Joint bidding: a smelly looking fish or a rockpool goby? An update from the Nordics[1]

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***E.C.L.R. 335** Introduction

Joint bidding is a hot potato in the EU/EEA Member States' competition law jurisprudence.

On the one hand, consolidation of public tenders is the direction of travel within a number of industries in order to reduce public spending and increase economic growth through competition and economies of scale and scope.[2] Large tenders may encourage undertakings to collaborate on the tender, either through a joint bid (hereinafter referred to as "joint bidding") or through other forms of co-ordination such as agreements not to bid, rotate bids or simulate bids (hereinafter referred to as "bid rigging"). On the other hand, tender collaboration, including joint bidding, is (often) viewed as a by object restriction of competition if the parties are potential competitors and therefore held to be unlawful without a full examination of its actual effects. The notion of potential competitors may have a broad scope, in particular if the tender allows bidding for lots and/or if the industry is consolidated and/or if the market players are sufficiently big players.

Whereas there are a number of cases from the national competition authorities, appellate bodies and Member States' courts dealing with joint bidding, cases from the EU and EFTA/EEA institutions themselves are scarce.[3] To date, there are only a handful of cases from the Commission and one case from the EFTA Court dealing with joint bidding and no cases from the Court of Justice of the European Union (CJEU).[4] This leads us to the question as to whether or not the national jurisprudence is in line with or at odds with EU/EEA competition law.

On 27 November 2019, the Danish Supreme Court decided that Eurostar Danmark A/S and GVCO A/S could have submitted independent bids for several lots of the same tender for road-marking services.[5] In effect, the joint bidding among the two companies constituted an anti-competitive agreement between competitors. Given that the joint bidding included an

agreement on the price of the tender as well as on the division of the services (share by lots) to be carried out by each of the teaming companies, which for apparent reasons it often does, the joint bidding amounted to a by object violation of art.101(1) TFEU and s.6 of the Danish Competition Act. The Danish Supreme Court thereby upheld the initial decision by the Danish Competition Council and overturned an intermediate decision by the Danish Maritime and Commercial High Court that had deemed the joint bidding lawful.

On the other side of the Skagerak, in a similar judgment on 22 June 2017, the Norwegian Supreme Court dismissed an appeal from Ski and Follo taxi companies relating to an NCA decision concerning joint bidding in a tender procedure for patient transport services. The Norwegian Supreme Court concluded that the two taxi companies were competitors, since they had, in principle, a realistic possibility to bid individually in the tender for hospital patient transport services and had therefore restricted competition by object.

In the author's view, these cases form part of a national trend of increased enforcement against joint bidding—and a strict approach to joint bidding as a "by object" restriction of competition.[6] A seminal question for this article is how to balance this strict national approach with the guidance on object restrictions in CJEU case law, notably the *Carte Bancaires* and *MasterCard* judgments and the upcoming judgment in *Budapest Bank*,[7] as well as the Commission guidance on horizontal co-operation agreements and bid rigging. From a practitioner perspective, we would also like to investigate whether there is a divide between the legal approach taken and the business context in which the joint bidding takes place. ***E.C.L.R. 336***

What is the legal test for joint bidding?

For an agreement or concertation to be caught by the prohibition in art.101(1) TFEU and art.53(1) EEA, as well as the Member States' prohibition against anti-competitive agreements, it must have as its "object or effect" the restriction of competition. Those are not cumulative but rather alternative requirements.[8] The classification of an agreement as a restriction of competition by object essentially means that the competition authority's burden of proof is alleviated, since anti-competitive effects are presumed and the authorities need not show adverse effects on competition before concluding that art.101(1) is infringed.[9] This logically means that until it is clear that a practice is not a restriction by object, the focus generally, and in this article, should be on whether the practice in fact restricts competition by its very object.

The CJEU has yet to consider a joint bidding case and has therefore not considered whether and when joint bidding is a restriction by object of competition. To quote the General Court, however,

"the fact that the Commission has not, in the past, considered that a certain type of agreement was, by its very object, restrictive of competition is therefore not, in itself, such as to prevent it from doing so in the future following an individual and detailed examination of the measures in question having regard to their content, purpose and context".[10]

Case law from the CJEU and guidelines from the Commission nevertheless provide a general framework to analyse joint bidding under art.101.

First, although the distinction between restrictions which restrict competition by object and those that need to be assessed according to their effects has been debated and the CJEU approach is not always consistent, it is now clear that "object" must be interpreted narrowly.[11] For an object restriction to exist, the conduct must reveal a "sufficient degree of harm" to competition.[12] The CJEU exemplified the legal test by reference to a price fixing cartel since

"[e]xperience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers".

This is and should be a basic premise for the application of competition laws to joint bidding.

Secondly, it is clear that joint bidding between non-competitors could not restrict competition by its very object and is unlikely to have any anti-competitive effects on the merits. A fundamental part of the legal test for joint bidding cases under competition law must therefore be whether the parties are competitors under competition law. For tenders where the parties decide to submit a joint bid instead of individual bids, the question is whether the parties are "potential competitors" as defined in the CJEU case law and Commission guidelines.[13] The constituent element as to whether or not an undertaking is a potential competitor, is whether or not it has "real concrete possibilities" of entering the market, that is to say submitting an individual bid. The CJEU has made it clear that entry does not have to be "certain" or "more likely than not", but that a theoretical possibility would not suffice.[14] The ability to enter is the important factor, whereas the intention to enter and an

undertaking's perception of another as being a potential competitor may also be relevant.[15]

Thirdly, in making the "sufficiently harmful" appraisal, the authorities need to take account of

"all relevant aspects of the economic and legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market." [16]

The addition in the *Cartes Bancaires* case that "whether or not such an aspect relates to the relevant market" meant that the Commission had to consider all aspects on two-sided markets. In the context of joint bidding, this should mean that the authorities need to look beyond just the tender competition itself (relevant market) when considering whether the joint bid amounts to a restriction by object.

