

ECJ guides on exclusion of tenders in case of competing bids by group companies

27 September 2022

On 15 September 2022, the European Court of Justice (ECJ) ruled on the question whether competing tenders submitted by group companies may be excluded from public procurement procedures even absent a violation of Article 101 Treaty on the Functioning of the European Union (TFEU) due to the “group privilege” ([Case C-416/21](#)).

Background of the ECJ decision

The case underlying the ECJ’s decision concerns a public procurement procedure for public transport bus services by a German district. Tenderers are, *inter alia*, a natural-person entrepreneur (*Kaufmann*) and a bus transport company with limited liability of which the beforementioned natural-person entrepreneur was the managing director and sole shareholder. Both bids were submitted through the same person. The contracting authority excluded the bids by the natural-person entrepreneur and the bus transport company for breach of competition rules in so far as they had been prepared by the same person.

After unsuccessfully lodging a complaint, the natural-person entrepreneur and the bus transport company brought a review application before the Public Procurement Chamber of Southern Bavaria (*Vergabekammer Südbayern*). The chamber ordered the contracting authority to reinstate the tenders submitted by those tenderers in the procedure for the award of the contract. The contracting authority appealed that decision before the Bavarian Highest Regional Court (*Bayerisches Oberstes Landesgericht - BayObLG*) which referred the case to the ECJ for a preliminary ruling on the interpretation of the grounds for exclusion and the principle of equal treatment.

Anticompetitive behaviour as a ground for exclusion

As part of the selection of participants in a procurement procedure, contracting authorities must examine whether there are grounds for exclusion. Identical rules for exclusion applicable in all Member States are specified in Article 57 of the Directive 2014/24/EU (EU Public Procurement Directive). A distinction is made between mandatory grounds for exclusion, where contracting authorities must exclude an economic operator from participation in a procurement procedure, and discretionary grounds for exclusion. If only discretionary grounds for exclusion apply, it is in the discretion of the contracting authority whether to exclude the tenderer. In German national law, the mandatory

grounds for exclusion are transposed in Section 123 of the Act against Restraints of Competition (GWB) and the discretionary grounds for exclusion in Section 124 GWB.

In case of anticompetitive behaviour, tenderers may be excluded where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition (Article 57(4) (d) of the EU Public Procurement Directive). The wording is thus similar to the ban on restrictions of competition laid down in Article 101(1) TFEU, according to which all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, shall be prohibited as incompatible with the internal market. In the same vein, the wording of Section 124(1) no. 4 GWB closely resembles the ban on restrictions of competition pursuant to Section 1 GWB.

Article 101(1) TFEU and the group privilege

In the procurement procedure in question, the tenderers did not infringe Article 101(1) TFEU and Section 1 GWB. The antitrust rules do not apply where the undertakings concerned constitute an economic unit (so-called group privilege). According to BayObLG, the natural-person entrepreneur and the bus transport company qualify as an economic unit and may therefore rely on the group privilege.

As a result, if the scope of Article 57(4) (d) of the EU Public Procurement Directive were to be limited to infringements of Article 101 TFEU, the ground of exclusion would not apply in the case at hand. It would then have to be answered whether an exclusion can be based on general procurement principles.

Ruling of the ECJ

Against this background, the BayObLG referred to the ECJ questions relating to (i) the scope of Article 57(4) (d) of the EU Public Procurement Directive and (ii) the possibility to rely on the principle of equal treatment in order to preclude the award of a contract where bids are submitted neither independently nor autonomously.

- **Scope of Article 57(4) (d) of the EU Public Procurement Directive:** The ECJ ruled that Article 57(4) (d) of the EU Public Procurement Directive is not limited to cases where there are sufficiently plausible indications for a violation of Article 101 TFEU but also covers anti-competitive agreements more broadly.

The court argues that the wording of Article 57(4) (d) does neither mention nor completely correspond to the wording of Article 101 TFEU. Additionally, according to the ECJ, the different objectives underlying the provisions confirm that interpretation. While the grounds for exclusion are intended to enable contracting authorities to

exclude unreliable tenderers with whom they cannot maintain a relationship of trust, Article 101 TFEU is intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct. The objective of Article 57(4) (d) of the EU Public Procurement Directive therefore presupposes a broad interpretation of that provision.

However, the ECJ emphasized that an exclusion on that basis is limited to cases where there is sufficient evidence that two or more bidders have entered into an agreement aimed at distorting competition. According to the ECJ this necessarily presupposes that there is a common intention to enter into an agreement on the part of the tenderers involved. In the case at hand, the court considered that it would seem doubtful whether there was an “agreement” absent two separate intentions that would be capable of converging. It is now for the BayObLG to determine whether this requirement and therefore the ground for exclusion is met.

- **Exclusion of tenderers according to the principle of equal treatment:** If the BayObLG concluded that Article 57(4) (d) of the EU Public Procurement Directive does not apply, the question would arise whether an exclusion of the tenderers can be based on the principle of equal treatment. In this regard, the ECJ found that Article 57(4) of the EU Public Procurement Directive exhaustively regulates the discretionary grounds justifying the exclusion of tenderers for reasons relating to professional qualities, to a conflict of interest or to a distortion of competition that would arise from the involvement in the tender. However, according to the ECJ, the list does not preclude Member States from ensuring observance of the principle of equal treatment and of the principle of transparency, which are binding on contracting entities in any procedure for the award of a public contract. In the case of related tenderers or tenderers that constitute an economic unit, the court considered the principle of equal treatment to be infringed if they submit coordinated or concerted bids which are likely to give them unjustified advantages in relation to the other tenderers. If the relationship between two entities has actually influenced the respective content of the tenders, a finding of such influence, in any form, is sufficient for those tenderers to be excluded from the procedure.

Accordingly, should the BayObLG come to the conclusion that the bids at issue were not submitted autonomously and independently, the principle of equal treatment precludes the award of the contract to one of the respective tenderers.

What does this mean for tenderers in public procurement procedures?

With this decision, the ECJ advances a broad interpretation of the ground for exclusion in the case of anticompetitive agreements beyond violations of EU competition law. Although the court specifies certain cases in which such an exclusion may take place, legal uncertainty remains because there is no definition of what constitutes “*anticompetitive*”

agreements” that allow for an exclusion. In addition, the ECJ not only allows for a (discretionary) exclusion of tenderers based on the general principle of equal treatment but considers an exclusion to be even mandatory in case bids of economic operators which constitute an economic unit are neither autonomous nor independent.

In Germany, the ECJ’s ruling is unlikely to have any major impact on the procurement practice. At least prior to the public procurement law reform in 2016, exclusion in such cases has already been based on the general public procurement law principles of equal treatment and the principle of competition. In this respect, the decision of the ECJ has confirmed that such an understanding is also permissible and possibly even required under the EU Public Procurement Directive. However, there is still no legal basis for such (mandatory) exclusion.

The judgement is relevant for tenderers participating in procurement procedures in other EU Member States in which exclusion was previously limited to violations of Article 101 TFEU where bids of several group companies could not be excluded due to the group privilege. Exclusion must now be expected if the bids are not submitted autonomously and independently. Thus, if separate bids of different group companies are submitted, precautions must be taken to prevent allegations of anticompetitive behaviour and resulting exclusion from the procurement procedure.

BLOMSTEIN advises on all aspects of public procurement and competition law. If you have any questions, [Roland Stein](#), [Max Klasse](#) and the entire BLOMSTEIN team will be happy to advise you.