THE SUPREME COURT OF NORWAY

On 22 June 2017, the Supreme Court gave judgment in

HR-2017-1229-A, (case no. 2015/203), civil case, appeal against judgment,

Ski Taxi SA Follo Taxi SA Ski Follo Taxidrift AS	(Counsel Stephan L. Jervell)
v.	
The State represented by the Competition Authority	(Attorney General repr. by Counsel Pål Wennerås)

O P I N I O N :

(1) Justice **Falch:** The case concerns the question whether the object of a tender cooperation that took place openly was to restrict competition, and is thus in conflict with the Competition Act section 10 subsection 1.

(2) On 4 July 2011, the Competition Authority made three decisions fining Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS – the latter referred to as SFT – under section 29 of the Competition Act for violation of section 10. The fines amounted to NOK 250 000, NOK 400 000 and NOK 2 200 000 respectively. In addition, the companies were ordered to bring any "cooperation similar to the one described in this decision" to an end, see section 12 of the Act.

(3) The basis for the fines was that Ski Taxi and Follo Taxi – jointly referred to as the taxi companies – through their wholly owned subsidiary SFT, in the autumn of 2010, had submitted a joint tender in two tender procedures regarding the provision of patient transport services. The Competition Authority concluded that the cooperation implied that the taxi companies did not submit separate and competing tenders, which they had a genuine opportunity to do. The Competition Authority therefore concluded that the cooperation had as its *object* the restriction of competition, which is prohibited under

section 10 subsection 1 of the Competition Act. Consequently, the Competition Authority did not make a separate assessment of whether the cooperation had as its *effect* the restriction of competition, which is an alternative condition in section 10 subsection 1. The Competition Authority further concluded that the conditions for exemption in section 10 subsection 3 were not met.

(4) Ski Taxi and Follo Taxi provide taxi services using small passenger cars. Both have been active in the entire Follo region consisting of the municipalities Nesodden, Frogn, Vestby, Ås, Enebakk, Ski and Oppegård. However, Ski Taxi has been active mostly in Ski, Ås and Oppegård, while Follo Taxi has been active mostly in Ås, Nesodden, Vestby, Frogn and Enebakk. In the autumn of 2010, approximately 24 taxi licence holders were affiliated to Ski Taxi, and 46 licence holders were affiliated to Follo Taxi.

(5) In 2001, the taxi companies established SFT, each owning 50 percent of the shares. SFT has carried out the joint administrative tasks for its owners, such as the operation of booking system, switchboard, communication, IT infrastructure, payment systems, invoicing, accounting and courses. For that reason, the taxi companies themselves have not had any employees.

(6) In addition, SFT has submitted tenders on behalf of the taxi companies in several tender procedures. When contracts have been awarded, SFT has acted as the contractual party and received settlements, while the licence holders affiliated to the taxi companies have acted as sub-suppliers.

(7) The *first* of the two tender procedures the decisions concern was announced by Oslo University Hospital HF – hereinafter the hospital – with a deadline for submission of tenders of 30 August 2010. The tenderers were invited to compete for a framework agreement for the provision of patient transport services for two years, with an option to prolong. The invitation was divided into nine geographical regions in Oslo and Akershus, of which one involved Søndre Follo – the municipalities of Nesodden, Ås, Frogn and Vestby - and one involved Nordre Follo – the municipalities Ski, Enebakk and Oppegård. Tenders could be submitted in one or several of the regions. A volume of approximately 40 000 travels a year was estimated for the entire Follo region, all day and all week. Up to three framework agreements could be entered into for each region. In the award criteria, price and quality were weighted by 50 percent each. Quality was divided into four equal sub-criteria – training and competence, capacity, the state of the carriage material and equipment as well as reception routines – each weighted by 12.5 percent.

(8) On behalf of Ski Taxi and Follo Taxi, SFT submitted a tender that covered Søndre Follo and Nordre Follo. It could be read from the tender that it was submitted on behalf of the two taxi companies.

(9) SFT was the only tenderer in both Follo regions. The hospital therefore cancelled the procedure there.

(10) The *second* tender procedure, which included only Follo, was announced by the hospital with a deadline to submit a tender of 5 November 2010. The competition base was the same as in the cancelled procedure, except for the division of the geographical regions.

This time, the procedure was divided into five smaller regions; Oppegård, Ås, Nesodden, Frogn and Vestby.

