clear that, in certain situations, joint tenders could lead to an elimination of competition akin to a classic bid-rigging cartel. Under those circumstances, competition is restricted by object and the fact that cooperation takes place openly is irrelevant to that assessment.

On the other hand, if competition law were to label all joint bids between actual or potential competitors 'restrictive of competition by object', companies will likely also refrain from engaging in benign joint bids. Relying on the exemption in Article 101(3) of the Treaty on the Functioning of the European Union and national equivalents is typically not an option for self-assessing companies when considering submission of a joint bid.

Therefore, it is crucial that courts provide clear and sound guidance as to how to determine what constitutes a restriction of competition by object given the legal and economic context of a particular situation of a joint bid. What value should be given to: the market position of the joint bidders vis-à-vis competitors and the tenderer; the fact that the cooperation is fully transparent; and, indeed, the fact that sometimes joint bids are encouraged or even required by the tenderer? Hereafter, we will briefly describe a Danish and a Norwegian case where the joint bids were deemed restrictive of competition by object, as well as a recent Swedish case where the appeal court took a different view.

The Danish road-marking case

In June 2015, the Danish Competition Council (DCC) held that two of the largest road-marking companies in Denmark had entered into an illegal consortium when they submitted a joint bid for the provision of road marking services.[1] The tender concerned three contracts, but tenderers could submit a bid in respect of only one or two of the contracts. The DCC found that the parties to the consortium were actual competitors, as each of them had the capacity to perform the contract individually, and that the consortium had the object of restricting competition since the parties had submitted only one bid and thereby coordinated prices and divided the market. Even if the companies had not been actual competitors, the DCC found that they would have been potential competitors. According to the DCC, the companies' business plans confirmed that it was realistic that both companies were capable of expanding the capacity they would have needed to perform the contract individually.

The DCC's decision was upheld in April 2016 by the Danish Competition Appeals Tribunal (DCAT).[2] The DCAT also concluded that, since it was possible to bid on one or two of the three contracts, the consortium was unnecessary. The fact that the chance of winning could potentially be higher when submitting a bid for all three contracts was within the scope of ordinary competition and, according to the DCAT, did not mean that the parties were not competitors.

The Norwegian taxi case

In July 2011, the Norwegian Competition Authority (NCA) opened an investigation based on a complaint from Oslo University Hospital (OUH) over the lack of competition for the provision of patient transport services in the Follo region. OUH had launched two tender procedures for the relevant services, in which two taxi companies participated through a jointly-owned management

company. The NCA found that the joint tenders were a cooperation between actual and potential competitors and that the companies had been able to submit individual tenders in both procedures. Therefore, the joint bids constituted a restriction of competition by object.

In February 2014, the Follo District Court (FDC) annulled the decision, but, on appeal, the Borgarting Court of Appeal (BCA) overturned the FDC's judgment in March 2015 and upheld the NCA's decision. The BCA found that the cooperation was 'capable' of restricting competition, and was thus a restriction by object. The judgment was appealed to the Norwegian Supreme Court (NSC). The NSC referred the case to the EFTA court.

In December 2016, the EFTA court ruled, inter alia, that for an agreement to be regarded as a by-object infringement, there must be a sufficient degree of harm to competition. It is not sufficient that, having regard to the specific legal and economic context, an agreement is 'simply capable' of restricting competition. However, with respect to joint bids, the assessment of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. This is because, according to the EFTA court, joint bids involve price-fixing, which is expressly referred to in Article 53(1) of the Agreement on the European Economic Area (EEA).[3] Such an assessment needs to take into account whether the parties are actual or potential competitors and whether the joint determination of the price of the bid constitutes an ancillary restraint.

The EFTA court also concluded that, while the disclosure of the joint nature of the bids may be an indication that the parties did not intend to infringe competition rules, that in itself is not a prerequisite for determining whether an agreement may be considered a restriction by-object.

On the basis of the EFTA court ruling, the NSC upheld the BCA judgment.[4]

The Swedish healthcare case

The question of whether a joint bid can constitute a by-object infringement was recently (April 2017) examined in Sweden by the court of final instance.[5]

In 2008, Stockholm County Council (SCC) procured healthcare services, which were divided up into five separate services for the purposes of the procurement process. Bidders could bid for one or more of these.

In connection with the drafting of its bid, a company entered into two separate subcontracts with three other companies. According to the subcontracts, all parties agreed to submit individual bids with maximum volumes for all services they had previously provided to the SCC. The unsuccessful bidder would be entitled (but not obligated) to provide up to 50 per cent of the successful party's contracted services. The precise set-up of the subcontracts was not disclosed in the bids, but the bids did state that the companies would enter into subcontracts with each other.

