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Articles

Studia Iuridica Lublinensia vol. 34, 1, 2025
DOI: 10.17951/sil.2025.34.1.235-257

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Evaluating Legal Frameworks for Joint Bidding in Public Procurement: Balancing Collaboration and Competition*

Ocena podstaw prawnych w zakresie wspólnego ubiegania się o udzielenie zamówienia publicznego. Równoważenie współpracy i konkurencji

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* The article is based on work from COST Action CA20123 – Intergovernmental Coordination from Local to European Governance (IGCOORD), supported by COST (European Cooperation in Science and Technology).

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ABSTRACT

Public procurement and competition law aim to ensure fairness and efficiency, but their strict application may unintentionally hinder supplier participation and limit contracting authorities' success. Agreements among suppliers must avoid restricting competition, yet overly rigid competition rules may prevent contracting authorities from receiving a single tender for works, services or goods. While there is a potential risk of consortia abuse, detailed case-by-case analyses are essential to address these concerns. Some countries are already developing practices for evaluating such agreements. This paper examines the legal framework and emerging practices surrounding joint bidding and explores options for balancing public procurement and competition law. Particular focus is given to the conditions under which undertakings can submit joint offers without breaching competition rules. Current regulations provide some direction but lack clarity on when bidding consortia are permissible. Given the strict sanctions for competition law violations, many undertakings hesitate to form joint ventures, fearing that consortia may be deemed a "by object" breach, placing the burden of proof on the participants. This uncertainty underscores the need for comprehensive legal and economic evaluations in joint bidding cases. The lack of legal certainty presents significant challenges, making it critical to advance research and publication on this topic to provide clearer guidance for stakeholders involved in public procurement.

Keywords: joint bidding; public procurement; competition law; restrictions; bidding consortia

INTRODUCTION

The involvement of public finances and the inclusion of a broader range of stakeholders in public procurement provide additional protection against potential abuse of position entity or person. By designing the process to more participants to participate, it becomes more transparent, making it more challenging to manipulate it for personal gain, whether from the purchasing organization's side or from a potential service provider. The transparency helps ensure that no one can unfairly influence the decision-making process.

This approach also satisfies the goal of spending as little money as possible while still acquiring high-quality products, as potential suppliers compete by offering the most attractive bids. The competitive environment encourages suppliers to lower prices and improve the quality of their offerings, ensuring that the contracting authority gets the best value for the public's money. By maintaining a balance between cost and quality, public procurement serves the interests of both the contracting authority and the public, maximizing the efficiency of public spending while minimizing the risks of overspending or receiving subpar products.

A great deal is expected from the element of competition – suppliers operating in the market submit offers, and the most appealing one, in terms of both price and quality, is selected through the bidding process. This ensures that no single provider dominates the market and encourages innovation, as suppliers try to offer better products and services to outdo their rivals. However, there are many situations

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where individual suppliers are unable to meet the complex or large-scale needs of purchasing organizations on their own. In cases where the requirements are too demanding or specialized, collaboration between suppliers becomes necessary. By working together, providers can combine their strengths, pool resources, and provide a more comprehensive proposal that meets the buyer's needs. This teamwork can result in better solutions and more effective delivery of services or products.

Additionally, fostering collaboration among suppliers can also encourage the development of new partnerships and innovations that might not have been possible if providers were competing alone. In some cases, smaller suppliers may benefit from teaming up with larger ones, gaining access to bigger contracts and opportunities they wouldn't be able to handle on their own. This creates a more inclusive and dynamic market, benefiting both buyers and suppliers, while still maintaining the core principles of fairness and competition in public procurement.

Theoretical and practical challenges faced by participants in the public procurement process are further examined, particularly in their efforts to comply with competition law rules while also striving to win public procurement contracts and deliver high-quality services.

In practice, public procurement participants must navigate a complex landscape where they are required to adhere to strict legal frameworks, such as competition law, which is designed to prevent unfair practices like price-fixing, market division or collusion. At the same time, these participants are under pressure to submit competitive bids that balance cost-effectiveness and quality, which can be a delicate task. Ensuring compliance with the rules while standing out in a competitive environment requires careful planning and collaboration, especially when the scope of the procurement is large or involves specialized needs.

Practice has shown that despite the well-intended goals of public procurement and competition laws, the stringent application of competition rules can sometimes hinder suppliers' participation in public procurement and impede the contracting authority's success. The parties' agreements must not restrict competition, and the conditions of competition should not prevent the contracting authority from receiving a single tender for the purchase of works, services or goods. Despite the potential risk of abuse of consortia by potential suppliers, a more detailed case-by-case analysis is necessary. In some countries, the practice of evaluating agreements between potential suppliers has already begun to develop.

Bidding consortia agreements have to be analyzed, i.a., on the basis of Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.[1] However, recent legal

[1] 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 (OJ C 259/1, 21.7.2023), hereinafter: the Guidelines.

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regulation does not provide unequivocal answer when bidding consortia is legal. In case the undertakings wish to participate in a public tender in the form of bidding consortia quite comprehensive legal and economic evaluation should be carried out. Bearing in mind strict sanctions for violation of the Competition Law rules a lot of undertakings might be discouraged from conclusion of joint venture agreements in tenders. There is a danger that the Competition Council could qualify bidding consortia as a breach "by object". In such a case, all the burden of proof to justify bidding consortia could be put on the undertakings who have concluded joint venture. The above-mentioned reasons prove that at the moment there is a lack of legal certainty in relation to the undertakings. It also proves that it is very important to publish articles on bidding consortia.

