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Danish Court Quashes Landmark Joint Bidding Decision – Legal and Economic Context Saves the Day

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The ink has barely dried on the DCCA's new guidelines on joint bidding – see recent blogpost here – before a court has overturned the landmark infringement decision on which much of the guidelines are based.

In its unanimous judgment containing little more than two pages of reasoning, the Danish Maritime and Commercial Court has deemed the DCCA's decision too formalistic. The Court held – in true *Cartes Bancaires* style – that the DCCA failed to take account of essential issues relevant to the legal and economic context of the joint bidding arrangement established by the road marking companies LKF and Eurostar.

Despite quashing the decision in no uncertain terms and with parts of the DCCA's guidelines now having to be rewritten, the Court does seem to acknowledge the general principle underpinning the guidelines: If you are capable of performing the contract yourself, you'd better show us good reasons for bidding with a competitor.

The joint bid by the Road Marking Consortium

In 2014 the Danish Road Directorate issued a request for tenders for road marking in three regions: Southern Denmark, Zealand, and Copenhagen area. The Road Directorate had structured the tender in a way that tender participants could submit bids for each individual region as well as submit a bid for all regions allowing for a volume/scope discount. The Road Directorate's underlying assumption was that a bidder's offer would be lower if the bidder won all three regions instead of just winning one.

Road marking companies LKF and Eurostar submitted a joint bid for all three regions by bidding through Danish Road Marking Consortium. As the only bidder covering all regions, the Consortium won and was awarded the whole contract. Soon after, however, one of the losing bidders submitted a complaint to the DCCA claiming that the joint bid was illegal.

The DCCA agreed with the complainant and adopted a decision through the Competition Council in 2015 holding that the joint bidding arrangement constituted a by object infringement. The essence of the DCCA's reasoning was that LKF and Eurostar each had the capacity to bid for individual regions at the very least and that they were therefore potential competitors in the tender.

Competitors submitting a joint bid through a consortium was tantamount to competitors fixing prices and sharing markets, the DCCA held. The decision was upheld by the Competition Appeals Tribunal and LKF and Eurostar therefore brought the case before the Court.

The DCCA failed to look at context and to put itself in the position of the bidders

In four paragraphs, the Court does away with the DCCA's main reasoning. Even though the request for tenders accepted bids for individual regions, the structure of the tender allowing for volume/scope discounts "encouraged bids for the whole contract", the Court said.

In reaching this conclusion, the Court referred to the fact that the Road Directorate's tender model reflected a strategy of trying to attract bids from abroad. This strategy followed recommendations that consultancy firm McKinsey had prepared for the Danish government in 2010 highlighting benefits of consolidating public procurement deliveries on fewer suppliers, attracting foreign businesses, and designing procurement models that would encourage efficient operations.

The Court added that at the time of submitting the bid "it was perceived [by LKF and Eurostar] as a realistic possibility that there would be bids for the entire contract by foreign bidders". This seems to be the Court's way of accepting LKF and Eurostar's argument that they had good reason to believe that – although bids for individual regions were formally possible – the true competition would be for the entire contract and not individual regions. The fact that, as it turned out, only the Consortium submitted a bid for the entire contract was irrelevant as this could only be determined after the event (*ex post*).

On this basis, the Court held that the DCCA was wrong to consider capacity for individual regions as being the relevant standard for whether LKF and Eurostar were in practical terms potential competitors in the tender.

The DCCA was wrong on how it determined capacity for the whole contract

The Court then went on to consider the question of whether LKF and Eurostar each had capacity to bid for the contract with the standard being all three regions seen together. The Court stated the following:

> "The [DCCA's] assumption that [LKF and Eurostar] each could have carried out the contract on their own is based on hypothetical assertions on the possibility of hiring more staff and buying more machines, and there is no evidence supporting that this was possible or was commercially viable."

Moreover, the Court rejected the DCCA's premise that LKF and Eurostar were not permitted to disregard capacity reserved for existing customers unless there were actual orders from these customers demonstrating that this capacity was spoken for. The Court added:

> "The Court does not find such a requirement justified as it must be permissible for bidding firms to reserve capacity for customers that – experience shows – approach the firms and where it would be commercially irresponsible not to service those customers thereby depriving the firms of higher contribution margins from other assignments."

The Court accordingly found that the DCCA had not met its burden of proof in demonstrating that LKF and Eurostar each had capacity to carry out the contract and the Court therefore quashed the infringement decision.

Context and the understanding of commercial realities saving the day

Although the Court didn't expressly categorize its reasoning in these terms, it is clear that the proper consideration of legal and economic context made all the difference. The Court sent the message that when considering restrictions by object, a competition authority must place itself firmly in the shoes of the investigated parties and ensure that it has considered the commercial realities in which they operate. The Court's emphasis in the judgment on what is "a realistic possibility", what is "commercially viable" and what would be "commercially irresponsible" testifies to the importance of this exercise.

As for the DCCA's guidelines, they will need to be amended in a number of places if the judgment is accepted and not appealed. However, the DCCA's general two-step test serving to identify when joint bidding is anticompetitive does seem to stand:

- Are you in a position to bid for the contract alone without joining forces with a competitor?
- If so, 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?

As to the first step, the Court's judgment unequivocally holds that the burden of proof lies entirely with the competition authority.

We now await either an appeal or amendment of the guidelines.

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