Fourthly, although agreements that involve price fixing, limitation of output, sharing of markets or customers are likely to restrict competition by object, this is less self-evident for production agreements, or agreements with elements of both production and selling such as often is the case for joint bidding.[17] In effect, joint bidding arguably needs a more nuanced approach than, for instance, bid rigging. This may be illustrated by reference to bid rigging. Bid rigging is defined by the Commission as ***E.C.L.R. 337***

"when two or more companies agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid or submit a bid at artificially high prices arrived at by agreement".[18]

The Commission refers to the *Dansk Rørindustri* case. The case concerned a cartel agreement between manufacturers of district heating pipes that allocated, for example, individual projects to designated manufacturers and manipulated the bidding procedure to ensure that the designated manufacturer was awarded the assigned project.[19] Generally, bid rigging (or collusive tendering) is a type of cartel behaviour.[20] As we know, cartels are the worst form of anti-competitive agreements. Bid rigging is therefore presumed illegal unless it somehow produces efficiencies that outweigh the loss of competition.[21] Indeed, in the Commission guidance on object restriction, bid rigging is defined as an object restriction.[22] In effect, the competition authorities need not demonstrate anti-competitive effects, and the restriction is automatically viewed as "appreciable"—a necessary element to conclude that there is a violation of art.101 TFEU. The point to be made is not simple semantics. The point is that the nature and effects of joint bidding are more opaque and disputed than (other) forms of bid co-operation, such as bid rotation (competitors decide to take turns), agreement to bid a certain price, cover bidding (fictitious bid), bid suppression (agreement not to bid) or market partitioning bidding.[23]

Commission Horizontal Co-operation Agreements Guidelines

Whereas joint selling is likely to be regarded as a restriction of competition by its very object, and therefore unlawful, joint production is, under certain conditions, treated favourably under EU competition law. First, joint production may benefit from the Specialisation Block Exemption Regulation. Secondly, and pursuant to the Commission guidelines, joint production is not a restriction by object, but needs to be assessed by its effects where either:

"the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition are not eliminated; or

a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that this restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place." [24]

The second alternative appears particularly relevant to joint bidding and highlights an important paradox in joint bidding, namely that it may share characteristics with joint distribution and/or production, whilst at the same time it is difficult, or even impossible, to co-operate and pool resources together in a joint bid without agreeing on a joint price. The Commission may offer a compromise to this paradox in the guidelines at para.167, when it states that

"a joint distribution agreement that is necessary for the joint production agreement to take place in the first place is less likely to restrict competition".

The emphasis in this sentence should be on "necessary". Neither the guidelines nor the case law makes it clear how strict this necessity test ought to be. In the *Ski and Follo taxi* case, the Norwegian Government argued that "necessary" in the guidelines had to mean that none of the parties could have entered the market without the agreement. In other words that the distinction between joint production and joint selling, when applied to joint bidding, in essence only echoes the competitor test.[25] The EFTA Court did not reject this proposition, but was more moderate when stating that competition concerns would not arise "if it is objectively necessary to allow *one party* to enter the market it could not have entered individually" (emphasis added).

If this is correct, it would mean that the principle in the guidelines at para.165, that "anti-competitive foreclosure is not likely to occur if the parties to the agreement do not have market power", is of less significance in a joint bidding scenario. Arguably, two small and medium-sized enterprises co-operating against a market leader, would not have market power even in the individual tender. ***E.C.L.R. 338***

In the author's view, the guidelines ought to be clearer on how to reach a lawful joint production on this point. Whereas para.237 regarding commercialisation agreements treats consortia arrangements where the parties could not have bid individually as—if anything—restrictions of competition by effect, paras 234 and 236 treat co-operation on pricing and allocation of markets and customers (and therefore also projects) as restrictions by object.

It is also not clear how a strict interpretation of the Commission horizontal guidelines is to be harmonised with the ancillary restraint doctrine and the Specialisation Block Exemption Regulation. First, if competitors' joint bidding is price fixing, the ancillary restraint doctrine would be of limited practical significance to joint bidding. Secondly, the Specialisation Block Exemption Regulation appears less relevant to joint bidding if it simply comes down to a question of potential competition, and if joint bidding among potential competitors generally amounts to joint selling (price fixing).[26] This appears contrary to the specialisation block exemption, when it states (art.4a) that the fixing of prices is not a hard-core restriction if it concerns "the fixing of prices charged to immediate customers in the context of joint distribution". Price fixing in the context of joint distribution may therefore qualify under the block exemption if the parties' combined market share is below 20 per cent. Thirdly, a finding that joint bidding generally is an object restriction seemingly ignores the "centre of gravity" test that the horizontal guidelines establish to consider whether certain types of arrangements, such as joint production, constitute a restriction of competition by object or effect.[27]

Joint bidding and joint selling in casu: the Nordic cases

Overview

In the absence of CJEU cases, it is helpful to analyse the national—and in this case, the Nordic—competition cases to understand the legal test applied to joint bidding. There have been several national cases before the national courts—also at the highest level. First, it is worth looking into the Danish road-marking case as it raised a number of issues that are of relevance beyond the specific case and beyond Danish competition law.

The Danish road-marking case

In essence, the case concerned a road-marking services tender published in 2014 by the Danish Road Directorate to bid for three of the initial geographical lots.

The two road-marking companies, Eurostar Danmark A/S ("Eurostar") and GVCO A/S ("GVCO") ("the parties") agreed to submit a joint bid for all three contracts/lots. If the consortium was awarded two or three contracts, a rebate of 5 per cent or 20 per cent would be granted, respectively. The consortium won all three contracts. No other company had submitted a total bid for all three lots. Further, for one of the lots the consortium's bid was the only one. One competitor (Guide-Lines) had submitted a bid for two lots with no rebate, and another competitor (Lemminkäinen) for one lot. Guide-Lines filed a complaint with the Danish Competition Council. It alleged that the joint bid from Eurostar and GVCO constituted an infringement of s.6 of the Danish Competition Act and art.101(1) TFEU.

