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Ski Taxi: Joint Bidding in Procurement as Price-Fixing?

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Case E-3/16 *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet* 22 December 2016

Since joint bidding in public procurement procedures involves price-fixing between the members of the bidding consortium, the assessment of whether it reveals a sufficient degree of harm to competition only requires limited consideration of its economic and legal context, which may be restricted to what is strictly necessary to establish the existence of a restriction of competition by object.

I Legal context

This comment concerns an EFTA Court Judgment based on the competition provisions of the EEA Agreement. Thus, it is worth noting that Article 53 EEA prohibits anticompetitive practices in roughly the same terms as Article 101 TFEU. In principle, it can be assumed that both provisions are substantially equivalent. Article 53(1) EEA establishes a prohibition of all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade, and which have as their object or effect the prevention, restriction or distortion of competition. It also includes an indicative list of different types of anticompetitive practices, such as price fixing or market sharing. Article 53(3) EEA provides an exemption for efficiency-generating anticompetitive practices that allow consumers a fair share of the resulting benefits. This can cover both quantitative and qualitative efficiencies, such as those derived from practices that allow for cost reductions or quality improvements—*eg* as the result of joint development of a new technology by two competing undertakings. Anticompetitive practices that breach of Article 53(1) EEA (or Art 101(1) TFEU) can thus be exempted under Article 53(3) EEA (or Art 101(3) TFEU), and this requires a two-stage analysis of the effects of the practice [see the EFTA Surveillance Authority's Guidelines on the application of Article 53(3) of the EEA Agreement [2007] OJ C208/1; see also the European Commission's Guidelines on the application of Article 101(3) TFEU [2004] C101/97].

Furthermore, when interpreting the EEA Agreement, the EFTA Court is bound to act under the principle of homogeneity of EU and EEA law [Art 6 EEA] and pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Union (CJEU) [Art 3(2) of the EFTA Surveillance and Court Agreement]. In practice, the EFTA Court follows closely the case law of the CJEU, and this contributes to further substantive compatibility between the competition rules in the EEA Agreement and the TFEU. However, there is no written obligation for the CJEU to take into consideration the jurisprudence of the EFTA Court. If the EFTA Court interpreted Article 53 EEA in a manner that deviated from the CJEU's interpretation of Article 101 TFEU, this could be corrected in subsequent Judgments of the CJEU. Therefore, the extent to which the Ski Taxi Judgment is relevant under EU competition law will depend on future decisions of the CJEU. Given the state of flux of the jurisprudence concerning the analysis of anticompetitive agreements by object, it is difficult to predict with much certainty whether the CJEU will endorse the approach of the EFTA Court to the treatment of joint bidding as price-fixing.

II Facts

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Ski Taxi and Follo Taxi are two taxi companies active in the vicinity of the city of Oslo. In 2001, they established a joint management company (SFD), which they own 50/50 and have tasked with certain administrative activities of common interest. Remarkably, SFD is also entrusted with the submission of joint bids in tender procedures. Where SFD is successful, Ski Taxi and Follo Taxi execute the contract as SFD's subcontractors. An SFD Shareholders' Agreement of 2007 explicitly recognises that the arrangements between Ski Taxi and Follo Taxi will result in *"less competition between them in the market than previously. This applies to both pric[ing] policy in tenders and other strategic measures in relation to the market"*.

In 2010, Oslo University Hospital (OUH) ran a public procurement tender for the award of framework agreements for the provision of patient transport services. The tender procedure was divided in nine geographical lots. For two of those lots, SFD submitted the only tender received by OUH, which decided to cancel the procedure for those two lots. After raising the issue of the lack of competition between Ski Taxi and Follo Taxi with the Norwegian Competition Authority, OUH launched a new tender procedure, where it redesigned the geographical coverage and divided the framework agreements in five areas instead of two. SFD submitted a joint bid for all five lots, as did two competing taxi companies. OUH eventually entered framework agreements with all three companies, and assigned SFD second priority in all five areas.

Despite the outcome of the second tender, the Norwegian Competition Authority decided to investigate SFD, Ski Taxi and Follo Taxi for the joint bidding strategy and eventually imposed sanctions. This was justified on the basis that Ski Taxi and Follo Taxi would have been able to submit separate tenders in both tender procedures, and that cooperation for the submission of the joint bids had as its object a restriction of competition contrary to Section 10 of the Norwegian Competition Act—which is equivalent to Article 53 EEA (and Art 101 TFEU).

After reversal on judicial review by the Follo District Court and reinstatement on appeal by the Borgarting Court of Appeal, the case made it to the Supreme Court of Norway. The latter requested the EFTA Court to clarify the legal test for a determination of whether an agreement between undertakings has a competition-restricting object. And, more precisely, to clarify what legal criteria must be emphasised when considering whether cooperation that takes the form of a joint tender through a joint venture, and where the two undertakings are to be subcontractors to the joint venture, should be deemed to constitute an infringement by object of Article 53 EEA.

In order to answer the more general question, the EFTA Court adhered to relevant CJEU case law on the delineation of anticompetitive practices by object (mainly, *CB v Commission*, C-67/13 P, EU:C:2014:2204). In relation to the more specific assessment of joint bidding in procurement as a possible anticompetitive agreement by object, the EFTA Court took the position that joint bidding implied price-fixing because *"by submitting joint bids ... [the undertakings] agreed on the price offered to the contracting authority"* (para 92). This led to the further clarification that *"in order to determine whether the submission of joint bids through a joint management company reveals a sufficient degree of harm [such] that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor"* (para 101). *"Moreover, since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and*

whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint” of their broader joint venture cooperation (para 102).

