Kluwer Competition Law Blog

When Sharing is NOT Caring – New Danish Antitrust Guidance on Joint Bidding

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As parents we tell our children that “sharing is caring” and “never be afraid to ask for help”. Although these are generally virtuous notions and good lessons to live by, they could easily get businesses into serious trouble with competition authorities. And even get you fined heavily or put in prison.

Most businesses know very well that secret discussions in a smoke-filled room with competitors about how much to raise prices next year or who’s turn it is to win the next big tender are illegal. These kinds of discussions are called cartels. Few businesses, however, are aware of a particular enforcement trend that is gaining traction across Europe. European antitrust authorities have stated that they may consider joint bidding through open consortia or other cooperative arrangements as being essentially no different from ‘classic’ cartels.

Antitrust enforcer: “If you are in doubt, seek legal assistance”

The Danish Competition and Consumer Authority (the “DCCA”) has published 39 pages of guidance (the “Guidelines”) seeking to explain to businesses in which situations cooperating through consortia, sub-contracting or other arrangements constitute illegal joint bidding. The Guidelines were published in Danish in April 2018 but have now in July 2018 become available in English. And for good reason. The DCCA makes a point of saying that the Guidelines are an extensively researched product of discussions with a number of other competition authorities and analysis of case-law and decisional practice across Europe. The Guidelines are therefore an important document for businesses and competition law practitioners across the EU as they – like it or not – reflect how competition authorities in the EU likely will go about enforcing competition law with respect to joint bidding.

Included in the 39 pages of guidance are 11 pieces of advice for businesses the last of which is surely welcomed by private practicing competition lawyers: “If you are in doubt, seek legal assistance”.

The enforcer’s DIY test – If you can Do It Yourself, then why partner up?

The Guidelines set forth a two-step test serving to identify when joint bidding is anticompetitive:

1. Are you in a position to bid for the contract alone without joining forces with a competitor?
2. Can you demonstrate tangible efficiency gains showing that the customer is better off with you submitting a joint bid with a competitor instead of bidding alone?

If the answer to question 1 is “Yes” and the answer to question 2 is “No”, then you’re in trouble. The questions essentially reflect the following principle: If you can Do It Yourself, you’d better show us good reasons for bidding with a competitor. Moreover, although the questions may seem relatively straight forward with black & white answers, in practice they are truly 50 shades of grey.

The Guidelines stress the following important aspect when it comes to answering question 1 on whether you can submit a bid alone:

> The key is whether your undertaking has the ability to carry out the contract – not whether you wish to carry out the contract alone.

Deciding whether you are capable of performing the contract alone is, however, not that simple. For example, you may think that you cannot possibly bid for the contract alone as you do not have the necessary capacity in terms of staff or assets or perhaps not exactly the right know-how. You would need to think again though, as that is not the end of the analysis. The Guidelines require you to be able to answer why you cannot just hire more staff or acquire/lease the assets necessary in order to perform the contract singlehandedly. And despite the fact that the DCCA – like most competition authorities – consist of lawyers and economists, they will not hesitate to second guess your commercial judgment of whether increasing capacity would be a viable business strategy:

> When the Danish Competition and Consumer Authority assesses whether undertakings are each other´s potential competitors, it takes into account whether it is realistic that the undertakings will for example be able to expand their capacity to the one needed to be able to bid for the contract individually, even if they do not currently have the capacity to do so. Whether the necessary development of capacity will constitute a sustainable economic strategy for an undertaking will always be a case by case assessment.

Ask not what joint bidding can do for you. Ask what it can do for the customer.

If the antitrust authority considers – despite perhaps your own assessment to the contrary – that you are capable of submitting an individual bid for the relevant contract, the dynamics change in terms of burden of proof. The onus is now on you to demonstrate exactly how the joint bid results in a lower bidding price or a better product for the contracting authority compared with the situation of bidding alone. In other words, you need to clearly and tangibly demonstrate why the contracting authority benefits from the joint bid and particularly why joint bidding is the only way you can provide these benefits:

> [I]t will be incumbent on the parties to the agreement to document the potential efficiency gains which includes their size, how they are achieved, how the consortium agreement is necessary to achieve the efficiencies and whether they benefit consumers/contracting entities.

