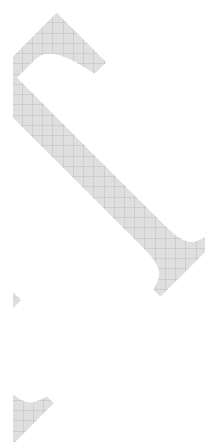


Joint bidding under com- petition law Guidelines

2017



KONKURRENCE- OG FORBRUGERSTYRELSEN



Danish Competition and Consumer Agency

Carl Jacobsens Vej 35
2500 Valby
Tlf.: +45 41 71 50 00
E-mail: kfst@kfst.dk

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Chapter 1

Introduction

Call for tenders regarding public and private contracts are created in order to create competition for the tendered contract. In certain cases undertakings jointly bid for a contract. Often these forms of cooperation are called consortia (in what follows cooperative agreements to submit joint bids will be referred to as “consortia”). In Denmark this type of cooperation is common practice and it can be valuable for the public contracting authority. It requires however that such a cooperation does not restrict competition but that it, instead, creates value for clients.

Competition rules forbid undertakings from entering into agreements that directly or indirectly have the object or effect of restricting competition. The prohibition of competition restrictions has been effective in Denmark since 1988 and it operates regardless the form the cooperation takes, including consortia.

It is the undertakings' own responsibility to respect competition rules. It is therefore important that undertakings themselves assess whether cooperation is legal. If it is not clear whether a consortium is legal, the Danish Competition and Consumer Authority recommends seeking legal counsel before beginning the cooperation.

Furthermore, undertakings may, as appropriate, ask for informal guidance from the Danish Competition and Consumer Authority regarding an envisaged cooperative agreement. Undertakings will be able to receive an immediate assessment from the Competition Agency. It is important to emphasize that it will only be an immediate assessment and thus not a decision on whether the consortium is legal or illegal.

1.1 Consortia in relation to competition rules

Many cooperative agreements and joint bidding agreements will comply with competition rules. This can either be because the parties to the agreement are not competitors with regards to the concerned contract or because the gains of cooperating for, inter alia, clients outweigh the restrictions for competition.

However, if the parties are actual or potential competitors, whether the consortium has the object or effect of restricting competition will have to be assessed. If this is the case, and the consortium is not included in the *de minimis* rules or in a block exemption, the consortium will only be legal if it entails efficiency gains. Moreover, the efficiencies shall benefit consumers and the collaboration and the elements that restrict competition may not go further than what is necessary to carry out the contract.

Cooperative agreements that lead to fewer, more expensive or worse bids will generally be harmful for competition and, in this case, for the public tenderer. Such consortia will be illegal and will, in certain circumstances, constitute a cartel or have harmful effects for competition that are similar to those of a cartel. Cartels are considered very serious breaches of competition law. Therefore, it is important to intervene against consortia that can harm competition.

From a competition point of view, the very form and meaning of the cooperation is not decisive. There is no specific analysis framework for consortia. It is the content of the cooperation and not its designation, which is essential for the competition assessment. The principles con-

tained in these guidelines will to a large extent also apply to other forms of cooperation between companies in connection with procurement, such as subcontracting and the like.

The Competition Council follows the same practice as other countries, and, as can be seen from the examples mentioned in the guide, Danish practice is in line with practice in both the EU and other countries where the assessment is based on EU practice.

1.2 Contents of the Guidelines

These guidelines are directed at undertakings that consider whether to enter for instance a consortium or a similar form of cooperation regarding a call for tenders. The guidelines give indications as to how the Danish Consumer and Competition Authority assesses such consortia according to competition rules.

In order to avoid breaching competition rules, an undertaking that considers submitting a joint bid with one or more undertakings, should consider a number of factors:

First and foremost undertakings shall clarify whether they can fulfil the contract individually in relation to the way in which the call for tenders is drafted, because in that case the cooperation may be considered to have the object or effect of restricting competition. *Chapter 2* of these guidelines looks deeper into this assessment.

If an undertaking can carry out the contract individually and the cooperation has the object or effect of restricting competition, but the concerned undertakings still wish to carry out the contract with one or more undertakings, the undertaking will then have to assess that there are efficiency gains associated to the consortia which can outweigh the restriction of competition and that these efficiencies benefit consumers. The guideline's *Chapter 3* goes deeper into the relevant criteria.

It is also important to pay attention to the fact that the information exchanged between undertakings participating in a consortium or between undertakings discussing such possibility will often be information about key competitive parameters. The exchange of such information can restrict competition and undertakings must therefore be very careful about this. This is discussed in more detail in *Chapter 4* of the Guide.

Handling a competition case requires a large amount of resources. This also applies to cases concerning consortia. The Competition Authority therefore prioritizes the cases it takes up. The Danish Competition and Consumer Authority's prioritization criteria in relation to consortia are set out in *Chapter 5*.

Chapter 6 contains a number of good pieces of advice for undertakings considering entering into a joint bidding agreement.

Chapter 2

Does a consortium restrict competition?

Consortia that by object or effect restrict competition are forbidden according to § 6 of the Danish Competition Act. If there is an effect on trade between Member States the consortium will also contravene Article 101 TFEU. § 6 of the Danish Competition Act reads as follows:

"It is prohibited for undertakings etc. to enter into agreements that have restriction of competition as their direct or indirect object or effect"

A consortium is a collaboration between undertakings. Often the parties to the consortium will come together to perform public or private contract. Such a consortium can restrict competition if the parties are competitors. This will be the case if they can complete the mentioned contracts individually.

However, a consortium does not generally restrict competition if the undertakings that constitute the consortium are not in a position to individually complete the contract and therefore bid for the contract on their own. That can for example be the case if the undertakings produce different services and therefore belong to different industries. But it may also be the case that the undertakings belong to the same industry but that due to, for example, the size of the contract or its complexity, objectively seen they cannot perform it individually. In that case, the undertakings will not be competitors in relation to that specific contract.

Even if the parties to a consortium are competitors and the consortium restricts competition, a consortium can comply with competition rules. This is the case if the cooperation results in efficiencies that enable undertakings to make more competitive offers than if they submitted bids individually and these benefits outweigh the restrictions to competition, see Chapter 3.

In many cases it will be obvious whether an undertaking can perform a particular contract on its own or whether it is necessary to cooperate to be able to bid for a contract. In other cases the assessment can be more difficult.

This chapter reviews the key criteria to determine whether two or more undertakings are competitors in relation to a contract. Undertakings should consider this before they contact potential consortium partners. This assessment will be based on information which the undertakings already possess regarding its capacity. The undertakings' assessment on whether it can carry out a contract individually must be based on objective criteria and furthermore it should not be based on subjective assessments of the undertakings' immediate wishes.

2.1 When are undertakings competitors?

If two undertakings can individually complete a contract, they are competitors in relation to that contract. If, however, they cannot complete the contract individually, they are not competitors.

The assessment on whether a contract can be individually completed or whether collaboration with another company is necessary shall be made before initiating discussions with other companies about forming a consortium in order to tender for a contract t.¹

This assessment shall be taken each time a company considers calling for a tender, that is, in relation to the concrete call for tenders. Therefore, undertakings shall not have “steady” consortium partners.

Box 2.1 Example of a case where companies were steady consortium partners

Collection of slum in Lombardy and Piemonte²

The case concerned five Italian companies, which were active in the collection of slum. The companies had been working together for several years to bid jointly on public calls for tenders. The call for tenders they won they shared among themselves at an agreed price.

The Italian Competition Authority considered that the systematic cooperation in order to submit joint bids eliminated competition between the companies and resulted in market sharing. It was therefore considered a breach of competition rules.

The concept “competitor” includes actual as well as potential competitors. Therefore, competitors are companies that produce or supply the same product or service in the same geographic area, or that could relatively easily tweak their production processes in order to do so.³

Including potential competition in the assessment of whether companies are competitors is standard practice in cases where companies collaborate⁴. The assessment is made based on the following criteria:

- » The possibility of entering the market as a competitor must be realistic. A purely theoretical possibility is not sufficient to demonstrate the existence of potential competition.
- » It is not of relevance whether companies have concrete intentions to enter the market, but whether they have the skills to do so.

For example, a catering company that is only active in Zealand is not the actual competitor of a catering company that is only active in Jutland. But if it is economically profitable and possible

¹ It can be sensible for undertakings to save these analyses in case there may later on be a competition case. See the ruling of the Stockholm Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 120, and the ruling of the Stockholm Tingsrätt of 18 December 2015, *Aleris Diagnostik AB m.fl.*, page 185.

