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## The FCO targets settlement of a tender dispute for suspicion of cartel infringement

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From December 2010 to February 2011, the FCO investigated a planned settlement between the parties to a tender dispute in the public transport sector. The FCO suspected that the planned settlement would infringe the cartel prohibition (“buying competition”). The FCO issued a case report on February 25, 2011.

The case illustrates that the FCO, which next to competition law also deals with public tender proceedings, is increasingly pushing the enforcement of competition and public tender law within the “public sector”. The case is further a good example of the interaction between competition law and public tender rules. In addition, the principles about “buying competition” may also apply to certain private bidding or other settlement scenarios.

The facts: A public transport utility directly awarded a contract for the provision of public transport services via light rail vehicles to a subsidiary of Deutsche Bahn (DB Regio NRW), *i.e.*, without carrying out a proper public tender procedure. Abellio, a competitor of DB Regio NRW, requested official review of the tender procedure, arguing that the general rules on public tenders should apply, not the sector-specific railway rules (which possibly could have allowed a direct award). Abellio prevailed in the first instance, and in the appeal the question was referred to the Federal Court of Justice.

The FCO then heard rumors that DB Regio NRW and Abellio planned to settle prior to the court hearing and investigated the matter. The settlement provided that Abellio would have withdrawn its request for review, and in turn DB Regio NRW would have subcontracted the operation of part of the tender contract to Abellio, with the consent of the public transport utility. The FCO informed the parties that the settlement raised suspicion of the infringement of Section 1 ARC/Article 101 TFEU. The FCO found that through the review process Abellio sought to preserve its possibility to compete against DB Regio NRW for the tender, which in itself exerted competitive pressure. The pressure would have further increased in case of a favorable court decision.

In contrast, the settlement would have immediately eliminated the competitive pressure on DB Regio NRW, and any further tender competition for the specific market concerned for several years. This raised the impression that DB Regio NRW would have simply “bought” the competitive pressure exerted through Abellio (market sharing). The fact that Abellio would have been at least active as subcontractor could, in the FCO’s view, not compensate these negative effects. Abellio would have only been active in a market downstream to the relevant competition

for the tender, and DB Regio NRW would have determined the scope of Abellio's activities.

After the FCO threatened to open official cartel proceedings, the parties refrained from settling. The Federal Court of Justice indeed decided that the general rules of public tender procedures applied.

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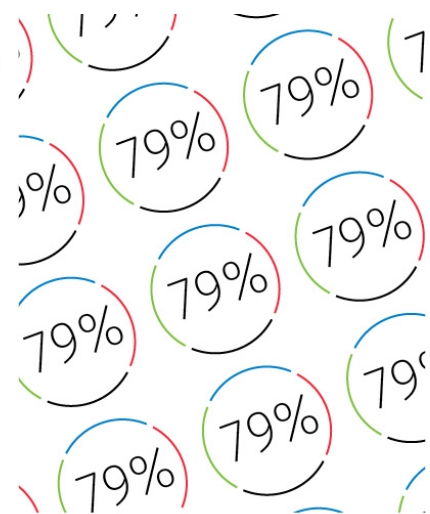
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