



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

Intertrade Ireland

Competition law, SMEs and Consortium Bidding

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What I will discuss

- Anti-competitive arrangements between businesses
- The importance of SME participation in public procurement
- Guide for SMEs on consortium bidding: Scope of the Guide
- Recent caselaw on consortium bidding
- Practical steps to reduce the risk that a consortium bid breaches competition law



Irish legislation on anti-competitive arrangements between businesses (known as "undertakings")

- Section 4(1) of the Competition Act 2002 prohibits and renders void: *"all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State"*.



Irish Legislation largely 'mirrors' EU Legislation (Article 101 TFEU)

Two key additional elements required for a breach of Article 101: Relevant activity

- Appreciably affects competition within the EU, and
- Is capable of appreciably affecting trade between EU member states.



'Object' arrangements

Activity between competitors which has the 'object' of restricting, preventing or distorting competition

- E.g. 'price fixing';
- E.g. 'market sharing';
- E.g. 'limiting production', and
- E.g. 'bid rigging'/'collusive tendering'.



'Effect' arrangements

Activity between competitors which has the 'effect' of restricting, preventing or distorting competition

- E.g. information exchange
- E.g. R&D agreements
- E.g. purchasing agreements
- E.g. standardisation agreements



However...Justifications for such arrangements

- Section 4(5) of the Competition Act 2002 provides that arrangements falling within Section 4(1) may nevertheless be permitted if **the pro-competitive benefits produced by an agreement outweigh the anti-competitive effects.**
- Similar justifying provision in Article 101(3) TFEU



Measures to facilitate SME participation in public procurement

- Public Service Reform Plan: move towards **centralised purchasing** and common frameworks
- OGP established to drive consolidated, integrated approach to public procurement
- Various measures to **facilitate SME participation** in public procurement:
 - DPER Circular 10/14
 - EU Procurement Directive 2014/24/EU
- Need for suppliers to consider joint tendering



Guide for SMEs on Consortium Bidding



Available at:

<http://www.ccpc.ie/news>

(See News Release of 15 December 2014:

“Commission publishes guidance for businesses regarding competition law and consortium bidding”)



Guide for SMEs on Consortium Bidding: Scope of the Guide

- Aimed specifically at SMEs who want to form consortium to tender for public contract
- Focus specifically on ensuring compliance with competition law (rather than procurement law)
- Key message: consortium bids permissible under competition law **provided certain conditions met**
- Legal framework for analysis: s.4 of Competition Act 2002 and/or Article 101 TFEU
- Guide does not constitute legal advice: if doubts exist, independent legal advice should be sought



Guide for SMEs on Consortium Bidding: Overview of Content (1)

- Consortium will not breach competition law:
 - If members are **not actual or potential competitors** (subject to information sharing caveats)
 - or
 - If members all part of **same corporate group**



Guide for SMEs on Consortium Bidding: Overview of Content (2)

- Where members are actual or potential competitors no breach of competition law if:
 - None of members can fulfil requirements of tender competition or contract on its own; and
 - No subset of members could together fulfil those requirements; and
 - Only minimum amount of information strictly necessary is shared between members; and
 - Members compete vigorously as normal in all other contexts



Guide for SMEs on Consortium Bidding: Overview of Content (3)

- In all other cases involving actual or potential competitors:
 - self-assessment applying four criteria in s.4(5) of Competition Act 2002 / Article 101(3) TFEU (i.e. weighing pro- and anti-competitive effects)
- **IN ALL CASES**: consortium must never be used as vehicle to facilitate anti-competitive collusion (e.g. price fixing, market sharing, bid rigging)



Recent Norwegian case on consortium bidding and competition law: Ski Taxi/Follo Taxi

- On 17 March 2015, appeals court in Oslo upheld the Norwegian Competition Authority's decision against two local taxi cooperatives and a jointly owned company.
- The taxi cooperatives had for several years operated through a jointly owned administration and sales company which won part of a tender for the transportation of patients to and from hospitals in Oslo.
- It was undisputed that the larger of the two cooperatives could have bid for and performed the entire contract alone. But the appeals court concluded that the other cooperative was a potential competitor in the tender process, had it not teamed up with the larger cooperative.
- The appeals court concluded that the two taxi cooperatives' joint bidding through the jointly owned company was anti-competitive 'by object'.



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

- Notify the purchasing body of the fact that you are submitting a consortium bid.
- Notify the purchasing body if you are aware that a member of the consortium will be participating in more than one consortium in the same tender competition.
- Be clear what the scope of cooperation will be before you start discussions.



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

- 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.
- Consider asking an independent person to manage the consortium bid.



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

- Consider signing confidentiality agreements to prevent disclosure of sensitive information.
- Treat all information related to the bid formation as strictly confidential.
- consider establishing a separate company to perform the contract.
- If discussions stray outside the scope of what is permitted voice your concern that competition law could be breached.
- Seek independent legal advice and/or contact the Competition and Consumer Protection Commission to tell us about what has happened.





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