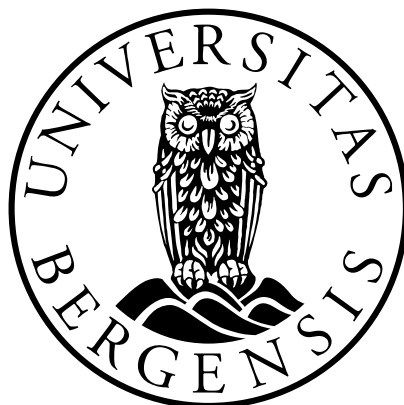


# Joint Bidding under Competition Law

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# 1 Introduction

## 1.1 Topic and issues

In this thesis I will discuss joint bidding in public procurement tenders from a competition law perspective. The term joint bidding describes the situation where two or more economic operators come together and submit a joint bid for the award of a contract in a public procurement procedure.<sup>1</sup> This can take form of an ad-hoc collaboration for a specific contract, or as an established consortium.<sup>2</sup> My aim is to clarify how joint bidding in public tenders is assessed from a competition perspective.

Combining public procurement and competition rules raises plenty of issues, but the main question raised in this particular thesis will be how joint bidding should be assessed under Art 101(1) of the Treaty on the Functioning of the European Union (hereafter TFEU) and its equivalent Art. 53(1) of the Agreement on the European Economic Area (hereafter EEA). This again opens up for a lot of sub questions, but the main focus will be the assessment of joint bidding as a possible object restriction. Is joint bidding always a restriction by object? How should the assessment of a joint bidding arrangement as a possible object restriction be carried out? Should joint bidding be treated as price-fixing? How to decide if the undertakings submitting a joint bid are actual or potential competitors? These are the main questions I will assess and give my opinion on.

When analyzing these research questions, I will focus on the nature of joint bidding agreements and the particularities this raises for competition law scrutiny, how joint bidding agreements and the procurement rules fostering them affect how the competitive assessment is to be made, and why these particularities and the reconciliation between the two areas of law should be taken seriously by tenderers, contracting authorities and competition enforcers alike when applying competition law.

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<sup>1</sup> See THOMAS (2015). RITTER (2017) uses the term joint tendering. SÁNCHEZ GRAELLS (2015) uses both joint bidding and bidding consortia.

<sup>2</sup> In a Danish case, *Dansk Vejmarkerings Konsortium*, Decision of the Competition Council of 24 June 2015, the undertakings created a consortium agreement with the purpose to bid jointly. In the Swedish case *Däckia Aktiebolag og euromaster Aktiebolag*, Stockholms Tingrätt 21 January 2014, the undertakings created a one-off collaboration. In Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 the undertakings had created a consortia, similar to the situation in the Danish case.

## 1.2 Motivation

There has only been one case within the EEA/EU jurisdiction regarding joint bidding and the application of Art. 101 TFEU or Art. 53 EEA.<sup>3</sup> The lack of substantive case law on this matter makes the topic highly relevant to discuss from an academic perspective. Not only because there are issues yet to be discussed, which were not addressed by the EFTA Court, but also because the issues actually addressed and the arguments of the Court also must be reviewed and discussed in depth in order to assess whether the result is adequate.<sup>4</sup> With the case being before the EFTA Court, it also remains to be seen if the ECJ will take on the same approach.<sup>5</sup>

This lack of relevant EU/EEA case law also leads to a lack of legal certainty for the undertakings considering to bid jointly for public contracts. The issues under scrutiny in this thesis are of practical significance, by if not providing the perfect solution, then at least highlighting issues requiring awareness from the undertakings.

In addition to a need of legal certainty and awareness, the issues are also of interest when looking to the worth of the procurement market. In 2017, the Norwegian public sector bought goods and services for 523 billion NOK.<sup>6</sup> From 2013 to 2017, the market has grown 19% in total.<sup>7</sup> Within the EU the total worth of the procurement market was nearly 2 trillion EUR, or 13,4% of the Member States' GDP in 2016.<sup>8</sup> These numbers show why undertakings would (and should) participate in the procurement market; i.e.: there is profit to be made and competition to take place for such a large buyer. Engaging in joint bidding might be one way to try to enter it, a method becoming more and more important when looking to the trend of centralization in the procurement market.<sup>9</sup>

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<sup>3</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16

<sup>4</sup> The case has already been subject to discussions. See SÁNCHEZ-GRAELLS (2017) and HERRERA ANCHUSTEGUI (2017)

<sup>5</sup> ECJ has in earlier cases adopted a rule of reasoning set by the EFTA Court by referring to the opinion in its own judgment in Judgment of 23 September 2003, *Commission v Denmark*, C-192/01, EU:C:2003:492 and Judgment of 9 September 2003, *Monsanto Agricultura*, C-236/01, EU:C:2003:431. The case for the EFTA Court was the Kellogg's case, Judgment of 5 April 2001, *Kellogg's*, E-3/00.

<sup>6</sup> Numbers published by Statistisk Sentralbyrå, 20 December 2018. Available at <https://www.ssb.no/offentlig-sektor/statistikker/offinnkj>

<sup>7</sup> Ibid

<sup>8</sup> KUTLINA-DIMITROVA (2018: 1)

<sup>9</sup> The trend in the procurement market and the rationale of joint bidding is discussed under section 2.1

## 1.3 Methodology

In this subsection I will describe how I resort to the application of legal method to my thesis. A preliminary remark is that this assessment is of the state of the law concerning joint bidding as it is unclear. Thus, my thesis is an analytical study of *de lege lata*. In this section I will discuss the legal sources, forms of interpretation and the relationship between EU competition law and public procurement law.

### 1.3.1 Legal sources

The main legal sources used in this thesis will be Art. 101 TFEU and its equivalent Art. 53 EEA together with Directive 2014/24/EU of the European Parliament and of the Council on public procurement (hereafter Directive 2014/24) on public procurement and relevant case law from the EU Courts and the EFTA Court. As some of the issues with joint bidding and competition law only have been discussed in one case for the EFTA Court, the thesis requires assessment of case law regarding Art. 101 TFEU in general to assess whether established rules are directly applicable to the joint bidding scheme or if there is a need of adjustments.

In this thesis I will also include Norwegian legislation and cases handled by the Norwegian Competition Authority. As an EEA state, both the legislator and the competition authority are obligated to comply with EEA law. Although national practice has no legal effect on EEA law, cases may provide useful argumentation for discussions on the matter.

I will also look to different sets of relevant soft law instruments, mainly guidelines published by the EU Commission and various national competition authorities within the EU. These instruments have special relevance for this thesis because of the value they have, even if they are soft law as I will discuss below but, more importantly, as this thesis deals with issues not yet ruled on by the EU Courts, such as the question on whether joint bidding is price-fixing. With their influence, it must be assessed if the guidelines are based on sufficient grounds, or if there is room for criticism and improvement based on how I believe competition law should be applied when assessing joint bidding.

Both the Danish Competition Authority and the Irish Competition and Consumer Commission have published guidelines on this topic as well.<sup>10</sup> These guidelines aim to assist undertakings assessing their conduct of business with regards to the compatibility of a co-operative agreement with Art. 101 TFEU, and indicate how the different authorities intend to use their powers. As soft law instruments they are not legally binding, but both the EU Courts and the EFTA Court may refer to the guidelines published by the Commission in its Opinions and Judgements.<sup>11</sup> With regard to the Commission's Guidelines, they are not only legally binding for the Commission itself but also guide their approach and case priority.<sup>12</sup> Held together with the Courts' practice, this gives the guidelines a certain legal weight after all and speaks about their relevance. Furthermore, their relevance is closely connected to the topic of this thesis as to how different authorities look at matters discussed in the thesis.

### 1.3.2 Interpretation

The sources used in this thesis are a combination of primary and secondary legislature from the EU/EEA, in addition to case law from the EU Courts and the EFTA Courts. Case law holds a prominent role in developing not only competition law but also public procurement law, the use of it in this thesis is therefore substantial. Due to this, it is necessary to present the legal method adopted within EU and EEA, and how the EEA Agreement and its application interacts with EU law.

Both the EU Courts and the EFTA Court apply a teleological interpretation of the legislation.<sup>13</sup> This method of interpretation is focused on applying law with the function and the purpose of the provision in question leading the way. In practice, the courts often look to the provision(s) underlying purpose to clarify its scope of application. If the underlying purpose implies a wider application of the provision than the wording alone suggests, the Court will apply the provision to the situation in line with its intended purpose and function.

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<sup>10</sup> Danish Guidelines available at: [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf)

Irish Guidelines available at: <https://www.ccpc.ie/business/help-for-business/guidelines-for-business-consortium-bidding-guide/>

<sup>11</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 97. For in depth discussions on soft law and its position in EU law in general, see SENDEN, L. *Soft Law in European Community Law*, 2004, Hart Publishing, Oxford. See also Judgment 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795 where ECJ held that the Commission's *De Minimis Notice* intended to give guidance to the Courts and authorities of the Member States.

<sup>12</sup> See Judgment of 28 June 2005, *Dansk Rørindustri*, C-189/02 P, EU:C:2005:408, para 211.

<sup>13</sup> The case of *Dassonville* is a clear example of a dynamic interpretation of EU law, see Judgment of 11 July 1974, *Dassonville*, C-8/74, EU:C:1974:82, para 5.



