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Preliminary communication

CONSORTIA BIDDING IN THE SEE REGION: WHEN DOES COOPERATION BECOME COLLUSION?

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Abstract

Over the past two decades, the Southeast European (SEE) region has faced persistent challenges in closing the economic development gap with more advanced parts of Europe. To achieve progress in this regard, this region must foster greater cooperation among market participants and promote the execution of large-scale projects while simultaneously ensuring the preservation of competitive market conditions. Since many large-scale projects are executed through public procurements, the legal frameworks and regulatory practices governing consortia bidding may play a pivotal role in shaping the competitive landscape. In this broader context, this paper analyses the competition law enforcement in the SEE region, identifying notable disparities and highlighting variations in national practices and regulatory capacities. Based on the legal and economic analysis, the paper emphasizes the necessity for national competition authorities across the SEE region to adopt the rule of reason approach (i.e., consider the efficiency argument) when assessing consortia bidding. That is crucial since it appears nearly impossible to distinguish pro-competitive cooperation from anti-competitive collusion without conducting an in-depth economic analysis of the effects that a given consortium bidding may have on competition.

Key words: *consortia bidding, joint bidding, public procurements, bid rigging, collusion.*

"*What we see depends mainly on what we look for*."
John Lubbock (1834–1913)

1. INTRODUCTION

Consortia (or consortium) bidding is a situation where multiple economic entities, often from different sectors or industries, cooperate to submit a single joint bid within a private or public procurement procedure.[1] This form of cooperation

[1] In U.S. antitrust literature, consortia bidding is commonly referred to as joint bidding; Hoffman, E.; Marsden, J. R.; Saidi, R., *Are Joint Bidding and Competitive Common Value Auction Markets Compat-*

typically occurs through a consortium, where the bidding entities (or consortium partners) jointly participate in the procurement.[2] Alternatively, it may also appear in the form of subcontracting, where one bidding entity agrees, prior to the bid, to delegate one or more tasks to another party if the contract is awarded.[3]

Regardless of its form, consortia bidding commonly occurs in large-scale public procurements that require diverse expertise and considerable financial resources. Moreover, many consortia biddings include consortia members from different regions or countries. Due to these and other specificities of consortia biddings, it could be extremely challenging to assess their impact on competition. On one side of the spectrum, by pooling their resources, consortia members may become significantly more competitive and thus meet the set requirements more efficiently. On the other side of the spectrum, collusion between consortia members may harm competition and lead to considerable economic inefficiencies. Thus, it is essential for each legal system to identify the various categories of consortia bidding and to establish effective mechanisms for distinguishing among them.

This distinction is increasingly significant in the South and East European (SEE) region.[4] Namely, the SEE region has been recording a rise in large-scale infrastructural projects and other public and joint venture investments, requiring the cooperation of numerous legal entities from different countries for successful implementation. In this context, depending on a particular legal regulation, consortia bidding may significantly strengthen competition and contribute to the further economic development of the region, or it could distort competition and prevent many significant projects from being executed. Having that in mind, the primary

ible? – Some Evidence from Offshore Oil Auctions, Journal of Environmental Economics and Management, Vol. 20, Issue 2, 1991, pp. 99–112.

2 Additionally, a distinction can be made between temporary and structural consortia. Temporary consortia refer to ad hoc cooperation agreements that dissolve if another firm submits the lowest bid. In contrast, structural consortia involve longer-term agreements or joint ventures, often covering multiple tenders and reflecting a more enduring collaborative arrangement between the participating entities; Bouckaert, J.; Geert, M., *Joint bidding and horizontal subcontracting*, International Journal of Industrial Organization, Vol. 76, Article 102727, 2021, pp. 2–3.

3 In general, subcontracting can be arranged either before the submission of a joint bid or after the contract has been awarded. Typically, only in the former case subcontracting may be qualified as consortia bidding, and under certain conditions, it may raise concerns regarding bid rigging; See: Marion, J., *Sourcing from the enemy: Horizontal subcontracting in highway procurement*, Journal of Industrial Economics, Vol. 63, Issue 1, 2015, pp. 100–128.