CURRENT LEGAL FRAMEWORK AND PRACTICE

The legal framework for competition operates on multiple levels. In the case of the EU, Article 101 TFEU[2] prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade between Member States and have the object or effect of preventing, restricting or distorting competition within the internal market. This means that any agreements or practices that extend beyond the borders of a single Member State are particularly significant, as they can impact the broader EU market.

In addition to EU-level regulations, national rules[3] also play an important role in ensuring fair competition, particularly when there is no distortion of the internal EU market. Each EU Member State has its own set of regulations to govern competition within its borders. These national laws work in tandem with EU legislation to ensure that competition is protected and that no unfair practices arise at either the national or EU level. By coordinating both national and EU rules, the legal framework aims to maintain a fair and open market, preventing practices that could harm competition or disadvantage certain players.

The EU regulations on public procurement explicitly state that "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favoring or disadvantaging certain economic

[2] Treaty on the Functioning of the European Union, consolidated version (OJ C 326/1, 26.10.2012).

[3] For instance, Law on Competition of the Republic of Lithuania, 23 March 1999, version of 1 February 2017, No. 2017-01078 (last amended on 5 December 2024).

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operators".[4] The key message is within the regulations – competition cannot be artificially restricted or distorted. Therefore, consequences can only be discussed when limitations arise not as a natural result of a transparent and fair process but due to artificial or unjust barriers.

This means that any restrictions placed on competition must be justified and arise organically from the fair dynamics of the procurement process.

The same principles are reflected in national regulations. For example, the Lithuanian Law on Public Procurement stipulates: "When planning and preparing for procurements, it is prohibited to aim to avoid the application of the procedures established by this law or to artificially reduce competition. Competition is considered artificially reduced when procurement unjustifiably creates more favorable or unfavorable conditions for certain suppliers".[5]

The analysis of legislation leads to a logical conclusion that the current legal framework encourages potential suppliers to avoid pooling and participating in the procurement in which they could collaborate with other entities.[6]

SUBMISSION OF THE COMPETITIVE BIDS BASED ON SPECIAL REQUIREMENTS

It is particularly difficult to submit competitive bids when the procurement is based on special requirements, i.e. in the field of defense and security, water, energy, transport or postal services, or conducted by contracting entities in the energy sector (both – providing fuels/producing energy as well as providing heat), etc. In such cases, the award of public contracts entails specific needs and the contracting authority imposes qualification as well as performance requirements that are unusually high, and sometimes – close to the point of being considered excessive, in order to ensure the performance of the contracts. Whenever the procurement with specialized needs is conducted, the contracting authority tends to require a high degree financial capacity of the supplier in order to ensure proper implementation of contract duties as well as fulfilment of other conditions, although these are not necessarily required by the substance of the contract.

[4] Article 18 (1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014).

[5] Law on Public Procurement of the Republic of Lithuania, 13 August 1996, No. I-1491 (last amended on 11 July 2024, No. XIV-2909).

[6] A. Puksas, R. Moisejevas, R. Petkuvienė, *Competition Law Implications for Joint Bidding During Public Procurement*, "Studia Iuridica Lublinensia" 2024, vol. 33(2).

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Let's look at the case from Lithuania,[7] where the contracting authority imposed the requirement to have a high average annual operating income, having purpose to procure waste management services for a small town whose urbanization is constrained by exceptional environmental conditions. As we know, waste management is a major concern in the EU, and the proper execution of the contract is therefore of great importance. In this case, the Klaipėda Regional Waste Management Centre has launched a tender procedure for the "procurement of services for the collection of municipal waste from the municipality of Neringa and the transportation of municipal waste to the Klaipėda Regional Disposal Treatment Facility".[8] A group of companies acting in a joint venture was awarded the contract. The other tenderer challenged the decision on the ranking of the tenders, arguing that none of the members of the group of tenderers is active in the collection and transportation of mixed municipal waste or related activities. According to the supplier who initiated the litigation, the group of suppliers was also not entitled to rely on the income generated by one of the members of the group in the context of the joint operation contract, since the other suppliers in the group did not have any document to support this qualification. The contracting authority, the suppliers of joint venture and the courts have interpreted the qualification requirement of the suppliers in question as implying, that the tender conditions did not require from the service providers to prove their qualification, deriving their income only in their own individual name and/or for their own benefit (i.e. not as a main partner) and only for the management of mixed municipal waste as in the case of a multiple contract (for various types of waste).

The Supreme Court of Lithuania (the Court of Cassation) referred the matter to the Court of Justice for a preliminary ruling,[9] in order to ascertain whether the economic performance criterion laid down by the contracting authority permits tenderers to be treated equally and in a non-discriminatory manner, and whether the contracting authority's conduct is transparent and complies with the principle of proportionality in accordance with Directives 89/665/EEC, 2014/24/EU3 and (EU) 2016/943.[10] The Court of Justice was asked to rule on the qualification of this

[7] Ruling of the Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania of 13 January 2022 in civil case No. e3K-3-185-916/2022.

[8] At the end of 2000, the entire Curonian Spit was inscribed on the UNESCO World Heritage List as a cultural landscape. This is the best recognition of the cultural heritage, nature conservation and infrastructure improvement works carried out in the Curonian Spit.

[9] Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 18 December 2019 – *'Klaipėdos regiono atliekų tvarkymo centras' UAB, other parties: 'Ecoservice Klaipėda' UAB, 'Klaipėdos autobusų parkas' UAB, 'Parsekas' UAB, 'Klaipėdos transportas' UAB*, case C-927/19 (OJ C 77/28, 9.3.2020).

[10] Ruling of the Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania of 13 January 2022 in civil case No. e3K-3-185-916/2022.

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condition, specifically for the purpose of determining the legality of the assessment of the conformity of the Supplier Group. It should be noted that, although the Court of Justice qualified the requirement set out in para. 4 of Annex 4 to the Tender Conditions as a condition of economic and financial capacity, but, in the light of its specific content, the Court provided new interpretations on its application.