The EFTA Court's application of the teleological method is best explained by reference to the principle of homogeneity.<sup>14</sup> The purpose of the agreement is to bring the EEA EFTA states and the EU Member States together in the internal market.<sup>15</sup> In order to create a functional market, the agreement imposes equal rights and obligations for both individuals and economic operators within the EEA. Common rules dictate both harmonized application and scope, and according to Art. 6 of the EEA Agreement any interpretation of the agreement must be done in conformity with EU law. This includes relevant case law by ECJ prior to the birth of the EEA agreement.<sup>16</sup>

Although there is no legal obligation under international law to do so<sup>17</sup>, the EFTA Court also follows rulings given after the signing of the agreement.<sup>18</sup> To ensure homogeneity in the development of EU and EEA law, also later case law is referred to by the EFTA Court when facing questions of interpretation and applicability.<sup>19</sup> Therefore, this thesis will not draw a line between case law from the EU Courts prior to and after the signing of the EEA Agreement.

### **1.3.3 The relationship between EU/EEA Competition and Public Procurement Law**

This thesis is a study of Competition and Public Procurement Law and how these rules interact in the case of joint bidding. These are two different set of rules that are interrelated, and both of them are EU and EEA law. The relevant part of competition law to discuss in this thesis is Art. 101 TFEU, and its EEA equivalent, Art. 53. This is a part of EU primary law<sup>20</sup>. The rules of public procurement consist of several pieces of secondary legislature.<sup>21</sup> Primary

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<sup>14</sup> See Art. 1 EEA where the aim of creating a homogeneous EEA is mentioned. The principle also shines through in recital 4. In Recital 16 the objective to arrive and maintain a uniform interpretation and application of the EEA agreement where it mirrors EU law is explicitly stated. See also FREDRIKSEN (2015: 183-189) for an in-depth discussion of the EFTA Court's approach on the case law from ECJ.

<sup>15</sup> The EFTA Secretariat, **The European Free Trade Association**, accessed 17 April 2019, <https://www.efta.int/about-efta/european-free-trade-association>

<sup>16</sup> As held in Art. 3(1) of the Surveillance and Court Agreement the EFTA Court's obligation lies with case law given prior to the date of signature.

<sup>17</sup> Art. 6 EEA and Art. 3(1) of the Surveillance and Court Agreement clearly states that the obligation only encompass case law given prior to signing.

<sup>18</sup> See for instance Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16

<sup>19</sup> See SEJERSTED et al. (2014: 223-224) and ROGNSTAD (2001: 448-449) for discussions on the principle of homogeneity, and how the aim affects the EFTA Court's approach to case law from ECJ.

<sup>20</sup> The Treaties are EU primary law, see statement from the EU Commission on *Types of EU law*, available at [https://ec.europa.eu/info/law/law-making-process/types-eu-law\\_en](https://ec.europa.eu/info/law/law-making-process/types-eu-law_en) accessed 30.04.2019

<sup>21</sup> Directive 2014/23, Directive 2014/24 and Directive 2014/25 together form the substantive law of public procurement.

law is the basis for all EU actions and legislation, meaning that any legal act deriving from primary law must comply with it.<sup>22</sup> Thus the rules on public procurement are subordinate to Art. 101 TFEU and Art. 53 EEA, meaning that the rules on joint bidding deriving from EU secondary law cannot be in breach with Art. 101 TFEU or Art. 53 EEA. This sets a frame for the further assessment.

## 1.4 Outline of the study

I have structured this thesis as follows. Firstly, the concept, rationale and modalities of joint bidding will be analysed. This will be followed by the reconciliation of joint bidding and competition law. Thereafter, I will discuss the condition of actual or potential competitors is discussed, both what the legal test is and how the assessment should be carried out. In the following section I will discuss joint bidding as an object restriction and how the assessment should be carried out. Lastly, I will discuss the EFTA Courts Opinion in the *Ski Follo* case, whether joint bidding constitutes price-fixing and the potential consequences thereof.

## 1.5 Limitations

I will not deal with the scrutiny of joint bidding as a possible restriction by effect, nor will I go into details on the application of Art. 101(3) TFEU and Art. 53(3) EEA. Furthermore I will not discuss the scope of application in terms of whether the EU Courts or the EFTA Court have jurisdiction. Regarding limitations in time, the legal analysis is conducted until 30 April.

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<sup>22</sup> The Treaties are EU primary law, see statement from the EU Commission on *Types of EU law*, available at [https://ec.europa.eu/info/law/law-making-process/types-eu-law\\_en](https://ec.europa.eu/info/law/law-making-process/types-eu-law_en) accessed 30.04.2019

# 2 Joint bidding in Public Procurement

## 2.1 Rationale of joint bidding

Call for tenders in public procurement are organized to create competition for the public contract, so that the public buyer is able to acquire goods, works or services to carry out its public functions.<sup>23</sup> This is based on the idea of competition resulting in better value for the public funding spent on the contract, as well as a way to limit public authorities discretion and ensure a transparent market and equal treatment of potential sellers.<sup>24</sup>

In this setting, joint bidding is potentially beneficial to both the buyer and the economic operators, one example being where a public contract requires different areas of expertise. If so, undertakings with different areas of expertise can collaborate in order to deliver what the buyer is looking for. The possibility to bid jointly can also increase the competition for a contract in different ways, one way being that it opens up for economic operators<sup>25</sup> coming together where they individually might not meet the requirements stated in the selection criteria<sup>26</sup>, or when a potential bid could be made more attractive due to pooling of resources and creation of economy of scale on the producer side.

In this setting, joint bidding allows for small medium enterprises (SME) to access the procurement market in cases where the contract is of such a size, that a single SME is not able to meet the stated requirements, leaving them without access to the procurement market.

In contrast to SME participation and joint tendering, the trend in the procurement market the recent years is centralization of procurement through establishment of centralized purchasing bureaus.<sup>27</sup> The bureaus conduct procurements on behalf of multiple buyers. This allows for

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<sup>23</sup> SÁNCHEZ GRAELLS (2015: 11)

<sup>24</sup> SÁNCHEZ GRAELLS (2015: 11) See Directive 2014/24 recital (1) and (2) for the principles and goals of public procurement.

<sup>25</sup> The legal term for undertakings participating in public procurement procedures, legal definition given in Art. 2 1.(10) of Directive 24/2014

<sup>26</sup> Art. 58 in Directive 2014/24 regulates selection criteria. These are minimum requirements the tenderers have to comply with in order to compete for the award of the contract

<sup>27</sup> Centralized purchasing is regulation in Art. 37 of Directive 2014/24. See also recital 69 for more the development and the underlying rationale of centralization. In Norway, the government established Statens Innkjøpscenter in 2016, a bureau who enters into and manage procurement agreements on behalf of all public bodies under state control. A similar bureau was established by law in Sweden in 1998 (Förordning om (1998:796) om statlig inköpsordning). The topic and trend is covered in articles by HERRERA ANCHUSTEGUI (2015) and SÁNCHEZ GRAELLS and HERRERA ANCHUSTEGUI (2014)

bigger contracts, resulting in large undertakings being the only ones able to deliver at the requested scale.<sup>28</sup> The result is a procurement market dominated by buyer power and undertakings with market power.<sup>29</sup> This trend is making it more difficult for SMEs to access the procurement market. Yet, this could also create greater opportunities for SMEs to bid and win contracts if done through collaboration, and if this modality is allowed by contracting authorities and resorted to by economic operators. The result will be improved market access, increased business sales, security for jobs and economic growth.

SMEs taking part in the public procurement might also benefit the buyer in a different way than large bidders. SMEs might be more adaptive and innovative, in contrast to large bidders where the chance is that the buyer is only offered standardized services or goods due to economy of scale which allows for a lower price. Ensuring that the SMEs can take part in the public market is of great interest also for the buyer to increase the chances of getting a bespoke service. Joint bidding thus allows for greater innovation and consistency, and opens up the procurement procedure to more competition.<sup>30</sup> Allowing two or more SMEs to collaborate through joint bidding will in such a case result in more tenderers for the award of a contract, and thus greater competition.<sup>31</sup>

## **2.2 Regulation of joint bidding in Directive 2014/24**

Joint bidding is allowed under the EU and EEA rules on public procurement, as incorporated in Art. 19(2) of Directive 2014/24.<sup>32</sup> Article 19(2) expressly states that “groups of economic operators (...) may participate in procurement procedures”. There is no form requirement for the legal personality of the collaboration in order to submit a tender or a request to participate.

According to paragraph two of Art. 19(2), the buyer may clarify in the procurement documents how the undertakings wanting to bid jointly are to meet the requirements stated in

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<sup>28</sup> For in-depth discussion on the benefits as well as the concerns of centralized purchasing, see HERRERA ANCHUSTEGUI (2015)

<sup>29</sup> Discussion on buyer power, SÁNCHEZ GRAELLS and HERRERA ANCHUSTEGUI (2016: 3) See also page 9 and 10 for discussion on how centralization may lead to market concentration and squeezing of SMEs.

<sup>30</sup> Irish Consumer and Competition Protection, Consortium Bidding, page 5 para 1.13 and 1.14, where the authority argue that exclusion of SMEs might mean exclusion of small firms and new entrants with innovative solutions. Joint bidding is a way to hinder this, and at the same time pool knowledge and resources to deliver competitive offers on both quality and price.

<sup>31</sup> See Irish Consumer and Competition Protection, Consortium Bidding, page 5 para 1.14, where it is argued that in long term an exclusion of SMEs may not only decrease competition and increase prices, but also hinder new entrants and even limit the number of firms left in the market.

<sup>32</sup> Incorporated to the EEA agreement by Decision of the EEA Joint Committee, No. 97/2016, 29 April 2016, OJ L 300, 16.11.2017, page 49.

the selection criteria, where it is considered to be necessary. Such a clarification must be justified by objective reasons, and be proportionate. The EU and EEA States may establish standard terms for how collaborations are to meet those requirements.