The Competition Council held that Eurostar and GVCO had infringed the prohibition against anti-competitive agreements since the two companies were able to submit separate bids for at least one lot with their current individual capacity. Also, the Council held that the companies could have increased their individual capacities and thereby made a bid for all three lots. The companies argued that the capacity agreement should be made with the total tender as a benchmark given how it was structured (e.g. the rebates). This argument was rejected and the council went on to hold that the joint bidding was a

restriction by object since it was concluded between competitors and involved fixing a joint price and sharing the different geographical lots with (allegedly) no pooling of resources, etc. The conditions for exemption under art.101(3) TFEU were not met.

On appeal, the Danish Competition Appeals Tribunal upheld the Council's decision. Unlike the Council, the Appeals Tribunal did not assess whether the parties could have submitted separate bids for the entire tender. The parties indisputably had the capacity to bid individually for some of the lots and were therefore held to be competitors. Against this background, the Tribunal held that the joint bidding amounted to an object restriction and that the criteria for exemption under art.101(3) TFEU were not met.

On further appeal, the Danish Maritime and Commercial Court reversed the Competition Council's decision. The Court emphasised that the tender favoured bids for all three lots. The ability to submit separate bids for some lots could not prevent GVCO and Eurostar from submitting a joint bid for the entire contract. Such a restriction on companies' freedom to carry out their business would not, according to the Court, necessarily promote competition. Since the Competition Council had not sufficiently proven that Eurostar's and GVCO's capacity calculations were inaccurate, the Court found that the parties were unable to bid alone for the entire contract. In effect, the Court thus held that the parties were not competitors, and therefore that the agreement did not fall within the scope of art.101(1). Two further observations should be made. First, the Court in assessing the capacity of the two undertakings also looked at whether hiring resources to submit an individual bid was "commercially sound" (e.g. not only possible). Secondly, ***E.C.L.R. 339*** the Court allowed the companies to deduct resources allocated to the servicing of existing key customers, even if written agreements were not in place, as long as the expectation of recurring orders was backed by previous experience. It would be commercially irresponsible not to, the Court argued.

On appeal, the Supreme Court set aside the judgment of the Maritime and Commercial High Court.

The Supreme Court found that Eurostar and GVCO were competitors. The Supreme Court started by stating that the basis for evaluating whether they were able to bid independently was the tender documents.[28] The pivotal question was therefore whether the tender documents allowed the parties to bid for one, two or all three lots, and not the entire contract. Interestingly, the Supreme Court thereby deems as irrelevant circumstances, which according to the parties encouraged a joint bid. These circumstances included the fact that the tender historically consolidated previous smaller tenders, that it provided for a collective rebate if bidding for several lots and that the previous winner submitted a total bid. Guided by the fact that other tenderers submitted bids only for one or a few lots, the Supreme Court held that the tender was for individual lots.[29]

The Supreme Court held the joint bid to amount to an object restriction. It started out by stating that in order to find a restriction by object it

"… must be sufficiently certain that the measure, based on its nature in the relevant market context, from an objective point of view, has such anti-competitive potential that it is not necessary to prove the existence of actual anti-competitive effects."[30]

On the facts, the Court found that the bidding agreement did not resemble a production agreement. The parties had essentially made their joint consortium bid on the basis of a prior division of the works in relation to the three districts and decided in advance who should operate in which geographical area. In effect, there was no genuine pooling of resources ("no cooperation between the parties in connection with the sale of the services"). The joint bidding was seen as price fixing and market sharing by the Court.[31] The conditions for individual exemption under art.101(3) TFEU had not been proved to be met.

The Court also, incidentally, noted that the fact that the consortium agreement was entered into for the purpose of making a competitive bid and performing the works in public does not change the illegal nature of it.[32] This raises the problem, when translated into a business decision context, how to balance the fact that undertakings may have the ability (objectively) to bid, but do not see any chances of winning the bid alone. To what extent should business be allowed to bid to (increase chances to) win?

In summary, the Danish road-marking case applies a broad notion of "object restriction" and makes it clear that companies

can only bid strategically jointly, insofar as the work involves a given integration of resources/competencies. For contracting authorities, the decision may also work as an incentive to not to allow bids on lots, if there are any economics of scale and scope to chase.

The Norwegian cases

The Supreme Court in the Ski and Follo taxi case[33]

The Supreme Court's decision in the *Ski and Follo taxi* case (pronounced on 22 June 2017) largely confirmed what has been perceived as a strict approach to joint bidding by the Norwegian Competition Authority. The background for the case was that the two regional taxi centres Ski Taxi and Follo Taxi submitted a joint bid to Oslo University Hospital (patient travel) ("OUS") in two competitions against "big brother" Oslo Taxi and another bidder, Konsentra. The Norwegian Competition Authority initiated investigations on the basis of an enquiry from OUS. In July 2011, the Authority made a decision (V2011-12) that the taxi centres' joint bids in the tender competitions were in defiance of s.10 of the Norwegian Competition Act. The Authority was of the opinion that the taxi centres had a "genuine opportunity" to submit separate bids and that the case involved collaboration between actual or potential competitors regarding price, quality and capacity. The Norwegian Competition Authority therefore concluded that

"the tendering collaboration in question must be deemed to have the purpose of restricting competition pursuant to Section 10, first paragraph, of the Norwegian Competition Act. There is thus no need to demonstrate a restrictive effect on competition." (para.106)

The conditions for exception stipulated in s.10, third paragraph, of the Norwegian Competition Act (efficiency benefits that offset the loss of competition) were not fulfilled. Ski Follo Taxidrift, Follo Taxisentral and Ski Taxi were issued with violation fines of NOK 2.2 million, NOK 400,000 and NOK 250,000, respectively. ***E.C.L.R. 340***