The Court of Justice states that, where the contracting authority has imposed only a requirement relating to the relevant minimum annual turnover and has not required that that minimum turnover be achieved in the field to which the contract relates, there is nothing to prevent the economic operator from relying on the income, generated by other participants of the joint venture, even if, in the context of a particular public procurement contract, it did not actually contribute to the activities of that group, similar to the activities to which the public procurement contract relates, for which the economic operator seeks to justify its economic and financial capacity.[11]

The Court of Justice has further clarified in its judgment that, although the turnover requirement relates to economic and financial capacity, where the tender conditions require a minimum turnover in the field to which the contract relates, it has a dual purpose, namely to determine the economic and financial capacity of the economic operators and to help demonstrate their technical and professional capacity.[12] By analogy with the *Esaprojekt* judgment,[13] the Court of Justice held in its Preliminary Ruling that, where the contracting authority requires economic operators to have a specified minimum turnover in the field of the contract in question, the operator may rely on a temporary group of undertakings, to which it belonged, to prove its economic and financial capacity only if it has actually contributed, under the public procurement contract in question, to the performance of an activity of that group similar to the one to which the public procurement contract in which that economic operator seeks to prove its economic and financial capacity relates.[14] It is therefore up to the contracting authority to determine, according to the way in which the requirement is formulated, whether economic operators will have a better chance of taking part in the tender.

There is an even greater need for specialized procurement for NATO-related activities. One of the usual conditions is that the successful supplier may be required

[11] Judgment of the Court of 7 September 2021 in case C-927/19, *'Klaipėdos regiono atliekų tvarkymo centras' v UAB*, Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas, ECLI:EU:C:2021:700, para. 77.

[12] *Ibidem*, paras 72 and 78.

[13] Judgment of the Court of 4 May 2017 in case C-387/14, *Esaprojekt sp. z o.o. v Województwo Łódzkie*, ECLI:EU:C:2017:338.

[14] Judgment of the Court of 7 September 2021 in case C-927/19, *'Klaipėdos regiono atliekų tvarkymo centras' v UAB*, Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas, para. 82.

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to have an authorization to work with classified information marked "Secret". This is an objective factor which reduces the number of potential providers. In Lithuania, public procurement is also often subject to additional evaluation due to specific requirements which are also security related. The Public Procurement Service evaluated the tender "Rental of structures for an event", which was carried out by means of an open negotiated procedure to secure the premises for the NATO Summit.

The Contracting Authority stated in its letter No. 7-71 of 18 August 2023 to the Public Procurement Service that "there are no suppliers on the Lithuanian market in general which could have fulfilled a public procurement contract of this magnitude on their own capacity. (…) in order for any supplier to be able to execute a public procurement contract in a proper and timely manner, it would have been necessary for such a supplier to procure part of the subject-matter of the contract from other suppliers or manufacturers on the market (…) and to order and purchase part of the subject matter".[15] The Public Procurement Service's inspection rejected the argument as unsubstantiated on the grounds of undisclosed negotiations. According to the Authority, the use of the negotiated procedure pursuant to Article 71 (1) (3) of Law on Public Procurement of the Republic of Lithuania may be applied only under the following three cumulative conditions: (a) an unforeseeable event must have occurred; (b) there must be circumstances of extreme urgency which make it impossible to comply with the time limits laid down in the other procedures; (c) there must be a causal link between the unforeseeable event and the ensuing extreme urgency. If at least one of the above-mentioned conditions is not fulfilled, contracting authorities may not fail to comply with the provisions of the Directives relating specifically to the publication of a contract notice.[16] In the case of Lithuania, following the Madrid NATO Summit on 29 June 2022, it was announced that the next meeting would take place in Vilnius in 2023. The exact date of the NATO Summit in Vilnius was announced on 9 November 2022. There was therefore no justification for procuring the service by means of a restricted negotiation procedure when the subject-matter of the contract was known for more than a year in advance. Consequently, there is no legal basis for limiting the number of suppliers in the absence of an imminent necessity and in the case of a foreseeable event. Obviously, such procurement could have been the subject of a joint operating agreement and would have resulted from offers from other suppliers or manufacturers on the market.

[15] Limited access online: https://www.infolex.lt/tp/2196977.

[16] Judgment of the Court of 18 March 1992 in case C-24/91, *Commission of the European Communities v Kingdom of Spain*, ECLI:EU:C:1992:134, para. 1. See also judgment of the Court of 2 August 1993 in case C-107/92, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1993:344.

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OPTIONAL GROUNDS FOR EXCLUSION

In Lithuania, the vague wording of the legislation creates legal preconditions for the Competition Council not to initiate investigations into alleged artificially reduced competition. A finding by the Competition Council that an investigation is not in line with the Competition Council's priorities becomes sufficient.[17] This more formalistic approach of the Competition Council does not motivate economic operators to merge and to compete with those already on the market.

The contracting authority may impose various, but not necessarily reasonable conditions for tendering. The contracting authority tends to maintain stability and, as mentioned above, may impose excessive conditions in order to maximize the security of contract performance. In this way, the contracting authority favors providers already experienced in a particular market. Due to the functioning of undertakings, which are already in a dominant position on the market, potential competitors may be forced to withdraw from the market, abandoning the idea of merging, as the market share of the dominant undertakings limits ability of other market participants to operate on the market due to artificially reduced competition. However, this leads to unfair prices being imposed on consumers, etc.