(11) SFT submitted a tender for all five regions. This time also, it was set forth in the tender that it was submitted on behalf of the two taxi companies. In addition, tenders were submitted by two other players - Oslo Taxi and Konsentra - for all five regions.

(12) The hospital awarded a framework agreement to all three tenderers. SFT was awarded an agreement with second priority in all regions, while the two other tenderers were awarded partially first and partially third priority in the various regions.

(13) Ski Taxi, Follo Taxi and SFT brought an action against the State, represented by the Competition Authority, to Follo District Court claiming that the Competition Authority's decisions be declared invalid. The district court gave judgment on 8 February 2013, concluding as follows:

> **"1. The Competition Authority's decision of 4 July 2011 in the case V2011-12 is invalid.**
>
> **2. The State represented by the Competition Authority is ordered to pay NOK 1 983 946 – onemillionninehundredandeightlythreethousandninehundredandfourtysix – in costs to Ski Taxi BA, Follo Taxi SA and Ski Follo Taxidrift AS. The time for performance is 2 - two – weeks from the service of the judgment."**

(14) The district court assessed the facts of the case differently from the Competition Authority, and concluded that the taxi companies were not competitors in the first tender procedure, and only partially competitors in the second tender procedure. The district court further concluded that the cooperation did not have as its object the restriction of competition. The cooperation in the second tender procedure, however, probably had as its effect the restriction of competition, but without influencing competition noticeably.

(15) The State appealed the judgment, and Borgarting Court of Appeal gave judgment on 17 March 2015, concluding as follows:

> **"1. Ski Follo Taxidrift AS is ordered to pay a fine of NOK 1 – one – million for violation of the Competition Act section 10.**
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> **2. Follo Taxisentral SA is ordered to pay a fine of NOK 200 000 – twohundredthousand – for violation of the Competition Act section 10.**
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> **3. Each party covers its own costs in the district court and in the court of appeal."**

(16) The court of appeal concluded that the taxi companies were competitors in both tender procedures, that the cooperation had as its object to restrict competition and that the exemption in the Competition Act section 10 was not applicable. The fines were however reduced, especially because the court of appeal concluded that the companies had not acted wilfully.

(17) Ski Taxi, Follo Taxi and SFT have appealed the judgment to the Supreme Court. They have only appealed on the law regarding the application of the competition restriction term in the Competition Act section 10 subsection 1.

(18) On 24 July 2015, the Supreme Court's Appeal Selection Committee agreed to hear the appeal. The hearing in the Supreme Court was limited, as the court would only hear the question whether the object of the cooperation was to restrict competition.

(19) Because the Competition Act section 10, with national adjustments, corresponds to the EEA Agreement Article 53, the Supreme Court decided to make a request to the EFTA Court regarding the interpretation of the EEA Agreement Article 53 no. 1, cf. the Courts of Justice Act section 51a. On 22 December 2016, the EFTA Court gave judgment in which it gave an advisory opinion answering the questions the Supreme Court had raised. I will revert to its contents.

(20) *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS* have mainly contended:

(21) The parties' open tender cooperation did not have as its object to restrict competition. The object was, objectively speaking, to offer a requested capacity through a cooperation involving a practical joining of resources. It involves two small taxi companies, in an industry with major competitors, which have cooperated in, to them, a major tender procedure. At the time, there was no inherent risk of severe damage to competition. The fact that the cooperation took place openly must be given substantial weight.

(22) The court of appeal has set the threshold too low when deeming it sufficient that the cooperation is "capable of" restricting competition. The EFTA Court is correct in stating that the threshold is higher under the EEA Agreement Article 53, and thus the Competition Act section 10. The cooperation must "reveal a sufficient degree of harm to competition". That was not the case. The cooperation had little, if any, significance to competition, which experience also shows. This is especially true when the court of appeal did not find it substantiated that Ski Tax in fact would have submitted a tender by itself.

(23) The appellants agree with the criteria established by the EFTA Court in its answers, except for answer no. 5, which is held to be incorrect. Here, the court confines the assessment to two criteria that have nothing to do with the assessment of the object. Those criteria are input criteria that must be met for Article 53, and thus Section 10, to be applicable at all. The assessment of the object must be significantly wider, as demonstrated especially in the Court of Justice of the EU's judgment of 11 September 2014 in case C-67/13 P *Groupement des cartes bancaires (CB)*.

