Introduction
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Public Procurement Law Concerns and Competition Law Principles: Tender Co-ordination by Affiliated Entities

Introduction

Whilst entities belonging to the same corporate group are not obliged to take the initiative and disclose their links when participating in the same public contract award procedure, tender co-ordination must lead to their disqualification from that process. This was the key conclusion of the Court of Justice of the European Union (the “Court”) in its Specializuotas transportas decision [see endnote 1].

This conclusion was reached despite the well-established “single economic entity” doctrine which provides that entities belonging to the same group and have a common source of control form, collectively, a single undertaking [see endnote 2]. As a result, arrangements between such entities are not caught by the prohibition on anti-competitive agreements and concerted practices between undertakings in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

This article sets out the main aspects of the Court’s decision and discusses its likely implications for affiliated enti-
entities wishing to participate in the same public contract award procedure. It also considers the application of competition law principles in a public procurement law context, as well as the possible ramifications of the case in the interpretation of certain other competition law-related aspects of EU procurement legislation.

**Relevant facts and law**

The Court’s decision relates to a request for a preliminary ruling by the Lithuanian Supreme Court (the “referring court”) in the context of proceedings originally brought by an unsuccessful tenderer against a public authority’s decision to award a contract for the provision of municipal waste collection and transportation services to another tenderer.

Four tenderers had submitted offers in the original tender procedure. Two of the tenderers, Specialus autotransportas UAB (Tenderer A) and Specializuotos transportas UAB (Tenderer B) were subsidiaries of Ecoservice UAB, and the Board of Directors of each of Tenderer A and Tenderer B were comprised of the same individuals.

Although neither the Lithuanian legislation nor the tender specifications required tenderers to disclose their links to other tenderers, Tenderer B submitted voluntarily with its tender a “declaration of honour” stating that it was tendering autonomously and independently of any other tenderer and that all other tenderers in the competition should be deemed to be its competitors. In addition, it indicated its willingness to provide a list of the entities to which it was connected, should the contracting authority require it to do so.

Whilst Tenderer A’s offer was rejected for failing to meet the specified quality requirements, Tenderer B’s offer was successful. The second-placed tenderer, VSA Vilnius, challenged the contracting authority’s decision to award the contract to Tenderer A, arguing that in bidding for the same contract award, Tenderers A and B had acted as a group of associated undertakings. That meant that the offers which they had submitted amounted to the submission of two variant offers [see endnote 3] (by the same entity) which was expressly prohibited by the rules of the competition. As a result, it was argued, the EU procurement legislation requirements for equality of treatment and transparency had been infringed.

The Lithuanian court of first instance annulled the contracting authority’s award decision finding that:

- although the contracting authority was aware of the links between Tenderers A and B, it had not taken (as it should have) any steps to determine what influence that link might have had on the competition;
- although not required under national legislation, since Tenderers A and B were each aware of the other’s participation in the competition, they should have disclosed their links to the contracting authority. Tenderer B’s declaration of honour was insufficient in disposing of that obligation.

The Court of Appeal’s subsequent decision to confirm the lower court’s judgment was in turn appealed to the referring court, by both VSA Vilnius and Tenderer B. The referring court then suspended proceedings and sought a preliminary ruling from the Court on:

- whether EU procurement legislation [see endnote 4] had to be interpreted as requiring related entities bidding in the same competition to disclose, at their own initiative, the links between them to the contracting authority; and
- whether in circumstances such as those in the main proceedings, Article 101 TFEU was applicable and whether EU procurement legislation, including the obligation to treat suppliers equally and non-discriminatorily and to act in a transparent way, required a contracting authority which had evidence that called into question the autonomous character of submitted tenders, to verify whether they were in fact autonomous and whether failure to act in this way was capable of affecting the legality of the tender procedure.

**The Court’s decision**

In considering whether related entities should have to disclose the links between them, the Court considered that the relevant EU procurement legislation did not prohibit the participation of related tenderers in the same competition. Indeed, the Court’s jurisprudence had made it clear that, in the light of the EU’s interest in ensuring the widest possible participation in a tender procedure, it would be contrary to the effective application of EU law to impose a general prohibition on the participation of related tenderers in the same competition.

Case law had also established that the principles of transparency and non-discrimination required a contracting authority to define clearly in advance and publicise the substantive and procedural rules for participation in a competition. Accordingly, in the absence of a domestic legislative provision or specific condition in the competition requiring related tenderers to disclose the links between them, there was no obligation on them to do so at their own initiative.