4 In this paper, the SEE region is defined as a group of countries that includes the former Yugoslav states (Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Montenegro, and North Macedonia), Albania, Bulgaria, and Romania, due to their geographical, historical, and political interconnectedness.

goal of this paper is to analyze and clarify the existing legal and regulatory framework governing consortia bidding in the SEE region.[5]

To achieve that objective, the paper first analyses the economics of consortia bidding, focusing on social costs and benefits associated with the cooperation between legal entities when submitting a joint bid (Part 2). It then explores the legal definitions of consortia bidding across various European competition law systems, primarily focusing on the European Commission's approach to this issue (Part 3). Subsequently, the paper identifies and addresses key competition law concerns associated with consortia bidding in the SEE region (Part 4) and concludes with final remarks (Part 5).

2. CONSORTIA BIDDING ECONOMICS IN A NUTSHELL

In economics, the auction theory explains in detail how individuals or entities behave when bidding in auctions,[6] and joint bidding is a specific aspect of it, as the practice when two or more bidders cooperate to place a single bid. In general, findings within this theory emphasize the main potential benefits and potential costs of joint bidding, while every single case has to be analyzed separately.

On the one hand, the primary benefits of joint bidding include risk sharing, resource pooling, and the reduction of barriers to entry, all of which may enhance the competitiveness of market participants and foster market competition. On the other hand, joint bidding generates substantial coordination costs, exacerbates information asymmetry, and heightens regulatory and legal expenses due to the risk of collusion among market participants and potential harm to competition.

In the first place, joint bidding enables market participants to share the financial, operational, and technical risk associated with project implementation,[7] thereby reducing the burden on any single market participant, which is particularly important for large-scale and complex projects. Namely, the substantial risk inherent in such large projects often renders them infeasible for a single market participant

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5 The central focus of this paper is on competition law and policy. However, one should also recognise the broader impact the rule of law and anticorruption policies may have on consortia bidding and competition; See: Estache, A.; Iimi, A., *Joint Bidding, Governance and Public Procurement Costs: A Case of Road Projects*, Annals of Public and Cooperative Economics, Vol. 80, Issue 3, 2009, pp. 424–425.

6 Milgrom., P., *Putting Auction Theory to Work*, Cambridge University Press, Cambridge, 2004, pp. 2–26; Menezes, M.F.; Monteiro, K.P., *An Introduction to Auction Theory*, Oxford University Press, New York, 2007, pp.71–115.

7 Albano, G. L.; Spagnolo, G.; Zanza, M., *Regulating Joint Bidding in Public Procurement*, Journal of Competition Law & Economics, Vol. 5, Issue 2, 2009, pp. 348–350,

to undertake independently.[8] Thus, joint bidding may be essential for executing many high-stakes projects. Secondly, joint bidding allows market participants to consolidate their material, financial, and human resources to submit a bid and execute the project, which would be less effective or infeasible if pursued independently. Finally, as a result of these and other advantages, joint bidding lowers barriers to entry, enabling relatively smaller market participants to participate in large-scale projects and contribute to their successful execution.[9] In other words, all these benefits of joint (or consortia) bidding may substantially enhance market participants' competitiveness and strengthen market competition.

However, at the same time, cooperation between market participants when submitting a bid and executing the project may lead to numerous adverse economic consequences. The most significant ones are increased costs associated with the participants' coordination and inefficiencies arising from issues of information asymmetry, such as principal-agent problems, moral hazards, adverse selections, and others.[10] In addition, this coordination among numerous market participants may increase dispute settlement costs and regulatory expenses. On top of that, even when undertakings can bid independently, they are strongly incentivised to opt for cooperative behaviours such as colluding on bid prices, terms, or strategies, resulting in undermined competition and heightened profits for the colluding parties.[11] This is the primary reason why legislators and regulators must allocate substantial human and material resources to investigate and prosecute such practices. Simply put, any cooperation among market participants incurs operational costs, and certain types of cooperation, i.e., collaboration, can further inflict con-

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8 This risk includes, but is not limited to the risk of failure; See: Watson, J., *Modelling the Relationship between Networking and Firm Performance*, Journal of Business Venturing, Vol. 22 No. 6, 2007, p. 854; Shen, J.; Pretorius, F.; Li, X., *Does Joint Bidding Reduce Competition? Evidence from Hong Kong Land Auctions*, The Journal of Real Estate Finance and Economics. Vol. 58, 2019, p. 113.