In public procurement in all EU Member States, compliance with competition law requirements can be assessed through the regulation of Article 57 of Directive 2014/24/EU. The Optional Ground for Exclusion provided in Article 57 (4) (a) of Directive 2014/24/EU relates to artificially reduced competition when the procurement is designed to unduly favor or disadvantage certain economic operators. This provision does not specify when competition must be considered to have been artificially reduced. The Law on Public Procurement of the Republic of Lithuania regulates those particularities in a similar manner.

In Lithuania, the 2022 report of the Competition Council[18] does not contain any evidence that any investigation for abuse of dominant position has been opened. On the contrary, the report presents the reasons why, in its view, investigations have not been opened or have been discontinued. For example, in 2022, the Competition Council did not open an investigation into a possible infringement of the deposit system for disposable packaging.[19] In its 2023 report, the Global Compe-

[17] Law on Competition of the Republic of Lithuania provides that the Competition Council has the right to establish and publish on its website the priorities of the Competition Council's activities.

[18] Competition Council of the Republic of Lithuania, *Annual Report 2022*, https://kt.gov.lt/uploads/documents/files/Ataskaita%202022.pdf (access: 20.12.2024).

[19] The Public Enterprise "Užstatas" addressed the European Court of Justice, requesting an investigation into the infringement of Articles 4 ("Obligation of public administration entities to ensure freedom of fair competition") and 7 ("Prohibition of abuse of dominant position") of the Civil Code in the single-use packaging deposit system. In the applicant's view, the current regulation of the deposit system for disposable packaging (or rather the lack thereof) favors the administrator of the public

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tition Review Centre noted that it would like to see more proactivity in launching investigations into abuse of dominance.[20]

An optional ground for exclusion is also set out in Article 57 (4) (d) of Directive 2014/24/EU, where the contracting authority has sufficient prima facie evidence to conclude that the economic operator has concluded agreements with other economic operators aimed at distorting competition. The competition-protecting provision is also enshrined in Article 57 (4) (f) of Directive 2014/24/EU, which states that a tenderer shall be excluded from the procedure where the situation of distortion of competition resulting from the prior involvement of economic operators in the preparation of the procurement procedure as referred to in Article 41 cannot be remedied by other less interventionist means.

Having analyzed the grounds for Optional Exclusion on the basis of restrictive effects on competition, we conclude that in all of these cases the contracting authority has a wide discretion in assessing the standards of compliance with competition rules to determine whether an economic operator that has infringed competition law should be excluded from the procurement procedure and whether it is proportionate to apply the measure of automatic inclusion of all members of the group in the list of unreliable suppliers. Similarly, the Competition Council has sufficient discretion to assess whether or not a market has been distorted following a request for an investigation of competition law infringements. Uncertainty, as mentioned above, encourages potential suppliers to shy away from joining together and participating in public procurement. On the other hand, the emerging case-law reduces the state of uncertainty, as the courts, in their interpretation and application of the competition rules in public procurement procedures, determine which factors artificially reduce competition, unjustifiably favoring or disadvantaging certain suppliers.

The judgment of the Court of Justice of 26 January 2023, in its Preliminary Ruling on the grounds for non-compulsory exclusion, emphasizes the application of the principle of proportionality in the light of Article 1 (1) and (3) of Directive 89/665/EEC – "Right to an effective remedy".[21] The Court of Justice has clarified under Lithuanian law, by examining the specificities of the conduct of joint activities

deposit system (USAD) and discriminates against "Užstatas", and does not ensure the integrity and compatibility of the system. The Competition Council concluded that a more detailed examination and assessment of the actions of USAD and the decisions of public administration entities would not be in line with the principle of rational use of resources, as it would require a disproportionate use of the institution's resources in relation to the likely outcome of the investigation, and therefore decided not to open an investigation.

[20] Competition Council of the Republic of Lithuania, *Annual Report 2023*, https://kt.gov.lt/uploads/publications/docs/2024-03/05c70f0188b29380460c306a1d1066db907605c72adc5b51a4bddc393f072422.pdf (access: 20.12.2024), p. 66.

[21] Judgment of the Court of 26 January 2023 in case C-682/21, *UAB 'HSC Baltic' and Others v Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2023:48.

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between suppliers, that the automatic inclusion of all the members of a group of undertakings in the list of unreliable suppliers may be challenged where the contract concluded with a group of undertakings in the context of a previous public procurement contract has been terminated under the Optional Grounds for Exclusion. In order to promote competition and the willingness of suppliers to form consortia, notwithstanding the risk that the contract may be terminated in the future on account of irregularities committed by one of the tenderers and that the other tenderers will automatically be placed on the list of unsuitable tenderers, the Court of Justice has stated that the principle of proportionality requires that appropriate measures be taken to ensure that the participation of that candidate or tenderer does not distort competition. This situation shows that it is the public interest that would benefit from such a reduction in the risk of suppliers' performance, since other potential suppliers would be interested in forming consortia.

The opposite is true when economic operators join together to win public procurement contracts by committing criminal acts. Lithuania is by no means the only country where it has been found that there is a tendency to form consortia in order to illegally win public procurement contracts. Article 46 of the Law on Public Procurement of the Republic of Lithuania regulates the grounds for exclusion of a supplier, one of which is bribery, influence peddling, bribery, i.e. a mandatory ground for exclusion of a supplier from the procurement procedure.