² Decision no. 25302 of 3 February 2015 from the Italian Competition Authority, *1765 Gare gestioni fanghi in Lombardia e Piemonte*. The decision has been confirmed by the Italian highest court (Consiglio di Stato).

³ See further the Commission’s guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation (2011/C 11/01), §10.

⁴ See for example the Retten’s ruling of 8 September 2016 in case T-472/13, *Lundbeck mod Kommissionen*, § 100-105, Retten’s ruling of 21 May 2014 in case T-519/09, *Toshiba*, § 230-233 and Retten’s ruling of 29 June 2012 in case T-360/09, *E.ON Ruhrgas AG, E.ON AG*, § 86-87 and decision of the Borgarting Lagmánsrét of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 14.

for the company based in Zealand to expand its business in order to include all or part of Jutland, it will be a potential competitor of the catering company based in Jutland⁵.

If a call for tender covers a geographical area where the undertaking is not currently active, and therefore the undertaking is not an actual competitor to the undertaking that is active in the concerned area, it will have to be analyzed if it would be realistic in terms of establishment costs etc., for the undertaking to expand its business in order to include this geographic market.

If a call for tender includes a product which a company does not currently produce or provide, it will need to be analyzed, whether it would be realistic for undertakings to expand their production, etc. in order to include this product, see also box 2.2.

Box 2.2
Example of the assessment of potential competition

Toshiba⁶

The case concerns a market sharing agreement between Toshiba in the EEA and in Japan. The parties had entered into a so-called "gentlemen's agreement" according to which companies in the EEA and Japan would not enter their respective markets. As they were not active in the same geographic markets they were not actual competitors. However, the fact that there were no insurmountable barriers to enter into the EEA market meant that there was a potential competitive relationship between the parties to the agreement and, as a consequence, the market sharing agreement restricted competition.

Lundbeck⁷

The case concerns Lundbeck's agreements with producers of generic drugs in order to delay launching generic drugs into the market. Given the first generic producers to enter the market can expect to have very high profits once the patents have expired, generic manufacturers compete to be the first to enter the market, and therefore producers will be willing to undertake significant investments to prepare for launching generic medicines. As a result and coupled with the facts that they had a business plan and a realistic opportunity to become suppliers of generics of Lundbeck's products, generic producers were considered potential competitors.

When the Danish Competition and Consumer Authority assesses whether undertakings are *actual* competitors, it takes into account whether undertakings already have the capacity that is necessary to bid alone. This analysis is based on the resources that the companies have access to and which are not bound by signed contracts⁸.

⁵ See decision of the Competition Council of 26 November 2003, *Samarbejdsaftale mellem Ove Juel Catering A/S og T.H. Schultz A/S*, where the Council considered it doubtful whether the investment costs etc. in themselves, constitute such a barrier that cooperation was necessary.

⁶ Ruling of the EU Court of 20 January 2016 in case C-373/14 P, *Toshiba Corporation vs. European Commission*, § 31-34.

⁷ Commission decision of 19 June 2013 in the Lundbeck case.

⁸ See decision of the Competition Council of 24 June 2015 in *Dansk Vejmarkerings Konsortium*, § 453.

When the Danish Competition and Consumer Authority assesses whether undertakings are *potential* competitors, it takes into account whether it is likely and realistic for the undertakings to expand their capacity to the one needed to be able to bid for the contract individually⁹.

The following sections describe the assessment the Danish Competition and Consumer Authority will undertake in order to determine whether undertakings compete with respect to a specific contract. When undertakings assess whether they are competitors with regards to a specific contract they do so before presenting a joint bid. In contrast, the Danish Competition and Consumer Authority's assessment will take place, as a general rule *ex post*, as a potential competition case will generally be initiated once the undertakings have presented a bid for a contract.

2.2 Assessment of actual and potential competition

The starting point to assess whether companies can fulfill a contract individually and are thus competitors, is, among others, the requirements included in the tender materials. This assessment includes, amongst other things, whether the individual companies already have the capacity that is necessary to complete the contract alone. Then it will be analyzed whether companies are potential competitors, if it is relevant.

In cases in which the Danish Competition and Consumer Authority has to assess whether a company would be able to bid individually, the Authority looks at whether this could constitute a sustainable economic strategy for the company. This means firstly that a mere theoretical possibility of carrying out a contract is not enough; the possibility must be real and it shall include assessing that the offer must be profitable¹⁰. The assessment shall be made on an objective basis.

Thus, there must be a realistic assessment of whether a company, for instance in relation to its current size, will be capable of increasing its capacity to the level necessary in order to complete the contract on its own. Such an assessment will be particularly relevant if the lacking capacity represents a limited part of the capacity the company already has¹¹. It will also be considered whether the company has undertaken contracts of a similar size before without collaborating with others.

Box 2.3 Example of assessment of the expansion needs

Danish Road marking Consortium¹²

The case regards a consortium created by two of the largest road marking companies in Denmark with the formal goal to bid jointly in a call for tenders. The Competition Council considered that each of the companies had the capacity to be able to fulfil the contract individually and that they were consequently actual competitors.

Furthermore, the Council considered that, even if that had not been the case (that is, even if they had not been actual competitors), both companies were capable of expanding their capacity in terms of manpower and machinery to the capacity necessary for each to complete the contract individually. Their business plans confirmed that it was possible and realistic for the companies to recruit more workers.

Given the two companies were already large, the concrete expansion needs were limited.

⁹ See decision of the Competition Council of 24 June 2015 in *Dansk Vejmarkerings Konsortium*, §638.

¹⁰ See decision of the Borgarting Lagmannsrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxisentral og Ski Taxi Ba*, page 19.

¹¹ See decision of the Competition Council of 24 June 2015 in, *Dansk Vejmarkerings Konsortium*, §681

¹² Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*.

The case is thus an example of how companies can be considered potential competitors if they already have a size that implies that with a limited expansion of their capacity they can complete a contract individually.

The assessment of an undertaking's capacity also encompasses assessing if the undertaking can bear the risk associated with the contract or whether the collaboration is necessary to spread the risk between several participants. This can be seen in the Elopak/Metal Box – Odin-case, which is discussed in box 2.7.

Thus, the case must be that, based on objective factors, it is not realistic for undertakings to be able to bid individually. However, a more subjective desire to spread the risk associated to the particular contract will, in general, not be part of the assessment.

Therefore, risk spreading is an element of the overall assessment of whether an undertaking can complete a contract on its own or whether it is objectively necessary to work together with one or more undertakings. Moreover, undertakings shall be able to bear the economic risks of offering a product or service on their own either directly or by taking realistic measures which for example do not completely undermine the profitability of bidding for the contract¹³.

The risk of not winning a contract if one bids alone cannot justify that two or more competitors submit joint bids.¹⁴

Finally, risk spreading can also be considered in an efficiency defense, but this requires among other aspects that the advantages also benefit the contracting entity, see chapter 3.

Below are included certain cases which concern risk. It should be noted that cases that have assessed cooperation to spread risk have focused on situations in which undertakings have faced major development costs.

Box 2.4

Example where risk is included as part of the assessment of a cooperative agreement

Consortium ECR 900-case¹⁵

The case concerns a cooperation agreement to develop, manufacture and sell digital cellular mobile telephone systems. The financial costs and staffing requirements associated to developing and manufacturing of the systems were so high that realistically it was not possible to carry out the project individually. Therefore the Commission considered that the cooperation was lawful.

Collection of slum in Lombardy and Piemonte¹⁶

As mentioned before, the case concerned five Italian companies which had been working together for several years to bid jointly on public calls for tenders regarding the collection of

¹³ Decision of the Borgarting Lagmanskrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 17.

¹⁴ See decision of the Competition Appeals Tribunal of 11 April 2016, that confirms the Competition Council decision of 15 June 2015 in *Dansk Vejmarkerings Konsortium*.

¹⁵ Commission's decision of 27 July 1990 in case IV/32.688 – *Konsortium ECR 900*. Commission's decision of 15 December 1994 in case IV/34.768, *International Private Satellite Partners*, §55, contains similar considerations.

¹⁶ Decision no. 25302 of 3 February 2015 of the Italian Competition Authority, *1765 Gare gestioni fanghi in Lombardia e Piemonte*.

slum. As justifications for their collaboration the undertakings stated sharing risks such as the contract being extended, counterparty insolvency or that the quality of the slam to be collected varied

The Italian Competition Authority considered that when a serious infringement of competition rules is being considered, it cannot be justified by the parties' potential need to share the kind of business risks that are inherent to the specific business activity or that have external sources such as changes in the law or in demand.

