When companies bid jointly

- guidelines for joint bidding under competition law

Guidelines

2020

KONKURRENCE- OG FORBRUGERSTYRELSEN

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This is an unauthorized translation of the Danish version which is the one the Council of the Danish Competition and Consumer Authority has approved.

In case of any discrepancy between the original Danish and the English translation of this text, the Danish text shall prevail.

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Chapter 1
Introduction

Call for tenders regarding public and private contracts are organized 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 agreements (in what follows cooperative agreements to submit joint bids will be referred to as "consortia agreements"). In Denmark this type of cooperation is quite common and can be valuable for the public as well as private contracting entities. However, this requires that such a cooperation does not in reality restrict competition and thereby infringe the Competition Act, but instead creates value for the customers.

Accordingly, undertakings must pay attention to competition rules when they consider entering into a consortium. Competition rules prohibit undertakings from entering into agreements that restrict competition. This prohibition has been in the Danish Competition Act since 1998 and has been applicable under the corresponding prohibition in EU´s competition rules since Denmark became a member of the European Communities in 1972, cf. box 1.1 below. The principles of this prohibition was also assessed in the Road Marking Case, which was upheld by the Supreme Court.[1]

Furthermore, it follows from competition rules that consortia agreements which benefit consumers are typically legal if a number of other conditions in the Danish Competition Act section 8 are fulfilled - even if the joint bidding consortium agreement may restrict competition, cf. chapter 3.

As a general rule a consortium agreement will typically be legal in accordance with the Danish Competition Act section 6 if the parties to a consortium agreement are not competitors as regards to the contract that the consortium is to carry out. In accordance with the Danish Competition Act section 8, this will also be the case if the undertakings cooperating in the consortium can carry out the contract significantly better and/or cheaper for the contracting authority than they could have done individually and if the undertakings do not exchange more information than necessary to fulfill the contract. Many consortia agreements will therefore be beneficial for competition.

A consortia agreements whose parties can each bid for the contract individually and are therefore competitors, and where the collaboration is not beneficial for the contracting authority and hence the conditions in the Danish Competition Act section 8 are not fulfilled will normally not be legal. Similarly, in exceptional circumstances it can be problematic if there are more parties than necessary to carry out the concrete contract, cf. section 2.2 below. Consortia agreements that weaken competition for a contract and that could eventually lead to higher prices have the same effects as a cartel. This form of cooperation is harmful for consumers, as well as for the great majority of undertakings that comply with competition rules.

[1] The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar A/S og GVCO A/S.*

The corporate structure of an undertaking does not change the assessment a company must carry out in relations to the competition rules. If the company e.g. is part of a group, this will be part of the assessment, the company must carry out before entering into a consortium. The key is to determine whether the company realistically would be able to handle the specific contract. For companies that are part of a group, the group´s capacity, knowhow, financial resources etc. will be decisive for the assessment of the company's capacity, knowhow and/or financial resources. If the company is part of a group with significant capacity, knowhow and/or financial resources, this will therefore also be part of the assessment of whether the company has the necessary capacity, knowhow and/or financial resources to bear the risks associated with the contract.[2]

It is the undertakings' own responsibility to comply with competition rules. Therefore, undertakings themselves shall assess whether a cooperative agreement is legal. In many cases, undertakings know whether a cooperative agreement will benefit consumers and whether the other conditions are fulfilled. But if there are doubts about whether a consortium agreement is legal, legal advice should be sought, e.g. from a lawyer, before commencing negotiations about the collaboration even though, this does not exonerate the undertakings from legal scrutiny.

Furthermore, undertakings may ask for informal guidance from the Danish Competition and Consumer Authority regarding an envisaged cooperative agreement. The process for obtaining informal guidance and the information to be provided is described in more detail in the Danish Competition and Consumer Authority´s guidelines on procedure in competition cases, which can be found in the authority's webpage (only available in Danish).

Box 1.1
The legal assessment of a consortium

According to the Danish Competition Act section 6:

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

The prohibition of agreements which restrict competition has, as mentioned above, been in the Danish Competition Act since 1998. It follows from the preparatory works of 1997 regarding the Danish Competition Act, that any restriction of competition is covered by the prohibition in section 6. Furthermore the criterion "as its object or effect" to restrict competition set forth in section 6 are two alternative criteria. Therefore the prohibition covers both agreements which have as their object to restrict competition, even though the agreements might not have these actual effects, and agreements which have as their effect to restrict competition, regardless of the intentions of the agreements.[3]

An agreement of entering into a consortium is also covered by the prohibition and has been since 1998, if it has as its object or effect to restrict competition. However a consortium would not restrict competition, when competitors bid jointly for a contract, if none of the undertakings would have been able to handle the contract alone (e.g. because of knowhow, capacity or economic resources).[4]

Similar it follows from the Commissions horizontal guidelines,[5] that:

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[2] See for example Commission´s decision of 14 September 1999 in case IV/36.213/F2 – *GEAE/P & W*, para 74.

[3] The preparatory works of the Danish Competition Act - Consolidation Act No 384 of 10 June 1997, FT.1996/1997, annex A, page 3659, left column.

[4] The preparatory works of the Danish Competition Act - Consolidation Act No 384 of 10 June 1997, FT.1996/1997, annex A, page 3659, left column.

[5] 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).

"Price fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing manufacturers or service providers."[6]

and, that

"A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)."[7]

1.1 Consortia agreements and competition rules

When there is competition for a contract, this results in lower prices and/or better quality. When two competitors, each of which is in a position to bid for a contract, enter into an agreement to bid jointly for the contract, there will be a risk that fewer bids are submitted than if the bidders had not entered into an agreement. This means that the competition and the uncertainty about competitors´ actions that otherwise would have taken place between the two bidders is eliminated and that the normal price competition in the market is distorted. This could normally lead to higher bids.

Many cooperations and joint bidding agreements will be legal according to the 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* the customers overweigh the negative effects for competition (and additionally certain other criteria are fulfilled cf. chapter 3).

As long as the participants are not competitors as regards the concrete contract, the fact that they form a joint bidding consortium agreement will normally not in itself be problematic under competition rules, unless there is some exceptional circumstances.

However, if the parties are actual or potential competitors in regards to the contract, it will have to be assessed whether the consortium agreement restricts competition (that is, whether the collaboration has the object or effect of restricting competition). If this is the case, and the consortium agreement moreover is not included in the *de minimis* rules (which only apply to "by effect" infringements) or in a block exemption, the consortium agreement will only be legal if it results in efficiency gains, if the efficiencies benefits the consumers, if the collaboration and the elements that restricts competition don't go further than what is necessary to carry out the contract and if the cooperation does not exclude competition for the contract.

Consortia agreements that leads to fewer, more expensive or worse bids are harmful to the contracting entity. Since they constitute an infringement of the Danish Competition Act, such consortium agreements are illegal and can be sanctioned.

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[6] 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), 234.

[7] 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), 237.

From a competition law point of view, the form or designation of the cooperation is not decisive. Accordingly, there are no special rules for joint bidding consortia agreements. It is the actual content of the collaboration and not its designation that is decisive for the competition law assessment.

The overall principles that are expressed in these guidelines may therefore also be applicable to other forms of collaboration between undertakings regarding procurement procedures, e.g. regarding subcontracting. Consortia agreements covers all collaborations, where the undertakings enter into an agreement in regards to a concrete contract in order to submit a joint bid. Collaborative agreements such as subcontracting agreements can take many different forms and it is not the purpose of these guidelines to go through all of them.

When interpreting Danish competition rules, EU practice is used as guidance, and in cases that affect trade between member states the EU competition rules are applied directly. The Danish Competition and Consumer Authority and the Competition Council aims to follow the practice of countries that similarly follow the Commission and the EU Courts. The guidelines have therefore been discussed with the Commission and competition authorities from other countries, and they include a number of EU decisions and decisions from other countries when the assessment of such cooperation is based on EU practice.

1.2 The Danish Competition and Consumers Authority's order of priorities

In accordance with the Danish Competition Act section 15, (1), third paragraph, the Danish Competition and Consumer Authority can decide, which cases the Danish Competition and Consumer Authority wishes to prioritize and spend resources on.

In recent years there have been a couple of competition cases about joint bidding consortia agreements in Denmark - in particular the Road Marking Case.[8] The judgment concerning the Road Marking Case by the Supreme Court established – similarly to the Competition Council and the Competition Appeal Tribunal – that a consortium agreement must be assessed in accordance with the analysis that has been established in recent case law. First, it must be assessed whether the undertakings are actual or potential competitors in regards to the contract in question. Second, it must be assessed whether the agreement has as its object or effect to restrict competition. Lastly, is must be assessed whether the cooperation leads to economic benefits in terms of efficiency gains, which is large enough to outweigh the restriction of competition. The Supreme Court stated in the Road Marking Case that the undertakings were actual competitors in regards to the contract in question, since both undertakings had capacity for one lot. Further, the Supreme Court stated that the consortium had as its object to restrict competition, since the consortium could not be characterized as a cooperation in production or similar, and therefore the agreement could only be seen as an allocation of the districts in question between the parties. Finally the Supreme Court found, that it was not established that the conditions for an individual exception in section 8 of the Danish Competition Act were met.[9]

[8] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk vejmarkerings Konsortium.* The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

[9] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium.* The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The

The cases concerning consortia agreements handled by the Competition Council falls within the category "to restrict competition by object". Especially since none of these consortia agreements could be characterized as a cooperation where the parties had integrated their resources in regards to assets and/or skills in order to produce the specific product. On the other hand, a consortium agreement would normally not be found to restrict competition by object, if the consortium agreement actual leads to an appreciable integration between the parties in order for the parties to submit a joint bid. In this case the consortium should be subject to a "by effect"-assessment, cf. chapter 2. If the consortium has as its effect to restrict competition, it must still be examined whether the consortium leads to efficiencies – e.g. because of the integration of assets and/or skills – which can overweigh the negative effects for competition, cf. chapter 3

In general, in the cases that have been opened, it have been considered clear and certain that there was not a relevant efficiency defense for the collaborations. This must also be seen in light of the lack of integration of the parties' resources in regards to assets and/or skills in order to take on the contract. These cases, which have been opened, must be seen as agreements concerning only market allocation and joint price setting.

The consortia agreements, which the Competition Council have looked into, did concern clear infringement of the Danish Competition Act. Furthermore, the agreements were entered into by close competitors with large joint market shares or within industries known for limited competition, cf. moreover box 1.2 for the Danish Competition and Consumer Authority's order of priorities.