The application of Article 101 and the extent of a contracting authority’s obligation to investigate evidence of collusive behaviour.

As regards the application of the Article 101(1) prohibition on anti-competitive agreements and concerted practices in this context, the Court had no difficulty in concluding, by reference to the Court’s jurisprudence, that this did not apply in relation to affiliated entities which constituted a single economic unit. Whether or not the two tenderers in question
met the relevant requirements to be deemed to constitute such a unit was for the referring court to determine.

However, even if the related tenderers constituted a single economic entity, allowing the submission of tenders which were “neither autonomous nor independent” breached, in all circumstances, the EU procurement law principle of equal treatment. This was on the basis that, if related tenderers were allowed to submit co-ordinated or concerted tenders, this was likely to give them an unjustified advantage vis-à-vis other tenderers in the competition. Accordingly, it was unnecessary to apply Article 101 for the purposes of establishing whether or not such co-ordination breached EU procurement law.

Separately, as regards the nature of a contracting authority’s obligations in this context, the Court’s case law had already established that contracting authorities have been assigned an “active role” in the application of the procurement law principles of equality of treatment, non-discrimination and transparency. Accordingly, where related tenderers participated in the same public procurement procedure and the contracting authority obtained objective evidence which called into question the autonomous and independent nature of tenders, it was obliged to examine, including by requesting where appropriate additional information from those tenderers, all the relevant circumstances that had led to the tenders’ submission so as to verify the position. If the tenders proved not to be autonomous and independent, the authority had to disqualify them from the competition.

As to the standard of proof that applied in this context, the EU law principle of effectiveness required that a breach of EU procurement rules could be proven not only by direct evidence, but also through indicia, provided these were objective and consistent and the related tenderers were in a position to submit evidence in rebuttal.

In this regard, a mere finding that the tenderers in question constituted a single economic unit, by virtue of the control which their parent company exercised over them, did not provide, in itself, adequate grounds for excluding their tenders from the contract award procedure. Instead, it was necessary to determine first whether that relationship affected the independence of the tenders in question. The finding that the links between tenderers influenced the content of their tenders sufficed, in principle, for those tenderers to be disqualified.

Comments

Competition law concepts and public procurement regulation

The Court’s Specializuotas transportas decision is in line with its earlier Assitur judgment [see endnote 5] in which the Court had concluded that it was incompatible with EU law for national legislation to impose a general prohibition on the participation of affiliated undertakings in the same public contract award procedure. At the same time, related tenderers participating in the same competition cannot be allowed to co-ordinate their tenders. Such co-ordination is likely to give them an unfair advantage, increasing their chances of success at the expense of other tenderers in the competition.

Permitting such conduct would, therefore, lead to the contracting authority breaching its EU procurement law obligation to carry out a fair process, without the need to examine whether such co-ordination breaches Article 101. In other words, breach of EU procurement legislation in this context is not conditional on such conduct breaching Article 101. It is sufficient that this conduct will have an impact on the fairness of the procurement process.

In this regard, EU procurement legislation goes beyond EU competition law requirements. Whilst tender co-ordination by affiliated entities which constitute a single economic entity does not bring into play the Article 101(1) prohibition, in the context of a public contract award procedure the submission of co-ordinated tenders by such entities must, effectively, lead to their disqualification in order to ensure the fairness of the competition.

An obvious implication of this approach is that, although the definition of an “economic operator” under EU procurement legislation is substantively similar to that of an “undertaking” under competition law [see endnote 6], in the light of the Court’s decision, that term must now be deemed to have a comparatively narrower scope. Related tenderers will be deemed to constitute distinct “economic operators”, irrespective of whether they might constitute collectively a single undertaking for the purposes of EU competition law.

It should be recognised that, from the perspective of a competitor undertaking, this approach may still be problematic. More specifically, the concern here might be that even if there is no tender co-ordination, related tenderers, though constituting a single economic entity, are effectively permitted to submit two tenders in the same competition, doubling their chances of success. However, as we have seen, what underlies the legal analysis from an EU procurement law perspective is the need to ensure, in the context of the single market, the widest possible participation in public tender procedures.

On that basis, the conclusion reached by the Court on this point is not surprising: if related tenderers prepare and submit tenders “autonomously and independently”, they will be treated as distinct “economic operators” for the purposes of EU procurement law. Put differently, EU procurement law is prepared to disregard the fact that a single economic entity is given two opportunities to tender in the same competition,
as long as the affiliated tenderers in question behave as if they are distinct competing undertakings.

