When companies bid jointly

- guidelines for joint bidding under competition law

Guidelines

2020

Konkurrence- og Forbrugerstyrelsen

When companies bid jointly

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In case of any discrepancy between the original Danish text 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 public or private contract. Often these forms of cooperation are called "consortia agreements" even though the designation of the cooperation is not decisive for the assessment of the agreement under the competition rules. In Denmark, this type of cooperation is quite common and can be valuable for public as well as private contracting entities. However, this requires that such a cooperation does not in practice restrict competition thereby infringing the Competition Act, but rather that it 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, but 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 were 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[2], are typically lawful when a number of other conditions in Section 8 of the Danish Competition Act are fulfilled - even if the joint bidding consortium agreement may in principle restrict competition, cf. Chapter 3 below.

As a general rule if the parties to a consortium agreement are not competitors for the contract, the consortium is to carry out, a consortium agreement will typically be legal in accordance with Section 6 of the Danish Competition Act. Following Section 8 of the Danish Competition Act, this will also be the case if the undertakings cooperating in the consortium can carry out the tendered 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 it. Many consortia agreements will therefore be beneficial for competition.

On the contrary, a consortia agreement whose parties can each bid for the contract individually and are therefore competitors, and where the collaboration is not beneficial for the contracting authority will usually not be legal, since the conditions in Section 8 of the Danish Competition Act are not fulfilled. Similarly, in special circumstances it can be problematic if there are more parties to the consortium than necessary to carry out the tendered contract, cf. section 2.2 below. Consortia agreements that weaken competition for a contract, potentially leading to higher prices have the same effects as a cartel. This form of

[1] cf. The Supreme Court's judgment of 27 November 2019 in case 191/2018, *Konkurrencerådet vs. Eurostar A/S and GVCO A/S*.

[2] The concept "consumers" includes all the customers of products or services concerned by the consortia agreements, including for example, public contracting entities in a public call for tenders. See further details in Chapter 3.

cooperation is harmful for consumers, as well as for the great majority of undertakings that comply with competition rules.

When considering the relevant capacity, know-how and/or financial resources for a particular contract, the undertaking will have to take into account whether they are part of a group. The formal corporate structure is not decisive for this assessment.[3]

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 lawful, 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 Section 6 of the Danish Competition Act:

"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.[4]

Accordingly, since 1998 if a consortium agreement has as its object or effect to restrict competition, just as all other agreements, such an agreement will also be covered by the prohibition. However a consortium will not restrict competition, when competitors bid jointly for a contract, but none of the undertakings would have been able to handle the contract alone (e.g. because of know-how, capacity or economic resources).[5]

Similarly, it follows from the Commission horizontal guidelines[6], that:

[3] cf. For example Commission´s decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*, paragraph 74.

[4] cf. 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] cf. 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.

[6] cf. The Commission´s guidelines of 14 January 2011 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) ("The horizontal guidelines").

"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."[7]

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)."[8]

1.1 Consortia agreements and competition rules

When there is competition in a tender, this results in lower prices and/or better quality on the contract performance. When two competitors, each of which is in a position to individually bid for a contract, enter into an agreement to bid jointly for it, 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 competition in the market is distorted. This could normally lead to more expensive or inferior bids.

Many cooperation arrangements 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 regard to the concerned contract or because the gains of cooperating for inter alia the customers outweigh the negative effects for competition (and additionally certain other criteria are fulfilled cf. Chapter 3).

As long as the participants are not competitors for the tendered contract, the fact that they form a joint bidding consortium agreement will normally not in itself be problematic under competition rules, unless there are some exceptional circumstances, e.g. if there are more parties to the consortium agreement than necessary, cf. section 2.2.

However, if the parties are actual or potential competitors for the specific 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 will only be legal if it results in efficiency gains benefitting the consumers, if the restrictive aspects of the collaboration on competition don't go further than what is necessary to carry out the tendered contract and if the cooperation does not exclude competition for the it.

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[7] cf. The horizontal guidelines, paragraph 234.
[8] cf. The horizontal guidelines, paragraph 237.

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 consortia agreements are illegal and can be sanctioned.

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.

These guidelines concerns all forms of collaboration between undertakings regarding procurement procedures where the undertakings submit a joint bid. The overall principles that are expressed in these guidelines may therefore also be applicable to other forms of collaboration e.g. subcontracting. However, subcontracting will not be reviewed further in these guidelines.

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 aim for a consistent practice of the other countries following the Commission's and the EU Courts' precedents. These guidelines have therefore been discussed with the Commission and competition authorities from other countries, and the guidelines include a number of EU decisions and decisions from other countries where the assessment of such cooperation arrangements is based on EU practice.

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

In accordance with the third paragraph in Section 15 (1) of the Danish Competition Act, the Danish Competition and Consumer Authority has discretion to prioritize.

In recent years there has been a couple of competition cases about joint bidding consortia agreements in Denmark - in particular the Road Marking Case[9]. The Supreme Court's judgment concerning the Road Marking Case established – similarly to the Competition Council and the Competition Appeal Tribunal – that a consortium agreement must be assessed in accordance with the competition law analysis that has been established in recent case law. First, it must be assessed whether the undertakings are actual or potential competitors for the tendered contract. 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 efficiency gains, which outweigh the restriction of competition. The Supreme Court stated in the Road Marking Case that the undertakings were actual competitors for the contract in question, since both undertakings had capacity for one lot. Further, the Supreme Court stated that the consortium was objectively capable by nature (and had as its object to) restrict competition, since the consortium could not be characterized as a production agreement 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

[9] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

conditions for an individual exemption were met as provided for in Section 8 of the Danish Competition Act t.[10]

If the consortium agreement leads to a significant integration between the parties of the agreement in order for them to submit a joint bid, the consortium agreement would normally not be found to restrict competition by object. In this case, a 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 outweigh the negative effects for competition, cf. Chapter 3.

It was determined in the cases that have been investigated, that there was a lack of integration of the parties' resources in regards to assets and/or skills in order to take on the tendered contract; and there was no relevant efficiency defense for the collaborations. The investigated cases just concerned agreements on market allocation and joint price fixing, and therefore fall within the category of "restrictions by object".

The Competition Council has found that the investigated cases, concerned clear infringements of the Danish Competition Act. Furthermore, the agreements were entered into by close competitors with large joint market shares or within industries characterized by limited competition, cf. also 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 will prioritize cases that cause the most harm to competition and the consumers. This can also involve matters of principle, going beyond the specific case.

When examining whether the Danish Competition and Consumer Authority should prioritize a case concerning a joint bidding agreement for a specific contract, the existence of one or more of the following elements will normally be important:

- The parties have a large joint market share in the market of which the tendered contract is part,
- The parties' activities are to a large extent overlapping , e.g. the parties are not specialized within different segments,
- The cooperation does not involve an integration of the parties' resources in regard to assets and/or skills in order to produce a specific product or service in order to submit a better joint bid,
- The cooperation does not lead to clear efficiencies, or
- The parties could each have submitted a bid for the contract on their own.

[10] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

1.3 The content of the guidelines

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

In order to avoid infringing upon competition law, an undertaking contemplating to bid for a contract together with one or more undertakings should consider a number of factors.

First and foremost undertakings must clarify whether they can fulfil the specific contract individually. This depends inter alia on the way in which the call for tenders is designed. If, on the basis of an objective assessment, the undertakings establish that they realistically could or would be able to carry out the contract individually, but choose to enter into a joint bidding consortium agreement anyway, 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 tendered contract individually, the cooperation has the object or effect of restricting competition and is otherwise not included in a block exemption (or the competition law´s de minimis rules, which only apply to the so called "infringements by effect"), the undertakings will then have to determine whether there are efficiency gains associated to the consortium agreement. Those efficiency gains must outweigh the restriction of competition and benefit consumers. Chapter 3 below goes deeper into the relevant criteria concerning efficiency gains and block exemptions.