Box 1.2
The Danish Competition and Consumer Authority's order of priorities

The Danish Competition and Consumer Authority prioritizes cases that causes the most harm to competition and the consumers. This can also involve matters of principle, which go beyond the specific case.

When examining whether the Danish Competition and Consumer Authority should prioritize a case, one or more of the following elements will normally be included in the examination:

- The parties have a large joint market share on the market where they normally compete,
- The parties' activities overlap a great deal, which means that the parties e.g. are not specialized within different segments,
- The cooperation does not involve an integration of the parties' resources in regards to assets and/or skills in order to produce a specific product or service in order to submit a joint bid,
- The cooperation does not lead to clear efficiencies,
- The parties have not made a real, realistic and sufficiently thorough assessment of, whether they could have submitted a bid alone, or
- The parties could each have submitted a bid for the contract on their own.

1.3 The content of the guidelines

The guidelines describe how the Danish Competition and Consumer Authority assesses consortia agreements according to competition rules.

Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

In order to avoid breaching competition law an undertaking that contemplates bidding for a contract together with one or more undertakings should consider a number of factors.

First and foremost undertakings shall clarify whether they can fulfil the specific contract individually. This depends inter alia on the way in which the call for tenders is drafted. If the undertakings, on the basis of an objective assessment establish that they realistically could or would be able to carry out the contract individually, but chooses to enter into a joint bidding consortium agreement, the cooperation may restrict competition (that is, have the object or effect of restricting competition). *Chapter 2* of these guidelines looks deeper into this assessment of when undertakings are actual or potential competitors.

If an undertaking can carry out the contract individually and the cooperation has the object or effect of restricting competition and otherwise is not included in a block exemption (or the competition law´s *de minimis* rules, which only apply to the so called "by effect infringements"), the undertakings will then have to determine whether there are efficiency gains associated to the consortium agreement that can outweigh the restriction of competition and whether these efficiencies benefit consumers. The guidelines ´ *Chapter 3* go deeper into the relevant criteria concerning efficiency gains and block exemptions.

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

1.4 Good advice for undertakings that are considering setting up a consortium agreement.

Based on these guidelines, below are a number of pieces of good advice for undertakings about which competition law considerations they should take into account when considering setting up a consortium agreement:

1. You can enter into a consortium agreement, if you objectively are not actual or potential competitors.

   As a starting point, your undertaking can enter into a consortium agreement, if your undertaking is neither actual nor potential competitor with the undertaking, who you consider entering into the agreement with - e.g. if your activities don't overlap in relations to the tendered contact - unless there is some exceptional circumstances, cf. section 2.2. Entering into such a consortium, would not create anti-competitive issues. However you must still consider other anti-competitive issues in relations to the arrangement of the consortium.

2. If earlier on, you have submitted a bid for the contract alone, this will point in the direction, that you can submit a bid on your own in a new call for tender in regards to the contract.

   If your undertaking earlier on was able to submit a bid for a contract, and thereby being capable of carrying out the contract on your own, this will point in the direction, that your undertaking will have the necessary capacity, knowhow and/or financial resources in order to maintain the contract alone in a new call for tender, unless e.g. there has been any changes to your undertakings capacity, knowhow and/or financial resources.

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

   You must establish whether your own undertaking´s capacity, know-how and/or financial resources is sufficient before you talk to other undertakings. The key is whether your undertaking objectively has the ability to carry out the contract - not whether you wish to carry out the

contract alone. Considerations in regards to "a sustainable economic strategy" are only relevant when assessing potential competitors, and are therefore of no relevance when assessing whether you already have the necessary capacity, knowhow and/or financial resources.

4. If you enter into a cooperation with a undertaking who you normally see as a competitor, and therefore have examined whether you can bid on the contract on your own, it can be an advantage to be able to document your calculations regarding i.e. capacity.

   In a possible competition case it can eventually be helpful to be able to document why you think that your undertaking does not have (and cannot achieve) the necessary capacity, knowhow and/or financial resources to carry out the contract concerned by the call for tenders and which considerations lies behind it.

5. If you are competitors in regards to the specific contract, make sure to avoid pure sales cooperation relating to the sale of the services or products offered.

   A consortium agreement between an undertaking and a competitor, which in reality is only an agreement concerning the sale of the undertakings' individual products or services would has as its object to restrict competition and thereby as a starting point be likely to be found illegal.

6. Avoid exchanging competitively sensitive information with other undertakings before it is clear whether you are (actual/potential) competitors regarding the contract

   Competitively sensitive information will typically concern prices, production, clients, markets, sales and costs.

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

   Even if the collaboration is legal it is important to remember that you may be competitors regarding other contracts. Exchanging competitively sensitive information beyond what is necessary can therefore be illegal.

8. If you are actual or potential competitors in regards to the specific contract but the collaboration leads to efficiency gains, which benefits the contracting entity and overweigh the restrictions of competition, it is an advantage to be able to document them.

   In a possible competition case it will be an advantage to be able to document that the joint bidding consortium agreement leads for example to lower prices, better product quality or wider choice of the products or services concerned by the call for tenders and that they have a scope that at least overweighs the restriction of competition.

   These can be for instance quantitative efficiencies, for example in the form of cost savings due to reduced duplication of resources or economies of scale.

   They can also be qualitative efficiencies for instance in the form of new or improved products or services.

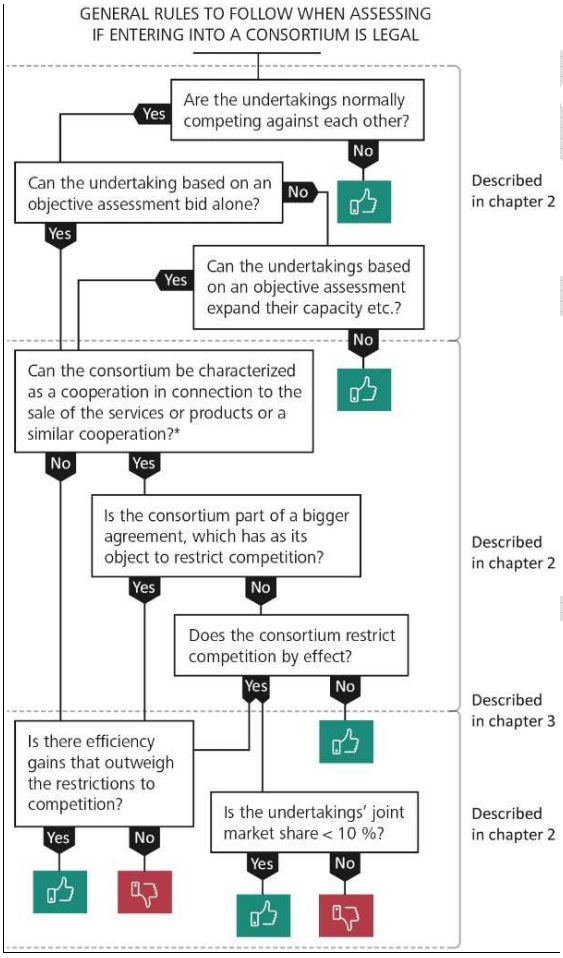
9. Do not extend the collaboration within the consortium agreement beyond the contract you teamed up to carry out.

   Even if you are not competitors regarding a specific contract you could be competitors regarding other contracts. You must make a case to case assessment of whether you can enter into a consortium agreement.

10. If you are in doubt, seek legal assistance.

The aspects that an undertaking must take into account to assess whether creating a consortium agreement in order to submit a joint bid is legal according to competition rules are summarized in the figure below. This is a stylized description and it might not be necessary to follow the figure step by step. The figure only focuses on the actual creation of the consortium agreement and therefore it does not cover other possible competition infringements that may follow from the collaboration such as illegal information exchanges (see chapter 4). For further details on how to assess a consortium agreement please refer to chapters 2 and 3.

If in advance you can clearly establish that a consortium with a competitor would resolve in efficiency gains, which benefits the consumers and which will outweigh any anti-competitive effects of the agreement, you may skip the first preliminary steps.



* This means, that the undertakings must integrate their resources in regards to assets and/or skills in order to produce a specific product or service.

Chapter 2
Does the consortium agreement restrict competition?

The general rule in competition law is that cooperations between undertakings (including joint bidding consortia agreements) which have the object or effect of restricting competition are forbidden. This follows from section 6 of the Danish Competition Act. If there is an effect on trade between Member States the consortium agreement will also contravene EU competition rules (Article 101 TFEU). Section 6 of the Danish Competition Act reads as follows:

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

In broad terms agreements between undertakings have the *object* of restricting competition from a competition law perspective when the agreement is capable of restricting competition. "By object" is therefore linked to the agreements characteristics in accordance to the characteristics of the market and not to what the subjective intention of the parties to the agreement may be. This category of agreement includes for example agreements on prices and market sharing. For other forms of cooperation (that are not included in the "by object category") an assessment of whether they have restrictive effects for competition will have to be made in order to determine whether they restrict competition *by effect* (see section 2.3.2).

A joint bidding consortium agreement is a collaboration between undertakings where the parties to the consortium agreement typically come together to submit a joint bid for a public or private contract. Entering into a consortium agreement can restrict competition if the parties are competitors regarding the contract. This will be the case if each of them can complete the concerned contract individually.

However, a joint bidding consortium agreement does not generally restrict competition if the undertakings that constitute the consortium agreement are not in a position to individually complete the contract. That can for example be the case if the undertakings produce different services and therefore belong to different industries. It can also be a possibility if the undertakings belong to the same industry but, for example due to the size of the contract or its complexity, objectively seen cannot carry out the contract individually. In that case, the undertakings will not be competitors in relation to that specific contract which as a general rule is what is relevant in the competition law assessment of a consortium agreement.

Even if the parties to a joint bidding consortium agreement are competitors in regards to the specific contract and the consortium agreement restricts competition, a consortium agreement can nevertheless be legal according to 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 assessment will have to be renewed for each new concrete call for tenders. It will therefore typically not be legal to have "steady" consortium partners to the extent that the collaboration goes beyond what is necessary in relation to the concrete calls for tender.

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

Collection of slum in Lombardy and Piemonte[10]

The case concerned five Italian undertakings which were active in the collection of slum. The undertakings were the largest in the market with a joint market share of over 50%, and they had been working together for several years to bid jointly for 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.

In the event that a competition case is taken up by the Danish Competition and Consumer Authority, it will be an advantage to be able to present any possible analysis or considerations that can justify the concerned consortium agreement collaboration.[11] This might result in the case not being prioritized by the Danish Competition and Consumer Authority.

