PhD Project Description

Collaboration and relations between economic operators in the competition for public contracts
– Legal and economic analyses of grey zones between public procurement law and competition law

EU and implementing national public procurement regulation and case law explicitly allows a great variety of collaboration forms and relations between tenderers who take part in the competition for public contracts. The legitimacy and desirability of such collaboration and relations is however regulated by EU and national competition law. In spite of the practical relevance, there is only very sparse case law at EU level, and the state of law concerning assessment of collaboration and relations between tenderers in competition for public contracts is highly unclear, which may jeopardize efficient spending of taxpayers' money. The Ph.D. project will analyse the application of competition law in a public procurement context in order to determine how to strike the balance between collaboration and relations between tenderers and effective competition for public contracts.

1. Introduction

The EU public procurement rules have the dual purpose of ensuring free movement of goods and services and ensuring undistorted competition for public contract.[1] "Undistorted competition" is in the sense of public procurement law typically understood as ensuring that contracting authorities provide every economic operator equal opportunities in the competition; that is, prevention of protectionism, favouritism and corruption. However, it is important to recognise that undistorted competition between tenderers in the sense of ensuring adherence to competition law is equally pivotal to obtain welfare optimizing public spending.[2]

The procurement rules allow for economic operators to collaborate and to have relations in a variety of ways, which may be substitutes for covert collusion or in other ways limits competition. First, an economic operator may rely on one or more other economic operators' capacity in order to document that it is capable to fulfil the tendered contract. Second, economic operators may form a consortium for the purpose of tendering for and fulfilling a public contract. Third, economic operators may use subcontractors to fulfil a public contract. Fourth, the Court of Justice of the European Union (CJEU) has accepted that in principle economic operators, which are organizationally related may compete against each other for public contracts. Allowing tenderers to collaborate and be related has the purpose of allowing the widest possible participation by tenderers – in particular SMEs – in the competition for public contracts, thereby increasing the

[1] E.g. Stadt Halle, C-26/03, EU:C:2005:5, para 37; Commission v Austria, C-29/04, EU:C:2005:670, para 42; Varec, C-450/06, EU:C:2008:91, para 34; more recently see e.g. SAG ELV Slovensko, C-599/10, EU:C:2012:191, para 25 and Fastweb, C-19/13, EU:C:2014:2194, para 65.

[2] GS Ølykke, "How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?", 2011(6) Public Procurement Law Review, 179, at pp. 181-183; GS Ølykke "How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?" in Ølykke, Hansen and Tvarnø (eds) Modernisation, Growth, Innovation – Discussions on the 2011 Proposals for Public Procurement Directives, DJØF Publishing 2012.

competitive pressure.[3] However, under economic theory it is generally acknowledged that the procurement setting displays features, which may promote collusion, due to transparency, predictability of demand and repeated purchases.[4] Allowing collaboration and relations between economic operators in all the mentioned forms may in reality be legitimizing collusive behaviour that has the purpose of reducing competition for the public contracts. Collusion is prohibited by and sanctioned under EU competition law,[5] but desirable collaboration may be subject to exemption.[6] Thus, the collaboration and relations between tenderers which are recognized as in principle legitimate under public procurement law, and not subject to any official scrutiny under those rules, are in fact regulated, potentially prohibited and sanctioned by fines under competition law.

Due to the parallel enforcement systems for public procurement law and competition law, there is only very sparse case law on enforcement of competition law in a public procurement context at EU level which leaves the area well suited for academic research with the purpose of establishing the current state of law as well as developing paradigms for how the state of law should be to prevent economic operators' distortion of competition for public contracts and obtain economic efficiency.

2. Purpose and problem statement

The purpose of this interdisciplinary Ph.D. project is: 1) to analyse the current state of law on collaboration and relations between economic operators in the competition for public contracts; and, 2) to apply economic theory to the specific public procurement context in order to explain the different forms of collaboration and relations between tenderers and examine the effects of the current state of law on incentives of economic operators to *effectively* compete for public contracts to the benefit of society. The economic theory underlying procurements and auctions is well-developed.[7] The focus in the literature has been to examine how various procurement and auction formats perform in terms of efficiency and performance (expected buying price in procurement and expected revenue in auctions) under different assumptions regarding the distribution of participants' valuations. There is also a great deal of work relating to how susceptible the outcomes of different formats are to collusion and entry costs, as well as the details of the auction and

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[3] C-538/07 Assitur, EU:C:2009:317, para 26; Serrantoni, C-376/08, EU:C:2009:808, para 40; C-425/14 Impresa Edilux and SICEF, EU:C:2015:721, para 36.

