



# Five years of procurement fines

What has happened at those agencies that  
have been ordered to pay procurement fines?

**REPORT** 2015:7



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What has happened at those contracting authorities that have been ordered to pay procurement fines?

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## Preface

The rules on procurement fines have now been in place for five years. To date, the courts have imposed procurement fines totalling almost SEK 24 million, divided up between 45 cases and 36 different authorities. The Swedish Competition Authority has therefore followed up on what has happened at those authorities that have been ordered to pay procurement fines.

The aim of this report is to provide better knowledge about how the Authority's supervision of the public procurement regulations affects the operations of contracting authorities. It is encouraging to note that almost 90 per cent of those authorities that have been ordered to pay procurement fines have implemented internal changes, and that the authorities themselves take a positive view of this.

It is hoped that more good examples of how the Swedish Competition Authority's supervision contributes towards more effective, more competent procurement can be highlighted.

We would like to convey our sincere thanks to all those authorities that took the time to respond to the survey on which this report is based.

The report is a direct translation of the Swedish version.

Stockholm, August 2015

Dan Sjöblom  
Director-General

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## Summary

Since 15 July 2010 the Swedish Competition Authority has been able to bring legal action to pursue claims for procurement fines from authorities for certain infringements of the public procurement regulations. In this report, the Swedish Competition Authority follows up on the actions taken by those authorities ordered to pay procurement fines.

Over the course of the last five years, the Swedish Competition Authority has submitted a total of 92 applications for procurement fines, 62 of which have been submitted on its own initiative (facultative applications). The other 30 were applications that the Authority was legally bound to submit (obligatory applications). The courts have so far issued 65 judgments that have entered into legal force. Of these final judgments, the courts have found entirely or partially in the Authority's favour in 89 per cent of the facultative applications and in 43 per cent of the obligatory applications. The procurement fines imposed amount to a total of SEK 23,946,000.

The follow-up report shows that 88 per cent of the authorities ordered to pay procurement fines have implemented organisational changes following the imposition of these fines. Many of these changes have been either wholly or partially implemented as a result of the authority being forced to pay the fine. The authorities themselves provide several good examples of how they are actively working to instigate more efficient and competent procurement operations.

Furthermore, the report also indicates that the authorities require information regarding the implications of the procurement

regulations, and support in their work to bring about sound procurement procedures.

## Terms and abbreviations

The following terms and abbreviations are used in this report:

**General administrative court** – the administrative courts consist of three courts: administrative courts, administrative courts of appeal and the Supreme Administrative Court.

**Standstill period** – a ban on an authority to enter into contracts directly after it has made a decision to award a contract. The standstill period applies for 10 or 15 days after the authority has sent a notification on the decision to award a contract to all tenderers. If the notification is sent electronically, the standstill period is ten days. Otherwise, it is 15 days. If a procurement is subject to review, the standstill period is automatically extended while the case is heard by the administrative court.

**Direct award** – procurement without a statutory requirement for tenders in a specific form.

**Direct award limit** – SEK 505,800 in 2015 for direct awards in accordance with the Swedish Public Procurement Act (2007:1091) and SEK 939,342 in 2015 for direct awards in accordance with the Swedish Act on Procurement within the Water, Energy, Transport and Postal Services Sectors (2007:1092) and the Swedish Defence and Security Procurement Act (2011:1029). Only contracts with a total value (if they are of the same type) that do not exceed the direct award limit can be entered into through a direct award,

unless exceptional reasons exist or certain specific conditions are met.<sup>1</sup>

**Facultative application** – an application for procurement fines that, according to the law, the Swedish Competition Authority *can* make to the administrative court. A facultative application means that the Swedish Competition Authority can decide whether or not an application should be made to the administrative court.

**LOU** – the Swedish Public Procurement Act (2007:1091).

**LUF** – the Swedish Act on Procurement within the Water, Energy, Transport and Postal Services Sectors (2007:1092).

**LUFS** – the Swedish Defence and Security Procurement Act (2011:1029).

**Authority** – contracting authorities in accordance with LOU and LUFS, and contracting entities in accordance with LUF and LUFS.

**Obligatory application** – an application for procurement fines that, according to the law, the Swedish Competition Authority *must* make to the administrative court. An obligatory application means that the Swedish Competition Authority cannot choose whether or not an application should be made to the administrative court.

**Public procurement** – actions that an authority takes in order to enter into a contract or a framework agreement to purchase goods,

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<sup>1</sup> The calculation of the direct award limit is detailed in chapter 15, § 3 of LOU, chapter 15, § 3 of LUF and chapter 15, § 4 of LUFS.

services or works. In principle, all contracts with financial conditions are covered by the public procurement regulations.<sup>2</sup>

**Illegal direct award of contracts** – contracts that exceed the direct award limit and that have not been entered into in accordance with the public procurement regulations. This means that the contracts can be declared ineffective by a court and that the authority can be ordered to pay a procurement fine.

**Procurement fine** – a specific fine imposed on an authority on the grounds of certain breaches of the procurement law regulations. Such procurement fines can total a minimum of SEK 10,000 and a maximum of SEK 10,000,000, and may not exceed ten per cent of the contract value. The fines are decided on by a court following an application from the Swedish Competition Authority.