After several rounds in the judicial system (the District Court found in favour of the taxi companies, while the Court of Appeal later convicted the taxi companies) and following an advisory opinion from the EFTA Court, the case was decided by the Supreme Court. The Supreme Court rejected the taxi companies' submission that joint bidding was not a by object restriction in its nature but had to be considered for its effect. The Supreme Court also rejected the companies' argument that the decisive factor should not be the "possibility" to submit separate bids, but whether they had been able to submit a realistic, commercially sound and viable bid. The Supreme Court (and the EFTA Court) points out that in joint bidding where joint bids include price-setting, which is expressly prohibited pursuant to competition rules, the investigation into the effect of the conduct may be limited to that which is absolutely necessary to clarify whether an object restriction exists, i.e. an assessment, albeit less detailed, of whether the parties to an agreement are actual or potential competitors, and whether the joint setting of the price offered to the procurement authority constitutes an ancillary restriction.[34]

The Supreme Court echoes the starting point of the CJEU and finds that for breaches of purpose it is sufficient that the conduct "appears sufficiently detrimental to competition", so that it is not necessary to examine the effects, and that the assessment must take into account the content of the provisions of the collaboration agreement, its purpose as well as the economic and legal context of which it forms part (premises 38–40). More surprising, however, is the subsequent reasoning of the Supreme Court, which in effect establishes a strict notion of competitor and a relatively low threshold for determining that a joint bid for a contract is an object restriction.

First, the Supreme Court states that it was "clear that a tendering collaboration, such as the one we are facing here, is detrimental to competition" (premise 46). The Supreme Court emphasises that both taxi companies *could have* submitted individual bids, and disregards submissions about the companies' limited number of licenses, the size of the tender, the inherent risk, other tied-up capacity, etc.

Secondly, the Supreme Court states that when two companies individually have the opportunity, or "can easily obtain the opportunity", to submit a tender to a client in a tender competition, they will subject each other to competitive pressure.[35] Remarkably, the fact that *Ski and Follo taxi* were small-sized companies competing against the market leader Oslo Taxi, which had up to ten times as many licenses as the two companies combined, was therefore irrelevant.[36] Thus, the Supreme Court also did not assess on the facts whether Ski Taxi would actually have submitted a bid on its own, but instead focused on the elimination of potential competition[37]:

”A retrospective conclusion that one of the parties probably would have refrained from submitting an individual bid, is of little consequence in this context. Competitive pressure is evident as long as the possibility of a competitive bid exists.”

It is worth pointing out that the Supreme Court’s findings were supported by certain statements in the documents establishing the collaboration—a strategy plan from 2009 and a shareholders’ agreement from 2007. Critics have pointed out, however, that it is not self-evident that documents from several years previously give much evidentiary value as to why the parties submitted a joint bid, and that even if a joint bid would restrict competition between the two companies, this is not tantamount to a restriction *by object*.[38]

Thirdly, concerning the openness of the joint bid to the contracting authority, the Supreme Court admitted that it would be easier to find for a restriction by object if the collaboration had been secret, but that this did not change the fact that competition was harmed by the joint bid.[39] Given the conclusion that the joint bid was an object restriction, this conclusion is unsurprising.

The El-Proffen case[40]

The Supreme Court’s decision in the *Ski and Follo taxi* case is largely followed up in the Norwegian Competition Appeals Tribunal’s decision of 31 August 2018. The case concerned five electrician service companies, Elektro Nettverk Service, Lysteknikk, Arkel, Hoel and Røa, organised under the common brand and joint purchasing co-operation El-Proffen, that violated the Norwegian Competition Act by submitting a joint bid to Oslo Undervisningsbygg in a tender competition for electrical services in 2013.

It is worth pointing out that two of the five El-Proffen member companies, in addition to participating in the joint bid, also chose to submit separate bids. Statements in the correspondence between El-Proffen and the companies suggested that the separate bids were priced slightly higher in order to avoid conflict with the joint bid, in the event that Undervisningsbygg wanted a joint bid instead of several individual bids—and these “smoking guns” (at least they were interpreted this way by the Authority) were probably key to the outcome of the case. The tender competition also allowed for parallel framework agreements, in which each contracting party would receive one to three school districts with four to six school buildings in each group. Thus, it was not a ***E.C.L.R. 341*** situation where one winner would take it all (even though the bidders through the joint bid positioned themselves to get a larger share).

The Tribunal’s starting point is that object restrictions may be found to exist following an assessment of the co-operation’s content, purpose and context in which the cooperation in itself is “sufficiently detrimental”,[41] and in which the detrimental behaviour “is easily identified”. The tribunal starts its analysis by stating that competitors could not co-operate on joint bids, and that joint bids is at the centre of the prohibition against anti-competitive agreements and concerted practices. The tribunal does not consider the distinction between joint sales and joint production and the centre of gravity of this co-operation.

The Tribunal appears to assume from the outset that tender collaboration equals price-fixing, and that price-fixing represents an object restriction.[42] It may be questioned whether this assumption at the very outset sufficiently takes into account the content of the agreement, its objectives and the economic and legal context of which it forms part, so as to conclude that it reveals a sufficient degree of harm to competition.[43] The Tribunal rejects the argument that the price fixing is ancillary to the pooling of resources to bid jointly, since (i) the tender did not invite competitors to co-operate on joint bids and (ii) the principle activity, the joint bid, was unlawful.[44]

The five electrician companies were all held to be competitors, since they could bid at least for one of the school districts covered in the overall tender. The Tribunal further held that the electrician companies in any event could have hired staff to submit individual bids. The paradox, however, is that the Tribunal thereby contends that the joint bid with the competitor is anti-competitive, precisely because the required capacity could have been hired from a competitor. In other words, the basic premise for the hiring argument is that the electrician companies could be dependent on a competitor to submit a bid.

The decision was, unfortunately one may argue, not brought before the courts for review.[45]

The Swedish cases

There are several rather recent cases from the Swedish courts concerning joint bidding or bidding arrangements.

The Swedish Court of Appeal has in two recent bid co-operation cases overturned the lower courts and the Competition Authority. Both cases concerned types of sub-contracting arrangements, and in both cases the Court of Appeal overturned the findings that the arrangements were restrictions of competition by object.

