On 25 April 2018, the Danish Competition and Consumer Authority issued new guidelines on the application of the competition rules to consortia. The Danish business community has been longing for such guidelines as the competition law assessment of consortia has been subject to great uncertainty.

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Background

In recent years, consortia and their compatibility with the competition rules have attracted increased attention. However, no specific guidelines have existed to clarify how consortia could be established without infringing the competition rules. This has resulted in uncertainty in the business community which has been calling for new guidelines in the area.

The drafting of the new guidelines has involved a lot of work for the Competition and Consumer Authority, which has consulted i.a. businesses and competition authorities in other countries. The guidelines are intended to prevent businesses from entering into illegal consortia which may result in both poorer and more expensive bids. The guidelines are also to increase awareness of the possibilities of entering into consortia for the benefit of competition and consumers.

The guidelines in brief

The guidelines, which are aimed at both businesses and their advisers, focus on consortia made for the purpose of tendering for contracts. First of all, the guidelines describe the application of the competition rules to consortia, but they also give examples of decisions made by the authorities in Denmark and in other EU member states. Further, the guidelines offer specific advice to businesses that consider entering into a consortium.

Highlights

Chapter 1

Initially, the guidelines give a brief description of consortia and the general guidance that the competition rules provide. Consortia are generally permitted if they enhance competition and benefit consumers, but are illegal if they restrict competition among bidders. The chapter offers specific advice to businesses that consider entering into a consortium.

Chapter 2

This chapter deals with the question when a consortium is deemed to restrict competition. This will typically be the case where the participants are competitors.
which are in a position to bid for the contract on their own. If, on the other hand, the participants are not competitors or do not have sufficient capacity to perform the contract alone, competition will not be affected. It is described in detail how businesses can determine if a contemplated consortium is likely to restrict competition.

Chapter 3
Chapter 3 describes how a consortium, even if it restricts competition, can still be lawful if it benefits consumers. This is subject to the requirement that the efficiency gains of the consortium outweigh the restriction of competition. The relevant rules are described in detail.

Chapter 4
The last chapter reviews the rules governing exchange of information between the consortium participants. Exchange of information must be limited to what is absolutely necessary. Hence, the participants may not share trade secrets, strategies etc. as it may restrict competition between them. The guidelines include directions on exchange of information both before and during the cooperation.

Read the guidelines (in Danish).

Read the Competition and Consumer Authority's press release (in Danish).