In the criminal case no. 1A-39-487/2022,[22] the legal entity of one political party was found guilty and convicted after it was proved that it was aimed at influencing the state institution – the Ministry of the Interior of the Republic of Lithuania, its civil servants, so that they would act lawfully and unlawfully in the exercise of their authority in the organized public procurement and would take favorable decisions, remove obstacles, and thereby assist one of the companies in winning the procurement of "Technical support services for the digital mobile radio system of the Ministry of the Interior" and another company in winning the procurement of "Software and hardware for the Integrated Criminal Procedure Information System" and the procurement of "Design and implementation services for the financial management and accounting information system". This case is more commonly known as "Buy an Elephant". One of the bidders involved in the procurement knew about all the purchases planned to be made by the Ministry of the Interior, the ministry's budget allocation lines, the scope of the programs and the amounts planned for the purchases. The public procurement and tendering were organized by the Asset Management Department of the Ministry of the Interior. The projects were prepared by the Ministry's Public Relations Unit. The person, who was an adviser to the Minister, an official of personal political trust, had the right to receive

[22] Criminal case no. 1A-39-487/2022 and judgment of the Supreme Court of Lithuania of 22 November 2023 in case 2K-168-594/2023.

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information from the Ministry's departments by virtue of his/her position. It was from this person that one of the providers received and forwarded the draft technical documentation. These drafts provided information on the conditions under which tenders would be issued.

Under Lithuanian law, if a supplier is found to have committed a criminal offence under Article 57 (1) of Directive 2014/24/EU, the supplier will be excluded from the procurement procedure and placed on the list of Unreliable Suppliers.

Abuse of power in the context of illegal conduct in public procurement is a very negative factor that reduces the interest of suppliers in forming consortia. There is no incentive to submit a high quality and competitive tender if bribery is publicly disclosed. In order to eliminate the resulting pessimism about the lack of transparency in Lithuania, certain bodies (in particular, the Special Investigation Service) publicly present ongoing investigations on bribery. For example, there was a criminal case in Lithuania against an individual (businessman R.M.) for attempt to give a bribe of EUR 90,000 to the commander of the Lithuanian Air Force.[23] The purpose of the crime was to ensure that a Latvian company "Wings 4 Sky Group" unofficially represented by the individual (a Lithuanian citizen), would win a state tender for the lease of L-39 aircraft. On 10 January 2023, the case was transferred from the Economic Court to the Riga Regional Court for examination of appeals. On 17 January 2023, the Riga Regional Court made the decision to examine the case for appeals and decided to uphold the decision of the first instance court (on application of coercive measures to SIA "Wings 4 Sky Group").

On 20 February 2024, the Senate of the Supreme Court of the Republic of Latvia refused to initiate cassation proceedings, thus giving effect to the judgment of the court of first instance. The Court of Economic Affairs had found that R.M. had made the bribe offer in the interests of SIA "Wings 4 Sky Group" and imposed a coercive measure on the company, i.e., the recovery of funds in the amount of EUR 120,000.

BALLANCING COLLABORATION AND COMPETITION

The challenge often lies in meeting both legal and performance expectations. Companies may struggle to innovate or form partnerships without risking violations of competition law, which could lead to penalties or disqualification from future tenders. At the same time, they must ensure that their bids are attractive enough to win the contract and deliver high-quality products or services that meet the public sector's needs. The balancing act between staying within legal boundaries and

[23] Šiauliai Regional Court Information, https://sat.teismas.lt/naujienos/nuteistas-buves-siauliu-oro-uosto-vadovas/447 (access: 20.12.2024).

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presenting a strong, competitive offer is one of the key hurdles in public procurement today.

It has to be taken into consideration that in some cases the legitimacy of the bid is under suspicion only due to the fact that supplier is acting as a consortium of joint venture, submitting a competitive bid. For example, when AB Lietuvos geležinkeliai announced on 23 June 2017 in the Central Public Procurement Information System (CPPIS) a public procurement procedure for the purchase of the reconstruction works of the Kaunas-Palemonas railway section by means of international value open negotiations, the consortium's bid quoted a price of EUR 0.01 (excluding VAT) for the retaining wall works (57 items of works). During the procurement procedure, the contracting authority invited the consortium to provide a justification for the abnormally low price of part of its bid. In its letter of justification for the tender price, the consortium of joint participants indicated that some of the works could be reduced due to a change in the design solutions, as allowed by the contract conditions. However, the settlement of the works with the consortium did give rise to a legal dispute.[24]

Infringements of competition law requirements have a twofold impact on companies, affecting both their business expectations and the legal implications for their future prospects. Where it is concluded that a group of undertakings has restricted competition, even if on the basis of an optional grounds for exclusion, but where the infringement cannot be corrected by other less intrusive means, the following has to be done: (a) the public contract has to be terminated, and (b) the whole group of supplier members is automatically placed on the list of unreliable suppliers. Thus, if the balance between the requirements of competitive bidding and legitimacy is not respected, participation in public procurement will lead the bidding company to undesirable economic consequences.

On the other hand, even in the event of a breach of competition law, if the economic operator proves its credibility, it may continue to participate in the public procurement procedure and award the contract, notwithstanding the existence of adequate grounds for exclusion. This applies both in the case of an individual economic operator and in the case of a group of suppliers. Even if, due to previous infringement, the whole group of supplier members should automatically be included into the list of unreliable suppliers, the economic operator could avoid this sanction by proving its reliability. Thus, the principle of proportionality allows the balance between compliance with the legal limits and submitting strong, competitive offer, and the expectation that partnerships can be beneficial.

The Court of Justice, interpreting the provisions of Article 57 of Directive 2014/24/EU in conjunction with the provisions of Article 2 (36) and Articles 46 and

[24] Ruling of the Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania of 7 December 2022 in civil case No. e3K-3-272-378/2022.

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91 of the Law on Public Procurement, in case C-682/21, has ruled on the joint liability for the performance of the suppliers of the contract (or, in the case of a group of suppliers, of all the members of the group) who have improperly performed the public contract, in so far as the irregularity occurred in relation to the part of the contract for which they were engaged.