The first case, *Aleris*, concerned a procurement for specialist healthcare services paid for by the Stockholm County Council (SCC) when doctors referred patients to such services based on framework agreements with the County.[46] Three healthcare providers Aleris, Capio and Globen Heart and Medical Heart entered into what in essence was sub-contracting agreements. The agreements entered into gave the losing party a right (no obligation) to act as a sub-contractor to the winning party at a price amounting to 98 per cent of the price submitted in the winning bid. The parties also disclosed which tender categories they would bid for. The contracting authority was informed about the existence, but not the details of the sub-contracting agreements.

The Swedish Competition Authority found that the sub-contracting agreements constituted a restriction of competition by object. The decision was upheld by the lower court (Patent and Market Court, PMC), which reasoned that if the object had been to ensure that the main contractor would have access to sub-contracting services, the agreements would have provided a right for the winner to buy sub-contracting services, rather than a duty to give access to its volumes.[47] Instead the agreements reduced the incentives to compete, since the other party in effect was given a "second chance" to win parts of the contract.

The Patent and Market Court of Appeal (PMCA), however, overturned the decision and came to the conclusion that the agreements did not restrict competition by object. Guided by recent judgments from the CJEU, the Court seems to base its findings on the fact that there is a narrow scope to establish an object restriction and that the behaviour must be "sufficiently harmful".[48]

The reasoning by the PMCA is novel when it states that the sub-contracting agreements may to some extent be considered pro-competitive to ensure that several suppliers could remain in the market in the periods between procurements.[49] This was based on the fact that the contracting authority was the only buyer (monopsony) of the services in question. If the argument is seen in the context that competition is "for the market", and less so "in the market", it still does not explain why the sub-contracting agreements would enhance the competition for the market. The finding of the PMCA is difficult to reconcile with the Norwegian and Danish cases, and arguably also with the CJEU case law on ***E.C.L.R. 342*** objection restrictions and the Commission horizontal guidelines. First, the parties to the sub-contracting agreements basically controlled around three-quarters of the relevant market and were thereby unlikely to be constrained by the competitors. Secondly, the losing party had a right, not an obligation, to act as a sub-contractor. Arguably, an obligation to support the bidder would better support a competitive bid to the benefit of the contracting authority. Thirdly, all three healthcare providers would be able to provide, at least as a sub-contractor, healthcare services to SCC, at a price that was no more than two percentage points below the price of the winning bid.

The other case, *Telia*, concerned itself with the City of Gothenburg's procurement of data communication services in 2009.[50] Prior to the deadline for submitting bids, Telia informed Gothnet that it did not intend to submit an individual bid and announced its ambition to become a sub-contractor if Gothnet won the procurement. The parties further exchanged a draft agreement obliging Telia not to submit an individual bid, whilst Gothnet agreed to appoint Telia as its sub-contractor if Gothnet won the procurement. However, a formal sub-contractor agreement was not signed until several weeks after the procurement. The PMC held that the behaviour constituted a restriction of competition by object since knowledge of the competitor not bidding will reduce incentives to compete and price aggressively.

The PMCA, however, overturned the PMC's judgment and concluded, again with reference to *Cartes Bancaires*, that the conduct did not constitute an object infringement. As part of its findings, the PMCA held that the contracting authority had—at least to some extent—incentivised the sub-contracting arrangement.

The Swedish Court of Appeal judgments are, on the face of it, surprising. They ought in the author's view, however, to be seen as evidence-based decisions with limited precedential value.

The two Swedish cases also raise the question whether the Swedish courts mixed the object analysis with the effects analysis. Indeed, commentators have warned against the undue limitation of the restrictions by object category, since a requirement to demonstrate the actual effects on price would make it virtually impossible to sanction this type of bid rigging or joint bidding cases.[51] It is recalled that when considering an alleged anti-competitive behaviour there is no need to take account of its actual

effects once it is apparent that its object is to prevent, restrict or distort competition. To the author's mind, however, this should not mean that actual effects—or the lack thereof—could be ignored, if proven.[52]

Balancing the legal framework and the application of competition law with joint bidding in the courts—what now?

Practitioners, courts and scholars cannot seem to quite agree whether joint bidding "looks like a fish and smells like a fish", or whether there is "something rather odd about this particular fish", so that it may only be classified as a fish after a detailed examination of the creature in question.[53]

The discussion rests on an inherent paradox in the prohibition against anti-competitive agreements. If joint bidding is characterised as a by object restriction, this acknowledges that anti-competitive effects may be difficult to prove beyond the fact that the joint bidders do not compete, whilst at the same time there is no true examination or appraisal of its actual effects. This paradox in theory is also one in practice, as seen in several of the cases discussed in this article.

First, the Nordic Supreme Courts have on two occasions held that joint bidding is harmful to competition, given that the joint bidders were potential competitors. The legal test is, they say, whether the bidders had the opportunity to, or could easily get the opportunity to, submit an individual bid, thereby eliminating the competitive pressure between them when submitting a joint bid. This strict view may risk equalling "pure cartels"[54] with co-operation among competitors more generally, such as pooling, research and development, joint purchasing, joint production and sharing of services or allocation of common tasks, etc.[55] This may obviously lead to the prohibition of pro-competitive behaviour (false positives).[56] As others have put it:

"It would be useful to obtain further clarity on how exactly "effective competition" is to be understood in a public procurement context, and how the static welfare of a contracting authority stemming from one tender procedure is to be weighed against the dynamic welfare of other contracting authorities and consumers in its broader sense". ***E.C.L.R. 343*** [57]

Secondly, the joint bidding theory of harm rests on the notion of restriction of potential competition. If the parties are (potential) competitors in the tender competition, co-operation on the bid will eliminate (or at least reduce) the competition between the two (or several) of them. However, when potential competitors include undertakings that are dependent on hiring staff or resources from third parties (competitors), this assumption seems to be a circle in proving.[58]

Thirdly, restrictions that are necessary to the pro-competitive main operation (so-called "ancillary restraints") are not contrary to the prohibition against anti-competitive agreements.[59] The Norwegian Supreme Court rejected ancillary restraint arguments in joint bidding with the reasoning that

"the joint bidding was, in this case, in its nature anti-competitive. There is therefore no lawful main operation which the price fixing can relate to".

