Joint Bidding – the joys and tribulations

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Key Topics

• Joint selling
• Classic cartels
• Joint bidding
• Types of consortia- joint bids/ sub-licencing
• Checklist for legitimate joint bidding
Background

- Competition law is relevant both as to any agreements as to how the sports media rights are sold and how one bids for these rights.

- In previous decades the enforcement was on joint selling of sports media rights:
  - E.g. EU cases UEFA Champions League, FA Premier League and Bundesliga; National cases
  - Specifically competition in the markets for the sale of TV rights of major football events was a priority to improve the functioning of the broadcasting markets and development of pay TV services
  - Resulting principles for joint selling: (i) follow open, transparent and non-discriminatory tenders, (ii) offer several packages (iii) limited duration(max 3 years) (iv) allow clubs to market rights individually if the league/association fails to sell them, and in some instances (v) a “no single buyer restriction
  - Some EU MS have codified these conditions in their legislation (France, Italy and Spain)

- Now enforcement trend is on joint bidding.

- We will disuses the key distinction between classic cartels and the risks in joint bidding consortia.

- Set out the key considerations for legitimate joint bidding.
Classic (Secret) Cartels

• Bidding rigging
  • 2 or more bidders agreeing their conduct in relation to a tender
    • Bid rigging and/or illegal information exchange
  • Can be agreeing who will win the next procurement round (bid rotation)
  • Agreeing/sharing with others what tender price you will submit
    • Can be agreeing who will place the winning bid
    • Can also be putting in a “cover price” - below the shared price of another bidder, giving the appearance of several competitive bids when in reality they are “fake bid” intended merely to appear to be participating (OFT investigation in the construction industry where over 122 companies fined)
Consequences of cartels

• Anticompetitive agreements caught under art 101 TFEU/ national equivalents.

• Treated as restrictions “by object”
  • The authority does not have to prove any anti-competitive effects
  • Such agreements automatically consider to have an appreciate effect on competition (so no de minimis safe harbour)
  • Secret cartels are eligible for leniency for whistle blowers (In certain jurisdiction also other types of cartels)
  • In damage claims there is a rebuttable presumption they have caused harm

• Current concern is that competition regulators are taking the approach that even open consortia bids can amount to a by object infringing agreement, so much higher hurdle to satisfy.
Classic cartels (cont)

The Italian sports media agencies

• April 2019 the Italian CA imposed EUR67m fine 4 global sports media agencies (MP & Silva; IMG, B4Capital and B4 Italia).
• Investigation started with a tip off by the Milan Public Prosecutor, followed by dawn raids.
• Coordination of bids in tenders for the broadcasting rights of Lega Nazionale Professionisti Serie A (LNPA) matches between 2008 – 2015:
  • Divided the geographic markets of distribution
  • Shared revenues of subsequent resale to other broadcasters abroad
  • Exchanged commercially sensitive information

Contrast with:
• German FCO which has allowed market sharing between two pay TV operators, given that only 2 bidders remained for the broadcasting rights to the Bundesliga matches.
Joint Bidding

Consortiums and competition law

• A consortium is a collaboration between two or more independent companies to perform a contract together.
  • From a competition law perspective consortia and subcontracting both constitute joint tendering
  • While in public procurement context in a joint bid you must disclose all the joint bidders, while in a subcontracting scenarios the lead contractor may not disclose up front its sublicensees
• Typically it is not established on a lasting basis (like a merger), but based on co-operation, information exchange and co-ordination of prices and capacity.
  • NB some long term JV do require merger clearance
• **Reasoning:** If you can do it yourself, but instead team up with another company, you reduce competition, as there will be one less bidder compared to the best possible scenario.
Types of consortiums

Overview of consortiums

• Consortiums can generally be divided into three categories:

1. Problematic
   • Consortiums between competitors
   • Consortiums between potential competitors

2. Potentially problematic
   • Sublicensing

3. Unproblematic
   • Consortiums between non-competing parties
   ! Upstream and downstream markets
Available Guidelines