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<sup>2</sup> For a more detailed description of the public procurement regulations, see The Swedish Competition Rules – an introduction (The Swedish Competition Authority, 2014).

# 1 Introduction

The regulation on procurement fines has now been in place for five years. Therefore there is good reason to follow up on what has happened at those authorities that have been ordered to pay procurement fines. The aim of this report is to provide better knowledge about what the Swedish Competition Authority's supervision and applications have meant for these authorities.

The report is based on a survey that was sent to all authorities ordered to pay procurement fines.<sup>3</sup> Of 35 respondents, 33 answered the survey, corresponding to a response rate of 94 per cent. Those authorities that have been ordered to pay procurement fines after 30 April 2015 were not covered by the survey.

## Issues addressed by the report

Chapter 2 describes the rules on procurement fines. There is a report of the Swedish Competition Authority's applications for procurement fines in chapter 3. The following chapters detail the results of the survey. Chapter 4 deals with the organisational changes carried out by the authorities, and chapter 5 addresses the extent to which the measures were carried out as a consequence of the procurement fines. Chapter 6 reports on views about how the Swedish Competition Authority's supervision could be developed and improved.

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<sup>3</sup> See Appendix 1 for the survey questions.

## 2 Procurement fines

Since 15 July 2010 the Swedish Competition Authority has been able to bring legal action to pursue claims for procurement fines from authorities. The fine comprises a financial penalty that is payable to the state.

The rules on procurement fines in LOU and LUF came into force on 15 July 2010. The rules on procurement fines in LUF came into force on 1 November 2011.

One of the aims of procurement fines is to ensure compliance with the public procurement regulations and that taxpayer's money are used correctly. The starting point is that the fines should be determined so that the authority refrains from breaching the law and that other authorities also refrain from such breaches. The sanctions should be effective and proportional, and should act as a deterrent.

Procurement fines can be imposed

- when an authority has carried out an illegal direct award of contract,
- when a general administrative court in a review has established that a contract may stand, despite having been entered into in contravention of the provisions on a standstill period or an extended standstill period, and
- when a general administrative court in a review has decided that a contract should not be declared invalid for overriding reasons relating to the public interest.

A judgment from a court to the effect that procurement fines shall be imposed does not mean that the contract entered into ceases to apply.

The Swedish Competition Authority can submit two forms of applications for procurement fines to the administrative court: an obligatory application or a facultative application.

The Swedish Competition Authority can apply for procurement fines at its own initiative

The Swedish Competition Authority can apply for procurement fines at its own initiative, known as a facultative application, in the case of an illegal direct award of contract. An illegal direct award of contract is for example made when an authority enters into a contract with a supplier without prior publication, despite the fact that the contract should have been preceded by a contract notice according to the public procurement regulations. Such an application should be submitted to the administrative court.

When prioritising whether a case should lead to a facultative application for procurement fines, the Swedish Competition Authority focuses on investigating cases that are of general interest and that lead to clear results. The aim is always to promote effective competition in private and public sectors for the benefit of consumers and effective public procurement for the benefit of the public and economic operators on the market. Among other things, the Swedish Competition Authority takes into account how severe the problem is, how important it is to obtain a guiding decision and whether the right conditions exist for effectively investigating and taking action against the problem when prioritising.

## The Swedish Competition Authority sometimes has to apply for procurement fines

In certain situations, the Swedish Competition Authority has to apply to the administrative court for procurement fines.

If a contract between a supplier and an authority has been entered into without having been procured in accordance with the procurement provisions, the contract can be declared ineffective by the administrative court.

If a general administrative court in a review of the effectiveness of a contract has declared that the contract may stand, despite having been entered into in contravention of the provisions on a standstill period or an extended standstill period, the Swedish Competition Authority must apply for procurement fines to be imposed. The same applies if a general administrative court in a review has decided that a contract, which constitutes an illegal direct award, should not be declared ineffective for overriding reasons relating to the public interest (e.g. to protect human life and health).

## The Swedish Competition Authority's application deadlines

The Swedish Competition Authority cannot submit an application for procurement fines to a court immediately after an illegal direct award of contract has taken place. The rules are designed so that a review of the effectiveness of a contract and a case regarding procurement fines cannot take place at the same time for a single procured contract.

Generally, suppliers have six months to apply for a review of the effectiveness of a contract, but in the case of ex ante transparency and after publication of a contract notice the time is shorter. If no

application for review of the effectiveness of a contract is made by a supplier, the Swedish Competition Authority can – as a main rule – apply for procurement fines to be imposed once the six-month deadline has expired.

If an application for a review of the effectiveness of a contract is made by a supplier, the Swedish Competition Authority must instead wait until the case has been decided and has entered into legal force before an application for procurement fines can be made.

If no supplier has applied for a review of the effectiveness of a contract, an application for procurement fines must be made no later than within one year from when the contract on which the Swedish Competition Authority bases its claim was entered into. If a supplier has applied for a review of the effectiveness of a contract, the Swedish Competition Authority's application for procurement fines must be made within six months from when the decision in the case of effectiveness entered into legal force.