The notion of ancillary restraints in the context of joint bidding, if this also is the EU/EEA state of law, then appears to be of no practical significance to joint bidding.[60]

Fourthly, it is at least arguable, based on the Nordic cases, to state that competitor (capacity) assessment under the object restriction approach is not necessarily balanced. In the *Ski and Follo taxi* case, the bidding companies argued that the Court should look not only at theoretical capacity (number of licenses, cars, drivers, turnover, etc.), but also at whether an individual bid was "realistic and commercially sound", taking into account risk exposure and company risk profile, etc.[61] This view has some support in the German notion of lawful consortiums ("Arbeitsgemeinschaftsgedanke"), where the Supreme Court (*Bundesgerichtshof*) has accepted that it suffices that the joint bid is commercially purposeful and mercantile ("*wirtschaftlich zweckmäßig und kaufmännisch vernünftig*").[62] The argument was, however, rejected by the Nordic Courts, and the courts' assessments as well as the prevailing Competition Authority guidelines, both in Denmark and Norway, have been criticised for being overly formalistic and not appreciative of the commercial realities in some industries where joint bidding is applied.

Further, the Supreme Courts and the Competition Authorities in Denmark and Norway clearly indicate that it suffices to classify two companies as competitors if they are capable of submitting bids for some lots—as long as the contracting authority accepts bids on lots. In other words, it is irrelevant whether they have the ability to submit bids for the entire tender/contract for which they have actually teamed up to bid, unless the contracting authority only accepts bids for the entire contract. This approach ignores that there could be commercially sound and legitimate business reasons for the business to compete for the entire contract through a joint bid, even if the contracting authority accepts competition for individual lots.[63]

It would be helpful also, if the case law and guidance on consortiums considered how financial risk should be incorporated in the capacity and competitor appraisal.[64] In particular, it remains unclear how a situation where the bidders have the potential capacity to themselves (or by hiring) perform the work, but are constrained by financial risk considerations implemented in the companies by the boards or the companies' banks and financial institutions is to be assessed. If the assessment of a company's "real and concrete possibilities" to expand its capacity in order to submit a bid for a single lot is stretched too far, it could lead to absurd results.[65]

Final remarks

The difference between object and effects-based assessments may not be of such significance, if it is proven that each party could have submitted an individual bid. If this is proven, the joint bid will, in effect, reduce competition between the bidders, which often will reduce competition overall. Against this background, it may be argued that joint bidding between competitors only requires a limited effects-analysis to conclude on its effects without this necessarily justifying the labelling of joint bidding as an object restriction, or that the distinction ***E.C.L.R. 344*** is not important.[66] As illustrated by at least some of the Nordic cases, however, an expansive interpretation of restrictions by object coupled with a strict competitor/capacity assessment risks denouncing and disincentivising co-operation between undertakings in the context of procurements that may benefit contracting authorities and ultimately consumers and in fact promote competition. From a practitioners' point of view, this effect is exacerbated by the fact that once the authorities and courts have concluded on an object restriction, it is difficult—if not impossible—to reverse such a finding based on efficiencies or "ancillary restraints".

The author calls for a more holistic approach to joint bidding. If joint bidding is subsumed under the object restriction category, then at least the competitor test must be balanced and nuanced, which does not seem to be the case in all matters to date. Clearly, the parties and the competition authorities and courts, as well as scholars, viewed the arrangements at stake in the Nordic cases very differently.

Framing a workable rule of law for joint bidding that both ensures the efficient enforcement of competition whilst also reducing the risk of sanctioning pro-competitive behaviour also raises the question of whether the courts should allow parties to disprove the assumed effects of the joint bidding on the facts. Whilst the notion of object restriction incorporates an assumption of effects, and protects the capacity and potential to harm, a non-rebuttable presumption seems, at least to the author, to bring the enforcement too far.

In summary, the boundary between legal and illegal joint bidding is still not clear cut and does not provide the legal certainty needed for companies to compete as effectively as possible. Guidance on joint bidding and object restrictions from the CJEU or the Commission in the upcoming review of the horizontal guidelines would be warmly welcomed.[67]

Svein Terje Tveit

Footnotes

1 According to *M. Bates, "Fish Changes Color in a Flash, Scientists Discover" (15 October 2014), National Geographics*, the rockpool goby is one of the few fish that changes colours depending on the circumstances.

2 See report from McKinsey & Company to the Danish Government: "Creating Economic Growth in Denmark Through Competition" (November 2010). Amongst the suggestions were to consolidate public tenders within the construction and services industries to achieve economies of scale and efficiencies.

3 This may simply reflect that tenders are normally national (or smaller) in scope. At the same time, tenders increasingly affect trade across the EU/EEA, and there are few preliminary reference cases to the CJEU and the EFTA Court.

4 See *Commission Decision of 27 July 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.688—Konsortium) [1990] OJ L228*, pp.31–34 and *Commission Decision of 24 October 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.437/8—Eurotunnel) [1988] OJ L311*, pp.36–39; EFTA Court judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government, E-3/16*. There are also a number of cases dealing with different types of bid rigging.

5 Supreme Court Case 191/2018, *Danish Competition Authority v Eurostar and GVCO of 27 November 2019*.

6 The topic is debated in Sweden after the Swedish Patent and Market Court of Appeal recently overturned two by object decisions from the Competition Authority and the Patent and Market Court concerning sub-contracting arrangements between alleged potential competitors.

7 *Groupement des cartes bancaires (CB) v European Commission (C-67/13 P) EU:C:2014:2204* and *MasterCard Inc v European Commission (C-382/12/P) EU:C:2014:2201* and *Gazdasági Versenyhivatal Budapest Bank (C-228/18) EU:C:2019:678*, not issued at the time this article went to press.

8 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) (56/65) EU:C:1966:38*.

9 See the judgment in *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (56/64 & 58/64) EU:C:1966:41*, p.342.

10 *Merck KGaA v European Commission (T-470/13) EU:T:2016:452*, premise 212 with further references.