(24) Under any circumstances, if the EFTA Court's answer no. 5 should be applied, the taxi companies' joint price offered to the hospital constituted an "ancillary restraint" to the joint bidding itself, which involved the delivery of a joint service by pooling of resources.

(25) The appellants have submitted the following prayer for relief:

> **"1. Follo District Court's judgment in case no. 11-2022508TVI-FOLL of 8 February 2013 is to be upheld.**
>
> **2. Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS are to be awarded costs in the court of appeal and in the Supreme Court."**

(26) *The State, represented by the Competition Authority*, has mainly contended the following:

(27) As the court of appeal concluded, the companies' joint bidding had as its object to restrict competition in conflict with the Competition Act section 10 subsection 1. The EFTA Court's advisory statement adequately expresses how to interpret this criterion. The Court of Justice of the EU's judgment in the CB case suggests no other interpretation.

(28) In principle, any agreement that replaces competition by cooperation is prohibited. In tender procedures, independent tenders are essential. Pricing cooperation, like in this case, is one of the most damaging forms of cooperation. In the companies' own documents, it is set forth that the object was to restrict competition. The taxi companies were competitors because they had an opportunity to submit individual tenders. Hence, it does not matter what they actually would have done individually. Nor do the joint tenders constitute an "ancillary restraint". In this case, it has no relevance that the cooperation was open.

(29) Should the companies succeed, the consequence must be an annulment of the court of appeal's judgment, and not an upholding of the district court's judgment as they have contended.

(30) The State, represented by the Competition Authority, has submitted the following prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrift AS are to be ordered – jointly and severally – to pay the costs in the Supreme Court to the State represented by the Competition Authority."**

(31) *I have concluded* that the appeal must be dismissed.

(32) The question the Supreme Court must consider is whether the cooperation between Ski Taxi and Follo Taxi, through SFT, regarding joint bidding to the hospital in the two tender procedures, had "as its object [...] the prevention, restriction or distortion of competition", cf. the Competition Act section 10 subsection 1. The companies have only appealed on grounds of the application of the law.

(33) The first part of the Competition Act section 10 subsection 1 reads as follows:

> **" The following shall be prohibited: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:**
>
> **a. directly or indirectly fix purchase or selling prices or any trading conditions;**
>
> **..."**

(34) With one exception, the wording is the same in the EEA Agreement Article 53 no. 1, which corresponds to Article 101 no. 1 of the Treaty on the Functioning of the European Union. The exemption is that the mentioned Articles 53 and 101 also contain a condition that the cooperation between the companies must be capable of affecting trade between the contracting parties, i.e. between the states included in the EEA and EU, respectively. There is nothing indicating, nor has it been held, that this trading condition is met in this case. The consequence is that the relevant cooperation is governed by the Competition Act, and not by the EEA Agreement.

(35) Otherwise, the Competition Act section 10 subsection 1 must as a clear starting point be interpreted in the same way as the EEA Agreement Article 53. Here, I will confine myself to referring to the Supreme Court judgments in Rt-2011-910 para 63 *Tine* and Rt-2012-1556 para 27 *Gran & Ekran*.

(36) For that reason, the Supreme Court obtained, as mentioned, the EFTA Court's advisory opinion regarding the interpretation of the relevant parts of the EEA Agreement Article 53 no. 1. The EFTA Court gave the following answers in Case E-3/16:

> **"1. For an agreement to be regarded as a restriction of competition by object within the meaning of Article 53(1) EEA, it must reveal a sufficient degree of harm to competition. It does not suffice that it is simply capable, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition.**
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> **2. In order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the 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.**
>
> **3. An agreement reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object only if its harmful nature is easily identifiable. That assessment cannot go as far as a full examination of its actual or potential effects. Nor can it amount to carrying out an assessment of the pro- and anticompetitive effects and thus to applying a rule of reason.**
>
> **4. In order to determine whether the submission of joint tenders through a joint management company reveals a sufficient degree of harm that it may be considered a restriction of competition by object, regard must be had to the substance of the cooperation, its objectives and the economic and legal context of which it forms part. The parties' intention may also be taken into account, although this is not a necessary factor.**
>
> **5. Since the submission of joint tenders 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, such an assessment needs to take into account, albeit in an abridged manner, whether the parties to an agreement are actual or potential competitors and whether the joint setting of the price offered to the contracting authority constitutes an ancillary restraint.**
>
> **6. While the disclosure of the joint nature of the tenders to the contracting authority may be an indication that the parties did not intend to infringe the prohibition on agreements between undertakings, that, in itself, is not a prerequisite for determining whether an agreement may be considered a restriction of competition by object."**

(37) The parties have expressed that answers no. 1 to no. 4 and no. 6 are also adequate for the interpretation of the Competition Act section 10 first paragraph. I share that view. I will revert to answer no. 5.

