

CONSORTIUM BIDDING

How to comply with
competition law
when tendering as
part of a consortium

A Guide for Small and
Medium Enterprises
(SMEs)

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Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

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Consumer Protection
Commission

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Summary of this Guide

The following is a high-level summary of the information contained in this guide. It is not intended to replace the guide. Please consult the guide in full for information on how to comply with competition law when tendering as part of a consortium.

- This guide is aimed at small and medium sized businesses (SMEs) who want to form a consortium to tender for a public contract. A consortium involves a number of independent firms coming together to submit a ‘consortium bid’, i.e. joint bid, for a contract. This guide is designed to help SMEs involved in consortium bidding to make sure that they comply with competition law.
- A consortium bid will not breach competition law if **(i)** the consortium members are not actual or potential competitors (subject to the caveats discussed in paragraph 1.9 below), or **(ii)** the consortium members are all owned by the same parent company. For further detail, see paragraph 3.4 below.
- In addition, in the view of the Competition and Consumer Protection Commission, a consortium bid even between actual or potential competitors will not of itself breach competition law if all of the following conditions are met: **(i)** none of the consortium members could fulfil the requirements of the tender competition or the contract on its own; **(ii)** no subset of the consortium members could together fulfil the requirements of the tender competition or the contract; **(iii)** only the minimum amount of information strictly necessary for the formulation of the consortium bid and the performance of the contract (if awarded) is shared between the consortium members and is restricted to relevant staff on a ‘need to know’ basis; and **(iv)** the consortium members ensure that they compete vigorously as normal in all other contexts. For further detail, see paragraph 3.5 below.
- In all other cases, consortium members who are actual or potential competitors should carry out a ‘self-assessment’ as to their compliance with competition law. This means that the consortium members must identify the pro-competitive benefits that result from joint bidding and assess whether those pro-competitive benefits outweigh any anti-competitive effects. There are four specific factors that all need to be examined as part of this assessment. For further detail, see paragraphs 3.6 and 3.7 and the accompanying text box below.
- Regardless of the type of consortium concerned, the consortium members must **always** ensure that the consortium is not used as a vehicle to facilitate anti-competitive collusion between the consortium members in relation to other contracts or other markets. Anti-competitive collusion involves practices such as price-fixing, market sharing and bid-rigging. This guide contains practical considerations to help you comply with competition law and avoid anti-competitive collusion. For further detail, see paragraphs 3.8 to 3.10 below.

1. Introduction

Who is this guidance for?

- 1.1 This guide is published by the Competition and Consumer Protection Commission (the Commission)¹ and is aimed at businesses, especially small and medium sized enterprises (SMEs), who want to form a consortium in order to tender for a public contract. It is designed to help SMEs who want to submit joint bids to do so in a way that complies with competition law.
- 1.2 Section 1 contains background information on SME participation in public procurement through consortium bidding. Section 2 explains how competition law applies to consortium bidding. Section 3 sets out some practical guidance for SMEs on how to ensure they comply with competition law when they get involved in consortium bidding.
- 1.3 Consortium bids are permissible under competition law provided certain conditions are met. However, since a consortium bid may involve competitors coming together to discuss the terms of a joint bid and potentially sharing commercially sensitive information relevant to that bid, it is very important to ensure that the cooperation between consortium members does not lead to anti-competitive collusion or result in other anti-competitive effects.
- 1.4 This guide is based on relevant Irish and EU legislation and guidelines, including the Competition Act 2002 (as amended)² and the European Commission's [Guidelines on horizontal cooperation agreements](#).³ If you need more help assessing your position, we suggest that you take a look at the European Commission's Guidelines on horizontal cooperation agreements, which provide more detail on the legal and economic principles which apply.

1 On 31 October 2014, pursuant to the Competition and Consumer Protection Act 2014, the Competition Authority and the National Consumer Agency were amalgamated and became the Competition and Consumer Protection Commission. In this Guide, the 'Commission' refers to the Competition and Consumer Protection Commission, while the 'European Commission' refers to the Commission of the European Union.

2 This refers to the Competition Act 2002, as amended by various subsequent Acts including the Competition (Amendment) Act 2006, the Competition (Amendment) Act 2010, the Competition (Amendment) Act 2012 and the Competition and Consumer Protection Act 2014.

3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

- 1.5 While this guide relates specifically to public procurement, the same competition principles apply to all tender processes, including those run by private firms.
- 1.6 This guide covers cases where a number of firms want to form a consortium to bid for a public contract, i.e., the firms come together openly to submit a joint bid to a purchasing body. It is not intended to address bid-rigging or collusive tendering, e.g., where a number of competitors agree in secret on who will win a particular tender competition. Such activity involves serious infringements of competition law which, if detected, will be investigated by the Commission and may expose the participants to criminal prosecution. The Competition Authority published a separate guidance booklet in 2009 on [The Detection and Prevention of Collusive Tendering](#).⁴

This guide does not constitute legal advice. You must decide for yourself whether your conduct, and that of your firm and its staff, complies with competition law. However, this guide should assist you in making that assessment. If you have doubts about whether a planned consortium complies with competition law, you should seek independent legal advice.

Why submit joint bids?