2.1 When are undertakings competitors?

To assess the legality of a joint bidding consortium agreement it is decisive whether undertakings are competitors regarding the concrete contract the consortium shall carry out; not whether in general they consider each other a competitor. If each of 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 in relation to the concerned contract. Thus the concept "competitor" includes actual as well as potential competitors. Therefore, competitors are both companies that produce or supply the same product or service in question in the same geographic area (actual competitors), and undertakings that realistically and likely can develop their businesses to do so in the same geographic area (potential competitors).[12]

An assessment of potential competition in regards to the specific contract is standard practice in cases where companies collaborate.[13] 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 decisive whether the undertakings have concrete intentions to enter the market, but whether they have the skills to do so, see box 2.2.

[10] 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).

[11] See the Judgement of the Stockholm Tingsrätts of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 120.

[12] See 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), para 10.

[13] See for example the Court´s ruling of 8 September 2016 in case T-472/13, *Lundbeck mod Kommissionen*, para 100-105, the Court´s ruling of 21 May 2014 in case T-519/09, *Toshiba*, para 230-233 and the Court´s ruling of 29 June 2012 in case T-360/09, *E.On Ruhrgas AG, E.On AG*, para 86-87 and decision of the Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 14, as well as the uphold of the Konkurranseklagenemnda's decision of 31 August 2018, para 140.

Box 2.2
Example of the assessment of potential competition

Toshiba[14]

The case concerns a market sharing agreement between Toshiba and other undertakings 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.

Lundbeck[15]

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. The Commission's decision was upheld by the General Court, who pointed out that "*The case-law requires only that it be demonstrated that the generic undertakings had real concrete possibilities and the capacity to enter the market, which is certainly the case when those undertakings had made significant investments in order to enter the market and when they had already obtained MAs or had taken the necessary steps to obtain them within a reasonable period.*"[16]

Regarding joint bidding via a consortium agreement, if the undertakings that bid together are already in a position to bid for the tendered contract individually, this will mean they will be considered actual competitors in regards to the contract. If they do not already have the capacity, knowhow or the financial resources to carry out the contract individually, but realistically could acquire it within a short time frame, they are potential competitors in regards to the contract. What exactly is "realistically" will inter alia be an assessment made by the undertakings depending on e.g. the contract concerned by the call for tender.

It is of no importance for the assessment of whether the undertakings can be seen as competitors in regards to the contract whether the joint bidding concerns a tender for a public or a private contract. If an undertaking wants to participate in a call for tender concerning a private contract, e.g. the cleaning services at a private entity, the undertaking must make the same considerations as if it was a call for tender concerning a public contract.

The assessment of whether the undertakings can each complete a contract individually and are thus competitors in regards to the contract depends initially on the requirements included in the tender materials and must be objective.[17]

[14] Ruling of the EU Court of 20 January 2016 in case C-373/14 P, *Toshiba Corporation vs. European Commission*, para 31-34.
[15] Commission decision of 19 June 2013 in the Lundbeck case, which was upheld by the General Court judgment of 8 September 2016 in case T-472/13.
[16] The General Court judgment of 8 September 2016 in case T-472/13, para. 131.
[17] The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S,* page 8.

When the Danish Competition and Consumer Authority assesses in a consortium agreement case whether undertakings are each other´s *actual* competitors in regards to the tendered contract, it takes into account whether they already have what is needed (e.g. capacity, knowhow or financial resources) to bid on their own. This analysis is based on the resources that the companies have access to, cf. box 2.3.

Box 2.3
Example on an assessment concerning actual competitors

Danish Road Marking Consortium agreement [18]

This case concerns a call for tender for road marking. The Danish Road Directorate had arranged a tender concerning road marking in three different districts. It was possible to bid individually for three districts but also to submit a bid that covered one or two districts. Two of the biggest undertakings on the market decided to enter into the Danish Road Marking Consortium agreement and submit a joint bid covering three districts.

It was undisputed that each of the parties to the consortia agreements had what was needed to bid for one lot. Therefore, the Competition Council found that the parties of the consortium agreement were actual competitors since both had the financial resources, knowhow and access to the requirements concerning machines and staff. This was upheld by the Competition Appeal Tribunal's decision, who also found that the parties to the consortium agreement were actual competitors. The Supreme Court upheld this as well, and stated that the parties to the consortium agreement were actual competitions since it was undisputed that each of the parties could submit a bid for one lot.

When the Danish Competition and Consumer Authority assesses whether undertakings are each other´s *potential* competitors in regards to the contract, it takes into account whether it is realistic that the undertakings will for example be able to expand their capacity, knowhow and/or financial resources to the one needed to be able to bid for the contract individually, even if they do not currently have ability to do so. Whether the necessary development of capacity, knowhow and/or financial resources will constitute a sustainable economic strategy for an undertaking will always be a case by case assessment. This means that the mere theoretical possibility of carrying out a contract alone is not sufficient; the possibility must be real. The assessment shall also take into account whether the undertaking´s offer "enables profitable operations".[19] See box 2.4 below.

Thus, there must be a realistic assessment of whether a company in relation to the concrete circumstances, the market structure and its current size, will be able to acquire, within a short time frame, the capacity, knowhow and/or financial resources necessary in order to complete the contract on its own. Such an assessment will e.g. involve, whether the lacking capacity, knowhow and/or financial resources represents a limited part of the capacity, knowhow and/or financial resources the company already has. It will also be considered whether the company has undertaken contracts of a similar size before without collaborating with others.[20]

[18] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

[19] See decision of the Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 19.

[20] See for example the Commission´s Decision of 14 September 1999 in case IV/36.213/F2 – *GEAE/P & W*, para 74.

The assessment must be carried out on an objective basis, that is, it shall look into whether the undertaking has the ability to do so - not simply whether it has the intention to do so,[21] cf. box 2.4.

Box 2.4
Example of assessment of the expansion needs

El Proffen case[22]

This Norwegian case concerns the joint bid submitted by 5 electricity companies within a framework agreement, divided into 4-6 contracts. The Norwegian competition authority assessed, on the basis of the requirements included in the tender materials, whether each of the five undertakings would have been able to carry out the contract individually. As a part of this the authority assessed the employees needed to complete the contract in relation to how many employees each of the undertakings already had or planned to have. Furthermore, the authority looked into the possibility of hiring extra manpower in the case that a particular undertaking did not already have the needed manpower.

It was customary to rent in labour in case of capacity needs and the tender allowed rejection of assignments due to the lack of capacity. Taking this into account, the Competition Authority found that the five undertakings either already had the necessary capacity or that with some minor adjustments to the capacity they would be in a position to bid for the contract on their own.

The Norwegian Court of Appeal upheld the decision and added to the assessment that it was considered sufficient with 3-4 fitters for the contract in question which the undertakings already had at their disposal or could rent in.

In situations in which the tendering authority, following a pre-qualification phase, has selected a number of applicants to submit a bid, as a starting point, only these undertakings can be considered competitors as regards the specific call for tenders. The undertakings that are not prequalified are thus not competitors in regards the specific call for tenders. The equal treatment principle in the Danish Public Procurement Act might however prevent prequalified undertakings from entering into consortium agreement after they have been pre-qualified with undertakings that are not pre-qualified. Similarly, the starting point in call for tenders based on a by-invitation only procedure is that only the undertakings that are invited can be considered as competitors in relation to the call for tenders. Given such undertakings could be considered competitors in other contexts, it is important not to exchange more information than is strictly necessary, see chapter 4.

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.[23]

[21] See e.g the Konkurrenseklagenemnda's decision of 31 August 2018 in case 2018/112 and 2018/113, *El-Proffen AS/EP Contracting AS and others,* para 141.

[22] Decision V2017-21 of 4 September 2017 of the Norwegian competition authority´s case against mod *El Proffen AS/Ep contracting AS* m.fl., para 349 f and the upholding of Konkurranseklagenemda's decision of 31 August 2018, para 185f.

[23] See decision of 18 October 2010 from the Norwegian Competition Authority, *Johny Birkeland Transport as/Norva 24 AS – Lindum AS*, para 266-274.

2.1.1 **Is the collaboration objectively necessary?**

To assess whether undertakings may bid jointly it is essential that the cooperation between two companies is *objectively* necessary seen in its market context. It has however no significance in itself which subjective goal the companies pursue with the cooperation.[24] See box 2.5 below.

Box 2.5
Example of an assessment of objective necessity.

Case Däckia/Euromaster[25]

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 agreement, 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.

Renovation of schools and nursery schools in Vilnius[26]

Two Lithuanian construction companies had, within a two year period, given joint bids for 24 different call for tenders regarding the renovation of schools and nursery schools, The undertakings had entered into agreements about how to share the individual contracts and revenue between them if they won the contracts in question.

The Lithuanian competition authority assessed that the two companies 'experience in the area, the scope of the contracts and the market conditions and found that they each either could have bid individually for all the contracts or could have participated in the call for tender in a way that did not restrict competition. Consequently, the joint bid was not objectively necessary

Some tenders will be drafted in a way that the overall contract is divided into different lots, thus it is possible for undertakings to submit a bid covering just one lot. Prima facie this means – depending on the certain circumstances – that an undertaking will be considered a competitor, if the undertaking objectively has the capacity, knowhow and/or financial resources to submit a bid covering the same lot. The implication of the tender documents providing access to submitting partial bids is accounted for in the below-mentioned box 2.6.

Box 2.6
Examples of the implication of the possi-

Case Ski Taxi/Follo Taxi[27]

This case concerns a joint bidding by two taxi companies concerning a call for tenders for patient transportation in a number of districts in Norway. Capacity was one of the criteria that the

[24] See for example the ruling of the Stockholms Tingsrätts 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,* para 99. Also The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S,* page 8.

[25] Ruling of Stockholms Tingsrätts of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, pages 121-126.

[26] Decision of the Lithuanian competition authority of 21. December 2017 in a case against UAB Irdaiva and AB Panevezio statybos trestas.

[27] Decision of Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba,* pages 16-17. The decision was confirmed by the Norwegian Highest court on 22 June 2017 (HR-2017-1229-A).

bility to place individual bids on lots of the contracts in the assessment of whether undertakings are competitors in regards to a specific contract

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 og Omegns´ Transportation Association coordination of bids[28]

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 carriers where competitors in regards to the tender and that the consortium agreement restricted competition.