In Article 6.6 (3) CC[25] it is explicitly stated that the joint liability of debtors shall be presumed if the obligation relates to the provision of services, joint activities or the compensation of damages caused by the acts of several persons. In the aforementioned case C-682/21, the assessment was carried out in relation to a public procurement contract, announced by the City of Vilnius on 7 December 2016 for the construction of a multi-purpose health centre, with a value (excluding value added tax) of EUR 21,793,166.72. Active Construction Management, HSC Baltic, Mitnija, Montuotojas and UAB Axis Power entered into a joint venture agreement, which stipulated that Active Construction Management would be the main partner of this group of undertakings for the purpose of carrying out the works under the contract, seeking to take part in a tender, launched by the City of Vilnius, on 30 January 2017. The City of Vilnius concluded the contract with this group. During the term of the contract, the Vilnius Regional Court (Lithuania) opened bankruptcy proceedings against the company on 28 October 2019 by order of the Vilnius Regional Court (Lithuania) on the basis of a petition filed by the manager of Active Construction Management. On 22 January 2021, the Public Procurement Service (Lithuania), under the initiative of the City of Vilnius, added the Group members HSC Baltic, Mitnija UAB, Montuotojas UAB and Axis Power to the list of Unreliable Suppliers. The inclusion into the list of Unreliable Suppliers gave rise to a legal dispute, and the Supreme Court of Lithuania referred for a preliminary ruling. The question before the Court was whether the automatic inclusion of any undertaking de jure responsible for the infringement into the list of Unsuitable Suppliers, which led to the termination of the public contract, is compatible with the requirement to carry out an individual assessment for the purposes of the grounds for exclusion provided in Directive 2014/24/EU.

In this particular case, the optional ground for exclusion was not related to an infringement of the competition law. However, this judgment of the Court of Justice sets out general guidelines under which an economic operator could prove its credibility, even though it had entered into competition restricting agreement, in the expectation that it would be able to continue bidding in the field of public procurement.

[25] Civil Code of the Republic of Lithuania, 18 July 2020, No. VIII-1864 (last amended on 9 May 2024).

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On the other hand, the consortium members, as interpreted by the Court of Justice, can assess whether they wish to avoid submitting a competitive bid, balancing the threshold of legitimate conduct.

First, the Court of Justice has indicated that the optional grounds for exclusion must be assessed in the light of the objective and purpose of that optional ground in accordance with Article 101 of Directive 2014/24/EU. Moreover, the application of that optional ground for exclusion must comply with the principle of proportionality, which is a general principle of EU law and, in the field of public procurement, is referred to in Article 18 (1) of Directive 2014/24/EU. The Court of Justice has noted that the exclusion must, first, be temporary. Recital 101 of Directive 2014/24/EU states that any national legislation laying down the conditions for the application of Article 57 (4) (g) of that Directive must provide for a maximum period of exclusion. Article 57 (7) of that Directive provides that, where that period is not fixed by a final judicial decision, it may not exceed three years. The participants in the consortium are therefore aware that they will not be included in the list of unreliable suppliers for more than three years. It should be noted that the Lithuanian courts have also focused in their judgments on a period of three years as the correct level of the sanction.

Second, during the exclusion period, the relevant economic entity is allowed to participate in the public procurement procedure, unless it has been excluded from all public procurement procedures by a final decision of the court, if it provides evidence that it has taken sufficient measures to prove its credibility.[26] Thus, economic entities in Lithuania, if they cooperate with the Competition Council, helping to conduct an investigation, find out the factual and other circumstances, the economic entity will be able to participate in the public procurement procedure. Consequently, the intended remedies, without mentioning the risk, may encourage economic operators to form consortia in order to submit a competitive bid.

Third, the principle of proportionality requires a specific and individual assessment of the conduct of the economic entity concerned, based on all relevant data.[27] Therefore, regardless of the regulation referred to in Article 6.6 (3) CC, in order to encourage suppliers to submit competitive offers so that the procuring organization receives the best offer, it is permissible to assess the individual behavior of the relevant business entity in order allow it to participate in the public procurement procedure. After proving that its inclusion in this list is unjustified, taking into account its individual behavior, the economic entity can carry out its activities and participate in public procurements without restrictions.

[26] In this regard, see judgment of the Court of 19 June 2019 in case C-41/18, *Meca Srl v Comune di Napoli*, ECLI:EU:C:2019:507, para. 40.

[27] Judgment of the Court of 3 June 2021 in case C-210/20, *Rad Service Srl Unipersonale and Others v Del Debbio SpA and Others*, ECLI:EU:C:2021:445, para. 40 and jurisprudence cited therein.

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EVALUATION OF THE BIDDING CONSORTIA BASED ON ARTICLE 101 (3) TFEU

1. The general principles for assessing agreements under Article 101 (3) TFEU

Article 101 (3) TFEU establishes an exception rule, which provides a defense to undertakings against a finding of an infringement of Article 101 (1) TFEU. Agreements caught by Article 101 (1) which satisfy the conditions of Article 101 (3) are valid and enforceable, no prior decision to that effect being required.[28] The Law on Competition of the Republic of Lithuania provides in Article 6 the same exception rules as provided under Article 101 (3) TFEU. Para. 2 of Article 6 of the Law on Competition provides that "the agreement meeting the conditions set out in para. 1 of this Article shall be effective from the moment of conclusion thereof (*ab initio*) without any prior decision of the Competition Council. In the event of a dispute regarding the compliance of the agreement with the provisions of para. 1 of this Article, the burden of proof to demonstrate that it complies shall fall upon the party to the agreement benefiting from this exemption".