- 1.7 There are various legitimate reasons why firms might decide to create a consortium in order to submit a joint bid for a public contract. For example
- The firms taken individually do not have the necessary scale to service the requirements of the contract.
 - The firms individually do not have sufficient turnover to meet the minimum turnover or other financial capacity requirements set by the purchasing body in the tender competition.
 - The firms individually do not have the necessary previous experience or other technical capacity requirements to meet the minimum requirements set by the purchasing body in the tender competition.
 - The firms individually do not have the necessary geographic reach to service the requirements of the contract.

⁴ All of the Competition Authority guidance booklets referred to in this document are available at: <http://tca.ie/EN/News--Publications/Information-Booklets.aspx>. Guidance produced by the Competition Authority remains relevant unless and until replaced by guidance from the Competition and Consumer Protection Commission.

- The firms individually do not have all of the plant, equipment or other technical resources required to perform the contract.
- The firms individually do not have all of the necessary skills or expertise to perform the contract.

What do we mean by consortium bidding?

- 1.8 The terms ‘consortium bidding’ and ‘joint bidding’ are used throughout this guide to refer to a situation where two or more parties choose to submit a joint bid in a public procurement competition. A consortium may comprise two or more SMEs, or it may, for example, consist of one large firm together with one or more SMEs. The guidance contained in this document applies irrespective of the composition of the consortium.
- 1.9 As already indicated, competition concerns are most likely to arise in circumstances where the firms involved are actual or potential competitors and it is those concerns that are the focus of this guide. (Further information on what the term ‘actual or potential competitor’ means is provided in paragraph 3.4 below.) However, this guide also covers consortium bids involving non-competitors, for example, between companies that are active in different markets entirely, or that are active in the same product markets but operate in different geographic markets and are not potential competitors.⁵ In certain circumstances, sub-contracting arrangements involving non-competitors can also cause competition problems (for example, where there is a specialist sub-contractor participating in multiple tenders in a tender competition). This document therefore also contains guidance to assist joint bidders in ensuring that sub-contractors are not used as conduits for exchanging sensitive information between different consortia in the same tender competition.
- 1.10 Consortium bidding involves a number of firms coming together openly to submit a joint bid to a purchasing body. If the consortium bid is successful, the purchasing body may require that one of the consortium members will act as the lead or ‘prime’ contractor who will have overall responsibility for the performance of the

⁵ If you are considering a joint bid with firms at different stages of the supply chain, referred to as ‘vertical agreements’, guidance is available in the Competition Authority’s Declaration and Notice in Respect of Vertical Agreements and Concerted Practices and in the European Commission’s Guidelines on Vertical Restraints.

contract. The guidance applies regardless of the specific legal form that the consortium takes.⁶

The importance of SME participation in public procurement

- 1.11 The public sector is a major purchaser of goods and services in Ireland. In 2013, the public sector spent in the region of €8.5 billion on purchasing goods and services, in addition to expenditure on public works. This level of expenditure offers significant business opportunities for firms that can provide the goods and services required by public bodies.
- 1.12 The Office of Government Procurement (OGP) has been tasked with centralising public sector procurement arrangements for common goods and services. The trend towards centralised buying in the public sector is designed to improve efficiency and value for money in public purchasing. The OGP wants to encourage SMEs to participate in public procurement competitions on a fair and equal basis. However, SMEs can sometimes find it difficult to tender for larger scale or aggregated contracts for the reasons described above (e.g., the SME on its own has insufficient scale, geographic reach or financial capacity to tender for the contract).
- 1.13 Excluding efficient SMEs from public procurement could potentially have a detrimental impact on competition. For example, it may have the effect of excluding smaller firms or new entrants with innovative solutions, thereby reducing the value for money that the State can achieve. It may also reduce the overall number of firms that can take part in a tender competition. This may potentially decrease competition and increase the cost of goods and services purchased by the State. In the longer term, it may limit the number of firms left in the market and deter new firms from entering the market, meaning that the field of potential bidders may be considerably reduced for the next round of tendering.
- 1.14 Consortium bidding offers an opportunity for SMEs to pool their knowledge and expertise and submit joint bids that offer higher quality products and more innovative solutions to the purchasing body. Consortium bids involving larger

⁶ It should be noted, however, that this guide does not cover situations where joint bidders decide to create a 'full function joint venture' going beyond limited co-operation such as is involved in consortium bidding. A full function joint venture is a joint venture which performs (on a lasting basis) all the functions of an autonomous economic entity (e.g., because it has its own dedicated day-to-day management team, and access to resources such as finance, staff and assets). Full function joint ventures may need to be notified to the Competition and Consumer Protection Commission for a formal review under the merger control regime set out in Part 3 of the Competition Act 2002 (as amended).

firms and SMEs may allow significant efficiencies to be realised if the SME can reduce the consortium's costs in particular geographic areas or in specific product lines.