Danish Road marking Consortium agreement [29]

As mentioned before this case concerns a call for tender 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. A bid was to be submitted for each district. A bidder could offer a combined discount if the bidder could submit a bid on more than one district. The allocation criterion was the lowest possible price, which meant the combination of bids which together would resolve in the lowest price. The Supreme Court found that the assessment of whether the undertakings to the consortium agreement were competitors in regards to the contract in question, must be made on an objective basis of the requirements of the tender. Therefore, the course of events in a previous tender and similar circumstances which in the parties' opinion clearly encourages the parties to submit a bid covering all three districts and because of this none of the undertakings would have submitted a bid for one or two lots, were without importance.[30]

Furthermore, the Supreme Court stated that the tender was aimed at all undertakings in the market, who had the possibility to participated in the call for tender and thereby submit a bid covering one, two or three lots, thus the Danish Road Directorate wanted to receive the lowest price for the tender. In the Supreme Court's opinion there was no grounds for the tender only concerning a bid covering all the three districts hence the possibility to offer a combined discount. The other undertakings participating in the call for tender did, in addition to the above, only submit bids covering one or two lots.[31]

El-Proffen case[32]
This case concerns a joint bid submitted by 5 electricity companies. According to the tender document, framework agreements would be concluded with 4-6 undertakings in regards to

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

[29] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium.* The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

[30] The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar A/S og GVCO A/S,* page 8.

[31] The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar A/S og GVCO A/S*, page 8.

[32] Decision V2017-21 of 4 September 2017 in Konkurransetilsynets case against El Proffen AS/Ep contracting AS and others. The decision was upheld by the Konkurranseklagenemnda on 31 August 2018.

electrician work at schools. The selected suppliers should have the capacity to handle minimum three school groups each.

Based on an objective interpretation of the requirements in the tender documents, the Norwegian competition authority found that the contract concerned 4-6 framework agreements, where the undertakings individually could bid on a single framework agreement – and not as stated by the parties – were required to place a joint bid on the whole contract.

This was upheld by the Norwegian Appeal Court, which found that the division of the contract, with all clearness, showed that the contracting entity was intending to open the market to competition by letting suppliers place bids with varying capacity.

2.1.2 What are the contract´s capacity etc. requirements?

Assessing whether an undertaking can complete a contract on its own implies an overall assessment of the undertaking´s capacity, knowhow, financial resources etc. with respect to the contract and time horizon the call for tender concerns. The assessment can inter alia include aspects such as the undertaking´s access to workforce, knowhow and equipment in the form of machinery, etc. The requirements in the tender materials that can make it necessary to collaborate in a consortium agreement can for example concern experience or special knowledge, adequate quality assurance, the ability to complete the contract timely and sufficient capacity and financial strength to make the investments the contract requires.[33]

As to call for tenders for framework agreements, the assessment of whether an undertaking can complete a contract on its own is also based on the requirements the contracting entity sets to the undertakings that compete for the framework agreements. Typically they will be turnover requirements 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. Moreover, it has no significance that e.g. one or more of the participants in the joint bidding consortium agreement could individually fulfill the requirements in a subsequent mini-call for tender.

The following paragraphs include various examples of types of requirements that tender materials may include which can be relevant to the assessment of whether forming a consortium agreement is objectively necessary.

Requirements regarding economic resources
Some contracting entities may, in the tender materials, include requirements regarding the bidding entities 'economic resources. In order to assess the economic resources of an undertaking one of the aspects that is considered is whether undertakings have the financial strength to make the investments that are necessary to carry out the contracts. This might including an assessment of whether the call for tender has certain minimum requirements, e.g. equity requirements and turnover etc. If the tender materials for example require a turnover of 100 mill. DKK, it will be lawful for two undertakings, each of which have a yearly turnover of 50 mill. DKK, to bid jointly.

As mentioned earlier on, for companies that are part of a group, the group´s capacity, knowhow and/or financial resources etc. will be decisive for the assessment of the undertaking's capacity,

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

knowhow and/or financial resources when entering into a consortium. If the companies are part of a group with significant financial resources, this will therefore also be part of the assessment of whether the company has the necessary financial resources to bear the risks associated with the contract.[34]

Requirements regarding machinery, etc.
Likewise, the assessment of whether an undertaking can submit a bid individually includes whether the undertaking has the machinery etc. needed to complete the contract within the time frame specified in the tender materials.

If the undertaking does not already have what is necessary to perform the contract, it will be assessed whether the company can realistically acquire it within a short timeframe, 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 inter alia whether the undertaking realistically has access to finance the investments in new machinery within the time frame specified in the tender materials.[35] See box 2.7

Box 2.7
Practical example of relevant considerations regarding a possible acquisition of machinery

Undertaking A is considering bidding for a contract that requires an expensive and specialized machine that A does not have. A, however, knows that one of the other undertakings on the market, B, does have such a machine.

Which aspects should A consider to determine whether A can set up a consortium agreement with B and thus bid together for the contract?

Answer:

What is essential for A and B to be allowed to bid together is whether they are competitors in regards to the contract in question. A shall therefore first of all determine whether it is possible for A to bid for the contract alone. Relevant considerations in this regard could be:

Possibility for A to acquire the machine?
Possible purchase, rental or leasing?
The costs hereof and A's access to the funding hereof?
Appropriation period and potential resale value of the machine?

If A finds, after having considered the above-mentioned questions, that the acquisition of the machine is a realistic possibility and A can place a bid alone; then a joint bid between A and B could restrict competition.

Even if it turns out that A and B are competitors in regards to the contract in question, a joint bid from them could be legal inter alia depending on how the parties to a consortium agreement arrange the cooperation, including if the cooperation can be seen as a cooperation relating to the sale of the services or products or a similar integrated cooperation, and if they together can submit a more competitive bid that they each could submit individually, and these advantages for the customer outweigh the restrictions of competition. See chapter 3.

[34] See for example Commission´s decision of 14 September 1999 in case IV/36.213/F2 – *GEAE/P & W*, para 74.

[35] The Competition Council's decision of 24 June 2015 *Dansk Vejmarkerings Konsortium,* para 676 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

Requirements regarding staff. etc.
If the completion of a contract requires increasing the undertaking´s staff, attention will be paid to whether the undertaking has real possibilities to attain the qualified staff.[36] The assessment will always have to be on a case by case basis. This assessment includes inter alia which skills the mentioned staff must have in order to complete the contract (see box 2.8). The assessment also depends on whether it is for example normal business practice or if it is possible to hire additional staff or machinery for larger contracts. This can vary from industry to industry and over time.

Box 2.8
Example regarding access to staff

El Proffen case[37]

As mentioned before, this Norwegian case concerns a joint bid submitted by five undertakings for a series of framework agreements. The Norwegian competition authority considered that each of the five undertakings either had sufficient staff or had the possibility of hiring staff for the contract. The assessment took into account that in that industry it was common practice to hire staff. As a consequence, the undertakings were considered to be either actual or potential competitors.

The Norwegian appeal court upheld the decision and indicated additionally that the claim in the tender material, that the execution of the contract should occur by use of the Norwegian language, did not prevent the companies from hiring non-Norwegian labour.

Requirements regarding technology, special knowledge, know how, etc.
The assessment of whether a company can bid on its own also includes whether the undertaking has access to the technology, special knowledge and know-how that are necessary to be able to bid for a contract. Another relevant aspect can be the requirement of 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. If one undertaking does not have the necessary know how etc. in order to meet all the elements of the contract, this could justify collaborating with another undertaking that does possess this know how. Such collaboration can for example be based on the fact that one undertaking has special knowledge that is necessary in order to fulfill part of the contract. An example of this, which does not however concern a joint bidding consortium agreement, can be found in box 2.9. Even though the case mentioned below in box 2.9 does not concern a consortium agreement, the case in box 2.9 can be used as an example of the assessment an undertaking must make when looking into the requirements regarding technology, special knowledge, know how etc., since a similar assessment must be made when entering into a consortium agreement.

[36] Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*, para 687 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

[37] Decision V2017-21 of 4 September 2017 of the Norwegian competition authority´s case against mod *El Proffen AS/Ep contracting AS m.fl.*, para 361 f. The decision has been upheld by Konkurranseklagenemnda, para 221f.

Box 2.9
Example regarding access to technology and know how

Elopak/Metal Box-Odin-case[38]

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. The two undertakings 'experience and resources complemented each other, and it would have required bigger and time consuming investments if they each were to have developed the competencies they lacked. Moreover, the Commission considered that the risks and the financial burden associated to the development and subsequent commercialization of the product realistically prevented the parties from doing it individually. The assessment took into account that the technical risks associated with developing a completely new product which had not yet been tested and involved quite a new technology for both companies, would in reality prevent each individual party from attempting to carry out the research and development on their own. In addition, there would also be a need for subsequent servicing of the new product.

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 and working together with another undertaking that has a particular knowhow implies that together they can submit a better bid, the collaboration may nevertheless be lawful. This would require inter alia that the efficiency of the collaboration really benefit the contracting entity and that these advantages outweigh the possible negative effects of weakened competition, see Chapter 3.

2.1.3 What about the capacity that is reserved for other contracts?

The assessment of capacity is based on the actual capacity that the undertaking has or that will be available to the undertaking in the period during which the contract is to be completed. This means that an undertaking must carry out a specific assessment on a case by case basis concerning whether the undertaking realistically has the required capacity to take on the contract alone or can acquire it within a short timeframe.

One particular question in the Road Marking Case[39] was the question in regards to how much capacity could be considered "allocated" to other expected and future contracts. The Supreme Court did not address this question, since the Supreme Court found – just as the Competition Council and the Competition Appeal Tribunal did – that the parties to the Road Marking Consortium were actual competitors seeing that it was undisputed that the parties could bid on one

[38] Commission´s decision of 13 July 1990 in case IV/32.009 – *Elopak/Metal Box Odin.*

[39] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

lot. With this, the Supreme Court annulled the Danish Maritime and Commercial High Court's decision.

The Competition Council therefore considers, that the capacity that is already disposed of because it has to be used in agreements that the companies have signed beforehand, including capacity reserved for maintenance services, are therefore not included in the assessment. Contracts which the undertakings shall complete in the concerned period, will thus tie up capacity which cannot be used for other purposes. See more in box 2.10. Furthermore, the possibility of expanding capacity must be included in this assessment.[40]

In the assessment of whether an undertaking has the required capacity, conversely, as a general rule new contracts, which haven't already been allocated to a signed agreement, are not taken into consideration. In that case the undertaking would actually have available capacity in the period where the contract is to be completed, which means, that it would not be necessary for the undertaking to submit a joint bid in order to participate in the call for tender. 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 contract from a core customer is so recurrent that it is realistic and fair to reserve capacity to fulfil such contract. In those particular cases, it may be appropriate to include capacity requirements for these expected contracts.[41]

Thus it is necessary for the undertaking to document, that the contract in question is an expected contract from a core customer which it would be realistic and fair to reserve capacity for. However this documentation does not need to be a written agreement.