• 2010 EU Guidelines on Horizontal Cooperation.
• Danish Competition Authority Guidelines on Joint bidding:
  • A product of discussions with a number of other NCAs and case law across EU
  • Intended to give guidance as to what may constitute illegal joint bidding
  • Not media specific
• Romanian Competition Council Guidelines on Consortia in Public Tenders.
• EU Commission has not issued any decision on joint tendering in years, likely because most joint tendering arises in context of public procurement, which tends to be national.
Do you compete with the proposed partner?  
- No: Proceed
- Yes: Can you and the proposed partner each bid on their own?  
  - No: Proceed
  - Yes: Does the joint bid generate benefits and efficiencies?  
    - No: Do not proceed
    - Yes: Are those benefits passed on in the form of lower pricing / better quality / better service?  
      - No: Do not proceed
      - Yes: Does the joint bid eliminate all competition on the tender?  
        - Yes: Do not proceed
        - No: Does the agreement contain any restrictions that are not necessary to achieve the benefits?  
          - Yes: Do not proceed
          - No: Seek guidance from legal
DIY test: *If you can do it yourself, why submit a joint bid?*

- The Guidelines essentially set forth a test serving to identify when joint bidding is anti-competitive:
  - **Are you competitors?** This includes potential competitors
  - **Can you do it alone?** If yes, are you in a position to bid for the contract alone without joining forces with a competitor?
  - **Are there efficiency gains?** If yes, 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?
- Reflect the following principle: if you can *do it yourself*, you need to be able to demonstrate good reasons for bidding with a competitor.
Competitors
Are we competitors?

• The concept of "competitor" includes actual as well as potential competitors.

• NB not simply active in the same business (e.g. TV broadcasters) but competitors for the particular tender.

• If the undertakings that bid together:
  • are already in a position to bid for the tendered contract individually (e.g. broadcasters in same country), they are actual competitors
  • do not already have the capacity to carry out the contract individually but relatively easily could achieve it, they are potential competitors

• Therefore, competitors are undertakings that:
  • produce or supply the same product or service in the same geographic area or
  • realistically and likely can develop their businesses to do so
Or are we potential competitors?

- "Businesses are potential competitors if a business has a realistic possibility to enter the market of another business"
- Broadcaster ≠ distributor ?
- Regional or national cable TV distributor ≠ OTT platform ?

It is not decisive whether the parties have the intention to enter the market, but whether they have the skills/ability to do so.
Can you do it alone?
Separate lots

• The starting point to determine whether the undertaking can carry out the contract on its own is whether it can bid for an individual lot.

• If parties individually have the capacity to bid on lots of the tendered contract, they are competitors.

• In that case, the parties will as a starting point be considered competitors even if the collaboration is reasoned by the fact that the consortium agreement enables them to bid for the whole contract.

“If a tender is structured in such way that to tenders can bid for one or more parts, and the tenderers have sufficient capacity to bid for parts of the project, it will not be necessary for these to submit a joint bid for the entire project”

NCA, Ski/Follo Taxi, V2011-12, para. 86

Nevertheless, if a joint bid on several lots makes it possible to achieve efficiencies, cooperation may be lawful
Capacity

• Make a realistic assessment of whether:
  • the undertaking already has the necessary capacity or
  • it could be a sustainable economic strategy to expand it to what is necessary in order to bid alone

The key is whether the undertaking has the ability to carry out the contract - not whether it wishes to carry out the contract alone
Capacity

- If the undertaking can't do it itself, is it really sure it can't undertake some additional investments and move its workers?
  - Current financial resources?
  - Can it source resources/competence from other group subsidiaries?
  - Can it guarantee sufficient geographic coverage (e.g. Olympics)?