Facilitating SMEs in public procurement

- 1.15 In recent years, the Government has put in place a number of measures to facilitate SME participation in public procurement. These include new guidelines adopted by the Department of Public Expenditure and Reform (DPER) in April 2014 that promote setting relevant and proportionate financial capacity, turnover and insurance levels for tendering firms (see DPER [Circular 10/14](#)).⁷ The DPER guidelines also promote sub-dividing larger contracts into lots, where possible, to enable SMEs to bid for these opportunities. The guidelines encourage SMEs to form consortia where they are not of sufficient scale to tender in their own right. The OGP standard tender documents also encourage SMEs to explore the possibility of forming consortia with other SMEs or with larger firms in order to submit joint bids.
- 1.16 The new EU Procurement Directive⁸ also contains various measures designed to make public contracts more accessible to SMEs. For example, the Directive encourages purchasing bodies to sub-divide large contracts into lots. In addition, the Directive states that the turnover requirement set by the purchasing body must generally not exceed two times the estimated value of the contract (in some cases a higher threshold may however be justified, for example, where there are special risks relating to the nature of the works, services, or supplies being procured). The Directive makes it clear that groups of firms can come together to submit joint bids.
- 1.17 However, consortium bidding must be carried out in a way that ensures that the firms involved comply with competition law, both in the tendering process itself and in the market generally. Consortium bidding often involves firms that are actual or potential competitors coming together to submit joint bids for public contracts. Consortium members must make sure that their collaboration on a joint bid does not spill over into their activities in the market more generally and

⁷ http://www.procurement.ie/sites/default/files/circular_10-14_0.pdf.

⁸ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Directive 2014/24/EU).

become a means for them to engage in anti-competitive behaviour outside the scope of the joint bid.

Where can you get information on forming a consortium?

1.18 This guide deals only with how to comply with **competition law** when tendering as part of a consortium. If you are looking for general information on forming a consortium, there are State agencies that offer support and advice to SMEs on issues such as consortium development and public procurement opportunities, including

- InterTradeIreland (www.intertradeireland.com)
- Enterprise Ireland (www.enterprise-ireland.com)

2. Overview of Competition Law

What is competition law?

- 2.1 All businesses in Ireland, whether small, medium or large, are obliged to comply with Irish and EU competition law and to refrain from anti-competitive behaviour.
- 2.2 Competition law protects the competitive process to ensure that products and services are competitively priced, of good quality and innovative. This benefits everyone: consumers, businesses and the economy as a whole. It is important to understand the types of behaviour that are prohibited by competition law. In summary, Irish and EU competition law forbid two broad types of behaviour:
- (i) **Anti-competitive agreements** between two or more independent firms. Examples of anti-competitive agreements include agreements between competitors to fix prices, share markets, restrict output, or share commercially sensitive information. Competition law applies not only to formal agreements but also to any sort of informal arrangement between firms, whether written or verbal, which has an anti-competitive object or effect.
 - (ii) **‘Abusive’ practices** by a firm which holds a dominant market position. The rules relating to abuse of a dominant position are usually not of direct relevance in the context of consortium bidding and are therefore not dealt with in this guide.⁹
- 2.3 See Appendix A for further information on the role of the Commission in enforcing competition law and on the penalties that apply for breaching competition law.
- 2.4 The Competition Authority (i.e. a predecessor to the Commission) has published a number of other guides to help businesses understand competition law. If you want to learn more about competition law, you may find it helpful to consult the following: [Guide to Competition Law and Policy for Businesses](#), [Your Business and](#)

⁹ In the unlikely event that a SME has a particularly strong market position by virtue of the fact that it has, for example, proprietary technology or other significant intellectual property rights, the SME may have a special responsibility to ensure that it does not abuse that power. Where such SMEs want to enter a consortium bid, they should think carefully before entering into consortium arrangements that prevent others from competing without objective justification. Such SMEs may wish to seek legal advice, in particular, before entering into exclusive arrangements.

[Competition Law - How it helps you and what you need to know](#), and [Complying with Competition Law - A guide for businesses and trade associations](#).

How does competition law apply to consortium bidding?

- 2.5 Consortium bids are commonly used in tendering for public contracts in Ireland and elsewhere throughout the world. Consortium bids do not necessarily breach competition law. However, since a consortium bid may involve actual or potential competitors coming together to discuss the terms of a joint bid and potentially sharing commercially sensitive information relevant to that bid, it is very important to ensure that **(i)** the joint bid itself complies with competition law, and **(ii)** the cooperation between the consortium members does not lead to anti-competitive collusion outside the scope of the joint bid.
- 2.6 As discussed in Section 1 above, there may be valid, pro-competitive reasons for the creation of a consortium. In consortium bidding a number of firms come together openly to submit a joint bid to a purchasing body. By contrast, a cartel (which could include conduct such as bid-rigging or collusive tendering) is the most serious form of anti-competitive behaviour and involves competitors coming together in secret to agree not to compete.
- 2.7 As discussed in paragraph 3.4, a consortium bid will not breach competition law if **(i)** the consortium members are not actual or potential competitors (subject to the caveats discussed in paragraph 1.9), or **(ii)** the consortium members are all owned by the same parent company.
- 2.8 In addition, in the Commission's view, a consortium bid even between actual or potential competitors will not of itself breach competition law if all of the following conditions are met: **(i)** none of the consortium members could fulfil the requirements of the tender competition or the contract on its own; **(ii)** no subset of the consortium members could together fulfil the requirements of the tender competition or the contract; **(iii)** only the minimum amount of information strictly necessary for the formulation of the joint bid and the performance of the contract (if awarded) is shared between the consortium members and is restricted to relevant staff on a 'need to know' basis; and **(iv)** the consortium members ensure that they compete vigorously as normal in all other contexts. For further detail, see paragraph 3.5 below.
- 2.9 In all other cases, consortium members who are actual or potential competitors should carry out a 'self-assessment' as to their compliance with competition law.

This means that the consortium members must identify the pro-competitive benefits that result from joint bidding and assess whether those pro-competitive benefits outweigh any anti-competitive effects. Under competition law, there are **four specific factors** that need to be examined when deciding whether the pro-competitive benefits of joint bidding outweigh any anti-competitive effects.

