CONSORTIA AND COMPETITION LAW

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The European Commission's draft revision of the horizontal cooperation guidance published on March 1, 2022, for the first time includes a specific section on the assessment of consortia agreements. Up to now, there has been very limited guidance in case law and in the existing horizontal cooperation guidelines. The article examines the role of consortia in procurement processes (tenders) and in M&A and discusses their assessment under EU competition law, looking at the limited guidance provided by case law and the new draft guidelines. It concludes with practical tips on issues to consider when assessing consortia collaborations.

I. INTRODUCTION

Consortia are a regular feature of bidding markets and in mergers and acquisitions ("M&A"). Companies often get together and form a consortium to bid on a particular tender because they have complementary skills or wish to share the risk of a very large project. Companies also often get together to form consortia to bid in M&A situations and own the acquired assets jointly or split the assets post-acquisition.

Even though the EU has for a long time issued guidance on collaboration agreements between competitors, the guidance on collaboration in the context of consortium agreements was minimal: a couple of sentences in the horizontal cooperation guidance.[2]

Now, for the first time, the EU has published significant new (still draft) guidance on consortia agreements and their treatment under competition law. In this paper, we will look at consortia and the competition issues they potentially raise, past case law, and the European Commission ("EC")'s new draft guidance and will offer some high-level views on practical issues to consider in a consortium collaboration.

II. CONSORTIA COLLABORATIONS IN TENDERS AND IN M&A DEALS

Bidding consortia are a form of joint bidding whereby two or more parties cooperate in submitting a combined bid in a public or private procurement process, typically through a specific legal entity (vehicle) created for the purpose of the tender process. If the bid is successful, the performance of the contract will be divided between the consortium members.

Consortia are also widely used for M&A, where several parties enter into an agreement to join forces to acquire a company. Typically, a consortium of this kind is achieved by forming a bidding vehicle in which each party has an equity interest.

Some recent examples of M&A deals that involved consortia include the following:

- The May 2019 acquisition of Merlin Entertainments by a consortium comprising a wholly owned subsidiary of KIRKBI A/S (the ultimate owner of the LEGO® brand), Blackstone, and the Canada Pension Plan Investment Board for a value of GBP 4.77 billion[3];
- The October 2019 acquisition of Nestlé Skin Health by a consortium led by EQT and a wholly owned subsidiary of the Abu Dhabi Investment Authority for a value of CHF 10.2 billion[4]; and,
- The December 2019 acquisition of Inmarsat by a consortium composed of Apax, Warburg Pincus, the Canada Pension Plan Investment Board, and the Ontario Teachers' Pension Plan Board for a value of GBP 2.6 billion.[5]

III. WHAT ARE THE COMPETITION ISSUES INVOLVED IN CONSORTIA COLLABORATIONS?

Consortia can be and often are pro-competitive. In a tendering context, consortia agreements could benefit both the buyer and the potential sellers involved as they may allow a wide range of firms with different areas of expertise to deliver what the buyer is looking for jointly. They could potentially increase competition by giving a wider choice of bids from the buyer's perspective since more firms may be able to participate in a tender as part of a consortium where they cannot meet the requirements set out in the tender criteria on their own. In the procurement of goods and services, a potential bid may also become more attractive to the buyer due to the pooling of resources and economies of scale on the producer side.

In the M&A context, consortia can also enhance competition for the target company or assets by enabling companies to share the risk of major transactions and participate in a transaction that they could not otherwise participate in individually. In addition, a consortium can bring

2 Communication from the Commission: Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements, OJ (2011) C 11/1 (Horizontal cooperation guidance), recital 237.

3 *KIRKBI, Blackstone, and CPPIB agree terms of a recommended offer for Merlin Entertainments Plc*, KIRKBI Press Release (June 28, 2019), https://www.kirkbi.com/media/tk2nqciu/kirkbi-blackstone-and-cppib-agree-terms-of-a-recommended-offer-for-merlin-entertainments-plc_.pdf.

4 *Nestlé closes the sale of Nestlé Skin Health*, Nestlé Press Release (October 2, 2019), https://www.nestle.com/sites/default/files/2019-10/press-release-nestle-skin-health-closing-en.pdf.

5 *Warburg Pincus Completes Acquisition of Inmarsat*, Warburg Pincus News Release (January 3, 2020), https://warburgpincus.com/2020/01/03/warburg-pincus-completes-acquisition-of-inmarsat/.

together acquirers with complementary skills that bring to the table not only joint financial capabilities but also skills such as expertise in running companies in the sector in question, local expertise in the relevant geographic region, etc.

