Kluwer Competition Law Blog

French Competition Authority amends its decision-making practice in relation to responses to calls for tenders by subsidiaries of the same group

Adrien Giraud, Pierre Bichet (Latham & Watkins LLP) · Sunday, December 6th, 2020

On 25 November 2020, the French Competition Authority (FCA) announced that it was amending its decision-making practice regarding responses to calls for tenders by subsidiaries of the same group.

Up until now, the FCA considered that it was unlawful for subsidiaries of the same group to submit separate tenders in the same public procurement procedure when those bids appear to be separate and independent but have in fact been coordinated, without notifying the contracting authority. This is not the case anymore.

The FCA's change of practice follows a 2018 judgment from the European Court of Justice reaching an opposite conclusion.

Executive summary

The FCA's new approach ensures consistency between the French and European rules regarding responses to public tenders. It is now clear that subsidiaries of the same group can individually participate in a tender and submit distinct offers without breaching antitrust rules.

The FCA follows the European jurisprudence according to which subsidiaries of the same group form part of the same "undertaking" for competition law purposes. It is well established that competition law does not apply to agreements between entities that are part of the same undertaking. There is therefore no cartelistic behaviour when sister companies respond to the same public procurement procedure.

The FCA's change of approach is welcomed given the high risks incurred when breaching competition law (notably fines amounting to up to 10% of the parties' worldwide turnover).

Even though this practice is no longer caught by competition rules, it can still be subject to public procurement rules since such behaviour can mislead the contracting authority and, thereby, distort the results of the public procurement process. Express legislative provisions or specific conditions in the call for tenders or in the tender specifications governing the conditions for the award of a

public contract can also oblige related tenderers submitting separate offers in the same procedure to disclose, on their own initiative, the links between them to the contracting authority.

The change of practice

The FCA's original position

The FCA's decisional practice and the Paris Court of Appeal's settled case-law considered that submitting bids that *appeared* to be separate and independent, but which had in fact been coordinated, amounted to a cartel. In such an instance, the companies, which presented themselves as independent and competing with each other, were deemed to have manifested their commercial autonomy vis-à-vis the contracting authority.

For example, the Paris Court of Appeal considered that it was possible for companies having legal or financial ties, but enjoying commercial autonomy, to submit distinct and competing offers in public procurement procedures as long as those companies did not coordinate their offers before submitting them. The companies were deemed to be independent, and competing with each other, notwithstanding the legal links between them. The companies were thus subject to the rules of competition.

Whereas this theory of appearance existed in French competition law, it did not exist in European competition law.

The European clarification

In its judgment of 17 May 2018 in the "*Ecoservice projektai*" case, the European Court of Justice reaffirmed that the prohibition against anticompetitive agreements does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit.

In this regard, where a parent company has a 100% — or close to 100% — shareholding in a subsidiary, the parent company is able to exercise decisive influence over the conduct of the subsidiary and there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary. In such a situation, the parent company and its subsidiary form a single economic unit and a single undertaking.

It follows from the judgment that the practice consisting in companies belonging to the same undertaking to submit separate (even if coordinated) tenders in the same public procurement procedure cannot breach competition rules.

The FCA's new approach

The FCA amended its decisional practice in its November 2020 *AgriMer* decision. France AgriMer is a national public body operating in the agricultural and seafood product sector. Each year, France AgriMer organises calls for tenders with a view to supplying food to charities and

subsidised grocery stores notably, which then distribute the food to the most deprived sections of the population.

The FCA launched an *ex officio* investigation on 28 May 2019 on the basis of a public report showing that four companies (Ovimpex, Établissements Dhumeaux, Mondial Viande Service and Vianov) — all belonging to the same group — submitted different and independent bids in the same public procurement procedure organised by AgriMer, although these bids were in fact drawn up jointly.

The FCA issued a statement of objections and the parties were willing to engage in settlements talks (allowing parties not contesting the facts to benefit from a reduction of fine).

However, in view of the European Court of Justice's judgment, the FCA amended its decision-making practice and decided not to pursue the case. Dhumeaux, MVS and Vianov were all subsidiaries almost 100% held by Ovimpex. These four companies therefore formed one single economic unit, notwithstanding the fact that they submitted different tenders in response to the public procurement procedure organised by AgriMer. The FCA concluded that competition law cannot apply to the relationship between entities forming part of the same economic unit. Further, the FCA did not have any evidence showing that the four companies were independent in determining their commercial course of action and therefore subject to competition rules regarding the agreements concluded between them.

It has to be noted that it was already clear from the judgment of the European Court of Justice that, at the time the FCA launched its investigation in 2019, such behaviour was not in breach of competition rules.

This entry was posted on Sunday, December 6th, 2020 at 10:00 am and is filed under Anticompetitive agreements, Competition enforcement, European Court of Justice, France, National competition authorities (NCAs), Public procurement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.