- 2.10 Further guidance on how to apply these four factors and the approach that you should take when weighing up the pro- and anti-competitive effects of joint bidding is provided in paragraphs 3.6 and 3.7 below.

What are the four factors you should examine when assessing whether the pro-competitive benefits of joint bidding outweigh any anti-competitive effects?

1. The consortium bid must produce real efficiency gains.
2. Consumers must benefit from those efficiency gains.
3. Any restrictions of competition involved in the consortium bid must be indispensable to the achievement of the efficiency gains.
4. Consortium bidding must not substantially eliminate competition either in the particular public procurement competition or in other markets.

Bid-rigging is always prohibited by competition law

- 2.11 ‘Bid-rigging’, or collusive tendering, is a serious form of anti-competitive behaviour. It involves firms agreeing (in advance) on who will win a tender. It occurs when two or more firms agree not to bid, or how they will bid, against one another for a tender or contract. It typically results in the winning bid being higher than it should have been.

- 2.12 Concerns regarding collusive tendering or bid-rigging may arise in particular from consortium bidding where consortium members or sub-contractors participate in multiple tenders. This is especially the case where they do so without notifying the purchasing body. The Competition Authority’s booklet on [The Detection and Prevention of Collusive Tendering](#) provides further details in relation to bid-rigging and collusive tendering.

Even if it appears that the pro-competitive benefits outweigh the anti-competitive effects, the members of a consortium must always ensure that the consortium is not used as a vehicle to facilitate serious anti-competitive collusion between them in relation to other contracts or other markets (e.g., agreeing on future pricing strategies or on future output, or agreeing to share markets or customers). This

type of collusion in relation to other contracts or markets constitutes a serious breach of competition law and is subject to severe penalties. It is very important therefore that cooperation between consortium members in relation to a particular bid is clearly defined at the outset. It must not stray outside the scope of the relevant procurement project.

3. Practical Guidance on Consortium Bidding & Competition Law

This section contains practical guidance on how to submit joint bids in compliance with competition law. The guidance set out below does not constitute a ‘checklist’ which can be applied mechanically in every case. Each case must be assessed on the basis of its own facts. If you have doubts about whether a planned consortium bid complies with competition law, you should seek independent legal advice.

Does competition law *forbid* consortium bids?

- 3.1 No, competition law does not forbid consortium bids. Consortium bids can often be organised in a way that complies with competition law.
- 3.2 Joint bidding can bring economic benefits, especially if it combines complementary activities, skills or assets, or allows competition within the tender process to be enhanced.
- 3.3 Consortium bidding, particularly between SMEs, often involves firms that are actual or potential competitors coming together to submit a joint bid for a public procurement competition. As already indicated (see paragraph 1.7 above), there may be good reasons why competitors decide to participate in a consortium bid. In many cases (as discussed in paragraphs 3.5 to 3.7), a consortium bid involving SMEs who are actual or potential competitors may not breach competition law. However, as mentioned above and in paragraphs 3.8 and 3.9, it is important in such cases that the joint bidders take care to ensure that their involvement in the consortium does not lead to collusion or other anti-competitive activity in areas outside the scope of their joint bid. In the following sections, we set out practical guidance on how to ensure that your consortium bid complies with competition law.

When is consortium bidding *allowed* under competition law?

- 3.4 A consortium bid **does not** cause competition problems if:
 - The consortium members are **not actual or potential competitors** (subject to the caveats discussed in paragraph 1.9).



What is a competitor?

The term includes actual (i.e., current) competitors as well as potential competitors. A competitor is therefore someone who supplies the same goods or services as you do, in the same geographic market, or who could easily adapt its existing business to do so.

For example, a company producing confectionery is unlikely to be a competitor of a company producing packed sandwiches. However, a company producing ready meals might be a competitor of a company producing packed sandwiches if it is economically viable for the company producing ready meals to tweak its production process to produce sandwiches. It is therefore a potential competitor of the company producing packed sandwiches.

Similarly, a SME in Cork would be a potential competitor of a SME in the same field in Donegal, if it would be relatively easy (i.e. would not incur significant additional costs or risks) for the Cork-based SME to deliver its goods or services to Donegal.

- The consortium members are all owned by the same parent company, i.e., the consortium members all form part of a **single economic entity**, or ‘undertaking’, for the purposes of competition law. To come under this heading this must be the case before you start discussing your joint bid. The fact that a merger or takeover is planned is not enough.

What is a single economic entity?

In essence, this relates to whether the parties to the bid are independent of each other. Generally speaking, if two firms can make their own business decisions independently of each other and any third party, they are separate entities. By contrast, if one company can exercise effective and decisive influence, or control, over another’s activities, then the two are a single economic entity. Similarly, if two subsidiary companies are wholly owned by the same (parent) company, then they are part of a single economic entity.

Competition law does not apply to agreements within a single economic entity because the members of the entity are all part of the same corporate group (or other similar entity) and are not competitors. (The entity itself is, of course, subject to competition law).

