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Judgment in Case E-3/16 - *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS* v *The Norwegian Government*

JUDGMENT ON THE SCOPE OF APPLICATION OF THE PROHIBITION AGAINST RESTRICTIONS OF COMPETITION BY OBJECT

In a judgment delivered today, the Court answered questions referred to it by the Supreme Court of Norway on the interpretation of Article 53 EEA.

In the proceedings before the referring court, Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS ("the appellants") are appealing against a judgment of Borgarting Court of Appeal, which upheld a decision by the Competition Authority to impose administrative fines on them for infringing the national prohibition on anti-competitive agreements by submitting joint bids in two tender procedures launched by Oslo University Hospital in 2010.

The appellants argue before the Supreme Court that, contrary to the findings of the Court of Appeal, it is not sufficient for an agreement to be considered a restriction by object, that a form of conduct is capable of restricting competition. They submit that their joint bidding cannot constitute a restriction of competition by object, especially in light of the objectives pursued, the economic and legal context and their intention. In this context, the Supreme Court has made a reference to the Court on the legal test and criteria to be applied when determining whether a form of conduct constitutes a restriction of competition by object.

The Court found that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. In order to determine the degree of harm to competition, regard must be had to the content of the agreement's provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Court from taking that factor into account.

The Court further noted that consideration of the economic and legal context of an agreement in order to identify an anticompetitive object within the meaning of Article 53(1) EEA must be clearly distinguished from the demonstration of anticompetitive effects under that provision. Otherwise the distinction between restrictions of competition by object and by effect would be blurred. Given the consequences that flow from classification of an agreement as a restriction of competition by object, that concept must be interpreted restrictively in the sense that it can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. Only conduct whose harmful nature is easily identifiable, in the light of experience and economics, should be regarded as a restriction of competition by object.

Since the submission of joint bids involves price-fixing, which is expressly prohibited by Article 53(1) EEA, consideration of the economic and legal context may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object. However, it still needs to be assessed, albeit in an abridged manner, whether the parties to the agreement are actual or potential competitors, and whether the submission of joint bids may be regarded as an ancillary restraint.

Disclosure of the joint character of the bids to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings. However, although the parties' intention may be taken into account in order to determine whether an agreement may be considered a restriction of competition by object, it is not a necessary factor. It is for the referring court to assess whether the fact that Ski Taxi and Follo Taxi disclosed the joint character of their bids to the contracting authority may support a finding that their conduct cannot be considered a restriction of competition by object.

The full text of the judgment may be found on the internet at: www.eftacourt.int.