9 Albano, G. L., *et al., op. cit.,* pp. 354–356; Woldesenbet, K.; Worthington, I., *Public Procurement and Small Businesses: Estranged or Engaged*? Journal of Small Business Management, Vol. 57 No. 4, 2019, pp. 1665–1666.

10 Lewis, G.; Bajari, P., *Moral hazard, incentive contracts, and risk: evidence from procurement*, Review of Economic Studies, Vol. 81, Issue 3, 2014, pp. 1201–1228; Chernomaz, K., *On the Effects of Joint Bidding in Independent Private Value Auctions: An Experimental Study*, Games and Economic Behavior, Vol. 76, Issue 2, 2012, pp. 705–706; Iimi, A. (*Anti-)Competitive effect of joint bidding: evidence from ODA procurement auctions*, Journal of the Japanese and International Economies, Vol. 18, Issue 3, 2004, pp. 417–419.

11 Christopher, T., *Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law*, Journal of European Competition Law & Practice, Vol. 6, Issue 9, 2015, 630–631; Estache, A.; Iimi, A., *Joint Bidding, Governance and Public Procurement Costs: A Case of Road Projects*, Annals of Public and Cooperative Economics, Vol. 80, Issue 3, 2009, pp. 396–397.

siderable harm to competition.[12] Thus, the potential costs of joint bidding are highly case-specific.[13]

Table 1: Potential Benefits and Costs of Consortia Bidding

Consortia Bidding (joint bidding)	
Potential benefits (PB)	*Potential costs (PC)*
Risk sharing	Coordination costs
Resource pooling	Information asymmetry costs
Eliminating barriers to entry	Dispute settlement and regulatory costs
Strengthening competition	*Harming competition*

Source: The author

Table 1 summarises the potential costs and benefits of joint or consortia bidding and the resulting consequences. Moreover, each benefit and cost could be further analysed and subcategorised for a more detailed examination. However, even this general preview is sufficient to distinguish two different groups of market participants' behaviours when submitting a joint bid. The first group consists of market participants who could submit a bid independently (on a stand-alone basis), and the second group consists of those who could not. Within the first group, there is a high probability that potential costs will outweigh potential benefits since market participants are efficient enough to compete and bid independently. Only exceptionally, cooperation between independent market participants could generate more significant potential benefits compared to the costs.

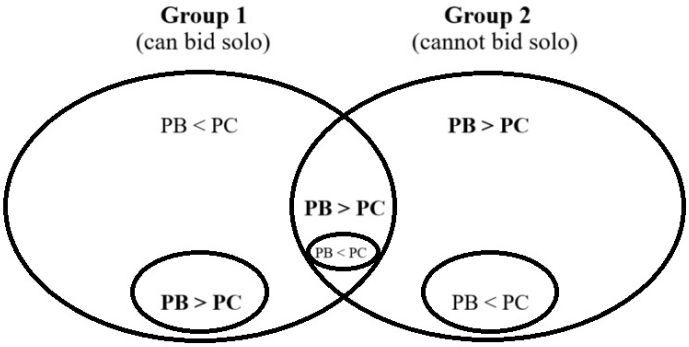
In contrast, participants within the second group are incapable of solo bidding, which increases the likelihood that their cooperation will result in higher potential benefits than the costs. Only in exceptional cases, participants in this group may engage in collusion, resulting in higher costs than benefits. Finally, those two groups may partially overlap, i.e., in some specific cases, market participants who can bid independently may establish cooperation with those who cannot. In that case, there is also a higher probability that the benefits of cooperation will

[12] According to some estimates, collusion between auction participants, on average, increases prices and causes damages to up to 23% of the total volume of commerce; Froeb, L.M.; Shor, M., *Auction, Evidence and Antitrust*, in: Harkrider, J. (ed.), The Use of Econometrics in Antitrust, Chicago, 2002, pp. 233–234.

[13] Similarly, the net-effect of joint bidding on conservation auctions' cost efficiency is ambiguous and it depends on specific circumstances of the case: See: Calel, R., *Improving Cost-Efficiency of Conservation Auctions with Joint Bidding*, Journal of Environmental Economics and Policy, Vol.1, Issue 2, 2012, pp.128–129.

outweigh the costs, primarily due to the reduction of barriers to entry, except in the case of collusion. Figure 1 presents these two groups of market participants (potential bidders) and the possible outcomes of their behaviour.