Box 2.10
Examples of cases that concern the question of whether capacity for other contracts can be deducted when determining spare capacity

Case Ski Taxi/Follo Taxi[42]

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 noted that in the determination of available capacity, the capacity for spot transportation and other contracts that were already signed had not been 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 case[43]

[40] Decision V2017-21 from 4 September 2017 in the case from Konkurransetilsynet *El Proffen AS/Ep Contracting AS and more*, para 361 f. The decision was upheld by the Konkurranseklagenemda on 31 august 2018, see para 227,

[41] See the Competition Council´s decision of 24 of June 2015, *Dansk Vejmarkerings Konsortium*, para 443 and 444.

[42] Decision of the Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, pages 16-17. This decision has been confirmed by the Norwegian High Court the 22 June 2017 (HR-2017-1229-A).

[43] 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 Konkurrensverket* and decision of Markmadsdomstolens afgørelse of 8 October 1997, *Konkurrensverket mod Cementa AB og Aalborg Portland A/S.*

This Swedish case concerns a consortium agreement 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 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 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 agreement was the only realistic way for the undertakings to participate in the concerned bidding.

The argument, that an undertaking does not wish to "put all the eggs in one basket" will as a starting point not be a sufficient argument concerning, why the undertaking does not have access to the necessary capacity.

Nevertheless, part of the assessment includes whether the undertaking has the economic resources to fulfill the contract which includes bearing the risks associated with the contract. See for instance case *Elopak/Metal Box – Odin* which is mentioned in box 2.9 above.

Therefore, the assessment of capacity includes risk and the need to spread risk as 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. What is essential for whether the risk that a contract entails make it necessary to bid jointly is whether, based on objective circumstances, it is realistic that the undertaking will be capable of bidding alone. Thus, the undertaking shall be capable of bearing the economic risk associated with offering the product or service either currently or with realistic measures.[44]

A case specific assessment of risk-related aspects will always be necessary. Risk can for example be a relevant aspect regarding a contract that requires developing a new product and where undertakings will not be in a position to bid individually because the necessary development costs are very high in relation to the undertaking´s size and because the project has a high risk of failure. On the other hand, cases that concern a serious infringement of competition rules cannot be justified by the parties´ potential wish to share commercial risk that is inherent to

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

business activities, or that are external e.g. through regulatory changes and shifts in demand, cf. box 2.11 below.

Boks 2.11
Practical example in regards to risk spreading

Undertaking A is active in the market for construction. A would like to bid on a tender for the construction of a new building. A assesses that A would have to take on a big risk if A was to bid on the contract alone, e.g. would A had to bear a fairly big risk premium which would resolve in an increase in A's price. As a result, A considers to enter into a consortium with A's competitor, B. If A and B enter into a consortium they would be able to share the risk related to the construction of the new building.

Can A and B enter into a consortium?

Answer:

A and B have to assess whether A and B realistically would be able to take on the construction of the building on their own. This means, that A and B have to assess, whether they have the resources, including capacity, to take on the construction on their own.

If the risk is so big, that A and B realistically cannot handle the contract on their own, then immediately A and B would not be seen as competitors in relations to the tender, and therefore could enter into a consortium agreement.

If A and B on the other hand do have the capacity required on their own, then A and B would be seen as competitors in regards to the specific contract. It is of no importance for this assessment, that A and B could share the risk.

Even if it turns out that A and B are competitors, a joint bid from them could be legal inter alia depending on how the parties to a consortium agreement arrange the cooperation, including if the cooperation actually does resolve in a reduction in the risk premium and these advantages for the customer outweigh the restrictions of competition. A and B must be able to document the above. See chapter 3.

Risk spreading can be part of an efficiency defense, but this requires, amongst other aspects, that the advantages also reach the contracting authority, see Chapter 3 for further details.

Box 2.12 refers to several cases that include references to risk spreading are mentioned below. However these cases only concern collaborations where the undertakings faced large development costs. Beyond the cases mentioned below, a reference can be made to case *Cementa/Aalborg Portland,* mentioned in box 2.10, where risk played a role in the courts assessment that the collaboration was necessary.

Box 2.12
Example where risk is included as part of the assessment of a cooperative agreement

Consortium ECR 900-case[45]

The case concerns a cooperation agreement to develop, manufacture and sell digital cellular mobile telephone systems (a new communication system, GSM). Given 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, the parties could not

[45] 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*, para 55, contains similar considerations.

be expected to be able to bear the financial risks linked with developing and producing the system individually.

As to the staffing requirements, the Commission considered that there was only a limited number of qualified engineers and that this number could not be increased within a short period of time. Moreover, the contract had to be completed within a short period of time and the costs to develop and manufacture the system where very high while it would take a long time to recover these cost.

Based on these considerations the Commission considered that the cooperation was lawful.

Collection of slum in Lombardy and Piemonte [46]

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 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 a serious infringement of competition rules 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 regulation or in demand.

2.2 Are there more parties to the consortium agreement than necessary?

If more undertakings than necessary are parties to a consortium agreement, the cooperation between them can potentially restrict competition even if not all of them can individually fulfill the contract. Whether this is the case will depend on a specific assessment of, inter alia, how the competition would most realistically play out without the consortium agreement in question.

If, for example, four undertakings form a joint bidding consortium agreement 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 specific call for tender. This could restrict competition.

Conversely, if it is not possible for the fourth undertaking to go together with other undertakings in regards to submitting an additional bid, the inclusion of the fourth undertaking in a consortium agreement will not result in there being fewer bids for the contract, and therefore there will be no immediate restriction of competition regarding the public contract.

In practice it will often be difficult to establish whether there are more parties to the consortium than necessary. The safest is therefore to avoid having more parties than necessary entering into a consortium (see box 2.13). As a starting point, the Danish Competition and Consumer Authority will prioritize the cases where the parties could each had submitted a bid for the contract on their own.

[46] Decision no. 25302 of 3 February 2015 of the Italian Competition Authority, *1765 Gare gestioni fanghi in Lombardia e* Piemonte. This decision was confirmed by the Italian Court (Consiglio di Stato) the 11 July 2016.

It is important to also pay attention to whether this assessment could raise some challenges related to information exchanges (see chapter 4).

Box 2.13
Example of agreements between competitors where they could have bid individually.

Däckia/Euromaster case [47]
In this case which, as previously described, concerns the supply of tires, two companies submitted joint tenders through the Swedish Tire Association (SDF). One of the companies (Däckia) had the capacity to bid alone, while the other (Euromaster) lacked the capacity to bid on its own. Given that Däckia could have bid alone and that Euromaster could have concluded a less extensive agreement with another undertaking, the cooperation between the undertakings was not considered necessary, and therefore the agreement had as its object to restrict competition.

The Swedish Competition Authority decided not to open a case towards the Swedish Tire Association (SDF).

Ski Taxi/Follo Taxi case[48]

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 agreement 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 consortium agreements[49], the court considered that a consortium agreement between two companies where only one would be able to tender alone could be legal. The decisive factor is whether the 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, given it was possible to bid on lots of the contract.

2.3 Assessment of consortia agreements between competitors in regards to a specific contract

The following paragraphs go through when consortia agreements by their very nature have the potential to restrict competition (and therefore in competition law terms have the object of restricting competition) and when it is necessary to assess whether a consortia agreements restrict competition by effect.

2.3.1 Consortia agreements that can restrict competition by object

Agreements that have as their *object* to restrict competition are characterized by the fact that by their very nature they have the potential to restrict competition. In competition law terms when it is said that an agreement restricts competition by object, this refers to the agreement´s real contents and not the subjective intention the undertakings pursue with the agreement

[47] Ruling of the Stockholms Tingsrätts of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 132.

[48] Decision of the Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, pages 16-17. This decision has been confirmed by the Norwegian High Court the 22 June 2017 (HR-2017-1229-A).

[49] Norwegian Competition Authority´s guidelines on consortium agreements. The guidelines are available in www.konkurransetilsynet.no.

For this type of infringement (by object) competition authorities will generally not have to identify harmful effects for consumers. However, the Danish Competition and Consumer Authority will generally assess potential harmful effects for competition, including whether there is a so called "efficiency defense "(see chapter 3), before potentially opening a case. If in a preliminary assessment it is considered that the joint bidding consortium agreement entails efficiencies for consumers, a case will generally not be opened even if the agreement could fall in the "by object" category. These efficiencies must outweigh the restrictions on competition caused by the agreement, which is rarely the case when assessing an agreement, which has as its object to restrict competition

As to the case law, there are a number of competition restrictions that are generally considered to restrict competition "by object" (by their very nature). This applies *inter alia* to price agreements, coordinating offers and market and customer sharing, but it also depends, amongst other aspects, on the content of the agreement.

As a starting point a consortium agreement that in reality only covers joint selling - with joint bidding and joint price setting - typically restricts competition by object.[50] A consortium agreement that realistically can be seen as solely a cooperation regarding the sale of the services or products would as a starting point have as its object to restrict competition. This means, that if the consortium can be characterized as a cooperation regarding the sale of the services or products without any integrated of the undertakings resources in regards to assets and/or skills in order to produce a specific product or service, the consortium must be subject to a "by object"-assessment. However, this will not necessarily be the case if the center of gravity of the agreement is another, for example, joint production where the parties to a consortium actually integrate their resources in regards to assets and/or skills in order to produce the specific product or service, in order for the consortium to take on the contract. In this case normally, a by effect assessment shall be made in cases concerning a consortium, see also paragraph 2.3.2, unless specific circumstances leads to a different result, e.g. if the cooperation is part of a bigger agreement concerning market allocation.

Assessing whether an agreement restricts competition by object is based, as mentioned before, on objective grounds. As a starting point, it has no significance which subjective intention the undertakings pursued with the agreement.[51] Even if the undertaking's subjective intention with the agreement was not to restrict competition, the agreement can well be assessed as a by object infringement (because the infringement by its nature has the potential to restrict competition). In concrete cases the subjective intention could however be part of the evidence in determining that the parties with the agreement had as their object restricting competition.[52]

In box 2.14 there are a number of examples of consortia agreements that have been considered to restrict competition by object based on the fact that they constituted a market sharing agreement or a joint pricing agreement.

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[50] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018, page 9-10.

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

[52] See EFTA Court Ruling of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA and Ski Follo Taxidrift AS*, para 89 and 106-108, as well as the Ruling of Stockholms Tingsrätts of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 134.