Consortia, given their potentially pro-competitive nature, must be distinguished from bid-rigging, which is a distortive practice whereby firms illegally (and usually secretly) collude to negatively influence the outcome of any competitive process in which bids are submitted. The practice of bid-rigging constitutes a restriction of competition by object, one of the most serious restrictions of competition alongside other forms of hard-core cartels within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), such as price-fixing, market sharing, customer allocation and the exchange of sensitive commercial information.

While consortia are most often perceived as a common business practice and seen as a legitimate means of cooperation that firms often avail themselves of, they also carry significant competition risks. These risks arise when tenderers who were in a position to submit their own competing bids expressly agree not to compete, be it on the basis of submitting a consortium bid or not to submit an independent bid in competition with the consortium.

The risk is that consortium members who could bid for the same tender or target/assets individually, in essence, agree not to compete and instead collaborate and bid jointly. There is, therefore, an inherent risk that competition is restricted directly. It results in a less competitive situation and a worse bid outcome from the perspective of the tenderer. Another inherent risk, even in more legitimate situations, is that the parties to a consortium bid may also run the risk of needing to exchange commercially sensitive information to agree on the various elements of the bid in the course of preparing a bidding consortium. This can raise suspicions of collusion that go not only to the specific bid in question but may extend to other activities (other bids) the parties may be participating in independently.

Under the EU competition rules, bidding consortia (that are not secret collusive secret bid-rigging collaboration) therefore need to be analyzed to assess whether they fall completely outside Article 101(1) TFEU (if the parties are not competitors for the relevant tender/assets at all). However, they may benefit from the exemption provided for in Article 101(3) TFEU if they can prove that the efficiencies they bring to customers and consumers outweigh any restriction of competition.

IV. LIMITED GUIDANCE AND CASE LAW PRIOR TO THE NEW EC (DRAFT) GUIDANCE

The EC's current horizontal cooperation guidance states that commercialization agreements do not generally raise competition concerns where they are objectively necessary to enable a party to enter a market that it would not have been able to enter individually, for example, because of the costs involved. More specifically, the EC considers that this applies to *"consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually."*[6] It clarifies that for such agreements to fall outside the scope of Article 101(1) TFEU, it is essential that the parties to the agreement are not regarded as *"potential competitors for implementing the project."*[7]

However, while this may provide a starting point from which to assess bidding consortia, it fails to provide any guidance as to when undertakings should be considered objectively incapable of bidding independently. It also does not provide further guidance on how an analysis ought to be performed under Article 101(3) in a situation where the undertakings concerned are considered competitors.

There is very little substantive case law on how the competition rules ought to apply to bidding consortia. The *Ski Taxi* judgment,[8] which came before the EFTA Court in 2016, is a rare example of a case in which such a competition analysis was carried out. This concerned a consortium bid submitted by two taxi companies in Norway, Ski Taxi and Follo Taxi, in the context of two tender procedures conducted by the contractor, Oslo University Hospital, for transporting its patients. The consortium bid was conducted through a joint venture known as Ski Follo Taxidrift ("SFD"), in which both taxi companies participated. In this respect, the bids were submitted by SFD, not by the taxi companies themselves, as was made clear in the shareholding agreement, according to which both companies were aware that *"there will be less competition between them in the market than previously. This applies to both pric[ing] policy in tenders and other strategic measures in relation to the market. Should this changed situation require permits from public authorities, such permits must be obtained."*[9]

6 Horizontal cooperation guidance, recital 237.

7 *Id.*

8 Case E-3/16, *Ski Taxi SA, Follo Taxi SA, and Ski Follo Taxidrift AS v. The Norwegian Government* (2016).

9 *Id.* para 8.

Oslo University Hospital conducted two tender procedures for the award of framework agreements for the supply of patient transport services. The first tender procedure was canceled due to the lack of competitors. In the second tender procedure, SFD submitted a consortium bid resulting in the two taxi companies winning the award of the framework agreements in question.

The Norwegian Competition Authority subsequently launched an investigation into the consortium bid carried out through SFD. This culminated in a decision by the Norwegian Competition Authority, which found that Ski Taxi and Follo Taxi could have submitted separate bids in the two tendering procedures.[10] This meant that Ski Taxi and Follo Taxi ought to be considered competitors, leading to the conclusion that the consortium in question had the object of restricting competition. Therefore, the consortium was in breach of Section 10 of the Norwegian Competition Act, equivalent to Article 53(1) of the Agreement on the European Economic Area ("EEA") (and, by analogy, Article 101 TFEU).