Figure 1: Two Groups of Consortia Members, Potential Benefits (PB), and Potential Costs (PC) of Consortia Bidding



Source: The author

Although it is not possible to determine the exact potential costs and benefits for these two groups due to the varying types of cooperation and participants, i.e. highly case-specific costs and benefits, Figure 1 provides a general illustration of these types and their possible outcomes.

Based on this general observation, one may conclude that the likelihood of cooperation yielding benefits that outweigh the costs is highest when market participants are unable to bid individually (on a stand-alone basis). On the contrary, when they can submit individual bids, there is a higher probability that the costs of joint bidding will outweigh the benefits. However, one should be aware of the exceptions to those rules, particularly in the case of cooperation between two different types of market participants, i.e. when those who can bid individually cooperate with those who cannot.

In general, this delineation between the rules and exceptions may be equalised with the distinction between cooperation and collusion. In economic terms, a joint bid can be classified as cooperation when the benefits exceed the costs and strengthen market competition; conversely, when the costs outweigh the benefits and undermine competition, the joint bid may be qualified as collusion. In this context, the analysis of the different types of market participants and their behaviours could provide a solid foundation for evaluating and potentially reformulating legal rules that differentiate between desirable cooperation and undesirable collusion associated with joint bidding. However, in the first place, it is essential

to briefly explain and clarify the conventional legal approaches to joint (consortia) bidding and the relevant legal definitions.

3. LEGAL DEFINITION AND EUROPEAN COMMISSION'S APPROACH TO CONSORTIA BIDDING

Traditionally, competition authorities in the United States and Europe did not define the meaning of joint or consortia bidding, and they have primarily relied on two main criteria when evaluating those biddings.[14] The first criterion referred to the "no-solo-bidding test", or the ability of market participants to bid independently. Namely, when failing this test, market participants lowered the number of competitors by submitting a joint bid and thus reduced competition in the market, which has been argued by the United States Congress when prohibiting consortia bidding arrangements between oil companies for offshore oil leases.[15] Similarly, European competition authorities have been using the ability to bid independently as the main criterion to assess joint bidding, including the recent decision of the competition authority in Norway, upheld by the Supreme Court in 2017.[16] In addition, as the second and subsidiary criterion, national competition authorities have been using offsetting efficiencies.[17] Even if market participants fail the non-solo bidding test, competition authorities may approve the joint bidding if it establishes that joint bidding generates sufficient offsetting efficiencies or benefits that can outweigh potential anti-competitive effects, such as cost savings, improved quality and innovation, etc. For instance, the Italian competition authority has recently approved the joint bidding by the two competing pharmaceutical companies that could have submitted bids independently due to sufficient offsetting efficiencies.[18] Similarly, the Danish competition authority initially found that a consortium agreement and the established cooperation between the two road marking companies infringed Article 101 TFEU and the equivalent Danish competition law provision since the companies could have bid independently. However, in the second instance, the Danish High Court emphasised that an assessment of consortia bidding under competition law has to be based on a realistic

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14 Bouckaert, J.; Geert, M., *op. cit.,* pp. 1–2.

15 Hendricks K., Porter, H., *Joint bidding in federal OCS auctions*, American Economic Review, Vol. 82, No.2, 1992, pp. 506–5011.

16 Judgment of the Court of 22 December 2016 in case E-3/16, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS v. The Norwegian Government, represented by the Competition Authority*, OJ C 133/5, 27.4.2017; Sanchez Graells, A., *Ski Taxi: Joint Bidding in Procurement as Price-Fixing?*, Journal of European Competition Law and Practice, Vol. 9, Issue 3, 2018, pp. 161–163.