One of the most common reasons for the Swedish Competition Authority to not address breaches is that the time limit to submit an application for procurement fines to the administrative court has expired. The application deadline is only one year, and this is calculated from the time when a contract was entered into. The Swedish Competition Authority has proposed that the application deadline should be extended to two years.<sup>4</sup>

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<sup>4</sup> See for example the Authority's referral statement on the Re-examination Inquiry considerations SOU 2015:12 (ref. no. 221/2015) and the Authority's communication *Erfarenheter av upphandlingskadeavgift t.o.m. september 2013 ("Experiences of procurement fines up until September 2013"*, ref. no. 532/2013).

## The size of the procurement fine

The procurement fine may be up to a maximum of SEK 10,000,000. However, the fine may not exceed ten per cent of the value of the contract in question. The contract value shall be calculated in accordance with chapter 3, §§ 3 and 4 or chapter 15, § 3a of LOU. When establishing the size of the procurement fine, particular attention shall be paid to how severe the breach is. The more severe the breach is deemed to be, the higher the fine should be. The highest fine amount is reserved for particularly severe cases. In minor cases, no fine should be decided on. The administrative court can decide that no fine should be imposed if the breach in question is deemed to be a minor breach, and the court can also decide that the fine should be waived in exceptional circumstances.

The size of the procurement fine should be determined in view of all relevant circumstances in the individual case within the framework of the fine's deterrent purpose.<sup>5</sup> When assessing the value of the sanction, both aggravating and extenuating circumstances should be taken into account.

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<sup>5</sup> See e.g. the Supreme Administrative Court's decision HFD 2014 ref. 69.

### 3 The Swedish Competition Authority's applications for procurement fines

During the period 15 July 2010 to 14 July 2015, the general administrative courts issued procurement fines in 33 cases based on facultative applications, corresponding to 89 per cent of the judgments that entered into legal force. During the same period, the general administrative courts issued procurement fines in 12 cases based on obligatory applications, corresponding to 43 per cent of the judgments that entered into legal force.

#### 3.1 Procurement fines have been imposed in 44 cases

During the period 15 July 2010 to 14 July 2015, the Swedish Competition Authority submitted a total of 92 applications to the administrative courts. Of these, 62 applications were submitted at the Authority's own initiative and 30 applications were obligatory applications. The courts have so far issued 65 judgments that have entered into legal force.

**Table 1** The Swedish Competition Authority's applications for procurement fines 2010-2015

Type of application	2011	2012	2013	2014	2015*	Total
Facultative applications	7	12	19	15	9	62
Obligatory applications	8	7	9	5	1	30
<b>Total</b>	15	19	28	20	10	92

\*Until 31 July 2015.

Source: The Swedish Competition Authority 2015.

The fines imposed regarding applications made by the Swedish Competition Authority at its own initiative are between SEK 35,000 and SEK 8 million. The corresponding amounts for fines regarding obligatory applications are SEK 10,000 to SEK 1.5 million. The size of the fines imposed depends on how severe the breach is deemed to be.

The authorities ordered to pay procurement fines include 14 municipalities, seven state authorities, five municipal companies, three universities, two county councils, two state companies and one central purchasing body.

#### Facultative applications

Of the 62 applications submitted by the Swedish Competition Authority at its own initiative, the courts have announced 37 judgments that have entered into legal force so far. In 33 cases, the courts ruled in favour of the Swedish Competition Authority's claim in full or in part, i.e. in 89 per cent of cases. Three applications were rejected and one case was closed, without the court taking any further action, since the Swedish Competition Authority withdrew an application.<sup>6</sup>

#### Obligatory applications

Of the 30 applications that the Swedish Competition Authority was obliged to submit, the courts have announced 28 judgments that have entered into legal force so far. In 12 cases, the courts ruled in

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<sup>6</sup> The three cases that were rejected involve the interpretation of the transitional provisions of LOU. In these cases, the courts ruled that no procurement fines could be imposed because the procurements were deemed to have been started before the rules came into effect. The question of how the transitional provisions should be interpreted was finally decided in a test case from the Supreme Administrative Court (HFD 2013 ref. 31).

favour of the Swedish Competition Authority's claim in full or in part, i.e. in 43 per cent of cases. The courts decided to reject 15 applications, and not to hear one application.

The 15 applications rejected by the courts relate to four individual breaches. For one breach (corresponding to six applications), the court decided that the procurement fines should be waived since the underlying ruling had incorrectly determined that the contract had been entered into in contravention of the standstill period. For two breaches (corresponding to four applications), the court decided that there were no legal grounds to impose procurement fines.<sup>7</sup> For the fourth breach (corresponding to five applications), the court decided that this was a minor breach and no fines were therefore imposed.<sup>8</sup>

### 3.2 The application deadline affects supervision

Many of the Swedish Competition Authority's cases require lengthy investigation before it is possible to assess whether or not an illegal direct award of contract has taken place. There are currently<sup>9</sup> 25 ongoing cases based on applications for procurement fines submitted at the Swedish Competition Authority's own initiative to the courts.

In recent years, the Swedish Competition Authority has developed and improved its working methods in order to be able to detect and take action against illegal direct awards of contract. There are still

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<sup>7</sup> This was despite the fact that, in the underlying judgments, the court had come to the opposite conclusion and applied the provisions on reviewing the effectiveness of the contract covered by the same transitional provisions.

<sup>8</sup> See the Supreme Administrative Court's decision HFD 2014 ref. 49.