It will be difficult for a competition authority to make an ex post objective assessment of the risk of taking on a contract, as this concerns aspects that are within an undertaking's control in terms of making commercial and strategic decisions.

It is therefore not a matter that the competition authority itself can uncover and where companies can be asked for documentation if it should become relevant. In this context, the issue of risk spreading will not necessarily be considered as an element when the Danish Competition and Consumer Authority assesses an undertaking's capacity.

2.2.1. Objective necessity

It is essential that the cooperation between two companies is objectively necessary. It has however no significance in itself which subjective goal the companies pursue with the cooperation, including if the parties have themselves considered that it was necessary to work together in order to complete a contract¹⁷. See box 2.5 below.

Box 2.5 Example of an assessment of objective necessity

Case Däckia/Euromaster¹⁸

This Swedish case concerned a call for tenders for a framework agreement regarding the supply of tires to the police. The two parties to the consortium, Däckia and Euromaster, argued that, in their view, the tender included both tires and tire service and that this required national coverage. Based on that assumption, they each lacked the capacity to bid individually.

However, a review of the tender materials showed that the call for tenders only included tires and did not require national coverage, it only required the bidder to provide a list of the workshops where tires could be collected together with the offer. Consequently, the Court considered that the cooperation was not objectively necessary.

2.2.2 Is it possible to bid for a part of the contract?

If the tender materials permit submitting bids on lots of the contract, each company's capacity to submit a bid for one or more of these lots will be the basis of the assessment, see box 2.6.

¹⁷ See for example the ruling of the Stockholms Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 120. See also ruling of the EFTA Court of 22 December 2016 in case E-3/10, *Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS*, § 99.

¹⁸ Ruling of Stockholms Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, pages 121-126.

Box 2.6

Example where the possibility of bidding on lots of the contracts is the basis to consider that the companies are competitors.

Case Ski Taxi/Follo Taxi¹⁹

This case concerns a call for tenders for patient transportation in a number of districts in Norway. Capacity was one of the criteria that the tender specifications considered, but it was not a requirement that in order to submit a bid, the company should be able to cover the total number of required cars. Furthermore, the fact that, according to the criteria, a bidder would get maximum scores by offering to cover the total needs, did not imply that a company would be barred from bidding if its capacity was lower. Moreover, the tender materials showed that there could be parallel framework agreements. Consequently, the Court found that the cooperation between the two taxi companies was not objectively necessary.

Skive and Omegns' Transportation Association coordination of bids²⁰

In this case, which concerns winter services (i.e. clearing roads of snow and salting) for a municipality, the association submitted a joint bid on behalf of its members. The carriers that were parties to the agreement had the capacity to individually carry out the contract as the call for tenders gave the possibility to bid for individual routes. The Competition Council therefore found that the consortium restricted competition

Danish Road Marking Consortium²¹

As mentioned before, this case concerns a call for tenders for road marking. The Danish Road Directorate had drafted the tender materials in such a way that it was possible to bid individually for three districts but also to submit a bid that covered various districts. The Competition Council considered that what is decisive is whether it is objectively possible to submit partial bids on lots of the contract, not whether the undertakings that wish to bid subjectively believe that competition takes place at the level of bids for the complete contract and not at the level of bids on lots of the contract.

Thus, it is crucial whether the call for tenders is designed in such a way that it is possible to submit bids on lots of the contract. If undertakings individually have the capacity to bid on lots of the tendered contract, they are competitors with respect to the call for tender. An argument from the undertakings that the consortium enables them to bid for the complete contract, does not as a starting point change the fact that the parties must be considered competitors.

It is therefore important to be aware of whether the tender materials give the possibility of bidding for a part of a contract (allocation by lot) or whether it is required to bid for the complete contract. In the assessment, what the tender materials state will be of importance.

The fact that the call for tenders for instance gives the possibility of offering a combined discount when bidding on several lots of the contracts does not change the above. Nevertheless, if a joint bid on several lots makes it possible to achieve efficiencies by making it possible to offer a discount, cooperation may be lawful according to § 8 or in certain cases according to Article 101 (3) TFEU, see Chapter 3.

¹⁹ Decision of Borgarting Lagmánsrétts of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, pages 16-17. It is noted that the case was brought before the Norwegian High Court, which referred a question for preliminary ruling to the EFTA court. The questions did not address the possibility of bidding on lots of the contract.

²⁰ Decision of the Competition Council of 30 April 2014, *Skive og Omegns Vognmandsforenings tilbudskoordinering*.

²¹ Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*. The Competition Appeals Tribunal confirmed the Competition Council's decision in its decision of 11 April 2016. The case is pending before the Maritime and Commercial Court.

Thus, regarding the question whether undertakings are competitors in relation to a specific contract it is essential whether undertakings have the capacity to complete either a part of the contract or the complete contract individually.

2.2.3. Capacity requirements

Assessing whether an undertaking can complete a contract implies an overall assessment of the undertaking's capacity etc. with respect to the contract and time horizon the call for tender concerns. The assessment can include aspects such as the undertaking's access to workforce, knowhow and equipment in the form of machinery, etc. Correspondingly, the assessment includes whether the undertaking has the economic resources needed to carry out the contract, including bearing the risk that the contract entails.

The tender material's requirements that can make collaboration in a consortium necessary can for example include experience and specific knowledge, adequate quality assurance, the ability to complete the contract timely and sufficient capacity and financial strength to make the investments the contract requires²².

The following paragraphs include various examples of types of requirements that tender materials may include which can be relevant to assess the possibility of forming a consortium.

Economic resources

In order to assess an undertaking's economic resources one of the aspect that is considered is whether undertakings have the financial strength to make the investments that are necessary to carry out the contracts, including whether undertakings can fulfill the call for tenders' equity requirements and turnover etc. If the tender materials for example require a turnover of 100 mio. DKK, it will be lawful for two undertakings, each of which have a yearly turnover of 50 mio. DKK, to bid jointly.

For companies that are parts of a group, the group's capacity, resources, knowhow etc. will be decisive to assess if the undertaking has the aforementioned resources. If the companies are part of a group with significant financial resources, this will be also be part of the assessment of whether the company has the necessary resources to bear the risks associated with the contract.²³

Machinery etc.

The assessment of whether an undertaking can submit a bid, includes whether the undertaking has the machinery etc. needed to complete the contract within the time frame specified in the tender material.

If the undertaking does not already have the necessary capacity, it will be assessed whether the company can realistically develop its capacity in order to carry out the contract, that is, whether the undertaking is to be considered a potential competitor, see paragraph 2.1 This means that the aspects to be considered include whether the undertaking has access to financing and can generate profits from investing in new machinery within the time frame specified in the tender materials²⁴. The Authority will take into account whether the capacity expansion is realistic, including whether it is economically viable.

²² Answer to question 106 (L 172 – annex no. 77) of 6 May 1997 from the Committee of the Danish Parliament.

²³ See for example Commission's decision of 14 September 1999 in case IV/36.213/F2 – GEAE/P & W, § 74.

²⁴ Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*, §. 676 f.

Staff etc.

In turn, if the completion of a contract requires increasing the undertaking's staff, attention will be paid to whether the undertaking has the necessary qualified staff or whether it needs to recruit qualified staff²⁵. This assessment includes which skills the mentioned staff must have in order to complete the contract. The assessment also dependent on whether it is normal business practice to hire additional staff or machinery for larger contracts, which can vary from industry to industry.

Technology, special knowledge and knowhow

As mentioned above, access to technology, special knowledge and know-how can be part of the assessment of whether it is necessary to enter into a consortium to bid for a contract. Another relevant aspect can be previous experience within a specific area.

Even if undertakings are active at the same level within the same industry, they can each be specialized in different fields.

The fact that a company does not have the necessary know how etc. in order to meet all the elements of the contract, could justify collaborating with another undertaking that does possess this know how. Such collaboration can for example be based on the fact that one of the companies has special knowledge that is necessary in order to fulfill the contract.

Box 2.7
Example regarding access to technology and know how

Elopak/Metal Box-Odin-case²⁶

The case concerns the creation of a joint venture to undertake the research and development of a new form of paperboard-based package. The joint venture would also develop machinery and technology to fill the new containers and produce and distribute the new containers and filling machines.

The Commission found that the experience and resources of both undertakings were necessary in order to develop the new product. Moreover, the Commission considered that the risks and the financial burden associated to the development and subsequent development of the product realistically prevented the parties from doing it individually. Consequently, the two undertakings were neither actual nor potential competitors and the collaboration was therefore lawful.