17 Bouckaert, J.; Geert, M., *op. cit*., p. 2.

18 Richards, M., Italy *Drops Pharma Bidding Probe*, Global Competition Review, 2019, https://bit.ly/2FfXToU, last access 02.10.2024.

assessment of market conditions (considering the offsetting efficiencies) and ruled on the legality of the consortium bidding.[19]

In addition to the established case law, the European Commission (EC), for the first time, provided a formal definition of consortia bidding in the 2023 Guidelines on the applicability of Article 101 TFEU.[20] Namely, the Guidelines broadly define consortium bidding as "a situation where two or more parties cooperate to submit a joint bid in a public or private procurement competition".[21] In addition to this definition, the Guidelines clarify that consortia bidding is not illegal *per se*, i.e., it does not automatically infringe Article 101 TFEU.[22] To establish whether joint bidding infringes Article 101 TFEU, the Guidelines suggest a rule of reason approach where anti-competitive risks should be weighed against potential efficiency gains.[23] In this context, the Guidelines emphasise several relevant criteria, including the necessity, consortia members' market power, and the scope of the cooperation agreement.[24] In accordance with these criteria, a consortium should be necessary to achieve efficiencies, and a joint bid may be seen as anti-competitive if each consortium member could have submitted a bid individually. In addition, the impact of joint bidding on competition may depend on the market power of the consortium members, i.e., if the members are significant players in the market, their cooperation may considerably reduce competition by lowering the number of independent bids. Moreover, the scope of cooperation and the exchange of information between parties should be limited to what is necessary for achieving the project objectives, i.e. extending the cooperation to encompass activities such as price-fixing or market-sharing beyond unavoidable level would most probably constitute an infringement of Article 101 TFEU.[25]

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19 The Danish Maritime and Commercial High Court judgement in the *LKF/Eurostar* case, dated August 27, 2018, was appealed by the Danish Competition Authority to the Supreme Court. In 2019, the Supreme Court ruled that the consortium's cooperation violated the Competition Act. However, this ruling did not challenge the lower court's adoption of the rule of reason approach; See: Kjær-Hansen, E.; Alsing, J., *Danish Court: Consortium Agreement and Joint Bidding Permissible under Competition Law*, Journal of European Competition Law & Practice, Vol. 10, Issue 4, 2019, pp. 241–245.

20 EC Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [2023] OJ C 259; These Guidelines have replaced the previous EC Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements [2011], which addressed the issue of consortia bidding only in para. 237, specifying undisputed situation, i.e. that consortia members who are not competitors and cannot bid individually would not restrict competition within the meaning of Article 101(1) TFEU.

21 *Ibid*., para. 347.

22 *Ibid*., para. 352, 356, and 358.

23 *Ibid*., para. 356.

24 *Ibid*., para. 356.

25 *Ibid*., para. 357 (d); Even in the case of a consortium agreement concluded between competitors that falls under Article 101 TFEU, the Guidelines explicitly indicate that such agreement may fulfil the

In defining consortia bidding, the Guidelines also provide a formal definition of bid rigging and make an effort to clearly distinguish between the two concepts. For this purpose, bid rigging is defined as "[…] one of the most serious restrictions of competition, constituting a restriction by object, and may take various forms, such as agreeing the content of each party's tenders […] to influence the outcome of the award procedure […]."[26] Moreover, under the Guideline's provisions, bid rigging is "[…] a form of cartel that consists in the manipulation of a tender procedure for the award of a contract".[27] However, despite these definitions, the Guidelines acknowledge that "[…] in some cases, the distinction between bid rigging and legitimate forms of joint bidding is not straightforward […]".[28] This is especially relevant in (cross-)subcontracting, where the distinction between anti-competitive behaviour and legitimate cooperation can be nuanced.[29] This complexity particularly underscores the need for a thorough analysis on a case-by-case basis, i.e., the rule of reason approach to ensure that the joint activity's purpose, necessity, and potential efficiency gains are carefully considered. Therefore, although the Guidelines define both consortia bidding and bid rigging, the boundary between legitimate collaboration and illegal collusion remains exceptionally thin. This ambiguity necessitates careful scrutiny, as even minor differences in intent or execution can transform lawful joint bidding into anti-competitive collusion.

This approach aligns with the underlying economics of consortia bidding. As previously explained, consortia bidding can involve diverse types of market participants and behaviours, each presenting unique costs and benefits. For participants capable of submitting independent bids, the probability that anti-competitive risks or inefficiencies will outweigh the potential benefits is higher due to the diminished necessity for cooperation. In such cases, the likelihood of collusion becomes more significant, as the joint bidding may serve primarily to reduce competition rather than to achieve efficiencies. Conversely, for participants who lack the resources or capacity to bid independently, the probability that pro-competitive benefits, such as pooled resources or expertise, will outweigh potential inefficiencies is greater. In these cases, consortium bidding may enable participation that would otherwise be unfeasible, fostering competition rather than stifling it. In any event, both of these scenarios are susceptible to exceptions, confirming that the rule of reason

conditions set out in Article 101(3), thereby qualifying for exemption from the prohibition; See: Petr, M., *Joint Tendering in the European Economic Area*, International and Comparative Law Review, Vol. 20, No. 1, 2020, p. 218; Puksas, A.; Moisejevas, R.; Petkuvienė, R., *Competition Law Implications for Joint Bidding During Public Procurement*, Studia Iuridica Lublinensia, Vol. 33, Issue 2, 2024, p. 323.

