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Undertakings with a (seemingly) divided self: Beware

Eric Barbier de la Serre (Jones Day) · Thursday, November 11th, 2010

It is commonly accepted that, pursuant to the principle of intragroup immunity, Article 101 TFEU cannot catch agreements or concerted practices between entities that belong to the same undertaking. Article 101 TFEU requires coordination between at least two undertakings: everything that happens within a single undertaking simply cannot be covered by Article 101 TFEU.

Yet, for more than 20 years, the French Competition Authority and the French Courts have applied a strange exception to this principle: they consider that when various entities belonging to a single undertaking present themselves as separate entities when participating in the same public procurement procedure, they express their will to act independently, thus implying that the coordination of their bids – even though it remains intragroup – can be caught by competition law. In other words, the mere appearance of the existence of two different undertakings can overrule the reality of their relationship to each other.

As the saying has it however, one cannot judge a book by its cover. More fundamentally, the rationale for this exception is difficult to understand: while in the context of a public procurement procedure it may be disloyal for two entities belonging to the same undertaking to present themselves as being independent from each other, is this sufficient justification for overstretching the realm of competition law and making the mere appearance of independence prevail over reality? Should this behaviour not rather be caught by public procurement rules? And what restriction of competition does such behaviour cause?

For many years the scope of this strange exception was limited by the fact that it was applied under French law rather than under Article 81 CE (the predecessor of Article 101 TFEU). However, the tension with EU law became apparent following the entry into force of Regulation No 1/2003 on 1 May 2004, which enshrines the principle of parallel application of EU and national competition laws, as well as the principle of complete supremacy of EU competition law:

− According to the principle of parallel application, when National Competition Authorities and national courts apply national competition law to agreements or concerted practices "*within the meaning of Article* [101(1)] *TFEU*", they must also apply Article 101 TFEU (See Article 3(1) of Regulation No 1/2003).

− According to the principle of supremacy, the application of national competition laws to agreements or concerted practices within the meaning of Article 101(1) TFEU may not lead to the prohibition of such agreements and concerted practices if they are not also prohibited under EU competition law (See Article 3(2) and Recital 8 of Regulation No 1/2003).

Paradoxically, one may wonder whether these principles really apply to the exception crafted by the French Authority and the French Courts: since coordination between two entities that belong to the same undertaking is neither an agreement nor a concerted practice between *genuinely* different undertakings, can it qualify as an agreement or a concerted practice "*within the meaning of Article 101 TFEU*"?

In any case, and irrespective of this issue, the French Authority and the French Courts now apply Article 101 TFEU to such a situation and consider that it does cover agreements and concerted practices between two entities that are only seemingly independent.

This was recently confirmed by a judgment of the Paris Court of Appeals. The reasoning of the Court is mostly based on the fact that in the case at hand the buyer was misled by the apparent independence of the two submissions. According to the Court, even though the two entities were perfectly allowed to present a single offer, by presenting themselves as independent bidders, they voluntarily decided to submit themselves to the constraints of competition law.

This seems difficult to reconcile with the wording of Article 101 TFEU, not only because the coordination in the present case objectively occurred within the same undertaking, but also because the ruling does not clearly define what effect such behaviour had on competition: the judgment merely mentions that competition was affected because: (i) the buyer was misled on the actual state of competition and (ii) the two entities belonging to the same undertaking enjoyed a joint market share of more than 85%. The outcome of the case is all the more troubling as each entity is eventually imposed a separate fine. In other words, the same undertaking ends up with two different fines concerning the same infringement.

Of course, the applicant invoked the intragroup immunity of EU law, but the Court of Appeals brushed the argument aside, arguing that the fact that the EU Courts have not yet ruled on such a situation (*i.e.*, coordinated offers made by seemingly independent entities) does not mean that it is not caught by EU law. One can hope that the French Supreme Court – and if need be the Court of Justice in the context of a preliminary reference – will soon be able to pronounce themselves on, and contradict, this proposition. Granted, national law may prohibit behaviours that do not come within the scope of Article 101 TFEU but display some similarity with those that are prohibited under this provision. However, assuming that such a prohibition does not already exist under public procurement law, it should be established more clearly, by stating the goal at hand (not to confuse public buyers) and be given the proper legal basis.

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