Responses to calls for tenders by subsidiaries of the same group: the Autorité amends its decision-making practice following a judgement of the CJEU

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Following a judgement of the CJEU clarifying European case-law, the *Autorité de la concurrence* amends its decision-making practice, which until now had prohibited subsidiaries from the same group, subject to penalty, from coordinating with each other over tender bids.

Background

The *Autorité de la concurrence* today issues a decision that marks a development in its decision-making practice. Up until now, the *Autorité* had regarded that it was unlawful for subsidiaries from the same group to respond to a call for public tenders by submitting bids that appear to be separate and independent, but which have in fact been coordinated, without notifying the public procurement agent. The CJEU has handed down a judgment that has prompted the *Autorité* to amend its previous decision-making practice: the CJEU ruled on 17 May 2018, in case « Ecoservice projektai », UAB, C 531/16, that even if subsidiaries from the same group respond separately to a call for tenders, they nonetheless constitute a single company within the meaning of European competition law. It was therefore not possible to hand out a fine for an anticompetitive practice in such a case, as it involved coordinated responses to calls for tenders submitted by companies from the same group.

This type of behaviour is, however, still likely to be sanctioned under public procurement law insofar as it can mislead the public procurement agent and distort the outcome of the public procurement process.

The facts of the case

Following a report submitted by the Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), the *Autorité de la concurrence* started proceedings *ex officio* into practices adopted by undertakings in response to calls for tenders issued by France AgriMer.

France AgriMer is a national public body operating in the agricultural and seafood product sector, which was set up in 2009. It develops strategies and management approaches in the agricultural and fisheries sectors in France. Each year, France AgriMer organises calls for tenders with a view to supplying food to charities and subsidised grocery stores notably, which then distribute the food to the most deprived sections of the population.

Between 2013 and 2016, several companies belonging to Ovimpex group (Dhumeaux, Mondial Viande Service, Vianov) submitted bids in response to calls for public tenders issued by France AgriMer. These bids, which were submitted as different and independent bids, were in fact drawn up jointly. After the statement of objections relating to anticompetitive practices had been notified by the Investigation Services, Dhumeaux, Mondial Viande Service, Ovimpex and Vianov requested initiation of a settlement procedure.

New European case-law

In accordance with its decision-making practice[1], which was confirmed by the case-law of the Paris Court of Appeal, the *Autorité* considered that fines could be handed out under rules prohibiting anticompetitive arrangements for practices consisting of submitting to the contracting authority bids that appear to be independent, but which have been prepared in a concerted manner by entities belonging to the same group.

However, in its Judgment of 17 May 2018 « Ecoservice projektai » UAB, C 531/16, the Court of Justice of the European Union ruled, for the first time, that the provisions of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") do not apply to practices where companies belonging to the same group submit coordinated separate bids that appear to be independent in response to a call for tenders on the grounds that, in such a case, the companies concerned constitute a single economic entity, which preclude the classification of such practices as anticompetitive within the meaning of Article 101 of the TFEU.

The Autorité dismisses the charges despite the signature of a settlement proposal by the respondents

This case-law has prompted the *Autorité* to amend its decision-making practice.

In this case, Dhumeaux, MVS and Vianov were subsidiaries that were almost wholly owned by Ovimpex, which was the group head at the time of the facts. These four companies, which were the parent company and subsidiaries of the group at the time of the facts, must therefore be regarded, in light of the case-law of the CJEU, as the same economic unit, notwithstanding the separate submission of bids in response to calls for tenders issued by France AgriMer.

The settlement procedure enables a company that does not contest the statement of objections notified by the Investigation Services of the *Autorité* to obtain a reduced fine. This procedure had given rise to the establishment of settlement proposals fixing the minimum and maximum amount of the fines that could have been handed out by the *Autorité.*

The *Autorité* consequently considered, notwithstanding the signature of the settlement proposals by concerned undertakings, that the conditions for handing out a fine had not been met and that there were no grounds to continue the proceedings.

[1] See, for example, Decisions 03-D-07 of 4 February 2003 regarding practices identified in the transfer of purchase markets for vertical road signs by local communities ; 08-D-29 of 3 December 2008 regarding practices identified in the sector for the public procurement of metal and steelwork maintenance services; Decision 10-D-04 of 26 January 2010 regarding practices implemented in the operating tables sector ; 18-D-02 of 19 February 2018 regarding practices adopted in the sector for the maintenance of green spaces in Martinique.

Practices that can nonetheless be covered by public procurement law

Although such practices are no longer covered by rules governing anticompetitive practices, they may well, as a general rule, be subject to public procurement law since such behaviour can mislead the public procurement agent and, thereby, distort the results of the public procurement process.

Public procurement procedures are governed by the principles of transparency and equal treatment (Article L. 3 of the French Public Procurement Code). Applicable public procurement case-law provides that the principle of equal treatment is infringed if bidding companies belonging to the same group of companies submit coordinated or concerted bids likely to give them an unjustified advantage.

The contracting authority can, for the purpose of guaranteeing compliance with these principles, require that bidders disclose information relating to the links between these entities (level of financial participation, decision-making structure, etc.).

The contracting authority, the foreclosed competitors and any third parties harmed by a concealment practice adopted by bidders can bring an action for compensation before the courts competent in matters relating to the termination or cancellation of procurement contracts. In such an event, foreclosed competitors and injured third parties may also, in certain circumstances, prior to final conclusion of the contract, file for an interim injunction before the administrative

judge pursuant to Article L. 551-1 of the French Code of Administrative Justice requesting measures to be ordered to regularise the tender procedure.

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