Box 2.14
Example of consortia agreements that are considered by object restrictions of competition

Däckia/Euromaster case[53]

As previously indicated, this Swedish case concerns 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 sales collaboration 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 case[54]

As described above, this case concerns joint bidding for patient transportation. The Norwegian Supreme Court upheld the Norwegian Competition Authority´s decision according to which the collaboration between the two taxi companies on 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 (and to section 6 of the Danish Competition Act). 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 Norwegian Supreme Court pointed out that it was not decisive that the two taxi companies were small companies, *inter alia* because they must have known that there were hardly any other competitors in the concerned area.

School busses[55]

This French case concerns a consortium agreement 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. It was stressed that the objective goal of the agreement was to share markets and maintain the price levels and that the cooperation was not necessary for the undertakings to be able to bid. Therefore, the agreement restricted the number of possible bids.

Railroad switches[56]

This case concerns the 14 year long joint bidding by four suppliers of railroad switches in the Spanish market. The Spanish competition authority found that each of the four undertakings could have bid individually and that there was no objective justification for the undertakings to bid together in a joint bidding consortium agreement. The joint bidding was considered to restrict competition by object.

Renovation of schools and nursery schools in Vilnius[57]

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[53] Ruling of the Stockholm Tingsrätts of 21st January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 132 f. The Tingsrätten references, inter alia para 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.

[54] Ruling of the EFTA Court EFTA of 22 December 2016 in case E-3/16, *Ski taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS*, para 89-94. This decision has been confirmed by the Norwegian High Court the 22 June 2017 (HR-2017-1229-A).

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

[56] Decision of the Spanish competition authority of 30. June 2016, case S/0519/14, *Infraestructuras Ferroviarias.*

[57] Decision of the Lithuanian competition authority of 21. December 2017 in a case against UAB Irdaiva and AB Panevezio statybos trestas.

As previously mentioned, this Lithuanian case concerns the joint bid of two construction companies for the renovation of schools and nursery schools. The Lithuanian Competition Authority considered that the collaboration was not objectively necessary and that it constituted a by object infringement.

Danish Road Marking Consortium[58]

The case concerns the tender for road marking. The Supreme Court established, that the consortium could not be characterized as a production cooperation or a similar cooperation in regards to the sales of the contract in question. Because of this the Supreme Court found, that the cooperation actually concerned the sales of the parties' individual services through a joint bid and setting prices jointly. Thereby the parties had eliminated the competition that should have taking place between the parties. The consortium therefore had as its object to restrict competition.

2.3.2 **Consortia agreements that can have as their effect restricting competition**

If an agreement does not restrict competition *by object,* it can only breach competition rules if it restricts competition *by effect.*

It is of no relevance for the assessment of whether joint bidding has the object or effect of restricting competition whether it has been a completely open and public collaboration.[59] It is however possible that this can be relevant when determining a potential fine for taking part in an illegal collaboration.

An agreement is considered to restrict competition by effect when it has - or is likely to have - a significant negative effect on at least one of the competition parameters in the market, for instance price, production or quality. Therefore it will be a case by case assessment whether an agreement has the effect of restricting competition.

An example of when a collaboration will be subject to a "by effect"-assessment can be a production cooperation where it is the joint production - and not for example the joint distribution - that is the center of gravity of the agreement.[60] Even if such an agreement for example also includes the joint distribution of the products which are produced jointly or includes a provision on jointly setting prices for these products, the agreement will prima facie generally be assessed according to its effects (as "by effect"). This is due to the fact, that when the joint production is the center of gravity of the agreement, the joint price setting etc. is ancillary to the production cooperation This requires however that these restrictions are necessary for the joint production, that is, that otherwise the parties would have had no incentives to enter into the production cooperation.

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[58] The Danish Competition Council's decision of 24 June 2015, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018, page 9-10.

[59] See Stockholms Tingsrätts´Judgement of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 134, as well as the EFTA Court Judgement of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA og Ski Follo Taxidrift AS*, para 106-108.

[60] 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, para 13-14 and 150 f. Also The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S,* page 9-10.

If the parties to a consortium can be seen as competitors in regards to a call for tender and if the consortium cannot be characterized as a production cooperation or in any other way resolves in an integration of the parties' resources in regards to assets and/or skills in order to produce the specific product or service, and thereby making it possible for the parties to produce a better/cheaper product to the contracting entity, than if they submitted a bid alone, the consortium should be assessed according to a "by object"-assessment.[61] On the other hand, the consortium should be assessed according to a "by effects"-assessment, if the parties have integrated their resources in regards to assets and/or skills in order for the parties to deliver a better result for the contracting entity, than if they were to submit a bid on their own. Unless specific circumstances leads to a different result, e.g. if the cooperation is part of a bigger agreement concerning market allocation.

What constitutes the center of gravity of the agreement will have to be assessed on a case by case basis. The decisive matter, as to whether a consortium can be viewed as a production cooperation, is whether the parties to the consortium agreement is considered to have integrated their resources in regards to assets and/or skills in order to provide the specific product.

If the collaboration leads to a significant integration of assets and/or skills, for instance a new production facility which both parties have a stake in, then this will generally be viewed as a joint production. This might be the case if two manufacturers initiate a cooperation regarding the production of spare parts for cars that both manufacturers use in the cars they each produce and they build a new factory for the production of the spare parts in question. If on the other hand, there is limited or no integration of assets and/or skills that are needed in the production of the goods in question, as included in the biding contract, then the center of gravity of the contracts would typically not be viewed as a joint production.

If the collaboration is instead closer to a means for the parties to sell products or services jointly in order to eliminate competition between them, this will typically be considered joint selling.[62]

Regarding services, the assessment can probably be a little different as there are generally no activities that can be pooled together. However, the principle mentioned above remains the same; the higher the degree of integration, the more likely that the collaboration will not be considered to constitute a by object infringement but rather that it will be subject to a by effect assessment.[63] This can e.g. be the case, where the cooperation is entered into by two undertakings that have different specialized qualifications, and where this qualifications are integrated in regards to the contract. This could e.g. be one undertaking with a specialized qualification in relations to a specific service and where the possibility to hire staff with specialized expertise is not a realistic option, and another undertaking with a specialized qualification in relations to staff with specialized expertise. In this case, the undertakings could integrate their specialized qualifications in order for them to deliver a better bid for the contract, than if they submitted a bid on their own. This would be an integration of the undertakings skills.

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[61] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortiu*m. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

[62] The Supreme Court's judgment of 27 of November 2018 in the case 191/2018, *Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S*, page 9-10. Also Cyril Ritter: *Joint Tendering under EU Law*, Concurrences N° 2-2017, pages. 60-69, para 50-51.

[63] See Cyril Ritter: *Joint Tendering under EU Law*, Concurrences N° 2-2017, pages. 60-69, para 50-51.

On the other hand, an agreement where e.g. two undertakings, that are active in the transport business, place a joint bid without an integration or merger of an essential part of those assets that are to be used in the delivery of the offered transport services (e.g. undertakings' fleet of cars), would typically not be viewed as a production cooperation. If two undertakings bid together on a building contract where the cooperation does not entail appreciable integration of the undertakings' assets, e.g. tools, materials, machines or offices and if they share the assigned contract between them so that they each complete certain parts of the contract with their own assets, then this would typically neither be viewed as a production cooperation.[64]

As mentioned before, it is the actual content of the agreement concerning joint bidding and not the form the agreement takes or its designation that is essential to how it is assessed. It is therefore not possible to avoid a "by object"-assessment simply by naming an agreement a production or subcontracting agreement. The same is the case where the parties assets are not integrated in order to carry out the contract, but are integrated in order to avoid a "by object"-assessment.

Furthermore, the Danish Competition Act section 7 includes a *de minimis* rule, which is relevant in cases concerning "by effect". According to this provision, a joint bidding consortium agreement between undertakings that are actual or potential competitors in regards to the contract in question and where the parties have a joint market share under 10% will not be included in the prohibition of agreements that restrict competition, unless it has the object of restricting competition. If covered by the *de minimis* rule, a consortium agreement will thus be legal even if it has the effect of restricting competition.[65]

The determination of the parties' joint market share shall be made according to the market, where the parties normally compete, and therefore not the tendering contract. The determination must therefore be established in accordance with the rules in the Danish Competition Act´s section 5 and the Commission's notice on the definition of the relevant market.[66] Depending on the concrete market circumstances and on the frequency of transactions in a given market, a retrospective view over a certain period can in certain circumstances give a more accurate picture of the undertakings' position in the relevant market.

The decisions named above in box 2.14 are characterized by a joint bidding consortium agreement considered to restrict competition by object. Precedents regarding joint bidding consortium agreements that only restrict competition by effect are scarce, which can be seen as an expression of the fact that competition authorities in general prioritize cases that constitute the most serious infringements of competition rules. Outside the consortium agreement context in-

[64] The Competition Council's decision of 24 of June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018, page 9-10.

[65] As well as the 10% threshold, section 7 of the Danish Competition Act also includes a 15% threshold for agreements between non competitors. This threshold will typically apply to agreements between undertakings that operate in different levels of the production chain for example, an agreement between a supplier and a retailer, and therefore will more often not be relevant for consortia agreements.

[66] See memo on the public hearing (høringsnotat) regarding the proposal to amend the Danish Competition Act of 27 September 2017, Erhvervs- Vækst- og Ek-sportudvalget 2017-18, L6, Annex 1, page 4.

ter alia is an example of a case which on appeal was considered to require a "by effects"-assessment. This is the Swedish Aleris Diagnostik ruling[67] regarding a subcontracting agreement in connection with the submission of a bid for a contract.

[67] Judgement of the Swedish Patents and Markets Court of 28 April 2017 in case *Aleris Diagnostik AB, Capis A:t Görans Sjukhus AB og Hjärtkärlgruppen i Sverige AB mod Konkurrensverket.*

Chapter 3
Efficiency gains by consortia agreements

As previously mentioned, a joint bid between undertakings which individually could complete the contract may has as its object or effect to restrict competition.

If the undertakings can submit a more competitive bid jointly than if they each bid separately, the joint bidding agreement can still be lawful even if the undertakings are competitors in regards to the specific contract. However, this requires that the collaboration fulfils a number of conditions, including that it benefits consumers. The concept "consumer" is wide and covers all the customers of products or services concerned by the consortia agreements, including, where the context is a public call for tenders, public contracting entities.

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

Even if the undertakings that participate in a joint bidding consortium can complete the contract individually, a consortium agreement can still be lawful if its advantages for consumers outweigh 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 agreement to be exempted from the prohibition of agreements that restrict competition. The conditions for the exemption can be found in section 8.1 of the Danish Competition Act and Article 101 (3) of the TFEU. If these conditions are fulfilled, the prohibition in section 6 of the Danish Competition Act and in Article 101 (1) TFEU (if it affects trade between Member States) are not applicable, and in such a case the agreement is automatically lawful according to competition rules.