The consortium members appealed the decision to the local district court and eventually to the Norwegian Supreme Court. The Norwegian Supreme Court, in turn, asked the EFTA Court for an advisory opinion to obtain clarification on the applicable test for determining whether a joint bid for a public contract constitutes a restriction of competition by object under the Norwegian Competition Law, corresponding to Article 101 TFEU.[11]

Before the EFTA Court, the taxi companies argued that the consortium bid constituted a restraint ancillary to the operation of SFD, whereby *"[its] submission […] was part of a wider scheme, which entailed the establishment of SFD as a provider of administrative tasks for Ski Taxi and Follo Taxi."*[12] The EFTA Court rejected the parties' arguments by underlying that, in order for the submission of a consortium bid to escape the prohibition of Article 53(1) EEA (and, by analogy, Article 101 TFEU) by virtue of being ancillary to the main operation that is not anti-competitive in nature *"that restriction [must be] proportionate to the underlying objectives of the operation."*[13] The EFTA Court held that *"[t]he fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the "objective necessity" required for it to be classified as ancillary."*[14]

As the parties had *"cooperated on price, quality and capacity"*[15] and had *"agreed on the price offered to the contracting authority"*[16] in their consortium bid, it came as no surprise that the EFTA Court found that the consortium bid at issue amounted to a form of price-fixing. The EFTA Court, therefore, held that the consortium bid amounted to a restriction of competition by object in violation of Article 53 EEA (and, by analogy, Article 101 TFEU).

It is interesting to point out that the EFTA Court had ultimately ruled that the competition assessment of bidding consortia in more general terms must be carried out on a case-by-case basis, considering *"the substance of the cooperation, its objectives, and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor."*[17] *It further acknowledged that "since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration 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. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint."*[18]

In addition, the EFTA Court had separately held that, although openly submitting a joint tender (without any element of secrecy or concealment) may reveal a lack of an anti-competitive intention, this is not in itself a decisive factor for determining whether an agreement restricts competition by its object.[19]

10 *Id.* para 19.

11 *Id.* para 24.

12 *Id.* para 86.

13 *Id.* para. 99.

14 *Id.*

15 *Id.* para 91.

16 *Id.*

17 *Id.* para 101.

18 *Id.* para 102.

19 *Id.* para 108.

Finally, it may also be appropriate to look briefly at an example of a consortium cleared by a competition authority, albeit a national competition authority of an EU Member State. By way of illustration, in *ÁB-Aegon/Allianz Hungária/Generali-Providencia/OTP Garancia/Uniqua*,[20] the Hungarian Competition Authority found that a consortium agreement between Hungarian insurers bidding for the provision of public insurance for children and young people could benefit from an individual exemption under Hungarian competition law. In its initial analysis, the Hungarian competition authority observed that the consortium bid at issue was restrictive of competition, as the companies could have participated in the public tender on an individual basis. It considered that such a consortium could only be excluded from being classified as a competition infringement if there were objective economic reasons for its creation, which was not the case in that instance. However, the Hungarian Competition Authority concluded that the consortium fulfilled the conditions for exemption under Hungarian national law, as it established a much larger number of contact points for potential claimants, which made it easier for young people to use the system at a lower cost. The scheme also allowed insurers to spread their risks better, enabling them to offer a lower price for their products, well below the price of general insurance.

In balance, it would therefore appear from the EC's current horizontal cooperation guidance and the EFTA Court's *Ski Taxi* judgment that there remains a certain degree of ambiguity as to the competitive assessment of bidding consortia under EU and EEA competition law. Nonetheless, it seems likely that such agreements would only be deemed to restrict competition following an individual assessment of both the context and the content of each consortium.

V. THE NEW EC DRAFT GUIDANCE

For the first time, the EC has now published guidance through a new section on bidding consortia included in the EC's draft revised horizontal cooperation guidance,[21] which was published for consultation on March 1, 2022. Although these guidelines are still subject to change and will not come into force until January 2023, they are nevertheless a particularly useful tool in providing an insight into how the EC views consortia agreements in the context of its competition analysis.

The section on bidding consortia in the draft horizontal cooperation guidance clarifies that such agreements do not restrict competition if they allow their participants to undertake projects that they would not be able to undertake individually.[22] As an addition to the current guidance, this section also provides much-needed guidance on the assessment of consortia agreements between parties who would be able to undertake the project individually.[23]

The EC begins by providing clarification on the distinction between consortia tendering and bid-rigging. As mentioned above, bid-rigging refers to illegal (and usually secret) agreements between economic operators to distort competition in contract award procedures. Bid-rigging is regarded as a form of cartel and thus constitutes some of the most serious restrictions of competition by object. This can take various forms, such as rival bidders fixing the content of their bids (including price) in advance to influence the outcome of the procedure, refraining from submitting a bid, or allocating bidding efforts according to geography.[24]

The draft then goes on to address the issue of when undertakings should be considered objectively unable to bid independently by referring to two possibilities. First, a bidding consortium will not restrict competition when the undertakings involved provide different services that are complementary for the purposes of participation in the tender. Second is that there will be no restriction of competition when the undertakings involved, although all active in the same markets, cannot carry out the contract individually, for example, due to the size of the contract or its complexity.[25]

The EC clarifies that the mere theoretical possibility of each party carrying out the contractual activity alone does not automatically make the parties competitors. A realistic assessment must be conducted, on a case-by-case basis, considering whether an undertaking will be capable of completing the contract on its own, considering its size, abilities, and future capacity in light of the contractual requirements. In this respect, an important element of the assessment is to consider the tender rules themselves. In cases of calls for tenders where it is possible

20 Hungarian Competition Authority, *ÁB-Aegon Általános and Ors* (Vj-149/2003/23).

21 Draft guidance on the applicability of Article 101 of the TFEU to horizontal cooperation agreements.

22 *Id.* recital 391.