It should also be noted that the fact that information exchanged between the parties to a joint bidding consortium agreement or between undertakings contemplating such possibility will often concern 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 these guidelines.

1.4 Good advice for undertakings contemplating a consortium agreement.

On the basis of these guidelines, the list below outlines some advice on key competition law considerations, which undertakings should assess when contemplating a consortium agreement:

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

   As a starting point, your undertaking can enter into a consortium agreement, if it is neither actual competitors for the specific contract nor potential competitors for the specific contract with the undertaking, with which you consider entering into the agreement. In this case, entering into such a consortium would not create anti-competitive issues, unless there is some exceptional circumstances, e.g. if there are more parties to the consortium agreement than necessary, cf. section 2.2.

   However you must still consider other anti-competitive issues in relations to the arrangement of the consortium. For instance, the cooperation foreseen must not go beyond what is necessary to perform the contract, such as exchanging sensitive information in relation to markets where you are actual or potential competitors.

2. If earlier on, you have submitted a bid for the contract on your own, this will be an indication, that you can submit a bid on your own in a new call for tender for the same or a similar contract.

If your undertaking earlier on was able to submit a bid for a contract, and thereby was capable of carrying out the contract on its own, this will indicate, that your undertaking will have the necessary capacity, know-how and/or financial resources in order to undertake the same or a similar contract on its own in a new call for tender, unless e.g. there have been any changes to your undertakings capacity, know-how and/or financial resources.

3. Make a realistic assessment of whether your undertaking can be seen as an actual competitor or a potential competitor for the tendered contract.

   You must establish whether your undertaking's capacity etc. is sufficient to bid on your own before you talk to other undertakings. The key is whether your undertaking objectively has the ability to carry out the tendered contract on its own - not whether you wish to undertake the contract alone.

   Actual competitor for the tendered contract: make a realistic assessment of whether your undertaking already has the capacity, know-how and/or financial resources required to carry out the contract on its own. Considerations in regard to whether your undertaking wishes to carry out the contract on its own are not relevant to this assessment.

   Potential competitor for the tendered contract: your undertaking must make a realistic assessment of whether your undertaking objectively have a real concrete possibility to expand its capacity, know-how and/or financial resources necessary for it to bid on its own.

4. If you enter into a cooperation with an undertaking, and have examined whether you can bid on the specific contract on your own, it is advisable to keep documentation of your calculations regarding, for instance, capacity.

   In the event of a competition case it would be advisable to be able to document why you think that your undertaking does not have - and cannot achieve - the necessary capacity, know-how and/or financial resources to carry out the contract concerned by the call for tenders and which considerations lie behind it.

   The competition authorities do not usually prioritize a case, where it is immediately clear that the cooperation leads to efficiency gains, which benefit consumers.

5. Pure sale arrangements will typically be unlawful if you are competitors for the tendered contract.

   A consortium agreement between an undertaking and a competitor, which in reality is an agreement concerning the sale of the undertakings' individual products or services would have as its object to restrict competition and thereby, as a starting point, be found unlawful. E.g. this will be the case, where the undertakings allocate the execution of the specific contract between them without the integration of their resources in regard assets and/or skills.

6. Avoid exchanging more information than necessary

   When considering entering into a joint bidding agreement for a specific contract, you must be aware of which information you exchange.

   You may only exchange competitively sensitive information to the extent that is strictly necessary. E.g. you may not discuss the price at which you will bid jointly until you have clarified whether you are (actual or potential) competitors for the tendered contract. Such information can reduce the undertakings independent decision-making and their incentive to compete.

Competitively sensitive information will typically concern prices, production, clients, markets, sales and costs, but also includes other commercial conditions.

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

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

8. If you are actual or potential competitors for the tendered contract, but the collaboration leads to efficiency gains, which benefit the contracting entity and outweigh the restrictions of competition, it is advisable to be able to document this.

   In the event of a competition case it is advisable 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 tendered products or services and that they have a scope that at least outweighs the restriction of competition.

   Efficiencies may be quantitative, for example in the form of cost savings due to reduced duplication of resources or economies of scale.

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

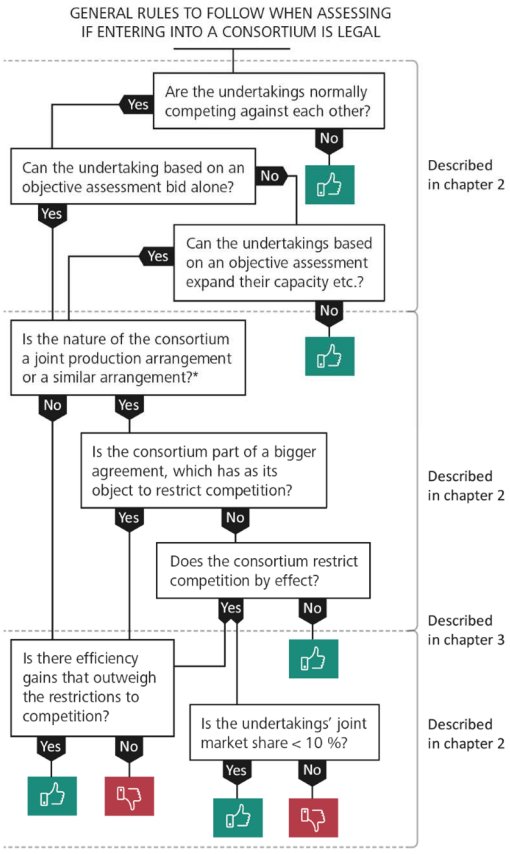
9. Do not extend the collaboration within the consortium agreement beyond the contract you teamed up to carry out.

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

10. If you are in doubt, you may seek legal advice.

The figure below summarizes 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 under the competition rules. 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.

Figur 1.1 **General rules to follow when assessing if entering into a consortium is legal**



Origin: Danish Competition and Consumer Authority

* This means, that the undertakings must integrate their resources in regard 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 cooperation 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 infringe upon 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 which have as their object to restrict competition are characterized by the fact that, by their very nature, they have the potential to restrict competition

“Restrictions by object” are therefore linked to the agreement’s characteristics in the specific market context and not to what the subjective intention of the parties to the agreement may be. This category of restrictions 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 on 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 tendered 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, they cannot objectively 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 the key factor in the competition law assessment of a consortium agreement.

Even if the parties to a joint bidding consortium agreement are competitors for the specific contract and the consortium agreement restricts competition, the cooperation 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 specific 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 specific calls for tender.

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

Collection of sludge in Lombardy and Piemonte[11]

The case concerned five Italian undertakings which were active in the collection of sludge. 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 arrangement worked in a way that they shared the awarded contracts 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.

Renovation of schools and nursery schools in Vilnius[12]

Two Lithuanian construction companies had, within a two-year period, given a joint bid for 24 different calls for tenders regarding the renovation of schools and nursery schools. The companies had entered into an agreement for each of the 24 tenders concerning how to share the individual contracts and revenue between them if they won the contracts in question in each of the tenders.

The Vilnius Regional Administrative Court found that the companies could have submitted bids on their own and thereby competed against each other. By bidding jointly in a systematic manner, the companies had restricted competition in terms of services offered and price.[13]

This was upheld by the Supreme Administrative Court of Lithuania, who noted that the companies should have made a case-by-case assessment of whether they could have submitted bids jointly based on whether it was objectively necessary for each bid.[14]

In the event that a competition case is taken up by the Danish Competition and Consumer Authority, it would be an advantage to be able to present any possible analysis or considerations that can justify the relevant consortium agreement.[15] This might result in the case not being prioritized by the Danish Competition and Consumer Authority.

[11] cf. The Italian Competition Authority's decision of 3 February 2015 in case no. 25302*, 1765 Gare gestioni fanghi in Lombardia e Piemonte*. The decision has been confirmed by the Italian highest court (Consiglio di Stato) on 11 July 2016.

[12] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.

[13] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 26.

[14] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 99.