3.1 Efficiency gains that can make a consortium agreement lawful

Section 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 decisions 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."

A consortium agreement composed of undertakings that are competitors in regards to the specific contract can fulfil the conditions for the exemption from the prohibition in competition rules if through the collaboration:

» they can submit a more competitive bid than the one they would have been able to submit individually,
» this to a reasonable extent must benefits consumers,
» the collaboration does not go further than necessary to achieve that objective, and
» the undertakings do not get the possibility of eliminating competition for the concerned contract.

It will always be necessary to make a concrete assessment of whether these conditions are fulfilled. Amongst other factors, the assessment will take into account the 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. These are explained in more detail in the following paragraphs.

If a case were to be opened, the undertakings themselves will have to document that the consortium agreement fulfills the exemption conditions. Therefore, it would be a good idea to make an assessment of whether the conditions for the exemption are fulfilled before submitting a joint bid for the contract. In particular the first and second conditions regarding the fact that the consortium agreement shall bring about sufficient efficiency gains that benefit consumers.

The Commission has in the horizontal guidelines and the Commission´s guidelines for the application of Article 101 (3) TFEU [previously article 81 (3)] elaborated further on the conditions for the exemption and give a number of examples of how the efficiencies will be evaluated in various types of cooperative agreements, cf. box 3.1 below.[68]

Box 3.1
Efficiency gains in accordance with art. 101 (3) TFEU

The Commission's guidelines on efficiency gains[69]

The Commissions has drafted guidelines on the application of efficiency gains in accordance with art. 101 (3) TFEU. When assessing whether an agreement leads to efficiency gains, the undertaking can, as a starting point, consider these guidelines.

Among other things it follows from the guidelines how an undertaking can assess whether an agreement which restrict competition might lead to efficiency gains that compensate for any negative impact caused by the restriction of competition and benefits the consumer. E.g., it follows that:

» Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive.[70]

» This assessment must be objectively. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree

[68] 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), particularly paragraphs 187-193 and 252-256 together with Guidelines on the application of Article 81(3) TEC (2004/C 101/08).
[69] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08).
[70] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08), para 33.

to fix prices or share markets they reduce output and thereby production costs. Such cost reductions does however not produce any pro-competitive effects on the market, and will therefore not compensate for any negative impact caused by the restriction of competition.[71]

» In general, efficiencies stem from an integration of economic activities whereby undertakings combine their resources in regards to assets and/or skills to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.[72]

» Consumers must receive a fair share of the efficiencies generated by the restrictive agreement. E.g. If a restrictive agreement is likely to lead to higher prices, consumer must be fully compensated through increased quality or other benefits.[73]

» In assessing whether the efficiencies brought by the agreement cannot be achieved by less restrictive means, the market conditions and business realities facing the parties to the agreement must be taken into account. Undertakings invoking the benefit are not required to consider hypothetical or theoretical alternatives.[74]

3.1.1 **Efficiency gains**

The cooperation that leads to a joint bid must bring economic benefits in terms of efficiency gains. This means that there should be efficiencies associated with the fact that two or more undertakings bid jointly instead of individually. Efficiency gains can be quantitative as well as qualitative.

The efficiencies shall be large enough to outweigh the competition restrictions as it is essential to ensure that the collaboration in general benefits consumers/the contracting entities and does not unnecessarily hinder competition. This will always be a case by case assessment. Therefore, it is not possible to give general criteria about how large the efficiencies have to be in order to fulfil the conditions.

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 joint bidding consortium use different technologies, which combined may be able to reduce the cost of carrying out the contract or where cooperation leads to economies of scale that likewise reduce costs. The cooperation can also enable the contract to be completed in a shorter period of time.

Qualitative efficiency gains can for instance consist of new or improved products or services. For example, it may 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.

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[71] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08), para 49.
[72] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08), para 60.
[73] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08), para 83 and 86.
[74] Commissions' Guidelines on the application of Article 81(3) TEC (2004/C 101/08), para 75.

It can also be the case that the cooperation includes a large undertaking that does have the capacity to carry out the contract individually but that the collaboration between this and a smaller undertaking with a particular know-how which could for example contribute with a particularly creative approach to complete the contract, could lead to a better result than if the parties bid alone.

Box 3.2
Example of assessments of efficiency gains

Däckia/Euromaster case[75]

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. Therefore, in this regard savings were not considered efficiency gains.

In general, a case concerning a consortium will not be opened if based on the available evidence, the Danish Competition and Consumer Authority considers in a specific case that the collaboration leads to sufficient efficiencies for consumers/contracting entities.

If a case were to be opened, it will be incumbent on the parties to the agreement to document the potential efficiency gains which includes their size, how they are achieved, how the consortium is necessary to achieve the efficiencies.[76] If a case is opened it will be important that the undertakings can document that collaborating though a consortium can for instance lead to cost savings. In the case of e.g. a new or improved product or service undertakings must be able to explain the efficiencies.

How to document efficiencies will depend on the concrete circumstances. For example, if the parties decide to build a joint production facility because this would put them in a position to offer a lower price for their products or services due to economies of scale that enable the undertakings to produce more cheaply, the parties would usually already have made these calculation etc. which can be used for this purpose.

Nevertheless, it is not enough that the collaboration makes it possible for the undertakings to produce more cheaply; the gains also have to benefit consumers, for example in the form of lower prices. If the competition authority in a specific case has concerns regarding the joint bidding consortium, it will be important for the undertakings to be able to document how lower costs will translate into e.g. lower prices.

Savings that only result from eliminating competition related costs are not considered efficiency gains. The Danish Competition and Consumer Authority does not generally consider that the potential savings related to presenting a bid constitute efficiency gains.

[75] Ruling of the Stockholms Tingsrätts of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page138 f.
[76] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), para 51.

In box 3.3 three cases where competition authorities have assessed efficiencies and the documentation of efficiency gains are mentioned. Furthermore, the Commission´s guidelines mention a number of examples of such an assessment.[77]

Box 3.3
Examples of the need to document efficiencies

Ski Taxi/Follo Taxi case[78]

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 og Omegn´s Transport Association coordination of bids[79]

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 allocated by lot so that each individual company was required to perform the service in the same way as if he had been individually contracted for each route.

Danish Road Marking Consortium[80]
The case concerned a tender for road marking. The parties to the consortium had argued that the consortium lead to efficiency gains. Firstly, since the consortium resolved in access to further machinery and staff. Secondly, the consortium resolved in the possibility for the parties to pull on each other's resources if necessary. Thirdly, the access to a larger capacity would resolve in a reduction in the possibility for breach of contract and damages, which would benefit The Danish Road Directorate since the parties would be joint and several liable.

The Competition Council found that the consortium did not lead to synergies through e.g. cost reductions resulting from economies of scale or a more effective use of the parties' resources etc. compared to the situation, where the parties would have bid individually. Moreover, prior to the bid, the parties had divided the three districts between them, therefore the parties did not integrate their machinery or staff.

The Supreme Court stated that the parties hadn't been able to establish that the conditions for efficiency gains were fulfilled.

[77] 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), para 187-193 and 252-256.

[78] Decision of Borgarting Lagmanssrets of 17 March 2015, *Staten v/ Konkurransetilsynet (Norge) mod Follo Taxisentral Ba, Ski Follo Taxidrift AS og Ski Taxi Ba*, page 25. This decision has been confirmed by the Norwegian High Court the 22 June 2017 (HR-2017-1229-A).

[79] Decision of the Competition Council of 30 April 2014, *Skive og Omegns Vognmandsforenings tilbudskoordinering*, para 134.

[80] The Competition Council's decision of 24 June 2015, *Dansk Vejmarkerings Konsortium.* The decision was upheld by the Competition Appeal Tribunal in the decision of 11 of April 2016 in the cases KL-2-2015 and KL-3-2015, but revoked by the Maritime and Commercial High Court in the judgment of 27 of August 2018 in the cases U-2-16 and U-3-16. The Supreme Court revoked the Maritime and Commercial High Court's judgment, and thereby upheld the decision of the Competition Council and the Competition Appeal Tribunal, in the judgment made by the Supreme Court 27 of November 2018 in the case 191/2018.

Risk spreading as an efficiency gain

For undertakings that take on new contracts, there will always be a risk which 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 bidder shall bear. Therefore, ordinary risk associated with taking on a contract is seen as a part of normal competition.

However, as seen in section 2.1.3 of the previous chapter, there may be situations where the risk associated with taking on a contract implies that a company objectively seen is not in a position to be able to carry out the contract alone - even if the company includes a high risk premium in the price for the contract. In such cases, cooperation will be necessary and the undertakings will therefore not be competitors in relation to that contract.

Normally the risk of taking on a specific contract cannot in itself justify that companies are not 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 spreading and other potential aspects as a whole lead to companies submitting a better and/or cheaper bid than they would have been able to submit individually. This means that the consortium agreement must fulfill the four conditions mentioned earlier, including that the cooperation leads to sufficient efficiency benefits, of which risk spreading can be one element.

Thus, even if a company is in a position to assume the risk of taking on the contract on its own, it is possible that the risk associated with the contract makes 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 contribute to achieve efficiencies that result in a lower price for the contract. In a potential competition case (where the competition authorities as a starting point have concerns about whether the conditions are fulfilled) it will be important that undertakings can show the efficiency gains that are linked to the undertakings sharing that risk and that they benefit consumers – and, in addition, that the efficiencies are large enough to outweigh the restrictions of competition.

Box 3.4 describes two Commission decisions where risk-sharing was included as an element in determining whether the cooperative agreement resulted in efficiency gains. These decisions were taken before the elimination of the possibility of notifying agreements to the Commission. The requirements concerning the need to document efficiencies are included in the Commission´s guidelines[81] and are discussed in the previous section.

[81] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08).

Box 3.4
Examples where risk is included as an element of the efficiencies assessment

Vacuum Interrupters case[82]

This case concerns a cooperative agreement between two companies to develop a vacuum interrupter. The Commission considered that the agreement restricted competition because the undertakings were potential competitors. However, the agreement fulfilled the 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 for the development.

Consequently, sharing the large financial and technical risks associated with the contract led the undertakings to develop the product in less time.

GEAP/P & W case[83]

This case concerns an agreement between two of the three players in the market 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 in the past made significant investments in product development and both were part of groups that had substantial financial resources. Thus, they were to be expected to be able to bear the technical and financial risk involved in developing a new type of aircraft motor.