<sup>9</sup> Until 31 July 2015.

many cases that are deprioritised or closed without any further action. Up until 24 April 2015, the Swedish Competition Authority has opened 368 logged cases and dismissed 240 of these.

The most common reason for a procurement fines case not being opened or being closed without any further action after having been commenced is that the Authority only discovers the breach once the deadline for applying for procurement fines has expired or will expire shortly, and the case cannot therefore be investigated in sufficient detail. As a result, many potential illegal direct awards of contract avoid the Authority's intervention in the form of procurement fines. Certain cases are also so complex and thus difficult to investigate that they cannot be fully investigated or even discovered before the end of the application deadline.

#### 4 29 out of 33 authorities have implemented changes following a decision to impose procurement fines

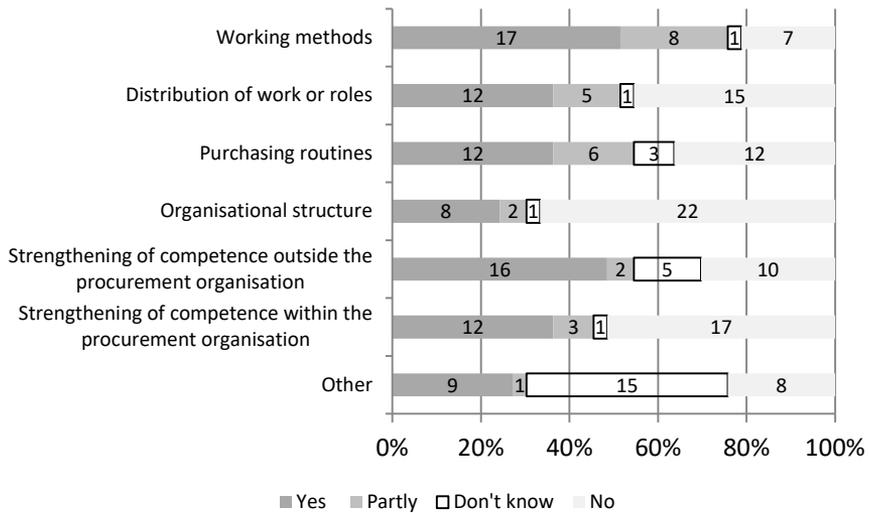
88 per cent of the responding authorities (29 out of 33) state that they have implemented organisational changes since having been ordered to pay procurement fines.

The vast majority of the organisational changes made consist of improvements to working methods (25 out of 29 authorities). Next come changes to purchasing routines (18 authorities), followed by changes to the distribution of work or roles (e.g. administration or decision-making), which were made by 17 authorities.

Strengthening of competence also accounts for many of the organisational changes made. 18 authorities stated that they had strengthened competence outside their procurement organisation (e.g. education), while 15 authorities have carried out internal strengthening of competence within their procurement organisation (e.g. employment of procurers or education).

Ten of the authorities have made changes to their organisational structure, with the same number choosing the response "other".

**Figure 1** Have any changes been made within your organisation since procurement fines were imposed?



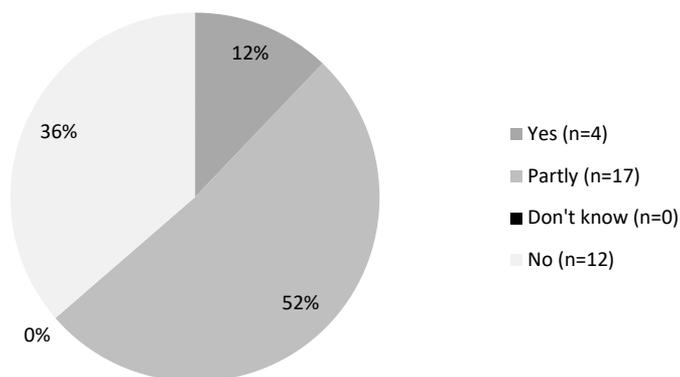
Source: The Swedish Competition Authority 2015.

## 5 Actions often depend on the decision on procurement fines

Those authorities that have implemented changes following a decision on procurement fines were also asked whether these were linked to procurement fines having been imposed.

The answers show that more than half (64 per cent) of the authorities have made organisational changes fully or partly as a consequence of procurement fines having been imposed.

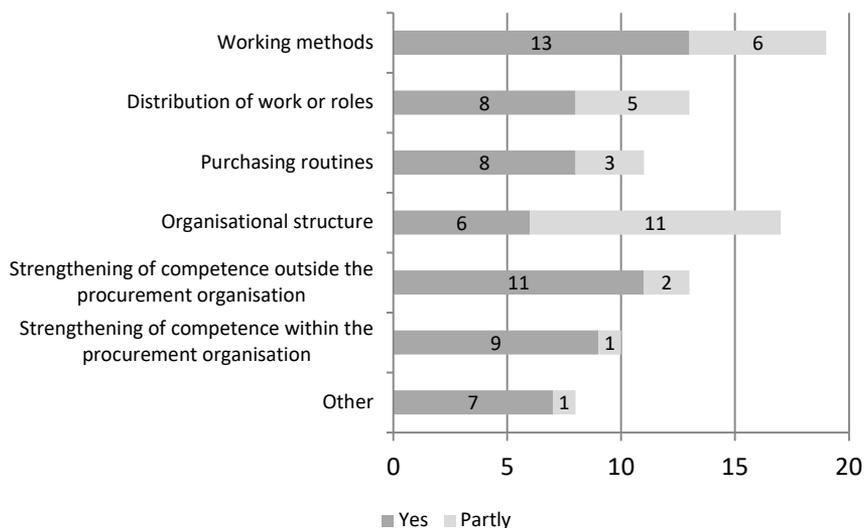
**Figure 2** Have changes been made as a consequence of the decision on procurement fines?