(38) The EFTA Court's answers to no. 1 to no. 4 and no. 6 imply, firstly, that the relevant object criterion is an objective term. The cooperating parties' subjective object – their intent – is not decisive, cf. answers no. 2, no. 4 and no. 6.

(39) Secondly, it is not sufficient to establish that the parties' cooperation "is capable" of restricting competition. To be covered by the option 'have as its object' in section 10 subsection 1, the cooperation must reveal a sufficient degree of harm to competition, so it is unnecessary to investigate the effects of the cooperation, see answer no. 1. This represents a clarification and specification of the condition as the court of appeal applied it, and as referred to in the Supreme Court judgment in Rt-2012-1556, para 64 and para 65 *Gran & Ekran*.

(40) Thirdly, in the assessment one must "take into consideration" the contents of the provisions of the cooperation agreement, its object and the economic and legal context of which it forms part, see answers no. 2 and no. 4. This implies that the decision whether the condition is met must be made based an individual assessment of the relevant facts. A full investigation of the actual and potential effects of the cooperation, however, should not take place. A restriction by object requires that the "harmful nature is easily identifiable" in light of experience and economic conditions, see answer no. 3.

(41) Bearing this in mind, I will now turn to reviewing the relevant facts.

(42) The court of appeal based its decision on the notion that the hospital, in its tender invitations, did not make any requirements in terms of the size and capacity of the tenderers. The tenderers therefore did not need to cover the hospital's total need for cars in the geographic regions in which they submitted their tenders. Although capacity was one of the criteria for being awarded the framework agreement, weighted at 12.5 percent, the invitations were arranged so that smaller players – such as Ski Taxi and Follo Taxi – could also submit bids.

(43) Furthermore, the court of appeal held that both taxi companies *could* have submitted tenders individually in both tender procedures. That conclusion was supported by both the mentioned qualification requirements in the invitation and by an analysis of Ski Taxi's – the smaller of the taxi companies – available capacity, which had been disputed. The court of appeal therefore concluded that Ski Taxi and Follo Taxi were "potential competitors".

(44) When two players individually have the opportunity to, or may easily get the opportunity to, submit tenders to a principal in a tender procedure, they will expose each other to a competitive pressure. Both must then consider how beneficial their respective tenders must be in terms of price and quality for the one to be able to outstrip the other, otherwise the assignment may be lost. The fact that it can be established later that the one probably would have chosen not to submit a tender alone, is of little importance in this context. The competitive pressure persists as long as the *possibility* of a competing tender is present.

(45) This competitive pressure lapses if the two players instead join forces and submit a joint tender. Such a joint tender may give room for offering principals less advantageous terms than if they had acted independently.

(46) In my view, it is therefore clear that joint bidding, like the one at hand, is harmful to competition. This "harmful nature" is easily identifiable, based on experience and knowledge of economic contexts. Although Ski Taxi and Follo Taxi were small players, this cannot be decisive. For instance, they had to be aware that there were few other competitors in Follo. This was most evident in the second tender procedure, following the cancelled procedure, where no other tenderers had come forward. Therefore, it must also be assumed that the cooperation was capable of having, at least, a certain effect on competition.

(47) The fact that the object of the companies' joint bidding was, objectively, to restrict competition, is supported by the documents establishing the cooperation – a strategy document of 2009 and a shareholders' agreement of 2007. The court of appeal has found proven that the object of submitting a joint tender was to strengthen the market position, among other things by limiting the competition between the cooperating companies.

(48) The companies have contended that it is of great importance that the cooperation took place openly. I agree that it is normally easier to identify a competition-restricting object if the joint bidding is kept secret. An open cooperation may indicate that the parties, subjectively, have not intended to restrict competition, and it may, under the circumstances, give the principal a better decision basis than what a secret cooperation would.