The classic requirements for the application of the exception rule of Article 101 (3) TFEU are subject to four cumulative conditions, two positive ones and two negative ones: (a) the agreement must lead to efficiency gains, it must contribute to improving the production or distribution of products; (b) the restrictions must be indispensable to the attainment of those objectives; (c) consumers must receive a fair share of the resulting benefits; (d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.[29]

2. First condition of Article 101 (3) TFEU – efficiency gains

The OECD Competition Committee provides that the primary objective of an effective procurement policy is the promotion of efficiency, i.e. the selection of the supplier with the lowest price or, more generally, the achievement of the best "value for money". Both public and private organizations often rely upon a competitive bidding process to achieve better value for money in their procurement activities. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. However, the competitive process can achieve lower prices or better quality and innovation only

[28] See Guidelines.
[29] *Ibidem*, para. 36.

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when companies genuinely compete, i.e. they set terms and conditions honestly and independently.[30]

The Court of Justice has emphasized the Community interest in ensuring the widest possible participation by tenderers in a call for tenders.[31] M. Petr noted that "higher number of competing bidders is in principle procompetitive, and this requirement thus increases the efficiency of the tendering procedure".[32] However, in the case of bidding consortium there is practically always reduced number of participants in the tendering procedure.

The efficiency gains of the bidding consortium should not be assessed from the subjective point of view of the parties. Only objective efficiency gains of the agreements should be taken into account. The parties to anticompetitive agreement on fixing of the prices could reduce production costs and increase their profits. However, such anticompetitive agreement may not create any benefits for the consumers in the market and therefore it will not benefit from the point of view of Article 101 (3).

The European Commission concludes that even if the undertakings could compete individually, still there is a chance that their bidding consortium could be justified under Article 101 (3).[33] However, practically such defense in accordance with Article 101 (3) is very difficult to implement because of high standards of proof.

If tender allows submitting bids for parts of the contract, undertakings that have the ability to bid for one or more lots – but possibly not for the whole contract – must be considered competitors and Article 101 (1) is applicable. In such case the undertakings could justify their cooperation in the bidding consortium on the basis that it allows to bid for the complete contract and to offer a combined rebate for the whole contract. Any efficiencies claimed in respect of the joint bid for the complete contract must be assessed in accordance with the conditions of Article 101 (3).[34]

The European Commission admits that a bidding consortium agreement between competitors to which Article 101 (1) applies may fulfil the conditions of Article 101 (3). Possible efficiencies may take the form of lower prices, better quality, greater choice or faster realization of the services for tenders. Moreover, the other conditions of Article 101 (3) must be fulfilled (indispensability, pass-on to consumers and no elimination of competition). In tender procedures, these conditions are

[30] OECD, *Competition and Procurement: Key Findings*, 2011, https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/11/competition-and-procurement-key-findings_48813c6d/c6e6d5ae-en.pdf (access: 20.12.2024).

[31] Judgment of the Court of 23 December 2009 in case C-376/08, *Serrantoni Srl and Consorzio stabile edili scrl v Comune di Milano*, ECLI:EU:C:2009:808, para. 40.

[32] M. Petr, *Joint Tendering in the European Economic Area*, "International and Comparative Law Review" 2020, vol. 20(1), p. 202.

[33] A. Puksas, R. Moisejevas, R. Petkuvienė, *op. cit.*, p. 323.

[34] Guidelines, para. 354.

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often interlinked: the efficiency gains of a joint bid through a bidding consortium agreement are more easily passed on to consumers – in the form of lower prices or better quality of the offer – if competition for the award of the contract is not eliminated and other effective competitors take part in the tender procedure.[35] The conditions of Article 101 (3) may be fulfilled if the joint bid allows the parties to submit an offer that is more competitive than the offers that they could have submitted on their own – in terms of price and/or quality – and the benefits accruing to the contracting entity and final consumers outweigh the restrictions of competition.[36]

The European Commission believes that in case of bidding consortium there are two most likely efficiency gains – lower prices or better quality of the offer. The parties to the bidding consortium should focus on proving the existence of the above-mentioned efficiency gains.

3. Second condition of Article 101 (3) TFEU – indispensability of the restrictions

The agreement should not impose restrictions which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.[37] The European Commission believes that the decisive factor is whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than in the absence of the restriction concerned.[38]

The European Commission provides the hypothetical example when A and B undertakings conclude a joint venture to have higher output and lower raw material consumption. The joint venture receives an exclusive license to the production technologies of the parties, existing production facilities and key staff. It helps to reduce production costs by a further 5%. The undertakings A and B sell independently the products of the joint venture. The indispensability condition necessitates an assessment of whether or not the benefits could be substantially achieved by means of a license agreement, which would be likely to be less restrictive because A and B would continue to produce independently. In the circumstances described, this is unlikely since under a license agreement the parties would not be able to benefit in

[35] *Ibidem*, para. 358.

[36] *Ibidem*, para. 359.

[37] Communication from the Commission – Notice – Guidelines on the application of Article 81 (3) of the Treaty (OJ C 101/97, 27.4.2004), para. 73.

[38] *Ibidem*, para. 74.

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the same way from their respective experience in operating the two technologies, resulting in significant learning economies. Once it is found that the agreement is necessary in order to produce the efficiencies, the indispensability of each restriction of competition flowing from the agreement must be assessed.[39] The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties. The more uncertain the success of the product covered by the agreement, the more a restriction may be required to ensure that the efficiencies will materialize.[40]

The above-mentioned means that assessment of indispensability of each restriction in the bidding consortia depends on every separate agreement, type of the business and risks related to the specific project. This could partly explain why it is difficult for the Competition authorities to create universal rules for all the types of the agreements.