III Analysis

This analysis is limited to the treatment of joint bidding as a potential price-fixing anticompetitive agreement by object. In abstract terms and taken to its logical extreme, equating joint bidding to illegal price-fixing could be tantamount to setting a blanket *a priori* prohibition of joint tendering in public procurement as an infringement of Article 53(1) EEA—and, potentially, Article 101(1) TFEU—even between non-competing undertakings (*ie* undertakings that can only be notionally considered as potential competitors under possibly thin or extremely abridged counterfactual scenarios). Such approach would tend to proscribe joint tendering *as such* because tenders for public contracts need to include an element of price, except in limited fixed-price tenders based on quality competition only [see Art 67(2) of Directive 2014/24/EU on public procurement [2014] OJ L94/65]. Its consideration as price-fixing would prevent the exemption of joint bidding under the *de minimis* rules and any potentially applicable block exemption regulations, and restrict its possibilities to an efficiency-based justification under Article 53(3) EEA (and Art 101(3) TFEU). This would go beyond the position advanced by even the strictest of commentators to date, which have argued for tests based on the effects of joint bidding in terms of loss of potential competition for the contract, rather than attempting to proscribe joint bidding as an almost absolute violation of Article 101(1) TFEU [for in-depth discussion, see Ignacio Herrera Anchustegui, ‘Joint bidding and object restrictions of competition: The EFTA Court’s take in the “Taxi case”’ (2017) *European Competition and Regulatory Law Review*, forthcoming].

In *Ski Taxi*, the EFTA Court seems to aim to distance itself from such extreme position by requiring that the assessment of the price-fixing element of joint bidding includes an abridged evaluation of the competitive relationship between the joint bidders in the context of their broader collaboration. However, the EFTA Court is not very clear in the weight it gives to the possibility in the case at hand for each bidder to have tendered independently (see paras 97-98), and the analysis of joint bidding as price-fixing is not restricted to a requirement of actual competition. The test also seems rather peculiar to the circumstances of the case, where the bidders had established a joint venture, which allows for a broader assessment. Generally, this seems difficult to operationalise in one-off collaborations for specific public contracts—except if one was willing to accept the setting of the bid price as an ancillary restraint of the one-off joint tendering agreement itself, which would create illogical circularity in the treatment of joint bidding as a price-fixing violation in the first place. Moreover, in requiring engaging in an analysis of the joint tendering agreement to demonstrate that it reveals a sufficient degree of harm to competition beyond establishing the mere possibility that it could have that effect, the EFTA Court follows the CJEU’s steps in blurring the limits of the substantive assessment of infringements of competition law by object and by effect [see *Maxima Latvija*, C-345/14, EU:C:2015:784]. This is due to create difficult boundary issues in the assessment of the discharge of the burden of proof by competition authorities, and comes to erode the distinction between object and effect infringements in practical terms.

Further, a broad approach to the substantive assessment of the competitive relationship of the joint bidders for the purposes of the prohibition of Articles 53(1) EEA and 101(1) TFEU—*ie* based on the position that, if they are *at least* potential competitors, joint bidding is deemed illegal price fixing—can create additional problems of interaction with the substantive test for the efficiency based exemption under Articles 53(3) EEA and 101(3) TFEU. Where the joint bidders are not actual competitors, their agreement to tender jointly can still be caught by Article 53(1) EEA on the basis that they could nonetheless have decided to compete for the contract *eg* by entering into

independent agreements with third parties. Similarly, a joint bidding agreement may not be exempted under Article 53(3) EEA if the undertakings could have generated the same efficiencies through less restrictive means, which some commentators have understood to include an assessment of potential alternative agreements with third parties as options less restrictive of competition [see Cyril Ritter, 'Joint Tendering Under EU Competition Law' (2017) <<https://ssrn.com/abstract=2909572>> accessed 3 May 2017]. However, this does not seem appropriate for the assessment of joint tenders by potential competitors. Given that the condition of potential competitors of the joint bidders would have formed part of the assessment of the prohibition—either as a potential infringement by object (due to the abridged analysis) or by effect (under a fuller analysis)—it seems inappropriate to take it into consideration *again* when assessing the exemption. Doing otherwise would create a double whammy resulting from a formal understanding of different implications of potential competition for the purposes of determining the anticompetitive nature of an agreement, as well as for the purposes of assessing the existence of less restrictive alternatives for the generation of the efficiencies claimed to derive from the joint tender – *quod non*.

IV Practical Significance

It seems that the Ski Taxi Judgment points in the direction of increasingly subjecting joint bidding to stricter and stricter competition assessments—and, potentially, to a very strict one if considered anticompetitive *by object* even between potential competitors—which will ultimately make the viability of this extended business practice hinge on the exemptability of joint tendering arrangements on the basis of Articles 53(3) EEA and 101(3) TFEU. This creates a situation where joint bidders need to take anticipatory measures to be able to prove that there are specific and measurable efficiencies derived from the joint bidding strategy and that they are passed on to the public buyer—either in the form of facilitating bids that could otherwise not be submitted, or as substantially superior bids than those that the joint bidders could have submitted separately [see A Sanchez-Graells, *Public procurement and the EU competition rules* (2nd edn, Hart 2015) 339]. This is important beyond the specific bid, as infringements of competition law are now an explicit cause for exclusion from public procurement opportunities [see Art 57(4)(d) and (c) of Directive 2014/24/EU, in relation with *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469].