Furthermore, it follows from paragraph three of Art. 19(2) that in case of imposing different conditions for the performance of a contract on the collaboration than on individual participants, the conditions shall also be justified by objective reasons and be proportionate.

The Directive provides no further rules on how joint bidding should be treated by the EU and EEA States. The provision only imposes a duty on the EU and EEA States to make sure that national procurement rules allow for groups of undertakings to submit a joint bid or a request to participate in the procurement process, together with a possibility to establish standard terms.<sup>33</sup> With a demand of the terms being both justified by objective reasons and proportionate, the Directive highlights that any further regulation needs to comply with the general principles of TFEU and other requirements deriving from EU law, such as equal treatment, non-discrimination, transparency and competition. The Directive provides minimum rights for undertakings to participate, making it a breach of EU/EEA law if the States do not open up national legislature for allowing joint bidding. The regulation must be seen in the light of EU's wish to facilitate for participation of SMEs in public procurement, as stated in recital 2 of the Directive.

As remarked before, Art. 19(2) does not require the cooperation between the economic operators to take on any specific form when placing bids. In practice, this means that joint bidding can take the form of two different economic operators choosing to cooperate for the specific contract, or the situation where you have an established consortium.<sup>34</sup> In case of loose groups coming together for the specific contract, the Contracting Authority (CA)<sup>35</sup> may impose an obligation to take on a specific legal form once they have been awarded the contract;<sup>36</sup> recital 15 gives examples on when this might be necessary, for instance where

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<sup>33</sup> See SÁNCHEZ GRAELLS (2015: 339) for discussion on how the Member States should regulate bidding consortia

<sup>34</sup> See Judgment of 23 January 2003, *Makedoniko Metro* C-57/01 EU:C:2003:47 as an example on established consortia participating in public procurements. This was also the situation in a decision by the Italian competition authority, regarding collection of slum in Lombardy and Piemonte. Decision no. 25302 of February 3th 2015, later confirmed by Consiglio di Stato (the high court of Italy). Also Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, where the undertakings submitting a joint bid had established a joint venture prior to the submission of bids. An example of a loose form of collaboration is the case of *EL-Proffen*, where several electricity companies decided to submit a joint bid for a framework agreement. A decision made by the Norwegian competition authority, V2017-21 of 4 September 2017.

<sup>35</sup> The term Contracting Authority is given a legal definition in Art. 2.1.(1) of Directive 2014/24

<sup>36</sup> According to recital 19(3)

joint and several liability is required. The point is, however, that this right to impose duties on taking on a legal form *only arises after the contract is awarded*. During the procurement process, the CA only has the option to clarify how economic operators are to meet the requirements laid out in the selection criteria. This eliminates concerns on whether or not SMEs have the necessary financial capacity to contract. With no obligation to take on a legal form when competing for the contract, this opens the procurement up to more competition and ensures equal treatment of potential bidders regardless of form.

In the Norwegian legislature, Art. 19 (2) is incorporated through *Forskrift om offentlige anskaffelser* § 16-11. In § 16-11 it is expressly stated that the CA can only require the economic operators choosing to bid jointly to take on a specific legal form after the contract has been entered into, and only so far as necessary to ensure satisfying performance of the contract. At this point there is a slight difference, as the Norwegian implementation is a result of a directly opposed interpretation of the wording in Art. 19(2)<sup>37</sup>. However, the wording of §16-11 does show that the legislator has paid close attention to primary EEA and EU law such as the principle of equal treatment by including a condition of necessity. In practice, this form of interpretation and implementation is an effective way to ensure national legislation being in accordance with EEA law, because the provision is clear on *when* the CA can impose requirements.<sup>38</sup> Aside from this, the provision mirrors the Directive's Art. 19(2) in wording, and there are no differences regarding the scope of the provision.

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<sup>37</sup> The wording of Art. 19(2) first paragraph is that «(groups of economic operators) shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.»

<sup>38</sup> As opposed to the wording of Art. 19(2), which only says the CA shall not impose requirements in order to tender or submitting a request to participate..

# 3 Joint bidding and the problems with competition law

## 3.1 Article 101 TFEU and Article 53 EEA reconciled with Art. 19(2) of Directive 2014/24

Art. 101(1) TFEU and Art. 53(1) EEA prohibit agreements<sup>39</sup> between undertakings considered to be competitors which have an anti-competitive object or effect, unless they can be justified under Art. 101(3) TFEU or Art. 53(3) EEA. As competition law does not provide special rules for the assessment of joint bidding<sup>40</sup>, is it important to determine if and when joint bidding agreements may be in breach of Art. 101(1) TFEU or Art. 53(1) EEA due to their object or effect. The rationale behind the provision is that restriction of competition through agreements between competitors is harmful to society.<sup>41</sup> The provision applies to both horizontal and vertical agreements.<sup>42</sup>

Joint bidding in itself constitutes an agreement between potentially or actually competing undertakings competing for a procurement contract.<sup>43</sup> The agreement is horizontal, as the parties are potential competitors in the same segment of the market, as opposed to vertical agreements in which parties compete in different segments of the market.<sup>44</sup> The agreement might be in writing or orally but, regardless of form, there is an expression of a joint intention to collaborate on a tender for a public procurement procedure. Thus, undertakings must pay attention to competition rules prior to entering into a joint bidding agreement or face competition law liability. The responsibility to comply with competition law lays with the undertakings themselves. Therefore, they have to assess whether a cooperative agreement

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<sup>39</sup> Case law from the EU court clearly shows that the form in which the joint intention is expressed is of less importance. See for instance Judgment of 8 July 1999, *ANIC*, C-49/92 P, EU:C:1999:356, para 108, where the court held that the only thing of importance is the distinction between independent conduct and collusion. And further, that an agreement typically is an expression, by the participating undertaking of their joint intention to conduct themselves on the market in a specific way.

<sup>40</sup> SÁNCHEZ GRAELLS (2015: 338) See also section 1.3.3

<sup>41</sup> Distorted competition affects both the consumers and the other competitors. For in depth discussion on theory of competition and the function of competition law, see WISH and BAILEY (2018: 4-24) See also FOX and GERARD (2017: 35-40) for a discussion on the harmful effects of cartels.

<sup>42</sup> See WISH and BAILEY (2015: 82-156) for literature on Art. 101 TFEU in general.

<sup>43</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16. Whether they are competitors are decided with regards to the specific tender in question. See section 3.2

<sup>44</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 151.

with (several) other undertakings is legal. This demands clear rules, leaving the undertakings able to plan their business strategy with full legal certainty.

### 3.1.1 The issue and need of reconciliation

Art. 101(1) TFEU and Art. 53(1) EEA gives examples on agreements that are generally considered to restrict competition by object. Direct or indirect price-fixing is specifically cited as an example of an agreement restricting competition in the Treaties. In case law price-fixing is considered likely to have negative effects, so that it may be considered as a restriction by object.<sup>45</sup>

In this perspective, applying Art. 101(1) TFEU and Art. 53 (1) EEA in a strict and formalistic manner will leave little room for joint bidding as in most cases, the undertakings must agree on a price prior to submitting a bid. Art. 19(2) of Directive 2014/24 will be left without effect, meaning that joint bidding is allowed and encouraged under the rules of public procurement, but illegal under the rules of competition law. In practice, this leaves no room for tender collaboration. At the same time, there is no doubt that some agreements in the form of a joint bid could be in fact anti-competitive, and thus is breach of Art. 101 TFEU and Art. 53 EEA.

Related to the risk of facing competition law liability, it is also important for the undertakings to clarify the legal scope under Art. 101 TFEU and Art. 53 EEA with regards to future procurement procedures. The questions arising from combining the rules on joint bidding and competition law is important beyond the contract in question. According to Art. 57(4)d) and c) of Directive 2014/24 infringements of competition law in general constitute an explicit cause of exclusion from future public procurement procedures.<sup>46</sup> A breach of competition law might leave undertakings unable to take part in the procurement market for years, meaning that if the joint bid in question is illegal, the undertakings involved are excluded from the market. This could potentially have serious consequences for the involved parties.

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<sup>45</sup> See for example Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 92, and Judgment of 4 June 2009, *T-Mobile*, C-8/08, EU:C:2009:343, para 43 as well as Judgment 14 March 2013, *Del Monte*, T-587/08, EU:T:2013:129, para 585. See also *Guidance on restriction of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*, C(2014) 4136/1. Published 18.06.2014, where it is held that price-fixing agreements between competitors are a restriction by object.

<sup>46</sup> Exclusion grounds are discussed in depth by SÁNCHEZ GRAELLS (2015), and especially on page 296-301 where previous breaches of competition law is discussed as grounds for exclusion of potential bidders



Due to this, *the material scope of Art. 101(1) TFEU and Art. 53(1) EEA in the cases of joint bidding therefore needs to be assessed, to clarify when joint bidding and consortia is legal and when it is illegal from a competition law perspective.*

## **3.2 The requirement of the undertakings being competitors.**

### **3.2.1 The starting point**

For the joint bid to restrict competition, the undertakings collaborating have to be competitors.<sup>47</sup> If they are not, the undertakings may cooperate in any desired way in the context of public procurement.<sup>48</sup> Thus, it is important to clarify when the parties are competitors in the procurement context.