However, if an undertaking has the knowhow etc. necessary to carry out the contract individually but working together with another undertaking that has a particular knowhow implies that together they can submit a better bid, the collaboration can be lawful. This would require amongst other things that the efficiency gains that the collaboration implies really benefit the contracting entity and that these advantages outweigh the possible negative effects of weakened competition, see Chapter 3.

2.2.4. Capacity reserved for other contracts

The assessment of capacity is based on the actual capacity that the undertaking has or will be available in the period during which the contract is to be completed. The capacity that is already disposed of because it has to be used in agreements that the companies have signed beforehand, are therefore not included in the assessment. Contracts which the undertakings

²⁵ Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*, §. 687 f.

²⁶ Commission's decision of 13 July 1990 in case IV/32.009 – *Elopak/Metal Box Odin*.

shall complete in the concerned period, will thus tie up capacity which cannot be used for other purposes

Conversely, as a general rule potential expected new customers or contracts are not taken into consideration. What is crucial so that undertakings may cooperate within a consortium is that the consortium is necessary in order to be able to compete for a contract. If the undertakings reserve capacity for future contracts that are not included in signed agreements, they do have spare capacity at the time when they plan to submit the bid and the cooperative consortium will therefore not be necessary.

However, in exceptional circumstances future contracts from core customers may be taken into account. This can for example be the case if it can be documented that the expected contracts from core customers are so recurrent that it is realistic and fair to reserve capacity to fulfil such contracts. In those particular cases, it may be appropriate to include capacity requirements for these expected contracts when the undertaking determines its available capacity²⁷. The possibility of deducting capacity will always have to be assessed on a case by case basis.

Box 2.8

Examples of cases that concern the question of whether determining capacity is determined by capacity allocated to other contracts

Case Ski Taxi/Follo Taxi²⁸

The case concerned, as mentioned above, transportation of patients in a number of districts in Norway. As to determining the capacity in form of cars, companies submitted a capacity equivalent to 50% of their total capacity. The Court took the view that in the determination of available capacity, the capacity for spot transportation and other contracts that were already signed was not included. However, the Court did not take a stand regarding the capacity the undertakings would have been able to offer.

The Court held that an assessment of how many cars a taxi company can offer individually, must take into the account the existence of circumstances in the form of public regulation or other obligations that limit the capacity which the company can offer.

Cementa/Aalborg Portland case²⁹

This Swedish case concerns a consortium to deliver cement for the construction of the Great Belt bridge. The undertakings had requested an exemption from the Swedish Competition Authority in order to submit a joint bid. The Swedish Competition Authority considered that each of the undertakings had the capacity to submit a separate bid for the contract and therefore rejected the request.

The undertakings brought an appeal to the Swedish Court. Stockholm's Tingsrätt (first instance) considered that the undertakings did not have the necessary capacity to submit separate bids for the contract if at the same time they could not meet their obligations towards other clients and therefore granted the exemption. The Swedish Competition Authority appealed the decision and argued that what was decisive was whether the undertakings' total

²⁷ See the Competition Council's decision of 24 June 2015, *Dansk Vejmarkerings Konsortium*, §. 444.

²⁸ Decision of the Borgarting Lagmannsrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, pages 16-17. It is noted that the case was brought before the Norwegian High Court, which Court referred a question for preliminary ruling to the EFTA court. The questions did not address the possibility of bidding on lots of a contract.

²⁹ Decision of the Swedish Competition Authority of 12 May 1995, *Icke-ingripandebesked/undantag avseende samarbete i ett konsortium i cementbranschen*, Decision of Stockholms Tingsrätts of 1 January 1997, *Cementa AB og Aalborg Portland A/S mod Konkurrensvetket* and decision of Marknadsdomstolens afgørelse of 8 October 1997, *Konkurrensvetket mod Cementa AB og Aalborg Portland A/S*.

capacity, independently of their obligations towards other clients, was adequate in relation to the concrete contract. Therefore, to calculate the capacity, the capacity needed for potential future agreement, should not be deducted. Similarly it should not be possible for companies to reduce their spare capacity by filing many potentially unrealistic bids. The Swedish Marknadsdomstol (second instance) did not take a concrete stand regarding the capacity issue but argued that the project in question was so large that the conditions were very special as regards financial obligations, risk, access to materials, experience requirements, knowhow, capacity and economic resources, and therefore the competitive conditions were very different from those that normally applied. The Marknadsdomstolen found that, against this background, cooperating within a consortium was the only realistic way for the undertakings to participate in the concerned bidding.

2.3 Number of participants in a consortium

If more undertakings than necessary in order to complete the contract are parties to a consortium, the cooperation between them can restrict competition, even if none of them can individually fulfill the contract. Whether this is the case will depend on a specific assessment of, inter alia, how competition would most realistically play out without the consortium in question.

If, for example, four undertakings form a consortium to carry out a contract that only requires three of them, it is possible that the fourth one would have been able to go together with other undertakings, and, this way, an additional bid could have been submitted to the call for tenders. In this case a consortium with four undertakings would restrict competition.

Conversely, if it is not possible for the fourth undertaking to go together with other undertakings which in turn would enable them to submit an additional bid, including the fourth undertaking in a consortium will not result in there being fewer bids for the contract, and therefore there will be no restriction of competition regarding the public contract.

If more undertakings than necessary go together in a consortium this could however mean that undertakings are refraining from expanding their activities.

Furthermore, undertakings will however be in a position to exchange competition sensitive information to a larger extent than if it the absolutely necessary number of undertakings participate. This could restrict competition and breach competition law, as the cooperation is not necessary in order to carry out the contract.

Box 2.9
Example of agreements
between competitors
where they could have
bid individually selv.

Case Däckia/Euromaster³⁰

In this case, which, as previously described, concerns the supply of tires, two companies, Däckia and Euromaster, bid together. While Däckia had the capacity to bid alone, Euromaster did not. Given that Däckia could have bid alone and that Euromaster could have concluded a less extensive agreement with another undertaking, the cooperation between the two undertakings was not considered necessary.

Ski Taxi/Follo Taxi case³¹

In this case, as mentioned before, two taxi companies bid jointly for patient transportation. In the proceedings before the Norwegian lagmannsrett it was considered whether the consortium could be legal if just one of the undertakings could have bid individually. In this context and following the Norwegian Competition Authority's guidelines on consortia³², the court considered that a consortium between two companies where only one would be able to tender alone could be legal. The decisive factor is whether cooperation leads to other collaborations being excluded. If so, the cooperation would limit the number of bids and therefore would be illegal.

The Court did not take a concrete position in the case, as during the process it came to the conclusion that both companies had been able to submit bids, as it was possible to bid on lots of the contract.

2.4 Pre-qualification and framework agreements

In situations in which the tendering authority, following a pre-qualification phase, has selected a number of applicants to submit a bid, only the undertakings that fulfil the pre-qualification requirements can be considered competitors. The undertakings that are not prequalified are thus not competitors of those that can submit a bid. The equal treatment principle in the Danish Public Procurement Law might however prevent prequalified undertakings from entering into consortium agreements with undertakings that are not pre-qualified.

Conversely, if collaboration takes place between two undertakings, that are both prequalified to bid for the same contract, this will of course support that the undertakings are competitors in relation to the concerned call for tenders.³³

³⁰ Ruling of the Stockholms Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 132.

³¹ Decision of the Borgarting Lagmannsrett of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, pages 16-17. It is noted that the Norwegian Supreme Court referred a question for preliminary ruling to the EFTA court. The questions do not concern this issue.

³² Norwegian Competition Authority's guidelines on consortia. The guidelines are available in www.konkurransetilsynet.no.

³³ See decision of 18 October 2010 from the Norwegian Competition Authority, *Johnny Birkeland Transport as/Norva 24 AS – Lindum AS*, § 266-274.

Box 2.10
Example of collaboration between prequalified undertakings

Johny Birkeland Transport/Norva 24-Lindum case³⁴

The case concerns an agreement between two undertakings to bid jointly for managing sludge in Bergen. The contract was divided by districts and it was possible to present partial bids for each district. Both undertakings were the only ones prequalified to submit an individual bid and they both had the capacity to bid for a part of the contract. However, the undertakings submitted a joint bid for the complete contract. In this context, the Norwegian Competition Authority considered that the undertakings were competitors in relation to the contract. This was supported by the fact that both were pre-qualified to submit bids.