3.5 *In the Commission’s view, a consortium bid even between actual or potential competitors **will not** cause competition problems if:*

- none of the parties to the consortium bid could fulfil the requirements of the tender competition or the contract on its own; and

- no subset of the consortium members could together fulfil the requirements of the tender competition or the contract; and
- only the minimum amount of information strictly necessary for the formulation of the consortium bid and the performance of the contract (if awarded) is shared between the members of the consortium and is restricted to relevant staff on a 'need to know' basis. (More specifically, discussions between them must be confined to the relevant procurement project and must not involve disclosure of the terms, especially prices, that individual consortium members currently offer to other customers or of information relating to other procurement projects or their future strategies, whether related to pricing, capacity, customers or markets.); and
- the consortium members ensure that they compete vigorously as normal in all other contexts. In other words, consortium members should not compete less aggressively with each other when tendering separately for other contracts or when offering their goods and services generally on other markets just because they have formed a consortium to help them bid for one particular contract.

How should you weigh up the pro- and anti-competitive effects of joint bidding?

- 3.6 Even if your consortium bid does not satisfy all of the requirements set out in paragraph 3.4 or paragraph 3.5 above, it may still be allowed under competition law. In such cases, you will need to examine whether the consortium bidding arrangement results in benefits to competition that outweigh any competition concerns. To decide whether a consortium bid has net positive effects, consortium members should identify the pro-competitive benefits produced by their joint bidding and assess whether those pro-competitive benefits outweigh any anti-competitive effects.
- 3.7 Each consortium member should consider its position carefully before entering detailed discussions with bidding partners. Try to weigh up the positive and negative effects on competition that cooperating on a consortium bid is likely to have. The discussion that follows will help you to do that.
- ***Does your company independently meet all of the requirements of the tender competition?***

If your company is capable of submitting an independent bid on its own, then there may not be any pro-competitive justification for forming a consortium. Consortium bidding may give rise to competition concerns when one consortium member or a subset of the consortium members could fulfil the requirements of the tender competition or the contract on its own. In such cases, it is essential for the consortium members to determine whether the net effect on competition of their consortium bid will be positive or negative. This will depend on a case by case assessment using the four factors outlined in paragraphs 2.9 to 2.10 and explained in the box below. For example, there may be cases where individual consortium members are capable of submitting independent bids but where consortium bidding nonetheless brings pro-competitive benefits. This could arise where the firms involved bring different proprietary technologies that work together to reduce the costs involved in undertaking the project or where coming together offers reduced costs through efficiencies of scale.

- ***What effect will the consortium have on prices and product quality?***

Participation in a consortium bid must not, when all effects are balanced against each other, result in anti-competitive effects in the specific tender competition or elsewhere – whether by increasing prices, or by reducing output, product quality, product variety or innovation. For example, two firms with complementary technologies coming together in a consortium might result in a more innovative product offering. However, if the only product the consortium offers is more expensive than their individual offerings that is not a good outcome for the purchasing body or for end consumers.

- ***How competitive is the market in which you are operating?***

Consortium bids are more likely to have anti-competitive effects in certain types of markets, especially in markets where there is not much competition to start off with. For example, competition is more likely to be restricted by consortium bids in markets with a small number of competitors or where a large percentage of the market is controlled by a small number of companies. If some or all of those competitors were to get together to form a consortium it would reduce the number of tenderers competing to win the contract and therefore potentially result in the winning tender price being higher than it would otherwise have been. By contrast, in a market with dozens of providers, two or three of them getting together to form a consortium is likely to leave enough other players in the market to ensure the tender competition can be effective. If you have a reasonably

accurate awareness of the degree of competition in your own market, this should allow you to judge the effect a consortium bid is likely to have on competition.

- ***What are the market shares of the various consortium members?***

Consortium bids are less likely to have anti-competitive effects when the consortium members are all SMEs that hold small market shares relative to other firms in the same market. By comparison, if a number of companies, with a large combined market share, say of 90%, were to form a consortium this would raise a red flag from a competition law perspective.

Weighing pro- and anti-competitive effects: the formal legal test

As outlined in paragraphs 2.9 and 2.10 above, under competition law there are four factors that need to be examined when weighing up the pro- and anti-competitive effects of many joint bidding scenarios in order to decide if the proposed joint bid complies with competition law. If all four factors are satisfied, then a consortium bid between competitors will be compatible with competition law. (Once again, however, it is important to remember that this will only be the case where the consortium is not used as a vehicle to facilitate serious anti-competitive collusion between the parties in respect of other contracts - e.g. price-fixing, market sharing or bid-rigging.)

The four factors are as follows:

1. The consortium bid must produce **real efficiency gains**.

This could arise, for example, if the consortium bid results in the parties delivering on the procurement contract requirements more efficiently than other efficient competitors, or than the parties themselves would have done if they had submitted separate bids.

An important factor in this analysis would be the respective contributions by the parties of capital, technology, or other assets. Unless the consortium involves improved efficiency in how the members operate for delivery of that contract, then this criterion is unlikely to be satisfied. For example, let's imagine there are four firms, each of which provides agency nursing services in a separate province. If they were to combine forces to enter a successful consortium bid to provide agency nursing

services to the Health Service Executive (HSE) on a national basis, the consortium bid would have to produce some 'added value' for the HSE beyond what would have been offered by the four firms if they had each submitted separate bids. For example, if the four firms in the consortium would co-ordinate some of their activities if awarded the contract (e.g. billing, dispatch of agency nurses) this would be likely to reduce costs and provide a more efficient service for the HSE.

2. Consumers must benefit from those efficiency gains.

In other words, some benefits or cost savings must be passed on to consumers, i.e., the purchasing body or end consumers of the products or services involved. In the case of public procurement projects, this could result in lowering costs to the State and the taxpayer, ensuring that a higher quality service is delivered to the public, or permitting the delivery of a more innovative solution, than any of the consortium members could deliver on its own.