[15] cf. The Stockholm Tingsrätts' judgement of 21 January 2014*, Däckia Aktiebolag og Euromaster Aktiebolag*, page 120.

2.1 When can undertakings be considered competitors?

When assessing the legality of a joint bidding agreement, the undertakings in question must assess whether they are competitors regarding the specific tender.

The concept of "competitors" includes actual as well as potential competitors. Competitors are both undertakings, which are active on the same relevant market (actual competitors), and undertakings, which have real concrete possibilities to undertake, within a short timeframe, the necessary steps to enter the relevant market where the other undertaking is already active (potential competitors).[16] Therefore, if you are potential competitors for the specific tender, the joint bidding agreement concerning this tender might restrict competition. The Court of Justice of the European Union recently pointed out that *"The assessment of whether there is potential competition must be carried out having regard to the structure of the market and the economic and legal context within which it operates."*.[17]

In certain cases, a joint bidding agreement between two undertakings might not restrict competition for a specific call for tender. E.g. if the undertakings actually cannot and potentially would not be able to timely undertake the necessary steps to handle the specific call for tender on their own. In this event, a joint bidding agreement between the two undertakings cannot restrict competition, since none of the undertakings could carry out the tendered contract individually.[18]

Therefore, it is key to determine whether the undertakings are competitors for the tendered contract when assessing the legality of a joint bidding agreement.

An assessment of potential competition for the specific contract is standard practice in cases where companies collaborate.[19] The assessment is made based on inter alia whether it is a real concrete possibility for the undertaking to enter the market as a competitor. A purely theoretical possibility is not sufficient to demonstrate the existence of potential competition.

Box 2.2 includes a few cases concerning the assessment of potential competitors. Even though the cases do not concern joint bidding agreements, the assessment an undertaking must make in regard to entering into a joint bidding agreement is the same.

This step in the assessment of the legality of a joint bidding agreement will generally be referred to, in these guidelines, as the question on whether the parties to the agreement would be considered competitors for the tendered contract.

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[16] cf. The horizontal guidelines, paragraph 10.

[17] cf. The Court of Justice of the European Union's judgment of 30 January 2020 in case C-307/18, *Generics*, paragraph 39.

[18] cf. The horizontal guidelines, paragraph 237.

[19] cf. For example the Court of Justice of the European Union's judgment of 8 September 2016 in case T-472/13, *Lundbeck vs. Commission*, paragraph 100-105; the Court of Justice of the European Union's judgment of 21 May 2014 in case T-519/09, *Toshiba*, paragraph 230-233; the Court of Justice of the European Union's judgment of 29 June 2012 in case T-360/09, *E.On Ruhrgas AG, E.On AG*, paragraph 86-87; the Borgarting Lagmanssrets' decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba*, page 14, as well as the uphold of the Konkurranseklagenemnda's decision of 31 August 2018, paragraph 140; and the Court of Justice of the European Union's judgment of 30 of January 2020 in case C-307/18, *Generics*, paragraph. 37 and 38.

Box 2.2
Example of the assessment of potential competition

Toshiba[20]

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[21]

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. In this context, the fact that they had a business plan and a real concrete possibility to become suppliers of generics of Lundbeck´s products made that generic producers were considered potential competitors.
The Commission's decision was upheld by the General Court. The case is currently under appeal.

Generics and others[22]

The case concerns the manufacturer of originator medicines, GlaxoSmithKline ("GSK"), who had entered into agreements with a number of generic producers. Among other things, it was agreed that the generic producers would receive various forms of payments from GSK if they temporarily agreed not to manufacture, import or supply its generic products in the UK, and not to challenge the validity of GSK's process patent for a period up to 3 years. As part of a request for a preliminary ruling, the Court of Justice stated that the undertakings were potential competitors when the undertakings were in dispute as to whether that patent was valid or whether the generic medicines concerned infringed that patent, and where it was established that the manufacturer of generic medicines had in fact a firm intention and an inherent ability to enter the market, and that market entry did not meet insurmountable barriers to entry.

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 for the contract. If they do not already have the capacity, know-how and/or the financial resources to carry out the contract individually, but has a real concrete possibility to acquire it within a short time frame, they are potential competitors for the tendered contract. What exactly is a real concrete possibility will *inter alia* be an assessment made by the undertakings depending on, for instance, the contract concerned by the call for tender.

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[20] cf. The Court of Justice of the European Union's judgment of 20 January 2016 in case C-373/14 P, *Toshiba Corporation vs. European Commission,* paragraph 31-34.
[21] cf. The Commission's decision of 19 June 2013 in the Lundbeck case, which was upheld by the Court of Justice of the European Union's judgment of 8 September 2016 in case T-472/13. The case is currently under appeal.
[22] cf. The Court of Justice of the European Union's judgment of 30 January 2020 in case C-307/18, *Generics*, paragraph 37-58.

It is of no importance for the assessment of whether the undertakings can be seen as competitors for 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 for the tendered contract must be objective and depends initially on the requirements included in the tender materials.[23]

When assessing a consortium agreement, the Danish Competition and Consumer Authority assesses whether undertakings are each other´s actual competitors for the tendered contract, it takes into account whether they already have what is needed (e.g. capacity, know-how and/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[24]

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, know-how and access to the requirements concerning machines and staff in order to bid for one lot. This was upheld by the Competition Appeal Tribunal. The Competition Appeal Tribunal found, that since the parties could each bid on individual lots, they were actual competitors. This was also upheld by the Supreme Court. The Supreme Court stated that the parties were actual competitors since it was undisputed that the parties could each bid on individual lots. .

Renovation of schools and nursery schools in Vilnius[25]

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. Both companies met the minimal requirements in the first phase (prequalification) of the different tenders. One of the undertakings had argued that the company would not had been able to participate in the second phase of the different tenders on its own, since they did not meet the requirements in the second phase on having sufficient similar contracts.
The Supreme Administrative Court of Lithuania found that the similar contracts, which the company actually had carried out, were sufficient for them to meet the requirements in the different call for tenders. Furthermore, the Supreme Administrative Court of Lithuania noted,

[23] cf. The Supreme Court's judgment of 27 November 2018 in the case 191/2019, *Konkurrencerådet vs. Eurostar Danmark A/S and GVCO A/S*, page 8.
[24] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*, paragraph 437 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.
[25] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May 2018 and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.

that it was of no importance to this assessment whether the chances of winning the tenders were higher, when the companies submitted joint bids. Lastly, the court ruled out that uncertain requirements in the call for tender could not justify restricting competition.[26]

When the Danish Competition and Consumer Authority assesses whether undertakings are each other's potential competitors for the contract, it takes into account whether it is a real concrete possibility that the undertakings will for instance be able to expand their capacity, know-how and/or financial resources to the extent needed to be able to bid for the contract individually, even if they do not currently have the ability to do so. Whether the necessary development of capacity, know-how and/or financial resources based on an objective assessment will constitute a sustainable economic strategy for an undertaking will always be a case-by-case objective assessment. This means that the mere theoretical possibility of carrying out a contract alone is not sufficient: the possibility must be real.[27] Whether an undertaking, based on a subjective assessment, wishes to expand their capacity, know-how and/or financial resources, is not decisive for this assessment. See box 2.4 below.

Thus, there must be a realistic assessment of whether a company in relation to the specific circumstances, the market structure and its current size, will be able to acquire, within a short time frame, the capacity, know-how 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, know-how and/or financial resources represent a limited part of the capacity, know-how 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.[28]

The assessment must be carried out on an objective basis. That is, it shall look into whether the undertaking has a real concrete possibility to take on the contract on its own - not simply whether it intends to taking on the contract on its own,[29] cf. box 2.4.

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[26] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 96-97.

[27] cf. For example the Borgarting Lagmanssrets' decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs. Follo Taxisen-tral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba*, page 19, and the Court of Justice of the European Union's judgment of 8 September 2016 in case T-472/13. *Lundbeck vs. the European Commission.*

[28] cf. For example the Commission´s decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*, paragraph 74.