Regarding call for tenders for framework agreements, the assessment of whether an undertaking can complete a contract on its own is made in relation to the requirements the contracting authority sets to the undertakings that compete for the framework agreements. Typically they will be requirements of turnover or other types of requirements regarding the undertakings' economic capabilities. The assessment shall be made at the time when undertakings have to submit a bid for the framework agreement, and depends on whether its requirements can be met. [Moreover, it has no significance that one or more of the participants in the consortium, seen in isolation, could individually fulfill the requirements in a subsequent mini-call for tender when public authorities make purchases according to the framework agreement].

When one enters into a consortium with one or more undertakings with the purpose of bidding for a contract, it is also important to be aware that the competition assessment is made in respect to the specific contract, regardless of whether the case concerns a framework agreement. That undertakings are not competitors in relation to a call for tenders for a specific framework agreement, does not mean that they will not be competitors in relation to other framework agreements or the following call for tenders for the same framework agreement. Therefore, undertakings cannot assume that they can have "steady" consortium partners; the assessment of whether undertakings are competitors shall be made each time and in relation to each specific call for tenders.

2.5 Consortia between competitors

If each of the undertakings has the capacity to complete a tendered contract, they will be in a position to each submit a separate bid. In that case, undertakings are competitors.

A consortium between competitors means that the number of possible bids for the contract will probably be smaller than it would have been in the absence of the consortium. The reduction in the number of bids can mean that the undertakings compete less intensively and that the price for the contract increases and/or that quality falls as a consequence of the competition restriction.

With respect to § 6 of the Danish Competition Act and Article 101 of the TFEU it is forbidden for undertakings etc. to enter into agreements that directly or indirectly have as their object or effect to restrict competition. If the consortium has the object or effect of restricting competition and it does not fall within the *de minimis* rules of § 7 of the Danish Competition Act or it does not lead to efficiency advantages that benefit consumers and that outweigh the competition restrictions, the consortium will be contrary to § 6 of the Danish Competition Act and Article 101 of the TFEU, if there is effect on trade.

³⁴ Norwegian Competition Authority decision of 18. October 2016, *Johny Birkeland Transport AS/Norva 24 AS – Lindum AS*, §. 292.

In addition to joint bidding, a consortium often implies that the undertakings for example fix prices as well as eventually also share markets and customers. Such restrictions of competition are considered serious and will constitute a cartel. Although the concept of cartel is normally applied to collaborations that take place secretly, and consortia are often fully transparent, they can have the same harmful effects on competition. Cartels constitute a serious and criminal breach of the Danish Competition Act. Cartels are punished with fines and in especially grave circumstances the penalty can include prison of up to 6 years.

The following sections review which consortia that given their very nature are apt (and therefore according to competition law have as their object) to restrict competition and which shall be subject to an assessment on whether they have the effect of restricting competition in order to determine whether they restrict competition.

It is of no significance to the assessment of whether a consortium has the object or effect of restricting competition, whether the cooperation has been fully open and public³⁵. It is however possible that this can be relevant in order to eventually set the punishment for taking part in an unlawful cooperative agreement. Taking a position in this matter will fall upon to the public prosecutor and the courts.

2.5.1. Consortia that can have as their object to restrict competition

Agreements that have as their object to restrict competition are characterized by the fact that by their very nature they are harmful to the proper functioning of normal competition. For this type of infringement (by object) competition authorities will generally not identify harmful effects for consumers.

In order to determine whether an agreement has as its object to restrict competition it is necessary to assess the content of the agreements and its aim as well as the economic and legal context the agreement is part of.³⁶

The types of horizontal agreements (that is, agreements between competitors) that according to the case law can be considered to have as their object restricting competition are for example price agreements³⁷, market and customer sharing agreements,³⁸ and agreements to limit capacity³⁹. Nevertheless, other types of restrictions can also have as their object the restriction of competition.

Assessing whether an agreement restricts competition by object is based on objective grounds. As a starting point, it has no significance which subjective intention the undertakings pursued with the agreement⁴⁰. Even if the undertaking's subjective intention was not to restrict competition, the agreement can easily be assessed as a by object infringement. In con-

³⁵ See ruling of the Stockholms Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 134, as well as the ruling of the EFTA Court of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA og Ski Follo Taxidrift AS*, §106-108.

³⁶ See EU Court Ruling in case C-67/13 P, *Groupement des Cartes Bancaire*, paragraphs. 49-53.

³⁷ See, for example, EU Court Ruling of 11 September 2014 in case C-67/13 P, *Groupement des cartes bancaires* and of 4 June 2009 in case C-8/08, *T-Mobile Netherlands*.

³⁸ See for example EU Court Ruling of 20 January 2016 in case C-373/14 P, *Toshiba*.

³⁹ See for example EU Court Ruling of 20 November 2008 in case C-209/07, *Beef Industry*.

⁴⁰ See for example EU Court Ruling of 20 November 2008 in case C-209/07, *Beef Industry Development*, § 21.

create cases the subjective intention could however be part of the evidence to determine if the parties with the agreement had as their object restricting competition.⁴¹

Box 2.11
Example of consortia
that are considered by
object restrictions of
competition

Däckia/Euromaster case⁴²

This Swedish case concerns, as indicated previously, a call for tenders for a framework agreement concerning the supply of tires to the police. The Swedish Tingsrätt considered that it was a clean marketing cooperative agreement which included joint price setting. The Court found, in this context, that the cooperation had been apt to have a negative effect on competition and that, therefore, it restricted competition by object.

Ski Taxi/Follo Taxi case⁴³

This case concerns, as described above, joint bidding for patient transportation. The Norwegian Competition Authority and the Norwegian Court of First Instance considered that the cooperation between the two taxi companies on the joint bidding had as its object the restriction of paragraph 10 of the Norwegian Competition Act, which is equivalent to article 53 of the EFTA agreement and Article 101 of the TFEU. This resulted from the fact that the cooperation eliminated competition between the two companies which could have submitted separate bids, and this constituted joint pricing.

The case was appealed to the Norwegian High Court, who referred a question for preliminary ruling to the EFTA court on which legal criteria is to be included in the assessment of whether the submission of a joint bid constitutes a by object infringement. The EFTA ruling has, in line with the EU case law, considered that agreements that appear as sufficiently harmful to competition will constitute by object infringements and that in order to assess whether submitting a joint bid is particularly harmful for competition, the content of the cooperation, its purposes and the economic and legal context in which the cooperation takes place should be taken into account. The EFTA Court has further stated that since the submission of joint bids includes price setting, the analysis of the economic and legal context could be limited to what is strictly necessary to determine whether there is a by object restriction. As part of the assessment of the economic and legal context, it will be assessed whether the parties are actual or potential competitors.

In this particular case the two taxi companies had constituted a joint venture which submitted the joint bid. According to the EFTA ruling, in such situations it shall also be investigated whether the joint price setting constituted an ancillary restraint associated to the operation of the joint venture.⁴⁴ As part of this it shall be analyzed whether it would have been impossible for the undertaking to operate without the restriction, and whether the restriction is proportionate to the company's main objectives. These aspects, that the undertakings become more difficult to operate or less profitable without the restriction, do not make the restriction "objectively necessary", which is what is required to consider a restriction ancillary.

⁴¹ See EFTA Court Ruling of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA and Ski Follo Taxidrift AS*, paragraphs 89 and 106-108, as well as the Ruling of Stockholm's Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 134.

⁴² Ruling of the Stockholm Tingsrätt of 21st January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 132 f. The Tingsrätten references, inter alia § 234 of the Commission's Communication of 14 January 2011: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation, 2011/C 11/01

⁴³ Ruling of the EFTA Court of 22 December 2016 in case E-3/16, *Ski taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS*, §§ 89-94.

⁴⁴ If the main content of a joint venture does not restrict competition, restrictions of competition that are directly related and necessary for the joint venture (ancillary restraints) are not included in the prohibition of restrictive agreements.

It is now for the Norwegian High Court to make a final decision on the case.

Danish Road Marking Consortium⁴⁵

This case concerns, as previously described, joint bids for a call for tenders for road markings. The Competition Council considered that the two companies had the capacity to individually bid for several lots of the contract, and that they were therefore competitors. The agreement concerned both price setting and market sharing. In this context, the Competition Council found that the agreement restricted competition by object.

This was confirmed by the Competition Appeal Tribunal, which has stated that since the consortium objectively considered in its market context contained anticompetitive effects, it was – regardless that it could not be described as a classic cartel agreement on price coordination or market sharing – by its very nature harmful to competition and therefore it restricted competition by object.