On the other hand, if the consortium members have a high combined market share, the consortium would be likely to reduce significantly the level of competition in the tender competition and result in the winning tender price being higher than it would have been if each of the firms had submitted separate bids. This would mean that the consortium would not result in any efficiency gains that benefit consumers.

3. Any restrictions of competition involved in the consortium bid **must be indispensable** to the achievement of the efficiency gains.

What this means in practical terms is that

- (i) the efficiency gains could not be achieved without the restriction of competition involved in the consortium bid, and
- (ii) the restrictions must not go beyond what is necessary to allow the consortium to bid in the tender market.

For example, where two firms with complementary skills come together to tender for a contract, it is perfectly permissible for them to agree not to submit independent bids. However, they could not successfully argue that it was also necessary for them to agree never to compete independently for any other contracts with the relevant purchasing body.

This type of broader restriction would go beyond what was necessary to allow the consortium to submit a tender.

4. Consortium bidding **must not substantially eliminate competition.**

This means that consortium bidding must not eliminate competition to a significant degree either in the particular tender competition or in other markets. As an extreme example, if all potential suppliers were to enter into a consortium bid this would mean that the purchaser could not benefit from a competitive tendering process. In addition, bidding together for one tender must not affect how you compete for other work. In other words, your involvement in a consortium bid must not prevent you competing vigorously against fellow consortium members for other projects.

How to avoid anti-competitive collusion between consortium members

3.8 Even if you decide that – in the circumstances of a particular procurement competition – the pro-competitive effects of joint bidding outweigh any anti-competitive effects, you must always ensure that the consortium is not used as a vehicle to facilitate anti-competitive collusion between consortium members in relation to other contracts or other markets. Anti-competitive collusion involves practices such as price-fixing, market sharing and bid-rigging.

3.9 The following is a list of practical considerations to help you comply with competition law. Many of these are relevant at all stages of your interaction with other consortium members, even if ultimately you decide not to submit a consortium bid:

- Cooperation among the consortium members **should not go beyond what is needed** to submit the tender and, if successful, to ensure successful delivery of the project requirements.

Discussions on the content of the consortium bid must not stray outside the scope of the relevant procurement project and lead to discussions about the terms, especially prices, that individual consortium members currently offer to other customers. Discussions must never involve consortium members agreeing on future pricing strategies, output or sharing of customers. Discussions must never

lead to consortium members agreeing on the prices or other terms they will individually offer in future procurement projects. If that happens, you should extract yourself from any discussions of the consortium bid. If a competitor divulges sensitive commercial intentions during such a meeting you should also extract yourself from any discussions of the consortium bid.

- An important question to ask yourself is **will your involvement in the consortium change how you behave** with other customers? In particular, will you or others compete less vigorously elsewhere in the market because of your involvement in the consortium bid?

Involvement in the consortium must not affect how you behave towards other customers and in other projects. You must continue to compete vigorously against fellow consortium members in all other relevant contexts.

- **Only the minimum amount of information necessary should be shared** between the members of the consortium (particularly where the consortium members are actual or potential competitors) in order to limit the risk of reducing competition in other markets. Receiving commercially sensitive information from a competitor, even if this information was not requested, can represent a breach of competition law if a firm subsequently changes its behaviour on the market on the basis of the information it received. This is known as a concerted practice. You can reduce the risk of this occurring by, for example: limiting dissemination of information within the bid team, or ensuring that, when you are discussing how to price the bid, you do not discuss your general commercial strategy, do not provide detailed information on your cost base and do not share pricing models.
- A firm that is simultaneously a member of more than one consortium must **ensure that it does not end up acting as a conduit for sensitive information between competitors**. Many purchasing bodies prohibit a firm from participating as a main contractor in more than one tender or prohibit the firm from doing so without the consent of the purchasing body. The issue of participation in more than one consortium more commonly arises in sub-contracting arrangements where a specialist sub-contractor participates in multiple tenders. For example, companies A and B are competitors and your firm, company C, is acting as a specialist sub-contractor in two separate consortia involving companies A and B in the same tender competition. If company A provides you with sensitive information about its business strategy (e.g., its future pricing intentions), you should ensure that this information is not passed on to company B. In such a case there is no need to remove yourself from the conversation but you should say that you will not

mention the content of this conversation to anyone else as it is commercially sensitive. It is common in these circumstances for companies to enter into confidentiality agreements to ensure that appropriate safeguards are in place to prevent deliberate or inadvertent disclosure of sensitive information between tenderers.

- If in doubt, you should seek independent legal advice.

Practical steps to *reduce the risk* that a consortium bid breaches competition law

3.10 The following is a list of practical steps to help you reduce the risk that a consortium bid breaches competition law:

- Notify the purchasing body of the fact that you are submitting a consortium bid. The template 'Request for Tenders for Goods' and 'Request for Tenders for Services' developed by the OGP require tenderers to set out clearly in their tenders the names of all consortium members who it is proposed will be involved in performing the contract.
- If you are aware that a member of the consortium will be participating in more than one consortium in the same tender competition, notify the purchasing body of this as the purchasing body may want to impose information-sharing restrictions or take other appropriate measures to resolve any actual or potential conflict.
- Be clear what the scope of cooperation will be before you start discussions. It should be specific to the products, services and customers involved in the procurement competition. It should not encourage you or others to compete less vigorously.
- Keep discussions limited to what is needed to put together the consortium bid.
- Limit access to materials and information relating to the tender at issue and dispose of them after completion of the bid or delivery on the contract as appropriate.
- Although it is not essential in order to comply with competition law, if resources permit you could consider asking an independent person to manage the consortium bid.