[29] cf. For example the Konkurrenseklagenemnda's decision of 31 August 2018 in case 2018/112 and 2018/113, *El-Proffen AS/EP Contracting AS m.fl.*, paragraph 141.

Box 2.4
Example of assessment of the expansion needs

El-Proffen case[30]

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. In this context, the authority assessed the number of 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 for 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 it, 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 to have 3-4 fitters for the performance of the contract in question which the undertakings already had at their disposal or could rent in.

Renovation of schools and nursery schools in Vilnius[31]

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. One of the companies had argued that the company was not capable of performing the tenders successfully on its own. Furthermore, the company did not have sufficient staff and financial resources to participate in all the call for tenders alone.

The Supreme Administrative Court of Lithuania rejected this argument and noted that there was no reason for the company not to apply its previous practice to these tenders and, for instance, use subcontractors or enter into joint bidding agreements with undertakings that were not able to perform the works on their own. It was of no importance to this assessment whether the company was actually capable of performing all the contracts on its own, had the company eventually won all tenders.[32]

As a starting point, in situations in which the tendering authority, following a pre-qualification phase, has selected a number of applicants to submit a bid, only these undertakings can be considered competitors for the specific call for tenders. The undertakings must be aware of whether they enter into the joint bidding agreement before or after the pre-qualification phase. The undertakings will be considered competitors if they can take on the contract on their own or if they could acquire the needed capacity etc. in order to take on the contract on their own. The undertakings will not be considered competitors if the undertakings enter into a joint bidding agreement after the pre-qualification, where one of the undertakings has been prequalified, and the other undertaking has not. Thus, only the pre-qualified undertakings can participate in the competition concerning the call for tender after the pre-qualification phase.

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[30] cf. Konkurransetilsynet's decision of 4 September 2017 in case V2017-21, *El-Proffen AS/Ep contracting AS m.fl.*, paragraph 349 f , which was upheld by Konkurranseklagenemda's decision of 31 August 2018 in case 2018/112 and 2018/113, paragraph 185 f.

[31] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May 2018 and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.

[32] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 95.

The undertakings that are not prequalified are thus not competitors for the specific call for tenders, unless there is some exceptional circumstances, e.g. if the undertaking did not participate in the pre-qualification phase in order to enter into a joint bidding agreement. The equal treatment principle in the Danish Public Procurement Act might however prevent prequalified undertakings from entering into a consortium agreement with non-prequalified undertakings once the former have been pre-qualified.

Box 2.5
Example of the assessment of pre-qualification

Renovation of schools and nursery schools in Vilnius[33]

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 companies had argued that the contracting entity did not receive fewer bids as a result of the joint bidding agreements between the companies.

The Supreme Administrative Court of Lithuania noted that a joint bidding agreement should not restrict competition in either the pre-qualification phase or thereafter. The competition in the pre-qualification phase was restricted, since the rivalry expected between the two companies in order to prequalify for the contract was limited by the joint bidding agreements.[34]

Similarly, the starting point in calls for tenders based on a by-invitation only procedure or on informal bids is that only the undertakings which are invited can be considered as competitors in relation to the specific call for tenders. Given that such undertakings could be considered competitors the non-invited companies in other contexts, it is important not to exchange more information than 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.[35]

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.[36] See box 2.6 below.

[33] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May 2018 and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.

[34] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 98.

[35] cf. The Norwegian Competition Authority's decision of 18 October 2010, *Johny Birkeland Transport as/Norva 24 AS – Lindum AS*, paragraph 292.

[36] cf. For example the Stockholms Tingsrätts judgment of 21 January 2014, *Däckia Aktiebolag and Euromaster Aktiebolag*, page 120. See also the EFTA Court's judgment of 22 December 2016 in case E-3/10, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS*, paragraph 99. Also The Supreme Court's judgment of 27 November 2019 in the case 191/2018, *Konkurrencerådet vs. Eurostar Danmark A/S and GVCO A/S*, page 8.

Box 2.6
Example of an assessment of objective necessity.

Case Däckia/Euromaster[37]

This Swedish case concerned a call for tenders for a framework agreement regarding the supply of tires to inter alia 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[38]

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 between them if they won the contracts in question.

The Lithuanian competition authority assessed the two companies' experience in the area, the scope of the contracts and the market conditions and found that they each could have individually bid 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.

This was upheld by the Supreme Administrative Court of Lithuania, who noted that the companies should have made a case-by-case assessment of whether they could have submitted joint bids based on whether it was objectively necessary for each bid.[39]

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, know-how 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 2.7.

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[37] cf. Stockholms Tingsrätts' judgment of 21 January 2014, Däckia Aktiebolag and Euromaster Aktiebolag, pages 121-126.

[38] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May 2018 and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.

[39] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 99.

Box 2.7
Examples where the possibility to place individual bids on lots in the contracts was relevant to the assessment of whether undertakings were competitors for a specific contract

Case Ski Taxi/Follo Taxi[40]

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 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[41]

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 for the specific contract and that the consortium agreement restricted competition.

Danish Road marking Consortium agreement[42]

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 for the contract in question, must be made on an objective basis of the requirements of the tender. Therefore, the Supreme Court considered irrelevant the course of events in a previous tender and that, in the parties' opinion, other circumstances clearly encouraged the parties to submit a bid covering all three districts and because of this, none of the undertakings had submitted a bid for one or two lots.[43]

Furthermore, the Supreme Court stated that the tender was aimed at all undertakings in the market, who had the possibility to participate 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 were no grounds for assuming that the tender in reality only concerned 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.[44]

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[40] cf. The Borgarting Lagmanssrets' decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba,* pages 16-17. The decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A.

[41] cf. The Competition Council's decision of 30 April 2014, *Skive og Omegns Vognmandsforenings tilbudskoordinering.*

[42] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

[43] cf. The Supreme Court's judgment of 27 November 2019 in the case 191/2018, *Konkurrencerådet vs. Eurostar A/S and GVCO A/S*, page 8.

[44] cf. The Supreme Court's judgment of 27 November 2019 in the case 191/2018, *Konkurrencerådet vs. Eurostar A/S and GVCO A/S,* page 8.

El-Proffen case[45]

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 regard to electrician work at schools. The selected suppliers should have the capacity to handle a minimum of 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 could individually bid on a single framework agreement. Contrary to what was stated by the parties, they were not 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 requirements?

Assessing whether an undertaking can undertake a contract on its own implies an overall realistic assessment of the undertaking´s capacity, know-how, financial resources etc. with respect to the contract and time horizon the relevant call for tender concerns. The assessment can inter alia include aspects such as the undertaking´s access to workforce, know-how and equipment in the form of machinery, etc. The requirements in the tender materials, which can render collaboration in a consortium agreement necessary may for example concern relevant experience or expertise, adequate quality assurance, ensuring timely delivery of the contract t and sufficient capacity and financial strength to make the investments required by the contract.[46]

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 set by the contracting entity for the undertakings that compete for the framework agreements. Typically, they will include turnover requirements or other types of conditions regarding the undertakings' economic capabilities. The assessment shall be made at the time when undertakings have to submit a bid for the framework agreement. For instance, it has no significance that 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, and which can be relevant to the assessment of whether forming a consortium agreement is objectively necessary.

Requirements regarding economic resources
Some contracting entities may include requirements regarding the bidding entities' economic resources in the tender materials. 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

[45] cf. Konkurransetilsynet's decision of 4 September 2017 in case V2017-21, *El-Proffen AS/Ep contracting AS m.fl.*. The decision was upheld by the Konkurranseklagenemnda on 31 August 2018.
[46] cf. Answer to question 106 (L 172 – annex no. 77) of 6 May 1997 from the Committee of the Danish Parliament.

include 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.

If the undertaking is part of a group of companies with significant financial resources, this will be part of the assessment of whether the undertaking has the necessary financial resources to bear the risks associated with the contract.[47] The group's financial resources can therefore be decisive for the assessment of whether the undertaking has a real possibility to have access to the required financial resources when the undertaking is part of such a group.