Source: The Swedish Competition Authority 2015.

In total, 21 authorities stated that they have made organisational changes fully or partly as a consequence of procurement fines having been imposed. Figure 3 shows which changes have been implemented.

**Figure 3** Organisational changes implemented as a result of procurement fines being imposed



Source: The Swedish Competition Authority 2015.

The four authorities that responded that they have made organisational changes *fully* as a result of fines being imposed state that these relate to working methods, strengthening of competence outside the procurement organisation and other changes. One of the authorities has introduced a routine that consists of calling the administrative court and checking any re-view requests received before entering into a contract. Another authority has changed to announcing reviews by e-mail instead of by fax. A third authority said that a jointly-owned municipal company had been liquidated in order to form a wholly-owned municipal company so that the so-called 'in house' exemption would apply.

Those organisational changes that had been implemented within the 17 authorities that made changes *partly* as a result of fines being

imposed related mainly to working methods and organisational structure, as well as the distribution of work or roles, strengthening of competence, purchasing routines and other changes.

Several authorities said that the organisational structure for purchasing and procurement had been redesigned and reinforced. One authority said that the procurement function now works more closely with the orderers. Another authority moved its entire procurement operations within the organisation following procurement fines being imposed.

Several authorities have created clearer routines for planning purchasing projects. One of these also said that documentation in connection with purchasing has been improved. Two authorities said that they have drawn up or updated their general guidelines for purchasing and procurement and for direct awards.

One authority said that it starts strategic and complex procurements earlier. Another authority said that it now ensures that there is sufficient time for any reviews. Another authority said that there is greater cooperation with lawyers when making direct awards.

Several authorities have strengthened competence in the form of recruitment and education for employees, both within and outside the procurement organisation. One authority said that it has strengthened competence in relation to procurement of works.

One authority said that – in addition to strengthening competence – it had also introduced expanded and ongoing follow-ups in the form of status reports on current projects, improved internal control and the development of internal routines such as reviews and changes to delegation arrangements. The same authority has also improved access to available contracts.

Almost 86 per cent of the authorities (18 out of 21) that had implemented organisational changes fully or partly as a consequence of procurement fines having been imposed take a positive view of these changes.

In summary, we note that many organisational changes have been carried out fully or partly as a consequence of procurement fines being imposed. The authorities themselves provide many good examples of how they are actively working to instigate more efficient and competent procurement operations.

## 6 Opportunities for improvement and development

Those authorities that have been ordered to pay procurement fines have been given the opportunity to freely express their opinions on this and on how the Swedish Competition Authority's supervision could be improved. Just under a third of the respondents (10 out of 33) have shared their views. These views and the Swedish Competition Authority's comments are detailed in this chapter.

### 6.1 Opinions on the regulations

#### Obligatory applications for procurement fines

One municipality was ordered to pay a procurement fine as a result of an obligatory application.

*"The principle should be that it is the authority that has failed in its routines that should pay procurement fines. In this case, it was Linköping Administrative Court that was unable to show that it had informed the municipality in time."*

As previously explained, the Swedish Competition Authority is obliged in certain situations to apply to the courts for procurement fines to be imposed. By law, no new assessment should be carried out of a final judgment that forms the basis for an obligatory application for procurement fines.<sup>10</sup> Even if no new assessment should be carried out, the circumstances surrounding the noted breach may be significant in terms of the value of sanctions and the size of the procurement fines.

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<sup>10</sup> The fact that no such review should be carried out has also been confirmed through the Supreme Administrative Court's decision HFD 2014 ref. 49.

## 6.2 Views of the Swedish Competition Authority's work

### More proportional procurement fines

One of the views reported relates to the issue of proportionality when calculating procurement fines, i.e. that the fines should be reasonable in proportion to what was procured.

*"I think more time should be spent on the principle of proportionality when imposing procurement fines."*

Initially, it is important to emphasise that it is the Swedish Competition Authority that calls for a certain procurement fine to be imposed and that it is the general administrative courts that ultimately establish the size of the procurement fines.

According to chapter 17, § 4 of LOU, procurement fines should be a minimum of SEK 10,000 and a maximum of SEK 10,000,000. However, according to the wording of the law, the fines may not exceed ten per cent of the contract value. By making reference to the contract value, the legislator has intended to reduce the risk of unreasonably high fines in the case of procurements involving relatively low values. It is thus the value of the contract that determines how high the procurement fine imposed can be. Once the interval in the individual case has been determined, particular attention should be paid to the severity of the breach when establishing the size of the procurement fine (see chapter 17, § 5 of LOU). This means that the size of the procurement fine should be determined with regard to all relevant circumstances in each individual case. It is the court that with final effect decides which circumstances are deemed to be important.