[4] E.g. GLB Albano, G Spagnolo and M Zanza, "Preventing Collusion in Procurement" in Dimitri, Piga and Spagnolo (eds) Handbook of Procurement, Cambridge University Press 2006, 347, at p. 347; R Coppier, G Piga, "Why Do Transparent Public Procurement and Corruption Go Hand in Hand?" in Piga and Thai (eds.) The Economics of Public Procurement, Palgrave Macmillian 2007, 183, at p. 185; OECD Policy Roundtable: Public Procurement – The Role of Contracting Authorities in Promoting Competition, 2007, available at: http://www.oecd.org/dataoecd/25/48/39891049.pdf, p. 7; OECD Policy Roundtable: Collusion and Corruption in Public Procurement, 2010, available at: http://www.oecd.org/dataoecd/35/16/46235399.pdf, p.12; GS Ølykke "How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?" in Ølykke, Hansen and Tvarnø (eds) Modernisation, Growth, Innovation – Discussions on the 2011 Proposals for Public Procurement Directives, DJØF Publishing 2012; C Estevan de Quesada, "Competition and transparency in public procurement markets", Public Procurement Law Review 2014(5), 229.

[5] Articles 101 and 102 TFEU.

[6] Cf. Article 101(3) TFEU; Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1; Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ 2010 L335/36; Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ 2010 L 335/43.

[7] For some recent textbooks see e.g. P Klemperer, *Auctions: theory and practice*, Princeton University Press 2004; PR Milgrom, *Putting auction theory to work*, Cambridge University Press 2004; and V Krishna, *Auction theory*, Academic Press 2009.

procurement designs, and more recently there has been a flurry of empirical examinations that have tested the theoretical predictions. It is not the purpose of the Ph.D. project to add to the extant theoretical literature on procurements and auctions. Instead, economic theory will help bring out the main trade-offs involved in public procurement to highlight the judicial issues. In particular, economic theory will be used to understand the consequences of allowing independent firms to collaborate/be related and thus coordinate their actions.[8] Based on the problems outlined in the previous section and the purpose of the project, the research questions are as follows below. They are divided on legal, economic and interdisciplinary questions, but the structure of the analyses may be more integrated than that, if appropriate.

1) When are collaboration in the forms mentioned (reliance on capacity, consortia, use of subcontractors) and relations between tenderers legal under procurement law and competition law?

2) When do economic operators have incentives to collaborate or to compete in the competition for public contracts?

3) How should the different forms of collaboration and relations between tenderers be regulated/assessed?

A main assumption behind the research question is that there should be coherence between public procurement law and competition law. At a first glance, such coherence is not currently present. First, there is no systematic enforcement of competition law in a public procurement context with regard to collaboration between economic operators. Second, the CJEU acknowledges that agreements between undertakings in a concern may be problematic in a public procurement context, whereas such agreements are not covered by competition law; see further below in section 3.4. If it turns out that the states of law are not coherent, it will be examined whether there is an economic rationale that explains and legitimises the difference.

3. Background and state of the art

Collaboration between economic operators in the competition for public contracts has always been allowed in certain forms, such as collaboration in consortia.[9] Over time, there has been a "push" from economic operators to clarify the possibilities of, and perhaps widen the scope for, collaboration and relations between tenderers (see further below). This agenda may be considered to be successfully realized through case law of the CJEU, which has widened the boundaries for collaboration and relations between economic operators in various ways, compared to the explicit provisions in the public procurement directives over time. Some of this case law has subsequently been codified.

3.1. Reliance on other economic operators' capacity

The possibility to rely on other entities' capacity was provided for by the CJEU in its case law;[10] this case law was codified in the 2004 Public Procurement Directive.[11] In the 2014 Public Procurement Directive,[12] reliance on other economic operator's economic, financial and technical capacity is explicitly allowed;[13] the

[8] The economic theories for mergers, collusion, and coalition formation are all closely related to the aspects of procurements which are the main topic for the proposed PhD thesis, as illustrated below.