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 has a real concrete possibility to acquire it within a short timeframe, that is, whether the undertaking is to be considered a potential competitor, see section 2.1. This means that the aspects to be considered include inter alia whether the undertaking can realistically finance the investments in new machinery within the time frame specified in the tender materials.[48] See box 2.8.

Box 2.8
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 for 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 of the machine?
- The costs thereof and A's access to the funding hereof?
- Depreciation 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 real concrete possibility and thus 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 for the contract in question, a joint bid from them could be legal depending inter alia on how the parties to a consortium agreement arrange the cooperation. This would include if the cooperation can be seen as a production agreement or a similar integrated cooperation, whether together they can submit a more

[47] cf. For example Commission´s decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*, paragraph 74.
[48] cf. The Competition Council's decision of 24 June 2015, *Dansk Vejmarkerings Konsortium*, paragraph 676 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

competitive bid than separately, and if these advantages for the customer outweigh the restrictions of competition. See Chapter 3.

Requirements regarding staff. etc.
If the performance of a contract requires increasing the undertaking´s staff, attention will be paid to whether the undertaking has real possibilities to hire the qualified workforce.[49] 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, cf. see box 2.9. 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 2.9
Example regarding access to staff

El-Proffen case[50]

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 temporarily engage additional workforce. 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 requirement 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, expertise 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 the relevant 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 instance be based on the fact that one undertaking has expertise that is necessary in order to fulfill part of the contract. An example of this can be found in box 2.10. Even though the case does not concern a joint bidding on a specific contract, the case can be used as an illustration of the assessment an undertaking must make when looking into the requirements regarding technology, expertise, know-how etc., since a similar analysis must be made when entering into a joint bidding agreement.

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[49] cf. Decision of the Competition Council of 24 June 2015, *Dansk Vejmarkerings Konsortium*, paragraph 687 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

[50] cf. Konkurransetilsynet's decision of 4 September 2017 in case V2017-21, *El-Proffen AS/Ep contracting AS m.fl.*, paragraph 361 f. The decision has been upheld by Konkurranseklagenemnda on 31 August 2018, paragraph 221 f.

Box 2.10
Example regarding access to technology and know how

Elopak/Metal Box-Odin-case[51]

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, produce and distribute the new containers, as well as to produce and distribute 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 should have developed the competencies they lacked. Moreover, the Commission considered, from a realistic point of view, that the risks and the financial burden associated to the development and subsequent commercialization of the product 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 a fairly 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 know-how etc. necessary to carry out the contract individually, and working together with another undertaking that has a particular know-how 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 actually benefits the contracting entity, and that these advantages outweigh the possible negative effects of weakened competition, see Chapter 3.

2.1.3 What about capacity that is reserved for other contracts?

The assessment of capacity is based on the realistically 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 it realistically has the required capacity to take on the contract alone or a real concrete possibility to acquire it within a short timeframe.

One particular question in the Road Marking Case[52] regarded how much capacity could be considered "allocated" to other expected and future contracts from core customers. 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 concerning the tendered contract, since that it was undisputed that the parties could each bid on individual lots. On that basis, the Supreme Court annulled the Danish Maritime and Commercial High Court's decision, and thus, there is no legally binding decision on the subject of capacity for other contracts.

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

[52] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*, paragraph 433 and 441 f. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

The Competition Council finds that the capacity which is already disposed of, because it is reserved for agreements that the company has signed beforehand, including maintenance services, are not included in the assessment. Contracts that the undertakings has obliged complete in the concerned period will thus tie up capacity, which cannot be used for other purposes. See more in box 2.11. In this respect attention should also be brought to the possibility of expanding capacity must be included in this analysis as indicated above.[53]

In the assessment of whether an undertaking realistically has the required capacity to fulfil a contract, it is the Competition Council's view that as a starting point that prospective contracts, which have not been signed yet, are not taken into consideration. In that case, the capacity would in reality be available to the undertaking in the period where the bid is being planned, which means that it would usually 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 may for example be the case if it can be documented that the expected contract from a core customer is so recurrent and certain that it is realistic and accurate to reserve capacity to fulfil such contract. In those particular cases, it may be appropriate to include capacity requirements for these expected contracts.[54]

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 accurate to reserve capacity for. However this documentation does not need to be in the form of a written agreement.

Box 2.11
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[55]

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. When establishing the available capacity, the Court stated that, capacity for spot transportation and other contracts that were already signed, had already been allocated. However, the Court did not take a stand regarding the capacity that 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[56]

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.

[53] cf. Konkurransetilsynet's decision of 4 September 2017 in case V2017-21, *El-Proffen AS/Ep contracting AS m.fl.*, paragraph 361 f. The decision has been upheld by Konkurranseklagenemnda on 31 August 2018, paragraph 227.
[54] cf. The Competition Council´s decision of 24 June 2015, Dansk Vejmarkerings Konsortium, paragraph 443 and 444.
[55] cf. The Borgarting Lagmanssrets' decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs. 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 in case HR-2017-1229-A.
[56] cf. The Swedish Competition Authority's decision of 12 May 1995, *Icke-ingripandebesked/undantag avseende samarbete i ett konsortium i cementbranschen*, Stockholms Tingsrätts' judgment of 1 January 1997, *Cementa AB and Aalborg Portland A/S vs. Konkurrensverket,* and Markmadsdomstolens' judgment of 8 October 1997, *Konkurrensverket vs. Cementa AB and Aalborg Portland A/S.*

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 they could not simultaneously meet their obligations towards other clients, and therefore granted the exemption. The Swedish Competition Authority appealed the decision arguing that what was decisive was whether the undertakings' total capacity, independently of their obligations towards other clients, was adequate in relation to the specific contract. Therefore, the capacity needed for potential future agreements should not be deducted from the calculation of the available capacity to the tendered contract. 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, know-how, 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.

An undertaking may have reserved capacity for a signed framework agreement. A framework agreement can take many forms, and it is not certain that the undertaking knows inter alia how much of the undertaking's capacity the signed framework agreement actually requires. To what extent the undertaking can reserve capacity for the signed framework agreement, and therefore not include it in the assessment, will for instance depend on whether such an agreement is sufficiently recurrent and certain.

The argument that an undertaking does not wish to "put all its eggs in one basket" will, as a starting point, not be sufficient 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 2.10 above.

Therefore, the assessment of capacity includes risk and the need to spread risk out is an element of the overall assessment of whether an undertaking is able to complete a contract on its own or whether it is objectively necessary to work together with one or more additional undertakings. In order to determine whether the risk that a contract entails makes it necessary to bid jointly, it is essential to define if, based on objective circumstances, it is realistic that the undertaking is 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.[57]

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, 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 the project has a high risk of failure. On the other hand, cases that concern a serious infringement of

[57] cf. The Borgarting Lagmanssrets' decision of 17 March 2015, Staten v/ *Konkurransetilsynet (Noway) vs. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba*, page 17.

competition rules cannot be justified by the parties' potential wish to share commercial risk, which is inherent to business activities or is external e.g. through regulatory changes and shifts in demand, cf. box 2.12 below.

Box 2.12
Practical example in regard 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 it would have to take on a substantial risk if A were to bid on the contract alone, e.g. A would have to bear a substantial risk premium in order to secure the specific risk related to the tender, which would resolve in an increase in A's price. As a result, A considers entering into a consortium with its 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 they 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 are not able to handle the contract on their own, then immediately A and B would not be seen as competitors in relation to the tender, and therefore would be allowed to enter into a consortium agreement.
If A and B on the other hand each have the capacity required on their own or can acquire the capacity to take on the contract on their own, then A and B would be seen as competitors for the specific contract. In this respect, whether A and B could share the risk is of no importance.

However, 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 result in a reduction in the risk premium and these advantages for the consumers 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 2.13 below refers to several cases that include references to risk spreading. 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 2.11, where risk played a role in the courts assessment that the collaboration was necessary.