The case is pending before the Maritime and Commercial Court.

School busses⁴⁶

This French case concerns a consortium founded by a number of transport companies with the aim of presenting joint bids for school bus transport. Each company could have bid individually. The French Competition Authority considered that it constituted a market sharing agreement that restricted competition by object.

The case is pending in court.

2.5.2. Consortia that can have as their effect restricting competition

If there is a production agreement in the form of either joint production or a subcontracting agreement, as a starting point, certain types of agreements will not be considered as by object restrictions of competition. In these cases it will generally be relevant to make an assessment of whether the agreement can have an anticompetitive effect (a “by effect” assessment). This concretely applies:

- when the parties agree on output that is directly concerned by the production agreement, provided that the other competition parameters are not excluded
- a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place.

The same assessment of restrictive effects on competition of such types of agreements is described in greater detail in the Commission's horizontal guidelines⁴⁷.

⁴⁵ Decision of the Competition Council of 24 June 2015, Dansk Vejmarkerings Konsortium. The Competition Appeals Tribunal upheld it in its decision of 11 April 2016. The case is brought before the Maritime and Commercial Court where it is pending.

⁴⁶ Decision of the French Competition Authority, Decision n° 16-D-02 of 27th January 2016 regarding school transportation by bus in Bas-Rhin.

⁴⁷ See the Commission's Communication of 14 January 2011: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation, 2011/C 11/01, §. 150 f.

As previously stated, what is decisive for the assessment is the actual content of the consortium and not its form or its designation. It is therefore not possible to circumvent a by object assessment by simply naming an agreement “production” or “subcontracting” if it does not fulfill the conditions mentioned above.

As it has already been indicated, a consortium that has as its object or effect to restrict competition will be lawful if the cooperation leads to efficiencies that benefit consumers and these outweigh the restriction of competition (see chapter 3).

DRAFT

Chapter 3

Efficiency gains by consortia

A consortium between undertakings for a contract which each of the undertakings can complete individually can, as previously stated, restrict competition, as undertakings will be competitors in relation to the contract. In the self-assessment on whether the undertakings are competitors and whether the cooperative agreement has the object or effect of restricting competition, it is not decisive whether the parties can submit a more competitive offer together or whether the cooperation benefits the undertakings or their owners.

If together the undertakings can submit a more competitive bid than if they bid separately, the cooperative agreement can still be lawful in spite of the fact that the undertakings are competitors. However, this requires that the collaboration fulfils a number of conditions, including that it benefits consumers.

A more competitive offer can for example be the consequence of the fact that the undertakings, through the cooperative agreement, can obtain cost reductions and thereby be able to lower the price of the bid. It can also be the case that the undertakings, by working together, can offer a better product compared to what they would be able to offer individually.

Even if the undertakings that participate in a consortium can complete the contract individually, a consortium can still be lawful if its advantages for consumers compensate the restrictive effects on competition. It is thus central that positive efficiency gains benefit consumers and that the cooperative agreement and the elements that restrict competition in the collaboration do not go beyond what is needed to complete the contract.

The following sections look deeper into the four conditions that must be fulfilled for a consortium (including between competitors) to be exempted from the prohibition against agreements that restrict competition. The requisites for the exemption can be found in § 8.1 of the Danish Competition Act and Article 101 (3) of the TFEU (if it affects trade between Member States). If these conditions are fulfilled, the prohibition in § 6 of the Danish Competition Act and also Article 101 TFEU are not applicable, this means that in this case the agreement is automatically lawful according to competition rules.

§ 8.1 of the Danish Competition Act states:

"The prohibition set out in Section 6(1) above shall not apply if an agreement between undertakings, a decision made by an association of undertakings or concerted practices between undertakings

i) contribute to improving the efficiency of the production or distribution of goods or services, or to promoting technical or economic progress;

ii) provide consumers with a fair share of the resulting benefits;

iii) do not impose on the undertakings restrictions that are not necessary to attain these objectives; and

iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."

3.1 Efficiency advantages that can make a consortium lawful

§ 8. 1 of the Danish Competition Act means that a consortium composed of undertakings that are competitors can fulfil the conditions for the exemption from the prohibition in competition rules if through the collaboration they:

- » can give a more competitive offer than the one they would have been able to make individually, and
- » this benefits consumers, and
- » the collaboration does not go further than necessary to achieve that objective, and
- » the undertakings do not get the possibility of eliminating competition as regards the relevant contract

It will always be necessary to make a concrete assessment of this. Amongst other factors, the assessment will consider market conditions, the undertakings' market shares, the number of additional offers, the nature of the cooperative agreement and the products or services concerned by it.

Undertakings shall be the first to make an assessment of the different conditions and, if a case were to be opened, they shall themselves document that they fulfill the requirements.

As is the case when assessing whether an undertaking can complete a contract individually, the assessment ought to be made before submitting a bid for the contract.

A reference to a number of decisions that take a position as to whether a cooperative agreement fulfills the conditions can be found below. In addition to these examples, a reference can be found in the Commission's horizontal guidelines and the Commission's guidelines for the application of Article 101 (3) TFEU [previously article 81 (3)], which look further into the conditions for the exemption and give a number of examples of how the efficiencies will be evaluated in various types of cooperative agreements.⁴⁸

3.1.1. Efficiency gains

The cooperation shall lead to economic advantages in the form of efficiency gains. Efficiency gains can be both quantitative and qualitative.

Quantitative efficiency gains can for example be cost savings, including those resulting from economies of scale. For instance, it may be the case that the undertakings that take part in a consortium use different technologies, which together may be able to reduce the cost of performing the contract or where cooperation leads to economies of scale that likewise reduce costs. Cooperation can also mean that the contract can be completed in a shorter period of time.

Qualitative efficiency gains can for example consist of new or improved products or services. It may for example be the case that each of the two undertakings that are active in the same industry is particularly competent in a different specific area or that each has a particular know how and thereby together they can submit a more competitive bid than they could have submitted individually.

⁴⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation (2011/C 11/01), particularly paragraphs 187-193 and 252-256 together with Guidelines on the application of Article 81(3) TEC (2004/C 101/08).

It can also be the case that cooperation includes a large undertaking that does have the capacity to fulfill the contract individually but that collaboration between the large undertaking and a smaller one with a particular knowhow that could, for example, contribute with a particularly creative approach in order to complete the contract. The cooperation would make it possible to achieve a better result than if the parties bid alone.

As an essential aim is that overall the cooperation favors consumers/the contracting authority, efficiencies have to be of such a size that they can offset the anticompetitive restrictions, , and that it does not needlessly restrict competition.

Box 3.1
Examples of assessments of efficiency gains

Danish Road marking Consortium⁴⁹

As mentioned before, this case concerns a call for tenders for road markings. The two undertakings that bid jointly had shared different districts between themselves. This meant that the undertakings did not jointly carry out the contracts in each district. In addition, the collaboration did not generate synergies in the form of cost savings through economies of scales or a more efficient use of resources. Therefore, the Competition Council found that the cooperative agreement did not lead to efficiency gains.

Däckia/Euromaster case⁵⁰

This Swedish case concerns, as previously described, a call for tenders for a framework agreement to deliver tires to the police. The Court considered that, given the cooperative agreement did not lead to the integration of the undertakings' production or distribution, the collaboration did not improve them. Furthermore, the Court considered that the costs of preparing an offer were included in normal competition. Savings in this regard were not considered efficiency gains.

If a case were to be opened, it will for the parties to the agreement to document the efficiency gains, this includes their size, how they are achieved, and the link between the consortium agreement and the efficiency⁵¹. If the consortium agreement for example leads to cost savings, undertakings must calculate these. In the case of a new or improved product or service, companies must be able to explain the efficiencies generated.

Savings that only result from eliminating competition related costs are not considered efficiency gains. A reduction of transportation costs that is simply caused by sharing customers without integrating logistical systems can therefore not be regarded as an efficiency gain⁵². In general, neither will potential savings related to making the bid be considered an efficiency gain.

As a starting point, there shall be an integration of economic activities, and both parties must contribute with significant capital, technology, or other assets. There can also be cost savings by eliminating duplication of resources and facilities. However, joint commercialization that

⁴⁹ Decision of the Competition Council of 24th June 2015, Dansk Vejmarkerings Konsortium §804 The Competition Appeals Tribunal upheld it in its decision of 11 April 2016. The case is brought before the Maritime and Commercial Court where it is pending.

⁵⁰ Ruling of the Stockholms Tingsrätt of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 138 f.

