Competition - Portugal

Clipping the Enforcer's Wings: Court Quashes Ruling in Helicopter Bid-Rigging Case

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Lisbon Commercial Court has reversed a decision in which the Competition Authority fined two companies for forming a consortium to bid for a public contract in an open competition.(1) In 2007 the authority found that the consortium for the provision of helicopter services to fight forest fires constituted an anti-competitive agreement under Article 4 of the Competition Act (18/2003) and fined the participants €310,000.

Facts

Between 2001 and 2005 the National Fire and Civil Protection Service launched an annual open tender procedure to award a public service contract for heavy helicopters and related services, including crew and maintenance, to combat forest fires. In 2002 and 2004 the only candidates to submit tenders were two Portuguese companies, Aeronorte and Helisul; in 2003 Aeronorte alone submitted a tender. In all three years the contract was awarded to Aeronorte.

In 2005 the public contract was for the provision of six heavy helicopters and related services. Aeronorte and Helisul formed a consortium and jointly submitted the only tender. The service noted that the price proposed for each helicopter was 93% higher than that agreed in the 2004 contract and greatly exceeded the budget allocated for the 2005 contract. The service recommended that the tender be rejected and the interior minister duly annulled the procedure in May 2005.

Since the helicopter services at issue were essential for firefighting and their procurement was urgent, the minister opened a special negotiated procedure for the services of six medium and two light helicopters in June 2006. Several companies (including Aeronorte and Helisul) were invited to submit tenders. Contracts for the medium and light helicopter services were awarded to Aeronorte and Helisul, respectively.

Having become aware of the annulment of the 2005 procedure, the authority began to investigate a possible infringement of Article 4 of the act (which closely follows Article 81 of the EC Treaty). On October 31 2007 the authority found that the agreement breached Article 4; it imposed fines of approximately €179,000 on Aeronorte and €128,000 on Helisul. The authority observed that the consortium had reduced the number of bidders in the competition from two to one, thereby eliminating the competitive pressure that had existed between Aeronorte and Helisul in previous tender procedures and replacing it with “conscious and explicit coordination”. The authority further stated that the parties had artificially inflated the price and the remaining conditions of the bid, and concluded that the consortium had the objective and effect of preventing, restricting or distorting competition.

Commercial Court Judgment

The court began by stating that the authority had erred in defining the relevant geographical market. Although it agreed that the relevant product market was limited to the procurement of the heavy helicopters and related services required by the tender procedure, the court considered that the procedure at issue was an international call for tenders and that several foreign companies could have provided the services in question - the helicopters that Aeronorte and Helisul proposed to use were leased from Eastern European companies. Furthermore, the court ruled that the burden was on the authority to show that international companies, especially those based in Spain, were unable to compete with the defendants on similar terms, and found the authority's "inexplicable” failure to carry out such an analysis particularly significant. Therefore, the court concluded that the relevant geographical market was international in scope.

The authority had concluded that the two defendants were the only companies active in the relevant market, especially as they had been the only companies to submit tenders between 2002 and 2004. The court completely disagreed with this reasoning, stating that the history of past procedures was irrelevant. Rather, the court found that the aim of the inquiry was to determine which companies were providing the services at issue in the relevant market and which companies that were not in the market were capable of entering it without incurring significant additional costs. This led the court to conclude that the market was not limited to the defendants, but included at least four other national companies, as well as certain international competitors.

The court then ruled that the consortium agreement had not appreciably restricted competition in the relevant market.

The court first noted that the rules of the tender procedure allowed joint tenders by consortia. The authority had also wrongly ignored the fact that the procedure at issue was an international call for tenders and had not explained its reasons for concluding that the defendants' conduct had the effect of excluding all potential international companies from the competition.

Above all, the court considered that the 2005 procedure differed significantly from those of previous years. For the first time, the procedure required the heavy helicopters to be capable of transporting a 16-person crew and a new, more efficient set of water-spraying valves. Moreover, it observed that in 2005:

- insurance premiums were significantly higher than in previous years;
- heavy helicopters were in high demand in the international market (for humanitarian and other purposes); and
- neither defendant had six helicopters available at the start of the procedure.

These circumstances had made it more difficult to submit individual bids. Therefore, the court concluded that the authority's view - that the defendants had not needed to bid jointly in order to participate and had done so with the sole purpose of eliminating competition - was flawed and unfounded.

The court recognized that the tender procedure was annulled because the price proposed was considered excessive, but it also considered the allotted budget to have been unrealistic. The court found that a direct comparison with the procedures in previous years was invalid, as the resources and services at issue in 2005 were substantially different.

Therefore, the court upheld Aeronorte and Helisul's appeal, acquitting them and cancelling the fines imposed by the authority. The judgment may be appealed to the Lisbon Court of Appeals; the authority has yet to announce whether it will appeal the judgment.

Comment

Overall, the court was highly critical of the authority's legal reasoning. The judgment begins by stating briefly that defendants in misdemeanour proceedings are presumed innocent and that the burden of proof rests with the authority that brings the complaint. The judgment repeatedly appears to suggest that the authority did not adequately discharge this burden and therefore did not rebut the legal presumption of the defendants' innocence.

The court did not attempt to replace the authority's analysis with a new assessment of the facts. In keeping with normal appellate proceedings, the judgment mainly limits itself to pointing out the flaws and inconsistencies in the authority's analysis.

The definition of the relevant geographical market proved crucial: the authority had concluded that it was national, whereas the court found it to be international. (However, the court's statement on the irrelevance of past procedures in assessing whether international bidders were likely to participate is controversial.) This finding meant that the court had to consider that the defendants were not the only players in the market, although the judgment offers no independent analysis of the true structure of the market or of the competitive constraints imposed on the parties by other national and international helicopter service companies. Nevertheless, the court ruled that the authority's decision offered no evidence of an appreciable restriction of competition on the market as a result of the consortium agreement.

The court found insufficient evidence that the defendants had the objective of artificially raising prices when deciding to submit a joint bid. Although the court recognized that proving intent in horizontal agreements is not straightforward and that such intent is the result of a combination of facts and circumstances, it noted that in the absence of additional evidence, the simple fact that in previous procedures the companies had operated separately and in 2005 submitted a joint bid was insufficient to prove such intent.

If not appealed (or not overturned on appeal), this judgment will probably make it harder for the authority to take action against agreements between competitors that are not clear-cut cartels, unless it can present evidence of anti-competitive effects. The ruling that the authority bears the burden of proof in all essential elements of a case - particularly in the definition of the relevant market and the analysis of the aim and effects of the agreement - will be welcomed, as this will help to ensure more consistently reasoned decisions in future.

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Endnotes

(1) Judgment of the Second Chamber of Lisbon Commercial Court on May 21 2008 in *Aeronorte v Competition Authority* (Case 48/08.7TYLSB) ruling on the authority's decision of October 24 2007 in Case 20/05. (See the authority's press release issued on October 31 2007 at www.concorrencia.pt. The decision is not publicly available.)

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