[9] See already Article 21 of Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ 1971 L185/5.

[10] Eg. Ballast Nedam, C-389/92, EU:C:1994:133 and Holst Italia, C-176/98, EU:C:1999:593.

[11] Article 47(2) of Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/144, which codified the then existing case law.

[12] Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65.

[13] Article 63.

provision elaborates on this right compared to the first version of the provision in the 2004 Public Procurement Directive, and it codifies more recent case law of the CJEU.[14] This right to rely on other economic operators' capacity seems to generate a substantial number of preliminary references from national courts;[15] however, none of them have so far touched upon a competition law assessment of economic operators' reliance on the capacity of other entities. The possibility to rely on the capacity of other entities does not seem to have created any particular discussions in the literature.

3.2 Consortia

As already mentioned, consortia have explicitly been allowed since the very first public procurement directive; focus has been on facilitating collaboration between tenderer on performance of public contracts and on ensuring equal treatment between consortia and other tenderers. The 2014 Public Procurement Directive has detailed and elaborated the regulation of participation of consortia in public procurement procedures.[16] EU case law on consortia has been sparse, but recently a few cases have been decided.[17] The CJEU has relied solely on procurement law and not even mentioned competition law in its judgments on consortia.

One case on a consortium in a public procurement context has been decided under competition law by the EU Commission.[18] However, in a number of Member States national courts and national competition authorities have decided cases and/or issued guidelines on the formation of consortia. In particular, competition law assessment of consortia seems to be a reoccurring issue in the Nordic countries.[19] Moreover, in December 2016, the EFTA Court decided the Norwegian case E-03/16 - Ski Taxi SA, Follo Taxi SA og

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[14] Swm Costruzioni 2 SpA, C-94/12, EU:C:2013:646; PARTNER Apelski Dariusz, C-324/14, EU:C:2016:214; Wrocław - Miasto na prawach powiatu, C-406/14, EU:C:2016:562.

[15] Apart from the already mentioned judgments, see Siemens and ARGE Telekom, C-314/01, EU:C:2004:159; Strong Segurança, C-95/10, EU:C:2011:161; Hochtief Solutions, C-218/11, EU:C:2012:643; Pizzo, C-27/15, EU:C:2016:404; and Ostas celtnieks, C‑234/14, EU:C:2016:6. See also pending cases C-287/15, Lg Costruzioni, C-110/16, OJ 2016 C 175/10 and Casertana Costruzioni, C-223/16, OJ 2016 C 251/9.

[16] Article 19(2) and (3); Article 63(1), last sentence, and 63(2) of the 2014 Public Procurement Directive.

[17] Makedoniko Metro, C-57/01, EU:C:2003:47; Evropaïki Dynamiki v Commission, T-457/10, EU:T:2013:527; MT Højgård and Züblin, C-396/14, EU:C:2016:347. See also Serrantoni, C-376/08, EU:C:2009:808, which is discussed further below in section 3.4.

[18] 90/446/EEC: Commission Decision of 27 July 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.688 - Konsortium ECR 900), OJ 1990 L228/31.