The Guidelines require you to be able to answer why you cannot just hire more staff or acquire/lease the assets etc. necessary in order to perform the contract alone

- Document the above
  - What evidence support and/or contradicts the assessment?
  - Document why you think that your undertaking does not have (and cannot achieve) the necessary capacity to carry out the contract
Efficiency gains
Article 101(3) TFEU

• Even in case of restrictions, exemption in Article 101(3) TFEU may be applicable.
• Four main criteria.
• Essentially contingent upon the agreement resulting in efficiency gains and these gains being passed on to the customer:
  • they can submit a more competitive bid than the one they would have been able to submit individually
  • this benefits consumers
  • the collaboration does not go further than necessary to achieve that objective
  • the undertakings do not get the possibility of eliminating competition for the concerned contract
1. More competitive bid

- Joint bid must bring economic benefits in terms of efficiency gains.
  - ie there should be efficiencies associated with the fact that two or more undertakings bid jointly instead of individually
- Efficiency gains can be quantitative and qualitative, eg:
  - Qualitative efficiency gains
    - pooling of differentiated know-how
    - new or improved products or services
  - Quantitative efficiency gains
    - costs savings (including from economies of scale)
    - faster contract performance
1. More competitive bid

- Risk spreading will not always be considered an efficiency gain.
- Guidelines deal specifically with risk spreading as a justification for joint bidding and appear to take quite a sceptical 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.”
2. Benefit consumers

• Efficiency gains from collaborations must benefit consumers.
• Must be of a magnitude as to at least offset restrictive effects on competition that the collaboration has.
• Case by case assessment.
• Efficiencies that only benefit the parties who are joint bidding are not sufficient.

Ask not what joint bidding can do for you/the parties to the consortia
Ask what it can do for the customer
2. Benefit consumers

**Example: Commission - British Interactive Broadcasting/Open**

- Agreement for the development of digital interactive television services.
- Restricted competition as two competitors collaborating.
- Exemption applied as:
  - new service to customers
  - retailers of products and services had new provider
  - each party contributed special expertise which made it possible to develop a better service
  - collaboration enabled service to be developed faster
3. Necessary

- Only include coordination and restrictions that are "STRICTLY NECESSARY" in order to achieve efficiency gains.
- Must not extend the cooperation beyond what is required in time or in scope.
- No other way economically viable and less restricting way of achieving the efficiencies.
- Exclusivity provisions?
- What information do the parties share?
- How open and transparent can you be towards your partner?
  - What can I say about capacities, costs, margins, prices, future commercial strategy, expansion plans, etc?
  - Should we apply a staged information exchange?
  - How do we ensure information exchanged are not widely distributed to others outside "core team"?
4. No elimination of competition

- Must not afford the possibility of eliminating competition in respect of a substantial part of the products concerned by the agreement to bid jointly.
- Size of the joint market shares of the parties joint bidding assessed in relation to that of other possible bidders.
- Higher the market share = more likely that the joint bid eliminates competition.
Advice when joint bidding
Do

• Check whether JV is a full function JV which might require merger clearance. If not then self assessment.

• Separate lots - look into whether the invitation for tenders gives the possibility of submitting bids for lots of the contract.

• Make a realistic assessment of whether your undertaking already has the necessary capacity, or whether it could be a sustainable economic strategy to expand it to what is necessary in order to bid alone.

• Document reasons for not tending alone.

• Establish whether your own undertaking’s resources are not sufficient before you talk to other undertakings about a joint bid.
Do

• If you are actual or potential competitors but the collaboration leads to efficiency gains, document them.

• Keep in mind that any efficiency gains shall benefit the contracting entity and outweigh the restrictions of competition.

• Avoid exchanging competitively sensitive information with other undertakings before it is clear whether you are competitors regarding the contract.

• Avoid exchanging more information than necessary for the contract that the consortium agreement is established to carry out.
Do

• Do not set up a joint bidding consortium agreement with more parties than are needed to carry out the contract.
• Do not extend the collaboration within the consortium agreement beyond the contract you teamed up to carry out
  • Limit to those rights you need to share
  • Limit any restrictions to what is strictly necessary
    • E.g. if agree to upfront sub-licencing with a significant national distributor – does that significantly restrict likely competition for the same rights?
• If you are in doubt, seek legal assistance.

Instead of having to build up a defence on the back foot after an inquiry or investigation has begun!
And the safe route under competition law is...
Any questions?