The necessary implication of this approach is that if tender co-ordination is proved, then this is, by itself, sufficient to lead to the disqualification of the tenderers in question, without having to examine in each case the specific intention or effect of such co-ordination. This might appear as too harsh from a competition law perspective where, in principle (although this is extremely rare in practice), “by object” restrictions can have the benefit of an efficiency gains defence under Article 101(3) [see endnote 7]. However, there is logic to this approach: from a procurement law perspective, allowing two related tenderers to co-ordinate their submissions is, by definition, discriminatory vis-à-vis other tenderers which are not able (or indeed, permitted under competition law) to do so. Indeed, if there is a need for co-ordination then that co-ordination is, by implication, designed to improve the chances of one or both of the tenderers in question to win the public contract being competed.

If affiliated tenderers (which constitute a single undertaking) consider that there is a need or justification for co-ordination then the obvious answer would be to submit a combined tender. Unlike joint submissions by two competing undertakings, this will not give rise to any competition law concerns.

It is also worth noting in this context that, in certain EU Member States such as France, the conduct of affiliated corporate entities which participate in the same public procurement procedure can become subject to competition law regulation, despite the single economic entity doctrine. More specifically, if affiliated entities are found to have co-ordinated their tenders, national competition law would apply to their conduct, as if that constituted tender co-ordination between two distinct undertakings.

The extent of the “active duty” to carry out a fair competition

According to the Court, where a contracting authority “has evidence” which calls into question the autonomous and independent character of tenders that related tenderers have submitted, it has an obligation to investigate this. The Court reached this conclusion by reference to its jurisprudence and the principle that contracting authorities have an active role to play in ensuring equality of treatment, non-discrimination and transparency throughout a procurement process.

At the same time, the Court’s conclusion on this point should not be interpreted as limiting a contracting authority’s obligations in this context to taking action to investigate possible tender co-ordination only when it comes across evidence which calls into question the independence of tenders. Instead, the obligation to ensure the carrying-out of a fair competition should be construed as also requiring contracting authorities to take appropriate steps to limit the risk of tender collusion and actively seek to identify (and then investigate) suspicious tenderer behaviour. The Court did not address this point in its decision, as this was not necessary for the purposes of responding to the specific questions that had been referred to it.

This interpretation would also seem consistent with the explicit obligation on contracting authorities in the current public procurement directive, to “take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.” The recitals to the preamble of that directive clarify this obligation further by indicating that:

“contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest. This could include procedures to identify, prevent and remedy conflicts of interests.”

Even if tender collusion does not constitute a conflict of interest as such, it would seem inconsistent with the Court’s view on the active role which contracting authorities have in ensuring the fairness of the competition, to interpret the legislation as not requiring them to take steps to limit the risk of collusive tendering and to identify suspicious tenderer behaviour which might indicate the existence of collusion.

In practice, such an obligation should not be cumbersome. First, as regards the possibility of affiliated tenderers co-ordinating their tenders, it should be obvious in most cases that two (or more) tenderers might be related to each other as a result of the detailed information that applicants must normally submit as part of the selection process in a public contract award procedure. In any event, contracting authorities may (and indeed, should) make it a tender condition that applicants disclose whether any other affiliated entity is expressing an interest in the same competition.

Whilst, in its judgment, the Court comments that it is not always possible for a tenderer to know the identity of all other tenderers in the same tender procedure before the closing date for the submission of tenders, it would not seem disproportionate to require tenderers which form part of a corporate group to make enquiries within their organisation so as to establish whether any other affiliated entity would be participating in the same competition. If they establish that this is the case, they can then provide separate undertakings to the contracting authority to the effect that they will prepare and submit their respective tender “autonomously and independently”, setting out the verifiable steps which they will take to ensure that this is the case.
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It is beyond the scope of this article to set out the detailed steps which contracting authorities should be taking more generally in seeking to identify tender collusion involving competing undertakings. Suffice it to say that, as a minimum, they should be requiring tenderers to submit declarations to the effect that they are cognisant of their competition law obligations and undertake to the contracting authority that in submitting a tender they do so in full compliance with applicable competition laws. Although the provision of such an undertaking is no guarantee that tender collusion will not occur, it is an easy way of at least concentrating the minds of would-be tenderers as to their obligations in participating in a public contract award procedure. Ultimately, given the covert nature of tender collusion, it is also important for contracting authorities to ensure that those involved on its behalf in the carrying-out of contract award procedures are in a position to identify suspicious tender patterns and tenderer behaviour. A number of European Governments, competition regulators as well as the Organisation for Economic Co-operation and Development (OECD) have already published useful guidance in that regard.

