The EU Court of Justice rules that Article 101 TFEU does not apply to circumstances where two separate and competing tenders are submitted by entities controlled by the same parent company (Specializuotas transportas)

ANTICOMPETITIVE PRACTICES, BID RIGGING, LITHUANIA, UTILITIES, EUROPEAN UNION, PUBLIC PROCUREMENT

EU Court of Justice, Šiaulių regiono atliekų tvarkymo centras / Ecoservice projektai UAB, Case C-531/16, 17 May 2018

Does the EU Court of Justice "Specializuotas transportas" case ring the death knell of the French derogation to intra-group immunity?

In its judgment Šiaulių regiono atliekų tvarkymo centras and Ecoservice projektai UAB (Case C-531/16) rendered on May 17, 2018, the EU Court of Justice has ruled that Article 101 of the Treaty on the Functioning of the European Union (TFEU) does not apply to circumstances where two separate and competing tenders are submitted by entities controlled by the same parent company. By doing so, it takes a position which contrasts with the derogation to the intra-group immunity which is traditionally applied in similar circumstances by the French Competition Authority.

A request for preliminary ruling by the EU Court of Justice was made in proceedings between ‘VSA Vilnius’ UAB and the centre for waste management for the region of Šiauliai concerning the award, by that centre, of a public service contract relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment. Two of the four tenders submitted in response to the call of tenders for this contract were submitted by subsidiaries of “Ecoservice” UAB, which held 100% and 98.2%, respectively, of the shares of those undertakings. In its tender, one of the subsidiaries specified that it was taking part in the procedure autonomously and independently of any other economic operators that might be connected to it. It further requested the contracting authority to treat all other operators as competitors. The contract was ultimately awarded to this subsidiary. One of the competitors complained before the contracting authority, but to no avail. The award was later annulled by the first instance court and the latter’s judgment was upheld by the Court of Appeal. The case then went up to the Supreme Court which inter alia raised the following question to the EU Court of Justice: “Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure (...) be in principle assessed — regard being had to,
inter alia, the voluntary submission by one of those economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?

Admittedly, the EU Court of Justice’s preliminary ruling deals primarily with the subject from a public procurement viewpoint (which will not be addressed in this article). Nevertheless, the incidental developments on the non-application of Article 101 TFEU are most welcome in light of the confusion brought about by the French Competition Authority’s decisional practice.

According to the French Competition Authority’s decisional practice, undertakings belonging to the same group, but enjoying commercial autonomy, may submit separate and competing offers, provided that they do not consult each other before submitting these offers. On the other hand, these undertakings may renounce their commercial autonomy for a given tender and consult each other either to decide which undertaking will submit an offer, or to establish together this offer in a group, on condition that they submit only one. When these undertakings submit several separate tenders, they are deemed to demonstrate their commercial autonomy and to guarantee in the eye of the contracting authority the existence of competition between them. In the event that these multiple offers cannot be regarded as independent, their coordination can be qualified as an anti-competitive agreement [1].

The challenge with this decisional practice is the following: the mere submission of two competing tenders by entities controlled by the same parent company renders them competitors (i.e., fictitiously two distinct economic units) in the eye of the Authority, regardless of their structural and organisational links; but generally their structural and organisational links make it very difficult, to say the least, to demonstrate, the same level of independence in the preparation of the tenders as two genuine competitors. Why? Because the criteria applied by the Authority to determine whether the tenders are independent from one another do not seem to differ substantially from the criteria applied in order to determine whether a subsidiary is or not under decisive influence of its parent company. Hence, entities under decisive influence of a same parent company are potentially at risk of breaching competition law, even if they did not actually discuss with one another in the preparation of the tenders or did not actually coordinate between them. It explains why, in this foggy landscape, groups may want to refrain from submitting separate and competing tenders in France in order to err on the safest side [2].

Unlike the French Competition Authority, the EU Court of Justice makes no reference to any derogation to intra-group immunity in these specific circumstances and refers, to the contrary, to traditional concepts. The Court recalls the principle according to which “Article 101 TFEU does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit” (paragraph 28 of the judgment), specifying in that respect that that economic unit is to be assessed in the light of the decisive influence exercised by the parent company over its subsidiaries (paragraph 29 of the judgment).

This suggests that the derogation to intra-group immunity is specific to the French Competition Authority’s decisional practice, which had until now considered that it did not contradict the Community courts when applying its approach under Article 101 TFEU, on the ground that the latter had never had the opportunity to rule on the subject (Decision 10-D-04 ).

What consequences on the French derogation to intra-group immunity?

This judgment should normally preclude the usual approach of the French Competition Authority provided that Community competition law is applicable. Article 3 of Regulation 1/2003 [3] prevents a national competition authority from prohibiting practices or agreements under national law if they are permitted under Community law if
that law is applicable concurrently with national law. On the other hand, where Community law is not applicable, this judgment cannot technically compel the Authority to change its practice under national law.

The question thus remains open as to how the Authority will react: will it spontaneously abandon its case-law in the event that Community law is applicable or will it wait for an undertaking to challenge it before the Court of Appeal?

In the first scenario, the infringing company would be exposed to a proceeding even if it may have better chances to win in the appeal proceedings. In the second scenario, there would not even be any risk of prosecution. One may only hope that the Authority will spontaneously align its approach with the EU Court of Justice, but this remains to be seen.

Another question arises: will the Authority, which has always declared that EU competition law constitutes a 'useful guide for analysis' when applying (in particular exclusively) national competition law, maintain its approach under national law?

The EU Court of Justice ruling shows that the Authority’s decisional practice is useless when EU public procurement law applies because, on this basis, it is prohibited for two companies of the same group to consult each other if they submit two competing bids, but as this prohibition is based on public procurement rules, it only applies to public contracts, not to private contracts.

The Authority might therefore consider that there is still an enforcement gap and wish to maintain its practice when EU law does not apply or, to the contrary, prefer to take inspiration from EU law.

Given these uncertainties, one may want to remain cautious and not prejudge what the French Competition Authority will do until the issuance of its next relevant decision.

