



# Joint Bidding

## Anti-competitive collusion or value-creating cooperation?

### Introduction

*When are companies allowed to team up in a consortium in order to bid for a total contract or parts thereof?*



This question has formed the basis for much public discussion since the Danish Competition and Consumer Authority's (DCCA) landmark decision in the road-marking consortia case in 2015.<sup>1</sup> A joint bidding arrangement was held to infringe § 6 of the Danish Competition Act (DCA) (TFEU art. 101(1)) because the involved companies were capable of submitting individual bids on parts of the contract. The Danish Maritime and Commercial Court (DMCC) recently repealed the decision<sup>2</sup>, and the case is now pending in the Supreme Court.

Despite the pending case, joint bidding raises a few questions and concerns when viewed through a competition law lens. It seems apparent that – as a general rule – companies capable of bidding individually should not team up to submit joint bids as this would lower the number of bids and thus restrict competition. But how do the companies assess this? Should they look at the total contract or sub-contracts when assessing their capacity? Should they take into account regular orders and other projects they expect to win? What if consortia bidding is part of a company's strategy to lower risk on bigger projects? What if a consortium consists of more companies than needed to bid? What if the chances of winning the contract is simply higher if companies team up though they could bid individually?

Companies have to assess ex ante whether a certain bidding arrangement is legal or not and thus decide whether to bid. If legal uncertainty exists this could lead to false charges and an insufficient number of pro-competitive joint bids (type 1 error), or it could lead to non-sanctioned collusive behaviour causing market failure and increased prices (type 2 errors). Thus, it is important to provide clarity on this legal area.

### Research Question

***To what extent is joint (consortia) bidding legal under the provisions on anti-competitive agreements, and can this state of law be considered efficient?***

### FAQ from Companies

- ? May we team up if that increases our (actual) chances of winning the contract?
- ? May we team up if one of us could submit a bid alone but the other could not?
- ? May we team up if our expected free capacity is insufficient to submit an individual bid?
- ? May we team up if that helps us enter a different/new market?
- ? Do we meet cartel sanctions if the joint bid is illegal?
- ? How do we prove efficiency gains?

### References

<sup>1</sup> The Danish Competition Council's decision 14/04158 of June 24 2015, upheld by the Danish Competition Appeals Tribunal on April 11 2016 in Cases KL-2-2015 and KL-3-2015.

<sup>2</sup> The Danish Maritime and Commercial Court, Cases U- 2-16 and U-3-16, August 27 2018.

<sup>3</sup> Judgment of the Court of December 22 2016 in Case E-3/16 Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v The Norwegian Government, represented by the Competition Authority (2017/C 133/05)

<sup>4</sup> Judgment of the Supreme Court of Norway of June 22 2017 in HR-2017-1229-A, (case no. 2015/203)

### Methodology

The legal dogmatic method will be applied to determine the applicable law (de lege lata). As part of this process it will be systematically examined how economic reasoning is used in the legal argumentation in joint bidding cases. It is noted that national and EU-based case law on joint bidding in the light of competition law is sparse.

A legal political approach will be used to provide a qualified discussion of whether the current state of law is efficient given the aims of competition law in a procurement context. This analysis will be backed by economic theories.

Though the project is heavily based on theory and document analysis, some interviews will be made with relevant market actors to ensure the practical relevance of the project.

### Topics to cover

#### Methodological

- § The value of political and economic reports etc. in the legal assessment of joint (consortia) bids.
- § The DMCC judgment's compliance with the EFTA Advisory Opinion<sup>3</sup> in the Norwegian Ski Follo case.
- § Economic theory as part of the legal argumentation.

#### Legal

- § The definition of actual/potential competitors in regards to a bid.
- § Joint bidding as a by object or by effect infringement.
- § Joint bidding as a "cartel" infringement sanctioned with imprisonment.
- § The application of the de minimis rule to joint bidding.
- § The (un)likelihood of meeting the criteria for individual exemption, cf. § 8 of the DCA (TFEU art. 101(3)).
- § The burden of proof – after the DMCC judgment, will the DCCA ever be able to lift it?
- § The proportionality principle when assessing the necessity of a consortium.

#### Economical

- § The main reasons companies team up to submit joint bids.
- § The likely effects on competition.
- § The effect of legal uncertainty on company behaviour.
- § The profitability analysis – the meaning of "commercially sound" and "commercially irresponsible".

#### Legal political

- § Chinese walls as an instrument to secure minimum information sharing/independency in regards to individual bids on sub-contracts.