ARTICLE

SUBSIDIARIES OF THE SAME GROUP CAN NOW SUBMIT SEPARATE BIDS TO THE SAME CALL FOR TENDERS WITHOUT RISKING BEING CONVICTED FOR ANTI-COMPETITIVE AGREEMENTS.

Competition, Retail and Consumer Law Commercial and International Contracts | 26/11/20 | Renaud Christol Marc-Antoine Picquier

In its Decision n° 20-D-19 of 25 November 2020 relating to practices implemented in the sector of food supply tenders of the national public establishment France AgriMer[1] (the "**Decision**"), the French Competition Authority (the "**Authority**") dismissed the case against several subsidiaries of the same group that submitted apparently separate and autonomous bids in response to a public call for tenders, bids that were in fact coordinated.

With this Decision, the Authority completely changes its decision-making practice to adapt it to the European case law.

Articles 101 of the TFEU and L. 420-1 of the French commercial code prohibit agreements or concerted practices concluded between companies, i.e. between separate economic units. Decision-making practice consistently considers that the prohibition of cartels is not applicable to agreements or practices implemented within the same economic unit.

The Decision points out in this respect that "*where a parent company holds, directly or indirectly through an intermediary company, all or almost all of the capital of its subsidiary, it is presumed, in a rebuttable manner, to exert a decisive influence on the behavior of its subsidiary and to form an economic unit with it*"[2].

The Commission guidelines on horizontal co-operation agreements of 14 January 2011 state that *"[t]he same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets*"[3].

However, the Authority and the French courts had consistently held that this rule did not apply in the context of a call for tenders. If companies in the same group decided to bid separately by filing separate bids, they constituted different companies and could be likely to implement an anti-competitive agreement, for example if they coordinated the content of their bids.

The Paris Court of Appeal had noted that "*the EU courts have never before had to deal with practices implemented by related companies whose object or effect was to distort the tendering procedure by submitting separate bids whose independence was only apparent*"[4].

The EU courts ruled on this issue in 2018.

On 17 May 2018, the Court of Justice of the European Union (the "**CJEU**") handed down the "Ecoservice projektai" UAB ruling[5], in which it held that subsidiaries of the same group that have coordinated to formulate separate responses to the same invitation to tender constitute a single undertaking within the meaning of European competition law. It is therefore not possible to sanction a cartel in such a case.

The change of ruling is now transposed in France.

The case before the Authority involved subsidiaries of the same group, all of which had bid in a coordinated manner in calls for tenders organized by France AgriMer. They had signed a framework commercial agreement which aimed to entrust one of them with the preparation of applications for private and public tenders for all the contracting companies. The coordinator prepared the bids for all the contracting companies and then each of them submitted their proposal to the buyer as if they had "personally" prepared it.

In such a situation, in view of its decision-making practice and French case law, the Authority would normally have sanctioned these practices under the prohibition of anti-competitive agreements[6]. Moreover, a reading of the Decision shows that a settlement procedure had been implemented, proof that the practices had indeed been observed by the Authority and that the companies in question were engaged in a process of not contesting the facts and their qualification.

However, the transaction did not come to an end.

The 2018 ruling of the CJEU has been taken into account by the Authority (the Decision does not mention the modalities of this acknowledgement).

The companies subject to the Decision are almost entirely owned by another company, which is the head of the group. These subsidiaries and their parent company therefore constitute, according to the CJEU ruling, the same economic unit within the meaning of competition law. Consequently, no anti-competitive agreement could be characterized as such.

The Authority dismissed the case.

It still stresses in its press release that the absence of sanctions under antitrust law does not place companies that would like to implement such practices in a situation of impunity.

Applicable case law on public procurement contracts provides that the principle of equal treatment would be violated if bidding companies belonging to the same group propose coordinated or concerted bids likely to give them unjustified advantages. The contracting authority, competitors who have been eliminated and third parties harmed by a practice of concealment of bidders may, in certain circumstances, apply to the administrative court for an interim injunction to obtain an order to regularize the procedure.

[1] https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-11/20d19.pdf

[2] Decision, § 58.

[3] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, point 11.

[4] Paris Court of Appeal, 28 October 2010, n°2010/03405, p. 13.

[5] CJEU, 17 May 2018, “Ecoservice projektai” UAB, case C-531/16.

[6] See decisions n° 03-D-01 of 14 January 2003 relating to the conduct of companies of Air Liquide group in the medical gases sector, paragraphs 123 et seq.; n°03-D-07 of 4 February 2003 relating to practices noted during the purchase of vertical road signs by local authorities, paragraphs 64 et seq. confirmed by the decision of the Paris Court of Appeal of 18 November 2003, Signaux Laporte, n°2003/04154, p. 4 to 6.