When the Swedish Competition Authority calculates procurement fines, the starting point is that these fines should be determined so that the authority – and other authorities – complies with LOU. The more severe the breach is deemed to be, the higher the fine. When calculating the size of the fine, the Swedish Competition Authority carries out an assessment of relevant circumstances in each individual case. Both aggravating and extenuating circumstances are taken into account. However, illegal direct awards of contract are one of the most severe breaches within the field of procurement, and the value of sanctions therefore tends to be high.

#### Drawn-out, extensive investigations

One municipality has opinions on the Swedish Competition Authority's investigation procedures.

*"It took a very long time, and information had to be submitted several times."*

The Swedish Competition Authority always carries out an assessment of every individual case in order to clarify whether or not the procurement legislation has been breached. It is important to establish when the contract was signed and to differentiate between different contracts. The investigation must also include an assessment of whether any exemptions from the obligation to publish can be applied. This could mean that the Authority needs to request extensive documentation of clarifications of previously submitted information. The ambition is to investigate the case thoroughly and in a legally secure manner. However, the Authority works continuously to improve its administrative routines, and is grateful for opinions on the handling of a case.

## More justified decisions to close cases

One authority expressed a desire for decisions to close cases to be justified.

*“In those cases where the Swedish Competition Authority asked questions but decided not to make a request for procurement fines to the administrative court, it would have been helpful to have read the Authority’s analysis/assessment in connection with those decisions that the contracting authority took on a de facto basis. In our experience, the Authority only said that it did not intend to proceed with the case, but we never learnt the reason. Had the authority made correct assessments when dealing with the case?”*

When making a decision to dismiss a case, the Swedish Competition Authority does not carry out any examination of the case. The decision does not therefore state whether or not the authority has committed a breach. Where possible, however, the Authority strives to be able to offer guidance on the legal situation after making a decision to close a case.

The Authority works in accordance with a prioritisation policy for its supervision and continuously considers whether or not a case should continue to be prioritised. This prioritisation policy can be viewed on the Authority’s website. The reason why a case is not taken to court should be given in the decision that is adopted (supervisory decision or decision to close a case). If the authority has any questions, it is welcome to contact the relevant case manager at the Authority.

## Better prioritisation of cases

There were also opinions on the Swedish Competition Authority’s scope for prioritising cases.

*“A desire that the Authority should have greater scope for determining for itself whether or not it should apply for procurement fines...”*

The type of breach of the procurement regulations in question determines how much scope the Authority has to prioritise a case. When it comes to cases where it is obligatory for the Authority to apply for procurement fines, there is no scope for prioritisation.

When the Authority submits an application for procurement fines at its own initiative, it has deemed on the basis of its prioritisation policy that it is important to investigate the issue in question and to apply for procurement fines.

In several cases, the Authority has not proceeded with supervisory cases, and has instead begun investigations with the intention of being able to provide suggestions to support procurement.

Take the whole of an authority's procurement operations into account

One authority believes that the Authority should look at the bigger picture and at the organisational circumstances in the Contracting authority's operations when prioritising facultative cases.

*“My personal opinion is that it's important to look at the whole of an authority's procurement operations, i.e. to look at the scope of procurement operations and the organisation. Carrying out spot checks that are not related to the number of cases (percentage relationship between the number of errors and the number of cases the authority deals with) or the authority's organisation (several different contracting authorities under the same organisation number, for example), or that relate to any harm or the scope of the deficiency (is the error extensive, flagrant and conscious?), or whether the error relates to services that the authority must provide in accordance with special legislation (food, interpreting, school transport, snow clearing, corporate healthcare, mobility services, etc.), will be both unfair and unhelpful.”*

It is far from the case that all suspected breaches result in an application for procurement fines being made to the court, since many cases are deprioritised as a result of the Swedish Competition Authority's prioritisation policy. The Authority also takes into account the circumstances in each contract award when assessing the value of sanctions and when determining how high it believes the fees imposed should be. The preparatory work for the provisions on procurement fines mentions, for example, repeated behaviour of the contracting authority in carrying out illegal direct awards of contract as an aggravating circumstance when making an assessment.

However, the Authority is of the opinion that the actual procurement object is not relevant to the size of the fines if an illegal direct award of contract has been established. The fact that there are operations that an authority must carry out cannot in itself justify a need not to follow the provisions of LOU or that it would be less severe to carry out illegal direct awards of contract in connection with such purchases.

However, what an authority procures may be of significance when assessing whether or not this is an illegal direct award of contract, for example if there is an exemption from the obligation to publish (extreme urgency) or if a contract that has been entered into in contravention of the provisions of LOU should not be declared ineffective for reasons overriding the public interest.

The Swedish Competition Authority's supervisory work can be regarded as providing guidance

At the same time, several of the Authorities see the importance of the Swedish Competition Authority's supervisory work based on the rules on procurement fines.

*"I want more checks from the Authority, as I believe this will make it easier for my colleagues and me to get our management to understand that control is still needed."*

*"We see your follow-ups as pointers for what you deem to be important."*

## 6.3 Need for support

### Rules on procurement fines

Several authorities say that the rules on procurement fines are hard to understand.

*"The rules for procurement fines are difficult."*

The Swedish Competition Authority works continuously to support authorities in interpreting the regulations and making correct procurements, and in building up good routines for planning purchasing and procurement. The National Agency for Public Procurement will assume responsibility for this from 1 September 2015.