The required standard of proof

As to the standard of proof required to determine whether tenders have been co-ordinated, the Court applied by analogy aspects of its earlier Eturas decision [see endnote 8] (which dealt with a request for a preliminary ruling on the interpretation of Article 101). In doing so, it concluded that tender co-ordination may be proven not only by means of direct evidence but also through indicia, provided these are objective and consistent and the related tenderers are given the opportunity to rebut the contracting authority’s presumption as to their conduct.

Relevant to clarifying further the standard of proof required in this context, is the Court's comment at [36] in Eturas, which arguably, should also be applied here by analogy. According to this:

“in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.”

Equally, the Court in that case referred to the principle of the presumption of innocence and explained that, whilst this applied under EU law, it did not preclude the possibility of concluding that objective and consistent indicia might justify the presumption that a breach of competition law had been committed, as long as the undertakings concerned had the opportunity to rebut that presumption.

Applying these principles in the current context, where the related tenderers are able to put forward another plausible explanation of the facts which had led the contracting authority to conclude initially that there had been tender co-ordination, in the light of the presumption of innocence principle, any such other plausible explanation would rebut the infringement presumption [see endnote 9].

It goes without saying that, although Specializuotas transportas deals specifically with the risk of tender-co-ordination between affiliated entities, the above principles should be deemed to apply more generally to tender collusion in a public procurement context, irrespective of whether the colluding tenderers are affiliated.

The Court’s decision in the light of Directive 2014/24

As noted elsewhere in this article, the Court’s decision related primarily to the interpretation of Directive 2004/18, which regulated the award of public contracts at the time of the dispute in the main proceedings. This has since been replaced by Directive 2014/24 which, although it is in all relevant respects substantively similar to the previous directive (so that the Court’s conclusions are equally applicable under current EU procurement legislation), it is also different in one important respect. Directive 2014/24 updates and expands the list of grounds on the basis of which tenderers may be disqualified from a competition. As a result, the legislation now provides also for the possibility of contracting authorities disqualifying an economic operator (at any point of the procurement process) where they have “sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition”. [Emphasis added]

Whilst this provision will clearly apply to anti-competitive agreements between undertakings which breach the Article 101(1) prohibition or equivalent domestic legislation, it would arguably also apply to situations where related economic operators agree to co-ordinate their tenders, thereby distorting competition for the award of a particular public contract. This approach would seem to be consistent with Specializuotas transportas and the principle, discussed earlier, that related tenderers constitute distinct “economic operators” for the purposes of procurement legislation, irrespective of whether they might constitute a single economic entity for the purposes of competition law.

Equally, it is arguable that the reference in Directive 2014/24 to establishing such misconduct on the basis of “sufficiently plausible indications”, a reference which the legislation does not clarify, should now be interpreted by analogy with the Court’s decision in Specializuotas transportas. On that basis, not only direct evidence but also objective and consistent indicia should be sufficient for the purposes of determining the existence of an agreement to co-ordinate tenders, provided that related tenderers are given the opportunity to rebut the contracting authority’s presumption in that regard.
Finally, although this “distortion of competition” provision is classified as a discretionary ground for exclusion in the legislation, in the context of an on-going competition, where such conduct is proven, it must lead to the disqualification of the tenderers in question so as to preserve the fairness of the process. This conclusion would seem consistent with the Court’s decision in *Specializuotas transportas* and its strict approach to tender co-ordination between affiliated entities, as discussed in this article.

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**Endnotes**


2. In very simple terms, entities will be deemed to constitute a single economic entity when they have a common source of control, in that the parent company is able to exercise a decisive influence over a subsidiary company resulting in lack of ‘real autonomy’ for the subsidiary in determining its commercial strategy.

3. A variant offer is essentially an offer which does not meet fully the contracting authority’s requirements, although it must still meet certain minimum requirements which the contracting authority is obliged to set out in the procurement documents, when authorising or requiring the submission of variant offers.


6. “Economic operator’ means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.” (Article 2, Directive 2014/24).

7. Article 101(3) sets out four cumulative conditions which if met, it means that an otherwise restrictive agreement generates economic benefits which outweigh its negative effects on competition and on that basis, it is exempt from the Article 101(1) prohibition.


9. See by analogy, Case C-89/11 *P. E.ON Energie v Commission*, EU:C:2012:738 at [74].