23 *Id.* recital 392.

24 *Id.* recitals 387 – 388.

25 *Id.* recital 391.

to submit bids on parts of the contract (lots), undertakings that have the capacity to bid on one or more lots – but assumedly not for the whole tender – have to be considered competitors.

Following this assessment, if it cannot be excluded that the parties could each compete individually in the tender, the bidding consortium may restrict competition by object or by effect under Article 101(1) TFEU.[26]

Where the bidding consortium does restrict competition, the next step is to assess whether such a consortium may benefit from an exemption under Article 101(3) TFEU. Generally, a specific and concrete assessment will be necessary based on various elements such as the parties' position in the relevant market, the number, and the market position of the other participants in the tender, the content of the consortium agreement, the products or services involved, and the market conditions. The Article 101(3) TFEU criteria can generally be fulfilled if the bidding consortium allows the parties to submit an offer that is more competitive than the offers they would have submitted individually (in terms of prices and/or quality) and if the benefits for consumers and the contracting entity outweigh the restrictions of competition. Crucially, any efficiencies must be passed on to consumers; if they only benefit the parties to the bidding consortium, Article 101(3) TFEU does not apply.[27]

Finally, it is important to note that the draft guidance (in the more general commercialization section, which includes the part on bidding consortia) specifies that in commercialization agreements, there is a heightened risk of collusive effects due to information exchanges. In a joint consortium situation, it is evident that the parties will need to exchange a lot of sensitive commercial information. It is, therefore, necessary to verify whether the information exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the co-operation. For example, even if the parties are not competitors for the particular tender in question, they may be competitors for other similar tenders. Any information exchange should therefore be assessed to ensure it does not result in wider collusive effects between the participating consortium members.

VI. CONCLUSION AND PRACTICAL TIPS

The draft revised horizontal cooperation guidance provides welcome clarification on bidding consortia for companies wishing to pool their respective expertise and capabilities to bid jointly in tenders or bid for assets/targets in an M&A context.

Bidding consortia can be beneficial by promoting cooperation between bidders of differing sizes or capabilities. For example, a bidder with substantial financial resources lacking the required industry expertise may benefit from joining forces with a smaller co-bidder already operating in the relevant industry.

However, the EC's assessment in practice cannot yet be predicted with certainty, given the limited application and case law to date. Considering the competition risks involved (the consortium could be seen as restricting competition; information exchanges could result in wider collusion), companies wishing to participate in a consortium should consider careful assessment, preparation, and safeguard measures. Parties wishing to participate in a consortium would need to assess not only whether participation in the consortium is legitimate but also whether any information exchange measures need to be adopted. For example, they will need to ensure that any information exchange in the context of the consortium is limited to what is necessary for the specific bid/acquisition in question. If information is potentially commercially sensitive such that it could reduce strategic uncertainty and disclose bidding strategy or influence bidding behavior in other projects where the parties may be competitors, adopt specific safeguards such as clean team and ring-fencing arrangements.

Finally, consortium participants may also need to consider whether the creation of the consortium may trigger merger control filings. This is because in some jurisdictions, the creation of the special purpose vehicle in itself may need to be notified as a concentration and obtain clearance in addition to any clearances required for the actual bid itself.[28] Careful assessment and preparation can mitigate the difficult competition risks that arise in consortia situations and ensure the consortium remains pro-competitive for the benefit of the parties as well as the tendering body or seller.

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26 *Id.* recital 392.

27 *Id.* recitals 395 – 397.

28 See, for example, in the People's Republic of China, its Anti-Monopoly Law and the Guiding Opinions for the Notification of Concentration of Undertakings, as amended, provide that a joint venture set up to acquire a target is notifiable to the State Administration for Market Regulation if it meets the notification thresholds. See also, for Ukraine, the Antimonopoly Committee of Ukraine evaluates ex post as to whether a vehicle qualifies as a non-full function joint venture after the notifying party has filed both the main transaction and the establishment of the vehicle pursuant to paragraph 23 of its of its Guidelines on Consideration and Clearance of Mergers Amounting to the Establishment of Joint Ventures of September 27, 2019.

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