### Authorities want to do the right thing

Several authorities find it hard to follow the regulations based on their existing organisational circumstances, and feel that there is a lack of understanding of the situation in which procurers often find themselves.

*"Municipalities are large and differentiated operations, where it is hard to keep an overview of all direct awards of contracts... There's a lack of understanding of how things can turn out wrong despite the intention that they should be right."*

*“There’s a lack of support in regard to how things are in many organisations, how people work and which resources are made available regarding public procurement. I believe that many people are more likely to get stressed at how they can’t influence their own situation and that they might end up in the unfortunate situation of having to pay procurement fines. Virtually all contracting authorities want to do the right thing, but end up in undesirable situations that they find it hard to influence. Forcing an agreement in order not to risk procurement fines is not the same as promoting ‘good business’.”*

*“In organisations that are as large and decentralised as ours, and where our research is financed not by taxes but by funds and donations, the regulations in connection with LOU are hard to understand. We have many non-European employees who also don’t have a background in EU cooperation. We also have managers who aren’t officials who applied for their roles but were appointed from the research ranks, which weakens the management function and makes management difficult.”*

The Swedish Competition Authority understands that authorities have many regulations to follow. However, the Authority notes that supervisory work has resulted in changes at almost 90 per cent of the authorities on which fines have been imposed, and that these authorities have taken a positive view of the changes.

### A need for electronic systems support

One opinion linked to the organisational changes relates to the need for procurement support in the work involved with direct awards of contract.

*“We want software that all direct awards of contract can be registered in and that makes it possible to get an overview of all direct awards of contract within the municipality. This is in view of the fact that municipalities are large and differentiated operations, where it is hard to keep an overview of all direct awards of contract within the municipality.”*

The Swedish Competition Authority has drawn up information and guidelines for direct awards of contract and information about the

duty of documentation.<sup>11</sup> As the municipality express it, it may be necessary to create electronic systems support to ensure a sense of order when it comes to purchasing and contracts, to make it easier to deal with direct awards of contract and to increase their effect.

Work is being carried out within the Authority's procurement support operations to draw up guidance on both legal and organisational issues regarding direct awards of contract. This procurement support work will be transferred to the new National Agency for Public Procurement in autumn 2015.

## 6.4 Other views

### Lengthy reviews within the courts

One authority cites the long time taken for the courts to carry out reviews as an area for improvement. The question of lengthy reviews relates to obligatory applications for procurement fines where an extended standstill period has been breached. The standstill period involves a ban on entering into contracts during the review process at an administrative court.

*"A clearer and shorter timeframe for how long a contracting authority should expect a review to take. We have high hopes for the results of the review inquiry..."*

The Swedish Competition Authority has highlighted the problem of lengthy reviews within the courts in several contexts.

The report *Överprövningar av offentliga upphandlingar – Siffror och fakta* (*Appeals in public procurement – facts and figures*, the Swedish

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<sup>11</sup> For more information, see the Authority's guidance "*Krav på riktlinjer vid direktupphandlingar*" ("*Requirements for guidelines for direct award of contracts*").

Competition Authority 2013:5) includes a review of the regulations in connection with reviews and of the available statistics on how long reviews take within the courts. The report is linked to the problem that mainly involves an authority not being able to sign a contract with a supplier who has won a procurement while the review is ongoing. The report includes a number of proposals that aim to make administration more effective and to reduce the negative effects of reviews for authorities and suppliers.

The Swedish Competition Authority has also discussed opportunities for making direct awards of contract during a review process in its referral statement to the review inquiry.<sup>12</sup> The referral statement is available on the Authority's website.

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<sup>12</sup> SOU 2015:12, the Swedish Competition Authority's ref. no. 221/2015.

## Appendix 1 Survey for authorities that paid procurement fines

1. Which authority or entity do you work for?
2. What is your role within the organisation?
3. Did you work for the organisation at the time when procurement fines were imposed?

Yes                  No                  Don't know

4. Have any changes been made within your organisation since procurement fines were imposed (relating to dealing with purchasing/procurement)?

- Purchasing routines
- Working practices
- Distribution of work or roles (e.g. administration or decision-making)
- Organisational structure
- Internal strengthening of competence within the procurement organisation (e.g. employment of procurers or education)
- Strengthening of competence outside the procurement organisation (e.g. education)
- Other

Please describe the changes made.

5. If changes have been made, were they made as a consequence of the decision on procurement fines?

Yes            No            Partly            Don't know

6. Do you see these changes as positive?

Yes            No            Partly            Don't know

7. Do you have any thoughts about the imposition of procurement fines or how the Swedish Competition Authority's supervision could be developed?

## Appendix 2 Imposed procurement fines

The table relates to rulings in application cases that had entered into legal force as at 31 July 2015, and that had led to procurement fines being imposed. Application cases that are still ongoing or for which the deadline for review had not yet expired are not included.