- Consider requiring specialist sub-contractors or consortium members participating in multiple tenders to sign confidentiality agreements to prevent disclosure of sensitive information.
- You should ensure that the people within your company working on the consortium bid treat all information related to the bid formation as strictly confidential and subject to ‘need to know’ restrictions. You should also ensure that information learned in the bidding process does not affect how you compete in other parts of your business before, during, or after the consortium bidding process.
- If your consortium bid is successful, subject to the requirements of the tender documents, you might also wish to consider establishing a separate company, for example, a joint venture or special purpose vehicle, to perform the contract. While this may facilitate compliance with competition law, it is not essential that such arrangements be put in place.
- If discussions stray outside the scope of what is permitted – for example, to prices generally, customer sharing, or future commercial strategy
 - voice your concern that competition law could be breached.
 - extract yourself from the discussions.
 - make sure you do not use anything that was discussed.
 - seek independent legal advice and/or contact the Competition and Consumer Protection Commission to tell us about what has happened.
- If in doubt about the competition law implications of any consortium bid, seek independent legal advice.
- You can report anti-competitive behaviour via:
 - ‘Complaint’ forms on our website: www.ccpc.ie
 - Email: info@ccpc.ie
 - Phone: + 353 1 402 5500
 - Fax: + 353 1 402 5501
 - Writing to: Competition and Consumer Protection Commission, PO Box 12585, Dublin 1

Sample hypothetical case studies

CASE STUDY 1:

Let's imagine that there are ten suppliers of classroom furniture (i.e., desks, chairs, white boards, bookshelves) operating in Ireland. These firms supply preschools, primary and secondary schools, and third level institutions. The firms are located in different parts of the country, with some having operations/storage facilities in two separate locations (e.g., Dublin and Galway).

Let's say that previously, furniture supply firms tended to compete with other local companies for orders from schools or third level institutions within their own geographic region. For example, a Cork-based firm would compete for business in the Munster region. However, with the advent of online sales and consolidation within the industry, suppliers increasingly look beyond their traditional geographic region and compete at a national level. Furthermore, in our example, government policy now favours larger centralised public purchasing. While schools and colleges previously ordered furniture from local suppliers, furniture is now bought centrally by the State in bulk. While this can generate greater efficiencies and costs saving for the State, it can be increasingly difficult for smaller local firms to tender for large contracts.

In response, three small furniture suppliers in Cork (say, Murphy Ltd, O'Leary Ltd and Egan Ltd) may decide to form a consortium and submit a bid for a large public contract because the individual firms do not have sufficient financial or technical capacity to meet the requirements of the proposed contract.

This hypothetical consortium between Murphy, O'Leary and Egan could potentially increase the level of competition and innovation (by increasing the number of bidders who would otherwise participate) and decrease the cost of goods and services purchased by the State. Our hypothetical consortium is likely to produce efficiency gains and is unlikely to raise competition concerns once:

- It is clear that the three individual firms, or any subset of the consortium members (e.g., Murphy and O'Leary), are too small to fulfil the requirements of the contract on their own.
- Murphy, O'Leary and Egan continue to compete vigorously (including against each other) for other public and private tenders.

On the other hand, the consortium bid may raise competition concerns if the following were to occur:

- If Murphy, O'Leary and Egan were actually capable of bidding individually for the tender. This would unnecessarily reduce the number of bidders by two and thus limit the effectiveness of the tendering process. In those circumstances, a careful analysis of the joint bidding arrangement should be carried out to see if it may nonetheless satisfy the four factors referred to in paragraph 2.10.



- If Murphy, O’Leary and Egan agreed to continue operating as a consortium for smaller local tenders where previously all three companies would have made individual bids. Bidding together for one tender should not affect how firms compete for other work.

CASE STUDY 2:

For the purposes of this case study, a number of local authorities require the construction of new waste water treatment plants over a five year period. Let’s say that there are three large Irish firms that typically bid for such projects. These firms all provide integrated construction, engineering and architectural services under one roof.

In addition, there are a number of small Irish-based construction and engineering firms in our example that would like to bid for these contracts. However, none of these smaller firms taken individually could fulfil the requirements of the tender. Specifically, the pre-qualification criteria require that interested parties should be able to demonstrate that they have the required level of construction, engineering and architectural skills to complete the project successfully.

Imagine that Byrne Construction and Ryan Engineering are considering entering a consortium to bid for contracts being advertised by Cork County Council and Limerick County Council. Similarly, Delaney Construction and Wilson Engineering are considering entering a consortium to bid for contracts being advertised by Waterford Country Council and Wexford County Council.

However, both of the consortia require specialised architectural skills to meet the pre-qualification criteria. These specialised skills are difficult to source. There is one small architectural firm – FH Architecture – based in the Midlands that specialises in the design of waste water treatment plants and has an excellent reputation. Both of the consortia – ‘Byrne/Ryan’ in the Southwest and ‘Delaney/Wilson’ in the Southeast – request that FH Architecture provide architectural services as part of their consortium bids.