Box 2.13
Example where risk is included as part of the assessment of a cooperative agreement

Consortium ECR 900-case[58]

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 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 sludge in Lombardy and Piemonte[59]

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 sludge. As a justification for their collaboration, the undertakings adduced 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 regard to submitting an additional bid, the inclusion of the fourth undertaking

[58] cf. 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*, paragraph 55, contains similar considerations.

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

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. Box 2.14 below covers some cases, where the parties to the joint bidding could have bid individually. 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.

When assessing whether there are more parties to the joint bidding agreement than necessary, it is important to also pay attention to whether this assessment could raise some challenges related to information exchanges, cf. Chapter 4.

Box 2.14
Example of agreements between competitors where they could have bid individually.

Däckia/Euromaster case[60]

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[61]

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,[62] 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 specific 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 individual lots of the contract.

[60] cf. The Stockholms Tingsrätts' judgment of 21 January 2014, *Däckia Aktiebolag and Euromaster Aktiebolag*, page 132.
[61] cf. The Borgarting Lagmanssrets' decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba*. This decision has been confirmed by the Norwegian High Court the 22 June 2017 in case HR-2017-1229-A.
[62] cf. Norwegian Competition Authority´s guidelines on consortium agreements. The guidelines are available in www.konkurransetilsynet.no.

2.3 Assessment of consortia agreements between competitors for a specific contract

An agreement between undertakings concerning joint bidding, which leads to more and better bids to the advantage of consumers, is beneficial for competition. This could, for instance, be a joint bidding agreement, where the undertakings have integrated their resources in regard to assets and/or skills, cf. section 2.3.2, leading to efficiency gains benefitting consumers, cf. Chapter 3. On the other hand, joint bidding agreements, which are harmful to competition and consumers, will restrict competition

The following sections analyze 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 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. This is*, inter alia*, due to the fact that there is sufficiently reliable and robust experience to support the view that these agreements are harmful to competition by their very nature.[63] In competition law terms when it is said that an agreement restricts competition by object, this refers to the real content of the agreement and not the subjective intention that the undertakings seeks to attain with the agreement.

As a general rule, competition authorities do not have to identify harmful effects for consumers for this type of infringement (by object). However, the Danish Competition and Consumer Authority will generally assess any harmful effects for competition, including whether there is a so-called "efficiency defense" (cf. Chapter 3), before potentially opening a case. If it is considered that the joint bidding consortium agreement entails efficiencies for consumers in a preliminary assessment, a case will usually not be opened, even if the agreement could fall in the "by object"-category. However, these efficiencies must outweigh the restrictions on competition caused by the agreement, which is rarely the case when assessing an agreement restricting competition by object.

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). There is a sufficiently reliable and robust experience to support the view that these agreements by their very nature are harmful to competition.[64] This applies inter alia to price fixing agreements, coordinating offers and allocating markets and customers, 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.[65]

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[63] cf. The Court of Justice of the European Union's judgment of 2 April 2020 in case C-228/18, *Budapest Bank*, paragraph 76.

[64] cf. The Court of Justice of the European Union's judgment of 2 April 2020 in case C-228/18, Budapest Bank, paragraph 76.

[65] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018, page 9-10.

A consortium agreement limited to joint selling of services or products would, generally 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 the integration of any of the undertaking's resources in regard 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 type of cooperation. For example, joint production, where the parties to a consortium actually integrate their resources in regard to assets and/or skills to produce the specific product or service, in order for the consortium to take on the contract. In this context, a by effect assessment will usually be applied in cases concerning a consortium (see also section 2.3.2), unless specific circumstances lead 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 the objectives the agreement seeks to attain. The undertaking's subjective intention is, in general, not a necessary factor.[66] 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 specific cases the subjective intention may nevertheless be taking into account in the determination of whether the parties had as their object to restrict competition.[67]

In box 2.15 there are a number of examples of consortia agreements that have been considered restrictions by object based on the fact that they constituted a market sharing agreement or a joint pricing agreement.

[66] cf. For example the Court of Justice of the European Union's judgment of 20 November 2008 in case C-209/07, *Beef Industry Development*, paragraph 21.

[67] cf. The EFTA Court's ruling of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA and Ski Follo Taxidrift AS,* paragraph 89 and 106-108, as well as the Stockholms Tingsrätts' judgment of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 134.

Box 2.15
Example of consortia agreements that are considered by object restrictions of competition

Däckia/Euromaster case[68]

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 pure sales 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[69]

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). The reasoning was that the cooperation eliminated competition between the two companies, who 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[70]

This French case concerns a consortium agreement founded by a number of transport companies with the aim of submitting 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[71]

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 a restriction by object.

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[68] cf. The Stockholm Tingsrätts' judgment of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 132 f. The Tingsrätten references, *inter alia* paragraph 234 of the horizontal guidelines.

[69] cf. The Borgarting Lagmanssrets's decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway*) vs, *Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba.* This decision has been confirmed by the Norwegian High Court the 22 June 2017 in case HR-2017-1229-A. The decision was presented for the EFTA Court's judgment of 22 December 2016 in case E-3/16, *Ski taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS.*

[70] cf. The French Competition Authority's decision of 27 January 2016 in case n° 16-D-02 regarding school transportation by bus in Bas-Rhin. The decision was upheld by Cour d´appel de Paris on the 21 December 2017.

[71] cf. The Spanish Competition Authority's decision of 30 June 2016 in case S/0519/14, *Infraestructuras Ferroviarias*.

Renovation of schools and nursery schools in Vilnius[72]

As previously mentioned, this Lithuanian case concerned 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.
This was upheld by the Supreme Administrative Court of Lithuania, which found firstly that the object of the agreements was to restrict competition. Secondly, that any other explanation concerning why the companies entered into a joint bidding agreement was not plausible. Thirdly, that the secondary goals with the agreement were not sufficient to change the assessment and lastly, that the potential anti-competitive effects were sufficiently established.[73]

Danish Road Marking Consortium[74]

The case concerns the tender for road marking. The Supreme Court established that the consortium could not be characterized as a production agreement or a similar cooperation in regard to the sales of the contract in question. Against this background, the Supreme Court found that the cooperation was in fact a means to distribute the parties' individual services through a joint bid and joint price-setting. Thereby the parties had eliminated the competition that should have taken place between the parties. The consortium, therefore, had as its object to restrict competition.

2.3.2 Consortia agreements that can restrict competition by effect

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

It is of no relevance for the assessment of a joint bidding, which has the object or effect to restrict competition, whether it has been a completely open and public collaboration.[75] It is however possible that this can be relevant when determining a potential fine for taking part in an illegal cooperation.

An agreement is considered to restrict competition by effect when it has - or is likely to have – an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, production or quality. Therefore it will be a case-by-case assessment whether an agreement has the effect of restricting competition.

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[72] cf. The Lithuanian Competition Authority's decision of 21 December 2017 in a case against UAB Irdaiva and AB Panevezio statybos. The Decision was upheld by Vilnius Regional Administrative Court's judgment of 14 May 2018 and upheld by the Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020.
[73] cf. The Supreme Administrative Court of Lithuania's judgment of 3 June 2020 in case eA-161-552/2020, paragraph 100-102.
[74] cf. 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 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018, page 9-10.
[75] cf. Stockholms Tingsrätts´ Judgement of 21 January 2014, *Däckia Aktiebolag and Euromaster Aktiebolag*, page 134, as well as the EFTA Court's Judgement of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxo SA and Ski Follo Taxidrift AS,* paragraph 106-108.

An example of when a cooperation 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.[76]

Even if such an agreement, for example, also includes the joint distribution of the products, which are produced jointly or includes a provision on joint price-setting for these products, the agreement will prima facie 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.

