

Competition - Austria

When could bidding consortia constitute illegal cartels?

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Facts

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Facts

On December 2 2013 the Supreme Court (acting as the Higher Cartel Court) issued its decision in a case concerning a tender procedure organised by a large Austrian municipality that was subject to heated debate among practitioners.⁽¹⁾

Contracts for the provision of gas, water and heating installation works amounting to more than €100 million, sub-divided into many territorial entities, were tendered. With regard to most of the entities, the contract was awarded to the participating bidding consortia.

Following a leniency application by an unsuccessful bidder, the Federal Competition Authority and the Federal Cartel Prosecutor filed before the Cartel Court for fines, arguing that the respective bidding consortia were illegal cartels.

Decision

The Supreme Court ruled that the consortia (if consortia at all) were so-called '*de minimis* cartels', within the meaning of (former) Section 2(2) of the Cartel Act, and therefore were in any case exempt from the cartel ban. According to this provision, undertakings participating in a cartel that have a common national market share of not more than 5% (and, in a possible national geographic sub-market, a market share of not more than 25%) are exempt from the cartel ban, irrespective of whether it is a hardcore cartel. The motions for fines were finally dismissed.

By defining the relevant market and responding to scholarly opinions on *ad hoc* markets in a tender procedure, the Supreme Court ruled that it is not only the actual bidders that should be included into the relevant market, but also all possible providers with similar know-how and resources that can provide the works tendered. The court explicitly stated that it was irrelevant whether these providers later actually participated in the tender procedure. Similarly, it was irrelevant whether actual or potential bidders showed their interest in the tender procedure by requesting the tender documents, as this could be evaluated only *ex post*, which would be incompatible with the principles of legal certainty. According to the court, it is the prevailing legal opinion that potential competition must be evaluated *ex ante*.

Regrettably, the court did not explicitly comment on the lawfulness of bidding consortia under Austrian competition law in the absence of an exemption. Strictly speaking, this was not necessary as the case had already been dismissed because of the applicability of the *de minimis* cartel exemption. In contrast, the first-instance court elaborated in detail on the lawfulness of consortia in general, as well as in the case at hand, and concluded that under competition law, bidding consortia of competitors are regularly unproblematic to the extent that they are necessary for the parties to enter the market. In particular, this is the case where the participating undertakings cannot bid without creating a bidding consortium, or if only the consortium puts them in the position to make a promising bid, thus increasing their chances.⁽²⁾

Comment

As the Supreme Court neither confirmed nor rejected the extensive elaborations of the first-instance court

on the question of the lawfulness of bidding consortia in tender procedures under competition law, no case law has yet been issued by the Supreme Court in this regard. In this case the court clearly had the opportunity to oppose the first-instance court's opinion on this controversial point, but did not do so.

Furthermore, lively discussion on specific Austrian provisions on *de minimis* cartels under Section 2(2) of the Cartel Act (on the basis of which the Supreme Court dismissed the case) led to the amendment of the Cartel Act on March 1 2013. The Austrian provision on *de minimis* cartels now roughly corresponds to the *de minimis* notice⁽³⁾ issued by the European Commission.

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Endnotes

- ⁽¹⁾ Supreme Court (as Higher Cartel Court), December 2 2013, 16 Ok 6/12.
- ⁽²⁾ Higher Regional Court (as Cartel Court), July 13 2012, 27 Kt 20, 21/09-155, with reference to *Hauck* in *Heid/Preslmayr, Handbuch Vergaberecht* 3, para 1448 *et seq.*
- ⁽³⁾ European Commission, December 22 2001, OJ C 368/13.

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