Ref.	Contracting authority/entity	Date of application	Date of final ruling	Application	Imposed procurement fines*
605/2011	Tornberget Fastighetsförvaltning AB Haninge	06/10/2011	14/05/2012	Obligatory	SEK 150,000
654/2011	Luleå Municipality	27/10/2011	10/04/2012	Facultative	SEK 100,000
702/2011	The Swedish Armed Forces	18/11/2011	02/07/2012	Facultative	SEK 270,000
739/2011	Falu Municipality	01/12/2011	30/10/2014	Facultative	SEK 8,000,000
832/2011	The Swedish Defence Materiel Administration	19/01/2012	07/06/2013	Facultative	SEK 600,000
833/2011	The Swedish Defence Materiel Administration	19/01/2012	07/06/2013	Facultative	SEK 220,000
834/2011	The Swedish Defence Materiel Administration	19/01/2012	07/06/2013	Facultative	SEK 240,000
16/2012	The Swedish Coast Guard	26/01/2012	08/03/2012	Facultative	SEK 35,000
47/2012	Fastighets AB Förvaltaren	10/02/2012	29/06/2012	Obligatory	SEK 140,000
70/2012	Danderyd Municipality	20/02/2012	01/02/2013	Obligatory	SEK 120,000
93/2012	Luleå University of Technology	07/03/2012	20/04/2012	Facultative	SEK 100,000
226/2012	Malmö Municipality	25/04/2012	10/08/2012	Facultative	SEK 170,000
375/2012	Borlänge Municipality	14/06/2012	03/05/2013	Facultative	SEK 40,000
394/2012	Länstrafiken Örebro AB	27/06/2012	20/10/2014	Obligatory	SEK 1,500,000
582/2012	Göteborgs Stads Parkerings AB	05/11/2012	12/01/2013	Facultative	SEK 37,000

Cont.

Ref.	Contracting authority/entity	Date of application	Date of final ruling	Application	Imposed procurement fines*
606/2012	The Swedish Agency for Economic and Regional Growth	26/10/2012	13/05/2013	Facultative	SEK 45,000
688/2012	The Swedish Civil Contingencies Agency	06/12/2012	13/03/2015	Obligatory	SEK 1,100,000
23/2013	Lejonfastigheter AB	14/03/2013	05/11/2013	Facultative	SEK 135,000
24/2013	Karolinska Institutet	06/02/2013	13/05/2013	Facultative	SEK 45,000
48/2013	Sveriges Radio AB	21/02/2013	11/07/2013	Facultative	SEK 200,000
54/2013	Karlstad Municipality	23/01/2013	07/08/2013	Facultative	SEK 230,000
85/2013	Sveriges Television AB	06/02/2013	21/05/2013	Facultative	SEK 115,000
86/2013	Sveriges Television AB	06/02/2013	21/05/2013	Facultative	SEK 95,000
101/2013	The Swedish Post and Telecom Agency	04/03/2013	17/07/2013	Obligatory	SEK 10,000
253/2013	Trollhättan Municipality	23/04/2013	08/01/2014	Facultative	SEK 36,000
331/2013	The National Government Service Centre	23/05/2013	23/05/2013	Facultative	SEK 100,000
440/2013	Täby Municipality	15/08/2013	21/10/2013	Facultative	SEK 2,450,000
454/2013	Täby Municipality	15/08/2013	21/10/2013	Facultative	SEK 2,550,000
462/2013	Region Gotland	05/09/2013	28/10/2014	Obligatory	SEK 250,000
487/2013	Växjö Municipality	12/09/2013	01/04/2014	Facultative	SEK 52,000
488/2013	Växjö Municipality	12/09/2013	01/04/2014	Facultative	SEK 81,000
489/2013	Växjö Municipality	12/09/2013	01/04/2014	Facultative	SEK 45,000
490/2013	Växjö Municipality	12/09/2013	01/04/2014	Facultative	SEK 101,000
491/2013	Växjö Municipality	12/09/2013	01/04/2014	Facultative	SEK 46,000
636/2013	Skåne County Police	18/11/2013	07/01/2014	Facultative	SEK 75,000
709/2013	Lund Municipality	23/01/2014	25/05/2015	Obligatory	SEK 250,000
765/2013	Stockholm County Council	18/12/2013	16/10/2014	Facultative	SEK 3,000,000

**Cont.**

<b>Ref.</b>	<b>Contracting authority/entity</b>	<b>Date of application</b>	<b>Date of final ruling</b>	<b>Application</b>	<b>Imposed procurement fines*</b>
64/2014	Eskilstuna Municipality	30/01/2014	14/05/2014	Facultative	SEK 225,000
65/2014	Kronoberg County Council	05/02/2014	10/04/2014	Facultative	SEK 185,000
173/2014	Nyköping Municipality	05/03/2014	29/09/2014	Obligatory	SEK 80,000
217/2014	Chalmers University of Technology	02/04/2014	15/05/2014	Obligatory	SEK 28,000
364/2014	Herrljunga Municipality	22/05/2014	29/01/2015	Facultative	SEK 65,000
751/2014	Mullsjö Municipality	13/11/2014	12/03/2015	Facultative	SEK 210,000
833/2014	Inköp Gävleborg	12/12/2014	17/06/2015	Facultative	SEK 170,000
109/2015	Lund Municipality	13/02/2015	31/03/2015	Facultative	SEK 250,000
<b>Total</b>					<b>SEK 23,946,000</b>

\*Table updated as at 31 July 2015.



The rules on procurement fines have now been in place for five years. The Swedish Competition Authority has therefore followed up on what has happened at those agencies that have been ordered to pay procurement fines.

The aim of this report is to provide better knowledge about how the Authority's supervision of the public procurement regulations affects the operations of procuring agencies.



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