A consortium should be subject to a "by object"-assessment when the parties are competitors for the contract and the cooperation cannot be characterized as a production cooperation or in any other way involves an integration of the parties' resources with regards to assets and/or skills to produce the specific product or service, thereby enabling the parties to produce a better/cheaper product for the contracting entity than if they had submitted a bid individually.[77] On the other hand, the consortium should normally be subject to a "by effects"-assessment, if the parties had integrated their resources in regard to assets and/or skills for them to deliver a better result for the contracting entity than if they were to submit a bid on their own, unless specific circumstances lead to a different result, e.g. if the cooperation is part of a bigger agreement concerning market allocation.

The center of gravity of the cooperation will have to be assessed on a case-by-case basis. In order to determine if a consortium can be viewed as a production cooperation, it is decisive whether the parties to the agreement have integrated their resources in regard to assets and/or skills to provide the specific product.

If the cooperation 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 collaboration. This might be the case if two manufacturers initiate a cooperation regarding the production of car spare parts 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. On the other hand, if there is limited or no integration of assets and/or skills, which are needed for the production of the goods included in the biding contract, then the center of gravity of the contract would typically not be defined as a joint production.

If the collaboration instead constitutes a way for the parties to sell products or services jointly in order to eliminate competition between them, the collaboration will typically be considered joint selling.[78]

Regarding services, the principle mentioned above remains unchanged: the higher the degree of integration, the more likely the cooperation will not be considered to constitute a "by

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[76] cf. The horizontal guidelines, paragraph 13-14 and 150 f. Also The Supreme Court's judgment of 27 November 2019 in the case 191/2018, *Konkurrenceråd vs. Eurostar Danmark A/S and GVCO A/S,* page 9-10.

[77] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium*. The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018.

[78] cf. The Supreme Court's judgment of 27 November 2019 in the case 191/2018, *Konkurrenceråd vs. Eurostar Danmark A/S and GVCO A/S*, page 9-10. Also Cyril Ritter: *Joint Tendering under EU Law*, Concurrences N° 2-2017 I pp. 60-69, paragraph 50-51.

object"-infringement, but rather it will be subject to a "by effect"-assessment.[79] This can for example be the case when the cooperation is entered into by two undertakings that have different specialized qualifications, which are integrated for the contract.

On the other hand, an agreement where for instance two undertakings, which are active in the transport business, place a joint bid without an integration or combination of an essential part of the assets dedicated to 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 involve appreciable integration of the undertakings' assets (e.g. tools, materials, machines or offices), and they share the assigned contract between them so that they each complete certain parts of it with their own assets, then this would typically not be viewed as a production cooperation either.[80]

As mentioned before, it is the actual content of the agreement and not the form or the designation of the agreement that is essential to how it is assessed. Therefore, it is not enough that an agreement for instance is called a production cooperation – the agreement must actually be a production cooperation. The same principle is applicable when 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 Section 7 of the Danish Competition Act includes a de minimis rule, which is relevant in cases concerning "by effect"-restrictions. According to this Section, a joint bidding consortium agreement between actual or potential competitors whose aggregate market share does not exceed 10 % on any of the relevant markets affected by the agreement, will not be caught by 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.[81]

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. This assessment must therefore be done in accordance with the rules in the Section 5 a of the Danish Competition Act´s and the Commission's notice on the definition of the relevant market.[82] Depending on the specific 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. This can for instance be the case in a tender market.[83]

The decisions named above in box 2.15 are characterized by a joint bidding consortium agreement considered a restriction by object. Precedents regarding joint bidding consortium agreements that only restrict competition by effect are scarce, which can be interpreted as an

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[79] cf. Cyril Ritter: Joint Tendering under EU Law, Concurrences N° 2-2017 I pp. 60-69, paragraph 50-51.

[80] cf. The Competition Council's decision of 24 June 2015 in the case 14/04158, *Dansk Vejmarkerings Konsortium.* The decision was upheld by the Competition Appeal Tribunal in the decision of 11 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 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, in the judgment made by the Supreme Court of 27 November 2019 in the case 191/2018, page 9-10.

[81] 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.

[82] cf. Memo on the public's comments (høringsnotat) regarding the proposal to amend the Danish Competition Act of 27 September 2017, Erhvervs- Vækst- og Eksportudvalget 2017-18, L6, Annex 1, page 4.

[83] cf. The Commission's decision of 20 December 2012 in case AT.39230, *Rio tinto alcan,* paragraph 38, note 14.

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, there is inter alia a Swedish case, which on appeal was considered to require a "by effect"-assessment. This is the Swedish Aleris Diagnostik judgment[84] regarding a subcontracting agreement in connection with the submission of a bid for a contract.

[84] cf. The Swedish Patents and Markets Court's decision of 28 April 2017, *Aleris Diagnostik AB, Capis A:t Görans Sjukhus AB and Hjärtkärlgruppen i Sverige AB vs. Konkurrensverket.*

Chapter 3
Efficiency gains by consortia agreements

A joint bidding agreement between undertakings, which could individually complete the contract and therefore can be seen as competitors for the specific contract, may have as its object or effect to restrict competition.

When 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 for the specific contract. According to case law, there is a higher chance that the agreement will lead to efficiency gains if it is a "by effect"-infringement rather than a "by object"-infringement. *Inter alia*, this entails that it is more likely that the Danish Competition and Consumer Authority will prioritize a "by object"-case. Conversely, the Danish Competition and Consumer Authority will not prioritize a case, where it is specifically found on the basis of the information readily available that the cooperation is necessary and lead to efficiency gains which benefit the consumer, e.g. public contracting entities.

The cooperation will be seen as legal if it fulfils a number of conditions, including benefitting 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 [sic] *made by an association of undertakings or concerted practices between undertakings*

1. *contribute to improving the efficiency of the production or distribution of goods or services, or to promoting technical or economic progress,*
2. *provide consumers with a fair share of the resulting benefits,*
3. *do not impose on the undertakings restrictions that are not necessary to attain these objectives. and*
4. *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 for 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 benefits consumers,
» the collaboration does not go further than necessary to achieve that objective, and
» it does not afford the undertakings the possibility of eliminating competition for the concerned contract.

It will always be necessary to make a specific assessment of whether these conditions are fulfilled. Amongst other factors, the assessment will take into account the market conditions, the undertakings´ market shares, the nature of the cooperative agreement, the products or services concerned by it and the number of additional offers, which the undertaking is expecting on the basis of its knowledge of the market and therefore, the knowledge on how other undertakings on that market can bid. These are explained in more detail in the following paragraphs.

If a case were to be opened, the undertakings themselves would have to document that the consortium agreement fulfills the exemption conditions. The undertakings have to document why the joint bidding agreement led to efficiency gains at the time they submitted a joint bid. 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 elaborated further on the conditions for the exemption, and gave a number of examples of how the efficiencies will be evaluated in various types of cooperative agreements in the horizontal guidelines and the Commission´s guidelines for the application of Article 101 (3) TFEU [previously article 81 (3)], cf. box 3.1 below.[85]

[85] cf. The horizontal guidelines, in particularly paragraphs 187-193 and 252-256 together with Guidelines of 27 April 2004 on the application of Article 81(3) of the Treaty (2004/C 101/08) ("Guidelines on the application of TFEU article 101 (3)").

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

The Commission's guidelines on efficiency gains[86]

The Commission 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 if an agreement, which restricts competition, might lead to efficiency gains that compensate for any negative impact caused by the restriction and benefit the consumer. For instance, 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.[87]
- This assessment must be objective. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. Such cost reductions do 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.[88]
- In general, efficiencies stem from an integration of economic activities whereby undertakings combine their resources in regard 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.[89]
- 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.[90]
- 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.[91]

3.1.1 Efficiency gains

The cooperation that leads to a joint bid on a specific contract between competitors 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, e.g. the contracting entities,

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[86] cf. The guidelines on the application of TFEU article 101 (3).
[87] cf. The guidelines on the application of TFEU article 101 (3), paragraph 33.
[88] cf. The guidelines on the application of TFEU article 101 (3), paragraph 49.
[89] cf. The guidelines on the application of TFEU article 101 (3), paragraph 60
[90] cf. The guidelines on the application of TFEU article 101 (3), paragraph 83 and 86.
[91] cf. The guidelines on the application of TFEU article 101 (3), paragraph 75.