[19] SE: Cementa och Aalborg Portland, 12.05.1995, overruled by Stockholms Tingsrätt, judgment of 03-01-1997, ärende nr Ä 8-68-95, which was upheld by Marknadsdomstolen, judgment of 08-10-1997, 1997:15, Dnr A 1/97. DK: Påbud til leverandører af ortopædiske sko, Rådsmødet d. 24.11.1999; Konkurrencebegrænsninger på markedet for ortopædiske sko, Rådsmødet d. 23.02.2000; Samarbejdsaftale mellem Ove Juel Catering A/S og T.H. Schultz A/S, Rådsmødet d. 26.11.2003; Dansk Vejmarkerings Konsortium, Rådsmødet d. 24.06.2015; Vejledning i konsortiedannelse, 17.06.2014 (available at: http://www.kfst.dk/Indhold-KFST/Publikationer/Dansk/2014/20140617-Vejledning-om-korsortiedannelse?tc=3614FB3D32F64DABB69CE4D887D74B56); Konsortiesamarbejde i forhold til konkurrenceloven, 17.06.2014 (available at: http://www.kfst.dk/Indhold-KFST/Publikationer/Dansk/2014/20140617-Konsortiesamarbejde-i-forhold-til-konkurrenceloven?tc=3614FB3D32F64DABB69CE4D887D74B56); Udbud med deltagelse af konsortier, 17.06.2014 (available at: http://www.kfst.dk/Indhold-KFST/Publikationer/Dansk/2014/20140617-Udbud-med-deltagelse-af-konsortier?tc=3614FB3D32F64DABB69CE4D887D74B56); Konsortier og udbud – kortlægning af ordregiveres valg af egnetheds- og udvælgelseskriterier, December 2016 (available at: http://www.kfst.dk/Indhold-KFST/Publikationer/Dansk/2016/20161216-Konsortier-og-udbud?tc=4D396CFE79764B55A37540898C91C04A?_z=z&_id=4D396CFE79764B55A37540898C91C04A). NO: Konkurrensetilsynet, Veiledning om prosjektsamarbeid, 24.02.2014 (available at: http://www.konkurransetilsynet.no/globalassets/vedtak-og-uttalelser/veiledninger/2014/prosjektveileder_-2014.pdf). IRL: Consortium Bidding Guide, December 2014 (available at: http://ccpc.ie/sites/default/files/Consortium%20Bidding%20Guide_0.pdf).

Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet, and found that in principle a consortium constitutes a hard core restriction on competition as prices are agreed on, and that the assessment of the economic an legal context of such agreements only need to take into consideration what is strictly necessary to establish a distortion of competition by object. In particular it must be assessed whether the parties to the agreement are competitors and whether the joint bidding is an ancillary restraint to other non-distorting agreements. The notification of the case to the EFTA Court shows that the Norwegian Competition Authority explicitly points to the similarity and substitutability between consortia, joint ventures and subcontracting. This is the basic approach taken in this Ph.D. project as well. National developments points to the practical importance of the topic and signals the timeliness of the proposed research, in the light of the obligation to ensure the uniform application of EU law in all the Member States. There is some legal and economic literature on consortia, but the competition law assessment of such in a public procurement context has not been the subject of substantial writings.[20]

3.3 Subcontracting

The 2014 Public Procurement Directive contains an entirely new provision on subcontracting in Article 71; the provision partially codifies case law of the CJEU. According to Article 71, amongst other things, a contracting authority may require tenderers to state whether they will use subcontractors to fulfil the contract and if so, which subcontractors they will use.[21] Article 63(2), which is also mentioned above, applies equally to situations where tenderers are using subcontractors;[22] thus, in such cases the contracting authority may require the tenderer to perform specific tasks by itself. The use of subcontractors in public procurement settings has been subject to some EU case law;[23] however, none of these cases have concerned competition law assessment of subcontractor arrangements.[24] In December 2016, the Swedish Patent and Market Court held that the exchange of information regarding the lack of intent to submit a tender in the negotiation of a subcontractor agreement for the purpose of a tender constituted concerted practice contrary to Article 101 TFEU.[25]

3.4 Organisational and other relations between tenderers

As background it may be noted that the research questions on this topic are spurred by the case law of the CJEU. In *Assitur*, the national law required automatic exclusion of tenderers with organisational relations; the purpose of the national law was to prevent collusion. The CJEU acknowledged this purpose and effect of the national legislation but held that automatic exclusion of two tenderers from the same concern (mother and daughter) would not be proportional, as there was no possibility to rebut the assumption of collusion.[26] The state of law was recently confirmed in *Impresa Edilux and SICEF*.[27] In is noteworthy that under competition law, in principle agreements between undertakings in a concern are not prohibited under Article