[26] *Ibid*., para. 349.

[27] *Ibid*. para. 348.

[28] *Ibid*., para. 349.

[29] *Ibid*.

approach remains essential for distinguishing between cooperation and collusion on a case-by-case basis.

4. CONSORTIA BIDDING PUZZLE IN THE SEE REGION

The issue of consortia bidding is particularly pertinent in the SEE region.[30] Over the past decades, this region has faced persistent challenges in closing the economic development gap with more advanced parts of Europe. To achieve progress in this regard, the SEE region must foster greater cooperation among market participants and promote the execution of large-scale projects while simultaneously ensuring the preservation of competitive market conditions. Since many of these large-scale projects must be executed through public or private procurement procedures, the legal and regulatory framework governing consortia bidding becomes particularly significant. Namely, the manner in which consortia bidding is defined and regulated plays a crucial role in determining the success of such projects, influencing both their execution and the preservation of competitive market dynamics in the region.

In general, the SEE countries, including the EU member states like Bulgaria, Croatia, Romania, and Slovenia, as well as candidates or aspiring members like Serbia and North Macedonia, have aligned their national competition laws with EU competition rules under Articles 101 (1) and 101 (3) of TFEU.[31] Thus, consortia bidding can fall under these provisions if they restrict competition by object or effect. In addition, if a consortium generates efficiencies and consumer benefits or meets other specific criteria, it may qualify for exemptions under certain conditions. However, variations in enforcing competition law across the SEE region are noticeable, reflecting differing national practices and administrative capacities.

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30 As already noted, the SEE region is defined as a group of countries that includes the former Yugoslav states (Bosnia and Herzegovina, Croatia, Serbia, Slovenia, Montenegro, and North Macedonia), Albania, Bulgaria, and Romania, due to their geographical, historical, and political interconnectedness.

31 See: for Albania: Law No. 9121 on the Protection of Competition (Ligji nr. 9121 për Mbrojtjen e Konkurencës), Off. Gazette No. 6 of 2003, amended by Law No. 27/2016, art. 4 and 7; for Bosnia and Herzegovina: Competition Act (Zakon o konkurenciji), Off. Gazette of BH No. 48/05, art. 4 and 5; for Bulgaria: Law on the Protection of Competition (Закон за защита на конкуренцията), State Gazette No. 102 of 1998, art. 15 and 21; for Croatia: Competition Act (Zakon o zaštiti tržišnog natjecanja), Off. Gazette No. 148/2005, 76/2007, 79/2009, 80/2013, 30/2014, 117/2018, art. 8 and 9; for Montenegro: Law on Protection of Competition (Zakon o zaštiti konkurencije), Off. Gazette No. 36/2012, art. 8 and 9; for North Macedonia: Law on Protection of Competition (Закон за заштита на конкуренцијата), Off. Gazette No. 145/2010, art. 11 and 12; for Romania: Law No. 21/1996 on Competition (Legea concurenței nr. 21/1996), Off. Gazette No. 15/1996, art. 5 and 6; Serbia: Law on Protection of Competition (Закон о заштити конкуренције), Off. Gazette No. 51/2009, 95/2013, art. 10 and 11; and for Slovenia: Prevention of Restriction of Competition Act (Zakon o preprečevanju omejevanja konkurence, ZPOmK-1), Off. Gazette No. 36/2008, art. 6 and 9.