The efficiency gains can be quantitative as well as qualitative. Quantitative efficiency gains will usually take the form of cost savings due to synergies or better use of technology. Qualitative efficiency gains can be, for example, pooling of differentiated know-how that enables the parties to develop new or improved products or services that would not have otherwise been possible. It can also simply be faster contract performance or other timing related value for the customer.

Not just an issue in public contracts

The risk of taking part in illegal joint bidding is not limited to competition for public contracts. In principle, the exact same legal framework applies when offers are made to private customers. By way of example, the European Commission announced last year that it is going to study competition law issues related to syndicated lending (multi-bank financing). Essentially the same questions arise: If a bank is capable of providing a loan to a customer on its own, when can the desire to spread the risk of customer default justify entering into a loan consortium with a competing bank? Interestingly, the Guidelines deal quite specifically with risk spreading as a justification for joint bidding and seem to take quite a skeptical approach:

> If a company finds it difficult to bear the risk of a specific contract, the company can choose to include a risk premium in the offered price, thus increasing the price. Such a price increase will obviously reduce the likelihood of the company winning the contract, but will be a natural reaction if there is a particular uncertainty associated with the project which the bidder shall bear. Therefore, ordinary risk associated with taking on a contract is seen as a part of normal competition.

Another important point is that the legal assessment does not change based on what form the cooperation takes – whether it be formal joint bidding through consortium or for example through sub-contracting.

Advice for businesses when considering joint bidding

Before starting discussions with potential bidding partners, it is wise to flesh out the pro-competitive reasons for submitting a joint bid as opposed to bidding on your own. This upfront assessment should cover in particular what capacity or skills that your business is lacking to be able to submit a competitive bid and how teaming up with the contemplated bidding partner will benefit the contracting authority by way of a more valuable offer.

It is also important to have certain procedures and safeguards in place to ensure that you and your bidding partner do not exchange any more (sensitive) information than is strictly necessary to

explore the possibility of joint bidding and ultimately the successful completion of the contract once awarded.

Although the Guidelines apply to all forms of cooperation and to all sectors, many (although not all) cases that have been subject to investigation do seem to share some common features:

- Cooperation primarily to cover a wider geographical area: Quite a few cases concern bidding cooperation that serve mainly to cover a wider geographical area in the areas of transport, logistics & infrastructure maintenance. For example, players that are strong in different regions of the Member State teaming up to submit a joint bid for the entire territory. In these situations, it is particularly important to carefully consider to what extent your geographical reach could be extended without partnering up with another bidder and also whether it is possible to submit bids for smaller lots of the contract, for example individual regions.
- Joint bidding with limited integration of operations: Many of the cases investigated also seem to cover situations where, although there is a joint bid for the contract as such, the tasks under the contract are subsequently sharply divided between the bidding partners. Cooperation that to a large extent ends once the contract is awarded and where there is limited integration at the operational stage by way of pooling of assets, know-how etc. should therefore be considered particularly carefully.

As the Guidelines emphasize several times, it is wise to address all relevant legal issues upfront – and if necessary seek specialist legal advice – instead of having to build up a defense on the back foot after an inquiry or investigation has begun. Showing competition authorities that you have done your legal homework and considered issues in due time demonstrates credibility and that you are eager to play by the rules even in difficult grey areas.

The Guidelines' recommendation that businesses should seek legal advice is therefore not based on a desire to generate work for private practicing competition lawyers. It is because many of the cases that the authorities have investigated could well have been avoided if the business under investigation had sought the right legal advice in time. Hence, the Guidelines' last piece of advice being: "If you are in doubt, seek legal assistance".

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This entry was posted on Tuesday, August 7th, 2018 at 11:04 am and is filed under Source: OECD“>Antitrust, Denmark, Joint Bidding
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