[20] However, see A Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd ed, Hart 2015, 336-340, and the references provided.
[21] This upholds the state of law, cf. Article 25 of the 2004 Public Procurement Directive.
[22] Cf. opinion of AG concerning Hörmann Reisen, C-292/15, EU:C:2016:480, para 22. The case is currently pending.
[23] E.g. Wall, C-91/08, EU:C:2010:182; Wrocław - Miasto na prawach powiatu, C-406/14, EU:C:2016:562;
[24] However, see Evropaïki Dynamiki v Commission, T-9/10, EU:T:2013:88 where the applicant claimed that one participant in the tender had been subcontracting on two of the submitted tenders; this recollection of the facts was rejected by the GC, see para 60 ff.
[25] Patent- och marknadsdomstolen, judgment of 21.12.2016, Konkurrensverket v Göteborg Energi GothNet AB and TeliaSonera Sverige AB, Mål nr PMT 17299-14.
[26] C-538/07 Assitur, EU:C:2009:317, paras 31-32. See also on parallel tendering by "permanent" consortia and their members in C‑376/08 Serrantoni and Consorzio stabile edili, EU:C:2009:808, para 39.
[27] C-425/14 Impresa Edilux and SICEF, EU:C:2015:721, paras 36-39.

101 TFEU, as such agreements are not perceived to be "agreements *between* undertakings".[28] Therefore, it seems like the CJEU takes a more strict approach under public procurement law. Under competition law, this implies that a mother company is responsible for actions of its daughters. As a reaction to mother companies' liability for the actions of its daughters, a test for independence has developed; the state of law is that there is an assumption for the mother's control of the daughter, but it is rebuttable.[29] Thus, if the daughter is acting independently on the market, the mother is not liable for its actions, which may influence the size of any pecuniary sanction as well as the liability to pay it. This case law could have inspired the CJEU to the approach adopted in *Assitur*. However no direct reference to or consideration of relevance of case law in the area of competition law was made by the CJEU.

The case law from the CJEU has been spurred by specific national legislation prohibiting organisationally or otherwise related tenderers from competing for the same public contract. However, in Member States where no such legislation exists, there are example of the simultaneous tendering for the same contract by organisationally related economic operators being contested, and coordinated bids being prohibited. Such cases are typically handled under procurement law, and competition law issues – such as whether the coordination of bids is a behaviour, which may be sanctioned – are not addressed.[30] The situation where tenderers in the same concern tender for the same contract has not been widely discussed in the literature,[31] though it has been compared to multiple bidding by the same tenderers.[32]

4. Perspective

The project takes an interdisciplinary approach. The main analytical part is the examination of the state of law; however, an important part of the project is to apply economic theory to explain the incentives and behaviour of economic operators in the public procurement setting.

The applied economic theory has the economic operator as the unit of analysis; thus, to ensure a common perspective for the project, the perspective in the legal analysis is on the legal framework within which the economic operator must act. This is appropriate, as the main part of the analysis will be competition law which regulates the behaviour of undertakings (economic operators in procurement terminology). The

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[28] E.g. Case 15/74 Centrafarm BV v Sterling Drug, EU:C:1974:114; Case 16/74 Centrafarm BV v Winthrop, EU:C:1974:115; Case 30/87 Bodson, EU:C:1988:225; Case 66/86 Ahmed Saeed Flugreisen, EU:C:1989:140; C-73/95 P Viho v Commission, EU:C:1996:405.

[29] E.g. Case 48/69 ICI v Commission, EU:C:1972:70, paras 132-135; Case 6/72 Continental Can, EU:C:1973:22, para 15; Case 107/82 AEG-Telefunken, EU:C:1983:293, paras 47-53; C-286/98 P Stora Kopparbergs Bergslags AB, EU:C:2000:630, para 26 ff.; C-97/08 P Akzo Nobel, EU:C:2009:536, paras 60-61; C-495/11 P Total and Elf Aquitaine, EU:C:2012:571; C-628/10 P and C-14/11 P Alliance One International and Standard Commercial Tobacco, EU:C:2012:479, para 43; C-440/11 P Stichting Administratiekantoor Portielje, EU:C:2013:514, para 66; C-247/11 P and C-253/11 P Areva, EU:C:2014:257, para 30; C-293/13 P and C-294/13 P Fresh Del Monte Produce, EU:C:2015:416, paras 76-99.