In this regard, although Bulgaria, Croatia, Romania, and Slovenia are all EU member states, their approaches to consortia bidding exhibit slight variations. Namely, only the Romanian competition authority has issued a specific Guide referring to joint bidding and competition law enforcement.[32] This Guide, in subsection 3.2., explicitly states that competitors who could have submitted bids independently can submit a joint bid since that may enable them to combine different comparative advantages and bid more efficiently. However, in such cases, the Guide places the burden of proof on the consortia members, requiring them to demonstrate that the pro-competitive efficiencies resulting from consortia bidding outweigh any potential restrictions on competition.[33] In contrast, other EU member states within the SEE region apply provisions on restrictive agreements without the issuance of specific guidelines. While certain states, such as Croatia, have developed guidance on public procurements,[34] these documents do not explicitly address the issue of joint or consortia bidding. In any event, with the issuance of the EC Guidelines on the applicability of Article 101 TFEU, it is anticipated that all EU member states within the SEE region will adopt a rule of reason approach, assessing consortia bidding on a case-by-case basis to distinguish between legitimate cooperation and collusion. In this context, EU competition case law will remain highly pertinent in evaluating the pro-competitive benefits of joint bidding as well as any potential inefficiencies.

Similarly, the majority of non-EU member states within the SEE region lack specific guidelines on consortia bidding and primarily rely on general provisions regulating restrictive agreements. A notable exception in this regard is the Serbian competition authority, which has issued the Opinion on the applicability of competition law in the context of joint bidding.[35] According to this opinion, "[…] consortia agreements in public procurement procedures shall not be considered restrictive […] where such agreements are concluded between undertakings: 1. that are not competitors […], [or] 2. that are considered affiliated undertakings

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32 Romania Consiliul Concurenței, Guide on compliance with competition rules in the case of participation in the form of association in a public procurement procedure (Ro: Ghid privind respectarea regulilor de concurență în situația participării sub formă de asociere la o procedură de achiziție publică), 31.01.2017.

33 *Ibid*., pp. 13–14.

34 The Croatian Competition Agency Rulebook on Implementing the Simplified Public Procurement Procedure (Cro. Pravilnik o provođenju postupka jednostavne nabave), 14.12.2018.

35 Commission for Protection of Competition of the Republic of Serbia, Opinion on the Application of Article 10 of the Law on Protection of Competition to Certain Forms of Cooperation between Undertakings in Public Procurement Procedures (Srb: Примена члана 10. Закона о заштити конкуренције на одређене облике сарадње између учесника на тржишту у поступцима јавних набавки), 25.03.2021.

[…].[36] Additionally, even consortium agreements concluded between close competitors are not considered restrictive if they cumulatively fulfil four preconditions. Namely, competitors should not be able to bid independently nor "participate in the public procurement procedure by presenting a separate joint bid".[37] Moreover, the exchange of business-sensitive information between the competitors should be limited to public procurement procedure purposes, and the consortia agreement should not contain any non-compete provisions that restrict or prevent competition in other public procurements.[38] According to this opinion, if a consortia agreement satisfies all of these preconditions, it is not deemed restrictive.

Moreover, the Opinion specifies that consortia agreements will not be considered restrictive even if one of the parties to that agreement can bid independently, while the other undertakings "join to acquire the necessary references and know-how".[39] Finally, the Opinion clarifies that all other consortia agreements that do not meet the listed conditions are restrictive and that parties to the said agreements can file a request for an individual exemption from the prohibition under Article 12 of the Law on Protection of Competition (national equivalent to Article 101(3) TFEU).[40]

Interestingly, the Serbian competition authority recently had the opportunity to apply and evaluate the opinion in the *Commission vs. Miteco-Kneževac et al.* case.[41] In this case, a consortium of five companies submitted a joint bid to provide services for the permanent disposal of hazardous waste as part of a public procurement organized by the Serbian Ministry of Environmental Protection. Among the relevant facts of the case, the five companies engaged a certified laboratory to fulfil all of the prescribed preconditions required under the public procurement procedure. However, upon the investigation,[42] the Serbian competition authority con-

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36 *Ibid*., p. 1.

37 *Ibid*.

38 *Ibid*.

39 An additional precondition for the application of this exception is that "the said parties to the agreement, namely those who join the agreement, cannot participate in the procurement procedure by presenting a joint bid" (*Ibid.).*

40 *Ibid*.