In cases where the undertakings submitting a joint bid are not deemed to be competitors, the joint bid is not caught by Art. 101(1) TFEU or Art. 53(1) EEA. However, if the undertakings are collaborating through subcontracting this would still be caught by Art. 101 TFEU or Art. 53 EEA. This is a vertical agreement, and differs from the situation of joint bidding where the undertakings have a horizontal agreement and will not be discussed further as it is outside the scope of my research.

In *Ski Follo*, the EFTA Court held that only if the parties are actual or potential competitors, the submission of joint bid may be considered as a restriction of competition.<sup>49</sup> This is in line with former case law from ECJ, and the Commission's Guidelines.<sup>50</sup> The main questions arising to be answered, is when are they considered to be competitors? And how to assess if they are or not? How does the test apply to the joint bidding situation?

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<sup>47</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 97

<sup>48</sup> SÁNCHEZ GRAELLS, Comments to Danish draft guidelines on joint tendering, How to crack a nut – a blog on EU economic law. Accessed 12.03.2019. Available at <http://www.howtocrackanut.com/blog/2017/7/7/Op5ahpp86745j76bemm6dflw6hwloz>

<sup>49</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 94, See also WISH and BAILEY (2018: 135)

<sup>50</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para. 10. See also Judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, para 31

In a normal market situation, Art. 101 TFEU and Art. 53 EEA applies if the undertakings are active on the same market, and they produce or supply the same product or service. *The decisive factor in relation to joint bidding is whether the undertakings are deemed to be competitors for the specific procurement contract.*<sup>51</sup> Why this difference in the procurement setting? The procurement market is demand-driven. The competition between undertakings on the market is limited to the competition for a specific contract, only then do the market itself and consequently competition arise. From this perspective, limiting the context to the procurement procedure gives a defined context and mirrors the nature of the market in my opinion.

### **3.2.2 How to assess if the undertakings are competitors in relation to the procurement?**

Once the market context in which the parties are considered to be competitors when assessing joint bidding is established, the next question is when are they competitors, and how to assess if they are or not?

In *Ski Follo*, the EFTA Court found it essential for the establishing of the joint bid as anti-competitive that the parties could have tendered individually, meaning that the Court held the undertakings as competitors, since they would have been able to submit individual bids for the contract.<sup>52</sup> However, the Court is not clear on how the assessment shall be carried out. And it is unclear if whether they are competitors should be determined on the basis of compliance with minimum requirements in the tender documents, or if the undertakings would have been likely to be awarded the contract.<sup>53</sup> By using the word “able” there is a slight leaning against the compliance with minimum requirements, as they are decisive of the ability to contract. Also, there is no mentioning of being able to tender successfully. This could add to the notion of minimum requirements being decisive. However, other sources must be resorted to in order to answer the question with certainty.

According to the Commission’s Guidelines on horizontal agreements a commercialisation agreement is normally not likely to give rise to competition concerns if it is “objectively

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<sup>51</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 98, See also RITTER (2017: 4)

<sup>52</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 98.

<sup>53</sup> Highlighted by HERRERA ANCHUSTEGUI (2017: 6)

necessary” to allow one party to enter a market it could not have entered individually.<sup>54</sup> In this context, the agreement to bid jointly must be necessary for the undertakings in order to enter the procurement market. This indicates that the assessment should be done with regard to the selection criteria, as opposed to the likelihood of contract award, as they are decisive for whether the undertakings are deemed fit to compete for the contract and thus gain market access.<sup>55</sup> If drawing a parallel to the normal market, there is no requirement of undertakings having market shares to be considered as competitors. As long as they (can) operate within the same segment they are considered as competitors, because they have market access. If adopting this view to the procurement setting, this would create coherent rules.

In the Guidelines published by the Danish Competition Authority, it is held that the undertakings are competitors if they individually can complete the contract.<sup>56</sup> This means that the assessment is based on the concrete contract in question. However, it is not clear if the statement should be interpreted as the ability to meet the minimum requirements being decisive, or if what matters is ability to contract completion. The latter is a third alternative different from the likelihood of contract award. If complying with selection criteria the undertaking is supposed to be able to complete the contract in theory but this is not given. Thus, it would be difficult for both competition authorities and the undertakings to assess if they are competitors or not, because the assessment would be based on potential future scenarios.

If the test is likelihood of contract award, this leads to the same conflict with the need of legal certainty and easily applicable rules. If assessing on the basis of ability to meet the selection criteria, this would create a rule more easily applicable by both competition authority, courts and the undertakings themselves when assessing whether they are competitors and thus in a position to bid jointly or not. It is a pure objective assessment were the undertakings capacity is held up against the specific selection criteria. In my opinion, this is the ideal solution.<sup>57</sup>

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<sup>54</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 237

<sup>55</sup> Art. 58(1) of Directive 24/2014

<sup>56</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) page 10

<sup>57</sup> This view is also argued for by HERRERA ANCHUSTEGUI (2017: 6)

When assessing the ability to meet the minimum requirements, it is of relevance whether the tender documents give the possibility to submit bids for lots of the contract. When dividing a contract into lots, the buyer is free to decide the size and subject-matter of the different lots. In case of larger contracts, the division allows for more undertakings to compete for part(s) of the contract, thus the buyer opens up for greater competition.<sup>58</sup> Division into lots is allowed according to Art. 46 of Directive 24/2014. If the buyer has divided the procurement into lots, the capacity to bid for one or more of these lots is decisive when determining if the undertakings are competitors.

On these grounds, *undertakings are actual competitors if they meet the selection criteria individually*. This gives them the ability to tender alone. If the contract is divided into lots, the undertakings' ability would be measured against the requirements for a single lot. Furthermore, the notion of potential competitors must be discussed, not only how the concept reconcile with the joint bidding scheme but also how an assessment of whether the undertakings are potential competitors should be carried out.

### **3.2.3 The notion of “potential competitors” – is it applicable?**

According to the Commission's Guidelines, commercialisation agreements are allowed if the agreements allow the companies involved to participate in projects that they would not be able to undertake individually.<sup>59</sup> This statement can be interpreted in the following way; as long as the undertakings collaborating are not able to meet the requirements on their own, they cannot be regarded as competitors.<sup>60</sup> Such an interpretations suggest that the notion of potential competition is not applicable when assessing commercialization agreements such as joint bidding arrangements. If so, joint bidding is allowed under the competition rules as long as the undertakings would not have been able to tender alone. Such an interpretation does not comply with Art. 101 TFEU and its case law. It is undisputed that agreements between

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<sup>58</sup> Literature on lots, see HERRERA ANCHUSTEGUI (2015) and SÁNCHEZ GRAELLS (2015: 347-352)

<sup>59</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 237

<sup>60</sup> SÁNCHEZ GRAELLS, Comments to Danish draft guidelines on joint tendering, How to crack a nut – a blog on EU economic law. Accessed 12.03.2019. Available at <http://www.howtocrackanut.com/blog/2017/7/7/0p5ahpp86745j76bemm6dflw6hwloz>

potential competitors run the risk of being considered anti-competitive just as agreements between actual competitors, and this must also apply to joint bidding situations.<sup>61</sup>

Yet, this is a discussion *de lege feranda*. By applying a narrow rule where joint bidding is allowed as long as the undertakings are not able to tender individually, this would lead to an objective rule easily applicable. The undertakings either have or do not have the ability to tender alone. Such a rule would also cause less problems when assessing whether the agreement could be defended under Art. 101(3) TFEU or Art. 53(3) EEA, due to the conditions of whether the undertakings could have reached the same efficiencies through less restrictive means. If so, the agreement cannot be defended under Art. 101(3) TFEU or Art. 53 EEA. If this condition is to be understood as to include an assessment of potential alternative agreements with third parties as options being less restrictive competition wise<sup>62</sup>, then it will be (almost) impossible to defend it for undertakings being potential competitors, because an undertaking is always free to subcontract instead of entering into a joint bidding agreement.<sup>63</sup> A narrow rule would also enhance the legal incentive Art. 19(2) in Directive 2014/24 represents due to legal certainty for the undertakings. Furthermore, it would eliminate the problem of second guessing business decisions by competition authorities.<sup>64</sup>

Such a solution do have a backside. If joint bidding typically is illegal between actual competitors due to their ability to tender alone, this could open the market up for speculations. Actual competitors could allocate resources to different projects, in order to give the impression that they do not have the required capacity for the contract, to be able to collude with a competitor. If so, there is still competitive pressure between the undertakings but this is artificially removed for the purpose of the procurement contract.

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<sup>61</sup> The issue of potential competitor was not discussed by the EFTA Court in *Ski Follo*, because the undertakings were actual competitors.

<sup>62</sup> As put forth by RITTER (2017: 8)

<sup>63</sup> This potential issue has been discussed in depth by several professionals. See SÁNCHEZ GRAELLS (2017), as well as the blog post *New analysis of joint tendering under EU competition law: a few comments on Ritter* (20 February 2017) How to crack a nut – a blog on EU economic law. Available at:

<http://www.howtocrackanut.com/blog/2017/2/20/new-analysis-of-joint-tendering-under-eu-competition-law-ritter-2017> Accessed 13.03.2019. See also RITTER (2017) and THOMAS (2015). A subcontracting agreement also run the risk of facing competition law liability, but this is outside the scope of my thesis

<sup>64</sup> It seems as if this view is argued for by SÁNCHEZ GRAELLS, *New analysis of joint tendering under EU competition law: a few comments on Ritter* (20 February 2017) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2017/2/20/new-analysis-of-joint-tendering-under-eu-competition-law-ritter-2017> Accessed 13.03.2019

Bearing in mind the possibility of speculation from undertakings, the positive sides from applying such a rule might outweigh the potential negatives, as it would contribute to more accurate decisions by competition authorities and the Commission, as well as effective enforcement of Art. 101 TFEU and Art. 53 EEA.