(49) But despite the fact that the cooperation took place openly, it nevertheless harmed competition in the ways I have described. A competitor was eliminated – in the legal and economic context I have accounted for. Therefore, in my view, the openness does not, objectively, deprive the cooperation of its character of being competition-restricting.

(50) The companies have also contended that their objective object was to offer a requested capacity in a way that involved an appropriate joining of resources.

(51) It is correct that joint bidding, like in the case at hand, consists of several elements. In part, this involves that the parties fix a joint price, which is expressively prohibited under the Competition Act section 10 subsection 1 a. But in addition, it involves a pooling of the parties' resources, with the possible result that they, jointly, will be able to offer a larger capacity than what they in sum could have individually. The court of appeal also considers this view to "be relevant" in this case, since the cooperation increased the flexibility of the car fleets.

(52) In my view, however, such and any other efficiency gains which cooperation may generate must be assessed pursuant to the Competition Act section 10 third paragraph, like the Competition Authority did. When the conditions there are met, cooperation likely to harm competition will nevertheless not be prohibited. The connection between the two rules imply, in my view, that whether the cooperation has as its object to restrict competition must be assessed under subsection 1, while the significance of possible efficiency gains must be assessed under subsection 3, see the EFTA Court's answer no. 3.

(53) In this respect, the companies have also referred to the CB judgment, in which they find that the Court of Justice of the EU makes a materially wider assessment than what the EFTA Court indicates in its answer no. 5. The case concerned an agreement between nine

banks regarding fees for participation in a common system for the use of payment cards. The Commission and the General Court had concluded that the purpose of the fee structure was to restrict competition, but the Court of Justice annulled the judgment of the General Court due to an incorrect application of the law. The Court of Justice emphasised among other things that the agreement had as its legitimate object to combat free-riding in the system, see particularly para 62, and also that there was a necessary balance between issuing and acquisition activities within the payment systems, see particularly para 76 and para 77.

(54) In my view, these are views that are associated with the economic and legal context in which the cooperation took place. The elements the companies in the present case argue must be included in the assessment, are of a different character. I cannot see that the CB judgement supports the view that possible efficiency gains related to a tender procedure should be included in the assessment of whether the object of the cooperation has been to restrict competition within the meaning of section 10 subsection 1 of the Competition Act. Generally, I find that the CB judgment does not support a different understanding of the provision than the one set forth in the EFTA Court's answers.

(55) Consequently, I find that also the EFTA Court's answer no. 5 expresses a correct interpretation of section 10 subsection 1 of the Competition Act in a case like this. When, as in the case at hand, a cooperation exists involving common pricing of services to the hospital, the investigation of the economic and legal context of the cooperation may be limited as the EFTA Court describes.

(56) It remains for me to consider the companies' submission that the common pricing constitutes a necessary "ancillary restraint".

(57) The companies have not submitted that the common pricing was directly related to, and objectively necessary for, SFT's execution of the administrative common tasks for the taxi companies as I described in the introduction. The submission is that the common pricing was directly related to, and objectively necessary for, the cooperation itself, which was to join limited resources.

(58) This submission cannot succeed. In this context, the cooperation, although it contained an element of coordination of resources, cannot be regarded as a legal main operation. The joint bidding, in this case, was anticompetitive in nature. Hence, no legal main operation exists to which the pricing is directly related.

(59) Consequently, I conclude that the cooperation between Ski Taxi and Follo Taxi, through SFT, regarding the submission of joint bids to the hospital in the two mentioned tender procedures, has revealed a sufficient degree of harm to competition and has thus restricted competition by object according to section 10 subsection 1 of the Competition Act. The appeal must therefore be dismissed.

(60) The State has claimed costs in the Supreme Court. Considering the fact that the appeal has raised legal issues not previously clarified, I have concluded that costs should not be awarded, cf. section 20-2 subsection 3 of the Dispute Act.

(61) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.

(62) Justice **Endresen:** I agree with the justice delivering the leading opinion in all material aspects and with his conclusion.

(63) Justice **Normann:** Likewise.

(64) Justice **Høgetveit Berg:** Likewise.

(65) Justice **Utgård:** Likewise.

(66) Following the vote, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. Costs in the Supreme Court are not awarded.