4. Third condition of Article 101 (3) TFEU – fair share for consumers

The consumers must receive a fair share of the efficiencies generated by the restrictive agreement. It should be noted that for the purposes of the Guidelines of the European Commission, "consumers" are the customers of the parties to the agreement and subsequent purchasers. The concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within Article 81 (3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.[41]

The concept of "fair share" means that the pass-on of benefits must compensate consumers for negative impact caused by the restriction of competition found under Article 101 (3).

[39] *Ibidem*, paras 77–78.
[40] *Ibidem*, para. 80.
[41] *Ibidem*, para. 84.

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5. Fourth condition of Article 101 (3) TFEU – no elimination of competition

The European Commission states that the protection of rivalry and the competitive process has priority over potentially pro-competitive efficiency gains, which could result from restrictive agreements. The last condition of Article 101 (3) recognizes that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. The ultimate aim of Article 101 is to protect the competitive process. When competition is eliminated, the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming, i.a., from expenditures incurred by the incumbent to maintain its position, misallocation of resources, reduced innovation and higher prices.[42] Therefore, in case we have a bidding consortium there still should be left enough competitors in the respective market who are able to compete effectively.

The European Commission recognizes that two undertakings who could compete in the tender individually still are allowed to enter into a bidding consortium if they are able to justify their contract based on Article 101 (3). Bidding consortium could be legal in case the parties are able to demonstrate that the joint bidding creates a significant degree of synergies capable of leading to efficiencies – in the form of lower prices and increased quality – in turn leading to a more competitive offer. A joint offer could be more competitive than the individual offers, in terms of pricing and range of products offered, in particular optional products, which is particularly important for the tendering authority. Moreover, competition in the tender procedure is not eliminated as at least two other relevant competitors are capable of participating independently in the tender procedure. The efficiency gains of the joint offer could benefit the contracting entity and ultimately consumers. Therefore, the agreement appears to fulfil the conditions of Article 101 (3).[43]

CONCLUSIONS

The consortium members, as interpreted by the Court of Justice, can assess whether they wish to avoid submitting a competitive bid, balancing the threshold of legitimate conduct. First, the Court of Justice has indicated that the optional grounds for exclusion must be assessed in the light of the objective and purpose of that optional ground in accordance with Article 101 of Directive 2014/24/EU. Moreover, the application of that optional ground for exclusion must comply with the principle of proportionality, which is a general principle of EU law and, in the field of public procurement, is referred to in Article 18 (1) of Directive 2014/24/

[42] *Ibidem*, para. 105.

[43] A. Puksas, R. Moisejevas, R. Petkuvienė, *op. cit.*, p. 323.

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EU. Second, during the exclusion period, the relevant economic entity is allowed to participate in the public procurement procedure, unless it has been excluded from all public procurement procedures by a final decision of the court, if it provides evidence that it has taken sufficient measures to prove its credibility. Third, the principle of proportionality requires a specific and individual assessment of the conduct of the economic entity concerned, based on all relevant data.

The European Commission believes that in case of bidding consortium there are two most likely efficiency gains – lower prices or better quality of the offer. The parties to the bidding consortium should focus on proving the existence of the above-mentioned efficiency gains. Bidding consortia should not impose restrictions which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies. The consumers must receive a fair share of the efficiencies generated by the restrictive agreement. It should be noted that for the purposes of the Guidelines of the European Commission, "consumers" are the customers of the parties to the agreement and subsequent purchasers. Bidding consortium could be legal in case the parties are able to demonstrate that the joint bidding creates a significant degree of synergies capable of leading to efficiencies – in the form of lower prices and increased quality – in turn leading to a more competitive offer.

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ABSTRAKT

Prawo zamówień publicznych i prawo ochrony konkurencji mają na celu zapewnienie uczciwości i efektywności, ale ich ścisłe stosowanie może niezamierzenie utrudniać udział wykonawców i ograniczać skuteczność działań zamawiających. Porozumienia między wykonawcami muszą unikać ograniczania konkurencji, ale zbyt rygorystyczne reguły konkurencji mogą uniemożliwić zamawiającym otrzymanie pojedynczej oferty na roboty budowlane, usługi lub dostawy. Chociaż istnieje potencjalne ryzyko nadużyć ze strony konsorcjów, szczegółowe analizy indywidualnych przypadków są niezbędne do rozwiązania tych problemów. Niektóre kraje już rozwijają praktyki oceny takich porozumień. W artykule analizie poddano ramy prawne i pojawiające się praktyki dotyczące wspólnego ubiegania się o zamówienia oraz zbadano opcje równoważenia prawa zamówień publicznych i prawa ochrony konkurencji. Szczególną uwagę poświęcono warunkom, w których przedsiębiorcy mogą składać wspólne oferty bez naruszania zasad konkurencji. Obecne regulacje dostarczają pewnych wskazówek, ale brakuje im jasności co do tego, kiedy konsorcja przetargowe są dopuszczalne. Ze względu na surowe sankcje za naruszenia prawa ochrony konkurencji wielu przedsiębiorców waha się przed tworzeniem wspólnych przedsięwzięć, obawiają się bowiem, że konsorcja mogą zostać uznane za naruszenie „ze względu na cel", przerzucając ciężar dowodu na uczestników. Ta niepewność zwraca uwagę na potrzebę kompleksowych ocen prawnych i ekonomicznych w przypadkach wspólnego ubiegania się o zamówienia. Brak pewności prawnej stanowi znaczące wyzwanie, co sprawia, że kluczowe jest rozwijanie badań i publikacji na ten temat, aby zapewnić jasne wytyczne dla zainteresowanych stron zaangażowanych w zamówienia publiczne.

Słowa kluczowe: wspólne ubieganie się o udzielenie zamówienia publicznego; zamówienia publiczne; prawo ochrony konkurencji; ograniczenia; konsorcja przetargowe