### 3.2.4 When are the undertakings potential competitors?

There is substantive case law from the EU Courts regarding the term potential competitor in general.<sup>65</sup> In *Toshiba* the parties to the agreement were not active in the same geographical market, and thus they had agreed to not enter into their respective markets. ECJ held that there was a potential competitive relationship between them, since there was no unconquerable barriers for the undertaking in Asia to enter the EEA market.<sup>66</sup> The agreement was therefore found to restrict competition. In later case law the legal test applied is whether there are “real concrete possibilities” for the undertakings concerned to compete in the relevant market.<sup>67</sup> Also, the case law further shows that the assessment of those possibilities must be founded on evidence or an analysis of the market in question<sup>68</sup> in the light of the ability and intention to enter the market, as well as the firm’s perception of another being a potential competitor.<sup>69</sup>

Based on my conclusion in section 3.2.2, the assessment of whether there are real concrete possibilities must be measured against the minimum criteria when looking into whether the companies are potential undertakings. Thus, the relevant questions are; how far off are the undertakings from meeting the minimum criteria and thus having the ability to tender alone? What measures must be taken and what are the consequences of taking those measures for the undertakings?

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<sup>65</sup> See also Judgment of 28 June 2016, *Telefónica*, T-216/13, EU:T:2016:369, paras. 201-227

<sup>66</sup> Judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, para 36

<sup>67</sup> Judgment of 8 September 2016, *Lundbeck*, T-472/13, EU:T:2016:449, para 99 (appealed, ruling of ECJ not published as of 08.05.2019), Judgment of 14 April 2011, *VISA*, T-461/07, EU:T:2011:181, para 68.

<sup>68</sup> In *Telefónica*, the General Court held that the Commission ought to have carried out an analysis of the market in question in order to establish the undertakings as potential competitors and by doing so, the agreement as a restriction by object. Judgment of 28 June 2016, *Telefónica*, T-216/13, EU:T:2016:369, paras. 201-227. The same statement was also put forth in Judgment of 28 June 2016, *Portugal Telecom*, T-208/13, EU:T:2016:368, paras. 162-188

<sup>69</sup> See the General Courts decision in *VISA*, where intention «may be of relevance». Judgment of 14 April 2011, *VISA*, T-461/07 EU:T:2011:181, para 168

### 3.2.5 How to carry out the assessment of “potential competitors”?

The notion of potential competitors is elaborated upon in the Danish Guidelines where the authorities held that when assessing whether the undertakings are potential competitors in a joint bidding scheme, the authorities “takes into account whether it is realistic that the undertakings will for example be able to expand their capacity to the one needed to be able to bid for the contract individually, even if they do not currently have the capacity to do so”.<sup>70</sup> Expanding of capacity must constitute a sustainable economic strategy, and will have to be assessed case by case. A theoretical possibility to carry out the contract alone is not sufficient, it must be realistic from the point of view of the undertakings.<sup>71</sup>

The Danish Authority’s argument of sustainable economic strategy is logical when assessing joint ventures which allows for a broader approach when assessing the anti-competitiveness of the joint bid, but the relevance of the argument is not given when facing case by case collaborations.<sup>72</sup> In these types of joint bidding the agreements between the undertakings are oriented towards the specific contract, making economic strategy less of a relevant consideration for the parties. This goes for short or medium length contracts in particular, since sustainability tends to be less of an issue.<sup>73</sup>

In my opinion, it is important to bear in mind that the standard is the ability to tender individually.<sup>74</sup> This means that there is no room for saying that it is a realistic possibility for subcontracting or expanding in other ways that bring the concept of an undertaking into question,<sup>75</sup> and thus the undertakings must be considered as potential competitors. This must be the rule, even if the undertaking(s) by previous tender procedures have subcontracted.

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<sup>70</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) Page 11

<sup>71</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) Page 10,

<sup>72</sup> Ibid, See also SÁNCHEZ GRAELLS, Comments to Danish draft guidelines on joint tendering, How to crack a nut – a blog on EU economic law. Accessed 12.03.2019. Available at <http://www.howtocrackanut.com/blog/2017/7/7/Op5ahpp86745j76bemm6dflw6hwloz>

<sup>73</sup> Ibid

<sup>74</sup> As put forth in Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 98

<sup>75</sup> As held by SÁNCHEZ GRAELLS, *Joint bidding and subcontracting under EU competition law: some critical comments on Thomas* (2 December 2015) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2015/12/joint-bidding-and-subcontracting-under.html> Accessed 12.03.2019 As well as the post *New analysis of joint tendering under EU competition law: a few comments on Ritter* (20 February 2017) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2017/2/20/new-analysis-of-joint-tendering-under-eu-competition-law-ritter-2017> Accessed 13.03.2019

Such a broad understanding of the criteria underlines the fact that the undertakings were unable to submit an individual bid in the first place. Therefore, the assessment of counterfactuals must be strictly limited to realistic ways for the undertaking to expand themselves in order to comply with the selection criteria. The assessment is not based on ability to tender in other constellations than joint bidding, but ability to tender alone.

Other views have been argued in academic circles.<sup>76</sup> According to Thomas, the test is whether there could in fact have been two or more independent bids in the absence of the joint bid.<sup>77</sup> This is a broad test with a restrictive effect, where the undertakings in reality must assess all of their options to expand or supply their business before entering into a collaboration with another undertaking not able to meet the requirements.<sup>78</sup> Such a test would also lead to the earlier mentioned issues with Art. 101(3) TFEU and Art.53(3) EEA,<sup>79</sup> and thus cannot apply. By creating such an environment as the proposed test does, the undertakings' freedom to plan their own business strategy is taken away by, in reality, denying them to explore consortia and ad-hoc collaborations.

The case of El Proffen<sup>80</sup> from the Norwegian Competition Authority might illustrate how far the assessment can go. The case was about a bid rigging consortia consisting of 5 undertakings agreeing on submitting price fixed tenders for a framework agreement. Some of the parties to the bid-rigging consortia were not able to carry out the contract on their own, and because of this they took part in the collusion. The undertakings had the necessary technical competence, but were short on staff. The Norwegian Competition Authority emphasized that it was normal business practice<sup>81</sup> to hire additional staff in order to comply with requirements in larger contracts. This was a minor adjustment, and included only a

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<sup>76</sup> THOMAS (2015) AND RITTER (2017)

<sup>77</sup> THOMAS (2015)

<sup>78</sup> Along the same line of arguments, see SÁNCHEZ GRAELLS, *Joint bidding and subcontracting under EU competition law: some critical comments on Thomas* (2 December 2015) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2015/12/joint-bidding-and-subcontracting-under.html> accessed 12.03.2019

<sup>79</sup> For in-depth discussion on this matter, see SÁNCHEZ GRAELLS (2017), as well as the blog post *New analysis of joint tendering under EU competition law: a few comments on Ritter* (20 February 2017) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2017/2/20/new-analysis-of-joint-tendering-under-eu-competition-law-ritter-2017> Accessed 13.03.2019. See also his post *Joint bidding and subcontracting under EU competition law: some critical comments on Thomas* (2 December 2015) How to crack a nut – a blog on EU economic law. Available at: <http://www.howtocrackanut.com/blog/2015/12/joint-bidding-and-subcontracting-under.html> accessed 12.03.2019. RITTER (2017) and THOMAS (2015)

<sup>80</sup> Decision made by Norwegian competition authority. KT-2017-21V, para 397

<sup>81</sup> A source of law in Norwegian law



limited financial risk. By hiring, the undertakings would be in a position to bid on their own. In addition, the undertakings being a part of the framework agreement did have the option to turn down projects if they did not have the capacity required.<sup>82</sup> Because of this, the undertakings were considered to be potential competitors.

I do not see any issues with applying the same views as put forth in El Proffen in a case of joint bidding. If looking to the selection criteria, the undertakings did comply with some of them, but not all. When assessing this in future cases, it is important to take into consideration how far off the undertakings are to fulfil the requirements, but also what type of requirement(s) the undertaking does not comply with. If the undertakings are short on staff, it must be taken into consideration how many workers the undertaking must expand with in order to comply with the criteria. And furthermore, if they have the necessary technical ability, this might play out differently than if they do not have the necessary equipment and they do not comply with the requirements on technical ability. If the undertakings are in a position where expansion includes a limited financial risk, and it is considered to be normal business practice to expand the business accordingly this might be enough to be considered as a realistic course of action.