41 Commission for Protection of Competition of the Republic of Serbia, Decision 4/0-01-30/2022-06, 13.07.2022.

42 Interestingly, in this case, the Serbian competition authority conducted a dawn raid. For a detailed discussion of the legal framework governing dawn raids in Serbia, see: Begović B., Ilić, N., *Nenajavljeni uvidaj i (ne)srazmera između ovlašćenja i obaveza Komisije za zaštitu konkurencije*, Pravni zapisi, Vol. 3, No. 1, 2022, pp. 54–75; Begović B., Ilić, N., *Dawn Raids and (Dis)Proportionality between the Powers and Obligations of the Commission for Protection of Competition*, Focus on Competition, 2022, pp. 32–46.

cluded that "[…] there was a possibility that individual members of the bidding consortium could have formed a smaller group, while the remaining members, in cooperation with an authorized laboratory, could have constituted another group, thereby submitting a competitive offer ".[43] As a result, the competition authority deemed the consortium agreement to be restrictive, and all members of the bidding consortium were fined.

Despite the decision being rendered more than a year after the issuance of the opinion, the Serbian competition authority made no reference to the opinion, nor did it assess whether the preconditions outlined in the opinion had been fulfilled. Essentially, the competition authority concluded that the bidding consortium constituted a restrictive agreement by the object (without conducting a detailed analysis of the consortium's effects on competition), and this conclusion has been primarily based on the possibility that some consortium members could have engaged another certified laboratory and submitted independent bid. Moreover, the competition authority did not offer any explanation regarding the possibility of consortium members submitting independent bids, as such a possibility always exists – whether through engaging external companies and resources or by expanding and improving their capacities over time. Finally, the competition authority did not take into account the potential efficiencies associated with consortium bidding, which may manifest as lower prices, enhanced quality, or faster delivery of the services encompassed by the bidding process.[44] In other words, in this case, the competition authority concluded that the cooperation constituted collusion or bid rigging, without clearly distinguishing between the two concepts.

5. CONCLUDING REMARKS

Consortia bidding undoubtedly constitutes a significant business practice that can facilitate the execution of high-stake projects while generating considerable economic efficiencies. Therefore, consortia bidding may be particularly pertinent to the SEE region and its economic development. However, to fully harness the potential of consortia bidding, the SEE countries should effectively distinguish between consortia bidding and bid rigging, thereby differentiating pro-competitive cooperation from anti-competitive collusion, and implement a harmonized, if not unified, approach to consortia bidding under national competition laws.

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[43] *Ibid*., p. 3.

[44] These potential offsetting efficiencies are explicitly highlighted in the EC Guidelines and implicitly acknowledged in the Romanian Guide. However, in contrast, the decision of the Serbian competition authority makes no mention of the concept of "efficiency," either explicitly or implicitly; See *ibid*., pp. 1–41.

Based on the conducted analysis, and considering the economics of consortia bidding, it is clear that the net effects of consortia bidding are highly contingent on the specific circumstances of each case. Generally, when consortium members are not capable of submitting individual bids, there is a greater likelihood that the consortia bidding will yield positive or pro-competitive outcomes. Conversely, this likelihood significantly diminishes when consortium members can submit solo bids. Nevertheless, significant exceptions to these general expectations may exist in both scenarios. Therefore, the net effects of consortia bidding on competition should be carefully weighed on a case-by-case basis, relying upon in-depth economic analysis. The most advanced competition law systems, including those of the US and the EU, have progressively evolved and incorporated the rule of reason approach to consortia bidding, enabling consortia members to rely upon efficiency defence. This approach aligns with the insights derived from economic (auction) theory, ensuring a more nuanced and economically grounded evaluation of such practices. However, in the SEE region, significant disparities in the enforcement of competition law persist, highlighting variations in national practices and administrative capacities.

The emerging trend of national competition authorities within the SEE region to issue specific guidelines or opinions on consortia bidding could lead to a slippery slope, where inconsistent or overly prescriptive regulations may undermine legal certainty and distort competition across the region. This trend is particularly concerning when some national competition authorities take the path of least resistance by classifying consortia agreements as collusion or violations by object without conducting a thorough economic analysis first. Such an approach risks oversimplifying complex collaborative arrangements between market participants and may lead to unjustified legal outcomes that stifle legitimate competitive behaviour.

Therefore, it would be prudent and advisable for national competition authorities in the SEE region to adopt the rule of reason approach, remaining open-minded and focused on conducting rigorous economic analyses of both the pro-competitive and anti-competitive effects of consortia bidding (in compliance with the EC guidelines).

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