⁵¹ Guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), §51.

⁵² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation (2011/C 11/01), § 247. See in addition the examples on joint selling that fulfill the exemption conditions in § 252-254

only involves a sales agency with no investment, will not, meet the requirements, but will more likely constitute a cartel⁵³.

Box 3.2
Examples of the need to document efficiencies

Ski Taxi/Follo Taxi case⁵⁴

This Norwegian case concerns joint bidding for patient transportation by two taxi companies and it is an example of the requirements to document efficiencies.

The Court held that it could not ignore the fact that cooperation could have led to efficiency gains in terms of better utilization of the total car fleet. However, the Court found that the parties had not sufficiently documented the probable benefits, since the calculations they provided were only to a limited extent based on facts and they contained few variables. It was therefore difficult for the court to assess the quality of the estimates

Skive and Omegn's Transport Association coordination of bids⁵⁵

In this case, which concerns winter road services (i.e. clearing roads of snow and salting) for a municipality, the association submitted a joint bid on behalf of its members. The call for tenders gave the possibility of bidding for individual routes. The undertakings considered that the cooperative agreement led to efficiencies as they led to a better utilization of driver's effective driving time within driving time regulations.

The Competition Council did not consider that such efficiencies were achieved, given the routes were shared between the companies in such a way that each individual company was required to perform the service in the same way as if he had been individually contracted for each route.

3.1.1.1. Risk spreading as an efficiency

For undertakings that take on new contracts, there will always be a risk which often also depends on how the call for tenders is designed. In addition, it will often be possible to take out insurance against certain kinds of risks. 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 offeror shall bear. Therefore, ordinary risk associated with taking on a contract should be seen as a part of normal competition.

However, as seen in Chapter 2, there may be situations where the risk associated with taking on a contract implies that a company is not in a position to be able to do the job alone - even if the company includes a high risk premium in the price. In such cases, cooperation is necessary, and companies will not be competitors in relation to that contract.

In many cases, the risk of taking on a specific contract cannot in itself justify that companies shall not be considered competitors with regards to the contract. In such cases, risk considerations will only determine that the agreement is lawful under the competition rules if risk diversification leads to or contributes to companies submitting a better bid together than they

⁵³ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-) (2011/C 11/01), §. 248.

⁵⁴ Decision of Borgarting Lagmanskrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 25.

⁵⁵ Decision of the Competition Council of 30 April 2014, *Skive og Omegns Vognmandsforenings tilbudskoordinering*, § 134.

would have been able to individually. This means that the consortium must fulfill the four conditions mentioned earlier, including that cooperation should lead to sufficient efficiency benefits, of which risk spreading can be a part.

Even if a company is in a position to assume the risks of taking on the contract, it is possible that the risk of the task associated with the contract make executing it more costly than if more companies could share this risk and thereby achieve, for example, a lower insurance premium. In this case, risk spreading could help to create efficiencies that result in a lower price of the contract. The companies must then be able to demonstrate the efficiencies that are gained through sharing risks and that they benefit consumers. No examples of this have been found in the case law.

The following box mentions two Commission decisions where risk is included as an element in determining whether the cooperative agreement resulted in efficiency gains. These decisions were taken before the termination of the possibility of notifying agreements to the Commission. Today's requirements concerning the need to document efficiencies are included in the Commission's guidelines and have been discussed in the previous section.

Box 3.3
Example of risk as an
element of the efficiency
assessment

Vacuum Interrupters case⁵⁶

This case concerns a cooperative agreement between the two companies to develop a vacuum interrupter. The Commission considered that the agreement was anticompetitive because the undertakings were potential competitors. However, the agreement fulfilled the necessary conditions for an exemption. The efficiencies the agreement led to consisted of the fact that the undertakings could together develop a model using fewer resources than if they were to develop it individually whereby they each had the opportunity in parallel to carry out other development contracts.

Sharing the large financial and technical risks associated with the contract would allow the undertakings to develop the product in less time.

GEAP/P & W case⁵⁷

This case concerns an agreement to develop a new type of aircraft motor. Although the agreement made it cheaper for the undertakings to develop the engine, the Commission considered that they were potential competitors because the development costs did not constitute a fundamental obstacle to the parties developing a new engine individually. Both companies had substantial financial resources and might thus be expected to bear the technical and financial risk involved.

As the collaboration allowed the undertakings to develop the new engine more quickly and cheaply than if they were to do it individually, the Commission considered however that the agreement led to efficiencies.

3.1.2. Pass on to consumers

The efficiency gains from agreements between competitors shall benefit consumers. This can for example take place in form of lower prices, better quality or a wider choice of the products or services concerned by the call for tender.. The advantages for consumers shall be of such a magnitude to at least offset the restrictive effects on competition that the agreement has for

⁵⁶ Commission decision of 20 January 1997 in case IV/27.442 – *Vacuum Interrupters Ltd.*

⁵⁷ Commission decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*.

them. Efficiencies that only benefit the parties to the agreement are not sufficient to meet the criteria of § 8 of the Danish Competition Act and Article 101 (3) TFEU.

"Consumers" is a broad term that covers all users of the product or service concerned by the consortium agreement, including for example, public entities responsible for a public call for tenders.

If a consortium that for instance participates in a public call for tenders where there are many participants and therefore there is effective competition for the contract, there will be greater likelihood that efficiencies are passed on to consumers in terms of lower offer price than if the consortium expects for example only another participant in the call for tenders.

Box 3.4
Example of assessment
of pass on to consumers

Catering case⁵⁸

The case concerns two catering companies respectively located in Zealand and Jutland. The two companies had agreed to present joint offers to customers who demanded nationwide coverage. One company would cover east of the Great Belt, and the other one west of the Great Belt. The goal of the agreement was to give the two catering companies the possibility to take part in competitions for contracts with nationwide scope. Nationwide coverage required distribution both in Zealand and Jutland.

The Competition Council considered that the agreement between the two catering companies restricted competition because it was not established that the investment costs etc. in themselves constituted such a barrier that cooperation was objectively necessary because neither of the two catering companies would be able to compete alone for nationwide delivery of catering goods.

The agreement was however exempted from the ban on restrictive agreements due to the market conditions, and because cooperation ensured a greater choice for customers.

Cekacan case⁵⁹

The case concerns a cooperative agreement for the production of a new type of food packaging. The Commission found that the agreement restricted competition because the parties were potential competitors. However, the agreement fulfilled the conditions for the exemption.

The efficiency the cooperation led to was the development of a new product that implied significant innovation. Food producers and final consumers would get a fair share of the benefit in the form of technical innovation for food packaging in the market. End users would also benefit from the cooperation through increased competition in the packaging market with the subsequent expected effects on packaging prices.

British Interactive Broadcasting/Open case⁶⁰

This case concerns an agreement for the development of digital interactive television services. The Commission considered that the agreement restricted competition because the parties were potential competitors. However, the agreement fulfilled the conditions for the exemption. The efficiencies consisted of making a new service available to customers through the cooperation, similarly it gave retailers of products and services a new provider.

⁵⁸ Decision of the Competition Council of 26 November 2003, *Samarbejdsaftale mellem Ove Juel Catering A/S og T.H. Schultz A/S*

⁵⁹ Commission's decision of 15 October 1990 in case IV/32.681 – *Cekacan*, §. 44-47.

⁶⁰ Commission's decision of 15 September 1999 in case IV/36.539 – *British Interactive Broadcasting/Open*, §. 141 and 159.

3.1.3. Indispensability

When cooperating with one or more competitors within a consortium which meets the above conditions, the parties will agree in aspects such as pricing, which are generally forbidden.

It is essential that the restrictions undertakings impose on each other are absolutely necessary in order to achieve efficiency gains and that the cooperation does not extend beyond the concrete cooperation either in time or in scope.

There shall be no other economically viable and less restricting ways of achieving the efficiencies.⁶¹ This can be either in the form of bidding instead individually or forming a consortium with undertakings other than the ones in the current consortium.

The agreement must also be implemented in the least restrictive way which for example means that information exchanges or the extent of pricing agreements may not go beyond what is strictly necessary for the cooperation.