However, here is a thin line. The condition can be problematic to assess in the aftermath, as some things are easier to conclude on in hindsight. Also, it is difficult to justify a strict scrutiny of how the undertakings should have conducted their own business before deciding to enter into a joint bidding agreement. In my opinion, this goes especially for SMEs which generally do not have the same business structure and ability to adapt their capacity rapidly. The starting point to keep in mind should be that the undertakings are free to decide their own business strategy. With this approach the authorities will have to be aware of the circumstances the undertakings were basing its decision on at the moment. Great emphasis must be put on the realistic approach from the view of the particular undertakings, otherwise the rule would create a disincentive for joint bidding and leaving the legal incentive in Directive 2014/24 without effect.<sup>83</sup>

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<sup>82</sup> The decision made by Norwegian competition authority, KT-2017-21V, para 397

<sup>83</sup> SÁNCHEZ GRAELLS, Comments to Danish draft guidelines on joint tendering, How to crack a nut – a blog on EU economic law. Accessed 12.03.2019. Available at <http://www.howtocrackanut.com/blog/2017/7/7/0p5ahpp86745j76bemm6dflw6hwloz>

## 3.3 Joint bidding as a restriction by object

### 3.3.1 The legal test to apply

Agreements that have as their object the restriction or distortion of competition are characterized by the fact that they are harmful to competition by their very nature.<sup>84</sup> It follows from the case law that in order to label an agreement as an object restriction the agreement has to reveal a sufficient degree of harm to competition.<sup>85</sup> To determine if a sufficient degree of harm is present regard must be had to the content of the agreements provision, its objectives and the economic and legal context.<sup>86</sup> The intention of the parties may be taken into account, although subjective intentions are not necessary to establish restriction by object.<sup>87</sup>

In *Ski Follo* the EFTA Court elaborated further on the legal test, saying that when looking into the context of the agreement, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market(s) in question.<sup>88</sup> An agreement must be capable of having at least some impact on the market. These statements are put forth by ECJ as well in a number of cases.<sup>89</sup>

In addition, The EFTA Court held that “only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object” with reference to the Opinion given by AG Wahl in CB.<sup>90</sup> The easily identifiable test is not yet endorsed by EU Courts, and has no support in former case law. For that reason, the following assessment will not discuss this threshold or its application.

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<sup>84</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires* C-67/13 P, EU:C:2014:2204, para 50

<sup>85</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires* C-67/13 P, EU:C:2014:2204, para 49, see also Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 50

<sup>86</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires* C-67/13 P, EU:C:2014:2204, para 53, and Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 89

<sup>87</sup> Judgment of 28 March 1984, *Compagnie Royale Asturienne*, C-29/83, EU:C:1984:130, para 3

<sup>88</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 56

<sup>89</sup> Judgment of 4 June 2009, *T-Mobile* C-8/08, EU:C:2009:343 para 31 and Judgment of 14 March 2013, *Allianz Hungaria* C-32/11, EU:C:2013:160, para 38

<sup>90</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 61

### **3.3.2 How to assess if joint bidding is a restriction by object? The content of the agreement**

It is evident from case law that the content of the agreement between the parties is of great importance to assess whether the joint bid constitutes a restriction by object. However, joint bidding agreements will vary in nature, with the possibility that some agreements in fact have such an anti-competitive nature revealed by its provisions that it stand out as a clear example of an object restriction.<sup>91</sup> In *Ski Follo* the agreement had a clear anti-competitive object by expressly stating that the objective of the agreement was not only to reduce competition between the undertakings in general, but also to cooperate on pricing policy in tenders.<sup>92</sup> The anti-competitive nature of the agreement was so prominent, making the subjective intentions of the parties a part of the evidence.<sup>93</sup> Regardless of assessing a joint bid agreement or a joint venture agreement, the agreement itself is key.

Also, what the agreement actually covers is of relevance. However, this has a side to the context of the agreement, due to the content being decided on the basis of what the procurement is about. This particular issue is discussed in section 3.3.4 after discussing the relevant context.

In cases where the agreement itself does not reveal any intention of the parties, the context in which the joint bidding agreement functions will be even more important to assess. In the following I seek to clarify what indications might be found concerning the context of joint bidding agreements in public procurement tenders.

### **3.3.3 The context of the joint bidding agreement**

One relevant aspect to assess is the tender documents, and the content of them. The tender documents unarguably are a part of the context, as to how the agreement between the parties should be interpreted. This might be of particular importance in case by case (ad-hoc) collaborations where there is no established consortia between the parties, as a result of the

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<sup>91</sup> In contrast to for instance *Allianz Hungaria*, where the provisions did not reveal a sufficient degree of harm to competition, Judgment of 14 March 2013, *Allianz Hungaria* C-32/11, EU:C:2013:160

<sup>92</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 96.

<sup>93</sup> See also Judgment of 6 October 2009, *GlaxoSmithKline* C-501/06 P, EU:C:2009:610 where the ECJ held that «Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the consequences of the agreement should then be considered (...)» para 55

assessment allowing for a much broader view in cases of consortia or joint ventures by looking at the collaboration between the parties in general. Also, the collaboration in these cases goes beyond the specific tender, giving the opportunity to consider if the collaboration goes beyond what was necessary to submit a joint tender. Thus, the documents will be a measuring point for the objective of the agreement by revealing what is necessary to agree upon. In a case by case collaboration one will have to limit the assessment to the situation for the specific tender. It is the tender documents that reveal the demand of the buyer, and thus being decisive for what the sellers have reasons to agree on.

Furthermore, in the case of joint bidding there is a particular legal context. With joint bidding being not only allowed but also encouraged<sup>94</sup> there is a legal incentive to engage in it. In addition, the procurement context imposes demands on potential sellers wanting to submit bids. In most cases, the procurement procedure is a competition on various criteria, including price. Thus, the undertakings submitting bids must not only comply with minimum requirements, but they must also set a price on their offer in order to access the market and thus the competition for the contract. This is a substantial difference in context from the normal market situation, where undertakings do not have the same reasons to collaborate and agree on prices.

An additional factor concerning the agreement's context, is if the number of competitors affects whether a joint bidding agreement can constitute an object restriction. The number of tenderers is a part of the context the bid is placed in. Logically, the more tenderers and bids the less restrictive a joint bid will be, because the buyer will have several options and there will be more competitive pressure. A joint bid will not cause a sufficient degree of harm to the competition. If there is heavy competitive pressure for the procurement, this might seem like an argument for not assessing whether the joint bid restricts competition by object in the first place but rather assess the actual effects of it.

There are arguments going against such a view regarding the amount of tenderers. In his article, Ritter addresses this matter as follows. Firstly, even with high competitive pressure, a joint bid may still cause a sufficient degree of harm if the undertakings apply competitive

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<sup>94</sup> Chapter 2

pressure on each other, or if they would be leading contenders had they bid independently.<sup>95</sup> Secondly, one of the aims with Art. 101 TFEU and Art. 53 EEA is to protect “competition as such”<sup>96</sup>, and those types of anti-competitive behaviour are prohibited as restrictions by object.<sup>97</sup> Ritter further argues that the reasoning for this is administrability, effectiveness and the optimal use of presumptions. More in-depth investigations would improve accuracy, but it would be less effective.<sup>98</sup>

A joint bid will always restrict the competition at some level if the parties are considered to be actual competitors. It is evident from the case law that the aim of Art. 101 TFEU is to protect competition in more general terms<sup>99</sup> and this is one of the reasons why restriction by object is illegal. In the case of joint bidding, this would probably be decisive if the Courts have to rule on a case where the issue discussed is raised. Especially when seen in the light of the result in *Expedia*<sup>100</sup>, where it was made clear that even if the agreement found to restrict by object is of minor importance and do not have an appreciable effect, it is still prohibited.<sup>101</sup>

*There is no legal base for exempting agreements with minor importance in the general market, and I cannot see a legal base for exempting the procurement market from the result of Expedia. Thus, the result of Expedia must apply also in a procurement setting. The numbers of competitors are irrelevant when assessing whether the agreement has an anti-competitive objective.*

### **3.3.4 Joint bidding and joint selling – a closer look at the content of the agreement**

The issue of joint bidding has also been discussed by the Commission and national competition authorities with respect to joint selling.<sup>102</sup> According to the Commission

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<sup>95</sup> Ritter (2017: 14)

<sup>96</sup> As put forth by the EU Courts in several judgements, see for instance Judgment of 4 June 2009, *T-Mobile*, C-8/08 EU:C:2009:343, para 38

<sup>97</sup> Ritter (2017: 14)

<sup>98</sup> Ritter (2017: 14)

<sup>99</sup> Judgment of 4 June 2009, *T-Mobile*, C-8/08, EU:C:2009:343, para 38

<sup>100</sup> Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795

<sup>101</sup> For in depth discussion on the De Minimis doctrine, see WISH and BAILEY (2018: 147-155)

<sup>102</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 chapter six, and Joint Bidding under Competition law – Guidelines published by the Danish Competition authority in 2018. Available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) see page 23

Guidelines, joint selling and certain types of joint production agreements must be treated differently under Art. 101 TFEU. Agreements limited to joint selling generally have the object of coordinating pricing policy.<sup>103</sup> However, the Guidelines provides no further explanation as to what joint selling is. In the chapter of production agreements the Guidelines exempt production agreements where the parties agree on the output, given that the other parameters of competition are not eliminated, or the agreement also entails joint distribution and price setting of those products if it is necessary for producing jointly in the first place, meaning that without the restriction the parties would not have incentive to produce jointly.<sup>104</sup> If either is the case, the agreement will not constitute an object restriction but it can be assessed under effect.<sup>105</sup> The Guidelines are clear on the point that this applies to all forms of joint production agreements<sup>106</sup>, which includes agreements on joint bidding.

The distinction between joint selling and joint production agreements is upheld by the Danish Competition Authority as well. In 2018 the Danish Competition Authority published new guidelines to joint bidding under competition law.<sup>107</sup> The Guidelines have no relevance for determining EU and EEA competition law, but since the Danish regulation correspond to EU law, views and arguments put forth by the authorities in the guidelines might be subject to scrutiny under EU law as well. In the Guidelines, the authorities hold that collaboration agreements in procurement procedures “that in reality only covers joint selling – with joint bidding and joint price setting - typically restricts competition by object.”<sup>108</sup> This might not be the case where the main function of the agreement is joint production. According to the guidelines, the authorities have to do an effect-assessment in the case of joint production being involved.