[30] See e.g. SE: Förvaltningsrätten i Stockholm, judgment of 20.10.2010, Nurse Partner Scandinavia AB v Stockholms läns landsting, Mål nr 34562-10, as upheld by Kammerrätten i Stockholm, Stockholms läns landsting v Nurse Partner Scandinavia AB, judgment of 18-02-2011, Mål nr 5915-10; Förvaltningsrätten i Stockholm, judgment of 22.04.2016, Prime Doctor Sverige AB v Stockholms läns landsting, Mål nr 25802-15. DK: Complints Board for Public Procurement, verdict of 23.01.2012, Proffice A/S v Statens & Kommunernes Indkøbs service A/S, J.nr.: 2011-00257.

[31] However, see Ølykke 2011 (fn. 2), 187-189 and GS Ølykke and R Nielsen, *EU's udbudsregler – i dansk kontekst*, DJØF 2015, 790-791.

[32] A Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd ed, Hart 2015, 340-347. P Trepte, *Regulating Procurement – Understanding the ends and Means of Public Procurement Regulation*, Oxford University Press 2004, finds at p. 312 that "Participation in more than one bid raises the almost rebuttable presumption of collusion…"

perspective in the legal policy part of the project is on optimising societal welfare and achieving goals common to competition law and public procurement law.

5. The link between law and economics in the project

The basic economic analysis of the trade-off involved in whether or not to allow some tenderers to cooperate in public procurement is straightforward. The first effect is a limiting of competition from fewer tenderers that follows from allowing firms that might be able to submit bids individually to bid jointly as a consortium. This will tend to increase the prices paid by the buyer. The second effect is that if there are synergies from combining the resources of individual firms in the consortium then it will be able to tender more aggressively. This counteracting effect will tend to bring down the price.

As illustrated, all of the mentioned types of collaboration and relations between economic operators are allowed under the EU Public Procurement Directives; therefore, the legal analysis will mainly be concerned with the state of law under competition law considering any relevant impact of the public procurement context. The legal dogmatic method will be applied in order to establish the current state of law, under the acknowledgment that the legal positivistic philosophy may be the legal philosophy best fit to understand and establish valid EU law.[33] The interpretative method favoured by the CJEU is teleological interpretation and as the state of law is rather unclear, identification of the relevant aims to be achieved will be necessary.[34] This will entail discussions on the aims of the perhaps liberal approach to collaborations and relations between tenderers under public procurement law, i.e. allowing the widest possible participation of in tenders, and the aims of competition law, i.e. ensuring undistorted competition, biased towards favouring consumer welfare. It must be discussed how these aims can be aligned to allow for a basis for teleological interpretation that will ensure meaningful fulfilment of goals common to the two areas of law.

Article 101 TFEU prohibits any agreements between competitors which distorts competition, unless the agreements have such beneficial results that it should allowed according to Article 101(3) TFEU (contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but does not impose indispensable restrictions and does not eliminate competition). From a competition law perspective, though many forms of collaboration are considered legitimate and efficiency enhancing, collaboration in all the mentioned forms between competitors will be potentially problematic. Thus, a main task is to establish when economic operators are in fact competitors[35] and when the collaboration may nevertheless be efficiency enhancing to such a degree that the collaboration should be allowed. Focus will be on establishing the dividing lines between collaboration and collusion.

One seemingly obvious distinction between collaboration legitimised and allowed by procurement law and collusion which is prohibited by competition law is that the former is overt and undisguised; reliance on other economic operators' capacity, consortia and subcontracting is open and visible collaboration – in this way the forms of collaboration allowed in public procurement law are very similar to joint ventures and mergers which are regulated by competition law. As demonstrated above, the state of law on collaboration

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[33] CD Tvarnø and R Nielsen, Retskilder & Retsteorier, DJØF 2014, p. 524 ff.; see also e.g. U Neergaard and R Nielsen, "Where Did the Spirit and Its Friends Go? On the European Legal Method(s) and the Interpretational Style of the Court of Justice of the European Union" in U Neergaard, R Nielsen and LM Roseberry (eds) *European Legal Method – Paradoxes and Revitalisation,* DJØF 2011, 95.