11 *Cartes Bancaires EU:C:2014:2204* at [58], and *SIA "Maxima Latvija" v Konkurences padome (C-345/14) EU:C:2015:784* at [18]: "must be interpreted restrictively and can be applied only to certain types of coordination".

12 *Cartes Bancaires EU:C:2014:2204* at [50].

13 See, e.g. *Toshiba Corp v European Commission (C-373/14 P) EU:C:2016:26* at [31]–[36]; *Telefónica, SA v European Commission (T-216/13) EU:T:2016:369* at [201]–[227]; *Portugal Telecom SGPS, SA v European Commission (T-208/13) EU:T:2016:368* at [162]–[188]; *Lundbeck v European Commission (T-472/13) EU:T:2016:449* at [98]–[104]; *European Night Services v Commission of the European Communities (T-374/94) EU:T:1998:198*.

14 See *E.ON Ruhrgas v European Commission (T-360/09) EU:T:2012:332* at [106], [114].

15 See *Visa Europe Ltd v European Commission (T-461/07) EU:T:2011:181* at [168]. See also *Lundbeck EU:T:2016:449* at [101]–[102]; *E.ON Ruhrgas EU:T:2012:332* at [87]; *Telefónica EU:T:2016:369* at [226]; and *Portugal Telecom EU:T:2016:368* at [186].

16 *Cartes Bancaires EU:C:2014:2204* at [53], [78].

17 See Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Commission horizontal guidelines") [2011] OJ C11/1, paras 160 and 234.

18 See *Commission Staff Working document, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, p.11*. See also a previous and similar definition in *European Commission, Glossary of terms used in EU competition policy, Antitrust and control of concentrations (European Commission, 2002)*.

19 *Dansk Rørindustri A/S v Commission of the European Communities (T-21/99) EU:T:2002:74*.

20 There are several examples from case law. See, e.g. *Verhuizingen Coppens NV v European Commission (T-210/08) EU:T:2011:288*, concerning price fixing, market sharing and bid rigging. The infringer had submitted cover quotes to customers that were a manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and, in any event, were higher than they would have been in a competitive environment. See also *Schindler Holding Ltd v European Commission (T-138/07) EU:T:2011:288* (appealed); *Team Relocations v European Commission (T-204/08) EU:T:2011:286* (appealed).

21 See Commission Notice on Immunity from fines and reduction of fines in cartel cases ("Leniency Notice"), [2006] OJ C298/17; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel cases ("Settlement Notice") [2008] OJ C167/1; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("Damages Directive") [2014] OJ L349/1, art.2.

22 https://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf [Accessed 6 May 2020].

23 *OECD, Guidelines for fighting bid rigging in public procurement (2009), p.2*.

24 Commission horizontal guidelines [2011] OJ C11, para.160.

25 https://eftacourt.int/download/3-16-judgment/?wpdmdl=1525 [Accessed 6 May 2020], para.76.

26 See among others, guidelines from the Danish Competition Authority, Joint bidding under competition law, 2018, stating that joint production may be exempt under the Block Exemption Regulation, p.35.

27 See Commission horizontal guidelines [2011] OJ C11, paras 13 and 14.

28 Supreme Court Case 191/2018, *Danish Competition Authority v Eurostar and GVCO of 27 November 2019*, p.8.

29 *Danish Competition Authority v Eurostar*, p.8.

30 *Danish Competition Authority v Eurostar*, p.9.

31 *Danish Competition Authority v Eurostar*, p.10.

32 See also to the same effect Stockholm District Court, *Swedish Competition Authority v Däckia AB et al (T-18896-10), 21 January 2014*.

33 Norwegian Supreme Court case 2015/1026, decision of 22 June 2017, *Ski Follo taxi*, reported in HR-2017-1229-A. For comments on the case, see, e.g. A. Sanchez-Graells, "Ski Taxi: Joint Bidding in Procurement as Price-Fixing?" (2017) 8(7) Journal of European Competition Law & Practice 451, and I. Herrera Anchustegui, "Joint bidding and object restrictions of competition: The EFTA Court's take in the 'Taxi case'" (2017) 1(2) European Competition and Regulatory Law Review (CoRe) 174.

34 Norwegian Supreme Court case 2015/1026, decision of 22 June 2017, *Ski Follo taxi*, reported in HR-2017-1229-A at [36].

35 *Ski Follo taxi*, reported in HR-2017-1229-A at [44].

36 *Ski Follo taxi*, reported in HR-2017-1229-A at [46].

37 *Ski Follo taxi*, reported in HR-2017-1229-A at [44].

38 *Hjelmeng, Erling and Østerud, Eirik, Anbuds-/prosjektsamarbeid – Høyesterettsdom 22. juni 2017 (HR-2017-1229-A) – Ski Follo taxi, Nytt i privatretten nr. 3/2017 s.17-20 – (NIP-2017-3-17)*.

39 *Ski Follo taxi*, reported in HR-2017-1229-A at [48].

40 Norwegian Competition Appeal Tribunal, case 2018/113, *El-Proffen AS*.

41 Cf. *Ski Follo taxi*, reported in HR-2017-1229-A at [130], compare the CJEU's decisions in *Cartes Bancaires EU:C:2014:2204* at [49] and *Allianz Hungária v Gazdasági Versenyhivatal (C-32/11) EU:C:2013:160* at [34].

42 See Norwegian Competition Appeal Tribunal, case 2018/113, *El-Proffen AS* at [136].

43 See *Allianz Hungária v Gazdasági Versenyhivatal EU:C:2013:160* at [36] and in *Cartes Bancaires EU:C:2014:2204* at [53] and *Lundbeck EU:T:2016:449* at [190].

44 See *El-Proffen AS* at [251], [252].

45 The Tribunal did reduce the total fines in the case by 75 per cent, from NOK 18.5 million to NOK 4.7 million (and 90 per cent for three of the smaller member companies which did not submit an individual bid alongside the joint bid).