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<sup>103</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 234

<sup>104</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 160

<sup>105</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 160 and 161

<sup>106</sup> Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements OJ (2011) C 11/1 para 153

<sup>107</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) page 23 and 24

<sup>108</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) page 23

Ritter also draws a line between legitimate joint bidding and anti-competitive joint selling.<sup>109</sup> In his article, Ritter holds that joint tendering among competitors involves joint selling by definition, because the joint tender eliminates choice and competition between the undertakings on price, quality and value for money.<sup>110</sup>

These statements put forth by both the Commission, the Danish Competition Authority and Ritter are difficult to interpret, and it is unclear what the legal basis for them is. Every procurement procedure involves a buyer and a seller. In the case of joint tendering, the sellers want to sell either goods, services or a production to the buyer. Thus, in every procedure there will be a joint bid and joint price setting. This cannot be decisive of joint bidding being an object restriction, as this type of assessment will be based on form and not function, which is the rationale behind the object restriction.<sup>111</sup> The point is to figure out how a particular agreement can work in a specific context, in order to establish that it would restrict competition. Thus, the agreement together with its legal and economic context must be examined. When the Guidelines suggest that agreements which in reality only covers joint selling typically will be an object restriction, it is difficult to see what in reality is encompassed by that notion. It is clear that agreements consisting of production might not constitute an object restriction, so the statements viewed in the light of each other might suggest that the decisive point being what the procurement is about and what level of integration between the parties the agreement leads to.

Such an interpretation is in line with case law from both EU Courts and the EFTA Court as well, where one must look not only to the context the agreement works in but first and foremost the content of the agreement.<sup>112</sup> What have the parties agreed upon? If the joint bidders decide to sell a service or goods jointly, and they are able to do so without making any adjustments besides pooling what they are selling in order to deliver at the requested scale, then the agreement in reality will be two undertakings agreeing on the price to do so. The level of collaboration and integration between the parties is low.<sup>113</sup> If the agreement

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<sup>109</sup> RITTER (2017: 10-11)

<sup>110</sup> RITTER (2017: 11)

<sup>111</sup> See HERRERA ANCHUSTEGUI (2017: 5)

<sup>112</sup> Earlier referred to case law shows that the courts first look at the agreement itself, before assessing its context. See section 3.3.2

<sup>113</sup> There is a chance that such an agreement might offer better terms than the parties would have been able to offer individually. In that case, the undertakings must defend the agreement under Art. 101(3) TFEU or Art. 53(3) EEA.

between the joint bidders requires them to integrate and collaborate on various levels, and perhaps take advantage of each other's know how in order to deliver at the demands of the buyer, the agreement covers a lot more than just price setting. It will be an actual collaboration, where the center of gravity of the agreement is regulating the parties' performances. The main object of the agreement will be what the parties are to do and regulation of how this should be done, not price setting or agreeing on other terms. The agreement could also be about pooling resources to potentially create an economy of scale which again will make the bid more competitive. This illustrates that what the agreement actually covers and what level of collaboration and integration the contract requires of the undertakings involved is a relevant factor in assessing whether the bid constitutes an object restriction or not. Agreements covering production, integration or adaptation may be complicated, and at some point the content of the agreement makes it necessary to examine its effect and not its object. It will be impossible to establish a restriction by object, due to the content of the agreement. The discussion above shows that it is not given that the joint bid constitutes a restriction by object.

### **3.4 Is joint bidding price-fixing?**

If joint bidding is to be treated as price-fixing, this will mean that joint bidding is a hard core restriction of competition by object.<sup>114</sup> This will have consequences for both the assessment of the bid and the agreement but also with regard to potential application of grounds of justification and exemptions. To answer the question raised, I will analyze the EFTA courts' decision in *Ski Follo*,<sup>115</sup> the only case for the court within EU/EEA regarding this question.

#### **3.4.1 Summary of the facts and conclusion by the Court**

In *Ski Follo*, two taxi companies submitted joint bids through a co-owned management company responsible for administrative functions in two different procurement procedures conducted by Oslo University Hospital. The hospital carried out the procedure for acquisition of transport services for its patients. The first procedure was terminated due to lack of

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<sup>114</sup> Opinion of AG Kokott 28 February 2013, *Schenker and others*, C-681/11, EU:C:2013:126, para 92. The notion «hardcore restriction» is also used by SÁNCHEZ GRAELLS in «Not worth the paper it is written on? AG on the expectations created by legal advice in #competition (C-681/11) # EUlaw» *How to crack a nut – a blog on EU economic law*. Accessed on 16 April 2019. Available at

<http://www.howtocrackanut.com/blog/2013/03/not-worth-paper-it-is-written-on-ag-on.html>

<sup>115</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16



competitors, and in the second procedure Ski Follo submitted a new joint bid and was admitted to the framework agreement.

The Norwegian Competition Authority initiated an investigation and later concluded that the joint bids had as their object the restriction of competition, and thus were in breach of § 10 of the Norwegian Competition Act, equivalent to Art. 53 EEA and Art. 101 TFEU. The decision was challenged for the court, with the following judgment being appealed all the way to the Supreme Court of Norway who then referred the matter to the EFTA Court for an Advisory Opinion. The EFTA Court held the joint bids to constitute an object restriction, as they were considered to constitute a form of price-fixing.

### **3.4.2 Analysis of the Court's decision**

In *Ski Follo* the EFTA Court took the position that the joint bids were to be considered as price-fixing because “by submitting joint bids the undertakings agreed on the price offered to the contracting authority”.<sup>116</sup> Looking at the quote itself, this might indicate that joint bidding always constitutes price-fixing. Two or more undertakings coming together for bidding on a specific tender will necessarily include an element of price, except where the tender is price fixed, and the competition between compliant tenders meeting the minimum requirements will be based on quality.<sup>117</sup> If so, joint bidding cannot constitute price-fixing since the agreement does not include an element of price.<sup>118</sup>

Although the EFTA Court by the brief look of it seemed to be of the opinion that joint bidding is to be treated as price-fixing, it provided no arguments for its view, beside the fact that the undertakings had agreed on a price in order to tender for the contract. *Yet and importantly, the Court did not speak on joint bidding in general, rather its opinion was given with the specific situation in mind.* The question of whether joint bidding constitute price-fixing in general was not discussed.

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<sup>116</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 91

<sup>117</sup> In accordance with Art. 67(2) of Directive 2014/24

<sup>118</sup> As put forth by SÁNCHEZ GRAELLS (2017) in *Ski Taxi: Joint Bidding in Procurement as price-fixing?*  
Page 162

The Opinion comes across as somewhat too easy at this point, given that the appellants did put forth some arguments on the matter which were not addressed by the Court.<sup>119</sup> The approach might be explained by other circumstances around the facts of the case, which in reality left it easy for the Court to conclude with the agreement being labelled as price-fixing. The agreement between the undertakings included a clear statement, saying that collaboration would lead to less competition between the parties, and this applied also to their pricing policy in tenders.<sup>120</sup> The parties had a clear anti-competitive intention, and they were able to complete the contract without any further integration or adaptation. It was also clear that the parties were able to bid individually, thus making them actual competitors for the contract. Looking at the facts of the case, it was a clear cut example of an anti-competitive behaviour and agreement. With the Court not being in doubt of the nature of the agreement, this can explain why the Court did not address some of the appellants argument on price-fixing. However, the Court could have been more transparent in its argumentation, if its decision to view it as price-fixing was due to the content of the agreement together with the price setting and not just the price setting in isolation. The decision of the Court should be taken into account as merely an example of when joint bidding can be assessed as price-fixing, but not that it should be. There is no case law from ECJ nor the General Court on this matter, leaving it a question yet to be answered with certainty.

### 3.4.3 What are the potential consequences?

After the EFTA Court in *Ski Follo* held that the submission of joint bids was price-fixing, the court added that

*in order to determine whether the submission of joint bids through a joint management company reveals a sufficient degree of harm [such] that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor. Moreover, since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economics and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, such an assessment needs to take into account, albeit in an abridged manner whether the parties to an agreement are*

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<sup>119</sup> The appellants argued that the joint bids allowed the tenderers to pool limited resources and submit more competitive bids. Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 69

<sup>120</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, para 96

*actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint.*<sup>121</sup>

With this statement, the EFTA Court takes the view that an agreement involving price-fixing does not have to undergo an as thorough assessment as any other agreement which might restrict competition by object. The starting point being that since the joint bid is price-fixing, the assessment of whether or not the agreement constitutes an object restriction may be adapted thereafter. It takes less to establish a restriction by object. This is in line with former case law from ECJ.<sup>122</sup>

In the case of the agreement not involving any of the elements expressly listed in Art. 101(1) TFEU and Art. 53(1) EEA, the assessment of its content and context is much more thorough<sup>123</sup> This difference must be seen in light of earlier case law, where experience shows that certain types of conduct lead to fall in production and price increase, which again result in poor resource allocation to the detriment of consumers especially<sup>124</sup> and, in the case of joint bidding: The public buyer. Such conducts include price-fixing agreements.<sup>125</sup>

Therefore, the assessment of the economic and legal context in such a perspective with regard to joint bidding is limited to what is “strictly necessary” to establish a restriction by object.<sup>126</sup> However, given the distinction between price-fixing and price setting, and how undertakings are forced to set the price in order to have a possibility to enter the procurement market due to compliance with minimum requirements, it is unfortunate to establish a default of joint bidding being price-fixing in my opinion. By doing so, the burden of proof shifts on the parties almost from the very start, forcing them to provide evidence of the agreement leading to economic efficiencies as set out in Art. 101(3) TFEU. This situation might have a negative effect on the incentive to engage in joint bidding in the first place, because in reality, the undertakings will have no choice but to carefully assess the positive effects of a collaboration before deciding to enter into it.