In August 2013, the Swedish Competition Authority (SCA) opened an investigation into the subcontracts and brought an action against the companies in the District Court.[6] The SCA claimed that the subcontracts were not necessary since bidders could successfully submit individual bids for one or more services. By agreeing to divide up the volumes of the procured services between them, as well as exchanging information and agreeing on which services they should bid (which in turn eliminated the uncertainty on the market), the companies had entered into subcontracts that were anti-competitive by object. In any event, the SCA claimed that the subcontracts had anti-competitive effects.

In December 2015, the District Court largely ruled in favour of the SCA. Although the subcontracts did not regulate the parties' prices, the District Court found that the contested subcontracts typically affect the incentive to compete on price to such an extent that they could distort competition. The assessment of the legal and economic context did not change this conclusion.

The District Court's ruling was appealed to the Appeal Court, which stated that there was nothing in the arrangement to indicate that the parties had divided up the volumes between them. The limitation of the subcontractor's right to provide up to 50 per cent of the services could not be regarded as market allocation. Furthermore, the fact that the companies had agreed to bid for maximum volumes did not result in the removal of the uncertainty of their market behaviour such as to restrict competition.

The Appeal Court concluded that the objective of the obligation for the successful bidder to appoint the other bidder as subcontractor to supply an undefined volume was not to restrict competition. The Appeal

Court also noted that the arrangement ensured that the companies would survive on the market even if they were not awarded the contract. The SCC was essentially the only buyer of the procured services and the subcontracts would maintain competition in future SCC procurements.

The Appeal Court also concluded that the cooperation did not have anti-competitive effects. Accordingly, the Appeal Court overturned the District Court's ruling and dismissed the SCA's claims.

Comments

These cases illustrate the difficulties companies face in trying to self-assess the legality of joint bids.

The Danish and the Norwegian cases seem to imply essentially that, if joint bidders could instead have submitted individual bids, the joint bid is a restriction of competition by object, at least if it involves coordination on price.

That test may appear attractively clear but entails two fundamental problems.First, it is far from clear where to draw the line for when companies are considered to be potential competitors. The Danish road-marking case illustrates that a company may be considered a potential competitor in a market if it is able to make substantial investments in order to bid for a contract on that market. The amount of investment a company is willing to make to enable it to potentially win a contract varies significantly between companies and industries. This makes the self-assessment of whether two companies are potential competitors a tricky process.

Secondly, the tendency for competition authorities to readily categorise joint-bidding as by-object infringements is problematic. The more balanced approach in the Swedish healthcare judgment is a step in the right direction, although the circumstances in that case were somewhat different.

A better approach from the courts would be to advise self-assessing bidders to consider the following: does a joint bid take out an important element of competition for the tendered contract? If so, caution is warranted.

However, if residual competition from other credible and similarly aggressive bidders is strong, it is likely that competition is strengthened rather than weakened by the joint bid, in particular when the joint bidders contribute with complementary services, which increases the competitiveness against larger bidders.

If the tenderer is a strong and sophisticated buyer, the acceptance of joint bids should serve as a strong indication that such joint bids are not restrictive of competition.

This could be the case even where the joint bidders are amongst the strongest market players; the tenderer may still appreciate the benefits of a joint bid, especially when the services requested are complex and may benefit from complementary skillsets and second opinions.

In summary, competitors should not be encouraged to distort competition by submitting joint bids, but, if the strict rules result in the absence of lawful joint bids on the market, this could have equally harmful effects on competition.

Notes

1 Decision of the Danish Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*.
2 Ruling of the Danish Competition Appeals Tribunal of 11 April 2016 in Case no KL-2-2015 and Case no KL-3-2015.
3 Article 53(1) of the EEA corresponds to Article 101(1) of the TFEU.
4 Judgment of the Norwegian Supreme Court of 22 June 2017, Case no HR-2017-1229-A.
5 Ruling of the Swedish Patent and Market Court of Appeal of 28 April 2017, Case no PMT 7497-16.
6 The SCA is one of only a small number of competition authorities in the EU that is required to bring an action in the courts in order to impose fines. A proposal has been put forward to grant the SCA the power to impose fines. See further: Lars Johansson, Kristian Hugmark and Kristin Heilborn, 'With great power comes great responsibility: proposal for increased powers for Swedish Competition Authority is seen in new light following recent failure to block merger in court' [May 2017] IBA Antitrust Committee newsletter..