However, the collaboration allowed the undertakings to develop the new engine more quickly and cheaply than if they were to do it individually. The Commission took into account that the parties possessed complementary technological know-how which enabled them to develop a cheaper and more environmentally friendly motor. Therefore the collaboration meant that they could develop the motor in less time and more cheaply because each of them could contribute with their top technological skills. Consequently, the Commission considered that the agreement led to efficiencies.

3.1.2 **Pass-on to consumers**

The efficiency gains from collaborations between competitors concerning joint bidding shall benefit consumers. As previously stated, the concept "consumers" covers all the customers of products or services concerned by the consortia agreements, including for example in a public call for tenders, public contracting entities.

For example, efficiencies can materialize in the form of lower prices, better product quality or wider choice of the products or services concerned by the call for tenders. Box 3.5 describes a number of relevant decisions.

The efficiency gains for consumers/contracting entities shall be of such a magnitude as to at least offset the actual or potential restrictive effects on competition that the collaboration has for them. Efficiencies that only benefit the parties to the joint bidding consortium agreement are not sufficient to meet the criteria of section 8 of the Danish Competition Act and Article 101 (3) TFEU.

[82] Commission decision of 20 January 1997 in case IV/27.442 – *Vacuum Interrupters Ltd.*
[83] Commission decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*.

The assessment of whether the efficiencies are passed on to consumers/contracting entities to a sufficient degree will be a concrete case specific assessment. It is not required that consumers receive a share of each and every efficiency gain identified.[84]

The greater the degree of competition, the more likely it is that the cost efficiencies will benefit the consumers.[85] On this basis, the efficiency gains associated to the undertakings bidding jointly for a contract through a consortium are more likely to be passed on to consumers in the form of lower prices if it is expected that there will be many participants in the call for tenders and competition for the contract is thereby effective than if, for example, only one other participant is expected to compete for the contract.

Box 3.5
Examples of assessments of pass-on to consumers

Catering case[86]

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

The Competition Authority considered that the agreement between the two catering companies restricted competition because it was not considered 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 otherwise be able to compete alone for nationwide delivery of catering goods.

Nevertheless, the agreement was exempted from the prohibition of restrictive agreements because of the market conditions, and because the cooperation ensured a greater choice for customers. The particular market circumstances determined that only few companies actually or potentially had the necessary capacity to bid for large country wide customers´ call for tenders.

Cekacan case[87]

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. Moreover, the collaboration meant that the new product could be spread out throughout the Community in less time. 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 case[88]

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.

[84] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), para 86.
[85] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), para 97.
[86] Decision of the Competition Council of 26 November 2003, *Samarbejdsaftale mellem Ove Juel Catering A/S og T.H. Schultz A/S*
[87] Commission´s decision of 15 October 1990 in case IV/32.681 – *Cekacan*, para 44-47.
[88] Commission´s decision of 15 September 1999 in case /V/36.539 – *British Interactive Broadcasting/Open*, para 141 and 159.

The efficiencies consisted in making a new service available to customers through the cooperation; similarly, it gave retailers of products and services a new provider. Each of the parties contributed with special expertise which overall made it possible to develop a better television service. In addition, the collaboration made it possible to develop the services faster.

3.1.3 **Indispensability**

When cooperating with one or more competitors within a cooperation agreement which meets the above conditions, the parties will often agree on aspects, which otherwise would be strictly forbidden to agree on, such as pricing, It is therefore 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 neither in time nor in scope.

There shall be no other economically viable and less restricting way of achieving the efficiencies.

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.

The assessment of indispensability must be made within the actual context in which the agreement operates. This means that the structure of the market, the economic risks related to the agreement, and the incentives facing the parties must be taken into account.[89]

3.1.4 **No elimination of competition**

Finally, a consortium must not afford the possibility of eliminating competition in respect of a substantial part of the products concerned by the agreement. I.e. the reduction in competition following the agreement.[90]

To determine if this condition is met, the size of the joint market shares of the parties to the consortium agreement in relation to that of other *possible* bidders will be analyzed. The players in the market will normally have a good sense of how many other undertakings *could* bid for the contract. Typically, the higher the joint market share of the parties to the consortium agreement the more likely that a consortium agreement eliminates competition.

Box 3.6
Example of the assessment of no elimination of competition

Cementa/Aalborg Portland case[91]

This Swedish case concerns a consortium agreement for the delivery of cement for the construction of the Great Belt bridge. The undertakings had asked the Swedish Competition Authority for an exemption in order to bid jointly. The Swedish Competition Authority considered that it might lead to cost savings because it could lead to an efficient joint utilization of the undertakings´ resources. However, given that the undertakings had market shares between 80 and 100 % in Sweden and Denmark respectively, and that it would have been difficult for foreign cement producers to enter the market, the Competition Authority considered that the cooperation did

[89] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), para 80.

[90] Commission´s guidelines on the application of Article 81(3) TEC (2004/C 101/08) (2004/C 101/08), para 107.

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

not fulfil the exemption condition that the collaboration may not eliminate competition in a significant part of the market.

3.2 Block exemptions

In addition to the possibility of exempting a particular cooperation agreement according to section 8 of the Danish Competition Act and potentially to Article 101 (3) TFEU, a cooperative agreement can also be exempted under the existing block exemptions, for example, the block exemption for certain categories of research and development agreements [92] and for certain categories of specialization agreements[93]. 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%,
- The agreements must not contain hardcore restrictions of competition in the form of price fixing vis à vis third parties, restricting production or sales or sharing markets or customers.

[92] 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.

[93] 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 agreements

When forming a consortium or when considering doing so, 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 while the consortium is active.

The exchange of competitively sensitive information between competitors can restrict competition. If an undertaking gains knowledge about its competitors´ market strategy this could reduce the undertakings independent decision making and their incentive to compete.

Competition sensitive information will typically concern prices, production, customers, markets, sales and costs, but can also concern other commercial terms. The competition rules in this area are *inter alia* described further in the Danish Competition and Consumer Authority's guidelines on information exchange in industry associations[94] and in the Commission´s horizontal guidelines. [95]

The more undertakings that exchange such information, the bigger the risk that the exchange restricts competition. As stated in chapter 2 it does not always restrict the number of possible bids that there are more parties to a joint bidding consortium than necessary. However, there may be other derived anticompetitive concerns as a consequence of exchanging sensitive information to a higher degree than if it only is the absolutely necessary number of companies, who participates.

Therefore it is important, that the undertakings pay attention to the competition rules in connection with information exchange, and secures, that only competitively sensitive information are being exchanged to the extent that is strictly necessary.

There is many ways an undertaking can ensure this. It is e.g. a normal part of a merger & acquisition process to lay down a procedure for how to exchange only a minimum of potentially sensitive information to the fewest possible individuals. The potential acquirer and vendor can e.g. arrange a team, who receives and processes all relevant information. These teams can be called "clean teams" and their function is to act as a mediator between the acquirer and vendor. They must collect and screen the material from the acquirer and vendor. By doing this, no sensitive

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

[95] Commission´s guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), in particular para 55-110.

information will be exchanged directly between the acquirer and vendor. It is important to secure, that the flow of information is "one way", meaning the clean team only can receive information from the acquirer and vendor, but not pass on the information.[96]

A similar process can be used when entering into a consortium.

4.1 Information exchange when a consortium agreement is being considered

If an undertaking wishes to bid jointly with one or more undertakings, an information exchange between the undertakings that are considering bidding together will take place. Undertakings can only exchange competitively sensitive information to the extent that is strictly necessary. This is no less applicable in the phase where setting up the consortium agreement is being considered. It is therefore important that the undertakings assess whether they can bid alone before they begin exchanging sensitive information.

If it turns out that the undertakings that have considered entering into a consortium agreement could have bid for the contract on their own and, thus, are competitors in regards to the specific contract, the information exchange that has taken place will in fact constitute an information exchange between competitors. Exchange of competitively sensitive information may be sanctioned.

In many cases, in order to assess the undertakings' combined capacity, knowhow and/or financial resources in relation to the requirements set in the tender materials, the undertakings will for instance 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 depending on what is necessary in the concrete situation to ensure this. In some situations it can be appropriate to designate a third party to handle the information that is sensitive from a competition point of view regarding e.g. available capacity, knowhow and/or financial resources, so that the parties to the consortium agreement will only access this information when it is clear that they can bid jointly. In other situations specially appointed workers that are bound by confidentiality clauses may be responsible for handling information in this phase.

Firstly, the exchange of information ought to be limited to what is strictly necessary in order to assess whether the potential parties to a joint bidding consortium agreement would be able to complete the contract alone. If this means that it is necessary to exchange information on free capacity, knowhow and/or financial resources, this ought to be restricted to what is absolutely necessary and done after the above mentioned principles. Other sensitive information on for example costs, strategy or prices ought not to be exchanged at this point.

If after these initial contacts it is clear that the potential consortium agreement partners can bid alone, as a general rule no further information exchange between the undertakings should take place unless the consortium agreement in question fulfils the conditions for an individual exemption that are described in Chapter 3. In that case the undertakings could exchange competitively sensitive information to the extent that this is necessary in order to complete the contract. This means that undertakings may exchange information that is necessary to determine whether the collaboration will make it possible for them to submit a more competitive bid than if they each bid individually and if the efficiency gains the collaboration entails are passed on to

[96] Commissions' decision of 24. April 2018 in case M.7993, Altice/ PT Portugal, para 437-439.

consumers. Given these information will be sensitive from a competition perspective the information exchange should as mentioned above, depending on the circumstances, take place following special procedures.

Conversely, if it turns out that the potential parties to the collaboration would not be able to complete the contract individually and therefore cannot submit an independent bid, the information exchange between the undertakings will constitute an information exchange between undertakings that are not competitors in relation to the concrete contract. In such a case the undertakings can exchange the information that is necessary to bid together and to be able to complete the contract if the consortium agreement wins the contract. However, it is important to be aware that the undertakings may be competitors in other contexts and therefore caution must be exercised.

If the call for tenders includes a task that only few undertakings can perform, this can cause that various undertakings want to form a joint bidding consortium agreement with the same undertaking. In such situations one should be particularly careful when exchanging information, so that no exchange of competitively sensitive information takes place through the undertakings that take part, or consider taking part in various bidding consortium agreements.

4.2 Information exchange while the consortium agreement is active

Undertakings that cooperate in a consortium agreement 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 agreement is lawful because the undertakings that are parties to it are not competitors in relation to the specific contract the consortium agreement 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 agreement does not spill over to or include other activities they perform and, thus, becomes a means for anticompetitive cooperation outside the consortium agreement. This applies both while the consortium agreement is active and afterwards.

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