Let’s say FH Architecture accepts the requests to join the Byrne/Ryan and Delaney/Wilson consortia. Individually, none of these firms could have fulfilled the requirements of the tender on its own. The establishment of these consortia would place greater competitive pressure on the three large integrated firms that usually win these contracts. The creation of the consortia is unlikely to raise any competition concerns once bidding together does not affect how the firms compete for other work.

Concerns could arise in our hypothetical example if a condition of the agreement between Byrne/Ryan and FH Architecture were that FH Architecture would not offer its services to any other parties to the procurement competition. Because FH Architecture holds a position of some market power – by virtue of its specialist skills – it should consider carefully the implications on competition if it were to agree to a restriction that would substantially eliminate the possibility of competition from others.

Serious concerns would certainly arise in this example if FH Architecture were used as a conduit in order to share commercially sensitive information between two consortia. For

instance, if Byrne/Ryan and Delaney/Wilson enter into separate consortia with FH Architecture for contracts in Dublin, it is vital that FH Architecture does not stray into discussions with Byrne/Ryan regarding the terms - especially prices - that Delaney/Wilson proposes to bid for the contracts. If FH Architecture is requested to divulge such information by either consortium, it should extract itself from any discussions and possibly seek legal advice. Cooperation among consortium members should not go beyond what is needed to ensure successful delivery of the project requirements.

A. Background Information on Competition Law Enforcement

Who investigates breaches of competition law?

- A.1 The Competition and Consumer Protection Commission (Commission) is the main body responsible for investigating and enforcing Irish and EU competition law in Ireland.
- A.2 Under the Competition and Consumer Protection Act, the Commission has the following powers of investigation:
- power to enter and search: authorised officers may enter and search a business premises or home with a valid warrant issued by the District Court.
 - power to seize documents and records: authorised officers can seize documents or records, including computer hard-drives and laptops with a valid warrant issued by the District Court.
 - power to summon witnesses: we can summon witnesses to be questioned under oath. Witnesses have the same immunities and privileges as a witness before the High Court. Failure to appear before the Commission on foot of a witness summons is a criminal offence.
 - power to demand records and documents: we have the power to require witnesses and third parties, such as telephone companies and financial institutions, on foot of a witness summons, to produce records and information.
 - power to demand written information: we have the power to require any person to provide written information that we consider necessary to enable us to carry out our functions.
- A.3 The Commission can decide to pursue specific breaches of competition law as criminal offences or as civil infringements, or to pursue them by less formal means. In the case of serious breaches of competition law (e.g., agreements between competitors to fix prices, share markets or limit output), the Commission conducts investigations and prepares files for the Director of Public Prosecutions (DPP) recommending criminal prosecution. The DPP prosecutes serious criminal cases on indictment and has done so in numerous cartel cases to date.

What are the penalties for breaching competition law?

- A.4 Businesses or individuals that breach competition law may be subject to civil and criminal sanctions. The most serious types of anti-competitive conduct are often referred to as 'hardcore' breaches of competition law. The following are examples of 'hardcore' breaches of competition law and are subject to the most severe penalties:

- fixing or agreeing prices with competitors for goods and services, including the level of price increases or discounts.
- sharing markets among competitors by dividing up territories or sharing out customers.
- agreeing with competitors to limit production/supply by controlling the quantity of goods or services to be supplied in a given market.
- **rigging bids among competitors** so that one person or company in particular wins the contract.

A.5 In the case of these ‘hardcore’ breaches of competition law, the criminal fines and prison sentences are as follows:

- A **business** can be fined up to €5 million or 10% of its annual business turnover, whichever is greater, if convicted on indictment.
- An **individual** found guilty of an offence on indictment can be fined up to €5 million or 10% of his or her annual individual turnover, whichever is greater. An individual can also be imprisoned for up to 10 years.

A.6 Under Irish company law, a company director convicted of a criminal offence under competition law will be automatically disqualified from acting as a director of any company in the State for up to five years from the date of conviction.

A.7 Firms convicted of a criminal offence under competition law may also be excluded from participating in future public procurement competitions.¹⁰

A.8 It is the responsibility of the directors and managers of a business to ensure that the business complies with competition law but it is not only directors and managers who can be prosecuted. Employees who involve themselves in serious anti-competitive activities might also face prosecution if they have played a role in such activity. It is also important to note that individual directors, managers and employees can be prosecuted for competition law offences even if the company for which they worked when committing the offence was not prosecuted.¹¹

A.9 An individual or business that assists a cartel can also be found guilty of a criminal offence. In Ireland, there have been convictions for aiding and abetting cartels where individuals did not work for the firms engaged in price-fixing but took on a co-ordinating or facilitating role in the cartel.¹²

¹⁰ See Recital 101 and Article 57(4) of the EU Public Procurement Directive (Directive 2014/24/EU).

¹¹ This was established by the Supreme Court in DPP v Hegarty [2011] IESC 32.

¹² There have been three such convictions to date. See for example <http://www.tca.ie/en/Enforcing-Competition-Law/Criminal-Court-Cases/Irish-Ford-Dealers-Association.aspx>.

- A.10 The Commission, in conjunction with the DPP, operates a Cartel Immunity Programme which enables the Commission to make a recommendation to the DPP to grant immunity from prosecution for the first member of a cartel to come forward and admit involvement in the cartel and fully co-operate with any subsequent investigation and prosecution. Any business or individual who wants to seek immunity can call 087 7631378.



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

**Competition and
Consumer Protection
Commission**