46 *Aleris v Swedish Competition Authority (PMT 7497-16), 28 April 2017*. A detailed and critical review of the cases can be found in T. Bergqvist, "The winner does not take it all. Swedish Court of Appeal says co-operation between competing bidders is not restrictive by object" (2019) 4 E.C.L.R. 141.

47 *Swedish Competition Authority v Aleris Diagnostik AB (T-12305-13), 18 December 2015*.

48 See *Aleris Diagnostik AB v Swedish Competition Authority (PMT 7497-16), 28 April 2017*, p.10 with reference to *Cartes Bancaires EU:C:2014:2204* at [78].

49 See p.13 of the judgment. The reasoning of the Court has been criticised, see among others Bergqvist, "The winner does not take it all. Swedish Court of Appeal says co-operation between competing bidders is not restrictive by object" (2019) 4 E.C.L.R. 141.

50 *Telia v Swedish Competition Authority (PMT 761-17), 13 February 2018*.

51 Bergqvist, "The winner does not take it all. Swedish Court of Appeal says co-operation between competing bidders is not restrictive by object" (2019) 4 E.C.L.R. 141.

52 This is a question for consideration in the pending Court of Appeal case in Norway, *Telenor Norge v the Norwegian Competition Authority*. See case no. 19-137886FØR-GULA/AVD2. Accused of disincentivising the roll-out of the third mobile network in Norway by having entered into roaming agreements and pricing arrangements favouring continued roaming instead of rolling out the roaming customer's own network, Telenor has argued that the potential harm to competition is disproven by the facts. In making this argument, reference is made to the fact that the roll-out of the network did happen according to plan, and that any delays were in fact owing to entirely different circumstances than the roaming agreement with Telenor.

53 See opinion of Advocate General Bobek in *Visa/MasterCard (C-228/18) EU:C:2019:678* at [51].

54 See *Commission Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, 25 June 2014, on "pure market sharing", p.7*.

55 The Supreme Court's (and the Norwegian Competition Authority's and the Tribunal's) assessment of joint bidding under the Norwegian

Competition Act has been criticised. See, among other sources, *Hjelmeng, Erling and Østerud, Eirik, Anbuds-/prosjektsamarbeid – Høyesterettsdom 22. juni 2017 (HR-2017-1229-A) – Ski Follo taxi, Nytt i privatretten no.3/2017 pp.17–20*, as well as *C. Ritter, "Joint bidding under EU competition law"* (https://ssrn.com/abstract=2909572 [Accessed 7 May 2020]), which in particular criticises the EFTA Court's statement in the *Ski and Follo taxi* case (which formed the basis for the Supreme Court's decision).

56 See Commission horizontal guidelines [2011] OJ C11, para.160.

57 See the Danish Supreme Court's ruling in the "Road Marking Case": the end of a joint-bidding era (guest post by H. Sander Løjmand, MSc, on Howtocrackanut.com).

58 It raises the question how the use of sub-contractors impacts the competition assessment, and more specifically, whether two companies should be classified as competitors if they could submit individual bids by using a (non-competitor) as sub-contractor? In a case for the Norwegian Competition Authority (Vedtak V2009-17 – *Gran & Ekran AS og Grunnarbeid AS* [available in Norwegian)]), the company Gran & Ekran could perform only 8 per cent of the tasks required in the tender. The fact that the company had contacted a sub-contractor with a view to submit a bid for the entire tender, however, indicated to the competition authority that it was a potential competitor to the company Grunnarbeid. The case was later decided in the Supreme Court, which upheld the authority's decision.

59 See *MasterCard Inc EU:C:2014:2201*.

60 See *Hjelmeng, Erling and Østerud, Eirik, Anbuds-/prosjektsamarbeid – Høyesterettsdom 22. juni 2017 (HR-2017-1229-A) – Ski Follo taxi, Nytt i privatretten no.3/2017 pp.17–20*.

61 In the Danish road-marking case, U-2-16/U-3/16 of 27 August 2018, the court of first instance (Sø- og Handelsretten) accepted the argument, and held that "there was no documentation showing that this [individual bid] was possible or commercially sound". The judgment was overruled by the Supreme Court.

62 See *W. Berg, in W. Berg and G. Mäsch, Deutsches und Europäisches Kartellrecht, 3rd edn (Luchterhand, 2018)* with further references, and Immenga/Mestmäcker (1992), Section 1 Rz. 449, interpreting the cartel prohibition in a restrictive way, not comprising so-called "Arbeitsgemeinschaft".

63 See to this effect the blog post https://www.howtocrackanut.com/blog/2019/11/28/the-danish-supreme-courts-ruling-in-the-road-marking-case-the-end-of-a-joint-bidding-era-guest-post-by-heidi-sander-ljmand-msc [Accessed 7 May 2020].

64 See *Commission Decision of 27 July 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.688—Konsortium ECR 900) [1990] OJ L228*, pp.31, pt II (2)(a), in which the Commission held that AEG, Alcatel and Nokia, upon a notification of the consortium to the Commission, were not competitors ("because of the high costs involved"/"hardly be able to comply with the timetable laid down if they were to proceed individually"/"the financial expenditure and the staff required […] so great that realistically there is no scope for companies to act individually"/"only a limited number of sufficiently qualified engineers are available, and this number cannot be increased in the short term"/"lastly, […] the parties cannot be expected to bear the financial risk involved").

65 Whereas the Danish road-marking case and the Swedish *Aleris* case concerned the biggest undertakings in the relevant market, the *Norwegian El-Proffen* case, applying largely the same doctrine of object restriction and competitor-test, concerned five undertakings, where the smallest undertaking fined for the joint bidding had a turnover of around €1 million and 12 employees.

66 See *Hjelmeng, Erling and Østerud, Eirik, Anbuds-/prosjektsamarbeid – Høyesterettsdom 22. juni 2017 (HR-2017-1229-A) – Ski Follo taxi, Nytt i privatretten no.3/2017 pp.17–20*.

67 In the Danish road-marking case, the Danish Supreme Court refused an application to refer questions to the CJEU for a preliminary ruling as it found the law to be clear.