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<sup>121</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16, paras 101-102.

<sup>122</sup> Judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, para 29

<sup>123</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires* C-67/13 P, EU:C:2014:2204 versus Judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26

<sup>124</sup> Judgment of 11 September 2014, *Groupement des Cartes Bancaires* C-67/13 P, EU:C:2014:2204 para 51.

<sup>125</sup> *Ibid*, paras 50-51

<sup>126</sup> This standard was also put forth by ECJ in Judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, para 26, and applies to price-fixing agreements as well.

Joint bidding being price-fixing will also affect the undertakings' possibility to claim the joint price setting as an ancillary restraints, because it would create an illogical line of arguments. Ancillary restraints are restrictions of competition which are necessary to achieve a different commercial goal, where the main operation is not restricting competition.<sup>127</sup> Thus, the result being that the agreement or the conduct/clause in the agreement fall outside Art. 101 TFEU or Art. 53 EEA altogether because of their nature as ancillary. For case by case collaborations, the joint bid *is the agreement*, and it would be illogical to state that the joint bid is price-fixing but then later consider the price-fixing ancillary. For established consortia this would be different, since there is a wider agreement behind the specific joint bid. The bid itself is not the agreement between the parties. If joint bidding is to be treated as price-fixing in general, it would be impossible for case by case collaborators to try and defend the bid under the rules on ancillary restraints. In contrast, in *Ski Follo* the EFTA Court did point out that an anti-competitive restriction may escape the prohibition in Art. 101(1) TFEU and Art. 53(1) EEA if the restriction can be regarded as ancillary to the main operation,<sup>128</sup> but it is difficult to see how this would play out in practice in the case of joint bidding being price-fixing, and especially in case by case collaborations. The view held by the Court adds to the conclusion of the arguments put forth in the case regarding joint bidding being price-fixing were quite single minded, and thus not applicable to joint bidding in general.

Moreover, the possibility to exempt the agreement under the rules on block exemptions for horizontal agreements will also be affected if joint bidding is to be treated as price-fixing. The block exemptions are not applicable to agreements containing hardcore restrictions such as price-fixing.<sup>129</sup> The same views applies to the De Minimis doctrine.<sup>130</sup> The Danish Competition Authority indicate in its Guidelines that exempting joint bidding agreements under block exemptions might be a possibility<sup>131</sup> but is not clear on how this would interact with the result in *Ski Follo*. The most obvious answer to this potential issue is that joint bidding cannot be regarded as price-fixing per se.

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<sup>127</sup> See Judgment of 18 September 2001, *M6 and Others*, T-112/99 EU:T:2001:215, para 104. For more on ancillary restraints, see WISH and BAILEY (2018: 136-138)

<sup>128</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 87

<sup>129</sup> WISH and BAILEY (2018: 178)

<sup>130</sup> Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, WISH and BAILEY (2018: 147-150)

<sup>131</sup> Joint Bidding under Competition law - Guidelines published by the Danish Competition authority in 2018, available at [https://www.en.kfst.dk/media/50765/050718\\_joint-bidding-guidelines.pdf](https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf) page 35

### 3.4.4 What is the status? Is joint bidding price-fixing?

The obvious argument to consider joint bidding as price-fixing is that there is an element of price in the agreement between the undertakings collaborating on the tender, this was also emphasised by the EFTA Court.<sup>132</sup> Furthermore, there are no specific rules in competition law to apply in joint bidding situations, meaning that there is a chance for joint bidding to be considered as price-fixing in theory.

However, joint bidding agreement differs from normal price-fixing agreements and cartels, where undertakings choose to collude with the specific goal to fix the prices, manipulate and control the market they are already a part of. In a normal market situation the undertakings competing in the same segments of the market have no legitimate reason to agree on prices, and since this is considered harmful by its nature by ECJ it is not necessary to assess the agreement further to establish it as a price-fixing agreement. In a procurement setting, the undertakings in a vast majority of cases must set the price in order to comply with minimum requirements, which again gives opportunity to compete in the procurement market.<sup>133</sup> From this point of view, there is no way around the price setting element for the parties to gain market access, in contrast to the normal market situation. This might indicate that when assessing if there is a breach of Art. 101(1) TFEU or Art. 53(1) EEA in a joint bidding situation, there cannot be put too much weight on the fact that the parties have agreed on the price in my opinion. The content and context of the agreement must be even more highlighted.

Building on this argument, when looking at the matter from a broader perspective outside the case of *Ski Follo*, it is useful to highlight the issue more thoroughly. In the case before the Court, the submitted bids resulted from a joint venture. The agreement between the undertakings goes beyond the specific tender, providing a broader context to the assessment. There is already a level of collaboration between the parties, and by submitting a joint bid, this collaboration is taken even further. In case of ad-hoc collaborations, it is easier for the undertakings to adopt the level of collaboration actually needed for the specific tender. With the possibility of a joint bid being a result of different types and levels of collaborations and

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<sup>132</sup> Judgment of 22 December 2016, *Ski Taxi SA v Norwegian Government*, E-3/16 para 91b

<sup>133</sup> Art. 67 of Directive 24/2014 provides rules on contract awarding.

agreements, this highlights even more the issue of treating joint bidding in a formalistic manner, and not having sufficient regard to the agreement between the parties.

Does this mean that joint bidding can never be price-fixing, because the parties to the agreement are forced to agree on and set a price in order to submit a tender or request to participate? No, the conclusion is that joint bidding can constitute price-fixing in some cases, but this should only apply to clear cut cases, where the anti-competitive objective of the agreement is prominent.

### **3.4.5 Closing comments on Ski Follo**

As already stated, the status after the Opinion given by the EFTA Court is that joint bidding *can* constitute price-fixing due to its price setting element, but not that it does in general. The problem with the Court's line of argument is that it applies to joint bidding in general, because every joint bid involves a price agreed upon by the parties. In this perspective, the Court delivered a very broad statement which could prove problematic if accepted without a critical eye. With this in mind, it is even more important to keep in mind that the Opinion does not provide legal basis for saying that joint bidding always will constitute price-fixing. There is no general statement from the Court on this point, but with its argumentation, the Opinion has opened the door wide open for further development on this matter. For this reason, it is important to be aware of the particular circumstances in Ski Follo, as already stressed.

Furthermore, joint bidding will take form of different types of agreements, with the possibility that the submission of a joint bid is a conduct rooted in a joint venture. This gives even more reason to base the assessment on the agreement between the parties and its context, and not the mere fact that the parties have set a price. Every agreement is different, and must be assessed individually in line with the general rules for object restrictions. If joint bidding is to be treated as price-fixing in general, this will undermine the purpose of the object restriction, which is to assess the agreement to figure out how it will function in and affect the relevant market it is a part of.

## 4 Concluding remarks

Over the last chapters I have discussed how joint bidding in public procurement can be reconciled with competition law and the prohibition of anti-competitive agreements. Although there are challenges as to how this reconciliation should work out, I have attempted to illustrate that there is and should be room for engaging in joint bidding - also under competition law, even if the case law points that these practices may qualify as object restrictions. These two set of rules can work together; yet it is paramount to interpret the existing rules to create a coherent system of law were the particularities of joint bidding and public procurement are not only respected but also taken seriously when assessing it from a competition perspective. How to achieve this is analyzed and discussed throughout my thesis.

My main contribution with this thesis is that future application of competition law to the joint bidding scheme must be aware and take into consideration the potential “booby traps” this reconciliation holds. These traps I have identified are several; the discussion on potential competitors; the need of reconciliation with the possibility to defend the agreement under Art. 101(3) TFEU and Art. 53(3) EEA; the question of whether joint bidding is price-fixing; and the possibility to defend the agreement as either an ancillary restraint or under block exemptions.

Joint bidding is not one generic agreement. Joint bidding can group a variety of agreements with different content taking place in different contexts. Furthermore, the requirement of price setting in order to submit a bid to avoid being declared not compliant by the contracting authority must be taken into account when assessing this question. As I have discussed earlier, there is no doubt that a joint bidding agreement could be considered as price-fixing, but the argumentation leading to such a result must be based on an assessment of the content and context of the agreement and not the mere fact that the parties set a price on their bid. This is the main problem I see with the EFTA Court’s Opinion in *Ski Follo*. In some cases, the assessment of the joint bid and the agreement between the parties will show that there is no restriction of competition by object – even if the joint bid is a way of fixing the price in an agreement between actual or potential competitors. Price setting does not equal price-fixing in general.

Such a take on the matter adopted in *Ski Follo* would be oversimplifying, by not paying due regard to the content and context of the specific agreement. With a formalistic view, we are left with a situation where undertakings wanting to bid jointly must assume that the collaboration is illegal, and it is up to them to prove the legality of the joint bid. This will not only undermine Art. 19(2) but also most likely have a substantial negative impact on the number of undertakings willing to risk engaging in joint bidding. This could potentially have a harmful effect on SMEs' participation in the procurement market, especially if looking to the development of centralization. The result could be fewer competitors participating in the market. Thus, the irony is that the development could potentially end up being harmful to competition itself, while trying to protect it. For those reasons, both the EFTA Court and the EU Courts must take responsibility when assessing joint bidding cases in the future. The issue requires cautiousness and awareness. The EFTA Court has opened the door for this development, but the right thing to do is to close it again and have a second thought.



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## EEA legislation

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Directive 2014/24/EU of the European Parliament and of the Council on public procurement

## Norwegian national legislation

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