3.1.4. No elimination of competition

Finally, a consortia agreement must not give the possibility of eliminating competition in respect of a substantial part of the products concerned by the agreement. This applies to both actual and potential competition. Ultimately, greater emphasis is placed on safeguarding competition and preserving the competition process than on the potentially pro-competitive effects that anti-competitive agreements might cause.⁶²

To determine if this condition is met, the size of the joint market shares of the parties to the consortium in relation to that of other possible bidders will be analyzed. Indeed, the lower the joint market share, the less likely it will be for the consortium agreement to eliminate competition. Conversely, the higher the market share of the cooperating undertakings is, the less likely that a cooperative agreement will fulfil this condition. Undertaking's market shares are determined with respect to the relevant market. The definition of the relevant market requires a specific assessment.

Box 3.5 Example of the assessment of no elimination of competition

Cementa/Aalborg Portland case⁶³

This Swedish case concerns a consortium agreement for the delivery of cement for the construction of the Great Belt bridge. The undertakings had requested the Swedish Competition Authority for an exemption in order to bid jointly. The Swedish Competition Authority considered that it could not be excluded that the cooperation led to savings costs, because it could lead to an efficient joint utilization of corporate resources. However, given the undertakings had market shares between 80 and 100 % in Sweden and Denmark, and that it would have been difficult for foreign cement producers to enter the market, the Competition Authority considered that the cooperation did not fulfil the exemption conditions as it could eliminate competition in a significant part of the market.

⁶¹ See, for example, the Competition Council's decision of 24 June 2015, *Dansk Vejmarkerings Konsortium*, §. 844.

⁶² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation (2011/C 11/01), §. 105.

⁶³ Decision of the Swedish Competition Authority of 12 Maj 1995, *Icke-ingripandebesked/undantag avseende samarbete i ett konsortium i cementbranschen*, Decision of the Stockholms Tingsrätt of 1 January 1997, *Cementa AB og Aalborg Portland A/S mod Konkurrensverket* and Decision of Marknadsdomstolens of 8 October 1997, *Konkurrensverket mod Cementa AB og Aalborg Portland A/S*.

3.2 Block exemptions

In addition to the possibility of exempting a particular cooperation agreement according to § 8 of the Danish Competition Act and also Article 101 (3) TFEU, a cooperative agreement can also be exempted under the existing block exemptions.

There are, for example, block exemption for certain categories of research and development agreements⁶⁴ and for certain categories of specialization agreements⁶⁵. The latter exemption applies to contracts for:

- i) unilateral specialization (agreements whereby one party fully or partly gives up manufacturing certain products or preparing of certain services in favor of another party)
- ii) reciprocal specialization (agreements whereby each party fully or partly gives up manufacturing certain products or preparing certain services in favor of another party), and
- iii) joint production

In addition, the following two conditions shall be met:

- The parties must not have a joint market share of over 20%, and
- The agreements must not contain hardcore restrictions of competition in the form of price fixing against third parties, restricting production or sale or sharing markets or customers

⁶⁴ Commission Regulation No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements. The regulation is implemented in the Danish Competition Act through the order no. 63 of 28 January 2011 on block exemption for certain categories of research and development agreements.

⁶⁵ Commission Regulation No. 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements. The regulation is implemented in the Danish Competition Act through the order no. 64 of 28 January 2011 on block exemption for certain categories of specialization agreements.

Chapter 4

Information exchange in relation to consortia

In addition to the fact that the formation of a consortium can be problematic in relation to competition law, one must also be aware of the competition rules in connection with information exchange. This applies to the discussions that companies have when they are considering whether to form a consortium, as well as to discussion while the consortium is active.

The exchange of competitively sensitive information between competitors can restrict competition. Competition sensitive information will typically concern prices, production, customers, markets, sales and costs, but can also concern other commercial terms. Inspiration can inter alia be found in the Danish Competition and Consumer Authority's guidelines on information exchange in industry associations.⁶⁶

4.1. Information exchange when a consortium is being considered

If an undertaking wants to bid jointly with one or more undertakings, an exchange of information between the undertakings that consider bidding together will take place.

If it turns out that the undertakings that have considered entering into a consortium will themselves be able to bid for the contract and, thus, they are competitors, the information exchange that has taken place, will in fact constitute information exchange between competitors. This will be a criminal offence if the information is sensitive from a competition perspective. It is therefore important that each undertaking clarifies beforehand whether it can complete the contract individually and thus whether the undertakings are competitors.

In general undertakings that work together within a consortium must only exchange information that is sensitive from a competition stance to the extent that is strictly necessary. This is no less applicable when setting up the consortium is being considered.

In order to assess the undertakings' combined capacity in relation to the requirements set in the tender materials, in many cases the undertakings will need to exchange information on their available capacity. Such information will often be characterized as a central parameter of competition. It is therefore important that the exchange takes place to the minimum possible extent and eventually following special procedures.

If the call for tenders includes a task that only few undertakings can perform, this can cause that various undertakings want to form a consortium with the same undertaking. In such a situation one should be particularly careful when exchanging information, so that no exchange of information that is sensitive from a competition perspective takes place between the parties that take part, or consider taking part in various bidding consortia.

⁶⁶ The Danish Competition and Consumer Authority's guidelines on information exchange in industry associations (2014) can be found in www.kfst.dk.

4.2. Information exchange while the consortium is active

Companies that cooperate in a consortium gain insight into each other's businesses. In order to prevent unlawful information exchanges, it is important to limit the exchange of competitively sensitive information to what is necessary in order to carry out the concerned cooperation. It is not lawful to exchange competitively sensitive information that goes beyond what is necessary to carry out the contract.

Even if a consortium is lawful because the undertakings that are parties to it, are not competitors in relation to the specific contract the consortium concerns, they can be competitors in relation to other contracts. It is therefore important to ensure that the exchange of information that takes place in the context of the consortium does not spill over to, or include, other activities they perform, and thus becomes a means for anticompetitive cooperation outside the consortium. This applies both while the consortium is active and afterwards.

Caution should also be exercised so that the close cooperation between undertakings that can be achieved within the consortium during the period covered by the agreement does not have a spillover effect on other contracts and contracts, both during the period covered by the agreement and after. This also applies to long term contracts and framework agreements.

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Chapter 5

The Danish Competition and Consumer Authority's prioritisation considerations

5.1 General prioritisation considerations

When the authority considers whether it will open a case concerning a possible breach of the competition rules, it follows the following criteria:

- » The case's seriousness as regards the breach of the competition rules
- » The cases' expected significance for the market, for competition culture and for the national economy
- » Whether the case addresses principal matters with new elements, that is, whether the case raises issues that have not been addressed before in the case law.
- » The expected number of the Authority's resources necessary to solve the case

5.2 Prioritisation considerations in consortium cases

As indicated in the introduction, some consortia are beneficial for competition, while others are harmful. Consortia that are harmful for competition can have the same effect as a cartel.

However, if it is considered that there is a high probability that the parties either cannot complete the contract individually or that the consortium fulfills the conditions that must be met for the consortium to be exempt under § 8 of the Danish Competition Act and possibly also Article 101(3) of the TFEU, the case will generally not be a priority.

If the consortium consists of companies with small market shares, and there has been effective competition in the relevant call for tender or calls for tenders, this will also reduce the likelihood that resources are allocated to the case.

The factors that comprise overall priority considerations include:

- » what undertakings have done before forming the consortium to investigate whether they themselves have the capacity to bid
- » the undertaking's possible prior use of an external advisor to clarify the consortium's legality, and what that counselor in this case has advised on
- » market shares of the undertakings that have come together in a consortium
- » whether the participants in the consortium are close competitors
- » whether it can be directly considered that there are efficiency gains from cooperation
- » how many other offers the client has received and how they have spread out.

Notwithstanding the above mentioned criteria, there may be cases that contain one or more principle matters and where, for this reason, the Danish Competition Authority will prioritize opening an investigation.

Chapter 6

Good advice

6.1 Good advice for companies that consider entering into a consortium

1. Clarify if the call for tenders gives the possibility of submitting bids for parts of the contract.
2. Make a realistic assessment of whether your company already has the capacity or whether it could be a sustainable economic strategy to expand the capacity to the one that would be necessary to bid alone.
3. Determine your own company's capacity before you start talks with other companies about establishing a consortium to bid for contracts.
4. Make sure you can document your calculations on capacity.
5. Do not exchange competition sensitive information with other companies before it is clear whether you are competitors in relation to the contract.
6. If you are actual or potential competitors but the collaboration leads to efficiencies make sure you can document them.
7. Remember that potential efficiencies (quantitative or qualitative) shall benefit consumers and must at least compensate the restrictions on competition.
8. Make sure not to include more companies than are necessary to fulfill the contract.
9. Do not exchange more information than necessary for the particular contract the consortium is established to fulfil.
10. If you are in doubt, seek legal advice.