[34] E.g. N Fennelly, "Legal Interpretation at the European Court of Justice", 1996 20(3) Fordham International Law Journal, 656; G Conway, The Limits of Legal Reasoning and the European Court of Justice, Cambridge University Press 2012; S Sankari, European Court of Justice Legal Reasoning in Context, Europa Law Publishing 2013.

[35] Cf. also the judgment of the EFTA court referred to above in section 3.2.

and relations between tenderers is unclear, and therefore the state of law on joint ventures/mergers might be applied by analogy. Economic theory on mergers and joint ventures will be used to explain and legitimise or problematize the current state of law. The first point to note is that if joining individual firms were not able to participate in the procurement individually then allowing consortia to be formed would increase the number of tenderers and thus work to increase the competition. As a consequence the other tenderers would (in a first-price sealed-bid auction with independent private values) have to respond by tendering more aggressively. Thus, the effect of increasing the number of bidders is reinforced by other non-consortia tenderers bidding more aggressively. A second point is that there might be an incentive for firms that are in fact able to bid independently might deliberately claim they are not and thus join a consortium. This would limit the competition at the procurement and might increase the buying price. However, this effect is mitigated by a strategic externality by which, in the absence of any synergies, it might be better to bid independently if the alternative is that other firms form a consortium. [36] This is connected to which criteria that should be applied if firms wish to form a consortium. Finally, if firms are allowed to form consortia it is a question of which consortia that will emerge. It is likely that the answer to this will hinge delicately on the details of situation and firms' cost structure and, this issue has seemingly not been addressed in the theoretical literature on procurement and auctions.[37]

An initial part in the analysis of legal policy proposals is to determine the relevant norms for assessment of the current state of law and the proposals. Therefore, it will be discussed whether the consumer welfare norm in competition law also applies in public procurement law, cf. also the issue of common goals above. The results from the legal and economic analyses, which reflect the expected behaviour of economic operators, given the state of law, will be assessed according to this standard and proposals made should increase societal welfare. The legal policy proposals may be inspired by national solutions adopted in various Member States. The legal policy questions could be answered either de lege ferenda (recommendations on how the rules should be) or de lege sentendia (recommendations to the courts on how to interpret the existing rules).

6. Impact

The project is focussing on EU law but the results will have impact on national practice in the area of public procurement law and competition law as in these areas of law, public authorities and practitioners apply EU law directly or national law implements/derives from EU law. The Ph.D. project sets out to clarify the state of law, explain why economic operators collaborate or compete against related tenderers and to make recommendations on how such collaboration and relations should be perceived in practice. Thereby, the project will contribute to the debate on the application of competition law to a public procurement context which is only in a modest beginning.

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[36] The economic analysis mirrors that of the effects of exogenous horizontal mergers in oligopolistic markets. Under certain conditions (see e.g. SW Salant, S Switzer, and RJ Reynolds, "Losses from horizontal merger: the effects of an exogenous change in industry structure on Cournot-Nash equilibrium" 1983 The Quarterly Journal of Economics, 185), a merger would lead to higher prices and industry profits. However, since much of the increased profits are going to "outsiders" it might not be profitable for the "insiders" to pursue the merger, as it is better to be an outsider than an insider. This might be offset by synergies of the merging firms that give an incentive to lowering prices (see e.g. J Farrell and C Shapiro, "Horizontal mergers: an equilibrium analysis", 1990 The American Economic Review, 107)

[37] In the literatures on cartel formation (e.g. REF) and endogenous mergers (e.g. REF) the related problem of coalition formation is studied, where the main issue is whether there are any stable coalitions such that no firm inside the coalition would like to leave it an no outsider would be admitted.

7. Project plan

The project is a three-year PhD project carried out at Copenhagen Business School (CBS), under the Doctoral School of Business and Management.[38] The candidate should have a MSc in Business Administration and Commercial Law or a similar degree and preferably relevant work experience.

Main supervisor is Professor Christina Tvarnø, Department of Law at CBS, and co-supervisors are Professor (wsr), Ph.D., Grith Skovgaard Ølykke, Department of Law at CBS, and Professor Marcus Asplund, Department of Economics at CBS.

During the three years, six months are allocated to PhD courses and six months to teaching. A three months stay at a University in another EU Member State is envisaged, probably in the second year of the project.

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