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.

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 one 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[92]

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

If a case were to be opened, it would be incumbent on the parties to the agreement to document the potential efficiency gains, which include their size, how they are achieved, and how the consortium is necessary to achieve the efficiencies.[93] 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 for example a new or improved product or service, undertakings must be able to explain the efficiencies.

How to document efficiencies will depend on the specific 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, which entail

[92] cf. The Stockholms Tingsrätts' judgment of 21 January 2014, *Däckia Aktiebolag og Euromaster Aktiebolag*, page 138 f.
[93] cf. The guidelines on the application of TFEU article 101 (3), paragraph 51.

cheaper production, the parties would usually already have made these calculations etc. which can be used for this purpose.

Nevertheless, it is not enough that the collaboration makes it possible for the undertakings to produce at lower costs; 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 costs relating to eliminating competition 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.

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.[94]

Box 3.3
Examples of the need to document efficiencies

Ski Taxi/Follo Taxi case[95]

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 possible 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[96]

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 it had been individually contracted for each route.

Danish Road Marking Consortium[97]

The case concerned a tender for road marking. The parties to the consortium had argued that

[94] cf. The horizontal guidelines, paragraph 187-193 and 252-256.

[95] cf. The Borgarting Lagmanssrets's decision of 17 March 2015, *Staten v/ Konkurransetilsynet (Norway) vs, Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba,* page 25. This decision has been confirmed by the Norwegian High Court the 22 June 2017 in case HR-2017-1229-A.

[96] cf. The Competition Council's decision of 30 April 2014, *Skive og Omegns Vognmandsforenings tilbudskoordinering*, paragraph 134.

[97] cf. 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, in the judgment made by the Supreme Court of 27 of November 2019 in the case 191/2018.

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 jointly and severally 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.

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, it 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 objectively, a company 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 regard 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 led 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. It will be important, in a potential competition case (where the competition authorities as a starting point have concerns about whether the conditions are fulfilled), that undertakings can show that efficiency gains 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[98] and are discussed in the previous section.

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

Vacuum Interrupters case[99]

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[100]

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 could 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 in a faster and less expensive manner 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 with less costs 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 on a specific contract 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. If a case is opened, the undertakings must be able to document why the joint bidding agreement at the time where the bid was submitted, lead to efficiency gains which did benefit the consumers. Box 3.5 describes a number of relevant decisions.

The efficiency gains for consumers, e.g. contracting entities, shall be of such a magnitude as to at least offset the actual or potential restrictive effects on competition that the collaboration

[98] cf. The guidelines on the application of TFEU article 101 (3).
[99] cf. Commission's decision of 20 January 1997 in case IV/27.442, *Vacuum Interrupters Ltd.*
[100] cf. Commission's decision of 14 September 1999 in case IV/36.213/F2, *GEAE/P & W*.

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.

The assessment of whether the efficiencies are passed on to consumers, e.g. contracting entities, to a sufficient degree will be a case-specific assessment. It is not required that consumers receive a share of each and every efficiency gain identified.[101]

The greater the degree of competition, the more likely it is that the cost efficiencies will benefit the consumers.[102] 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[103]

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 to have been 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[104]

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

[101] cf. The guidelines on the application of TFEU article 101 (3), paragraph 86.
[102] cf. The guidelines on the application of TFEU article 101 (3), paragraph 97.
[103] cf. The Competition Council's decision of 26 November 2003, *Samarbejdsaftale mellem Ove Juel Catering A/S and T.H. Schultz A/S.*
[104] cf. The Commission´s decision of 15 October 1990 in case IV/32.681, *Cekacan*, paragraph 44-47.

in the packaging market with the subsequent expected effects on packaging prices.

British Interactive Broadcasting/Open case[105]

This case concerns an agreement for the development of digital interactive television services. The Commission considered that the agreement restricted competition because the parties were potential competitors. However, the agreement fulfilled the conditions for the exemption. The efficiencies consisted 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 consortium 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, which undertakings impose on each other when submitting a joint bid are absolutely necessary in order to achieve efficiency gains and that the cooperation does not extend beyond the specific 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.[106]

3.1.4 No elimination of competition

Finally, a cooperation between competitors concerning a joint bid on a specific contract 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.[107]

To determine if this condition is met, the size of the joint market shares of the parties to the consortium agreement in relation to 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.

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[105] cf. The Commission´s decision of 15 September 1999 in case /V/36.539*, British Interactive Broadcasting/Open*, paragraph 141 and 159.

[106] cf. The guidelines on the application of TFEU article 101 (3), paragraph 80.

[107] cf. The guidelines on the application of TFEU article 101 (3), paragraph 107.

Box 3.6
Example of the assessment of no elimination of competition

Cementa/Aalborg Portland case[108]

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 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[109] and for certain categories of specialization agreements[110]. 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.

Note that the block exemptions do not apply to hardcore restrictions of competition.

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

[109] cf. 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. Note that it follows from article 5 of the block exemption regulation that the block exemption does not apply to hardcore restrictions.

[110] cf. 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. Note that it follows from article 4 of the block exemption regulation that the block exemption does not apply to hardcore restrictions.

Chapter 4
Information exchange in relation to consortia agreements

When forming a consortium or when considering doing so, an undertaking 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. For instance, it would be illegal for an undertaking to inform to what price the undertaking is planning to bid if the undertaking were to bid on its own, or to reveal which future tenders the undertaking wishes to take part in. If an undertaking gains knowledge about its competitors' market strategy, this could reduce the undertakings' independent decision making and their incentive to compete.

Competitively 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[111] and in the Commission´s horizontal guidelines.[112]

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 from exchanging sensitive information to a higher degree than it normally would if only the absolutely necessary number of companies participates in the consortium.

There are many ways an undertaking can ensure that there is no exchange of competitively sensitive information. E.g. within larger mergers & acquisitions a procedure is sometimes laid out to ensure that only a minimum of potentially sensitive information to the fewest possible individuals is exchanged. The potential acquirer and vendor may arrange a team, who receives and processes all relevant information. Such teams will often be referred to as "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, it is ensured that no sensitive information will be exchanged directly between the parties. It is important to ensure that the flow of information is "one way", meaning the clean team only can receives

[111] 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).
[112] cf. The horizontal guidelines, in particular paragraph 55-110.

information from one of the parties to the transaction, but may not pass on the information to the other party.[113]

If considering a consortium for a large project, a similar process could be useful.

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 it is strictly necessary and within a limited scope. This is also applicable in the phase where it is considered whether to entering into a consortium. The undertakings must therefore ensure that they do not exchange information concerning e.g. how the undertakings will set the price or how the lots in the tender are executed etc. before the undertakings have examined whether they can take on the specific contract alone. 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 for 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, since the undertakings could have coordinated their bids and/or price if the undertakings had exchanged more information than necessary.

In many cases, in order to assess the undertakings' combined capacity, know-how 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 specific 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, know-how 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, know-how 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, since an exchange of such information could resolve in an exchange of information between competitors.

If, after these initial contacts, it is clear that the potential consortium agreement partners can bid each on their own, as a general rule, no further information exchange between the undertakings should take place unless the consortium agreement in question fulfils the

[113] cf. Commission's decision of 24 April 2018 in case M.7993, *Altice/ PT Portugal*, paragraph 437-439.

conditions for an individual exemption 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 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, which the undertakings should have laid down beforehand.

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 specific 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. This could for instance be the exchange of future prices, the undertakings future strategy or information concerning the undertakings future production and sale.

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. Therefore, the exchange of information between undertakings could restrict competition on the markets where the undertakings are actual or potential competitors, whether it’s the market concerning the specific call for tender or another market, where the parties are or could be active. 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.